IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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

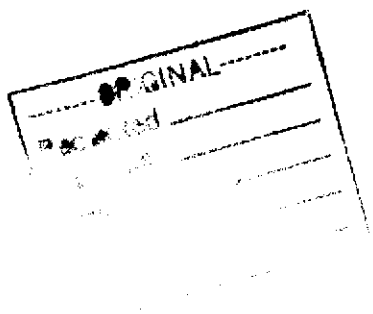
PROTESTANTS/PETITIONERS,

v.

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

RESPONDENTS/PROPONENTS.

Case No. _____



PETITIONERS' BRIEF IN SUPPORT OF APPLICATION AND PETITION TO ASSUME ORIGINAL JURISDICTION AND REVIEW THE CONSTITUTIONALITY OF INITIATIVE PETITION NO. 426

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FEBRUARY 28, 2020

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(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/PROPONENTS.	Case No. _____

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INDEX

I. INTRODUCTION

Initiative Petition 426, State Question 810 ("IP 426"), violates the U.S. Constitution and should be stricken from the ballot. First, IP 426 manipulates how prisoners are counted in violation of Article I, § 2 and the Equal Protection Clause of the U.S. Constitution. IP 426 singles out prisoners from all other "group quarters" residents, which the Census Bureau counts at the location where they actually reside. Instead of counting prisoners at the prison, it would count them at their previous address if they lived in Oklahoma and exclude them if they lived somewhere else. Prisons tend to be located in rural and generally more conservative areas. By counting prisoners differently from other "group quarters" residents, the proponents have selected a methodology with specific partisan consequences. It is also telling that other similarly situated "group quarters" residents, like college students, will continue to be counted in the liberal-leaning districts where they attend school. In other words, by choosing to "reallocate" prisoners, but not other people living in group quarters as counted by the Census, the proponents have selected a distinctly partisan methodology. This arbitrary and disparate population redistribution method violates Article I, § 2 and the Equal Protection Clause.

Second, IP 426's eligibility restrictions for serving on the Redistricting Commission violate the Equal Protection Clause and the First Amendment. The prohibition on changing party affiliation is discriminatory and infringes on the fundamental right to associate with a political party and violates the Equal Protection Clause. Prohibiting potential Commissioners from changing political parties up to four years before redistricting begins is much longer than necessary to protect any compelling interest that the state may have.

IP 426's disqualification of family members of elected officials, lobbyists, and even paid "consultants" of the Legislature also violates Equal Protection. It is wholly arbitrary and illegitimate to disqualify an individual whose spouse retired from the Legislature multiple

years before IP 426 was even filed. Such an applicant has no financial interest tied to redistricting, and any claim that they may be controlled by the political views of their spouse is nothing more than an outdated stereotype.

Finally, IP 426 is unconstitutional under the First Amendment of the U.S. Constitution. The state cannot make participation on the commission conditional based on a person's foregoing the right to political association. *Elrod v. Burns,* 427 U.S. 347, 357 (1976); *Rutan v. Republican Party of Illinois,* 497 U.S. 62, 78 (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 spouse, who belongs to a different political party, was a consultant to the Legislature on a non-politically sensitive matter four years ago.

II. SUMMARY OF THE RECORD

The Summary of the Record including a description of what IP 426 does is set forth in § IV of the Application and Petition for this case.

III. ANALYSIS

A. IP 426's arbitrary method for counting prisoners is unconstitutional.

IP 426 is unconstitutional and should be stricken. Rather than apportioning by counting people at their "usual residence," which has been the Census Bureau's standard since 1790,[1] IP 426 would constitutionalize an arbitrary method for counting prisoners.

Historically, Oklahoma has apportioned congressional districts based on total population as determined by the Census. *See, e.g.,* 2011 Okla. Sess. Laws Ch. 194, § 2. IP 426 would distort Oklahoma's population numbers before the Redistricting Commission even began attempting to draw districts with population equality. The Commission must first

[1] 83 Fed. Reg. 5525, 5526 (Feb. 8, 2018), App. at Tab C.

"[g]ather information from the Department of Corrections about the home address of state and federal inmates." IP 426, § 4(C)(2)(e). After the Census is published, "the Commission shall . . . [add the home address data] to the Federal Decennial Census data so that incarcerated people are counted in their home communities." *Id.* § 4(C)(3)(a). This necessarily means that individuals whose address is outside of Oklahoma[2] will not be included in the population count.

IP 426 would manipulate the Census data to treat prisoners differently than any other subcategory of "group quarters" residents recognized by the Census Bureau. Other group quarters are college dormitories, military barracks, nursing homes, mental hospitals, group homes, missions, and shelters.[3] The Census Bureau's rule is that people in these facilities are counted at the facilities.[4] Yet, IP 426 would arbitrarily change the rules solely for prisoners.

The proponents' choice to count prisoners differently is partisan. Most of Oklahoma's prisons are located in rural areas,[5] which are becoming more conservative as urban areas become more liberal.[6] Less than 20% of Oklahoma's state and federal prison population is located in Oklahoma, Tulsa, Cleveland, and Payne County,[7] which is the Democrat party's power base. Oklahoma's sole Democrat in Congress is from the 5th Congressional District,

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[2] Oklahoma's federal prisons—FTC Oklahoma City and FCI El Reno—and private prisons like CI Great Plains hold prisoners from around the country. For instance, "in 2015, approximately 86,000 inmates passed through the Federal Transfer Center (FTC) in Oklahoma City, Oklahoma, on the way to their designated institutions across the country" with the facilitation holding up to 1,500 inmates at any one time. FTC Oklahoma City has One-of-a-Kind Mission, Federal Bureau of Prisons, App. Tab E. *See also* Silas Allen, Detroit's ex-mayor begins his sentence in El Reno prison, The Oklahoman, Jan. 23, 2014, at 13A, App. Tab F.

[3] U.S. Census Bureau, Group Quarters/Residence Rules, https://www.census.gov/topics/income-poverty/poverty/guidance/group-quarters.html (last revised Mar. 20, 2018), App. Tab D.

[4] 83 Fed. Reg. at 5533-36, App. Tab C.

[5] Okla. Dep't of Corrections, Incarcerated Inmates Daily Count Sheet (Feb. 18, 2020), App. Tab. G; Okla. Dep't of Corrections, Facility and Community Locations (revised Jan. 2020), App. Tab H.

[6] Catherine Sweeney, Tulsa and OKC: Looks can be deceiving, The Journal Record (Nov. 9. 2018), App. Tab I ("Legislators, political scientists and campaign consultants are in a near-consensus: Oklahoma's cities are getting more liberal while the rural areas get more conservative.").

[7] App. Tab G, H, & W.

which is comprised mostly of Oklahoma County residents.[8] Every Democrat in the Oklahoma Senate has a district covering some portion of Oklahoma, Tulsa, or Cleveland County, and 86% of Democrat state house seats include Oklahoma, Tulsa, Cleveland, or Payne County.[9]

The proponents' choice to exclude out-of-state prisoners from the count, but not out-of-state college students, has partisan consequences. For example, the proponents would prefer that out of state prisoners not be counted at all rather than have them counted in the rural location they reside. Neither is it happenstance that the proponents of IP 426 want to count incarcerated Oklahomans anywhere but in the rural locations that they reside.

1. The arbitrary prisoner counting method violates Article I, § 2 of the U.S. Constitution.

For congressional redistricting, each district must "be apportioned to achieve population equality 'as nearly as is practicable.'" *Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964)). "[T]he 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality." *Id.* (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 530–31 (1969)).

It is unquestionably permissible to redistrict based on total population as determined by the Census. *Karcher*, 462 U.S. at 738. If a state bases congressional apportionment on some other standard such as eligible voter population, it must "ascertain the number of eligible voters in each district and . . . apportion accordingly." *Kirkpatrick,* 394 U.S. at 534–35. If a state attempts to "correct" census data for a more accurate reflection of total population, it must be in "a good-faith effort to achieve population equality." *Karcher*, 462 U.S. at 727. The deviations cannot be "haphazard, inconsistent, or conjectural . . . ." *Id.* at 732 n.4.

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[8] 87% of the population in CD 5 live in Oklahoma County. 2011 Okla. Sess. Laws Ch. 194, § 2.

[9] Thomas Thoren, Mapping the 2020 Legislature, Oklahoma Watch (Jan. 31, 2020), App. Tab J, https://oklahomawatch.org/2020/01/31/the-new-legislature-mapped/.

In *Kirkpatrick*, Missouri attempted to justify a malapportioned map because "the percentage of eligible voters among the total population differed significantly from district to district—some districts contained disproportionately large numbers of military personnel stationed at bases maintained by the Armed Forces and students in attendance at universities or colleges." 394 U.S. at 534. The U.S. Supreme Court rejected this justification because "Missouri made no attempt to ascertain the number of eligible voters in each district and to apportion accordingly." *Id.* at 534–35. Rather Missouri had made "haphazard adjustments to a scheme based on total population," which was not constitutionally permissible. *Id.* at 535.

In *Karcher*, the Supreme Court struck down New Jersey's redistricting plan because it was "not the result of a good-faith effort to achieve population equality." 462 U.S. at 727. New Jersey attempted to justify their inequal plan by highlighting the "statistical imprecision of the census." *Id.* at 735. The Court rejected this argument noting that "census data provide[s] the only reliable—albeit less than perfect—indication of the districts' 'real' relative population levels." *Id.* at 738. If a state deviates from population equality, "the population deviations" must be "necessary to achieve some legitimate state objective." *Id.* at 740. The deviations were not justified, and the plan was held unconstitutional.

Since *Kirkpatrick* and *Karcher*, courts have affirmed redistricting based on total population as determined by the Census, *Tennant v. Jefferson Cty. Comm'n*, 567 U.S. 758, 762 (2012), and have recognized states' authority to count prisoners at their usual residence. *See Davidson v. City of Cranston, Rhode Island*, 837 F.3d 135, 146 (1st Cir. 2016) (equal protection case). Under the less restrictive standard applicable to state legislative redistricting, the U.S. Supreme Court summarily affirmed Hawaii's redistricting plan that excluded both out-of-state military personnel and out-of-state college students for redistricting purposes only

after a "careful and comprehensive process free from any taint of arbitrariness or invidious discrimination against minority groups or the military." *Kostick v. Nago*, 960 F. Supp. 2d 1074, 1095 (D. Haw. 2013), *aff'd*, 571 U.S. 1161 (2014). The Hawaii plan applied equally to these two politically diverse subcategories of group quarters residents, and there is no evidence Hawaii was picking and choosing groups to exclude.[10]

Conversely, the Supreme Court summarily affirmed a Maryland district court case in which the state manipulated only the prisoner population count by excluding out-of-state prisoners and reassigning in-state prisoners to the last address. *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 896 (D. Md. 2011), *aff'd*, 567 U.S. 930 (2012). It is not surprising that the Supreme Court affirmed the district court judgment with the 2012 election approaching because the prison population adjustments did not "exceed 1% of a district's population." *Id.* at 893. However, there is no basis to conclude the Court was approving the district court's unpersuasive reasoning or unnecessarily ruling on Maryland's flawed prisoner reallocation statute. The reasoning in *Fletcher* is inconsistent with *Kirkpatrick* and *Karcher*,[11] and the district court's refusal to require the state to justify its deviation from population equality is inconsistent with the Supreme Court's subsequent decision in *Tennant*. If the Court had

[10] Hawaii did not attempt to exclude out-of-state prisoners "because it does not import prisoners from elsewhere . . . ." *Kostick*, 960 F. Supp. 2d at 1094 n.14.

[11] The *Fletcher* court's reasoning directly conflicts with *Kirkpatrick* and *Karcher*. First, the district court admitted that "Maryland might come closer to its goal of producing accurate data if it assigned college students or active duty military personnel to their permanent home addresses for purposes of redistricting." *Fletcher*, 831 F. Supp. 2d at 896. Yet, without any authority, the court summarily concluded that is not what is required by Article I, § 2. This is directly contrary to *Karcher's* mandate that any corrections to Census data must be "consistent" and "systematic," 462 U.S. at 732 n.4, and that any criteria a state considers in redistricting must be "nondiscriminatory." *Id.* at 740. Second, the *Fletcher* court failed to shift the burden to Maryland to "show with some specificity" that the population deviations from prisoner residence manipulation was to achieve a legitimate objective like compact districts or respecting political boundaries. *Id.* at 740, 741. Singling out one subcategory of group quarters residents does not further any legitimate state interest recognized by the Court.

intended to upend *Kirkpatrick* and *Karcher*, it would not have done so in a summary affirmance.[12]

IP 426 should be stricken from the ballot as unconstitutional for the same reasons recognized in *Kirkpatrick*, *Karcher*, and *Kostick*. IP 426 goes beyond any acceptable discretion a state has in drawing congressional districts. First, IP 426 cannot be classified as a good faith attempt to apportion based on the eligible voter population. *See Kirkpatrick, supra.* If IP 426 was making a systematic effort to draw districts with a similar number of eligible voters, it would eliminate all non-residents from the population count, not just prisoners. The proponents made no attempt to eliminate for reapportionment purposes the more than 20,000 college students paying out-of-state tuition in Oklahoma[13] or the more than 80,000 undocumented non-citizens that are estimated to be residing in Oklahoma.[14]

Second, IP 426 cannot be justified as a systematic effort to account for those undercounted by the Census as recognized by the *Karcher* court. 462 U.S. at 732 n.4. We are unaware of any argument that the Census undercounts prisoners. It merely counts prisoners at a place other than where the proponents prefer.

Third, redistributing prisoners to their last known residence has nothing to do with

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[12] The summary affirmance of *Fletcher* does not bind this Court in this case. "[T]he precedential weight of that summary disposition [by the U.S. Supreme Court] is confined to the narrowest possible grounds." *Turpen v. Oklahoma Corp. Comm'n*, 1988 OK 126, ¶ 8, 769 P.2d 1309, 1315. "[A] summary affirmance is an affirmance of the judgment only." *Id.* (*quoting Mandel v. Bradley*, 432 U.S. 173, 176 (1977)). The judgement in *Fletcher* was that Maryland's plan was constitutional. It is not surprising the Supreme Court affirmed this judgment since the prisoner residence adjustments did not "exceed 1% of a district's population." *Fletcher*, 831 F. Supp. 2d at 893. The affirmance should not be construed as endorsing the district court's reasoning, *Mandel*, 432 U.S. at 176, especially in light of its conflict with *Karcher. See supra.* n.11. The Supreme Court's decisions since *Fletcher* have further undercut its reasoning. In *Tennant*, 567 U.S. at 760, the Court reiterated that the state's burden to justify a legitimate state interest for deviating from population equality, which *Fletcher* district court ignored since no justifiable interest existed. The Supreme Court also summarily affirmed a district court decision in *Kostick*, which is directly opposed to *Fletcher* as discussed above.

[13] Racey Burden, Out-of-State Students, by College, Oklahoma Watch (July 3, 2014), App. Tab K.

[14] Profile of the Unauthorized Population: Oklahoma, Migration Policy Institute, App. Tab L.

achieving population equality, which is the standard set in *Karcher*. Under IP 426, the populations of districts will necessarily be unequal because some districts will be allotted prisoner residents who do not actually live there. While excluding prisoners from the formula may theoretically help achieve voter equality on a district by district basis, arbitrarily reassigning prisoners does not further the goal of population equality without similarly accounting for other groups of ineligible voters.

Fourth, this is not a consistent, systematic, good faith effort to correct census data. Even if a state could redistribute group quarters residents consistent with Article I, § 2, the Supreme Court has made clear that it cannot be done in a "haphazard, inconsistent, or conjectural manner." *Karcher*, 462 U.S. at 732 n.4. Singling out prisoners from all other group quarters residents is not "systematic" and consistent. It is, however, politically expedient. Recalculating prisoners will reduce numbers in rural districts, while college students will continue to be counted in liberal leaning districts. "[U]nless some systematic effort is made to correct the distortions inherent in census counts of total population, deviations from the norm of population equality are far more likely to exacerbate the differences between districts." *Id.*

2. The arbitrary counting of prisoners also violates the Equal Protection Clause.

IP 426's arbitrary method of counting prisoners violates the Equal Protection Clause when applied to redistricting the state legislature. "States must draw congressional districts with populations as close to perfect equality as possible. But, when drawing state and local legislative districts, jurisdictions are permitted to deviate somewhat from perfect population equality to accommodate traditional districting objectives, among them, preserving the integrity of political subdivisions, maintaining communities of interest, and creating geographic compactness." *Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016). With this leeway,

the Supreme Court has recognized the right to exclude certain non-residents including prisoners for apportionment of the state legislature. *Id.* at 1124; *Burns v. Richardson*, 384 U.S. 73, 92 (1966). However, it expressly prohibited a scheme assigning people to districts "in which they admittedly did not reside." *Mahan v. Howell*, 410 U.S. 315, 332 (1973). States must use a comprehensive, nondiscriminatory process to analyze similarly situated groups if groups are going to be eliminated from the Census count. *Kostick*, 960 F. Supp. 2d at 1095. IP 426 not only assigns prisoners to the district in which they do not reside, it singles out one subcategory of group quarters residents to count differently for political purposes. This exceeds the discretion allowed to states under the Equal Protection Clause.

IP 426's political maneuvering is apparent after looking at Oklahoma's current State House and State Senate maps. *See* App. Tab J. Less than 20% of the state's prison population is included in districts represented by Democrats.[15] Conversely, Democrats in the House represent districts that include the University of Oklahoma, Oklahoma State University, and the University of Tulsa.[16] The Census Bureau treats prisons and college housing the same, but IP 426 chose to redistribute the prisoner population but not the college student population. Neither does IP 426 attempt to redistribute the populations living in nursing homes and mental health facilities, which are dispersed throughout the state, nor does it attempt to account for the non-voting non-citizen population (documented or undocumented). For the same reasons IP 426 is unconstitutional when applied to congressional districts, it violates the Equal Protection Clause when applied to redistricting the State Legislature.

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[15] App. Tab G, H, J, W. *See also* District Maps and Reports, Oklahoma State Legislature, https://www.okhouse.gov/Publications/GISDistrictMapsReports.aspx.

[16] Notably, all three of the Democrats' non-metro seats include major universities and colleges: Northeastern State University in Tahlequah, University of Science and Arts of Oklahoma in Chickasha, and Northeastern Oklahoma A&M College in Miami. App. Tab J.

B. IP 426's restrictions on who can be a Commissioner are unconstitutional.

1. Party affiliation restrictions violate the Equal Protection Clause.

IP 426 discriminates against individuals who exercise their fundamental right to be affiliated with a political party. Under the Equal Protection Clause, strict scrutiny applies when a "classification impermissibly interferes with the exercise of a fundamental right, such as . . . rights guaranteed by the First Amendment . . . ." *Hendricks v. Jones*, 2013 OK 71, ¶ 9, 349 P.3d 531, 534; *Autor v. Pritzker*, 740 F.3d 176, 184 (D.C. Cir. 2014). Under strict scrutiny, the enactment must be narrowly tailored and support a compelling government interest. *Bush v. Vera*, 517 U.S. 952, 976 (1996).

IP 426 interferes with the exercise of fundamental, First Amendment rights. "The freedom of association protected by the First and Fourteenth Amendments includes partisan political organization. . . . 'The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom.'" *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986). IP 426 interferes with this right by disqualifying Commission applicants who change their political affiliation "in the four years immediately preceding the date of appointment to the Commission or the date the initiative petition proposing this Article was filed, whichever period is shorter . . . ." IP 426, § 4(B)(2)(a).

This restriction cannot pass heightened scrutiny. There is no compelling state interest to restrict potential Commissioners from changing party affiliation. IP 426 precludes Commissioners from considering the political affiliation or voting history of the population of a district, IP 426, § 4(D)(2)(b), so the Commissioners' political affiliation should not matter.

Even if the state could have a compelling interest, the proponents' prohibition is much broader than necessary to achieve any compelling state interest. The sheer amount of time that switching political parties is prohibited for someone wishing to sit on the Commission is

unreasonable and cannot be defined as narrowly tailored. Petitioners and everyone else similarly situated cannot serve on the Commission because they exercised their First Amendment rights approximately one year before Commissioners will be appointed for the 2021 redistricting cycle, and four years before Commissioners are appointed in future years. IP 426, § 4(B)(4)(g) & § 4(B)(2)(a). This is far beyond any necessary temporal limitation. For instance, a candidate for political office must be a member of a political party for only six months before seeking its nomination for elective office. 26 O.S. § 5-105(A). If candidates for political office can switch parties up to six months before the filing period, there is no way that the 1 to 4 year restriction imposed by IP 426 can be deemed "narrowly tailored."

Moreover, when strict scrutiny applies, the burden is on the government to prove the enactment is necessary. *Johnson v. California*, 543 U.S. 499, 505 (2005). It is much more likely that individuals will change their party years before the redistricting process begins because they wish to be affiliated with a different party, rather than to apply to fill one of three seats on the Commission designated for their new party instead of their old party. The protestants in this case knew of the unconstitutional limitation IP 426 sought to impose when changing their party affiliation, but virtually all who are similarly situated would not have known. IP 426 was filed on February 6, 2019, the deadline to switch parties to vote in the Presidential Preference Primary was February 7, and notice of the petition was not published until February 13. The Democratic presidential primary will be hotly contested in Oklahoma,[17] and candidates have been actively campaigning in the state.[18] The state cannot have a compelling interest in precluding individuals who changed parties to vote in the presidential

[17] Ryan Welton, Presidential Poll Shows Surprise, Perhaps Indecision Atop Democratic Field In Oklahoma, Newson6.com (Feb. 24, 2020), https://www.newson6.com/story/41809481/presidential-poll-shows-surprise-perhaps-indecision-atop-democratic-field-in-oklahoma.

[18] Klobuchar pitches plans over 'pipe dreams', The Oklahoman, Feb. 25, 2020, at A1, App. Tab M.

primary, or for any other reason, more than a year before Commissioners will be appointed.

Finally, there are less restrictive measures to facilitate any state interest in preventing someone from switching parties to become eligible for a different party-designated seat on the Commission. For instances, the state's interests would be preserved if those switching parties shortly before a redistricting cycle were eligible only for positions designated for their former party. This would alleviate any concerns about affiliation changes disrupting ideological balance. There is nothing that should be disqualifying about the act of switching parties. In fact, if the goal is to reduce partisan gerrymandering, it seems logical that someone willing to switch parties may be well-suited for the role of a Commissioner.

2. IP 426's prohibition on the family members of former elected official violates Equal Protection.

IP 426 would prohibit family members of former elected officials (who retired before this petition was even proposed) from serving on the Commission. This is arbitrary, irrational, and violates the Equal Protection Clause. "[T]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination . . . ." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Under rational basis scrutiny, a classification must "rationally further a legitimate state interest." *Hendricks*, 2013 OK 71, ¶ 9, 349 P.3d 531, 534. When there is no rational basis for differences in treatment of similarly situated individuals, a law cannot pass constitutional muster. *Id.* ¶ 16; *Vill. of Willowbrook*, 528 U.S. at 564.

While it is logical that the state may wish to preclude current state legislators and lobbyists from being Commissioners, it defies logic that the spouse of a retired Legislator who has no financial interest in how the Legislature is apportioned can be rationally precluded from serving on the Commission. Petitioner Newberry is qualified in every respect to serve on the

Commission except that her husband retired from the state senate two years before IP 426 was even filed.[19] There is no discernable conflict of interest that would preclude Newberry from complying with the standards for drawing districts set forth in IP 426. Newberry has no financial incentives precluding her from correctly applying the law. Neither she nor her husband currently derive any income from the Legislature or lobbying the Legislature.

It is wholly illegitimate to claim that Mr. Newberry's former service to the state can impute the appearance of disinterestedness or impropriety on Ms. Newberry. Presuming that a wife is bound by her spouse's political view or interests or could be controlled by her spouse is an outdated gender stereotype that should be summarily rejected. *Cf. Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015). Further, if Ms. Newberry was not married to Mr. Newberry or was divorced there would be nothing precluding her service, which itself demonstrates an Equal Protection violation. *See Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972) (holding that "dissimilar treatment for married and unmarried persons who are similarly situated" violates the Equal Protection Clause).

Precluding Ms. Newberry and others who are similarly situated from serving on the Commission is wholly arbitrary and cannot be said to be rationally related to a legitimate state purpose. From today until a Commission is seated, Ms. Newberry is disqualified from serving on the Commission. The constitutional injury is ripe, and she undoubtedly has standing to raise this challenge. The Court should strike down IP 426 under the Equal Protection Clause.

3. IP 426 violates the First Amendment.

IP 426, § 4(B)(2)'s exclusion of individuals from serving as a Commissioner solely because of their protected First Amendment activities—or their blood or marital status with

[19] Resignation Letter of Sen. Dan Newberry (June 6, 2017), App. Tab N; Tulsa state Sen. Dan Newberry resigning to take senior management position at TTCU, Tulsa World (06/06/2017), App. Tab O.

someone exercising those rights—is an unconstitutional condition of employment and denial of government benefit. *Elrod*, 427 U.S. at 372; *Rutan v. Republican Party of Illinois*, 497 U.S. at 78–79; *Autor*, 740 F.3d at 183; *see also Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973).

In *In re Initiative Petition No. 420*, 2020 OK 9, __ P.3d __, Petitioners raised the same argument, but this Court declined to reach the merits of the First Amendment claim. Petitioners' incorporate its arguments from *In re Initiative Petition No. 420* by reference, see App. at Tab P, and asks the Court not to defer in this case.

First, the protestants have addressed the Courts concerns that it would be addressing abstract legal issues. Two protestants—Mr. McCormick and Ms. Davey —changed their voter registration and are prohibited from serving as Commissioners.[20] This is not a hypothetical; they are now disqualified from serving as Commissioners. Similarly, protestant Laura Newberry is now disqualified from serving as a Commissioner because her spouse retired from the state senate two years before this petition was filed. Her injury is not abstract.

Second, the proponents have not solved the retroactivity problem specified by the Court in footnote 17 of *In re Initiative Petition No. 420*, 2020 OK 9. IP 420 disqualified anyone from serving as a Commissioner who had changed their party affiliation, served as an elected official, or lobbied the Legislature years before IP 420 was filed. In IP 426, the proponents chose to do nothing about the retroactivity problem for elected officials, lobbyists, paid consultants, and their family members, and their remedy for those who changed party affiliation is also deficient. For the 2020 redistricting cycle, IP 426 disqualifies those who changed their party affiliation any time after IP 426 was filed. Thus, IP 426 still bars individuals who changed parties between the filing of the petition and the publication of notice on February 13. It is likely that a sizable number of voters switched parties during this period to meet the

[20] Voter Registration of McCormick, App. Tab Q; Voter Registration of Robinson Davey, App. Tab R.

February 7 to vote in the contested Democratic presidential primary. Since the proponents did not remedy the retroactivity problem, the Court should rule in this case.

Third, IP 426's overbreadth is demonstrated by new provisions added to IP 426 after IP 420 was stricken. IP 426 disqualified "paid consultant" of the Legislature in the past 5 years from serving as a Commissioner. § 4(B)(2)(f). This is clearly overbroad. For example, people working on the Capitol restoration project would be disqualified without reason.

Fourth, the Court should take up the federal constitutional challenges here not only because these protestants present concrete and ripe issues, but also because the Legislative specifically provided for such challenges. In 2009, 34 O.S. § 8(B) to add language that during the pre-circulation phase a citizen "may file a protest as to the constitutionality of the petition." 2009 Okla. Sess. Laws Ch. 318, § 1. Since 2009, the Court has taken up federal constitutional issues on multiple occasions.[21] Under *Threadgill v. Cross*, 1910 OK 165, 109 P. 558, the Supreme Court declined to take up constitutional challenges to initiative petitions. Over time, however, the Court recognized the need to take up clear and manifest constitutional infirmities. *In re Initiative Petition No. 358*, 1994 OK 27, ¶ 7, 870 P.2d 782 (citations omitted). The protestants ask the Court to take up the federal constitutional challenges pursuant to 34 O.S. § 8(B) or because IP 426 has clear and manifest constitutional infirmities. When a protestant, as in this case, can show that a petition will create a concrete injury immediately upon enactment, the Court should resolve the constitutional challenge expressly authorized by 34 O.S. § 8.

IV. CONCLUSION

For these reasons, Petitioners respectfully request the Court find IP 426 to be unconstitutional and order that it be stricken.

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[21] *E.g. In re Initiative Petition No. 406*, 2016 OK 3, ¶ 3, 369 P.3d 1068 (Petition was unconstitutional under *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *In re Initiative Petition No. 396*, 2012 OK 67, ¶ 3, 281 P.3d 1275 (Petition did not violate federal Equal Protection Clause); *In re Initiative Petition No. 395*, 2012 OK 42, ¶ 1, 286 P.3d 637 (Petition was unconstitutional under *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

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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:

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