

**IN THE SUPREME COURT OF THE  
STATE OF OKLAHOMA**

In Re )  
LEGISLATIVE REFERENDUM ) Case No. 101136  
NO. 334, STATE QUESTION 711 )

**INTERVENERS, THE HONORABLE JAMES A. WILLIAMSON AND HONORABLE  
THAD BALKMAN’S BRIEF IN OPPOSITION TO PETITIONER’S APPLICATION TO  
ASSUME ORIGINAL JURISDICTION AND REQUEST A WRIT OF MANDAMUS**

COME NOW the Honorable State Senator, James A. Williamson and The Honorable Representative, Thad Balkman (hereafter referred to as “Interveners”), in support of their Objection to Petitioners’ Petition for this court to Assume Original Jurisdiction and Request for Extraordinary Relief would state the following to wit:

**INTRODUCTION**

Interveners Williamson and Balkman vigorously object to the Petitioners’ efforts to delay and stop a vote on State Question 711. The Petitioners’ action is a desperate attempt to avoid democracy. Petitioners are inviting the Court to exercise jurisdiction that would have the affect upon encroaching cherished rights of the people to vote on amending their Constitution including State Question 711, if approved would defend the institution of marriage and the rights of children to be nurtured and developed within a marriage relationship of a mother and a father.

In Oliver v. City of Tulsa, 654 P.2d 607, 613 (Okla. 1982), this Court acknowledged: “The right of initiative is precious to the people and is one which the Courts are zealous to preserve to the fullest tenable measure of spirit as well as letter...” The same can be said for a referendum initiated by the Legislature for the people to amend their Constitution in accordance with Art. 5 §1 Okla. Const.

## PROPOSITION I

### **PETITIONERS ARE BARRED BY THE DOCTRINE OF LACHES FROM INVOKING THE COURT'S JURISDICTION FOR A WRIT**

Petitioners have not timely filed their action, and as will be shown, the Doctrine of Laches, bars consideration of their Petition. They have failed to prove utmost diligence in pursuing their alleged rights.

House Bill 2259, which enacted Legislative Referendum 334, State Question 711, was passed by the Oklahoma Senate on April 15, 2004. The measure then passed the House of Representatives on April 22, 2004. It was received by the Office of the Secretary of State on April 26, 2004 (See copy of executed House Bill 2259 in Appendix, Exhibit "1"). By May 4, 2004, the Secretary of State's office submitted to the Secretary of the State Election Board the measure and official ballot title.

Petitioners did not file their Petition with this Court until August 27, 2004. As of this time, according to Michael Clingman, Secretary of State Election Board, one million of the approximate two million ballots for the November 2, 2004 election have been printed. The ballots for the November election will be mailed out to the counties the week of September 1, 2004 and then mailed out by the County Election Boards beginning September 7, 2004 to absentee voters. Clingman further states in his Affidavit that if the Petitioners' challenge is successful, the State Election Board will not have the ability to obtain new cardstock for purposes of reprinting approximately two million ballots without State Question 711 in time for the general election because the paper would not be available in sufficient time. (Affidavit of Michael Clingman, Appendix Exhibit "2").

It is well settled law in the State of Oklahoma that one who seeks to challenge an election will be barred by laches if they do not act with diligence. See Evans v. State Election Bd., 804 P.2d 1125, 1127-28 (Okla. 1990). This Court has stated regarding the application of laches to elections:

“The law fixes a date for holding said election and then by reason of the necessary work required **and time consumed in causing the ballots to be printed for use in said election**, it is manifest that time is of the essence and it was the duty of the Petitioner to proceed with utmost diligence in asserting in a proper forum his claimed rights. The law favors the diligent, rather than the slothful. By reason of his delay in asserting such claimed rights, it does not appear the Petitioner is entitled to the issuance of the extraordinary and discretionary writ of mandamus.”

Harding v. State Election Board, 170 P.2d 208, 209 (Okla. 1946). Wickersham v. State Election Board, 357 P.2d 421 (Okla. 1960) (The right to contest an election may be lost by laches or inexcusable delay.”)

**Laches can apply in an election case filed within ninety (90) days prior to the election.**

State ex. rel. Super America Group v. Licking Cty. Bd. of Elections, 80 Ohio St.3d 182, 685 N.E.2d 507 (1997).

Given the prejudice to the State of Oklahoma as demonstrated by the Affidavit of Michael Clingman, Secretary of State Election Board, the Petitioners have not proven the requisite diligence in proceeding with their challenge. Consequently, Interveners urge the Court not to reward the Petitioners’ extreme tardiness by assuming jurisdiction of this matter.

## **PROPOSITION II**

### **PETITIONERS ARE BARRED FROM A PRE-ELECTION CONTEST OF A CONSTITUTIONAL AMENDMENT REFERENDUM PROPOSED BY THE STATE LEGISLATURE**

Petitioners have invoked the original jurisdiction of the Court pursuant to Oklahoma Constitution Article 7 §4 and Title 34 §8, and Oklahoma Supreme Court Rule 1.194. Article 7 §4

of the Oklahoma Constitution only grants the Supreme Court original jurisdiction and the power to “issue, hear and determine writs of ... mandamus, quo warranto, certiorari, prohibition, and such other remedial writs as may be provided by law and may exercise such other and further jurisdiction as may be conferred **by statute.**” It does not confer by its express terms, jurisdiction to hear Petitions pre-election challenge of a referendum proposed by the Legislature.

Title 34 O.S. §9, the statute that Petitioners rely upon as a basis for a right to be heard, does not provide a basis for an elector to contest a proposed constitutional amendment by the Legislature. In contrast, the statute does provide a procedure for determining the final wording on a ballot on a referendum by initiative petition. However, Title 34 O.S. §10(B) expressly does not permit an appeal as to the ballot title of a constitutional or legislative enactment proposed by the Legislature. This statutory scheme makes it crystal clear that referendums on constitutional amendments proposed by the Legislature are treated differently and therefore not subject to pre-election review by the Oklahoma Supreme Court.

The effect of Petitioners’ request for mandamus in this case is to stop the vote on November 2, 2004 on State Question 711. As a practical matter, this amounts to injunctive relief. In McAlister Secretary of State Election Board v. State Ex Rel. Walton, Governor, 221 P. 779 (Okla. 1923), this Court refused to grant injunction relief in an instance where there were proposed constitutional amendments that were resolutions passed by the Legislature which authorized the amendments be submitted to the people at an election. The Court stated:

“Equity has no jurisdiction to enjoin the exercise of legislative authority when being carried out by the Legislature of the state or by the people of the state.” Id. at 782.

Most importantly, Plaintiffs have failed to demonstrate to the Court that there is a statutory mechanism that grants the Supreme Court jurisdiction to hear their challenge.

### **PROPOSITION III**

#### **THE SEPARATION OF POWERS DOCTRINE PROHIBITS JUDICIAL SCRUTINY OF THE LEGISLATIVE PROCESS WHICH RESULTED IN STATE QUESTION 711**

Oklahoma Constitution Articles 4 §1, 5 §§130. Petitioners have asserted in this action that the legislative process creating legislative referendum for State Question 711 was “defective”. The Oklahoma Constitution Art. 5 §30 provides that “each House [Senate and House of Representatives] may determine rules of its proceedings...” Essentially, what Petitioners are asking this Court to do is scrutinize and pass judgment upon the rules of proceedings for the House and Senate. This Court, in Dank v. Benson, 2000 OK 40, 5 P.3d 1088 declined to grant a writ of mandamus and review the House of Representatives’ internal procedures for a bill to be read at length before a final vote. The Court held that it may not intrude by way of a writ of mandamus into the House’s exercise of its constitutionally assigned legislative function. Id. ¶10. Additionally, a question of review of internal procedures of the House was deemed to be a non-justiciable claim. ¶¶8 and 9. General constitutional order is offended when one department of government usurps power expressly delegated to another. Tweedy v. Oklahoma Bar Ass’n, 624 P.2d 1049, 1054 (Okla. 1981). Likewise, in the instant case, this Court should refuse to interject itself into the internal process of how State Question 711 pass both Houses of the Legislature.

Therefore, it follows that Petitioners have no basis to challenge State Question 711 on grounds that the legislative process was “defective”.

### **PROPOSITION IV**

#### **THE PRUDENTIAL RULE OF NECESSITY PROHIBITS THE CONSIDERATION OF CONSTITUTIONAL ISSUES**

Petitioners challenge the constitutionality of State Question 711 claiming that the measure is void for vagueness and violates the U.S. Constitution’s 14th Amendment, Equal Protection and

Due Process Clauses. However, this Court has declined to review the constitutionality of referendum measures on grounds that: “the prudential bar of restraint commands that... constitutional issues... not be resolved in advance of strict necessity. In Re: Initiative Petition No. 363, 927 P.2d 558, 565 (Okla. 1996). See also, Smith v. Westinghouse Elec. Corp., 732 P.2d 466, 467 n.3 (Okla. 1987). In the case of In Re Initiative Petition No. 349, 838 P.2d 1, 21 (Okla. 1992), Justice Opala concluded that the prudential rule of necessity precluded consideration of a pre-election challenge to an unenacted measure. “No person can adversely be affected by, or have a litigable interest in, a measure that is not enforceable against anyone as law. No showing of actual or threatened injury can be made vis-a-vis a measure that is not law.” Id.

## **PROPOSITION V**

### **PETITIONERS HAVE FAILED TO PRESENT A JUSTICIABLE CASE**

In order for there to be a justiciable claim, there must be a controversy that is (a) definite and concrete, (b) concerns legal relations among the parties with adverse interests and (c) is real and substantial so as to be capable of a decision granting or denying specific relief of a conclusive nature. Dank, supra ¶8 P.3d at 1091.

The basis for the Petitioners’ challenge is non justiciable because State Question 711 does not change their legal status, therefore, any alleged injury is purely hypothetical. Oklahoma has never given legal status to same sex relationships under any circumstances. Indeed, Title 43 O.S. §3.1. specifically states that a marriage between persons of the same gender is not recognized as valid and binding in Oklahoma. Title 43 O.S. §3 states that unmarried persons are qualified to marry persons of the “opposite sex.”

In order to have a definite and “concrete” controversy, the alleged injury requires an “interest must consist of obtaining compensation for, or preventing, the **violation of a legally**

**protected right.”** Vermont Agency of Natural Resources v. United States, 529 U.S. 765, 772, 120 S. Ct. 1858, 1862 (146 L. Ed.2d 836 (2000)). It follows that since the Petitioners do not have a legally protected right to same sex marriages, they do not have a legally cognizable claim.

The Petitioners do not allege that they hold the position of a judge or clerk of an Oklahoma District Court that is empowered to issue a marriage license. Consequently, they do not have standing to contest State Question 711's revision that anyone who knowingly issues a marriage license to a same sex couple is guilty of a misdemeanor.

### **PROPOSITION VI**

#### **STATE QUESTION 711 COMPLIES WITH THE SINGLE SUBJECT REQUIREMENT**

As argued earlier in Proposition II, Petitioners do not have a statutory mechanism in which to invoke the Court's jurisdiction for a pre-election review of a legislative referendum to be submitted to the people. Nevertheless, State Question 711 does in fact comply with the single subject requirement within the meaning of Art. 24 §1, Okl. Const. “A single subject measure is one whose componential ingredients, no matter how numerous, are so interrelated as to all form parts of an integrated whole.” In Re Initiative Petition No. 363, 927 P.2d 558, 566 (Okla. 1996). The test for determining whether a proposed constitutional amendment passes single subject muster is, whether the proposed constitutional changes are *all germane* to a singular common subject and purpose, or are essentially unrelated to one another. *Id.*

It is abundantly clear that State Question 711 deals specifically with the institution of marriage and who is qualified to be married and enacts a criminal penalty to anyone issuing a marriage license contrary to its provision. Indeed, the word “marriage” appears in each section of the measure. Petitioners' assertion that State Question 711 engages in “log rolling” amounts to sophistry. Petitioners' argument is contrary to the standard set forth by this Court in In Re Init.

Pet. No. 319, 682 P.2d 222, 224 (Okla. 1984) which stated that the single subject standard was to be accorded a liberal rather than a narrow or technical construction. See also Rupe v. Shaw, 286 P.2d 1094, 1097 (Okla. 1962).

Petitioners in footnote five at page five of their brief make a tacit admission that their proffered hyper-technical interpretation of “marriage” and the “legal incidents of” is on thin ice. Petitioners in the footnote suggest that the “clear and language” standard of Title 34 §9 be applied to State Question 711. A closer review of that statute requires that the submitted measure use, “basic words, which can easily be found in dictionaries of general usage. (34 §9(2). The language must be written on “the eighth-grade reading comprehension level.” (34 §9(3).

If State Question 711 is indeed approved as an amendment to the constitution, this Court will not adopt a strict or technical construction of the constitution provision so as to defeat the evident object and purpose. Lepak v. McClain, 844 P.2d 852. The words of the Constitution will be used in their plain, natural and ordinary meaning. *Id.* at 854. As an additional tool of constitutional construction, the common law and statutes may be used to determine the meaning of a constitution provision. Public Service Co. of Okl. v. Caddo Elec. Co-op, 479 P.2d 572, 574 (Okla. 1970) see also Harkrider v. Posey, ¶10 2000 OK 94, 24 P.3d 821.

Applying the above standards to Petitioners vagueness and alleged log rolling objections, demonstrates their contentions are misplaced and meritless.

### **MARRIAGE**

Petitioners contend that there are both multiples of different types or kinds of marriage, “even among heterosexual persons.” However, using the above rules of construction, one need only consult a dictionary. *Websters New World Dictionary, Second College Edition*, defines “marriage”:

“Refers to the state of, or relation between a man and a woman who have become husband and wife or to the ceremony marking this union...” (Attached to Interveners Appendix as Exhibit “3”).

Title 43 O.S. §3 defines who is qualified for marriage as:

“Any unmarried person of the age of eighteen years or upwards and not otherwise disqualified is capable of contracting and consenting to marriage with a person of the opposite sex...”

Petitioners cite *Blacks Law Dictionary*, Exhibit 4, to the Petitioners Appendix. According to *Blacks*, marriage is defined as: “A legal union of a man and woman as husband and wife.”

In order for there to be a common law marriage recognized in the State of Oklahoma, there must be an exclusive relationship where a couple holds themselves out as “man and wife”. Matter of the Estate of Stinchcomb, 674 P.2d 26, 29 (Okla. 1983); Matter of Phifer’s Estate, 629 P.2d 808 (Okla. App. 1981); In Re: Miller’s Estate, 78 P.2d 819, 827 (Okla. 1938) (“With respect to such a marriage, the word implies and means living or residing together of a **man and a woman** ostensibly as husband and wife”).

Thus, in the simplest terms, State Question 711 makes it a legal requirement that in order for there to be a lawful “marriage” in the State of Oklahoma, it must be a “union of one man and one woman.” Therefore, the concept of what constitutes “marriage” is unmistakable.

### **LEGAL INCIDENTS THEREOF**

Petitioners claim that the “legal incidents thereof” language in State Question 711 is vague. They fail to offer any support for this contention. According to *Websters New World Dictionary, Second College Edition*, “Legal” is defined “of, created by, based upon, or authorized by law.” (Attached to Appendix as Exhibit “3”).

“Incident” is defined by the same *Websters* dictionary as “likely to happen as a result or concomitant... 3. Law dependent upon or involved in something else. n. 1. something that

happens; happening; occurrence. 2. Something that happens as a result of or in connection with something more important...” (Attached to Appendix as Exhibit “3”).

*Blacks Law Dictionary, Fourth Edition* defines “incident” as:

“Used both substantially and adjectively of a thing, which either usually or naturally and inseparably, depends upon, appertains to, or follows another that is more worthy. (Citations omitted). Used as a noun, it denotes anything which inseparably belongs to, or is connected with, or inherently in, another thing called the ‘principal’.” (Attached to Interveners’ Appendix as Exhibit “4”).

In fact, this Court has used the phrase “legal incidents” when describing the rights and privileges of marriage. In Whitney v. Whitney, 134 P.2d 357, 360 (Okla. 1943), the Court held that plural marriages were not valid and did not confer on either parties any of the rights and privileges of a valid marriage. This Court stated:

“With the adoption of our Constitution, any validity or sanctity thereof accorded to subsequent marriage in cases of bigamous or plural marriages ceased, and such a bigamous or plural marriages when attempted are void and wholly in effectual to create a marital status or any of the **legal incidents** that usually flow therefrom as between the parties.” **Id. at 360.**

See also, Matter of Burgess’ Estate, 646 P.2d 623, 625 (Okla. App. 1982) (“Antenuptial contracts, by which engaged couples waive rights to each others’ separate property or in other ways alter **incidents of marriage** that would otherwise attach, are well recognized in Oklahoma.”)

Just as the Whitney Court declined to give any status or privilege to mutual property rights to the parties of a bigamous marriage, State Question 711 has the same bar for unmarried couples or groups. In others words, in order to have the legal privileges of marriage, one must be married in the State of Oklahoma.

Accordingly, State Question 711 is “sufficiently definite to apprise the voters with substantial accuracy as to what they are asked to approve.” Authur v. Stillwater, 611 P.2d 637,

643 (Okla. 1980). Therefore, this Court should not prohibit the voters of Oklahoma from voting upon State Question 711 on its merits.

### **PROPOSITION VII**

#### **PETITIONERS HAVE NO STANDING TO CONTEST ANY ALLEGED VAGUENESS**

Petitioners attack State Question 711 saying it is unconstitutionally vague and assert that it is a “log rolling” measure due to alleged vagueness. Petitioners allege they contest State Question 711 because they desire to be married and have the benefits of marriage. (See Application to Assume Original Jurisdiction ¶¶3 pp. 1-3) The Petitioners have no standing to challenge the constitutionality of the measure due to vagueness. “Embedded in traditional rules governing constitutional adjudication is the general principal that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied to others in situations not before the Court. St. Paul Fire & Marine Ins. Co. v. Getty Oil Co., 782 P.2d 915, 917 (Okla. 1989); Kimery v. Public Service Co. of Oklahoma, 622 P.2d 1066, 1070 (Okla. 1981).

Intervenors incorporate the arguments made in Proposition VI rebutting Petitioners’ argument that State Question 711 amounts to “log rolling”. Those arguments demonstrate that the measure is not vague.

### **PROPOSITION VIII**

#### **STATE QUESTION 711 DOES NOT VIOLATE EQUAL PROTECTION OF DUE PROCESS GUARANTEES OF THE US CONSTITUTION**

As previously argues, Petitioners do not have standing to argue that State Question 711 violates the United States Constitution’s guarantees to equal protection and due process under the Fourteenth Amendment. Nevertheless, Petitioners recognize at page 14 of their brief that the

rational basis test applies to the measure at issue. Under the equal protection clause, the limiting of marriage to opposite sex couples has been seen by the United States Supreme Court as having a traditional purpose to regulate and legitimize the procreation of children. See Zablocki v. Redhail, 434 US at 385-86, 98 S.Ct. 673, 680-81 (1978); Skinner v. State of Okl. ex rel. Williamson, 62 S.Ct. 1110, 1113 (1942). See also, Dean v. District of Columbia, 653 A.2d 307, 337 (D.C. 1995).

Petitioners attempt to characterize the impact to State Question 711 as the same as Colorado's Amendment 2, which the U.S. Supreme Court overturned in Romer v. Evans, 517 U.S. 620 (1996). Romer is clearly distinguishable from the present case both in scope and analysis.

The language of Amendment 2 was sweeping in scope:

No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

*Id.* at 624. The Colorado Supreme Court interpreted this language as prohibiting the plaintiffs “from obtaining legislative, executive, and judicial protection or redress from discrimination absent the consent of a majority of the electorate through the adoption of a constitutional amendment.” Evans v. Romer, 882 P.2d 1335, 1339 (1994). The U.S. Supreme Court interpreted

Amendment 2 even more broadly:

It is a fair, if not necessary, inference from the broad language of the amendment that it deprives gays and lesbians even of the protection of *general laws and policies* that prohibit arbitrary discrimination in governmental and private settings.

. . . At some point in the systematic administration of these laws, an official must determine whether homosexuality is an arbitrary and, thus, forbidden basis for decision. Yet a decision to that effect would itself amount to a policy prohibiting discrimination on the basis of homosexuality, and so would appear to be no more valid under Amendment 2 than the specific prohibitions against discrimination the state court held invalid.

*Romer*, 517 U.S. at 630 (emphasis added). The Court further opined that Amendment 2 withheld “protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.” *Id.* at 631.

It is abundantly clear that Colorado’s Amendment 2, as interpreted, infringed individual rights and even repealed ordinary protections of the criminal laws. In contrast with the vastness of Colorado’s Amendment 2, State Question 711, only deals with the institution of marriage, and who is qualified to enter into the marriage contract. It is not predicated on a bare desire “to hurt any group”, but protect the institution of marriage and the children that are born in this State.

As this Court has observed in the past: “Under our form of government, and at common law, *the home* is considered the keystone of the government structure.” School Board Dist. No 18 v. Thompson, 24 Okla. 1, 9, 103 P. 578, 581 (1909). Children are the natural product of the marriage between a man and woman. Therefore, it follows that the state has a fundamental interest in protecting the institution which procreates and protects and provides for children.

### **CONCLUSION**

WHEREFORE, above premises considered, Interveners, Honorable State Senator, James A. Williamson and Honorable Representative, Thad Balkman, pray the Court allow them to intervene as parties and accept their brief; and additionally prays that the Court does not accept jurisdiction in this matter and dismiss the Petitioners’ Petition, thereby allowing the people of the State of Oklahoma to vote on State Question 711 as scheduled on November 2, 2004.

Respectfully submitted,

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**CERTIFICATE OF MAILING**

I hereby certify that a true and correct copy of the within and foregoing was mailed this 7th day of September, 2004 to the following:

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