April 19, 2019

The Honorable Michael Rogers
Oklahoma Secretary of State
2300 N. Lincoln Boulevard, Ste. 122
Oklahoma City, Oklahoma 73105-4897

Re: Initiative Petition

Dear Mr. Secretary:

Please accept for filing the enclosed copy of an initiative petition and suggested ballot title. The Petition requests that a proposed amendment to the Oklahoma Constitution, which would expand eligibility for Oklahoma’s Medicaid program, be submitted to the voters at the next general election.

Very truly yours,

D. Kent Meyers
Roger A. Stong
Melanie Wilson Rughani
CROWE & DUNLEVY
Braniff Building
324 N. Robinson Ave., Ste. 100
Oklahoma City, OK 73102

Counsel for Proponents

cc: Oklahoma Attorney General

RECEIVED
APR 19 2019

OKLAHOMA SECRETARY OF STATE
PROPOSED BALLOT TITLE

This measure adds a new Article to the Oklahoma Constitution. The new Article would expand Oklahoma's Medicaid program to include certain low-income adults between the ages of 18 and 65 whose income does not exceed 133% of the federal poverty level, as permitted under the federal Medicaid laws.

Shall the proposal be approved?

For the proposal - YES
Against the proposal - NO

A "YES" vote is a vote in favor of this measure. A "NO" vote is a vote against this measure.
IT IS A FELONY FOR ANYONE TO SIGN AN INITIATIVE OR REFERENDUM PETITION WITH ANY NAME OTHER THAN HIS OWN, OR KNOWINGLY TO SIGN HIS NAME MORE THAN ONCE FOR THE MEASURE, OR TO SIGN THE PETITION WHEN HE IS NOT A LEGAL VOTER.

INITIATIVE PETITION

To the Honorable J. Kevin Stitt, Governor of Oklahoma:

We, the undersigned legal voters of the State of Oklahoma, respectfully order that the following proposed amendment to the Constitution shall be submitted to the legal voters of the State of Oklahoma for their approval or rejection at the regular general election, to be held on the 3rd day of November, 2020 (or at a special election as may be called by the Governor), and each for himself or herself says: I have personally signed this petition; I am a legal voter of the State of Oklahoma; my residence or post office are correctly written after my name. The time for filing this petition expires ninety (90) days from ______________. The question we herewith submit to our fellow voters is:

Shall the following proposed new Article XXV-A to the Constitution be approved?

BE IT ENACTED BY THE PEOPLE OF OKLAHOMA THAT A NEW ARTICLE XXV-A TO THE OKLAHOMA CONSTITUTION BE APPROVED:

CONSTITUTION OF OKLAHOMA, ARTICLE XXV-A – MEDICAID EXPANSION

SECTION 1. Definitions

As used in this Article:

A. “Centers for Medicare and Medicaid Services” or “CMS” refers to the agency responsible for administering the Medicaid program at the federal level, including review and approval of State Plan Amendments.

B. “Low Income Adults” refers to those individuals over age 18 and under age 65 whose income does not exceed one-hundred thirty-three percent (133%) of the federal poverty level, as described by and using the income methodology provided in the federal Medicaid statute at 42 U.S.C. § 1396a(a)(10)(A)(ix)(VIII), and who meet applicable non-financial eligibility conditions for Medicaid under 42 CFR Part 435, Subpart E.

C. “Medical assistance” means payment of part or all of the cost of the care, services, or the care and services themselves, or both, as provided in the federal Medicaid statute, 42 U.S.C. § 1396 et seq.

D. “Oklahoma Health Care Authority” refers to the single State agency responsible for administering the Oklahoma Medicaid program pursuant to 42 U.S.C. § 1396a(a)(5).

E. “State Plan Amendment” refers to the document(s) the State submits to the Centers for Medicare and Medicaid Services for review and approval before making a change to its program policies, including setting forth the groups of individuals to be eligible for medical assistance.
SECTION 2. Medicaid Expansion

A. In addition to those otherwise eligible for medical assistance under Oklahoma’s Medicaid program, the State shall provide medical assistance under Oklahoma’s Medicaid program to Low Income Adults.

B. No greater or additional burdens or restrictions on eligibility or enrollment shall be imposed on persons eligible for medical assistance pursuant to this Article than on any other population eligible for medical assistance under Oklahoma’s Medicaid program.

SECTION 3. Implementation

A. Within 90 days of approval of this Article, the Oklahoma Health Care Authority shall submit a State Plan Amendment and all other necessary documents to seek required approvals from the Centers for Medicare and Medicaid Services to include Low Income Adults as a coverage group in Oklahoma’s Medicaid program beginning no later than July 1, 2021.

B. The Oklahoma Health Care Authority shall take all actions necessary to maximize federal financial participation in funding medical assistance pursuant to this Article.

SECTION 4. Severability

The provisions of this Article are severable, and if any part or provision hereof shall be void, invalid, or unconstitutional, the decision of the court so holding shall not affect or impair any of the remaining parts or provisions hereof, and the remaining provisions hereof shall continue in full force and effect.

Name and Address of Proponents

Kelly Smalley
106 S. 44th W. Ave.
Tulsa, OK 74127

Erin Taylor
3037 S.W. 66th St.
Oklahoma City, OK 73159
**SIGNATURES**

The gist of the proposition is as follows: This measure adds a new Article to the Oklahoma Constitution, which would expand Oklahoma's Medicaid program to include certain low-income adults between the ages of 18 and 65 whose income does not exceed 133% of the federal poverty level, as permitted under the federal Medicaid laws.

Restrictions on eligibility or enrollment for persons eligible for medical assistance as a result of this Article may be no greater than those on any other population eligible under Oklahoma's Medicaid program. The Article would require the Oklahoma Health Care Authority to submit a State Plan Amendment and other documents necessary to seek federal approval within 90 days, and to take all actions necessary to maximize federal financial participation in funding this medical assistance.

**WARNING**

IT IS A FELONY FOR ANYONE TO SIGN AN INITIATIVE OR REFERENDUM PETITION WITH ANY NAME OTHER THAN HIS OWN, OR KNOWINGLY TO SIGN HIS NAME MORE THAN ONCE FOR THE MEASURE, OR TO SIGN THE PETITION WHEN HE IS NOT A LEGAL VOTER.

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<th>Signature of Legal Voter</th>
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STATE OF OKLAHOMA )
COUNTY OF _________ ) ss.

I, ____________________________, being first duly sworn, say:

That I am at least eighteen (18) years old and that all signatures on the signature sheet were signed in my presence. I believe that each signer has stated his or her name, mailing address, and residence correctly, and that each signer is a legal voter of the State of Oklahoma and the County of his residence as stated.

Circulator's Signature
Address
City Zip Code

Subscribed and sworn to before me this ___ day of ______, 20______.

My Commission Expires: 
Notary Public
Address
City Zip Code

My Commission Number:     

April 19, 2019

Kelly Smalley
106 S. 44th W. Ave.
Tulsa, Oklahoma 74127

Erin Taylor
3037 S.W. 66th St.
Oklahoma City, Oklahoma 73159

Dear Proponent(s):

This acknowledges receipt of the petition submitted to the Secretary of State office, which has been designated as State Question Number 802, Initiative Petition Number 419 and filed accordingly this 19th day of April, 2019.

Per Title 34 O.S. Section 8, subsequent to the publication of the notice of filing of said petition, the apparent sufficiency or insufficiency thereof and notice that any citizen(s) of the state may file a protest as to the constitutionality of the petition, the Secretary of State will provide a notification to the proponent(s) of record, setting the date to begin circulation for signatures. The date set shall not be less than fifteen (15) days nor more than thirty (30) days from the date when all appeals, protests and rehearings have been resolved or the period for filing such has expired.

If I may provide any further assistance or should you have any questions, please do not hesitate to contact me.

Thank you,

Amy Canton
Director, Executive Legislative Division

Oklahoma Secretary of State Office
405.522.4565 / executivelegislative@sos.ok.gov
April 19, 2019

Ms. Cindy Shea  
Oklahoma Press Service  
3601 N. Lincoln  
Oklahoma City, Oklahoma  73105

Dear Ms. Shea:  

Please find enclosed the following for publication;  

- Notice of Filing for State Question 802, Initiative Petition 419

Per Title 34 O.S. § 8, the publication must appear in at least one newspaper of general circulation in the State of Oklahoma. Please publish the enclosed notice in *The Oklahoman, Tulsa World,* and the *Journal Record* as soon as possible.

Also, upon the completion of publication, please provide our office with corresponding Affidavits of Publication. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Amy Canton  
Director, Executive Legislative Division  
**OKLAHOMA SECRETARY OF STATE OFFICE**  
405.522.4565 / executivelegislative@sos.ok.gov
Proof of Publication
Order Number 19-04-60

I, Cindy Shea, of lawful age, being duly sworn upon oath, deposes and says: That I am the Authorized Agent of OK-JOURNAL RECORD, a Daily newspaper printed and published in the city of OKLAHOMA CITY, county of Oklahoma, and state of Oklahoma, and that the advertisement referred to, a true and printed copy of which is hereunto attached, was published in said OK-JOURNAL RECORD in consecutive issues on the following dates-to-wit:

Insertion: 04/25/2019

That said newspaper has been published continuously and uninterruptedly in said county during a period of one-hundred and four consecutive weeks prior to the publication of the attached notice or advertisement; that it has been admitted to the United States mail as second-class mail matter; that it has a general paid circulation, and publishes news of general interest, and otherwise conforms with all of the statutes of the Oklahoma governing legal publications.

PUBLICATION FEE $35.15

(Composer, Publisher or Authorized Agent)

SUBSCRIBED and sworn to me this 26 day of April 2019.

(Notary Public)

NOTICE OF THE FILING OF STATE QUESTION 802, INITIATIVE PETITION 419, THE APPARENT SUFFICIENCY THEREOF, AND NOTICE TO CITIZENS OF THE STATE THAT ANY SUCH PROTEST, AS TO THE CONSTITUTIONALITY OF SAID PETITION, MUST BE FILED ACCORDINGLY WITHIN TEN (10) BUSINESS DAYS AFTER THIS NOTICE (Okla. Stat. tit. 34, § 8)

NOTICE is hereby given that on April 19, 2019, State Question 802, Initiative Petition 419 was filed in the Office of the Oklahoma Secretary of State. NOTICE is also hereby given that State Question 802, Initiative Petition 419 is SUFFICIENT for filing with the Office of the Oklahoma Secretary of State. NOTICE is likewise, hereby given, as provided in Title 34 Section 8 of the Oklahoma Statutes, that any citizen or citizens of the state may file a protest as to the constitutionality of said petition, by a written notice to the Supreme Court and to the proponent(s) filing the petition. Any such protest must be filed within ten (10) business days after publication of this notice. Also, a copy of any such protest shall be filed with the office of the Oklahoma Secretary of State.

Proponents of record for State Question 802, Initiative Petition 419:
- Kelly Smalley
- Erinn Taylor
- 106 S. 44th W. Ave.
- 3037 S.W. 66th St.
- Tulsa, Oklahoma 74127
- Oklahoma City, Oklahoma 73159

Michael Rogers, Oklahoma Secretary of State and Education
Proof of Publication
Order Number 19-04-60

I, Cindy Shea, of lawful age, being duly sworn upon oath, deposes and says: That I am the Authorized Agent of OK-THE OKLAHOMAN, a Daily newspaper printed and published in the city of OKLAHOMA CITY, county of Oklahoma, and state of Oklahoma, and that the advertisement referred to, a true and printed copy of which is hereunto attached, was published in said OK-THE OKLAHOMAN in consecutive issues on the following dates-to-wit:

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Erin Taylor  
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Oklahoma City, Oklahoma 73159

Michael Rogers, Oklahoma Secretary of State and Education
Proof of Publication
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I, Cindy Shea, of lawful age, being duly sworn upon oath, deposes and says: That I am the Authorized Agent of OK-TULSA WORLD - Legal, a Daily newspaper printed and published in the city of Tulsa, county of Tulsa, and state of Oklahoma, and that the advertisement referred to, a true and printed copy of which is hereunto attached, was published in said OK-TULSA WORLD - Legal in consecutive issues on the following dates-to-wit:

Insertion: 04/25/2019

That said newspaper has been published continuously and uninterruptedly in said county during a period of one-hundred and four consecutive weeks prior to the publication of the attached notice or advertisement; that it has been admitted to the United States mail as second-class mail matter; that it has a general paid circulation, and publishes news of general interest, and otherwise conforms with all of the statutes of the Oklahoma governing legal publications.

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Kelly Smalley
106 S. 44th W. Ave.
Tulsa, Oklahoma 74127

Erin Taylor
3037 S.W. 66th St.
Oklahoma City, Oklahoma 73159

Michael Rogers, Oklahoma Secretary of State and Education
IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

OKLAHOMA COUNCIL OF PUBLIC
AFFAIRS, INC., DOUGLAS P. BEALL,
M.D., JONATHAN S. SMALL, II, and
JENNIFER WITHERBY, R.N.

Petitioners/Protestants,

vs.

KELLY SMALLEY, and
ERIN TAYLOR,

Respondents/Proponents.

Case No. #117962

BRIEF IN SUPPORT OF APPLICATION AND PETITION TO
ASSUME ORIGINAL JURISDICTION TO REVIEW THE
CONSTITUTIONALITY AND GIST OF INITIATIVE PETITION NO. 419

RECEIVED
MAY 09 2019
OKLAHOMA SECRETARY
OF STATE

Dated May 9, 2019

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
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Attorneys for Petitioners/Protestants,
Oklahoma Council of Public Affairs, Inc.,
Douglas P. Beall, M.D., Jonathan S. Small, II,
and Jennifer Witherby, R.N.
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City of Okla. City v. Okla. Dept’ of Labor,
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A. IP 419 delegates legislative authority to the federal government.

42 U.S.C. § 1396(y)(1)(E)

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84 Fed. Reg. 1167

Pub. Law 111-148

B. IP 419 violates Okla. Const. art. V, §1 and art. IV, § 1

City of Okla. City v. Okla. Dept’ of Labor,
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C. The gist is inadequate because it fails to explain what this petition actually does:
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I. **INTRODUCTION**

Initiative Petition 419 ("IP 419") is unconstitutional, and its gist is inadequate. IP 419 should be struck down and removed from the ballot. This initiative petition has two distinct problems that create constitutional conflicts and infect its gist.

First, IP 419 purports to expand Medicaid coverage to adults whose income does not exceed 133% of the federal poverty level. The Affordable Care Act, however, requires Medicaid expansion to cover adults at or below 138% of the federal poverty level, not 133%. Proponents have ignored 42 U.S.C. § 1396a(e)(14)(I)(i). That creates a conflict and renders IP 419 unconstitutional pursuant to the Supremacy Clause of the U.S. Constitution.

If Proponents wish to claim that IP 419 really means 138% of the federal poverty level, even though it says 133%, IP 419 still must fail because its gist would be false. The difference between extending coverage to 133% and 138% will likely cost the State millions of dollars. Voters have a right to know what they are signing, and this Court should not tolerate a false gist.

Second, IP 419 constitutionalizes a massive entitlement program in which the federal government would control eligibility and the cost to Oklahoma. Eligibility for the benefit proposed by IP 419 is based on an adult’s relation to the federal poverty line. Federal bureaucrats, not the Oklahoma Legislature, determine the federal poverty line, 42 U.S.C. § 9902(2), which violates separation of powers. *City of Okla. City v. Okla. Dep’t of Labor*, 1995 OK 107, ¶14, 918 P.2d 26, 30. Also, by constitutionalizing this Medicaid benefit, Congress will determine how much of the cost is borne by Oklahoma going forward. Today, the federal government pays for 90% of the program, and Oklahoma would pay 10%, but Congress can lower its amount at any time. The Oklahoma Legislature, on the other hand, would have no choice but to appropriate more money.

Delegating this legislative authority to the federal government violates the Oklahoma Constitution. *Id.*; Okla. Const. art. V, § 1; *id.* art. IV, § 1. If the proponents wish to change who
exercises legislative power in Oklahoma, they must amend Article V, § 1, which they have not done in this case. Moreover, a wholesale redistribution of legislative authority must be included in the gist of the initiative petition under this Court’s precedent. In re Initiative Petition No. 344, 1990 OK 75, ¶15, 797 P.2d 326, 330.

IP 419’s delegation of sovereignty and fiscal policy to the federal government also violates the U.S. Constitution. The Guarantee Clause of the U.S. Constitution mandates that states maintain a republican form of government, and inherent in this guarantee is separation of powers. VanSickle v. Shanahan, 511 P.2d 223, 235 (Kan. 1973); see also In re Initiative Petition No. 348, 1991 OK 110, ¶24, 820 P.2d 772, 780. While states may intermingle powers between the branches of state government, VanSickle, 511 P.2d at 235, there is no support for states delegating core legislative power to the federal government.

The Tenth Amendment also precludes the federal government from exercising the authority IP 419 would delegate. The federal government cannot be in the position of forcing Oklahoma to make an appropriation. See MLC Mortgage Corp. v. Sun Am. Mortgage Co., 2009 OK 37, ¶14, 212 P.3d 1199, 1205; Printz v. United States, 521 U.S. 898, 925 (1997).

IP 419 is unconstitutional, and its gist is legally inadequate. Petitioners respectfully request that the Court strike down this Petition and prohibit it from the ballot.

II. ARGUMENTS AND AUTHORITIES

Proposition 1: IP 419 conflicts with federal law and violates the Supremacy Clause of the U.S. Constitution.

IP 419 is unconstitutional because it violates 42 U.S.C. § 1396a(e)(14)(I)(i). According to the Supremacy Clause of the U.S. Constitution, “[t]his Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S.
Const. art. VI, cl. 2 (emphasis added). Thus, when a state constitutional provision conflicts with a federal statute, the federal statute prevails. *Local 514 Transp. Workers Union of Am. v. Keating*, 358 F.3d 743, 754 (10th Cir. 2004); *In re Get Real II, L.L.C.*, 2009 OK CIV APP 72, ¶15, 217 P.3d 638, 643. This Court has struck down initiative petitions attempting to amend the Oklahoma Constitution that were in violation of federal law pursuant to the Supremacy Clause. *In re Initiative Petition No. 406*, 2016 OK 34, ¶3, 369 P.3d 1068; *In re Initiative Petition No. 349*, 1992 OK 122, ¶14, 838 P.2d 1, 7. This initiative petition should be struck down as well.

The Affordable Care Act (ACA), as amended, requires states that choose to expand Medicaid to extend the program to adults whose income is up to 138% of the federal poverty level. Two provisions of the ACA dictate the income level for Medicaid expansion coverage—42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) and 42 U.S.C. § 1396a(e)(14)(I)(i). Subsection (a)(10) says that Medicaid shall be expanded up to 133% of the federal poverty level. Subsection (e)(14) says that “the State shall . . . determine . . . the upper income limit on eligibility . . . (expressed as a percentage of the poverty line) and such upper income limit increased by 5 percentage points . . . .” 42 U.S.C. § 1396a(e)(14)(I)(i). Accordingly, CMS,1 the IRS,2 the Congressional Research Service,3 and multiple commentators4 all recognize that the Affordable Care Act raises the income cap for adults to 138% of the federal poverty level.

Conversely, Sections 2(A) and 1(B) of the IP 419 mandate that the state to expand Medicaid to adults at or below 133% of the federal poverty level. This is a direct conflict with the mandate given directly to states in § 1396a(e)(14)(I)(i): “The State shall” increase the “upper

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3 Congressional Research Service, Summary of Potential Employer Penalties Under the Patient Protection and Affordable Care Act (PPACA), at 6 (June 2, 2010), (App’x at F).
income limit . . . by 5 percentage points.” Other states that have expanded Medicaid by initiative petition have complied with § 1396a(e)(14)(I)(i). Neb. Init. Measure 427, § 2 (codified at Neb. Rev. Stat 68-992) (“one hundred thirty-eight percent of the federal poverty level”) (App’x at C); Maine Question 2 (2017) (codified at Me. Rev. Stat. tit. 22, § 3174-G(H)) (App’x at D) (“133% plus 5% of the nonfarm income official poverty line”). IP 419, on the other hand, ignores § 1396a(e)(14)(I)(i), which is fatal. Pursuant to the Supremacy Clause federal statutes prevail, and IP 419 should by struck down as unconstitutional.

The conflict between IP 419’s attempt to expand Medicaid to 133% of the federal poverty line and the ACA’s mandate of 138% is crystalized by the fact federal law does not allow partial Medicaid expansion. It is an all or nothing proposition. Other states have requested waivers from the U.S. Department of Health and Human Services to implement partial expansion, but those waivers have been denied. Specifically, CMS rejected waiver requests by both Arkansas and Massachusetts to expand Medicaid coverage only to those at or below 100% of the federal poverty level under the ACA’s 90%/10% reimbursement formula.\footnote{Ltr. from CMS Administrator Seema Verma to Cindy Gillespie, Director, Ark. Dept. of Health, at 2 (Mar. 5, 2018), (App’x at G); Ltr. from CMS Acting Director Tim Hill to Daniel Tsai, Assistant Secretary, MassHealth, at 3 (June 27, 2018), (App’x at H).}

IP 419’s attempt to expand Medicaid coverage to adults at or below 133% of the federal poverty level violates the express directive in 42 U.S.C. § 1396a(e)(14)(I)(i). Pursuant to the Supremacy Clause, IP 419 is unconstitutional.

**Proposition 2:** IP 419 delegates Oklahoma’s legislative power to the federal government in violation of the U.S. and Oklahoma Constitutions.

IP 419 violates separation of powers by ceding legislative authority to the federal government. *City of Oklahoma City*, 1995 OK 107, ¶18, 918 P.2d at 30. This unconstitutional delegation violates Article V, § 1 and Article IV, § 1 of the Oklahoma Constitution and the
Guarantee Clause and Tenth Amendment to the U.S. Constitution.

A. IP 419 delegates legislative authority to the federal government.

This initiative petition is a significant transfer of state sovereignty and self-governance to the federal government. Under IP 419, federal bureaucrats, not the Oklahoma Legislature, would control who is eligible for the new constitutionalized Medicaid entitlement. Additionally, Congress would dictate how much of the cost is paid by the State of Oklahoma.

Eligibility. IP 419 bases eligibility on an adult’s income relative to the federal poverty level. The problem is that federal bureaucrats set the federal poverty level, and the power to control the federal poverty level is the power to control eligibility. The Affordable Care Act provides that the “poverty line” is "defined in section 1397jj(c)(5) of this title.” Pub. Law 111-148. Section 1397jj(c)(5) cross references to 42 U.S.C. §990(2), which provides that the poverty line is established by the Office of Management and Budget based on data from the Census Bureau, and it is updated yearly by the Secretary of the Department of Health and Human Services. 42 U.S.C. § 9902(2); 84 Fed. Reg. 1167, 1168. While a plethora of federal officials are involved, missing from the policymaking decision is the Oklahoma Legislature. Considering the scope and cost of Medicaid, this exclusion is constitutionally fatal.

Costs to Oklahoma. IP 419 also delegates to Congress the determination of how much Oklahoma will actually pay for this new constitutionalized Medicaid benefit. The legislative authority to determine how to spend Oklahoma’s finite resources will be in the hands of Congress, not the Oklahoma Legislature. Congress does not have a great track record.

Since IP 419 would create a constitutional right to Medicaid for certain adults, the Legislature is powerless to curtail this benefit. Currently, the federal government is pays 90% of the cost for the Medicaid expansion group, and the state’s pay 10%. 42 U.S.C. § 1396d(y)(1)(E). However, this allocation of costs is not constitutionalized like the benefit would be under IP 419.
Congress could reduce the proportion that the federal government pays at any time. The Oklahoma Legislature would have no option other than to appropriate funds for adult Medicaid coverage. Though some other states have expanded Medicaid benefits, we are aware of none doing so in its constitution.

The Legislators elected by the people of Oklahoma will have no opportunity to determine whether this is the best use of the tax revenue paid by Oklahomans to fund their government. Instead, the members of Congress, 528 of 535 of which are not accountable to Oklahomans, can decide how much Oklahoma pays. This delegation of legislative authority to the federal government violates separation of powers.

**B. IP 419 violates Okla. Const. art. V, § 1 and art. IV, § 1.**

By delegating the power to determine eligibility and costs for the proposed Medicaid program to the federal government, IP 419 violates separation of powers. Okla. Const. art. V, § 1; id. art. IV, § 1. *City of Oklahoma City*, 1995 OK 107, 918 P.2d 26.

In *City of Oklahoma City*, the Oklahoma Supreme Court struck down Oklahoma’s Minimum Wages on Public Works Act. 1995 OK 107, ¶¶8-11, 18-19, 918 P.2d 26, 28-30. The act violated Article IV, § 1 and Article V, § 1 of the Oklahoma Constitution because it delegated the power to determine prevailing wages to a department of the federal government. *Id.* ¶19. The act required the Labor Commissioner to adopt the prevailing wage determined by the Department of Labor, which the Court found to be an unconstitutional delegation of legislative authority to the federal government. *Id.* ¶14. The Court reasoned:

The current Act leaves an important determination to the unrestricted and standardless discretion of unelected bureaucrats. Worse, it delegates to an administrative arm of the federal government. As a result, the federal agency which actually determines the prevailing wage is less answerable to the will of the people of Oklahoma than is the Labor Commissioner who holds elected office. It leaves public entities with no Oklahoma forum in which to challenge the accuracy of the United States Department of Labor's wage determinations.
Id. IP 419 suffers the same problem as the act in City of Oklahoma City, the eligibility
determination for Oklahoma’s adult Medicaid program would be left to “unelected
bureaucrats” who set the federal poverty line. These federal agencies charged with setting the
poverty line are “less answerable to the will of the people of Oklahoma” than the Oklahoma
Legislature or the Oklahoma Health Care Authority. There is no forum in which Oklahoma or
its taxpayers could challenge the accuracy of HHS, OMB, and the Census Bureaus’ poverty
line determination. Instead, Oklahoma would simply be left to pay the bill.

Similarly, Congress’s ability to heap the costs of this program on Oklahoma despite the
fact that most are not elected by or answerable to Oklahoma residents, problematic under City of
Oklahoma City. Since this Medicaid benefit will be constitutionalized, Congress will be in control
rather than the Oklahoma Legislature. Just as in City of Oklahoma City, IP 419’s attempt to
delgate legislative authority to the federal government violates separation of powers.

The fact that this initiative petition proposes a constitutional amendment does not cure the
separation of powers problem. In In re Initiative Petition No. 403, Justice Taylor, Justice Kauger,
and Justice Winchester were prepared to strike down an initiative petition for violating separation
of powers. 2016 OK 1, ¶15, 367 P.3d 472, 484 (Taylor, J., dissenting). Initiative Petition 403
included a provision prohibiting the Legislature from making appropriations until the Board of
Equalization had certified that the Legislature had not supplanted existing education revenue with
the new sales tax revenue. Id.

Justices Taylor, Kauger, and Winchester believed the initiative petition could not give this
power to the Board of Equalization without repealing it from the Legislature in Article V. Id. “As
Initiative Petition No. 403 contains no repeal of the legislative power being taken by the Board of
Equalization, the Initiative Petition is in direct conflict with Article V of the Oklahoma
Constitution, the power of the legislative branch.” *Id.*

The majority did not reach the separation of powers issue viewing it as speculative. 2016 OK 1, ¶17, 367 P.3d 472, 478. *Id.* “[A]ny suggestion by Petitioners at oral argument that the implementation of the Education Improvement Fund would negatively affect the legislative appropriations process or usurp legislative fiscal policy-making is entirely speculative at this point. We decline, at the pre-election stage, to declare the proposal unconstitutional on nothing more than speculation.”

In this case, the separation of powers problem is not speculative. *City of Oklahoma City* demonstrates that IP 419 would result in an unconstitutional delegation of legislative power to the federal government. The legislative authority to set the federal poverty level and determine Oklahoma’s percentage of the cost of Medicaid coverage is being delegated to the federal government. Yet, proponents have made no attempt to repeal or alter Article V, § 1, which delegates legislative authority to the Legislature and the people. Thus, consistent with Justice Taylor, Kauger, and Winchester’s analysis in *In re Initiative Petition No. 403*, this initiative petition is unconstitutional pursuant to the Oklahoma Constitution.

C. IP 419 violates the Guarantee Clause of the U.S. Constitution.

The delegation of legislative authority described above violates separation of powers. Though it is a rare circumstance,6 this case rises to the level of a violation of the constitutional

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6 To be sure, there are examples of laws and actions violating the Guarantee Clause. *Kelley v. Metro. Cty. Bd. of Educ. of Nashville & Davidson Cty.*, Tenn., 836 F.2d 986, 996–97 (6th Cir. 1987) (Guarantee Clause prevented federal judge from requiring state to appropriate money); *City of Cleveland v. Ruple*, 200 N.E. 507, 510 (Ohio 1936) (taxing for private purposes); *City of W. Allis v. Milwaukee Cty.*, 159 N.W.2d 36, 46 (Wisc. 1968) (same); see also *Morrissey v. State*, 951 P.2d 911, 916-17 (Colo. 1998) (indicating, but not holding, that Guarantee Clause prohibited a constitutional amendment which required legislatures to propose a constitutional amendment regarding term limits); *Solomon v. State*, 364 P.3d 536, 545 (Kan. 2015) (holding that law dictating selection of chief judges of judicial districts violated separation of powers and noting that separation of powers “is an inherent and integral element of the republican form of government . . . .”); *Bauers v. Heisel*, 361 F.2d 581, 588–89 (3d Cir. 1966) (avoiding interpreting a Congressional act to abrogate judicial immunity due to the Guarantee Clause).
mandate that states maintain a republican form of government. Oklahoma’s legislators would no longer function as legislators with respect to the state’s adult Medicaid program, and Congress would have power to wreck the state’s budget by passing a law despite the fact that 528 of the 535 members of Congress stand unaccountable to the citizens of Oklahoma.

The Guarantee Clause of the U.S. Constitution provides that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government . . . .” U.S. Const. art. IV, § 4. “[T]he doctrine of separation of powers is an inherent concept of a republican form of government, and is a guarantee to the people of the states that the powers inherently belonging to one department may not be vested by the people in another department of that government.” VanSickle v. Shanahan, 511 P.2d 223, 235 (Kan. 1973), cited in In re Initiative Petition No. 348, 1991 OK 110, 820 P.2d 772, 780 n.21.

In re Initiative Petition No. 348 establishes that the power to amend the Oklahoma Constitution is limited by the Guarantee Clause of the U.S. Constitution and indicates that there are limits on restricting legislative authority. 1991 OK 110, ¶¶24-25, 820 P.2d 772, 780.7 In that case, an initiative petition to amend Oklahoma’s Constitution to require a supermajority of the legislature or vote of the people to raise taxes. The Court ultimately held that the initiative petition did not violate the Guarantee Clause, but the Court’s parameters are instructive for applying the Guarantee Clause. The Court concluded that Initiative Petition 348 “restricts” the legislative power, but “does not abolish government by representation.” Id. ¶28. The Court quoted Kadderly v. City

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7 In the past, federal courts have questioned whether the Guarantee Clause is justiciable. The view that assessing a Guarantee Clause violation is always political question is no longer the prevailing view. New York v. United States, 505 U.S. 144, 185 (1992) (“More recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions.”). In In re Initiative Petition No. 348, 1991 OK 110, ¶¶24-25, 820 P.2d at 780, this Court analyzed whether an initiative petition violated the Guarantee Clause, which demonstrates justiciability. Moreover, in that decision, the Court refers to the Kansas Supreme Court’s “analysis concluding the Guaranty Clause is justiciable” in Vansickle v. Shanahan, 511 P.2d 223, 234 (Kan. 1973). In re Initiative Petition No. 348, 1991 OK 110, 820 P.2d 772, 780 n.21. Under the Vansickle test, whether IP 419 violates the Guarantee Clause is also justiciable.
of Portland, for the propositions that a republican form of government exists when "[t]he government is still divided into the legislative, executive, and judicial departments, the duties of which are discharged by representatives selected by the people." Id. ¶29 (citing 74 P. 710, 719 (1903)). Also, even when the people exercise legislative authority through the initiative process, it is a republican government if "legislative and executive departments are not destroyed" and "their powers or authority" are not "materially curtailed." Id. (quoting Kadderly, 74 P. at 719).

Unlike Initiative Petition No. 348, IP 419 does not merely restrict the Legislature’s power. Instead, Oklahoma’s adult Medicaid program will be controlled by federal officials rather than "discharged by representatives selected by the people." Id. The Legislature will control neither eligibility nor costs, which will "materially curtail" its legislative power in the important area of entitlements. Id. Moreover, this constitutional welfare benefit over which the Legislature will have no control going into the future has the potential to completely disrupt the appropriation process. Federal officials and Congress will have the authority to direct millions of dollars from Oklahoma’s treasury, which is inconsistent with the Guarantee Clause. See Kelley v. Metro. Cty. Bd. of Educ. of Nashville, 836 F.2d 986, 996–97 (6th Cir. 1987) (Guarantee Clause prevented federal judge from requiring state to appropriate money).

While courts have recognized states’ discretion to distribute some legislative authority in the executive branch, VanSickle, 511 P.2d at 235, there is no support for a wholesale transfer of legislative authority to the federal government regarding an important issue like welfare benefits. The proposed structure of IP 419 violates separation of powers under the test established in City of Oklahoma City, the Petition violates the Guaranty Clause of the U.S. Constitution.

D. IP 419 violates the Tenth Amendment of the U.S. Constitution.

As recognized by the Tenth Amendment, Congress and federal agencies have no power to govern Oklahoma’s adult Medicaid program. “The powers not delegated to the United States by
the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. Const. amend. X. Nowhere in the U.S. Constitution is the federal government given an enumerated power to accept legislative authority from the state of Oklahoma.

This Court has recognized that a “federal mandate for [a] state to enact legislation,” would “raise Tenth Amendment concerns.” MLC Mortgage Corp. v. Sun Am. Mortgage Co., 2009 OK 37, ¶14, 212 P.3d 1199, 1205; also Printz v. United States, 521 U.S. 898, 925 (1997) (“[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.”). IP 409 would cede Oklahoma’s authority to determine eligibility and costs for adult Medicaid to the federal government. Thus, the decisions by the federal government—regarding either eligibility or costs—would mandate that that the State of Oklahoma pass an appropriation bill to pay for the effect of the federal government’s policy choices.

The federal government simply does not have power to exert this level of control over Oklahoma’s adult Medicaid program. That power is reserved to the state of Oklahoma and cannot be ceded to the federal government according to the Tenth Amendment.

**Conclusion.** Initiative Petition 419’s delegation of legislative authority to the federal government violates by the Oklahoma and U.S. Constitutions. The Petition should be stricken.

**Proposition 3: The gist of IP 419 is legally deficient.**

The gist of IP 419 is false, misleading, and legally deficient. The purpose of the gist is to “prevent fraud, deceit, or corruption in the initiative process.” *In re Initiative Petition 409, 2016*

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8 The Proponents’ gist states: “The gist of the proposition is as follows: This measure adds a new Article to the Oklahoma Constitution, which would expand Oklahoma’s Medicaid program to include certain low-income adults between the ages of 18 and 65 whose income does not exceed 133% of the federal poverty level, as permitted under the federal Medicaid laws. Restrictions on eligibility or enrollment for persons eligible for medical assistance as a result of this Article may be no greater than those on any other population eligible under Oklahoma’s Medicaid program. The Article would require the Oklahoma Health Care Authority to submit a State Plan Amendment and other documents necessary to seek federal approval within 90 days, and to take all actions necessary to maximize federal financial participation in funding this medical assistance.”
OK 51, ¶3, 376 P.3d 250. The gist must “at least put [signatories] on notice of the changes being made” and “explain the proposal’s effect. . . .” Id. The Court should only approve a gist if “it is free from the taint of misleading terms or deceitful language.” Id. (internal citations omitted). The gist “must be brief, descriptive of the effect of the proposition, not deceiving but informative and revealing of the design and purpose of the Petition.” In re Initiative Petition 384, 2007 OK 48, ¶7, 164 P.3d 125, quoting In re Initiative Petition 344, 1990 OK 75 ¶14, 797 P.2d 326 (emphasis added). Voters, after reading the gist, “should be able to cast an informed vote.”” Id. (emphasis added) (internal citations omitted).

A properly drafted gist is “indispensable and noncompliance is fatal.” In re Initiative Petition No. 342, 1990 OK 76, ¶11, 797 P.2d 331, 333. “The gist is not subject to amendment by this Court, and as a result, the only remedy is to strike the petition from the ballot.” In re Initiative Petition No. 409, 2016 OK 51, ¶7, 376 P.3d 250, 254. IP 419’s gist is legally deficient for multiple reasons, and the Initiative Petition should be stricken.

A. The gist’s claim that Medicaid will be expanded the adults at or below 133% of the federal poverty level, “as permitted under the federal Medicaid laws” is legally inaccurate.

The gist fails because “expand[ing] Oklahoma’s Medicaid program to include certain low-income adults . . . whose income does not exceed 133% of the federal poverty level” is not what is “permitted under the federal Medicaid laws.” Based either on the Supremacy Clause of the U.S. Constitution or Oklahoma’s gist requirements, IP 419 is deficient. If to rebut the Supremacy Clause, Proponents argue that despite stating that Medicaid will be expanded to cover adults at or below 133% of the federal poverty level, IP 409 actually means 138%, this is an admission that the gist is false. If they stand by the fact that the Initiative Petition will only cause Medicaid to be extended to adults at or below 133%, then the Petition conflicts with 42 U.S.C. § 1396a(e)(14)(I)(i) and is preempted pursuant to the Supremacy Clause. Either way, federal law is unambiguous that
expanding Medicaid to adults at or below 138% of the federal poverty line (not 133% as stated in gist) is what is “permitted under the federal Medicaid laws.”

This Court has repeatedly rejected gists that merely misrepresent or omit relevant changes proposed by an initiative petition. *In re Initiative Petition No. 409*, 2016 OK 51, 376 P.3d 250; *In re Initiative Petition No. 384*, 2007 OK 48, 164 P.3d 125; *In re Initiative Petition No. 344*, 1990 OK 75, 797 P.2d 326; *also Oklahoma's Children, Our Future, Inc. v. Coburn*, 2018 OK 55, 421 P.3d 867 (referendum). The flaws with this gist are more egregious than any of those rejected by the Court. If the intent is to actually expand Medicaid coverage to adults at or below 138% of the federal poverty level, than the gist is just plain wrong. While the error is no doubt unintentional, allowing this petition to proceed as written would perpetrate deceit on the voters. This Court has made clear that this cannot be allowed. *In re Initiative Petition 409*, 2016 OK 51, ¶3, 376 P.3d 250.

Conversely, if the intent is to expand Medicaid coverage to only those at or below 133% of the federal poverty level, then the statement that this is “permitted under the federal Medicaid laws” is demonstrably false. In *Oklahoma's Children, Our Future, Inc. v. Coburn*, 2018 OK 55, ¶33, 421 P.3d 867, 876, the referendum’s gist was legally deficient because it did not explain that the hotel / motel tax in the law targeted by the referendum was already repealed by intervening legislation. *Id. ¶33, 421 P.3d at 876.* IP 419’s gist is even more problematic. Rather than merely omitting an explanation of the current state of the law, the gist misleads voters into believing this expansion is in conformity with federal law. As discussed above, it is not. Expanding to 133% of the federal poverty line is contrary to federal law—42 U.S.C. § 1396a(e)(14)(I)(i). In conformity with *Oklahoma's Children, Our Future, Inc.*, this petition should be held to be deficient because of its misstatement of federal law.
B. The gist is inadequate because it fails to explain the delegation of legislative authority to the federal government and the financial commitment by the state of Oklahoma.

As recognized by the City of Oklahoma City case discussed in detail above, this initiative petition would delegate legislative authority away from Oklahoma to the federal government. According to this Court’s precedent, this type of transfer of state authority must be included in the gist. This Court struck down the gist in an initiative petition seeking to redistribute the executive branch power. In re Initiative Petition No. 344, 1990 OK 75, ¶15, 797 P.2d 326, 330.

It appears from the design of Initiative Petition No. 344 that the effect would be to increase the power of the newly elected Governor from what the designers of the Constitution intended. The signatories on the Petition and the voters should be informed of this effect.

Id. Also, the gist of Initiative Petition 384 was held legally deficient because “the gist failed to alert potential signatories to the effect the proposed statute would have on the balance of power between local school boards and the state.” In re Initiative Petition No. 384, 2007 OK 48, ¶11, 164 P.3d 125, 129–30.

IP 419 gives the federal government control of this large and growing entitlement program. The gist neither explains that the federal poverty level is set by federal bureaucrats or that the cost of Medicaid is shared between the State and federal government, and Congress has the ability to change the amount it pays at any time. To make things worse, the gist’s statement that Oklahoma’s Medicaid program will be expanded “as permitted by federal Medicaid law” and direction “to take all actions necessary to maximize federal financial participation in funding this medical assistance” gives voters that false sense that this expansion will be funded completely by the federal government. As the gist currently stands, potential signatories will not have the requisite notice and information to assess the “entire practical effect of the petition.” Oklahoma’s Children, Our Future, Inc., 2018 OK 55, ¶23, 421 P.3d at 874.
Even if the Court does not hold this delegation of legislative authority to be unconstitutional as Petitioners request in Proposition 2, this transfer of authority to the federal government must be included in the gist under this Court’s precedent in *In re Initiative Petition No. 344* and *In re Initiative Petition No. 384*.

**C. The gist is inadequate because it fails to explain what this petition actually does: constitutionally obligate the state to pay Medicaid benefits.**

The gist states that IP 419 will “expand Oklahoma’s Medicaid program.” This is misleading because it does not adequately explain the obligation that will be imposed on the State. According to Section 2(A), “the State shall provide medical assistance under Oklahoma’s Medicaid program to Low Income Adults.” To make an informed decision, the voters must understand that this provision imposes a constitutional obligation on the State. This could have been accomplished if the first sentence of the gist tracked with Section 2(A). For instance, this measure adds a new Article to the Oklahoma Constitution, which would require the State to provide medical assistance to adults whose income does not exceed 138% of the federal poverty level.

This Court has found gists to be deficient because they omitted *some of the things* that an initiative petition would have done. *In re Initiative Petition No. 409*, 2016 OK 51, ¶6, 376 P.3d 250, 253 (omitted changes to liquor laws); *Oklahoma’s Children, Our Future, Inc. v. Coburn*, 2018 OK 55, ¶26, 421 P.3d 867, 874 (omitted little cigars). The gist in this case omits *the thing* that IP 419 would require pursuant to the plain text of the measure: the state shall provide medical assistance to adults whose income does not exceed 138% of the federal poverty line.

Since the gist omits this new obligation for the state, the gist is legally inadequate as in *In re Initiative Petition No. 409* and *Oklahoma’s Children, Our Future*.

**III. Conclusion**

For the foregoing reasons, Petitioner respectfully requests that the Court strike down IP 419 as unconstitutional and violative of the State’s gist requirements.
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of May 2019, a true and correct copy of the above
and forgoing was served by hand delivery or U.S. mail, postage prepaid, as follows:

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(Pursuant to 34 O.S. § 8(B))

Travis V. Jett

S507072
ORDER

¶ 1 Oral argument was held on June 18, 2019, concerning a challenge to the sufficiency of the gist and the constitutionality of Initiative Petition 419, State Question 802, pursuant to 34 O.S. Supp. 2015 § 8 (B) & (C). We find that the challenge to the gist's use of 133% in determining eligibility for the proposed Medicaid expansion is not misleading and is sufficient. In *McDonald v. Thompson*, we stated that "[b]y its very nature, the gist is a simple statement that summarizes the petition." 2018 OK 25, ¶ 12, 414 P.3d 367, 373. We believe the language of the gist is clear. The gist informs signers of what the proposed amendment is intended to
do—"expand Oklahoma's Medicaid program to include certain low-income adults between the ages of 18 and 65 whose income does not exceed 133% of the federal poverty level, as permitted under the federal Medicaid laws." (emphasis added).

¶ 2 The remaining challenges to the constitutionality of Initiative Petition 419, State Question 802, are also denied.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE

this 19th day of June, 2019.

[Signature]
CHIEF JUSTICE

CONCUR: Gurich, C.J., Darby, V.C.J., Kauger, J., Reif, S.J., Thornbrugh, S.J. and Swinton, S.J.

CONCUR IN PART; DISSENT IN PART: Winchester and Combs, JJ. and Bell, S.J. Combs, J., with whom Winchester, J. and Bell, S.J., join, concurring in part; dissenting in part:

"I concur with the majority that the Protestant's constitutional challenges to Initiative Petition 419 are meritless. However, I dissent to its ruling that the gist is sufficient. The use in the gist of 133% of the federal poverty level rather than the more accurate 138% is misleading to signatories and therefore the petition should be stricken on that basis alone."

RECUSED: Edmondson and Colbert, JJ.