

William G. Myers III (ISB #5598)
Alison C. Hunter (ISB #8997)
Chris C. McCurdy (ISB #8552)
HOLLAND & HART LLP
800 W. Main Street, Suite 1750
Boise, ID 83702-5974
Telephone: (208) 342-5000
Facsimile: (208) 343-8869
wmyers@hollandhart.com
achunter@hollandhart.com
ccmccurdy@hollandhart.com

Attorneys for Proposed Intervenor-Respondents

IN THE SUPREME COURT OF THE STATE OF IDAHO

MICHAEL STEPHEN GILMORE, a)	Docket No. 48760-2021
Qualified Elector of Ada County,)	
)	BRIEF IN SUPPORT OF
Petitioner,)	UNCONTESTED AND VERIFIED
)	PETITION FOR LEAVE TO
vs.)	INTERVENE OR, IN THE
)	ALTERNATIVE, APPLICATION FOR
LAWRENCE DENNEY, Idaho Secretary)	LEAVE TO PARTICIPATE AS AMICI
of State, in his official capacity,)	CURIAE
)	
Respondent.)	
)	
_____)	
SCOTT BEDKE in his official capacity as)	
Speaker of the House of Representatives of)	
the State of Idaho; CHUCK WINDER, in)	
his official capacity as President Pro)	
Tempore of the Idaho State Senate, and the)	
SIXTY-SIXTH IDAHO LEGISLATURE,)	
)	
Proposed Intervenor-Respondents.)	
_____)	

I. Introduction

Idaho Speaker of the House Scott Bedke, Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho Legislature (collectively, the “Legislature”) seek to intervene in this

action to defend the constitutionality of Senate Bill 1110 (“SB 1110”), codified at 2021 Idaho Session Laws, Ch. 255. Neither Petitioner nor Respondent oppose the Legislature’s intervention in this appeal. *See* Verified Petition for Writ of Mandamus (“Petition for Writ of Mandamus”) ¶¶ 16; Uncontested and Verified Petition for Leave to Intervene or, in the Alternative, Application for Leave to Participate as Amici Curiae (“Legislature’s Petition to Intervene”), Certificate of Uncontested Motion. The Legislature’s intervention will also not delay this appeal, as the Legislature is prepared to meet the deadline set for the Respondent to reply to the Petition for Writ of Mandamus and any other deadlines set by this Court in this appeal.

In the event that this Court does not grant this Petition, the Legislature alternatively asks this Court for leave to file an amici curiae brief and to participate in oral argument pursuant to Idaho Appellate Rule 8.

II. Factual and Procedural Background

The first regular session of the Sixty-Sixth Idaho Legislature convened on January 11, 2021. SB 1110 was introduced in the Senate on February 12, 2021, and passed with a vote of 26-9-0 on March 1, 2021. Idaho Senate Journal (March 1, 2021) at 125.¹ The Idaho House of Representatives (“House”) received SB 1110 from the Senate on March 2, 2021, and passed SB 1110 on April 7, 2021, with a vote of 51-18-1. Idaho House Journal (March 2, 2021) at 146; and Idaho House Journal (April 7, 2021) at 251. Governor Brad Little signed SB 1100 on April 19, 2021. *See* 2021 Idaho Session Laws, Ch. 255.

Petitioner filed his Petition for Writ of Mandamus with this Court on April 26, 2021. The Petition for Writ of Mandamus requests that the Court declare SB 1110 unconstitutional and issue a writ of mandamus to the Secretary of State not to implement the Act’s requirement that a

¹ 2021 Senate and House Journals are available at: <https://legislature.idaho.gov/sessioninfo/2021/journals/>

certain number of qualifying signatures for a Referendum or an Initiative Petition must come from each of Idaho's thirty-five Legislative Districts. This Court issued an Order on April 29, 2021, that gave the Respondent fourteen days from the date of the Order to file a reply to the Petition for Writ of Mandamus.

Petitioner's argument challenging the constitutionality of SB 1110 directly implicates the authority of the Idaho Legislature to place conditions on and determine the manner of the referendum process and calls into question the proper interpretation and application of Article III, § 1 of the Idaho Constitution.

III. Argument

Petitioner's argument challenging the constitutionality of SB 1110 directly implicates the authority of the Legislature and calls into question the proper interpretation and application of Article III, § 1 of the Idaho Constitution. Accordingly, the Legislature petitions this Court for leave to intervene pursuant to Idaho Appellate Rule 7.1 or, in the alternative, for leave to file an amici curiae brief and participate in oral argument pursuant to Idaho Appellate Rule 8.

A. The Legislature's Petition for Intervention Should Be Granted.

Idaho Appellate Rule 7.1 ("Rule 7.1") permits intervention by a "real party in interest" to a proceeding under the Idaho Appellate Rules, or by a person or entity whose interest "would be affected by the outcome" of these proceedings. In the context of intervention under Idaho Rule of Civil Procedure 24(a), the Court has held that it has "the inherent power to grant intervention to persons who may be adversely affected by the outcome of a proceeding or when equitable principles otherwise require." *City of Boise v. Ada Cnty.*, 147 Idaho 794, 803, 215 P.3d 514, 523 (2009) (citations omitted). Further, "'courts [should] look with favor on intervention in a proper case, and . . . be liberal in permitting parties to intervene under the proper circumstances.'" *Id.*

“If there is any doubt as to whether intervention is appropriate, a motion to intervene should usually be granted.” *Id.*

A “real party in interest” is “one who has a real, actual, material or substantial interest in the subject matter of the action.” *Caughey v. George Jensen & Sons*, 74 Idaho 132, 134–35, 258 P.2d 357, 359 (1953). Because the subject of this proceeding is SB 1110, a bill that was ultimately approved by both legislative chambers and signed into law by the Governor, the Legislature is a “real party in interest” as well as a party “who would be affected by the outcome of the proceeding.” Petitioner’s argument challenging the constitutionality of SB 1110 directly implicates the Legislature’s authority to place conditions on and determine the manner of the referendum or initiative process as provided under Article III, § 1 of the Idaho Constitution. The manner in which the Legislature conducts the business of the House and the Senate also invokes the Idaho Constitution’s separation of powers, Articles III, IV, and V, and directly affects the Legislature’s interests that are “real, actual, material, [and] substantial.”

Accordingly, the Legislature requests the Court to allow the Legislature to appear in this matter to oppose any challenges, including constitutional challenges, to SB 1110.

B. Alternatively, the Legislature Should Be Allowed to Participate as Amici Curiae.

The Legislature prefers intervenor party status over non-party amici status, especially given the uniqueness of this original jurisdiction action, its constitutional implications, and its importance to the Legislative Department. If, however, the Court determines intervention is not appropriate, the Legislature requests leave to file an amici curiae brief and to participate in oral argument pursuant to Idaho Appellate Rule 8.

Rule 8 provides that a party “may appear as amicus curiae” in any proceeding “by leave of the Supreme Court” after setting forth “the interest of the applicant in the appeal or proceeding and the name of the party in whose support the amicus curiae would appear.”

The role of amicus curiae is to assist in a case of general public interest, supplement the efforts of counsel, and draw the Court’s attention to certain aspects of the law. *Miller-Wohl Co., Inc. v. Commissioner of Labor and Industry State of Mont.*, 694 F.2d 203, 204 (9th Cir. 1982). An amicus petition is typically permitted “when the amicus has an interest in some other case that may be affected by the decision in the present case . . . , or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997); *see also Community Ass’n for Restoration of the Environment (CARE) v. DeRuyter*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999).

The Legislature is well-positioned to assist the Court as amici. First, the Legislature has demonstrated that it has a direct interest in, and will be materially affected by, the outcome of this case. *Supra*, at 3-4. Second, the Legislature will offer the Court its unique perspective on the constitutionality of SB 1110, the proper interpretation and application of Article III, § 1 of the Idaho Constitution, and perspectives that are not currently addressed in the parties’ filings. The Legislature’s amici brief and advocacy at oral argument will, therefore, present perspectives, arguments, theories, and facts not found in the petition for writ of mandamus and not likely to appear in the Respondent’s reply briefs. The Legislature has a unique perspective that can assist the Court beyond what the parties can provide.

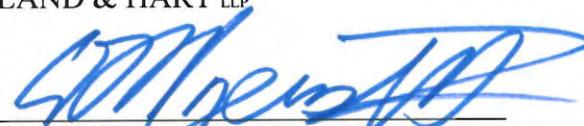
IV. Conclusion

The Legislature, as both a “real party in interest” and a party who “would be affected by the outcome of the proceeding” is properly allowed to intervene in this matter. No parties to this appeal oppose the Legislature’s intervention. Alternatively, if the Court declines to grant intervention, the Legislature requests that they be granted leave to file an amici curiae brief and participate in any oral argument that the Court sets.

Dated this 6th day of May, 2021

HOLLAND & HART LLP

By



William G. Myers III
Alison C. Hunter
Chris C. McCurdy

Attorneys for Proposed Intervenor-Respondents

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May, 2021, I caused to be filed and served, via iCourt, a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Michael Stephen Gilmore
mgilmore@cableone.net

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Email/iCourt/eServe

Brian Kane
Brian.kane@ae.idaho.gov

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Email/iCourt/eServe


for HOLLAND & HART LLP

16676290_v1