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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

RECLAIM IDAHO, and the COMMITTEE TO PROTECT AND DEFEND THE IDAHO CONSTITUTION, INC.,

Petitioners,

v.

LAWERENCE DENNEY, in his official capacity as the Idaho Secretary of State, and the STATE OF IDAHO,

Respondents, and

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; SIXTY-SIXTH IDAHO LEGISLATURE,

Intervenor-Respondents.

Case No. 48784-2021

PETITIONERS' OPPOSITION TO RESPONDENTS' MOTION TO STRIKE THE DECLARATIONS OF CHAMPION AND MONCRIEF

Petitioners Reclaim Idaho and the Committee to Protect and Preserve the Idaho Constitution, Inc., oppose the Respondents' joint motion to strike the rebuttal Declarations of Dr. Joe Champion and the Supplemental Declaration of Dr. Gary Moncrief. The Court should deny the Respondents' motion.

There is nothing in the Court's rules that prohibits the filings of declarations in support of a verified petition for a writ, or requires the Court's pre-approval to do so. This is an extraordinary proceeding in which the Court retains significant discretion in how it wishes to take and review evidence. In theory, it could grant relief on a verified petition alleging facts without even ordering a response. I.A.R. 5 (d). It can consider what it deems helpful and unrebutted, and discard what it doesn't. Declarations filed in support of petitions are not unusual. They have been filed in writ actions before the Court over the past decades to supplement a petition's verified facts. *See e.g*. *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 15 P.3d 1129 (2000) (considering affidavits in support of a verified petition for writ of prohibition). The Respondents don't appear troubled by the use of declarations, as the State filed three of their own in this action without leave of Court (Declarations of Cann, Hancock, and Hicks). And yet Respondents move to strike the rebuttal declarations, now pending alongside the State Respondent's earlier motion to strike, as they continue to attempt to force district court

rules on this expedited exercise of the Court's original jurisdiction alleging it is "a run of the mill" case.

This case is anything but. It is an urgent request for extraordinary relief. The Legislature has created a new law that denies to Idaho citizens their fundamental constitutional right to make and repeal law. Even the Governor expressed doubt over the constitutionality of the law and in his signing statement invited the Idaho judiciary to address its constitutionality.

Against this uncommon and urgent backdrop, the Petitioners *must* supply evidence in support of their petition in order to have the Court hear it. *E.g., Sweeney v. Otter*, 119 Idaho 135, 137-138, 804 P.2d 308, 310–11 (Idaho 1990)("Because the petition alleges sufficient facts concerning a possible constitutional violation of an urgent nature, we accept jurisdiction in this case to review the petition for extraordinary relief.") The Respondents have countered with evidence in their verified answer and declarations that they want the Court to consider. Respectfully, the Court should be disinclined to accept the Respondents' Goldilocks version of the right amount of evidentiary support. While they contend the Petitioners' declarations are too much, the absence of sworn statements in support of a petition would surely be too little; and we are left to speculate as to Respondents' version of what would be "just right." Petitioners are trying to give the Court the factual information it needs to resolve this pressing matter.

Respondents are trying to keep that information away from the Court.

The declarations that Respondents seek to strike are offered in rebuttal to Respondents' claims of deficiencies in Petitioners' evidence. The supplemental declaration of Dr. Gary Moncrief rebuts some of the testimony presented by Dr. Cann, which contained several false equivalencies, or "apples to oranges" comparisons. (Moncrief Suppl. Dec., ¶¶ 6, 8, and 9 attached as Exhibit 10 to the Petition.) This is not surprising. Unlike Dr. Moncrief, who has studied Idaho's political institutions for over forty years, Dr. Cann is not personally familiar with Idaho's initiative and referendum process. The declaration of Dr. Joe Champion rebuts the Respondents' assertion that the extreme burden the new law imposes on the Petitioners is only a mere possibility, not a probability. The Champion declaration provides the very probability analysis Respondents found absent.

The Petitioners are mindful of the Utah Supreme Court's recent admonition in a challenge to Utah's initiative procedures that the court requires evidence, which can include statistics, to consider such a challenge when exercising it original jurisdiction. *Count My Vote, Inc. v. Cox*, 452 P.3d 1109, 1119 (Utah 2019). ("Petitioners' 'proof' of the burden on their right to propose an initiative is anecdotal. They have not submitted any expert testimony or statistical evidence of the impact of the challenged statutory provisions on their ability to succeed in getting an initiative on the ballot.") To provide

that evidence, Dr. Champion took just a few minutes to perform a simple probability calculation for the Court. Here it is, in its entirety: (.75^20)*(.9^8)*(.99^7), which equals about .001, or a tenth of one percent.

In his discipline of mathematics, Dr. Champion has a special expertise in probability, which is the study of the chance an event will occur *under a given set of conditions.* (Champion Dec. ¶ 3, attached as Exhibit 9 to the Petition.) Dr. Champion made the following assumptions: that Petitioners were collecting signatures for a very popular initiative and/or referendum, that Petitioners' independent probability of collecting 6% of signatures in the 35 respective districts in Idaho would be, at best, 75% in 20 districts, 90% in 8 districts, and 99% in the final 7 districts. Respondents' complaint that Dr. Champion has not explained how he derived his assumptions in each tier of districts misses the mark. He is offering a *hypothetical* for the Court to put the probability of success in a mathematical context. Dr. Champion is not opining that Reclaim Idaho or the Committee actually have a 75%, 90%, and 99% chance of collecting sufficient signatures in the three tiers of districts. Instead, Dr. Champion calculated the probability of a hypothetical initiative with very rosy prospects as an example of how a popular initiative would fare under a requirement that every one of the 35 districts must be qualified.

In reality, the likelihood that under a "worst case scenario" in any district, a

proponent would have a 75% chance of collecting the needed signatures, is optimistic indeed. In the case of volunteer drives, organizational potential varies widely across districts. The critical task of building organizational strength is much, much harder in some districts than in others. (Mayville Dec., ¶ 49.) But, through the use of a hypothetical, Dr. Champion's calculation demonstrates that even with luck in their corner and the wind at their back, the odds of qualifying all 35 of the 35 districts are only 1 out of 1,000. Again, this hypothetical assumes that even in the 20 most difficult districts, the proponents have an 75% chance of qualifying the measure, and it only gets better or easier from there, in the remaining districts. Why? Though the chance of success in each individual district is assumed to be relatively large in Dr. Champion's hypothetical, by requiring only success in each district, a compounding restriction is placed on the chance of success, which makes the likelihood of it near impossible (or more precisely 1 out of 1,000). *Id*. at ¶ 5.

This is better understood by most of us through Dr. Champion's sports analogy. He asks the reader to imagine a scenario where an efficient basketball player takes several types of shots in a game: layups (each with 99% chance of scoring), short-range shots (each with 90% chance) and mid-range shots (each with 75% chance). The chance of making each individual shot may be high, but if the player hopes to attempt 35 shots without a single miss, stringing together so many made shots without a single

miss becomes virtually impossible. The general multiplication principle of compounded probability, applied to such a large number of events, explains why the result of his calculation is such a small number; one tenth of one percent. Dr. Champion's calculation demonstrates that while the challenged law's requirement that 35 out of 35 districts be qualified for an initiative or referendum to appear on the ballot may seem harmless, it is in fact lethal to Idaho citizens' fundamental constitutional right to make and repeal law.

Petitioners hope the short and succinct rebuttal testimony of Drs. Champion and Moncrief is helpful to the Court in deciding the expedited review of a matter of great consequence to the citizens of this State.

Respondents assert allowing the declaration of Dr. Champion is unfair as they did not have the opportunity to rebut it. Petitioners would have no objection if Respondents wished to provide a declaration from their own statistical expert if they believe that Dr. Champion's analysis is flawed. That could be done in short order before the hearing on the petition on June 29th.

Respectfully submitted on this 16th day of June, 2021.

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CERTIFICATE OF SERVICE

Petitioners' Opposition To Respondents' Motion To Strike the Declarations of Champion and Moncrief has been served on the following on this 16th day of June, 2021, by filing through the Court's e-filing and serve system to:

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