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Attorneys for Respondents Lawerence Denney
and the State of Idaho

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

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| In Re: Petition for Writ of Prohibition. | |
| RECLAIM IDAHO, and the COMMITTEE TO PROTECT AND PRESERVE THE IDAHO CONSTITUTION, INC.,<br><br>Petitioners,<br><br>v.<br><br>LAWERENCE DENNEY, in his official capacity as the Idaho Secretary of State, and the STATE OF IDAHO,<br><br>Respondents, | Supreme Court Docket No. 48784-2021<br><br>**RESPONDENTS' REPLY TO PETITIONERS' MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION TO STRIKE** |

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.

## ARGUMENT

Not content to just bypass the district court with their run-of-the-mill statutory challenge, Petitioners ask this Court to also bypass the Idaho Rules of Evidence. Worse, Petitioners would have this Court consider inadmissible evidence even when they admit that their Petition turns on the resolution of factual issues inappropriate for an original action. This Court should decline Petitioners' invitation. As this Court decided just last year, the Idaho Rules of Evidence apply in original actions. Because the challenged testimonies are inadmissible speculation and/or conclusions of law, this Court should grant Respondents' Motion to Strike.

### A. The Idaho Rules of Evidence apply to this original action.

The challenged testimony is inadmissible, so without citing any support, Petitioners attempt to change the ground rules by arguing that the Idaho Rules of Evidence do not apply in this original action. Petitioners' Memorandum in Opposition to Respondents' Motion to Strike ("Opposition Brief"), at 3. They ignore that this Court, in *Ybarra v. Legislature by Bedke*, 166 Idaho 902, 466 P. 3d 421 (2020), applied the Idaho Rules of Evidence in striking portions of a declaration filed in support of an original action. Specifically, the Court relied on Idaho Rules of

Evidence 401 and 702 in concluding that the declarant's legal conclusions were not helpful to the Court's determination of whether to issue a Writ of Mandamus or a Writ of Prohibition. *Ybarra*, 166 at 908, 466 P.3d at 427. Because the *Ybarra* Court applied the Idaho Rules of Evidence, those rules apply here, too.

Idaho Appellate Rule 5 does not require otherwise, as it merely delineates the *manner* in which the Court determines facts (such as through live testimony, declarations, or some other means) and not which forms of evidence are admissible; such rules are contained within the Idaho Rules of Evidence. Petitioners' strained interpretation of Idaho Appellate Rule 5, an interpretation that would have this Court issue a potentially unreviewable, first-impression, merits decision on the constitutionality of a duly enacted statute without any of the evidentiary safeguards that would apply if the challenge were brought in the district court, does not withstand scrutiny.[1] This argument is particularly troubling here, where Petitioners admit that their Petition turns on disputed issues of fact and they ask this this Court to jettison all evidentiary safeguards.[2] Opposition Brief at 4, 6-7, 11.

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[1] In a footnote, Petitioners point to certain proceedings where the Rules of Evidence are relaxed, including restitution proceedings, proceedings before the Industrial Commission and Juvenile Detention hearings. These proceedings are irrelevant here as they are not at all similar to special writs under Idaho Rule of Appellate Procedure 5, which allow Petitioners to bypass the lower courts to obtain a potentially unreviewable merits decision on a constitutional question.

[2] The fact that the resolution of the Petition turns on resolution of disputed issues of fact compels the conclusion that this matter is not appropriate for an original action.

**B. The declarants' speculative statements are not admissible under the Idaho Rules of Evidence and are not relevant to this Court's analysis.**

Petitioners argue that the speculative lay witness statements are admissible because they are "rationally based on the witness's perception." Opposition Brief, at 7. However, speculative statements by their very nature are not based on a witness's perception but on conjecture. While lay witnesses may testify about their perceptions, the testimonies at issue here are conjectural *conclusions* not perceptions. Notably, Respondents challenge only the lay witnesses' suppositional statements.

For example, Robin Nettinga's opinion about the possibility of gathering qualifying signatures in all 35 legislative districts in 2021 is not rationally based on her perceptions, which were obtained in 2011 in the context of an effort to gather qualifying signatures at a time when there was no geographic distribution requirement. *See* Ex. 5 to the Petition (Declaration of Robin Nettinga) at ¶¶ 7, 14, 31. Ms. Nettinga's conclusion about what might happen in a scenario not even remotely close to that which she encountered, is pure conjecture. Similarly, Karen Lansing is not testifying as to her perception when she expresses her opinion about the possibility of volunteers collecting qualifying signatures from all of Idaho's 35 legislative districts in 2021. Ex. 6 to Petition (Declaration of Karen Lansing) at ¶ 10. Ms. Lansing never attempted to obtain qualifying signatures from all of Idaho's 35 legislative districts.[3] While it is certainly in the lay witnesses' purview to discuss their experiences, it is not proper or relevant under Idaho Rules of

[3] Ms. Lansing also, apparently, has no perceptions of what it is like to gather signatures at public gathering places outside of a pandemic. *Id.* at ¶ 4 (describing her efforts gathering signatures at polling places in March 2020).

Evidence 401 and 701 for a lay witness to offer conclusions by trying to predict the future or commenting on a hypothetical situation, particularly in a hypothetical situation divorced from that where their perceptions were formed. Such testimony cannot possibly be helpful to the determination of a fact at issue here. I.R.E. 701(b).

With respect to Petitioners' purported experts, while an expert opinion may be based on probability, any such opinion must be sufficiently grounded in fact and based on established methodology to ensure the opinion is reliable.[4] "The key to admission of an expert's opinion is the validity of the expert's reasoning and methodology . . . . The court's function is to distinguish scientifically sound reasoning from that of the self-validating expert, who uses scientific terminology to present unsubstantiated personal beliefs." *State v. Konechny*, 134 Idaho 410, 417, 3 P.3d 535, 542 (Ct. App. 2000) (citation omitted). Indeed, in *Nield v. Pocatello Health Services, Inc*, 156 Idaho 802, 815, 332 P. 3d 714, 727 (2014), a case relied on by Petitioners, the Court points out that "[a]n expert opinion that merely suggests possibilities, not probabilities, would only invite conjecture and may be properly excluded."

Petitioners' purported experts opine on what might happen in the future with particular initiatives and referenda, but this type of testimony is inadmissible because it is simply not possible

[4] The improper and late-filed Declaration of Joe Champion and Supplemental Declaration of Gary Moncrief should be stricken for the reasons stated in the Joint Motion to Strike Declaration of Joe Champion and Supplemental Declaration of Gary Moncrief and the Memorandum in Support, filed on June 14, 2021. Of particular note, and as argued in the supporting memorandum, the declaration of Joe Champion is neither grounded in fact nor supported by established methodology. Given that Petitioners apparently admit that their other purported expert declarations are inadmissibly speculative, (*see* Opposition Brief, at 9), the failure to provide admissible evidence in the declaration of Joe Champion is fatal to their claims.

for Petitioners' purported experts to predict the future success or failure of an initiative/referendum with any reasonable level of probability or established methodology based on the data they rely on. The variety of factors that can affect the success or failure of a petition drive that Petitioners' experts do not consider include the overall support for a particular initiative or referendum; technological aids; signature-gathering strategies; social capital indicators; and available funds. *See* Declaration of Damon Cann, Ph.D. at ¶¶ 13-19.[5] Given these variables, Petitioners' argument that the challenged testimony is admissible because it focuses on "practical effect" misses the point. Opposition Brief, at 6. Petitioners' purported experts cannot predict with any reasonable probability whether the Medicaid Expansion campaign would have succeeded if Senate Bill No. 1110 had been in place in 2018 or whether any other particular initiative or referendum drive would be successful under the 35 legislative district requirement. Furthermore, Petitioners' purported experts do not identify any scientific or logical methodology on which they base their speculative conclusions. Rather, their conclusions are unsubstantiated personal beliefs that are irrelevant to this Court, meaning their conclusions are unreliable and inadmissible as expert testimony. Moreover, because Petitioners have brought a facial constitutional challenge, it is error for them to ask this Court to issue a decision based on how Idaho Code § 34-1805(2) would have applied to the Medicaid Expansion petition signature drive or how it might apply to their current signature

[5] Petitioners are incorrect to accuse the declarations filed by Respondents of suffering from the same flaws as their declarations. In fact, a comparison of the declarations filed by Respondents with the declarations filed by Petitioners can be used to highlight the flaws in Petitioners' declarations.

drives; such evidence is not relevant.[6] *See Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res*., 143 Idaho 862, 871-72, 154 P.3d 433, 442-43 (2007).

In sum, because the challenged lay and expert statements are based on unsubstantiated conjecture, this Court should strike the statements under Idaho Rules of Evidence 401, 701 and 702.

**C. The declarants' conclusions of law are not admissible under the Idaho Rules of Evidence and are not relevant to this Court's analysis.**

Petitioners argue that the declarants' conclusions of law are admissible because they do not mention the word "unconstitutional" and instead are merely "forceful iterations of the declarants' opinions." Opposition Brief, at 11. But the force with which declarants exert their opinions does not make the opinions any less of a legal conclusion. The ultimate legal question here is whether Idaho Code § 34-1805(2) is reasonable and workable. Opinions that the statute is "beyond unreasonable" (*see* Ex. 2 to Petition (Declaration of Luke Mayville) at ¶ 51) or that it "effectively

[6] It must be noted that, because they bring a facial challenge, Petitioners must show the absence of any circumstances under which Idaho Code § 34-1805(2) might be constitutional to prevail. *See Am. Falls Reservoir Dist. No. 2*, 143 Idaho at 871-72, 154 P.3d at 442-43. Petitioners have not met their burden. Petitioners' declarants Larson, Mahuron and Nettinga offer anecdotal, lay opinions that the statute renders the petition process impossible. Ex. 7 (Declaration of Linda Larson) at ¶ 7; Ex. 8 (Declaration of Jessica Mahuron) at ¶ 8; Ex. 5 (Declaration of Robin Nettinga) at ¶ 31. None of Petitioners' other declarants state that Idaho Code § 34-1805(2) is in every application impossible. They all hedge. Ex. 1 (Declaration of Ben Ysursa) at ¶ 8 ("near impossible"); Ex. 2 (Declaration of Luke Mayville) at ¶¶ 18 and 69 ("virtually impossible"); Ex. 3 (Declaration of Dr. Gary Moncrief) at ¶ 12 ("almost impossible"); Ex. 4 (Declaration of David Daley) at ¶ 11 ("nearly impossible"); Ex. 6 (Declaration of Karen Lansing) at ¶ 10 ("practically impossible"); Ex. 9 (Declaration of Joe Champion) at ¶ 4 (".001" chance); Ex. 10 (Supplemental Decl. Gary Moncrief) at ¶ 5 ("may be 'possible' to collect the required signatures"). If the process is possible, it is not impossible, and Petitioners have failed to substantiate their facial challenge.

eliminates" the initiative right (*see* Ex. 3 to Petition (Declaration of Dr. Gary Moncrief) at ¶ 4) are simply dressed up legal conclusions and thus are inadmissible.

Admittedly, background information explaining how typical initiative drives work and the challenges that volunteers face might be helpful for this Court's analysis.[7] These are the type of facts that are appropriate for this Court to consider in determining the reasonableness and workability of the statute, but again, such evidence can only be properly vetted in a district court proceeding, involving discovery, live testimony, and cross examination.[8] In contrast, for example, it is not relevant to this Court that Ben Ysursa believes that "[i]n [his] opinion the constitutionally guaranteed right of the referendum is in effect nullified by Senate Bill 1110"—that is, at bottom, an opinion that the requirements are unworkable, an ultimate legal issue. *See* Ex. 1 to Petition (Declaration of Ben Ysursa) at ¶ 13. Nor is it relevant that Dr. Gary Moncrief believes that "Senate Bill 1110 destroys an essential right of the citizens of Idaho"—again, it is for the Court to decide whether an essential right is at issue here and whether the challenged law is unworkable. *See* Ex. 3 (Declaration of Dr. Gary Moncrief) at ¶ 8.

Petitioners further argue that there is no harm in their declarants presenting legal conclusions because this Court knows the law, and so the concern that witness will improperly and inappropriately opine on erroneous law is of no harm here as it would be with a jury. While this

[7] Respondents do not challenge the admissibility of these facts in Petitioners' declarations.
[8] The numerous facts presented to this Court in the declarations, and Petitioners' own admission that "[t]he level of difficulty that the statutes create for signature drives is obviously a question of fact, not one of law", (Opposition Brief at 11) demonstrates that the Petitioner's claims are better considered by a trial court in the first instance. The factual disputes at issue here must be sorted out through discovery, live testimony, and credibility determinations by the factfinder.

may be true, it does not change the fact that the evidence is simply inadmissible under Idaho Rules of Evidence 401, 701 and 702. Because Idaho courts have held that conclusions of law are generally inadmissible, *see Ballard v. Kerr*, 160 Idaho 902, 908, 466 P. 3d 651, 657 (2002), this Court should strike the conclusions of law in Petitioners' declarations, as it did in *Ybarra,* 166 Idaho at 908, 466 P.3d at 427.

**CONCLUSION**

For the reasons discussed above, Respondents respectfully request that this Court strike and not consider the challenged portions of Petitioners' declarations.

DATED this 15th day of June, 2021.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: */s/ Megan A. Larrondo*
MEGAN A. LARRONDO
Deputy Attorney General

**CERTIFICATE OF SERVICE**

I certify that on this 15th day of June, 2021, I served the foregoing document electronically through the iCourt E-File system, which caused the following iCourt-registered counsel to be served by electronic means, as more fully reflected on the Notification of Service.

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