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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' MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION TO STRIKE

Petitioners Reclaim Idaho and the Committee to Protect and Preserve the Idaho Constitution, Inc. oppose the Respondents' motion to strike portions of the Petitioners' declarations filed in support of their Verified Petition for a Writ of Prohibition and Application for Declaratory Judgment. Because the declarations contain admissible facts and opinions that are relevant and necessary to support the Petition so that the Court can consider the urgent constitutional question before it, the Respondents' motion to strike should be denied and all portions of the declarations considered.[1]

A. Rule 5 of the Idaho Rules of Appellate Procedure Governs this Motion.

Respondents have ignored Rule 5 of the Idaho Rules of Appellate Procedure concerning "Special writs and proceedings" which governs this motion. These proceedings are intended to be expedited and to do justice as the Court sees fit. The proceedings and procedure for a petition for a writ are not meant to replicate a jury or a bench trial. In fact, even the right to file a response to an application for a writ is not automatic or guaranteed. Rule 5(a) provides that "There shall be no response to

[11] Ironically, Respondents have moved to strike large portions of Petitioners' declarations and simultaneously filed three of their own declarations that contain the same alleged evidentiary flaws that they seek to strike. Petitioners believe the Court should consider the factual evidence before it, but in the event the Court grants any portion of the motion to strike, the Respondents' declarations should of course be subjected to the same evidentiary review and standard.

applications filed pursuant to this rule unless the Supreme Court requests a party to respond to the application before granting or denying the same."

The Court is the factfinder, not a jury. For those reasons, Rule 5(d) gives the Court broad discretion concerning the facts presented in these proceedings. It provides: "Issues of fact, if any, shall be determined in the manner ordered by the Court."

B. Petitioners are Required to Provide Factual Support For Their Petition.

Petitioners have asked the Court to invoke its original jurisdiction. In order to do so, the Court requires that the Petition assert sufficient facts to support it. *Idaho Watersheds Project v. State Bd. of Land Commissioners*, 133 Idaho 55, 57, 982 P.2d 358, 360 (1999) ("We will exercise jurisdiction to review a petition for extraordinary relief *where the petition alleges sufficient facts* concerning a possible constitutional violation of an urgent nature."); *Sweeney v. Otter*, 804 P.2d 308, 310–11, 119 Idaho 135,138 (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.").

Respondent asks that the very factual assertions necessary to support the petition be stricken by the strict application of the rules of evidence that the Court has not determined even apply to this proceeding. But to the extent the Court applies the Idaho Rules of Evidence, the Petitioners' declarations fully comply with these rules.

This Court has held that a cornerstone purpose of the Idaho Rules of Evidence is to construe the rules "*to the end that the truth may be ascertained* and proceedings justly determined" as set forth in Idaho Rule of Evidence 102. (emphasis in original). *Safaris Unlimited, LLC v. Von Jones*, 163 Idaho 874, 880, 421 P.3d 205, 211 (2018). In keeping with the spirit of Rule 102 of the Idaho Rules of Evidence and Idaho Appellate Rule 5, the Court is not required to rigorously apply the rules of evidence in this proceeding, but if it does so the Petitioners' declarations present admissible testimony to the Court. [2]

C. The Declarations Provide Admissible Testimony.

Respondents ask this Court to strike numerous portions of Petitioners' declarations on the ground that they are mere speculation and that they are conclusions of law. Respondents are incorrect on both points. The challenged statements are admissible opinions of lay witnesses and expert witnesses relevant to the issue presented by Petition.

[2] There are also many other proceedings where Idaho courts do not require the strict adherence to the rules of evidence where the court or an administrative entity is the fact finder. Some examples include sentencing hearings, *State v. Dunlap*, 155 Idaho 345, 375, 313 P.3d 1, 31 (2013), restitution proceedings, *In re Doe*, 146 Idaho 277, 285, 192 P.3d 1101, 1109 (Idaho App. 2008), proceedings before the Industrial Commission, *Hagler v. Micron Tech., Inc*., 118 Idaho 596, 598, 798 P.2d 55, 57–58 (1990) and juvenile detention hearings, Rule 51 of the Idaho Juvenile Rules.

1. The Testimony is Admissible Opinion, Not Speculation.

Many of the declarants' statements that Respondents seek to strike are those which opine that the new statutes will render future initiatives and referenda a virtual or practical impossibility. These are indeed opinions, but they are not inadmissible. Opinion testimony from both lay witnesses and experts is admissible when properly predicated.

Idaho Rule of Evidence 602, Need for Personal Knowledge, provides in pertinent part that: "A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony."

Idaho Rule of Evidence 701, Opinion Testimony by Lay Witnesses, governs the testimony of lay witnesses and states that "testimony in the form of opinions or inferences is limited to those opinions or inferences which are: "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of [the witness's] testimony or the determination of a fact in issue."

Idaho Rules of Evidence Rule 702, Testimony by Expert Witnesses, provides that "a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific,

technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue."

To address the constitutional issue presented by this case, Petitioners must prove their claims. Even under a strict scrutiny test, it is the Petitioners who bear the burden of initially demonstrating that the challenged legislative enactments unduly burden Idahoans' constitutional rights to bring initiatives and referenda to voters. Respondents rely on a more relaxed reasonableness standard. But under either of these formulations, the test is not whether it is *literally* impossible to obtain the requisite number of petition signatures--even a requirement of signatures from *100 per cent* of registered voters would not be *literally* or *theoretically* impossible. Rather, the test is whether on the ground, in the real world where initiative and referenda proponents live and act, the new legislative requirements are so onerous as to unduly burden constitutional rights or to be unreasonable or unworkable. That is a question of the practical effect of the legislation. Therefore, it is a question that is properly addressed through the opinions of people with knowledge gained by real-world experience in initiative or referenda campaigns (declarants Mayville, Larson, Nettinga, Mahurin, and Lansing) or opinions of expert witnesses with knowledge gained by study, training, or occupation (declarants Ysursa, Moncrief, Mayville, Daley and Champion).

The witnesses' opinions on the burdensomeness, reasonableness or workability of the 35 out of 35 district requirement must, of necessity, address future effects of the legislation. They therefore must be predictive, but that does not render the opinions mere speculation. As to the lay witnesses, each declaration presents the witness's personal knowledge based upon extensive experience in one or more signature-gathering campaigns and therefore comply with I.R.E. 602. They present the witness's knowledge of the organizational needs, procedures, impediments, complexity, and difficulty of the signature-gathering process. In short, they establish the witnesses' bases, in knowledge and experience, for their opinions. They therefore comply with I.R.E. 701 because they are "rationally based on the witness's perception," are "helpful to clearly understanding the witness's testimony or to determining a fact in issue," and are "not based on scientific, technical or other specialized knowledge within the scope of Rule 702."

As to the expert testimony, Respondents do not challenge the experts' qualifications, but only attack certain statements as speculation. As with the lay witnesses, the declarations set forth the knowledge and experience on which they base informed opinions as to the effect that the challenged legislation will have on future initiative or referenda efforts. Mr. Ysursa's declaration delineates his 41 years of experience within the office of the Idaho Secretary of State, including 26 years as Chief

Deputy Secretary and 12 years as Secretary of State, during which he supervised all Idaho elections, including initiatives and referenda. His service in observing and overseeing initiative and referendum efforts, including both successful and unsuccessful ones, over such an extended period that included several changes to the statutory requirements, certainly puts him in a position to opine about the effects of the most recent amendments to the Idaho statutes.

Luke Mayville, Ph.D., is a scholar of the constitutional thought of founding-era America as well as the co-founder of Reclaim Idaho. He testifies to the extraordinary effort to place the Medicaid initiative on Idaho's 2018 ballot and the impossible standard created by Senate Bill 1110 on a volunteer group such as Reclaim Idaho as well as the historic context of majority rule. Dr. Gary Moncrief, Ph.D., a retired Boise State University professor of political science for over forty years, has vast knowledge of initiatives and referendums in Idaho and other states. He testifies that Senate Bill 1110 creates an extraordinary difficult standard for any citizen initiated measure to attain ballot status in Idaho. David Daley, a national journalist and author, has published extensively about initiative and referendum rights in the United States in two books and many articles. He testifies that Senate Bill 1110 imposes the most difficult standard in America for initiatives and referendums. Lastly, Dr. Champion is a scholar of mathematics and statistics education with special expertise in probability, who teaches

at Boise State University. He estimates that under the new law the probability that even a very popular initiative or referendum will successfully qualify for the ballot is exceedingly, exceedingly low.

Respondent's argument that the opinions are utter speculation or conjecture is, at its core, an assertion that because there are infinite variables that can affect any signature campaign, it is impossible to legitimately predict the effect of the legislation. Respondents do not, however, cite any authority for the proposition that opinions are inadmissible merely because they deal with future events that cannot be known with absolute certainty. It is well established that an expert witness may express an opinion in terms of probability instead of certainty. *Tech Landing, LLC v. JLH Ventures, LLC*, 168 Idaho 482, 483 P.3d 1025, 1031 (2021). Expert opinions may assert probabilities; they need not express certainties. *See*, *e.g.*, *Nield v Pocatello Health Services, Inc*. 156 Idaho 802, 814-815, 332 P3d 714, 726-727 (2014). The declarants' statements that success in future signature drives is virtually or practically impossible are entirely appropriate expressions of probability.

But because Respondents challenge the evidence before the Court as speculative, the Petitioners have also provided the declaration of Dr. Champion with their reply briefing to present a probability analysis to the Court. As stated, Dr. Champion is a scholar of mathematics and statistics education with special expertise in probability,

which is the mathematical study of the chance an event will occur under a given set of conditions. According to his calculation, the probability of even a very popular initiative or referendum being able to qualify for the ballot in Idaho under a 35 out of 35 district requirement is about .001, or a tenth of one percent. Champion Dec. ¶¶ 4, 5.

Respondent's expert, Damon Cann, Ph.D. opines in a lengthy declaration that the ability of individuals to successfully qualify ballot measures in other states "strongly suggests" that individuals will be able to qualify ballot measures under the new law. Cann Dec. ¶ 11. This assertion is rebutted in the declaration of Dr. Champion as well as the supplemental declaration of Dr. Moncrief who highlights for the Court the flaws in declarant Cann's testimony.

All of Petitioners' declarants present the bases of knowledge that fully support their opinions that it would be virtually impossible to qualify initiatives or referenda under the new legislative requirements. Respondents' contention that they are mere speculation or conjecture are without merit.

2. The Opinions Are Not Legal Conclusions

Respondents next brand many statements in Petitioners' declarations as inadmissible legal conclusions. They apply this argument not only to the virtual impossibility opinions discussed above but also to opinions that the legislation is "beyond unreasonable," inflicts "uniquely severe harm," empowers minority interests

to "frustrate and subvert" the right of the majority, "is so high as to effectively eliminate citizens' rights," and "destroys an essential right." Contrary to Respondents' unfounded assertions, these statements are not legal opinions. [3] They do not opine that the statutes are unconstitutional. They are merely forceful iterations of the declarants' opinions that the legislation so severely impairs citizens' ability to qualify future initiatives and referenda for the ballot as to make it virtually impossible.

The level of difficulty that the statutes create for signature drives is obviously a question of fact, not one of law. By Respondents' own argument, Petitioners must demonstrate that the legislative strictures are so onerous as to be "unreasonable or unworkable." It is well-established that reasonableness is a question of *fact. See Smith v. Zero Defects Inc*., 132 Idaho 881, 884, 980 P.2d 545, 548 (1999)(whether an employer's expectation is reasonable is a question of fact); *Young v. State Farm Mut. Ins. Co*., 127 Idaho 122, 126, 898 P.2d 53, 57 (1995)(reasonableness of insured's reliance on an agent's

[3] Just two of the declarants' statements that are challenged by Respondents as legal conclusions present even a close question. These are portions of paragraphs 13 and 24 of the Ysursa declaration. Petitioners do not intend these statements to be considered as legal opinions and ask that the Court consider them only as particularly vigorous expressions of the witness's opinion on the level of harm inflicted upon Idahoans' ability to exercise their Art III, Sec. 1 constitutional rights. If the Court finds that these statements are legal conclusions, it may still consider them if it finds these opinions of Mr. Ysursa, a lawyer, helpful. I.R.E. 701. *But cf. Ybarra v. Legis. By Bedke*, 166 Idaho 902, 908, 466 P.3d 421, 427 (2020) (testimony containing conclusions of law by an expert witness is generally inadmissible).

oral representations is a question of fact). The challenged statements also are not impermissible merely because they touch upon the ultimate issue in the case. I.R.E. 704 makes that clear: "An opinion or inference is not objectionable just because it embraces an ultimate issue." *State v. Almaraz*, 154 Idaho 584, 599, 301 P.3d 242, 257 (2013).

As this Court has acknowledged, "the problem with testimony containing a legal conclusion is in conveying the witness's unexpressed, and perhaps erroneous, legal standards *to the jury*. This 'invade[s] the province of the court to determine the applicable law and to instruct the jury as to that law.' " *Ballard v. Kerr*, 160 Idaho 674, 694, 378 P.3d 464, 484 (2016), *quoting Torres v. Cnty. of Oakland*, 758 F.2d 147, 150-151. (6th Cir. 1985) (italics added). This is a non-issue in the context of a petition for a writ where there is no jury involvement and the Court knows what the law is.

D. Conclusion

Because the Petitioners' declarations contain admissible facts and opinions that are relevant and necessary to support the Petition so that the Court can consider the urgent constitutional question before it, the Respondents' motion to strike should be denied in its entirety.

Submitted on this 9th day of June, 2021.

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CERTIFICATE OF SERVICE

This Motion has been served on the following on this 9th day of June, 2021, by filing through the Court's e-filing and serve system to:

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