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

In Re: Petition for Writ of Prohibition.

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

Petitioners,

vs.

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.

Docket No. 48784-2021

INTERVENOR-RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF PROHIBITION AND APPLICATION FOR DECLARATORY JUDGMENT

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I. INTRODUCTION

Petitioners (collectively, "Reclaim Idaho") ask this Court to amend Article III, Section 1 of the Idaho Constitution by supplanting the Court for the Intervenor-Respondents (collectively, "Legislature") as the branch of government authorized to set the conditions and manner by which initiatives and referenda may be placed on the ballot at the next general election.

In both 2013 and 2021, the Legislature passed and the Governor signed into law geographic requirements for the collection of six percent of voter signatures from legislative districts in Idaho. The 2013 law required that minimal six percent from 18 districts. The 2021 law requires 35 districts. Reclaim Idaho petitions this Court for an order eliminating any and all geographic requirements from Idaho Code § 34-1805(2). Further, Reclaim Idaho asks this Court to rewrite Idaho Code § 34-1813(2)(a) setting the effective date for an initiative. Reclaim Idaho would have the Court retain the 1933 legislatively imposed requirement that a percent of voters support an initiative or referendum petition and the 1997 legislatively imposed requirement that the percent should be six percent.

In short, Reclaim Idaho asks the Court to amend the Constitution to read that voters in the state may initiate legislation or demand a referendum "under such conditions and in such manner as may be provided by the acts of the legislature except as amended by orders of the court." Article XX, Section 1 of the Idaho Constitution does not empower the Court to amend the Constitution. Nor is the Court to exercise the powers properly belonging to the Legislature by crafting statutory amendments. Idaho Const. art. II, § 1.

Further, Reclaim Idaho has failed to carry its burden to "overcome a strong presumption of validity" of the statutes in question. Under this Court's long-established doctrine, statutes must be construed to avoid conflict with the Constitution. The challenged statutes fit

comfortably within the Legislature's prerogative to set conditions on initiative and referenda petitions, just as it has done since 1933.

If the Court finds the Reclaim Idaho Petition to be justiciable, the Petition fails on the merits. The 2021 amendment to Idaho Code § 34-1805 is a constitutionally valid exercise of the Legislature's authority to set conditions on lawmaking through the initiative and referendum processes. Twenty-six states provide no alternative to representative democracy. Of those that do, Idaho's process is consistent with court-tested processes adopted by other state legislatures.

This Court should also deny the Petition because the issues Reclaim Idaho raises in its Petition lack the urgency necessary to trigger original jurisdiction. The Legislature's setting of the effective date of initiatives is sound both legally and as a matter of efficient government.

For all of these reasons, the Court should eschew Reclaim Idaho's invitation to relieve Reclaim Idaho of its obligation to put forth initiatives or referenda that will garner the requisite support from each of Idaho's 35 legislative districts.

II. STATEMENT OF THE CASE

A. Procedural Background.

Reclaim Idaho filed its Petition for Writ of Prohibition ("Pet."), Brief in Support of Petition for Writ of Prohibition ("Pet. Brief"), and a Motion to Expedite Briefing and Argument with this Court on May 7, 2021. The Petition for Writ of Prohibition requests that the Court declare provisions of Idaho Code § 34-1805(2) as amended by Senate Bill 1110 ("SB 1110"), and Idaho Code § 34-1813(2)(a), unconstitutional and issue a writ of prohibition to the Secretary of State prohibiting enforcement of the challenged provisions. The Legislature moved to intervene on May 12, 2021. This Court granted the Legislature's intervention by order dated May 19, 2021 and gave the Legislature and Secretary of State fourteen days from the date of the Order to file their responses to the Petition.

B. Prior Versions of Idaho Code § 34-1805.

The Legislature enacted Idaho Code § 34-1805 in 1933 pursuant to the 1912 amendment to Article III, section 1 of the Idaho Constitution providing for the initiative and referendum processes. Prior to this 1912 amendment, Idaho, like most states, lacked any such process. As proposed by Senate Joint Resolutions in 1911, and ratified at the general election in November 1912, Article III, Section 1 was amended by adding the following two paragraphs:

> The people reserve to themselves the power to approve or reject at the polls any act or measure passed by the Legislature. This power is known as the Referendum, and legal voters may, under such conditions and in such manner as may be provided by Acts of the Legislature, demand a referendum vote on any act or measure passed by the Legislature and cause the same to be submitted to a vote of the people for their approval or rejection.
>
> The people reserve to themselves the power to propose laws, and enact the same at the polls independent of the Legislature. This power is known as the Initiative, and legal voters may, under such conditions and in such manner as may be provided by Acts of the Legislature, initiate any desired legislation and cause the same to be submitted to the vote of the people at a general election for their approval or rejection provided that legislation thus submitted shall require the approval of a number of voters equal to a majority of the aggregate vote cast for the office of Governor at such general election to be adopted.

1911 Idaho Sess. Laws 786.

The constitutional provision for initiatives and referenda was not self-executing and laid dormant until the legislative session of 1933 when the Legislature first enacted statutes providing the conditions and manner of the initiative and referendum processes. This included signature verification requirements and a minimum signature requirement of ten percent of the state electors to qualify an initiative or referendum petition. 1933 Idaho Sess. Laws 434-46.

The initiative process, including the signature requirement for qualifying an initiative, was next amended in 1997 to remedy abuses to the initiative process. 1997 Idaho Sess. Laws

758; *see also* Legislature's Resp. to Pet. for Writ of Mandamus, Dkt. No. 48760-2021, at 5-6. The Legislature amended Idaho Code § 34-1805 to reduce the signature requirement to "6% of the qualified electors of the state at the time of the last general election," but these signatures needed to include "signatures of qualified electors from each of twenty-two (22) counties equal to not less than six percent (6%) of the qualified electors at the time of the last general election in each of those twenty-two (22) counties." 1997 Idaho Sess. Laws 759.

The requirement that signatures must come from six percent of qualified voters in at least 22 of Idaho's counties was subsequently found to be unconstitutional. Specifically, the Ninth Circuit held that this geographic distribution violated the Equal Protection Clause because it disproportionally favored some counties over others given the wide variation in county populations. *Idaho Coalition United for Bears v. Cenarrusa ("ICUB")*, 342 F.3d 1073, 1074 (9th Cir. 2003). Critically, however, the Circuit noted that geographic distribution based on equipopulous legislative districts (rather than counties) would be permissible. *Id.* at 1078 ("Idaho could achieve the same end through a geographic distribution requirement that does not violate equal protection, for example, *by basing any such requirement on existing state legislative districts.*") (emphasis added). Four years after the *ICUB* decision, the Legislature amended Idaho Code § 34-1805 to remove the requirement that signers of petitions be from 22 counties. 2007 Idaho Sess. Laws 622.

In 2013 the Legislature passed Senate Bill 1108 amending Idaho Code § 34-1805 to reinstate a geographic signature requirement based on legislative districts rather than counties as the Ninth Circuit suggested in *ICUB*. 2013 Idaho Sess. Laws 504 (requiring signatures from "voters equal in number to not less than six percent (6%) of the qualified electors at the time of the last general election in each of at least eighteen (18) legislative districts").

The merits of Senate Bill 1108 were debated extensively in the Legislature following testimony from the public. *See, e.g.,* Senate State Affairs Committee, Minutes, March 6, 2013, pages 4-7;[1] House State Affairs Committee, Minutes, March 18, 2013, pages 1-2.[2] Senate Bill 1108 was signed into law on April 1, 2013 (2013 Idaho Sess. Laws, Ch. 214) after passing the Senate with a vote of 25-10-0 (Idaho Senate Journal (March 11, 2013) at 182) and the House with a vote of 45-21-4 (Idaho House Journal (March 22, 2013) at 268).[3]

C. SB 1110 – The 2021 Amendments to Idaho Code § 34-1805.

Senate Bill 1110 amended Idaho Code § 34-1805 by increasing the geographic distribution of signatures required for an initiative or referendum to be placed on the ballot. Specifically, SB 1110 amended Idaho Code § 34-1805 as follows (with additions indicated with underline, and deletions in strikethrough):

> 34-1805. SPONSORS TO PRINT PETITION — NUMBER OF SIGNERS REQUIRED. (1) After the form of the initiative or referendum petition has been approved by the secretary of state as provided in sections 34-1801A through 34-1822, Idaho Code, ~~provided,~~ the same shall be printed by the person or persons or organization or organizations under whose authority the measure is to be referred or initiated and circulated in the several counties of the state for the signatures of legal voters. (2) Before such petitions shall be entitled to final filing and consideration by the secretary of state, there shall be affixed thereto the signatures of legal voters equal in number to not less than six percent (6%) of the qualified electors at the time of the last general election in each of ~~at least eighteen (18)~~ the thirty-five (35) legislative districts~~; provided however, the total number of signatures shall be equal to or greater than six percent (6%) of the qualified electors of the state at the time of the last general election~~.

[1] Available at https://legislature.idaho.gov/sessioninfo/2013/standingcommittees/SSTA/.

[2] Available at https://legislature.idaho.gov/sessioninfo/2013/standingcommittees/HSTA/.

[3] 2013 Senate and House Journals are available at: https://legislature.idaho.gov/sessioninfo/2013/journals/

2021 Idaho Sess. Laws, Ch. 255.

The purpose of SB 1110 is to "increase voter involvement and inclusivity in the voter initiative/referendum process" by "ensuring signatures are gathered from each of the 35 legislative districts, so every part of Idaho is included in [the initiative and referendum] process."[4] SB 1110, Statement of Purpose.[5] As with the 2013 Senate bill amending Idaho Code § 34-1805, SB 1110 was debated extensively by the Legislature following testimony from the public. *See, e.g.*, Senate State Affairs Committee, Minutes, February 19, 2021, pages 2-4. The Senate State Affairs Committee heard testimony from Idahoans both opposed to and in support of SB 1110 before voting to send the bill to the Senate floor for a vote. *Id*. Some of the reasons the Idahoans testifying gave for their support of the SB 1110 included that the bill "gives a voice to both urban and rural citizens, i.e. the whole state" and "cuts down on possible influence of special interest and out-of-state groups," while others opposed the bill because it "increases the difficulty of getting an initiative on the ballot." *Id.* at page 2-3. The Senators then discussed the merits of SB 1110 before ultimately voting to send it to the Senate floor with a "do pass" recommendation. *Id.* at 3-4.

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.[6] The House received SB 1110 from the Senate on March 2, 2021, and passed SB 1110 on April 7, 2021, with a vote of

[4] The United States Supreme Court recently recognized Idaho's "important regulatory interests in combating fraud and ensuring that ballots are not cluttered with initiatives that have not demonstrated sufficient grassroots support." *Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2617 (2020) (granting the Governor's request to the stay an order from the District Court).

[5] Available at https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2021/legislation/S1110SOP.pdf.

[6] 2021 Senate and House Journals are available at: https://legislature.idaho.gov/sessioninfo/2021/journals/

51-18-1. Idaho House Journal (March 2, 2021) at 146; and Idaho House Journal (April 7, 2021) at 251. Governor Little signed SB 1110 on April 19, 2021. *See* 2021 Idaho Sess. Laws, Ch. 255.

D. History of Idaho Code § 34-1813.

Similar to Idaho Code § 34-1805, the Legislature enacted Idaho Code § 34-1813 in 1933 pursuant to the 1912 amendment to Article III, section 1 of the Idaho Constitution providing for the initiative and referendum processes. *See* 1933 Idaho Sess. Laws, Ch. 210. Idaho Code § 34-1813 was amended for the first and only time in 2020 by House Bill 548, a bill that amended the "Idaho Initiative Code to improve clarity, transparency, and integrity in the initiative process" by, among other things, clarifying initiative "effective dates." HB 548 Statement of Purpose.[7] House Bill 548 amended Idaho Code § 34-1813 as follows (with additions indicated with underline, and deletions in strikethrough):

> 34-1813. COUNTING, CANVASSING AND RETURN OF VOTES – EFFECTIVE DATES. (1) The votes on measures and questions shall be counted, canvassed, and returned by the regular boards of judges, clerks, and officers, as votes for candidates are counted, canvassed, and returned, and the abstract made by the several county auditors of votes on measures shall be returned to the secretary of state on separate abstract sheets in the manner provided for abstract of votes for state and county officers. It shall be the duty of the secretary of state, in the presence of the governor, to proceed within thirty (30) days after the election, and sooner if the returns be all received, to canvass the votes given for each measure, and the governor shall forthwith issue his proclamation, giving the whole number of votes cast in the state for and against such measure and question-,- and declaring such measures as are approved by a majority of those voted thereon to be in full force and effect as the law of the state of Idaho from the date of said proclamation~~; provided, that if~~ for any referendum measure. The effective date for an initiative measure shall be governed by the provisions of subsection (2) of this section. If two (2) or more measures shall be approved at said election which are known to conflict with each other or to contain conflicting

[7] Available at https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2020/legislation/H0548SOP.pdf

provisions, he shall also proclaim which is paramount in accordance with the provisions of sections 34-1801—through 34-1822, Idaho Code.

(2) (a) A statewide initiative may contain an effective date, if passed, that shall be no earlier than July 1 of the year following the vote on the ballot initiative. If no effective date is specified in the petition, the effective date of a statewide initiative that has been approved by the electorate shall be July 1 of the following year.

(b) A city or county initiative may contain an effective date, if passed, that may be earlier than July 1 of the year following the vote on the ballot initiative, but no earlier than the mayor's proclamation as provided in section 34-1801B, Idaho Code, or the proclamation by the board of county commissioners, as provided in section 34-1801C, Idaho Code. If no effective date is specified in the petition, the effective date of a city or county initiative that has been approved by the electorate shall be July 1 of the following year.

2020 Idaho Sess. Laws, Ch. 336.

III. ADDITIONAL ISSUES PRESENTED ON APPEAL

A. Whether Idaho Code § 34-1805 establishes conditions for the initiative and referendum processes under Article III, Section 1 of the Idaho Constitution?

B. Whether Idaho Code § 34-1813 establishes conditions for the initiative and referendum processes under Article III, Section 1 of the Idaho Constitution?

C. Whether the content of those conditions is justiciable?

IV. ARGUMENT

A. Standards of Review.

1. The standard for interpreting Idaho's Constitution.

When interpreting constitutional provisions, the ordinary rules of statutory interpretation generally apply. *Moon v. Inv. Bd*., 97 Idaho 595, 596, 548 P.2d 861, 862 (1976). Under the well-established standard, "[s]tatutory interpretation begins with the statute's plain language." *Ada Cnty. Highway Dist. v. Brooke View, Inc*., 162 Idaho 138, 142, 395 P.3d 357, 361 (2017). "Where the language used by the legislature is clear and unambiguous, the clearly expressed intent of the legislature must be given effect." *Cameron v. Lakeland Class A Sch. Dist. No. 272,*

Kootenai Cnty., 82 Idaho 375, 381, 353 P.2d 652, 656 (1960). The primary objective for construing the Constitution "is to determine the intent of the framers." *State v. Clarke*, 165 Idaho 393, 397, 446 P.3d 451, 455 (2010) (quoting *Idaho Press Club v. State Legislature*, 142 Idaho 640, 642, 132 P.3d 397, 399 (2006)); *Williams v. State Legislature*, 111 Idaho 156, 158–59, 722 P.2d 465, 467–68 (1986). Constitutional provisions must be interpreted in the context of the entire document and cannot be read in isolation. *Westerberg v. Andrus*, 114 Idaho 401, 403–04, 757 P.2d 664, 666–67 (1988). The provisions must be read "to give effect to every word, clause and sentence" and not "in a way which makes mere surplusage of the provisions included therein." *Id.* (quoting *Wright v. Willer*, 111 Idaho 474, 476, 725 P.2d 179, 181 (1986) and *Hartley v. Miller-Stephan*, 107 Idaho 688, 690, 692 P.2d 332, 334 (1984)).

2. The standard of determining the constitutionality of a statute.

An act of the legislature is presumed to be constitutional. *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 869, 154 P.3d 433, 440 (2007). "The judicial power to declare legislative action unconstitutional should be exercised only in clear cases." *Id.* When reviewing the constitutionality of a statute, the Court makes "every presumption [] in favor of the constitutionality of the statute, and the burden of establishing the unconstitutionality of a statutory provision rests upon the challenger." *Citizens Against Range Expansion v. Idaho Fish & Game Dep't*, 153 Idaho 630, 633–34, 289 P.3d 32, 35–36 (2012) (quoting *Idaho Schs. for Equal Educ. Opp. v. State*, 140 Idaho 586, 590, 97 P.3d 453, 457 (2004)) (omission in original). The challenger's burden is to show that "the statute is 'unconstitutional as a whole without any valid application.'" *Id.* "This Court may not ignore or amend unambiguous statutes; rather, policy arguments for altering unambiguous statutes must be advanced before the legislature." *Rogers v. Household Life Ins. Co.*, 150 Idaho 735, 739, 250 P.3d 786, 790 (2011) (citing Idaho

Const., art. III, § 1; *Farber v. Idaho State Ins. Fund*, 147 Idaho 307, 313, 208 P.3d 289, 295 (2009)).

3. The heightened standards governing facial challenges to the constitutionality of a statute.

Reclaim Idaho brought a facial challenge to Idaho Code §§ 34-1805 and 34-1813. *See* Reply in Supp. of Mot. to Expedite Briefing and Argument at 2. An as applied challenge generally requires a complete factual record and no remaining factual issues. *See Am. Falls Reservoir Dist. No. 2*, 143 Idaho at 870, 154 P.3d at 441 ("A district court should not rule that a statute is unconstitutional 'as applied' to a particular case until administrative proceedings have concluded and a complete record has been developed."). Because Reclaim Idaho invokes the Court's original jurisdiction, no record has been developed.

Further, in its Prayer for Relief, Reclaim Idaho seeks declarations from this Court that certain statutory provisions of the Idaho Code are facially unlawful. Pet. at 18. This action is a facial challenge to the constitutionality of those statutes and subject to a heightened burden. *See N. Idaho Bldg. Contractors Ass'n v. City of Hayden*, 164 Idaho 530, 541, 432 P.3d 976, 987 (2018). "To succeed on a facial challenge, one must demonstrate that under no circumstances is the statute valid." *Hernandez v. Hernandez*, 151 Idaho 882, 884, 265 P.3d 495, 497 (2011) (citing *State v. Korsen*, 138 Idaho 706, 712, 69 P.3d 126, 132 (2003)); *see also Lochsa Falls, L.L.C. v. State*, 147 Idaho 232, 240, 207 P.3d 963, 971 (2009) ("For a facial constitutional challenge to succeed, the party must demonstrate that the law is unconstitutional in all of its applications."). "Generally, a facial challenge is mutually exclusive from an as applied challenge." *Lochsa Falls, L.L.C.*, 147 Idaho at 240, 207 P.3d at 971 (citing *Korsen*, 138 Idaho at 712, 69 P.3d at 132).

B. The Idaho Constitution Grants the Legislature the Authority to Place Conditions on and Determine the Manner of the Initiative and Referendum Processes.

Article III, Section 1 of the Idaho Constitution plainly empowers the Legislature to set the "conditions" and "manner" by which the initiative and referendum processes are to be conducted in this state. Idaho Const. art. III, § 1; *see also* Pet. Brief at 5.

As a threshold matter, Reclaim Idaho fails to show why this Court should adopt a strict scrutiny review of the ballot initiative process. Reclaim Idaho argues that the right to vote is fundamental. Pet. Brief at 13-14 (citing *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 125, 15 P.3d 1129, 1133 (2000)). The Legislature agrees that the right to vote is fundamental, but also agrees with Reclaim Idaho's declarant that the ballot initiative process is distinct from voting. Decl. of Ben Ysursa in Supp. of Pet. for a Writ of Prohibition ("Ysursa Decl.") ¶ 20 ("There is an important distinction between signing a petition to support an effort for an initiative or referendum to appear on a ballot (and in the process have the subject become the focus of a statewide discussion) and an actual vote cast. Regardless of whether a voter signs a petition, it has no bearing on their ability to vote on those matters that do in fact qualify for the ballot."). Reclaim Idaho's attempt to conflate the two is improper.

1. Article III, Section 1 of the Idaho Constitution.

The Legislature's authority to enact statutes regarding the initiative and referendum processes arises from Article III, Section 1 of the Idaho Constitution that states in pertinent part:

> The people reserve to themselves the power to approve or reject at the polls any act or measure passed by the legislature. This power is known as the referendum, and legal voters may, ***under such conditions and in such manner as may be provided by acts of the legislature***, demand a referendum vote on any act or measure passed by the legislature and cause the same to be submitted to a vote of the people for their approval or rejection.

> The people reserve to themselves the power to propose laws, and enact the same at the polls independent of the legislature. This power is known as the initiative, and legal voters may***, under such conditions and in such manner as may be provided by acts of the legislature***, initiate any desired legislation and cause the same to be submitted to the vote of the people at a general election for their approval or rejection.

Idaho Const. art. III, § 1 (emphasis added).

"The Constitution should receive a reasonable construction, and should be interpreted in such a way as to give it practical effect according to the intention of the body that framed it and the people who adopted it." *Nate v. Denney*, 166 Idaho 801, 804, 464 P.3d 287, 290 (2017) (quoting *Grice v. Clearwater Timber Co*., 20 Idaho 70, 76–77, 117 P. 112, 114 (1911)). Applied here, Article III, Section 1 of the Idaho Constitution authorizes the Legislature to create statutes like those found in Title 34, Chapter 18 of the Idaho Code.

Further, Article III, Section 1 does not limit the conditions the Legislature can place on the initiative or referendum processes under a plain reading of Article III, Section 1. *See* Idaho Const. art. III, § 1; *see also* Pet. Brief at 6 (stating that "legislative power to provide 'conditions' and 'manner' for qualifying Referenda and Initiatives for the statewide ballot is not explicitly constrained by the language of Article III, § 1 . . . ."). "'It is a well-established rule that a state legislature has plenary power over all subjects of legislation not prohibited by the federal or state constitution,' and 'prohibitions are either express or implied.'" *Nate*, 166 Idaho at 804, 464 P.3d at 290 (quoting *Wilson v. Perrault*, 6 Idaho 178, 180, 54 P. 617, 617 (1898)). Article III, Section 1 affirmatively empowers the Legislature to pass legislation, like Idaho Code § 34-1805 or Idaho Code § 34-1813, that create the conditions and manner in which the initiative and referendum processes are to be conducted and their effective dates.

Without question, Article III, Section 1 authorizes the Legislature to create statutory conditions for the exercise of the initiative and referendum processes, and this Court may so

hold. As long as the Legislature's chosen method of exercising that power is consistent with the Idaho Constitution, how the Legislature exercises that authority is a political question.

2. Reclaim Idaho's petition presents a nonjusticiable political question.

The Idaho Constitution vests the "powers of the government of this state" into three distinct, co-equal branches. Art. II, § 1. That constitutional separation of powers precludes this Court from adjudicating "political questions" committed to the sound discretion of the Legislature or the Executive. *In re SRBA Case No. 39576*, 128 Idaho 246, 261, 912 P.2d 614, 629 (1995).

The central question in analyzing whether a case presents a justiciable controversy or a nonjusticiable political question is "whether this Court, by entertaining review of a particular matter, would be substituting its judgment for that of another coordinate branch of government, when the matter was one properly entrusted to that other branch." *Miles v. Idaho Power Co.*, 116 Idaho 635, 639, 778 P.2d 757, 761 (1989). In analyzing that issue, this Court looks initially to whether there exists a "textually demonstrable constitutional commitment" of a grant of authority to one of the three branches of government. *Idaho State AFL-CIO v. Leroy*, 110 Idaho 691, 698, 718 P.2d 1129, 1136 (1986).

Here, the Constitution plainly commits to the Legislature the authority to impose conditions on initiatives and referenda. It provides that voters may exercise the initiative and referendum powers "under such conditions and in such manner *as may be provided by acts of the legislature*." Art. III, § 1 (emphasis added). As this Court explained long ago: "it can readily be seen that the people, in reclaiming and retaining the initiative legislative power, were nevertheless content to leave the *manner and conditions* of its exercise to their chosen senators and representatives." *Luker v. Curtis*, 64 Idaho 703, 708, 136 P.2d 978, 980 (1943) (emphasis in

original). In "no form or manner" did the people limit the power of the Legislature in "time, manner or method" on this subject. *Id.*

The Court's recognition in *Luker* that the people have granted the Legislature the power to set conditions on initiative and referendum petitions negates Reclaim Idaho's heavy reliance on this Court's decision in *Van Valkenburgh v. Citizens for Term Limits.* 135 Idaho 121, 15 P.3d 1129 (2000). In *Van Valkenburgh*, the Court found a fundamental right of suffrage in the Idaho Constitution. *Id.* at 126, 15 P.3d at 1134. The Court then analyzed the subject statute and found it lacked a compelling state interest rendering it unconstitutional. *Id.* at 128, 15 P.3d at 1136. Importantly, the Court distinguished the fundamental right of suffrage from state electoral process regulations that are "simply a time, place or manner voting restriction to which a more deferential standard of review might be applied." *Id.* at 126, 15 P.3d at 1134.

This case is squarely a dispute over "time, place or manner" type conditions codified in Idaho Code § 34-1805(2). It is, therefore, similar in many respects to the recent U.S. Supreme Court case *Rucho v. Common Cause*, examining Article I, Section 4 of the U.S. Constitution that assigns to state legislatures the authority to prescribe the "Times, Places and Manner of holding Elections." 139 S. Ct. 2484, 2495 (2019). The Supreme Court found the question in that case to be nonjusticiable partly because the "only provision in the Constitution that specifically addresse[d] this matter assign[ed] it to the political branches." *Id.* at 2506. Absent a "presumptively invalid" exercise of legislative authority such as race-based prescriptions, the Constitution contained "no plausible grant of authority" enabling the judiciary to play a role in the process. *Id.* at 2496, 2506. So too here, where Article III, Section 1 authorizes the Legislature alone to set conditions on the manner of conducting initiatives and referenda.

In addition to determining whether the Idaho Constitution commits the matter to a specific branch of government, this Court looks to whether it would be required to "second-guess" a coordinate branch's discretionary or policymaking decision. *Leroy*, 110 Idaho at 698, 718 P.2d at 1136.

Adjudicating Reclaim Idaho's petition would involve exactly that. After hearing from the public and debating the issue, the people's representatives in the Legislature deemed it advisable to "increase voter involvement and inclusivity in the voter initiative/referendum process." SB 1110, Statement of Purpose. The people, through the Legislature they elected, did so by proposing legislation to ensure that "signatures are gathered from each of the 35 legislative districts, so every part of Idaho is included in this process." *Id.*

Perhaps a different legislature would make a different policy determination. If the people believe that their representatives in the legislature have imposed too many or too few conditions on the initiative and referendum processes, they can resolve that political question by electing new representatives. *Luker*, 64 Idaho at 712, 136 P.2d at 982 (citation omitted). But whether support for an initiative's or referendum's ballot access should come from all or some part of the State is a political matter committed by Article III, Section 1 to the Legislature.

This case thus fits squarely in the mold of this Court's prior cases in which it declined to insert itself into policy matters entrusted to a co-equal branch. In *Troutner v. Kempthorne*, for example, this Court refused to review the Senate's exercise of its constitutional authority to confirm a gubernatorial appointment because doing so would "violate the separation of powers guaranteed by Article II, § 1 of the Idaho Constitution." 142 Idaho 389, 393, 128 P.3d 926, 930 (2006). The Court explained that whether the appointment complied with statutory requirements, including "due consideration for area representation," was an issue constitutionally

delegated to the Senate in Article IV, Section 6, and that the judiciary must "appreciate and respect the allocation of power to another branch of government." *Id.* Elsewhere, the Idaho Constitution empowers the Legislative Department alone to regulate the affairs of the State. *See*, *e.g.*, Art. III, § 27 (legislative authority over continuity of government consistent with the requirements of the Constitution except where impracticable or untimely); Art. III, § 26 (legislative authority over intoxicating liquors without interference from either the judicial or executive branches); *Taylor v. State*, 62 Idaho 212, 219–20, 109 P.2d 879, 881–82 (1941).

Similarly, in *Diefendorf v. Gallet*, this Court declined to pass on the Governor's determination that an "extraordinary occasion" necessitating a special session of the Legislature existed because Article IV, Section 9 delegated the right to make that determination to "the exclusive province of the governor." 51 Idaho 619, 638, 10 P.2d 307, 315 (1932) (superseded by statute on other grounds). The Court held that "a review of such a discretionary act . . . should not be done by the courts." *Id.*

Luker itself stands for the proposition that the Legislature's amendment or repeal of an initiative law is a political question "over which the courts have no jurisdiction to consider or pass upon." 64 Idaho at 714, 136 P.2d at 983 ("the manner, method and instrumentalities, through which the people of a state determine to *legislate*, are *political and not judicial* questions") (emphasis in original). So it is with the Legislature's conditioning of the initiative and referendum process in Idaho Code §§ 34-1805 and 1813. *See also Leroy*, 110 Idaho at 698, 718 P.2d at 1136 (declining to review a legislative declaration made pursuant to Article III, Section 22 of the Idaho Constitution on the grounds that the decision was "exclusively within the ambit of legislative authority"); *cf. Bedke v. Ellsworth*, 168 Idaho 83, 480 P.3d 121, 129 (2021) (no political question when the Court was not being asked to "override [the Legislature's]

discretionary decision regarding where to locate the Treasurer's office" or to "decide the policy question of whether the Treasurer's office should or should not be moved from its current location").

A further indication that this case involves a nonjusticiable political question is the lack of "judicially discoverable and manageable standards" available to the Court to assist it in resolving the question. *Leroy*, 110 Idaho at 695, 718 P.2d at 1133; *Baker v. Carr*, 369 U.S. 186, 217 (1962). "[J]udicial action must be governed by *standard*, by *rule*, and must be principled, rational, and based upon reasoned distinctions found in the Constitution or laws." *Rucho*, 139 S. Ct. at 2507 (italics in original; internal quotation marks and citation omitted). That "basic requirement[]" is not satisfied in this case. *Id.*

Rucho involved various challenges to state congressional districting maps as unconstitutional gerrymandering. *Id.* at 2491. Like here, the petitioners alleged that the state legislatures commissioned unconstitutional congressional district maps because the maps made it "too difficult" to "translate statewide support" into the petitioner's desired result. *Id.* at 2499.

The law is clear that some level of map-drawing to secure a partisan advantage is acceptable. *Id.* at 2503. In arguing that the extent of the gerrymandering in the maps at issue was so severe as to be unconstitutional, the petitioners pointed to evidence regarding "difficulty drumming up volunteers and enthusiasm" in light of the allegedly unconstitutional maps. *Id.* at 2504. But the Court refused to opine on "how much is too much," holding that doing so would have involved an "unmoored determination" of the judiciary characteristic of a political question. *Id.* at 2500.

"How many door knocks must go unanswered? How many petitions unsigned? How many calls for volunteers unheeded?" for legislative action to cross the threshold from

acceptable to unconstitutional? *Id.* at 2504. There were "no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral." *Id.* at 2500. The question was nonjusticiable for that reason.

Likewise here, this Court lacks "discoverable and manageable standards" to enable it to decide if 35 districts is the appropriate number of districts necessary to ensure statewide support for initiatives and referenda, or whether zero is the appropriate number as Reclaim Idaho suggests, or whether the appropriate number is somewhere between zero and 35.

At what point does permissible conditioning of initiatives and referenda to ensure statewide support become unconstitutional? In other words, "how much is too much?" *Id.* at 2501. If the Court is to make that determination, it "must be armed with a standard that can reliably differentiate unconstitutional from constitutional." *Id.* at 2499. There are no such standards here. These are quintessentially political questions properly left to the people as expressed through the Legislature.[8]

Adjudicating the petition also would involve rendering a decision based on a hypothetical. Reclaim Idaho provides testimony of four declarants in support of its contention that it would be "impossible" to qualify future initiatives for the ballot under SB 1110. Pet. Brief at 9. But Reclaim Idaho's contention is nothing more than speculation. Asking the Court to strike down duly enacted legislation based on "prognostications as to the outcome of future" initiatives and referenda is to invite the Court to make "'findings' on matters as to which neither

[8] This Court has approved a prior legislative condition on the initiative and referendum processes when the condition was "reasonable and workable." *Dredge Mining Control-Yes!, Inc. v. Cenarrusa*, 92 Idaho 480, 484, 445 P.2d 655, 659 (1968). While the Legislature's 2021 amendment to the processes are both reasonable and workable, even that standard lacks the clarity required to reliably measure the constitutionality of a legislative condition.

judges nor anyone else can have any confidence." *Rucho,* 139 S. Ct. at 2503. "[A]sking judges to predict how a particular [initiative or referendum] will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise." *Id.* at 2503–04. The Court should decline to do so here.

True, it is "emphatically the province and duty of the judicial department to say what the law is." *Ellsworth*, 168 Idaho 83, 480 P.3d at 130 (quoting *Marbury v. Madison*, 5 U.S. 1 Cranch 137, 177 (1803)). But in "rare circumstance[s]," such as this one, that duty "is to say 'this is not law,'" but a political matter delegated to the Legislature. *Rucho*, 139 S. Ct. at 2508. Reclaim Idaho may believe that SB 1110 creates an unduly difficult hurdle for initiatives and referenda, but that "does not mean that the solution lies with the . . . judiciary." *Id.* at 2506. "In the absence of a legislative invasion of constitutionally protected rights, the judicial branch must respect and defer to the legislature's exclusive policy decisions." *Leroy*, 110 Idaho at 698, 718 P.2d at 1136. "Such is the very nature of our tripartite representative form of government." *Id.*[9]

For these reasons, Reclaim Idaho's petition is nonjusticiable to the extent it seeks anything more than the Court's reiteration of the Legislature's authority to set presumptively valid conditions on the initiative and referendum process under Article III, Section 1.

C. Reclaim Idaho Fails to Prove That Idaho Code § 34-1805 is Unconstitutional in All Possible Applications.

Reclaim Idaho fails to meet the heightened evidentiary burden required of a facial challenge to Idaho Code § 34-1805. *See Hernandez*, 151 Idaho at 884, 265 P.3d at 497 ("To

[9]As noted above, this Court could pass on the constitutionality of SB 1110 if it were "presumptively invalid," such as by requiring a percentage of votes from each of Idaho's non-equipopulous counties or by barring a certain religious or ethnic group from signing petitions, without rendering it a political question. *See Rucho*, 139 S. Ct. at 2495–96 (recognizing that the courts have a role to play with respect to matters such as one-person, one-vote and racial gerrymandering). But that is not this case.

succeed on a facial challenge, one must demonstrate that under no circumstances is the statute valid."). More specifically, Reclaim Idaho fails to show that Idaho Code § 34-1805 is inconsistent with the Idaho Constitution and fails to show that the initiative process has been made impossible.

1. Idaho Code § 34-1805 is consistent with the Legislature's authority under Article III, Section 1.

First, "[t]he party challenging a statute on constitutional grounds bears the burden of establishing the statute is unconstitutional and 'must overcome a strong presumption of validity.'" *Alcohol Beverage Control v. Boyd*, 148 Idaho 944, 946–47, 231 P.3d 1041, 1043–44 (2010) (quoting *Olsen v. J.A. Freeman Co*., 117 Idaho 706, 709, 791 P.2d 1285, 1288 (1990)). Reclaim Idaho has failed to meet that burden here.

The plain language of SB 1110's amendments to Idaho Code § 34-1805 are within the Legislature's authority under the Idaho Constitution. Article III, Section 1 authorizes the Legislature to set conditions on the initiative and referendum processes, and Title 34, Chapter 18, provides those conditions. Reclaim Idaho offers no evidence or argument that the 35 legislative district signature requirement is unworkable as a practical matter beyond speculation that such a process is potentially more difficult than prior signature requirements.

2. Idaho Code § 34-1805 preserves the initiative and referendum powers of the people under Article III, Section 1.

Second, Idaho Code § 34-1805, like the other statutes in Title 34, Chapter 18, enables the constitutionally created initiative and referendum processes to be exercised by the people. For example, there are requirements for the content of initiatives. *See* Idaho Code § 34-1801A. There are provisions that outline the timeframe for gathering signatures. *See* Idaho Code § 34-1802. There are specific times for submitting initiative petitions to the Secretary of State. *See* Idaho Code § 34-1803. There are requirements for the printing of petition and signature sheets.

See Idaho Code § 34-1804. And there are requirements regarding the necessary signatures for a petition to be considered by the Secretary of State. *See* Idaho Code § 34-1805. These statutes provide the framework for the process, and if there is a way to construe these statutes as being consistent with Article III, Section 1 of the Idaho Constitution, this Court is bound to do so. *Leroy*, 110 Idaho at 698, 718 P.2d at 1136 ("Where two constructions of a statute are possible, one resulting in the statute being constitutional and the second rendering the statute unconstitutional, we will construe the statute . . . so as to avoid conflict with the constitution."). Idaho Code § 34-1805 is part of the statutory framework necessary to pass initiatives and referenda, nothing more.

3. Idaho Code § 34-1805 does not give veto power to a "Tiny Minority."

Reclaim Idaho argues that SB 1110 allows a "small and unpopular minority" of the state to exercise a "heckler's veto" to keep "a popular petition off the general election ballot." Pet. Brief at 22. This argument ignores what Idaho Code § 34-1805 actually requires.

It only requires geographic diversity for an initiative or referendum to reach the ballot—not necessarily participation from every town, city, or county in the state. Idaho Code § 34-1805 requires minimal (6%) support from every legislative district, and all 35 legislative districts in Idaho are approximately equipopulous. *See* Art. III, § 5. As outlined above, prior versions of Idaho Code § 34-1805 had county-based participation requirements, *see* 1997 Idaho Sess. Laws 759, but those requirements were found to be unconstitutional, *see ICUB*, 342 F.3d at 1074. The move to geographic distribution by legislative district was suggested by the Court in *ICUB* and was thought by then-Secretary of State Ysursa to have a "better chance of being upheld" because

legislative districts "are, by law, fairly even in population."[10] Senate State Affairs Committee, Minutes, March 1, 2013.

D. Idaho Code § 34-1805 is Consistent With Legislative Conditions on Initiatives and Referenda Across the United States.

Idaho Code § 34-1805 is not only consistent with the Idaho Constitution, it is also consistent with conditions placed on citizen initiatives in our sister states. Twenty-six states do not permit any form of citizen-initiated policymaking whatsoever. The 24 states that do permit citizen initiatives or referenda set various conditions and restrictions as to how the process is to operate. The Legislature's exercise of its authority to determine the manner in which Idaho's initiatives and referenda processes operate is consistent with how other state legislatures have exercised that authority.

Fourteen of the 24 states that permit citizen initiatives require the proponent of the initiative to obtain signatures from registered voters in some or all of the state's geographic or political subdivisions. This is especially the case in large, rural states like Idaho that may have one or more significant population centers but whose voters otherwise may be distributed throughout the state.

In Colorado, for example, the proponent of a ballot initiative to amend the state's constitution must obtain signatures from at least two percent of the registered voters who live in each of the state's 35 senate districts. C.R.S.A. § 1-40-109(1)(b); Colo. Const. art. 5, §§ 1, 45. The U.S. Court of Appeals for the Tenth Circuit has upheld the constitutionality of that statute under the U.S. Constitution. *Semple v. Griswold*, 934 F.3d 1134, 1138–43 (10th Cir. 2019).

[10] Available at https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2013/standingcommittees/130301_ssta_0800AM-Minutes.pdf.

Similarly, in Utah, the proponent of an initiative must obtain signatures from at least eight percent (for direct initiatives) or four percent (for indirect initiatives) of active voters in at least 26 of the state's 29 senate districts. U.C.A. § 20A-7-201(1)(a)-2(a); Utah Const. art. 9, § 2. The Utah Supreme Court has twice upheld that provision as consistent with the Utah Constitution. *Count My Vote, Inc. v. Cox*, 452 P.3d 1109, 1115–17 (Utah 2019); *Utah Safe to Learn-Safe to Worship Coalition, Inc. v. State*, 94 P.3d 217, 228–29 (Utah 2004).

Alaska requires an initiative proponent to obtain signatures from voters equal in number to at least seven percent of the votes cast in the preceding general election in at least 30 of the state's 40 house districts. A.S. § 15.45.140(a); Alaska Const. art. 6, § 4. Wyoming likewise requires a proponent to obtain signatures from voters equal in number to at least 15 percent of the votes cast in the preceding general election in at least 16 of the state's 23 counties. Wyo. Const. art. 3, § 52(c).

Mississippi requires initiative signatures from all of its equipopulous congressional districts. Miss. Const., Art. 15, § 273(3) (invalidated on other grounds by *In re Initiative Measure No. 65 v. Watson*, NO. 2020-IA-01199-SCT, 2021 Miss. LEXIS 123 (May 14, 2021)).

This Court may look to the law and experience of other states in analyzing legislative conditions on Idaho's initiative process. *Luker*, 64 Idaho at 708–12, 136 P.2d at 980–83. The initiative conditions enacted by the legislatures in these sister states lend further support to the validity of the Legislature's exercise of its authority in enacting SB 1110. That legislatures in other states—particularly smaller or less rural states—have not conditioned their initiative processes in the same manner does not render SB 1110 unduly or abnormally restrictive.

E. Reclaim Idaho's Petition Should Also Be Denied Because the Issues Raised in the Petition Lack the Urgency Necessary to Trigger Original Jurisdiction.

Reclaim Idaho has failed to demonstrate that original jurisdiction before this Court is warranted under the circumstances in this case. "Article V, Section 9 of the Idaho Constitution vests this Court with original jurisdiction to issue writs of mandamus and prohibition, as well as 'all writs necessary or proper to the complete exercise of its appellate jurisdiction.'" *Ybarra v. Legislature by Bedke*, 166 Idaho 902, 906, 466 P.3d 421, 425 (2020) (quoting Idaho Const. art. V, § 9). However, this Court has also held that its "willingness to act upon [its] original jurisdiction includes cases requiring a determination of the constitutionality of recent legislation where there is 'urgency of the alleged constitutional violation and the urgent need for an immediate determination.'" *Id*. (quoting *Regan v. Denney*, 165 Idaho 15, 21, 437 P.3d 15, 21 (2019)). Reclaim Idaho must therefore provide "evidence or proof of a crisis or urgent situation" to trigger this Court's exercise of original jurisdiction. *See Idaho Falls Redevelopment Agency v. Countryman*, 118 Idaho 43, 45, 794 P.2d 632, 634 (1990).

Reclaim Idaho's challenge to Idaho Code §§ 34-1805(2) and 1813(2)(a) is not urgent. Reclaim Idaho argues that the Petition is urgent because "Petitioners have filed initiatives and a referendum for the next election cycle" and they need "clarity from the Court as to the constitutionality of SB 1110's amendment" to these statutes in order to move forward. Pet. Brief at 11. However, Reclaim Idaho provides no reason why the initiative and referendum processes could not proceed in parallel with this Petition. [11] Rather, they provide subjective assertions that no initiative can succeed under the current law. *See* Pet. Brief at 18-19 (citing Ysursa Decl. ¶¶

[11] And, there is presently no set date for the Legislature's adjournment sine die. As of the filing of this brief, the Legislature is considering House Concurrent Resolution 23 ("HCR 023"), which would delay adjournment of the 66th Legislature until September 1, 2021. Information on HCR 023 is available at: https://legislature.idaho.gov/sessioninfo/2021/legislation/HCR023/

8–9; Decl. of David Daley in Supp. of Pet. for a Writ of Prohibition ¶ 9; Decl. of Dr. Gary Moncrief in Supp. of Pet. for a Writ of Prohibition ¶¶ 4, 8). Reclaim Idaho fails to show why an urgent ruling on its Petition is necessary for prospective initiative campaigns. If an initiative had broad popular support across the state, that hypothetical initiative could reach the ballot regardless of the outcome of this Petition because the methods of signature collection are unchanged by SB 1110. *See* 2021 Idaho Sess. Laws, Ch. 255. Even assuming a decision is necessary for initiatives to move forward—something the Legislature does not concede—such a decision is unnecessary before April 30, 2022, the probable date that initiative signatures would be due under Idaho Code § 34-1802 for inclusion on November 2022 ballots.

The circumstances surrounding this Petition are distinguishable from previous instances of urgency found by this Court. For example, in *Regan*, this Court exercised original jurisdiction for a challenge to Idaho's expansion of Medicaid after it determined that an immediate decision was necessary. 165 Idaho at 21, 437 P.3d at 21. That determination was based on 1) a statutory 90-day time requirement for the state to submit required plan amendments to the Center for Medicare and Medicaid Services, and 2) the need for a decision while the Legislature was still in session in case further amendments became necessary. *Id*. Similarly, in *Ybarra*, this Court exercised original jurisdiction to determine the constitutionality of two appropriation bills that were set to become law soon after the legislative session had ended. 166 Idaho at 906, 466 P.3d at 425. *Ybarra* not only dealt with tight deadlines but had certain—and potentially damaging—personnel and budgeting issues associated with the legal questions at issue. *Id*. ("[W]e find that this case presents an urgent constitutional dispute between two executive branch agencies and the Legislature concerning the education of Idaho's children, and the potential for uncertainty and disruption of educational services during a drawn out trial court proceeding is great . . . ."). In

contrast, the Petition's supposed urgency is hypothetical at best because initiative and referenda proponents can collect signatures with or without a ruling from this Court. This Court has asserted original jurisdiction over several constitutional matters that required immediate determination, but the Petition is not one of those matters.

F. Idaho Code Section 34-1813(2)(a)'s Effective Date Provision Is Consistent With the Constitution and Essential for Reliable Governance.

Reclaim Idaho takes issue with Idaho Code § 34-1813(2)(a) that states:

> [a] statewide initiative may contain an effective date, if passed, that shall be no earlier than July 1 of the year following the vote on the ballot initiative. If no effective date is specified in the petition, the effective date of a statewide initiative that has been approved by the electorate shall be July 1 of the following year.

I.C. § 34-1813(2)(a). It argues that the effective date of an initiative "remains solely within the province of those who have proposed the legislation" and that "the legislature has no authority to set the date on which legislation proposed by initiative shall take effect." Pet. Brief at 25. This position has no legal basis for two primary reasons.

1. The Legislature has the authority to set conditions on the initiative process under Article III, Section 1.

First, and similar to Idaho Code § 34-1805, the Legislature's passage of Idaho Code § 34-1813 is consistent with the authority conferred by the Idaho Constitution to prescribe the manner and conditions of the initiative process. *See* Idaho Const. art. III, § 1. Statutory parameters regarding the effective date of an initiative approved through the Article III, Section 1 process are inarguably conditions on that process.

2. The Idaho Constitution is silent as to the effective date of any approved ballot initiatives.

Second, Reclaim Idaho argues that initiatives stand on "equal footing" with laws passed by the Legislature and therefore should be allowed to take effect immediately. *See* Pet. Brief at 25 (citing *Westerberg v. Andrus*, 114 Idaho 401, 404, 757 P.2d 664, 667 (1983)).

Reclaim Idaho, however, fails to recognize that the Idaho Constitution places initiatives and laws passed by the Legislature on unequal footing regarding their effective dates. Article III, Section 8 outlines when acts of the Legislature take effect—at least 60 days after the end of the legislative session unless an emergency is declared. Idaho Const. art. III, § 8. There is no parallel provision in the Idaho Constitution expressly outlining when initiatives are to take effect, and the reason for this is clear when reading Article III in its entirety. That authority was left to the Legislature to decide.

3. The Idaho Code would be subject to whiplash reversals if initiatives became effective law prior to the end of the next legislative session.

Beyond the legal justifications behind Idaho Code § 34-1813, there are practical and policy concerns for the establishment of a predictable effective date for ballot initiatives. Reclaim Idaho argues that only the proponents of a ballot initiative should be allowed to set an initiative's effective date and that the Legislature should be prohibited from modifying the same. Pet. Brief at 26. However, Reclaim Idaho concedes that the Legislature has the authority to amend or repeal initiatives. *See* Pet. Brief at 26 (citing *Luker*, 64 Idaho at 708, 136 P.2d at 982). Therefore, Reclaim Idaho is asking this Court to revert to the system prior to the 2020 amendments wherein a ballot initiative could take effect in December following a general election and be amended or repealed within weeks when the Legislature convened in regular session the following January. This creates numerous problems associated with unpredictable governance: what if the initiative calls for an immediate overhaul of k-12 education or teacher

certification; or if the initiative requires a significant and immediate financial outlay; or if the initiative makes certain conduct legal (only to have that same conduct become illegal again within weeks).

Additionally, where a referendum and initiative appear on the same ballot and contain conflicting provisions, the Governor must proclaim the "paramount" measure. Idaho Code § 34-1813(1). This 1933 provision was not amended by the Legislature in 2020. Consequently, if the Governor were to proclaim an initiative paramount to a conflicting referendum, the Legislature would have time to convene and assess the Governor's decision before the initiative takes effect and, in so doing, secure the lawmaking authority of the state squarely in the Legislative Department and not by default in the Executive Department.

This is not a hypothetical concern. Petitioner Reclaim Idaho has pending before the Secretary of State an initiative to remove all geographic district requirements from Idaho Code § 34-1805.[12] Petitioner Committee to Protect and Preserve the Idaho Constitution, Inc. has pending for the same 2022 election a referendum to reject or approve the 35-district amendment. *See* Pet. at ¶ 41. If the voters were to approve both the initiative and the amendment by referendum, the zero-district and 35-district requirements would conflict. The Governor would then need to decide which of the conflicting measures is paramount and becomes law. If he chose the initiative, under current law, that choice would not become effective until July 1, 2023, giving the Legislature time to consider the people's simultaneous support for the referendum approving 35 districts. If this Court invalidates the effective date provision in Idaho Code § 34-1813 (but upholds the geographic signature requirements of Idaho Code § 34-1805), then the Idaho Code could whiplash between 35 districts the day before the November election, to zero

[12] Available at https://sos.idaho.gov/elections/initiatives/2022/Idaho_Initiative_Act.pdf

districts in December if the Governor chooses the initiative, to 35 districts in January if the Legislature were to affirm the referendum.

The people, through their Legislature and its amendment of Idaho Code § 34-1813, have devised a sound solution to this problem by allowing their Legislature to consider the merits of an initiative and the need for any amendment or repeal before an initiative takes effect. This methodical system of lawmaking is consistent with the Legislature's preeminence as the "first and foremost" legislative power of Idaho's government and the initiative and referendum processes as "an afterthought." *Luker*, 64 Idaho at 707, 136 P.2d at 980.

V. CONCLUSION

For the reasons set forth above, the Legislature respectfully requests that this Court deny the Petitioner's request for a writ of mandamus and uphold the Legislature's constitutional authority to enact enabling statutes under Article III, Section 1 of the Idaho Constitution.

Dated this 2nd day of June, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of June, 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:

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