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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 PRESERVE 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	Supreme Court Docket No. 48784-2021 **RESPONDENTS' MEMORANDUM IN SUPPORT OF MOTION TO STRIKE**

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.

Respondents, Lawerence Denney, in his official capacity as the Idaho Secretary of State, and the State of Idaho, hereby submit this Memorandum in Support of their Motion to Strike portions of paragraphs 8, 9, 13, 21, 23 and 24 of the Declaration of Ben Ysursa; portions of paragraphs 18, 22, 45, 51, 69, 70, 71, 72, 73 and 74 of the Declaration of Luke Mayville; portions of paragraphs 4, 8 and 12 of the Declaration of Dr. Gary Moncrief; portions of paragraphs 11 and 17 of the Declaration of David Daley; portions of paragraph 31 of the Declaration of Robin Nettinga; portions of paragraph 10 of the Declaration of Karen Lansing; portions of paragraph 7 of the Declaration of Linda Larson; and portions of paragraphs 8 and 9 of the Declaration of Jessica Mahuron.

I. INTRODUCTION

Petitioners Reclaim Idaho and the Committee to Protect and Preserve the Idaho Constitution, Inc., have filed a Petition for Writ of Prohibition and Application for Declaratory Judgment which relies on eight declarations attached as exhibits to the Petition. All eight of those declarations, the Declaration of Ben Ysursa ("Ysursa Declaration"), the Declaration of Luke Mayville ("Mayville Declaration"), the Declaration of Dr. Gary Moncrief ("Moncrief Declaration"), the Declaration of David Daley ("Daley Declaration"), the Declaration of Robin

Nettinga ("Nettinga Declaration"), the Declaration of Karen Lansing ("Lansing Declaration"), the Declaration of Linda Larson ("Larson Declaration") and the Declaration of Jessica Mahuron ("Mahuron Declaration") contain impermissible speculative statements and/or conclusions of law. Because neither a lay witness nor an expert may testify as to matters that are speculative or constitute conclusions of law, those portions of each declaration should be stricken.

It must be noted that this motion demonstrates yet another reason why this Petition does not fall under this Court's original jurisdiction. Respondents have not been allowed to depose the declarants or even contest the relevant declarant's qualifications to testify as experts. Nevertheless, if this Court is to consider the merits of the Petition and consider the attached declarations, the challenged portions of each of the declarations should be stricken for the reasons stated below.

II. ARGUMENT

To support the allegations in the Petition, the Petitioners have relied on lengthy declarations from Ben Ysursa, a member of the Committee to Protect and Preserve the Idaho Constitution, Inc., (a Petitioner in the case); Luke Mayville, co-founder of Reclaim Idaho (a Petitioner in this case); Dr. Gary Moncrief, a professor of political science; David Daley, a journalist; Robin Nettinga, former Executive Director for the Idaho Education Association; Karen Lansing, a volunteer signature collector for Reclaim Idaho for the initiative petition to expand Medicaid in 2018; Linda Larson, the Bonner County Co-Leader for Reclaim Idaho for the signature drive to qualify the Medicaid Expansion initiative petition for the ballot and a signature collector; and Jessica Mahuron, a volunteer leader for Kootenai County for Reclaim Idaho for the Medicaid Expansion

initiative petition signature drive. Many of the factual assertions in each of these declarations are disputed by Respondents.

Portions of these declarations also contain speculative statements as to how Idaho Code § 34-1805(2) and 1813(2)(a) will affect future initiative and referenda efforts. Similarly, portions of these declarations contain speculative statements as to how the challenged provisions would have allegedly hindered Reclaim Idaho's efforts to put the 2018 initiative to expand Medicaid on the ballot, and the Idaho Education Association's efforts to qualify the three 2012 referenda petitions for the ballot.

Additionally, the declarants also make statements regarding a final issue for this court to decide: whether Idaho Code §§ 34-1805(2) and 1813(2)(a) constitute reasonable and workable conditions and manner requirements governing the initiative and referenda process under Article III, § 1 of the Idaho Constitution.[1] *See Dredge Mining Control-Yes!, Inc. v. Cenarrusa*, 92 Idaho 480, 445 P.2d 655 (1968). Declarants' challenged testimony is inadmissible under Idaho Rule of Evidence 701 (opinion testimony by lay witness) and Idaho Rule of Evidence 702 (testimony by expert witness), for those declarants that Petitioners offer as purported experts.

[1] Respondents strenuously dispute that the nature or degree of any alleged burden placed on initiative and petition circulators has any bearing on whether the challenged laws are permissible under Article III, §1 of Idaho's Constitution, as discussed in their brief in opposition. Thus, all of the speculative commentary from the declarants on the nature of the burden imposed by the 35-District Requirement is irrelevant. However, should this Court agree with Petitioners that an evaluation of burden is relevant to this Court's analysis of the constitutionality of the challenged laws, the question of whether the challenged provisions are impermissibly burdensome is a legal question for this Court to decide.

A. Parts of the Ysursa, Mayville, Moncrief, Daley, Nettinga, Lansing, Larson, and Mahuron Declarations should be stricken because they contain speculative assertions that lack foundation.

"Our rules of evidence, specifically Rules 602 and 701, generally do not permit speculative testimony." *Schwan's Sales Enterprises, Inc. v. Idaho Transp. Dep't*, 142 Idaho 826, 830, 136 P.3d 297, 301 (2006). Idaho Rule of Evidence 701 governs the testimony of a lay witness 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." I.R.E 701.

Additionally, it is well settled that "expert opinion must be based upon a proper factual foundation." *Bromely v. Garey*, 132 Idaho 807, 811, 979 P. 2d 1165, 1169 (1999). Under Idaho Rule of Evidence 702, an expert "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." Expert opinion that is "speculative, conclusory or unsubstantiated by facts in the record" is inadmissible. *Id*. "An expert opinion that merely suggests possibilities, not probabilities, would only invite conjecture and may be properly excluded. *Nield v. Pocatello Health Servs., Inc.*, 156 Idaho 802, 815, 332 P.3d 714, 727 (2014) (citing *Slack v. Kelleher*, 140 Idaho 916, 923, 104 P. 3d 958, 965 (2004)). Finally, "expert opinion that is speculative or unsubstantiated by facts in the record is inadmissible because it would not assist the trier of fact to understand the evidence or determine a fact that is at issue." *Nield*, 156

Idaho at 815, 332 P.3d at 727 (citing *Karlson v. Harris,* 140 Idaho 561, 565, 97 P.3d 428, 432 (2004)).

Despite the prohibition against speculative testimony from either experts or lay witnesses, the Ysursa, Mayville, Moncrief, Daley, Nettinga, Larson, Lansing, and Mahuron Declarations contain testimonials from the declarants that are so speculative that no person could possibly opine on the veracity of such statements. These statements amount to nothing more than possibilities and conjecture. The following contain speculative, hypothetical, and unsupported conclusions:

> *Declaration of Ben Ysursa*
>
> **Paragraph 8**: In my opinion, Senate Bill 1110's dramatic increase in the geographical signature requirement makes it near impossible, if not impossible for the people of Idaho to exercise their sacred power to put an initiative or a referendum up for election.[2]
>
> **Paragraph 21**: … Under the guise of increasing rural voter involvement and inclusivity, Senate Bill 1100 actually does the opposite. It makes the likelihood that voters will consider, discuss and vote on initiatives and referendums very remote, as these near impossible requirements will prevent any initiatives or referendums from qualifying for the ballot. Legislative requirements concerning "such conditions and in such manner" in Article III, § 1 of the Idaho Constitution should serve a reasonable gatekeeping function to the ballot but instead Senate Bill 1110 is a brick wall barrier.[3]
>
> **Paragraph 23**: Another fatal flaw of Senate Bill 1110 is that it gives a veto power to any one of the 35 legislative districts, and could allow a single district to veto the qualification of an initiative or referendum for the ballot that might otherwise enjoy overwhelming support throughout the state.

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[2] Ben Ysursa's statement in paragraph 8 also constitutes a legal conclusion that should be stricken for the reasons explained in Section B, below.
[3] Ben Ysursa's statement in paragraph 21 also constitutes a legal conclusion that should be stricken for the reasons explained in Section B, below.

Declaration of Luke Mayville

Paragraph 18: As I will convey below with detailed reference to the facts of our 2017-2018 Medicaid Expansion signature drive, the concept of organization strength helps explain why the 35-district rule will make it virtually impossible for volunteer-driven initiatives to qualify for the ballot, even in cases when those initiatives enjoy broad and deep support from voters in all 35 districts ….[4]

Paragraph 22: … There is simply no way our volunteer-driven signature drive could have qualified 35 districts. Likewise, I think this is true of any volunteer-driven campaign in Idaho.

Paragraph 45: If SB 1110 had been in place in 2018, our Medicaid Expansion campaign would have needed to build organizational strength in approximately 15 districts with low organizational potential. With the limited organizing hours at our disposal, this feat would have been impossible.

Paragraph 69: … Indeed any significant increase above the 18-district requirement that existed prior to the enactment of SB 1110 would make volunteer-driven initiatives virtually impossible to qualify for the ballot by requiring initiative campaigns to qualify a large number of districts with low organizational potential.[5]

Paragraph 71: Let us assume that, by some miracle, a volunteer-driven signature drive is well on its way to collecting valid signatures from 6% of registered voters in each of Idaho's 35 districts. In such a scenario, the all-districts requirement grants enormous power to any opposition group (even those motivated by the narrowest special interest) to prevent an initiative from making the ballot and thereby to negate the will of the majority.

Paragraph 72: … These blockers might attempt to distract signature gatherers by starting verbal disputes, or they might physically stand in between signature gatherers and potential signers….

Paragraph 73: Under Idaho's new 35-district requirement, a well-funded opposition campaign can start by identifying the 10–15 districts where the initiative campaign has exhibited the least organizational strength. The opposition campaign can then deploy paid signature blockers and fund a concerted signature-removal removal campaign in those

[4] Luke Mayville's statement in paragraph 18 also constitutes a legal conclusion that should be stricken for the reasons explained in Section B, below.

[5] Luke Mayville's statement in paragraph 69 also constitutes a legal conclusion that should be stricken for the reasons explained in Section B, below.

districts. Even if, in any randomly selected district, the probability were low that these tactics would block that district from qualifying, the probability would increase dramatically if the opposition campaign were to have 15-20 attempts. With an all-districts requirement, the opposition only needs to block one district in order to block the entire statewide initiative.

Declaration of Dr. Gary Moncrief

Paragraph 12: Senate Bill 1110 will make the popular referendum virtually obsolete because it will make it almost impossible to qualify for the ballot.[6]

Declaration of David Daley

Paragraph 17: The combination of this significant period of name removal, along with the requirement for every district to reach challenging total numbers of signatures, creates an additional burden that gives well-funded initiative opponents large advantages. A special interest group could simply pour millions of dollars into a small number of districts in an aggressive campaign to confuse voters and relentlessly urge them to take their names off the list. They would only have to flip one district in this way, with the use of dark money, to subvert the entire citizen effort and the will of every other district in the state. This, too, is truly uncharted territory for initiatives.

Declaration of Robin Nettinga

Paragraph 31: Had we needed to meet the geographical requirement in Senate Bill 1110 requiring that 6% of signatures must come from every single one of Idaho's 35 legislative districts, it would have been overly burdensome and our path to success would have certainly been vastly more difficult . . . I do not think it would have been possible. [7]

Declaration of Karen Lansing

Paragraph 10: … In my view it would be practically impossible for volunteers to collect signatures from 6% of registered voters in all of Idaho's 35 state-legislative districts.[8]

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[6] Dr. Moncrief's statement in paragraph 12 also constitutes a legal conclusion that should be stricken for the reasons explained in Section B, below.

[7] Ms. Nettinga's assertion in paragraph 31 as to the nature of the alleged burden imposed by Senate Bill 1110 also constitutes a legal conclusion that should be stricken for the reasons explained in Section B, below.

[8] Ms. Lansing's assertion in paragraph 10 also constitutes a legal conclusion that should be stricken for the reasons stated in Section B, below.

Declaration of Linda Larson

Paragraph 7: … But I doubt we'd be willing to work on another ballot initiative under these impossible rules.[9]

Declaration of Jessica Mahuron

Paragraph 8: … I know in my bones that requiring signature collection of 6% of registered voters from all 35 legislative districts is an unsurmountable wall to climb. ... It would deter Idaho citizen initiative organizers from sacrificing valuable time, energy, volunteer commitment, and financial resources with the increased, if not total, risk of failure.[10]

Paragraph 9: The restrictions brought forth by the Idaho Legislature will have the same devastating damage to civic engagement and trust in government that voter suppression laws in other areas have.

The declarants in the paragraphs above have speculated in numerous ways as to how the 35 District Requirement will affect future signature drives. But given the numerous factors that can play into whether an initiative or referendum petition signature drive is successful, including those discussed by Dr. Damon Cann in the declaration filed in support of Respondents' brief in opposition, such as the variability of the overall support of a particular initiative or referendum, the technological aids and signature-gathering strategies that could be employed by the petition sponsors, the availability of a labor force in each district to collect signatures, the presence of locations where people gather, and social capital indicators, as well as the fact that the proponents of the Medicaid Expansion initiative voluntarily chose not to use all of the statutorily available time to gather signatures (including the summer months when people tend to gather at locations

[9] Ms. Larson's description in paragraph 7 of the rules as "impossible" constitutes a legal conclusion that should be stricken for the reasons stated in Section B, below.
[10] Ms. Mahuron's description of the 35 District Requirement as an "unsurmountable wall to climb" constitutes a legal conclusion that should be stricken for the reasons stated in Section B, below.

such as county fairs across Idaho), there is simply no way for any of these declarants to know whether a future signature drive will be successful in putting a particular initiative on the ballot based on their past experiences with qualifying with no geographical requirements (as with Robin Netttinga's experience) or in 18 legislative districts (as with the Medicaid Expansion initiative).[11] Likewise, there is no way for these declarants to know whether the 2012 referenda or the 2018 Medicaid Expansion initiative would have made it on the ballot when Petitioners' declarants did not even attempt to qualify in all 35 legislative districts.

Because the challenge statements are impermissibly speculative, this Court should strike the identified portions of the declarations listed above.[12]

B. Conclusion of Law

If this Court were to decide the Petition on the merits, the ultimate question that this Court must decide is whether the challenged provisions constitute permissible conditions and manner for the initiative process set by the legislature under Article III, § 1, that is to say, whether the challenged provisions are reasonable and workable. And, if this Court accepts Petitioners' (incorrect) formulation of this analysis, this Court will have to decide whether Idaho Code § 34-

[11] Again, it must be noted that these declarations demonstrate how inappropriate Petitioners' case is for an original action. Petitioners' decision to present evidence as to their experience with qualifying past petitions makes it essential for Respondents to have a chance to depose the declarants about what strategies they employed to qualify for the ballot, why they chose the strategies and time to gather signatures they did, and whether they could have employed more effective strategies to gather signatures to qualify their respective measures for the ballot.

[12] Respondents recognize that their expert, Damon Cann, Ph.D. provides opinions regarding the foreseeable impact (or lack thereof) of Idaho Code § 34-1805(2) on future signature drives. Unlike speculative statements in the declarations above, Dr. Cann's conclusions are properly based on the empirical data outlined in his declaration.

1805(2) and Idaho Code § 34-1813(2)(a) place an impermissible burden on the citizens of Idaho to exercise their constitutional rights under Article III, § 1. *See* Petitioner's Brief in Support of the Petition, at 11-12. This Court has stated that "[w]itnesses are not allowed to give opinion on questions of law…." *Carnell v. Barker Mgmt., Inc*., 137 Idaho 332, 328, 48 P. 3d 651, 657 (2002). "[W]hen an expert witness offers a legal conclusion, it "invades the province of the court to determine the applicable law." *Ybarra v. Legislature by Bedke*, 166 Idaho 902, 908, 466 P.3d 421, 427 (citing *Ballard v. Kerr*, 160 Idaho 674, 694, 378, P.3d 464, 484 (2016)); *see also Ybarra*, 166 Idaho at 908, 466 P.3d at 427 (stating that the court has "previously held that testimony containing conclusions of law by an expert witness is generally inadmissible" and striking the portions of the Petitioner's affidavit that were conclusions of law).

The challenged Declarations all contain the declarants' personal legal conclusions that invade the province of the court.[13] The following portions of the challenged declarations contain such conclusions of law:

Declaration of Ben Ysursa

Paragraph 8: (quoted above)

Paragraph 9: The onerous signature requirement effectively kills the referendum and initiative in Idaho.

Paragraph 13: In my opinion the constitutionally guaranteed right of the referendum is in effect nullified by Senate Bill 1110.

[13] In addition to being improper legal conclusions, the cited portions of the declarations are irrelevant because they address the overly burdensome test, which is not applicable to this Court's review. Rather, the question for this Court is whether the challenged provisions constitute permissible conditions and manner for the initiative process set by the legislature under Article III, § 1, that is to say, whether the challenged provisions are reasonable and workable.

Paragraph 21: (quoted above)

Paragraph 24: It is also my opinion that Idaho Code § 34-1813(2)(a)'s prohibition on any initiative taking effect before July 1 of the year following its passage in the general election violates the right of the people, "independent of the legislature", to propose and enact laws in Article III, § 1 of the Idaho Constitution….

Declaration of Luke Mayville

Paragraph 18: (quoted above)

Paragraph 51: It is beyond unreasonable to expect a volunteer-driven signature drive with limited financial resources to collect valid signatures from at least 6% of registered voters in each of 35 districts, including those districts with very little organizational potential.

Paragraph 69: (quoted above)

Paragraph 70: But there is a uniquely severe harm to initiative and referendum rights brought about by the all-districts requirement contained in SB 1110.

Paragraph 74: To summarize, Idaho's 35-district requirement empowers the most determined and well-funded minority interests to frustrate and subvert the right of the majority to propose and reject legislation.

Declaration of Dr. Gary Moncrief

Paragraph 4: Senate Bill 1110 creates an extraordinarily difficult standard for any citizen-initiated measure to attain ballot status. In fact, the standard is so high as to effectively eliminate citizens' rights in this regard.

Paragraph 8: …. For these reasons, I believe Senate Bill 1110 destroys an essential right of the citizens of Idaho.

Paragraph 12: (quoted above)

Declaration of David Daley

Paragraph 11: … Indeed, these new rules are so restrictive that they all-but relegate the initiative -- enshrined the state's constitution -- to a mere right "on paper" that cannot actually be used in reality. This is an extreme and deeply burdensome set of restrictions that will make it nearly impossible for Idaho voters to, in Roosevelt's words, "provide a

check" when the government becomes "misrepresentative." That seems to be the actual purpose.

Declaration of Robin Nettinga

Paragraph 31: (quoted above)

Declaration of Karen Lansing

Paragraph 10: (quoted above)

Declaration of Linda Larson

Paragraph 7: (quoted above)

Declaration of Karen Mahuron

Paragraph 8: (quoted above)

The opinions stated above by the declarants regarding the burden placed on Idaho voters by Senate Bill 1110 is irrelevant to this Court's ultimate determination (as well as being an incorrect formulation of the standard that this Court must employ to evaluate the constitutionality of the challenged provisions). This Court states what the law is, not Petitioners' declarants. For example, this Court, not Dr. Moncrief, must decide whether Senate Bill 1110 "destroys" the ability to initiate laws and demand referenda. (Moncrief Declaration ¶ 8). Nor does it matter to this Court's legal determination of whether the challenged laws are reasonable and workable that David Daley believes that new initiative and referenda rules are "deeply burdensome" and make it "nearly impossible" for Idaho voters to pursue ballot initiatives and referenda. (Daley Declaration ¶ 11).

It is for this Court to determine whether the legislature has legislated within its express constitutional duty under Article III, § 1 to set the conditions and manner for the initiative and

referenda process, not the declarants. As such, these paragraphs, and the ones listed above, should be stricken from the Petition.

III. CONCLUSION

For the reasons state herein, Respondent requests the Court to strike and not consider portions of paragraphs 8, 9, 13, 21, 23 and 24 of the Declaration of Ben Ysursa; portions of paragraphs 18, 22, 45, 51, 69, 70, 71, 72, 73 and 74 of the Declaration of Luke Mayville; portions of paragraphs 4, 8 and 12 of the Declaration of Dr. Gary Moncrief; portions of paragraphs 11 and 17 of the Declaration of David Daley; portions of paragraph 31 of the Declaration of Robin Nettinga; portions of paragraph 10 of the Declaration of Karen Lansing; portions of paragraph 7 of the Declaration of Linda Larson; and portions of paragraphs 8 and 9 of the Declaration of Jessica Mahuron.

DATED this 2nd 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 2nd 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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