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Attorneys for Petitioners

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

Petitioners,

v.

LAWERENCE DENNEY, 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; and 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

**MEMORANDUM IN
SUPPORT OF
PETITIONERS' MOTION
FOR AN AWARD OF
REASONABLE
ATTORNEYS' FEES AND
COSTS**

The Court has concluded that attorney fees are warranted under the private attorney general doctrine in this case. The Court found: “The contested legislation constituted a grave infringement on the people’s constitutional rights, making this matter vital to the public interest to people across Idaho. Accordingly, this Court grants attorney fees for Reclaim and the Committee, to be apportioned equally between the SOS and the Legislature, inasmuch as both were active in opposing the petition.” *See* Decision dated August 23, at p. 46. Under the authority of that finding, Petitioners now move this Court to order Respondents and Intervenors to pay \$ 150,947.50 for Petitioners’ reasonable attorneys’ fees and \$ 918.50 in costs in this matter to be shared equally between them.

I. The reasonable attorney fees of representing the Petitioners.

Idaho Rule of Civil Procedure 54(e)(3) provides that the Court must consider the following twelve factors in determining the amount of a reasonable attorney fee. The application of these factors to this case are discussed in turn.

(A) The time and labor required.

Timesheets in six-minute increments were maintained contemporaneously for all the work performed in connection with this case, which are attached as exhibits to the declarations of Deborah A. Ferguson and Craig H. Durham. In total, 332.20 hours were expended. The fees are broken down as follows:

Deborah A. Ferguson: 240.90 hours at \$475 an hour = \$ 114,427.50

Craig H. Durham: 91.30 hours at \$400 an hour = \$ 36,520.00

Total hours billed= 332.20 Total fees = \$ 150,947.50

This work was reasonably incurred and necessary to advance and win this case.

After conducting extensive legal and historical research, the Petitioners filed a petition which attached eight detailed declarations (and later two additional declarations) to fully inform the Court of the facts supporting its petition, and an extensive memorandum setting forth its legal arguments. Petitioners opposed the intervention of the Legislature and then responded to the separate and distinct briefing of the Attorney General's Office and the private counsel retained by the Legislature which raised different and sometimes contradictory defenses. It was publicly reported that the Legislature hired outside counsel to focus on different points of law in its defense of SB 1110 than those asserted by the Attorney General's Office.¹ Senate President Pro-Tem Chuck Winder, R-Boise is quoted as stating: "We felt that it was important that we have outside counsel that represented the Legislature, and you'll get a broader defense of the existing legislation." *Id.* Petitioners also responded to the Attorney General's motion to strike which sought to gut large portions of the Petitioners' initial declarations, and then

¹ https://www.idahopress.com/news/local/legislative-leaders-hire-own-lawyers-to-defend-new-initiative-law/article_ffee077d-c98e-5b98-9839-f9ef4a05b8b7.html

another joint motion joined by the Intervenors to strike the supplemental declarations of the Petitioners. The Respondents also filed their own supplemental declaration.

The time spent by Petitioners' counsel strategizing, researching, briefing and arguing this case was reasonable and necessary against the "double teaming" of Respondents' and Intervenors' myriad claims and defenses. *See* supporting declarations of Deborah A. Ferguson, Craig H. Durham, Howard Belodoff and Richard Eppink.

(B) The novelty and difficulty of the questions.

The proper constitutional standard to be applied when reviewing legislation that impacts the people's initiative and referendum rights was a matter of first impression. Decision at 30. The Court concluded "that the Legislature has acted beyond its constitutional authority and violated the people's fundamental right to legislate directly." *Id.* at 26. Based on the evidence Petitioners provided to the Court, it also found an unmistakable pattern by the legislature of constricting the people's initiative and referendum powers after they successfully use it. *Id.* at 42. The questions presented to the Court for its determination were both novel and difficult.

(C) The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law.

As set forth in the declarations of counsel for the Petitioners, Deborah A. Ferguson and Craig H. Durham have extensive experience litigating civil rights and public interest cases against governmental entities who violate the rights of citizens

under the law. Their law firm focuses on impact litigation in the hope that it can help individuals in Idaho beyond their immediate clients. Many of their cases have resulted in decisions that have established new case precedent in Idaho's state and federal courts and the Ninth Circuit Court of Appeals and some have involved issues of national importance as set forth in their declarations. The depth of their experience is also acknowledged in the declarations of Howard Belodoff and Richard Eppink, two highly respected and experienced Idaho civil rights attorneys.

(D) The prevailing charges for like work.

Ms. Ferguson requests an hourly rate of \$475 an hour, and Mr. Durham requests an hourly rate of \$400. This is in keeping with the hourly rates other courts have awarded attorney fees to them, and is also supported in the declarations of Mr. Belodoff, and Mr. Eppink.

The best evidence of the prevailing charges for "like work" is what the Legislature paid its private counsel for its work in this very case. It has been publicly reported that the Legislature's private attorney "discounted" his rate to \$470 per hour to oppose this case.² The total fee that the Legislature has paid its counsel for this matter,

² Quoting Senate President Pro-Tem Chuck Winder, R-Boise as stating: "And I think that is a discounted rate, that's below his normal rate."

https://www.idahopress.com/news/local/legislative-leaders-hire-own-lawyers-to-defend-new-initiative-law/article_ffee077d-c98e-5b98-9839-f9ef4a05b8b7.html

according to public reporting based on public records requests, is approximately \$180,000.³ If that fee is reasonable for the State of Idaho to pay for one half of its defense in a losing effort, the lower request of Ferguson Durham for a winning one is eminently reasonable. This is underscored by the fact that Ferguson Durham spent fewer hours than Intervenors' counsel, while being required to produce more work product to advance and win this case.⁴

(E) Whether the fee is fixed or contingent.

There are no contingency fees in constitutional cases, as there is no potential of a monetary award a client can share with counsel. Neither of the Petitioners in this case were in a financial position to enter into a hourly rate agreement with their counsel, and could not have pursued this action had they been required to do so.

³ "As of July 24, lawmakers had paid nearly \$180,000 in taxpayer funds to the Boise law firm of Holland & Hart for legal fees in the case."

https://www.idahopress.com/news/local/idaho-supreme-court-overturms-restrictive-initiative-law/article_fd0a93d0-ac74-55fd-9c4a-136c7c76300e.html

This is in addition to the \$1.2 million dollars paid in the past two years by the Legislature to Mr. Myers. <https://www.idahostatesman.com/news/politics-government/state-politics/article251748183.html>

⁴ Intervenors' fee of \$180,000 at a rate of \$470.00 an hour would represent 383 hours of work. However it is likely that the other attorneys of record from his firm who appeared in the case billed at a lessor rate than Mr. Myers. It stands to reason more hours were billed than the estimated 383 hours, which assumes for illustrative purposes all the work was performed by Mr. Myers at a rate of \$470 an hour and none by associates at a lower rate.

(F) The time limitations imposed the circumstances of the case.

The Court exercised its original jurisdiction in this case because the Court found that “this case presents an issue of a vital and urgent constitutional nature.” Decision at 22. Accordingly, the Court issued an order that expediated and compressed the timing of briefing and oral argument. The petition was filed on May 7 and the case was heard by the court on June 29, within a seven week frame. This necessitated counsel forgoing other paying matters to focus on the expedited demands of this important case.

(G) The amount involved and the results obtained.

The Court held that “[t]he contested legislation constituted a grave infringement on the people’s constitutional rights, making this matter vital to the public interest to people across Idaho.” Decision at 46. What was at stake was far greater than any amount of money. The results obtained were excellent and unequivocal. The Court’s unanimous finding that the contested legislation was unconstitutional provides a much-needed course correction for the Legislature and protects the right of Idaho citizens to direct democracy now and for the generations to come.

(H) The undesirability of the case.

While constitutional challenges are not *per se* undesirable cases, most are never pursued, because it is too expensive for most individuals, businesses, or organizations such as Petitioners’ entities to file an action to vindicate their rights. Most of these

groups cannot justify the expense or simply lack the resources to mount a constitutional challenge to stop government misconduct. And should a challenge be brought, the government, unlike the challenger, has unlimited resources to defend its actions, as demonstrated by the State of Idaho's legal defense in this action which summoned a large team of legal counsel to mount two simultaneous but distinct defenses. It also has the ability to access and to fund with taxpayer dollars both the Legislative Legal Defense Fund and the general Constitutional Defense Fund ⁵ (ironically named) when it violates the constitutional rights of its citizens.

This creates an incentive for some governmental entities and agencies to take an aggressive position they can reasonably assume will never be challenged, or scrutinized by a Court. The Legislature here appears to have been emboldened when it expected that any consequences or accountability for its actions would be remote or nonexistent.

(I) The nature and length of the professional relationship with the client.

In 2020 at the beginning of the pandemic, Ferguson Durham represented Reclaim

⁵ The Legislative Legal Defense Fund is separate from the state's Constitutional Defense Fund, which has spent millions in recent years to pay the other sides' attorney fees in major lawsuits that the state has lost. That fund is controlled by both the legislative and executive branches of state government. See https://www.idahopress.com/news/local/legislative-leaders-hire-own-lawyers-to-defend-new-initiative-law/article_ffee077d-c98e-5b98-9839-f9ef4a05b8b7.html

Idaho pro bono in an action which successfully obtained a preliminary injunction from the federal district court in Idaho, and was upheld by the Ninth Circuit. Reclaim Idaho was on track and in the final push of signature gathering to put its educational initiative on the 2020 ballot. This is the same initiative that it is advancing currently for the 2022 ballot when it was forced to cease its signature collection after Governor Little issued a stay at home order. Reclaim Idaho asked for additional time or the ability to collect signatures electronically to compensate for the time lost because of the Governor's order and was given the right to collect the remaining signatures electronically through an injunction. The State sought an emergency stay of the injunction from the United States Supreme Court, which was granted. That effectively killed the case as the time had run out for Reclaim Idaho to qualify the education initiative for the 2020 ballot. The initiative effort began over this spring, starting from scratch. Ferguson Durham agreed to represent Reclaim Idaho again, along with the Committee after the legislature passed the unconstitutional laws to thwart direct democracy in Idaho which would have prevented all initiatives and referendum from appearing on the ballot.

(J) Awards in similar cases.

The supporting Ferguson, Durham, Belodoff and Eppink declarations highlight fee awards in similar cases.

(K) The reasonable cost of automated legal research.

This factor is not applicable to this case as Ferguson Durham pays for its on-line legal research service with an annual contract for unlimited use.

(L) The Court may consider any other factor which the Court deems appropriate in the particular case.

The attorney fees were awarded by the Court under the private attorney general doctrine. The factors that it considered and found were fulfilled in the circumstances of this case are: (1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, and (3) the number of people standing to benefit from the decision." Citing *Ada Cnty. v. Red Steer Drive-Ins of Nevada, Inc.*, 101 Idaho 94, 100, 609 P.2d 161, 167 (1980) (citing *Serrano v. Priest*, 569 P.2d 1303, 1314 (Cal. 1977)). The Court should also consider these factors in addition to the factors set forth in Idaho Rule of Civil Procedure 54(e)(3) when determining the attorney fees and costs in this matter.

II. The costs incurred by the Petitioners.

The Petitioners incurred only two costs in this action which were paid by Reclaim Idaho and for which counsel seeks reimbursement on Reclaim Idaho's behalf:

Court filing fee for Petition:	\$ 76.00
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Services of Becker & Gallagher Legal Publishing ⁶ :	\$ 842.50
Total Costs:	\$ 918.50

III. Conclusion

Very important and fundamental constitutional rights for all Idahoans were vindicated and protected by this action. Counsel for the Petitioners asks the Court to award a full recovery of their reasonable and necessary attorney fees and costs.

Respectfully submitted,

/s/ Deborah A. Ferguson
Deborah A. Ferguson

Craig H. Durham
Ferguson Durham PLLC

⁶ Becker & Gallagher's invoice is attached as Exhibit A. This firm provided the final formatting and citation proof for the briefing. This service is employed by Ferguson Durham to enhance the quality of the firm's work product when it files consequential briefs with the Idaho Supreme Court, the Ninth Circuit Court of Appeals or the U.S. Supreme Court. Petitioners acknowledge this is a discretionary cost under IRCP 54(d)(1)(D) and respectfully ask for reimbursement of this cost on behalf of Reclaim Idaho which paid this expense.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of September, 2021, I electronically filed the foregoing document using the iCourt E-File system, and emailed a copy to counsel for Respondents at:

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Exhibit A

INVOICE

Becker Gallagher Legal Publishing, Inc.

8790 Governor's Hill Drive
Suite 102
Cincinnati, OH 45249
(513) 677-5044

PAID
05/19/2021

Invoice No ID-21002
Date 5/18/2021
Terms Due On Receipt

Bill To

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IDAHO SUPREME COURT

Petition -
Reclaim Idaho, and the Committee v. Lawrence Denney

Quantity	Description	Rate	Amount
	Petition and Brief in Support - Base Fee	350.00	350.00
5	Pages of Tables - Generate table of contents and table of authorities	35.00	175.00
56	Pages Proofread	5.00	280.00
0.5	Hours of Edits/Revisions	75.00	37.50
	daf@fergusondurham.com		

Total Amount Due \$842.50