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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.

Case No. 48784-2021

BRIEF IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION AND APPLICATION FOR DECLARATORY JUDGMENT

ORIGINAL JURISDICTION

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Introduction and Nature of the Case

The people of Idaho retained for themselves a constitutional right to make or repeal laws. At the same time, they gave the legislature a trust responsibility to enact the methods and procedures for exercising the right. Over the years, the legislature has exploited its limited power, imposing increasingly byzantine and unreasonable requirements for the proponents of initiatives or referendums to qualify their petitions for the ballot. This campaign of death-by-a-thousand-cuts reached its apotheosis in this 2021 legislative session, when the legislature passed Senate Bill 1110, which contains the most stringent requirements for signature collecting in the nation. Now, proponents must get the valid signatures of at least 6% of registered voters in each of Idaho's 35 legislative districts. And for referendums, that must be done in a mere 60 days. These requirements unreasonably burden the core fundamental right and are unconstitutional.

Governor Little has invited the Idaho judiciary to pass on the constitutionality of SB 1110.[1] The Petitioners agree. Reclaim Idaho and the Committee to Protect and Preserve the Idaho Constitution bring this original action seeking a declaration from the

[1] In his April 17, 2021 letter signing SB1110 into law, Governor Little frankly acknowledged SB1110 may amount "to an impermissible restriction in violation of our constitution" but thought this issue should be put before the Court as it was, in his opinion "a question for the Idaho judiciary to decide." *See* April 17, 2021 Letter of Bradley Little to Hon. Janice McGeachin, *at* https://tinyurl.com/ymkcbz6y.

Court that provisions of Idaho Code § 34-1805(2) and Idaho Code § 34-1813(2)(a), pertaining to initiatives and referendums, violate Article III, § 1 of the Idaho Constitution. They further seek a writ from this Court prohibiting the Secretary of State from enforcing these unconstitutional provisions.

Statement of the Facts

The People's Right to Make and Repeal Law, and the Legislature's Attempts to Take it Away

The Idaho Constitution has direct democracy bred deep into its bones. The people are paramount: "[a]ll political power is inherent in and starts with the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform or abolish the same whenever they may deem it necessary." Idaho Const., art. I, § 2.

In 1912, in the wake of populist reform measures sweeping the West, the people reserved to themselves the right to reject *any* measure passed by the legislature (the referendum) and the right to propose and enact laws (the initiative). Idaho Const., art. III, § 1. This is a broad right. It does not limit the type or subject matter of an initiative or referendum. It is a right that is expressly "independent of the legislature." *Id*. The people left it to the legislature to set the "conditions" and "manner" under which the right would be exercised. *Id*. In doing so, the people conferred upon the legislature a trust responsibility of the highest order – essentially a fiduciary duty. That is, the people

retained the unqualified substantive right to make or repeal law, and the legislature was to enact reasonable procedures to enable this right, without infringing upon it.

Unfortunately, there was an inherent conflict between the legislative power the people conferred upon the legislature and the legislative power retained by the people. From the start, concerns were raised about the legislature's fidelity to provide the people with the ability to exercise their legislative power. When the legislature agreed in 1911 to submit the initiative/referendum constitutional amendment for a vote in 1912, the measure did not outline a procedure, leaving it to the legislature to do so. Idaho Const., art. III, § 1. An article in the February 5, 1911 issue of the Idaho Statesman explained that supporters of the amendment believed that "what the enemies of the initiative and referendum proposed to do in Idaho, put into the constitution a provision for the initiative and referendum and there let it rest without laws to put it into operation." *See* Appendix C to Petitioners' Brief. It describes this strategy as an effort to "bottle up the initiative and referendum." *Id*.

In the years since, the legislature appears to have begrudged the right of the people to legislate and endeavored to make it extremely difficult. On three occasions Idaho governors have vetoed the legislature's attempts to make these constitutional rights a nullity by imposing excessive restrictions on their use.

It began in 1915, when the legislature passed a bill that would have set the signature threshold at 15%, requiring that number of signatures be obtained from each

and every county, made it a crime for any volunteer to carry a petition for signatures, and required that the petitions remain at the offices of state officials and be signed in the presence of a judge or other state official. Verified Petition, Exhibit 1, Declaration of Ben Ysursa, ¶ 15, Exhibit A.[2] Governor Alexander vetoed the legislation and said the bill would be "fatal" to the use of the initiative or referendum. *Id*. He noted that no other state imposed these patently unreasonable requirements. *Id*.

After being chastened by the 1915 veto, the legislature chose to do nothing. It did not pass any enabling legislation to set the "conditions and manner" for the people to exercise the right for nearly 20 years. Ysursa Decl., ¶ 16. The right lay dormant.

In 1933, the legislature finally enacted signature requirements. Ysursa Decl., ¶ 16. The creation of the Idaho Fish and Game Commission was the first law passed by initiative in 1938 by an overwhelming majority of 76% of voters. *See* Idaho Secretary of State, at sos.idaho.gov/elect/inits/inithist.htm (setting out a historical list of all initiatives and referendums that have qualified for the ballot in Idaho.)

From 1933 to 1997 – a 64-year period – the rules required signatures from 10% of the votes cast in the prior gubernatorial election, with no geographical requirement.

During this period, in 1984, another gubernatorial veto stopped the legislature's attempt to make this right a nullity by doubling the number of signatures required from

[2] All declarations cited in this brief have been attached as exhibits to the Verified Petition. They will hereafter be cited by the name of the declarant.

10% to 20% to put an initiative on the ballot. Ysursa Decl., ¶ 17, Exhibit B. Within 24 hours the legislature introduced this bill without a hearing, voted on it, and sent it to Governor Evans's desk. *Id*. In his veto letter, Governor Evans noted that the bill would make Idaho's initiative requirement more restrictive than any other state in the nation. *Id*. He emphasized that "*the legislature's authority to regulate the 'conditions' and 'manner' of the exercise of the people's power to initiate legislation does not extend to emasculating the people's initiative power*. Idaho should not have the dubious distinction of enacting the nation's most restrictive initiative procedure." *Id*. (italics added). To underscore his point, Governor Evans said the right of the initiative and referendum would become a "dead letter" if the bill became law. *Id*.

In 1997, the legislature reacted to a successful term-limits initiative enacted by Idaho voters in 1994 and retaliated by placing additional restrictions on these rights. 1997 Session Laws, ch. 266, sec. 5, p. 759. It passed legislation requiring signatures from 6% of *registered* voters, and for the first time imposed a geographical requirement requiring that valid signatures be gathered from 6% of registered voters in each of at least 22 counties.[3] This geographical requirement was later struck down as

[3] While at first blush 6% of registered voters may appear to be an easier threshold than 10% of votes cast in the previous general election, in fact the opposite is true. Moncrief Decl., ¶ 6.

unconstitutional on equal protection grounds. *Idaho Coalition United for Bears v. Cenarrusa*, 342 F.3d 1073 (9th Cir. 2003).

From 2001 until 2013, the requirement was 6% of registered voters, again without any geographical limitations. Verified Petition, ¶ 23.

In 2013, the legislature reacted again to the successful referendum campaign against wildly unpopular educational laws (the "Luna Laws") by creating more restrictions yet: 6% of registered voters statewide and 6% of the registered voters in each of 18 legislative districts. These are exceedingly difficult standards. Mayville Decl., ¶ 58; Ysursa Decl., ¶ 13.

Despite the geographical requirement of qualifying 18 legislative districts, Reclaim Idaho mounted an extraordinary volunteer campaign – perhaps the largest in Idaho's history – and expanded Medicaid coverage for Idaho's working poor in 2018. Mayville Decl., ¶ 16. The initiative won the majority vote in 35 of Idaho's 44 counties, with strong rural support. Mayville Decl., ¶ 62. The citizens of Idaho embraced this measure at the ballot, after the legislature had refused for seven consecutive years to accept the federal funds to expand health coverage for its citizens. *Id*.

But the legislature was not done yet. It struck back again, in the wake of the successful Medicaid initiative to make the law even harder, in its quest to create standards that cannot be met despite the determined effort of its citizens. In 2019 the legislature attempted to expand the geographical requirement, and the percentage of

signatures collected, while shortening the time to collect them.[4] This resulted in a third gubernatorial veto of the legislature's attempt to nullify the citizens' constitutional right to make and repeal laws. Ysursa Decl., ¶ 18, Exhibit C. Governor Little expressed his serious concerns about the constitutionality of Senate Bill 1159 and vetoed the bill. *Id*.

The following year, in 2020, the legislature took more of a stealth approach. It made many amendments to Title 34, chapter 18 which further undermined and burdened the citizens' right to make law "independent of the legislature" as Idaho's constitution explicitly provides. One addition is Idaho Code § 34-1813(2)(a), which is also challenged in this action. 2020 Session Laws ch. 336, sec. 3, p. 978; *see also* Appendix D to Petitioners' Brief. It prohibits any initiatives from taking effect until at least July 1 of the year following its passage at the polls. *Id*. Here, the legislature has provided itself an opportunity to repeal any initiative in the next legislative session, before it ever takes effect.

This year, despite fierce public opposition, the legislature increased the geographical distribution requirement from 6% of registered voters in 18 legislative

[4] Instead of having to gather signatures from more than 6% of registered voters in each of 18 of Idaho's 35 legislative districts, under the proposed bills, proponents would have to get the signatures of at least 10% of registered voters in each of 32 legislative districts. The statewide total of voter signatures would be increased from 6% to 10% of registered voters. And, the signatures would have to be gathered in 180 days, rather than the current 18 months. *See* 2019 House Bill 296; 2019 Senate Bill 1159a.

districts to every legislative district – all 35 – for either an initiative or a referendum.[5] This creates the most restrictive process in the country, *see* Daley Decl., ¶ 9; Moncrief Decl., ¶ 7, an apparent goal for the legislature.

If this unconstitutional power grab of the legislature goes unchecked by the Court, for all intents and purposes, the constitutional right is a dead letter. The legislature will have finally succeeded in robbing Idaho citizens of their sacred power they reserved for themselves 109 years ago to make or repeal law. As noted by a scholar of initiative and referendum rights in America, "[t]here is no better proof that the price of liberty is eternal vigilance than the history of the statewide initiative process in Idaho." David D. Schmitt, *Citizen Lawmakers*, 232 (1989).

Reclaim Idaho and the Committee to Protect and Preserve the Idaho Constitution Seek to Exercise their Rights under Article III, § 1

Reclaim Idaho is a grass roots volunteer organization designed to protect and improve the quality of life of working Idahoans. Verified Petition, ¶ 5. Reclaim Idaho organizes to pass citizens' initiatives and engage in advocacy efforts to build an Idaho where all have access to affordable healthcare, protected public lands, and strong public schools. *Id*.

[5] Governor Little's office received over 4,000 citizen comments on SB1110 after it was sent to his desk, with over 97% of those Idahoans requesting that Governor Little veto the bill. Mayville Decl., ¶ 62.

Reclaim Idaho currently has two initiatives in play. The first is the Initiative Rights Act, which would eliminate the 35-district distribution requirement. Verified Petition, ¶ 39. The second is the Quality Education Act, an initiative to increase funding for Idaho K-12 education. *Id*. Both have been submitted to the Secretary of State for approval and, if qualified, will appear on the 2022 general election ballot. *Id*. Based on its in-depth experience qualifying the Medicaid expansion initiative for the ballot in 2018, Reclaim Idaho believes it is impossible to qualify future initiatives for the ballot under the draconian requirements of the new law. Mayville Decl., ¶¶ 18, 45, 69; Lansing Decl., ¶ 10; Larson Decl., ¶ 7; Mahuron Decl., ¶ 8.

The Committee to Protect and Preserve the Idaho Constitution was created by a group of distinguished citizens to protect the integrity of the Constitution of Idaho. Verified Petition, ¶ 6. It has filed a referendum with the Secretary of State to repeal Senate Bill 1110 for the 2022 general election ballot, if it qualifies. *Id*. at ¶ 41. Like Reclaim Idaho, the Committee believes that Senate Bill 1110 will render the use of both the initiative and referendum a nullity because of the all-district geographical requirement. Verified Petition, ¶¶ 42, 48, 55-57; Ysursa Decl., ¶¶ 8, 9, 21; Moncrief Decl., ¶¶ 8, 12.

ISSUES PRESENTED

I.

Idaho Code § 34-1805(2)'s new requirement that sponsors of citizens' initiatives and referendums must receive the valid signatures of 6% of the registered voters in all 35 of Idaho's legislative districts before qualifying for the ballot violates the people's right to propose initiatives and referendums enshrined in Article III, § 1 of the Idaho Constitution.

II.

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.

III.

Petitioners are entitled to recover their attorney's fees from Respondents under the "private attorney general" doctrine.

THE COURT HAS JURISDICTION

The Idaho Constitution confers original jurisdiction on this Court to issue "writs of mandamus, certiorari, prohibition, and habeas corpus, and all writs necessary and proper to the complete exercise of its appellate authority." Idaho Const., art. V, § 9.

The Court has been willing in recent years to exercise its original jurisdiction when petitioners have "alleged sufficient facts concerning a possible constitutional violation of an urgent nature." *See, e.g.*, *Ybarra v. Legislature of Idaho*, 166 Idaho 902, 906, 466 P.3d 421, 425 (2020) (reviewing a petition brought by the Superintendent of Public Instruction seeking to invalidate appropriation bills related to the legislature's funding and staffing of her department); *Regan v. Denney*, 165 Idaho 15, 20, 437 P.3d 15, 20 (2019) (reviewing a petition alleging that the initiative resulting in Medicaid expansion was unconstitutional); *see also Coeur D'Alene Tribe v. Denney*, 161 Idaho 508, 513–14, 387 P.3d 761, 766–67 (2015) (granting a petition for writ of mandamus and ordering the Secretary of State to certify a law after an invalid gubernatorial veto attempt).

This case fits squarely in that tradition. By recent statutory changes, the legislature has effectively taken away the people's century-old constitutional right to initiate or repeal laws. This petition raises urgent questions related to that fundamental right. Petitioners have filed initiatives and a referendum for the next election cycle. To move forward, they desperately need clarity from the Court as to the constitutionality of SB 1110's amendment to Idaho Code § 34-1805(2) and Idaho Code § 34-1813(2)(a). The legislature itself declared its most recent changes in the law as necessary to address an "emergency" so that the amendments would take effect immediately.

As for a remedy, the petitioners seek a declaration that these laws impose an unconstitutional burden on the people's rights under Article III, § 1, and a writ of

prohibition directed at the Secretary of State from enforcing the unconstitutional provisions. For support that this is an appropriate vehicle in which to seek this type of relief, the Court need look no further than *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 15 P.3d 1129 (2000). There, as here, the petitioners sought a writ from the Court prohibiting the Secretary of State from enforcing provisions in a newly enacted law that the petitioners claimed was unconstitutional. 135 Idaho at 123, 15 P.3d at 1132. There, as here, the petitioners asked for a declaration that portions of the new law were unconstitutional. *Id*.

The Court has original jurisdiction. It should exercise its jurisdiction, address the petition on the merits, and grant the requested relief.

ARGUMENT

I.

Idaho Code § 34-1805(2)'s new requirement that sponsors of citizens' initiatives and referendums must receive the valid signatures of 6% of the qualified electors in all 35 of Idaho's legislative districts before qualifying for the ballot violates the people's right to propose initiatives and referendums enshrined in Article III, § 1 of the Idaho Constitution.

A. Introduction

In 2021, Senate Bill 1110 amended Idaho Code § 34-1805(2) to require any proponent of an initiative or referendum to get a minimum of 6% of valid registered

voter signatures from each and every one of Idaho's 35 legislative districts. Appendix A. This amendment places a severe and unreasonable burden on the people's fundamental right to propose or repeal legislation. It is pretextual and unnecessary. There is no history in Idaho of ballot initiatives being proposed by narrow special interests from one corner of the state. Even to the extent that the State may have some interest in diverse geographical support, the rules already more than adequately serve that interest. And there can be no legitimate state interest in giving any particular minority segment of the population veto power over ballot access. Every registered voter, urban or rural, has the right to vote upon any ballot measure.

This amendment has made the people's right effectively a dead letter, no more so than for grassroots, volunteer-driven campaigns. The Court must strike it out of the statute.

B. The Right is Fundamental, and Strict Scrutiny Applies.

When the people reserved the right to themselves, they did so "independent of the legislature," subject only to the legislature's limited gatekeeping role for enacting reasonable conditions by which the right could be exercised. Idaho Const., art. III, § 1. It has long been clear that "[t]he legislature cannot violate the reserved right of the people to propose laws and enact them at the polls." *Gibbons v. Cenarrusa*, 140 Idaho 316, 320, 92 P.3d 1063, 1067 (2002). But what standard this Court must apply when reviewing legislation that impacts the people's right appears to be a matter of first impression.

In *Dredge Mining Control – Yes!, Inc., v. Cenarrusa*, 92 Idaho 480, 484, 445 P.2d 655, 659 (1968), the Court upheld a statutory requirement that only registered voters are eligible to sign an initiative petition. *Id*. The Court held that "the statutory scheme set up by the legislature, although restrictive and perhaps cumbersome, is reasonable and workable." 92 Idaho at 484, 445 P.3d at 659 (citations omitted). Although the Court looked to reasonableness as a touchstone, it was not asked to develop a specific constitutional test. *Dredge Mining* is of dusty vintage and should have limited force.

This Court has more recently sharpened the contours of its state constitutional jurisprudence. Now, in any case involving state constitutional provisions, the initial question for the Court is whether the constitutional right at issue is "fundamental." *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 125, 15 P.3d 1129, 1133 (2000). A right is fundamental "if it is expressed as a positive right, or if it is implicit in Idaho's concept of ordered liberty." 135 Idaho at 126, 15 P.3d at 1134 (citing *Idaho Sch. For Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 581–82, 850 P.2d 724, 732–33 (1993).

In *Van Valkenburgh*, the Court found that the right at issue there – the right to vote – was fundamental "because the Idaho Constitution expressly guarantees the right of suffrage." 135 Idaho at 126, 15 P.3d at 1134. Once the Court finds a constitutional right to be fundamental, it then applies strict scrutiny to the challenged legislation. *Van Valkenburgh*, 135 Idaho at 126, 15 P.3d at 1134. Under that exacting standard, "a law that

infringes on a fundamental right will be upheld only where the State can demonstrate that the law is necessary to promote a compelling state interest." *Id*. (citations omitted).

1. The Right is Expressly Guaranteed and is Independent of the Legislature.

Van Valkenburgh provides the appropriate template. Like the right to vote in that case, the right to initiate or repeal laws is "expressly guaranteed" by Article III, § 1 of the Idaho Constitution. It is a positive right because it is a right of *action* that the people have retained – to legislate – rather than a right against government action. It is also implicit in Idaho's concept of ordered liberty, as it flows in a straight line from Article I, § 2's foundational principle that "all political power is inherent in the people." The initiative and referendum were a small portion of the people's all-inclusive political power that they chose to reserve for themselves.

The Court can also look to other states with a similar right in their state constitutions. They have had little difficulty finding it to be fundamental. *See*, *e.g.*, *Gallivan v. Walker*, 54 P.3d 1069, 1081 (Utah 2002) ("[t]he reserved right and power of initiative is a fundamental right under article VI, section 1 of the Utah Constitution); *Loonan v. Woodley*, 882 P.2d 1380, 1384 (Colo. 1994) ("[t]he right of initiative and referendum, like the right to vote, is a fundamental right under the Colorado Constitution.").

The fundamental nature of the right, and the corresponding relative weakness of the legislature's power to set "conditions" on it, is further supported by the inclusion of

the "independent of the legislature" clause. Idaho Const., art. III, § 1. Each word in a constitution or statute must be given its plain meaning, and each word must be construed so as not to be redundant or superfluous. *E.g.*, *In Re Doe*, 47918, 2021 WL 1201442, at *3 (Idaho Mar. 31, 2021); *BHC Intermountain Hosp., Inc. v. Ada Cnty.*, 150 Idaho 93, 95, 244 P.3d 237, 239 (2010). No phrase should be disregarded as surplusage: "[i]f possible, every word and every provision is to be given effect. None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 174 (2012). The drafters of Article III, § 1 included this provision for a reason. The Court must give it meaning and force.

To ascertain the ordinary meaning of an undefined term the Court has often turned to dictionary definitions. *Marek v. Hecla, Ltd.*, 161 Idaho 211, 216, 384 P.3d 975, 980 (2016). The word "independent" is defined by the Merriam-Webster's Dictionary as "not dependent, not subject to control by others: self-governing." Black's Law Dictionary (11th ed. 2019) defines independent as "[n]ot dependent; not subject to control, restriction, modification, or limitation from a given outside source." *Accord Yenter v. Baker*, 248 P.2d 311, 314–15 (Colo. 1952) (construing "independent of the general assembly" to mean "not dependent; not subject to control, restriction, modification, or limitation from a given outside source.")

Over the decades, this Court has grappled around the edges of this specific phrase. Chief Justice Holden opined that the Court should give meaning to these words in his dissent in *Luker v. Curtis*, 64 Idaho 703, 709, 136 P.2d 978, 984 (1943) (Holden, J., dissenting). Likewise, Justice Kidwell saw the need for the Court to give clarification to the clause in his special concurrence in *Gibbons v. Cenarrusa*, 140 Idaho 316, 321, 92 P.3d 1063, 1068 (2002) (Kidwell, J., concurring). There, he passionately wrote:

> '[I]ndependent of the legislature' applies to the people's *power* and *ability* to propose laws through the initiative process, free from interference by the legislature. A proposed initiative cannot be amended, reviewed, or thwarted by the legislature. The initiative power is reserved to the people and is to be exercised without intrusion by the legislature. It is this power reserved to the people that this Court must adamantly preserve and protect.

Id. (italics in original).

These wise words should be well taken. The Court should now give the phrase the force of its plain meaning: the Constitution explicitly prohibits the legislature from interfering or controlling the people's independent power to make and repeal law in Idaho, a right that is separate and apart from the legislature.

The drafters' inclusion of the phrase matters for yet another reason. It also speaks to their intent as to the corresponding limited scope of the legislature's power to set the conditions by which the right can be exercised. If the clause "independent of the legislature" means anything, it must at least mean that the legislature's role in setting conditions is ancillary, subservient, and designed to facilitate – not hinder – the people's ability to exercise their right. *See* Scalia & Garner, at 176 (courts should avoid construing

a provision that leaves some word altogether redundant; two provisions should be construed to leave both with some independent operation); *see also, League of Women Voters of Michigan v. Secretary of State*, 952 N.W.2d 491, 507 (Mich.App. 2020) ("while the [state] Constitution places the duty of implementation of initiative and referendum provisions on the Legislature, it does so incident to a right to the people.")

For these reasons, the right at stake is fundamental. The Court should apply strict scrutiny to the all-district geographical requirement now found in Idaho Code § 34-1805(2).

C. The Extreme Geographical Distribution Requirement in Idaho Code § 34-1805(2) Unconstitutionally Burdens the Right.

Over time the legislature has aggrandized its limited power to build a higher and higher wall that petitioners must try to scale before their petitions can qualify for a vote on the ballot. The 35-district requirement – at 6% of registered voters – is now the most extreme requirement in the country. Daley Decl., ¶ 9; Moncrief Decl., ¶ 7.

Requiring petitioners to get the valid signatures of 6% of registered voters in each of Idaho's 35 legislative districts imposes an insurmountable burden. This is true with 18 months to collect valid signatures for initiatives. It is doubly so for a mere 60 days to qualify a referendum. As petitioners have demonstrated in their declarations and submissions to this Court, it has made compliance effectively impossible for even the most diligent of grassroots organizers. The declarations of Mayville, ¶¶ 35, 69, Lansing, ¶ 10, Nettinga ¶ 31, Larson ¶ 7, and Mahuron ¶ 8 provide the Court with the

first hand "boots on the ground" experience of these passionate volunteers. This is also the opinion of experts with extensive political experience concerning the initiative and referendum. Ysursa Decl., ¶¶ 8, 9; Daley Decl., ¶ 9; Moncrief Decl., ¶¶ 4, 8. By creating an all-district requirement, the legislature has crafted a statute that will guarantee defeat of the citizens' ability to get either an initiative or a referendum on the ballot. The legislature has a trust responsibility to provide reasonable procedures for the exercise of the people's legislative power that it has breached.

1. The Law is Not Necessary to Promote a Compelling State Interest

The State will no doubt claim in response that Idaho has an interest in requiring petitioners to show support in both urban and rural areas across the state before a matter is placed on the ballot. Mayville Decl., ¶¶ 53-55. The scope and urgency of that interest is exaggerated, to say the least. Idaho's history of initiative and referendums provides no evidence that urban or rural voices have been ignored. Mayville Decl., ¶¶ 59, 61-63. The risk of cluttering the ballot with pet projects supported by only a few special interests is non-existent in Idaho. Ysursa Decl., ¶ 11.

For years, Idaho required that petitioners only get 10% of the citizens who voted in the prior gubernatorial election in the state. That system was straightforward and worked well. It has never been easy to qualify for the ballot. Only 27 did from 1933 to 1997, the 64-year period this standard was in effect. *See* Secretary of State, at sos.idaho.gov/elect/inits/inithist.htm. The legislature imposes absolutely no rule upon

legislators to demonstrate geographic support for any legislative proposal they wish the legislature to consider under the legislative power delegated by the people to the legislature. Ysursa Decl., ¶ 22.

Given that a fundamental right is at stake, a regulation that is intended to promote an interest in geographical distribution must be narrowly tailored to achieve that end. Once that is accomplished, the law must go no further. *See Van Valkenburgh*, 135 Idaho at 126, 15 P.3d at 1134 (holding that a law will fail under strict scrutiny unless it is *necessary* to further a compelling state interest); *see also Hargesheimer v. Gale*, 294 Neb. 123, 134 (Neb. 2016) (recognizing "that the right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter"); *see also Loonan v. Woodley*, 882 P.2d 1380, 1384 (Colo. 1994) (holding that a liberal construction in favor of the people is required).

Senate Bill 1110 was not tailored at all, much less narrowly so. Even if there is a legitimate interest in some modicum of urban and rural support, there is no need to require the unanimous support of a segment of voters in *every* legislative district to meet that goal. Many of Idaho districts mirror or duplicate the urban or rural character of other districts. Districts are not snowflakes, each unique unto themselves. More to the point, the previous iteration of the law required petitioners to get support from at least 6% of registered voters in 18 of the 35 legislative districts. In a rural state like Idaho, a requirement that petitioners reach a threshold of support in half of the legislative

districts *necessarily ensures* that both urban and rural voices will be heard. This was a key holding of *Ryan Isbelle v. Lawerence Denney*, where the federal court found that the previous version of Idaho Code § 34-1805 "ensures that ballot initiatives brought in Idaho enjoy broad support—not in the magnitude of the number of signatures, but in the breadth of where those signatures come from." *Isbelle v. Denney*, 1:19-CV-00093-DCN, 2020 WL 2841886, at *5 (D. Idaho June 1, 2020).

And that has been exactly the petitioners' experience. Reclaim Idaho's Medicaid expansion initiative drew support from across the state and broad support from 35 of 44 counties at the ballot, most of which were rural. Mayville Decl., ¶ 62. Some of the largest vote totals came from very rural areas and from every part of the state. *See id*. at Exhibit D (map attached to Mayville Declaration that dramatically illustrates that support was from across the state). Rural voters were heard, and heard loudly, in support of that successful initiative.

2. The Law Gives Veto Power to a Tiny Minority

The new law burdens petitioners in yet another way. Even if a campaign were to get the required number of signatures in 34 districts, and gets close in the final one, that single district retains a heckler's veto over an overwhelmingly popular initiative. Ysursa Decl., ¶ 23. More troubling, the requirement empowers well-funded opponents of an initiative or referendum to focus on one legislative district to tank the effort. Daley Decl., ¶ 17; Mayville Decl., ¶¶ 70-74. Proponents must put forth maximum effort in all

districts while opponents can target one. It is contrary to both the letter and spirit of Article III, § 1 to give a small and unpopular minority veto power that keeps a popular petition off the general election ballot.

The legislature has also made it easier to exercise this heckler's veto by an amendment to Idaho Code § 34-1803B(2). That amendment further erodes the right of citizens to place an initiative or referendum on the ballot by greatly increasing the ease of removing signatures from a petition. This amendment allows signatories to electronically remove their signatures by a signed statement in an email request to the county clerk. Idaho Code § 34-1803B(2); Daley Decl., ¶¶ 16-17. Creating this convenience makes removal far more likely. Ironically, at the same time, this year the legislature also specifically banned the use of electronic signatures to sign a petition with an amendment to Idaho Code § 34-1807, adding another new weapon in the legislature's war against the use of the initiative or referendum by Idaho's citizens.

Providing an easy method for signature removal, coupled with an all-district geographical requirement is especially perilous to initiative rights. Mayville Decl., ¶¶ 72-73; Daley Decl., ¶ 17. It creates the very real threat that after the deadline has passed to turn all petitions into the county clerks for verification, opponents of the initiative can target a district and seek the removal of signatures, so that the proponent no longer meets the 6% requirement. This is not a far-fetched hypothetical, but an effective strategy which has been employed in other jurisdictions to defeat a popular

initiative after the required number of signatures had been gathered. *E.g., Count My Vote, Inc. v. Cox*, 452 P.3d 1109, 1112 (Utah 2019)

* * *

This extreme requirement, the harshest in the country, is not necessary to promote an alleged state interest in requiring a diversity of geographical support. It is not narrowly tailored. It significantly burdens the people's right while empowering a sliver of the state population or special interests to scuttle otherwise popular grass roots initiatives or referendums. It is unconstitutional.

3. The Law is Unreasonable and Unworkable

This would be equally true under a more relaxed standard than strict scrutiny. Petitioners have explained why *Dredge Mining* is not authoritative and why *Van Valkenburgh* is instructive. But if this Court were to dust off *Dredge Mining* and look to vague terms like "reasonableness" and "workability," Idaho Code § 34-1805(2) still does not pass muster because it is unreasonable and unworkable.

Proponents of an initiative or a referendum should be able to meet conditions for ballot access if they are reasonably diligent and receive a modicum of voter support. Here, Petitioners have established that the new standards are effectively impossible to meet for grassroots and volunteer groups even through an extraordinary or superhuman effort. Nettinga Decl., ¶ 31; Mayville Decl., ¶¶ 18, 45, 69; Lansing Decl., ¶ 10; Larson Decl., ¶ 17.

On the other side of the ledger, as petitioners have argued above, it is not necessary to require signatures from every legislative district to promote a claimed interest in geographical support before an initiative or referendum qualifies for the ballot. An extreme burden weighed against a non-existent need for imposing that burden equals an unreasonable restriction on the people's right.

Under any standard of review, the extreme geographical distribution requirement in Idaho Code § 34-1805(2) violates Article III, § 1 of the Idaho Constitution. This Court should issue a writ prohibiting the Secretary of State from enforcing the clause that the requisite number of signatures be from "each of the thirty-five (35) legislative districts" as to petitions that are submitted to him for review and approval.

II.

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.

The legislature has curtailed and burdened the people's initiative right in a second way. In the 2020 Session, it amended Idaho Code § 34-1813 to include a provision that no initiative can take effect until July 1 of the year following the election in which it is approved:

> 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.

Idaho Code § 34-1813(2)(a).

Because the people's right is "independent of the legislature," the legislature has no authority to set the date on which legislation proposed by initiative shall take effect. Ysursa Decl., ¶ 24. Instead, the Constitution empowers the people to decide for themselves the urgency of the laws that they have initiated, and, if the initiative qualifies for the ballot, the voters may agree or disagree. The effective date of an initiative remains solely within the province of those who have proposed the legislation. The legislature has no role to play in that process. If the contrary were true, the legislature could set an arbitrary date far into the future that effectively nullifies an initiative passed by popular support.

Moreover, the laws passed by initiative stand on no worse than "equal footing" with laws passed by the legislature. *Westerberg v. Andrus*, 114 Idaho 401, 404, 757 P.2d 664, 667 (1983)(holding that the two methods of passing laws stand on "equal footing.")(citing *Luker v. Curtis*, 64 Idaho 703, 136 P.2d 978 (1943)). The legislature frequently declares that its legislation addresses an "emergency," which allows it to take effect immediately. That right is unreviewable. *Idaho State AFL-CIO v. Leroy*, 110 Idaho 691, 698, 718 P.2d 1129, 1136 (1986) ("the legislature's determination of an

emergency in an act is a policy decision exclusively within the ambit of legislative authority and the judiciary cannot second-guess that decision."). The legislature did not include a clause within Idaho Code § 34-1813(2) to allow the people to declare an emergency for initiatives. It is another unconstitutional intrusion on the people's power in Article III, § 1.

Here again the legislature is making an insidious power-play. The only conceivable purpose it could have in imposing a blanket requirement of a July 1 or later effective date – some eight months after passage – is to give itself the opportunity to repeal a successful initiative in the session before July 1. While it is true that the legislature has the right of repeal already, *see Luker v. Curtis*, 64 Idaho at 708, 136 P.2d at 982, legislators surely know that it is much harder to muster the political will to repeal a law that is then in effect than a law that has not yet begun to take effect.

For these reasons, the Court should issue a writ prohibiting any state official from placing the effective date language from Idaho Code § 34-1813(2) on any initiative that qualifies for the ballot.

III.

Petitioners are entitled to recover their attorneys' fees from Respondents under the "private attorney general" doctrine.

Petitioners request an award of attorneys' fees under the private attorney general doctrine. The Idaho Supreme Court has held that three basic factors are to be

considered in awarding attorneys' fees under the theory of the private attorney general doctrine. They 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." *Ada County v. Red Steer Drive-Ins of Nevada, Inc*., 609 P.2d 161, 167 (Idaho 1980) adopting the standards established in *Serrano v. Priest*, 20 Cal.3d 25, 141 Cal.Rptr. 315, 569 P.2d 1303, 1314 (1977).

Petitioners' case is the exact kind of case for which this doctrine was created. It squarely fulfills each of these criteria. The case has been pursued with the purpose of benefiting the public, to protect the sacred constitutional rights enshrined in Idaho's Constitution for all Idaho citizens. Verified Petition, ¶¶ 5, 6; Mayville Decl., ¶ 8. The right at stake is a fundamental right, so it merits the highest echelon of protection. What is at stake rises above any single policy concern and goes to the core of the right for Idahoans to govern themselves.

Without petitioners' enforcement of this right, no one in the public sector – namely the attorney general – would or could take action to mount this essential challenge. Even if the attorney general wanted to litigate against the constitutionality of SB1110, a conflict of interest would prevent him from doing so, as he is charged with advising and representing the state officials that created it. The attorney general must

defend, rather than prosecute this case. If this fundamental right is to be protected from legislative abuse, private enforcement is essential. It is the only path forward.

The burden on petitioners as a result is high. Their resources have been redirected to take on this challenge and are diverted away from their core missions to instead raise funds and provide support for this litigation. Mayville Decl., ¶ 8. And all the citizens of Idaho, and their children and grandchildren as well as others who will be honored to call Idaho their home in the future, stand to benefit from a decision in favor of the petitioners. This is truly a case brought in the public interest.

Because the very purpose and criteria of the private attorney doctrine is fulfilled in all respects, the cost of protecting the fundamental right of Idaho citizens to make and repeal state law should not be borne by a volunteer group and a non-profit. Instead, the government should shoulder the petitioners' cost of the challenge, as the government has tread on its citizens' rights, enshrined in the Idaho Constitution.

CONCLUSION

Petitioners respectfully ask the Court to declare these provisions unconstitutional and issue a writ prohibiting the Secretary of State or any state official from enforcing them.

Respectfully submitted on this 7th day of May 2021.

/s/ Deborah A. Ferguson
Deborah A. Ferguson

/s/ Craig H. Durham
Craig H. Durham

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CERTIFICATE OF SERVICE

This Brief has been served on the following on this 7th day of May, 2021, by filing through the Court's e-filing and serve system, and separately by email, to:

Brian Kane
Deputy Attorney General
Idaho Attorney General's Office
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Attorney for Respondents

Also hand delivered on this date to:

Lawerence Denney
Secretary of State
Idaho Secretary of State's Office

/s/Deborah A. Ferguson
Deborah A. Ferguson

APPENDIX A

Senate Bill 1110

LEGISLATURE OF THE STATE OF IDAHO

Sixty-sixth Legislature First Regular Session - 2021

IN THE SENATE

SENATE BILL NO. 1110

BY STATE AFFAIRS COMMITTEE

AN ACT

RELATING TO BALLOT INITIATIVES AND REFERENDUM; AMENDING SECTION 34-1805, IDAHO CODE, TO REVISE PROVISIONS REGARDING THE NUMBER OF SIGNATURES REQUIRED TO SIGN A PETITION AND TO MAKE TECHNICAL CORRECTIONS; AND DECLARING AN EMERGENCY.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 34-1805, Idaho Code, be, and the same is hereby amended to read as follows:

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~~.

SECTION 2. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval.

APPENDIX B

Idaho Code § 34-1813

Idaho Statutes

Idaho Statutes are updated to the web July 1 following the legislative session.

TITLE 34
ELECTIONS
CHAPTER 18
INITIATIVE AND REFERENDUM ELECTIONS

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 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 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.

History:

[34-1813, added 1933, ch. 210, sec. 13, p. 431; am. 2020, ch. 336, sec. 3, p. 978.]

How current is this law?

Search the Idaho Statutes and Constitution

APPENDIX C

Article from the Idaho Statesman

February 5, 1911

FRIENDS OF REFORM SCENT JOKERS

Suspect Scheme to Bury Direct Legislation in State Constitution.

Recall May Go Through With Bills to Lengthen Terms of Office.

Boosters for the initiative, referendum and recall are beginning to scent a "joker."

When it was announced that the committee on privileges and elections of the senate would report favorably on the initiative and referendum, and when the statement was coupled with this announcement that the constitutional amendment would not provide a basis of petition; that is that it would not fix the percentage necessary to submit and refer measures, but that this would be left to some future session of the legislature, the radicals began to look around.

After some hard thinking the friends of direct legislation decided that this was a scheme to bottle up the initiative and referendum. They recalled that in Utah the state constitution provides for the initiative and referendum, but that no legislature since the admission of the state, 16 years ago, had put into force this particular provision of the constitution by enacting the required laws.

The conclusion was reached that this was what the enemies of the initiative and referendum proposed to do in Idaho, put into the constitution a provision for the initiative and referendum and there let it rest without laws to put it into operation.

Course of Action Not Clear.

Just what the advocates of direct legislation will do under the circumstances has not yet developed. It is the general impression that the initiative and referendum measures are to be favorably reported to the senate early in the week. There is also a prediction out that they will go through both senate and house with but little opposition. At the same time it is the impression that amending the constitution is the extent to which this method of making laws will go for many years.

The right to recall officers for cause is also scheduled to go through the senate and house by virtue of a senate to increase the terms of office of senators, representatives and county officers to four years. The present term is two years. Friends of the four-year term of office and friends of the recall are getting together with the prospect that both schemes will go through. This trade will result in a four-year term for the officers named, and the right of the people to recall any of these officers when they prove unfaithful.