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IN THE SUPREME COURT OF THE STATE OF IDAHO

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

Petitioners,

v.

LAWRENCE DENNEY, in his official  
capacity as the Idaho Secretary of State, and the  
STATE OF IDAHO,

Respondents.

Case No. 48784-2021

**OPPOSITION TO MOTION TO  
EXPEDITE BRIEFING AND  
ARGUMENT AND REQUEST FOR  
CASE MANAGEMENT ORDER**

## INTRODUCTION

After filing a Petition with over 100 pages of factual exhibits that have not been previously submitted to Respondents or reviewed by a trial court, Petitioners seek an extraordinary original **OPPOSITION TO MOTION TO EXPEDITE BRIEFING AND ARGUMENT AND REQUEST FOR CASE MANAGEMENT ORDER** - 1

action and ask this Court to schedule their Petition for a hearing next month and expedite the “schedule for Respondents’ response and for Petitioners’ reply.” Motion to Expedite Briefing and Argument, at 2. Petitioners are not entitled to this special treatment, not least because all of the relief they seek is readily available to them through the ordinary course of litigation and Idaho’s well-crafted and applicable Rules of Civil Procedure. This request to expedite (and corresponding original action) should be denied.

Further, because a separate petition for writ of mandamus challenging the constitutionality of Idaho Code § 34-1805 is currently pending before this Court in *Gilmore v. Denney*, No. 48760-2021, should this Court order briefing in response to this Petition, this Court should delay briefing on this matter until after a final decision is entered in *Gilmore v. Denney*. Although the two petitions present different constitutional challenges to Idaho Code § 34-1805, resolution of the first petition for writ of mandamus likely will resolve some of the issues posed by this Petition. Accordingly, to secure a just, efficient, and inexpensive determination, any briefing on this Petition should be deferred until after *Gilmore v. Denney* is resolved.

Respondents have consulted with counsel for the proposed intervenors in *Gilmore v. Denney*, and they agree with this approach.

## **ARGUMENT**

### **I. This Court should deny Petitioners’ motion to expedite.**

To start, Petitioners erroneously presume that their Petition warrants a hearing or additional briefing. Hearings and briefing on special writs are discretionary. Idaho Rule of Appellate Procedure 5. “There shall be no response”—let alone a reply and a hearing—“unless the Supreme Court requests a party to respond to the application before granting or denying the same.” *Id.* at

R. 5(a). The Court first needs to decide whether action is required before Petitioners can request that those actions be expedited.

If this Court decides that a response and a hearing are necessary, an expedited schedule is unwarranted. Petitioners assert that, because they have initiatives and a referendum pending for the 2022 election, “[t]hey, and the citizens of Idaho, urgently need clarity from the Court on the constitutionality of the legislature’s restrictive amendments.” Motion to Expedite Briefing and Argument, at 2. That assertion is conclusory and wrong.

First, the two provisions of Idaho Code that Petitioners challenge are duly passed laws and are presumptively constitutional. Petitioners should plan to follow them. They have not yet fully tried—let alone failed—to comply with the challenged provisions of Idaho Code. Until they do so, it is speculative whether the initiatives and referendum they support would be placed on the 2022 ballot absent the challenged provisions of Idaho Code. Along these lines, this Petition is a routine challenge to the constitutionality of duly passed statutes. There is nothing noteworthy or extraordinary about it.

Second, Petitioners’ most pressing alleged deadline is the requirement to seek a referendum within 60 days from the date when the legislature adjourns *sine die*. The legislature is still in session, and news reports suggest that it may not adjourn *sine die* until much later in the year. *See* House GOP Floats Recessing Until September As Session Drags On, Boise State Public Radio.<sup>1</sup> In short, the unusual posture of this year’s legislative session has given Petitioners ample time to organize a referendum—almost certainly months longer than 60 days—defeating their argument for rushed adjudication of the constitutional issues they raise. This is particularly true given that

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<sup>1</sup> Available at <https://www.boisestatepublicradio.org/politics-government/2021-04-23/house-gop-floats-recessing-until-september-as-session-drags-on> (last accessed May 10, 2021).

Petitioners are using this unusual grace period for their referendum effort. They have already filed their referendum petition. *See* Petition at ¶ 41. With regard to Petitioners' initiatives, they have 18 months to gather signatures on their petitions after the ballot titles are issued, and the ballot titles have not been issued yet. Petition at ¶¶ 39-40; Idaho Code § 34-1802(1).

Finally, if Petitioners really needed expedited relief, they could have sought a temporary restraining order or a preliminary injunction from the district court. Their choice to file an extraordinary original action and forgo available temporary remedies does not warrant rushing into a merits decision on a constitutional issue. Any circumstances necessitating expedited review are entirely of the Petitioners' making: Idaho's Rules of Civil Procedure outline multiple district court alternatives, including expediency for the relief they are seeking. *See, e.g., Wasden v. Idaho State Bd. of Land Comm'rs*, 150 Idaho 547, 551-54, 249 P.3d 346, 350-353 (2010) (granting Land Board's motion to dismiss where a "plain, speedy, and adequate remedy in the ordinary course of law" existed by means of joining an action for declaratory relief with a request for injunctive relief).

In fact, Petitioners' claims warrant an extended briefing schedule. As demonstrated by the eight declarations Petitioners filed in support of their Petition, Petitioners' claims are laden with factual questions. *See* Exhibits 1 through 8 to the Petition. For example, if justiciable, Petitioners' claims require the Court to assess the magnitude of the alleged burdens on Petitioners caused by the challenged provisions, Petitioners' ability to overcome those alleged burdens, the State's interests in regulating ballot initiatives and referenda, whether other regulations may exist, and the effectiveness of any alternative regulations. Petitioners recognize as much, as they have taken the time to put together over a hundred pages of exhibits. Yet Petitioners have also elected to bypass the trial court. Much of the legal work, factual inquiries, and weighing of issues that Petitioners

are seeking to expedite is work that is ordinarily borne through the trial court process. As a result, Respondents have not had a chance to conduct necessary discovery or retain expert witnesses, nor has there been an evidentiary hearing or a trial to establish a factual record. Because of Petitioners' choices, the parties and the Court need the time that is usually necessary to litigate an appeal, plus additional time to conduct discovery and develop the record in the first instance.

**II. The Court should delay briefing in this matter to allow for resolution of *Gilmore v. Denney*.**

The Petition in *Gilmore v. Denney*, which is a separate petition for a writ of mandamus challenging the constitutionality of Idaho Code § 34-1805(2), has already been filed against Secretary Denney. The opposition briefing in that case will be filed this Thursday, May 13<sup>th</sup>, and the issues there, if justiciable, will likely involve whether and to what extent Idaho's Constitution contains a right to qualify an initiative or referendum petition for the ballot, the appropriate level of scrutiny given to laws that impinge on that alleged right, the state's interests underlying Idaho Code § 34-1805(2) and the extent to which it achieves those interests, and whether Idaho Code § 34-1805(2) implicates any alleged right. The Petition here, while raising different constitutional issues, similarly requires this Court's determination as to whether Idaho's Constitution contains a right to qualify an initiative or referendum petition for the ballot, the appropriate level of scrutiny, the nature of the state's interests underlying Idaho Code § 34-1805(2) and the extent to which it achieves those interests, and whether Idaho Code § 34-1805(2) violates any alleged right. Should this Court decide to order briefing on this Petition, it should wait to schedule that briefing until after this Court resolves *Gilmore v. Denney*, as resolution of that petition is almost certain to make the resolution of this Petition more efficient.

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## CONCLUSION

For the above reasons, Respondents ask the Court to deny Petitioners' motion to expedite and, if this Court concludes that the instant Petition requires briefing, that this Court not schedule briefing in this matter until after a final decision is entered in *Gilmore v. Denney*. If the Court decides to schedule a response and a hearing on this Petition prior to the resolution of *Gilmore v. Denney*, Respondents ask that appropriate time be given to accommodate the lack of a trial court record.

DATED: May 10, 2021

BY: /s/ Megan A. Larrondo

Megan A. Larrondo

Robert A. Berry

Cory M. Carone

Deputy Attorneys General

## CERTIFICATE OF SERVICE

I certify that on this 10<sup>th</sup> day of May, 2021, I served the foregoing *Opposition to Motion to Expedite Briefing and Argument and Request for Case Management Order* 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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