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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. LAWERENCE DENNEY, in his official capacity as the Idaho Secretary of State, and the STATE OF IDAHO, Respondents.	Case No. 48784-2021 **REPLY IN SUPPORT OF MOTION TO EXPEDITE BRIEFING AND ARUGMENT**

Within a matter of days, two separate writs have been filed with this Court challenging the constitutionality of the legislature's recent amendments to the statutes governing initiatives and referendums under Article III, § 1 of the Idaho Constitution.

Both the petition for a writ currently pending before this Court in *Gilmore v. Denney*, No. 48760-2021 and the petition in this action brought by Petitioners, Reclaim Idaho and the Committee to Protect and Preserve the Idaho Constitution, name the Idaho Secretary of State Lawerence Denney as Respondent. The Governor has asked the Court to determine the constitutionality of Senate Bill 1110 which he signed into law less than a month ago, and the law raises urgent constitutional questions the Court has been called to address. [1]

The Court has already set the Gilmore petition for an expedited review, to which the State has not objected. The Court should do the same with this petition which cries out for the same accelerated treatment. Both petitions should be considered equally and in tandem, not piecemeal as the Respondent suggests. Both petitions raise facial constitutional challenges from different perspectives and with different analyses, and the State concedes that the petitions raise common issues. The Court would be best served by hearing both at the same time in order to have the most comprehensive sets of analyses and arguments before it and the most complete picture. This could be accomplished by a consolidated hearing on both petitions on its June calendar. To do

[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.

otherwise, and proceed with piece meal litigation may leave the Court with inconsistent results. It would also duplicate judicial effort and waste its resources.

The writ requested in the Reclaim Idaho and the Committee petition is a matter of considerable urgency. Petitioners must know whether Senate Bill 1110 violates Idaho's Constitution as this will determine the rules that govern their two initiatives and the referendum they are advancing for the general ballot in 2022. Notwithstanding the State's inaccurate statements to the contrary, relief is not available to the Petitioners through the ordinary course of litigation in district court. And any preliminary injunctive relief that might be found there is appealable and does not provide finality, and could not be obtained within the 60 day deadline to qualify a referendum for the ballot. Absent a petition for a writ of prohibition before this Court, the initiatives sponsored by Reclaim Idaho and the Committee's referendum rest on very uncertain ground which would doom these efforts from the start.

The Committee has only 60 days after the legislature adjourns to collect and submit over 65,000 signatures to the Secretary to support a referendum. The State ironically characterizes this as "ample time," ignoring that signature gathering has not, and cannot lawfully begin until the Attorney General issues a certificate of review, and the referendum's ballot title is approved, which has yet to happen.[2] It also remains

[2] Idaho Code § 34-1809 provides that once a referendum is filed with the Secretary of State, the Attorney General has 20 days to review. After that review is completed the

unclear that adjournment will be delayed until September 1st as the State speculates. As of May 11th, the legislature has not taken the necessary actions to determine whether such a delay will occur, adding to the uncertainty and urgency of the situation.

But even if the legislature does decide to delay adjournment, it also remains an urgent matter for Reclaim Idaho to know whether its volunteers will be required to collect signatures under the new restrictions. The State erroneously claims that Reclaim Idaho will have 18 months to collect signatures after the date ballot titles are issued. (Opp. To Motion, p. 4). In fact, Reclaim Idaho will have less than 12 months to collect signatures. The final day to collect signatures will be April 30th, 2022. Like a referendum, the clock begins ticking the moment ballot titles are issued. Each month that passes in which volunteers believe they must comply with recently enacted draconian restrictions will be a month that many volunteers remain discouraged and unlikely to participate. (Declarations of Larson ¶ 7 and Mahuron ¶¶ 9,10, attached as Exhibits 7 and 8 in support of the Verified Petition).

In its opposition to treat the Reclaim Idaho and the Committee's petition on the same expedited basis as the Gilmore petition, the States ignores all of the Court's recent jurisprudence concerning the expedited handling of writs that have mounted pressing

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Committee has up to 15 days to ask the Secretary to assign a ballot title. Then the Attorney General has 10 days to advise as to the form of the petition. As this must occur before any signatures can be gathered.

constitutional violations. 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).

Brushing those more relevant and recent cases aside, the Secretary relies instead on *Wadsen v. Idaho State Bd. Of Land Comm'rs*, 150 Idaho 547, 551-54 (2010) where the Court was "convinced that the availability of preliminary injunctive relief is sufficiently 'speedy' as to warrant denial of the requested writ of prohibition." *Id*. at 351. No urgency was asserted in the *Wadsen* case, which instead concerned the rate to charge for state cabin sites. The writ requested here is a matter of considerable urgency under the Idaho Constitution and there is no other sufficiently speedy relief available, unlike in *Wadsen*.

There is no need for discovery in this action just as there was no discovery conducted in the other recent petitions advanced in *Ybarra v. Legislature of Idaho*, *Regan v. Denney* and *Coeur D'Alene Tribe v. Denney*, which the State defended before this Court. Instead the facts in those cases were contained in the verified petitions and declarations provided by the parties just as has been done in this case.

The declarations provided by Reclaim Idaho and the Committee are critical to establish their standing, an essential element of their case. The declarations also provide the Court with the uncontested historical record, which demonstrates the legislature's institutional bias against the People's use of their constitutional right of the initiative and referendum. The Petitioners also have provided the Court with the declaration of Ben Ysusra, a three term Idaho Secretary of State, which adds valuable perspective to the use of the referendum and initiative in Idaho. Likewise, David Daley and Professor Montcrief provide the Court with a broader overview, placing the Idaho law in a national framework for comparision. The other declarations demonstrate the insurmountable burden the law imposes, and are based on the individual personal experiences of volunteers.

The State is free to submit any declarations of its choosing. If may decide to present to the Court the opinion of people experienced in signature gathering in Idaho who believe the law is not unduly burdensome. But none of this opinion testimony creates a factual dispute the Court is asked to resolve. Instead the declarations provide

baseline facts to focus the Court's attention on the constitutional issues before it, to set the historical context, establish standing and the urgent need for expeditious action.

In a matter of days, Petitioners' counsel moved very efficiently to mount this challenge. Counsel prepared and filed the petition and supporting declarations, and a brief in support through the efforts of their small two person law firm. The Attorney General's Office has assigned four of its capable attorneys to this matter, and it has deep reserves of other manpower. It is reasonable to expect that it could allocate those resources as it has done in innumerable fast track cases in the past to defend both challenges. Defending these two cases in tandem will also save the State's resources.

And if the Court allows the legislature to intervene, despite its questionable standing to do so, [3] the State's defense will be further aided by the large law firm the legislature has retained, and the three attorneys that have appeared on the legislature's behalf. With a stable of seven attorneys already on the case, an expedited response to Reclaim Idaho and the Committee's petition and a consolidated hearing may be challenging but it is reasonable and workable over the course of at least a month's time.

The State gas-lights the petition as "routine" asserting "there is nothing noteworthy or extraordinary about it." (Opp. To Motion, at p. 3). On the contrary, this

[3] *League of Women Voters of Michigan v. Secretary of State*, 952 N.W.2d 491 (Mich.App. 2020)(legislature lacked standing to intervene in challenge to unconstitutional initiative procedures.)

petition raises an urgent and vitally important constitutional question which effects a fundamental right of all Idaho citizens. Namely, the constitutionality of the current procedure for qualifying a measure for the ballot. It raises a challenge that the Governor himself requested be considered by the Court. And for the same reason that the Court has set an expedited briefing on the companion Gilmore petition, it should do so with this petition. Reclaim Idaho and the Committee to Preserve and Protect the Idaho Constitution raise legal arguments that are distinct from the Gilmore petition, and the Court should allow itself to be fully informed in the premises that these urgent constitutional challenges present.

Submitted on this 11th day of May, 2021.

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CERTIFICATE OF SERVICE

This reply in support of the motion to expediate has been served on the following on this 11th day of May, 2021, by filing through the Court's e-filing and serve system, and separately by email, to:

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