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Idaho Supreme Court
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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

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.

Supreme Court Docket No. 48784-2021

RESPONDENTS' OPPOSITION TO VERIFIED PETITION FOR WRIT OF PROHIBITION AND APPLICATION FOR DECLARATORY JUDGMENT

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STATEMENT OF THE CASE

This Court should decline Petitioners' invitation to ignore the twin clauses in Article III, § 1 of the Idaho Constitution that expressly grant to the Idaho Legislature the power to set the conditions under and the manner in which the rights to initiate laws and to demand referenda are executed. Those clauses establish the constitutionality of (1) Idaho Code § 34–1805(2)'s requirement that initiative and referenda petition sponsors obtain signatures from all 35 of Idaho's legislative districts (instead of the previous 18) in order to qualify a petition for the ballot and (2) Idaho Code § 34–1813(2)(a), which sets a default effective date for all laws enacted via initiative that mirrors the default for laws passed by the legislature. Further, this Court should decline Petitioners' effort to convert the extraordinary remedy of obtaining a writ via an original action into an ordinary option available to any litigant who wishes to avoid the district court—especially when Petitioners' case turns on factual disputes should best be resolved at the district court level through discovery, cross examination, and live testimony.

The first challenged provision, added via Senate Bill No. 1110 ("S1110"), passed through all the hurdles of representative legislation and was signed into law on April 17, 2021, becoming Idaho Code § 34–1805(2). *2021 Legislation – Senate Bill 1110*, IDAHO LEGISLATURE, https://legislature.idaho.gov/sessioninfo/2021/legislation/S1110 (last visited June 1, 2021). Because S1110 contained an emergency clause, it became effective immediately. Petitioners argue that only the geographic distribution requirement in 34–1805(2) is unconstitutional. They do not challenge the required percentage of signatures that must be collected from each legislative district. Respondents will refer to the challenged geographic distribution requirement as Idaho Code § 34–1805(2) for ease of reference.

The second challenged provision, was added by House Bill No. 548 in the 2020 legislative session and likewise surviving all the hurdles of representative legislation, was signed into law on

March 30, 2020. *2020 Legislation – House Bill 548*, IDAHO LEGISLATURE, https://legislature.idaho.gov/sessioninfo/2020/legislation/H0548/ (last visited June 1, 2021). It became effective on July 1, 2020, becoming Idaho Code § 34–1813(2)(a).

On May 7, 2021, Petitioners filed their Verified Petition for Writ of Prohibition and Application for Declaratory Judgment ("Petition") seeking a declaration that Idaho Code §§ 34–1805(2) and –1813(2) are unconstitutional under Article III, § 1; a declaration that Idaho Code § 34–1805(2) is constitutional without a geographic distribution requirement; and a peremptory writ of prohibition to the Idaho Secretary of State prohibiting him from enforcing Idaho Code § 34–1805(2) as written. Petition, Prayer for Relief, (a)–(d). Petitioners also filed a Brief in Support of Petition for Writ of Prohibition and Application for Declaratory Judgment ("Petitioners' Brief"). Petitioners did not challenge the laws in the district court.

ADDITIONAL ISSUES PRESENTED ON APPEAL

A. Should this Court dismiss the Petition because the Court lacks original jurisdiction to consider it?

B. Should this Court dismiss the Petition because it lacks jurisdiction to issue the requested relief?

ARGUMENT

I. This Petition is not appropriate for the exercise of this Court's original jurisdiction.

Petitioners have not established that the Court should review their Petition in the first instance. The Court exercises its original jurisdiction to review a petition for an extraordinary writ "when compelled by urgent necessity." *Regan v. Denney*, 165 Idaho 15, 19, 437 P.3d 15, 19 (2019). Petitioners must provide "evidence or proof of a crisis or urgent situation." *See Idaho Falls Re-*

development Agency v. Countryman, 118 Idaho 43, 45, 794 P.2d 632, 634 (1990). They have not done so.

There is no urgency created by any "uncertainty" about whether Petitioners need to comply with Idaho Code §§ 34–1805(2) and –1813(2)(a). Both are duly passed laws that have taken effect.[1] They are presumptively constitutional. *Regan*, 165 Idaho at 19, 437 P.3d at 19; *Rich v. Williams*, 81 Idaho 311, 316–17, 341 P.2d 432, 435 (1959) and Petitioners need to comply. If Petitioners need temporary relief while their claims are adjudicated, they could ask the district court for a temporary restraining order or a preliminary injunction. Idaho's Rules of Civil Procedure provide multiple means of obtaining expedited relief from the district court. *See, e.g.*, *Wasden ex rel. State v. Idaho State Bd. of Land Comm'rs*, 150 Idaho 547, 551–54, 249 P.3d 346, 350–53 (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). Moreover, Idaho Code § 34–1808 provides a specific process for expedited relief related to initiatives and referenda. By forgoing available remedies at the district court, Petitioners ask this Court to rush into a merits decision on a constitutional issue. Worse, Petitioners ask this Court to rush to a decision on an issue that is rife with factual questions, as discussed further below and as demonstrated by the eight declarations Petitioners filed in support of their Petition. The adjudication process would greatly benefit from discovery, followed by live testimony under scrutiny of cross examination.

Instructively, the Utah Supreme Court has declined to exercise original jurisdiction in similar circumstances. In *Count My Vote, Inc. v. Cox*, the petitioners sought an extraordinary writ, arguing that the "terms and conditions" set by the Utah Legislature to the ballot initiative process

[1] Notably, Idaho Code § 34–1813(2)(a) has been in effect since July 1, 2020, yet Petitioners only challenge it now, almost a year later, conclusively defeating any claim of urgency.

were unconstitutional. 452 P.3d 1109 (Utah 2019). Under Utah's standard, the court needed to determine whether the terms and conditions were unreasonable because they presented an undue burden—a factual question similar to Idaho's reasonable and workable standard. *Id.* at 1118. And, as here, the petition had a "key shortcoming": "Because the case was filed [before the Utah Supreme Court] in the first instance, there is no evidentiary record; and the parties' submission reveals an underlying dispute on the nature and extent of any burden on the right to pursue an initiative." *Id.* at 1119. "[I]n the absence of a record and decision by a lower court," the Utah Supreme Court determined it was "in no position to resolve the dispute" as it could not "determine, for example, whether or to what extent the challenged statutory provisions resulted in an undue burden on the right to initiative." *Id.* at 1120. Nor could the court "decide whether any alleged impact on the voters' right to an initiative is outweighed by the importance of the legislature's legitimate purposes in enacting the provisions in question." *Id.* at 1120–21. Due to time limits (*Cox* was decided in October and the election was in November), the Utah Supreme Court outright denied the petition. *Id.* at 1120. Given the additional available time here (Petitioners' initiative and referendum petitions, if they qualify for the ballot, would appear on the 2022 general election ballot), this Court could merely decline to exercise original jurisdiction and let Petitioners' claims first percolate through the district court.

Petitioners also do not need urgent clarity to meet the deadline to collect signatures for a referendum because the deadline to collect signatures is tied to the date when the legislature adjourns *sine die*. Idaho Code § 34–1803. The deadline has not yet begun to run because both chambers of the Idaho legislature have not yet adjourned sine die.[2] *See* Declaration of Jason

[2] While the Senate has adjourned *sine die*, the House of Representatives has adopted a concurrent resolution suggesting that it may not adjourn *sine die* until after September 1, 2021. *Senate Journal of the Idaho Legislature - May 12, 2021*, 8, *available at* https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2021/journals/sday122.pdf; *2021 Legislation – House Concurrent*

("Hancock Decl."), ¶ 18 (stating that, under the Idaho Secretary of State's interpretation of the law, the 60-day deadline to collect signatures on any referendum on legislation passed by the Sixty-Sixth Legislature has not yet begun to run). The unusual posture of this year's legislative session has given any sponsor ample time to organize a referendum and collect signatures—almost certainly months longer than 60 days—defeating any argument for rushed adjudication. Indeed, Petitioner the Committee to Protect and Preserve the Idaho Constitution, Inc., is already using the unusual grace period for its referendum effort. Petition, ¶ 41; Verified Answer, ¶ 37.

II. This Court lacks jurisdiction to issue the requested relief.

Petitioners request the issuance of a writ of prohibition to the Idaho Secretary of State prohibiting him from enforcing the geographic distribution requirement in Idaho Code § 34–1805(2) and a declaratory judgment. Petition, Prayer for Relief, (a)–(d). Petitioners' request is improper.[3]

Resolution 23, IDAHO LEGISLATURE, https://legislature.idaho.gov/sessioninfo/2021/legislation/HCR023/ (last visited May 13, 2021 at 10:34 am).

[3] It must be noted that Petitioners lack standing to sue on behalf of all Idahoans. Petition, ¶¶ 5–6. "Even though a potentially illegal action may affect the litigant as well as a third party, the litigant may not rest his claims on the rights or legal interests of the third party." *State v. Doe*, 148 Idaho 919, 936, 231 P.3d 1016, 1033 (2010) (citation omitted). The U.S. Supreme Court, for example, "requires a litigant who seeks to assert the rights of another party to demonstrate three interrelated criteria: (1) he must have suffered injury in fact, providing a significantly concrete interest in the outcome of the matter in dispute; (2) he must have a sufficiently close relationship to the party whose rights he is asserting; and (3) there must be a demonstrated bar to the third parties' ability to protect their interests." *Id.* (citing *Powers v. Ohio*, 499 U.S. 400, 411 (1991)). It is unclear whether Petitioners themselves have a palpable injury traceable to the challenged laws, as it is speculative whether any of the initiatives or referenda they are currently sponsoring or will sponsor in the future be able to qualify for the ballot under the signature requirements prior to S1110's amendments to Idaho Code § 34–1805. But in any event, Petitioners, by definition, do not have a close relationship with all Idahoans. And other members of the public whose interests are injured (*i.e*. those who have standing) can protect their interests, for example, by filing their own lawsuit.

A writ of prohibition "arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person." Idaho Code § 7–401. It can be issued only "where there is not a plain, speedy and adequate remedy in the ordinary course of law." Idaho Code § 7–402. Because the writ is an extreme remedy, it is issued only "with forbearance and caution." *Agric. Servs., Inc. v. City of Gooding*, 120 Idaho 627, 628, 818 P.2d 331, 332 (Ct. App. 1991) (quoting *Taylor v. Girard*, 54 Idaho 787, 36 P.2d 773 (1934)); *Wasden ex rel. State*, 150 Idaho at 552, 249 P.3d at 351 (quotation omitted). Petitioners' request for the writ is inappropriate.

To start, Petitioners have not named proper respondents. The State of Idaho is not a "tribunal, corporation, board or person," thus it cannot be subjected to the requested writ. *See* Idaho Code § 7-401. For the Court to issue a writ against Secretary of State Denney, "Petitioners must show that the Secretary of State will exceed the powers conferred upon him by law." *Henry v. Ysursa*, 148 Idaho 913, 917, 231 P.3d 1010, 1014 (2008). Secretary Denney did not enact the geographic distribution requirement of Idaho Code § 34–1805(2). He "will not be exceeding his powers by" following the statute's requirements, "he will simply be complying with the [law's] mandate." *Id.*

Petitioners have also failed to prove that an alternative remedy does not exist. The Court "adhere[s] strictly to the principle that the extraordinary writs of prohibition and mandamus are not available where an adequate remedy exists in the ordinary course of law, either legal or equitable." *Agric. Servs., Inc.*, 120 Idaho at 629–30, 818 P.2d at 333–34. "The party seeking the writ of prohibition carries the burden of *proving* the absence of that adequate, plain, or speedy remedy." *Wasden ex rel. State*, 150 Idaho at 552, 249 P.3d at 351 (citation omitted) (emphasis added). Petitioners have not carried their burden. They say they "have no other adequate remedy at law," but they never explain why. Petition, ¶ 4. That omission is itself enough for the Court to

deny relief. *See Agric. Servs., Inc*, 120 Idaho at 630, 818 P.2d at 334 ("The party seeking the writ must prove that no such remedy exists. In the present case, such proof was lacking.").

Any proof that Petitioners offer up for the first time in their reply cannot suffice. This Court has already recognized that "joining an action for declaratory judgment with a request for injunctive relief" at the district court level is "a plain, speedy, and adequate remedy in the ordinary course of law." *Wasden ex rel. State*, 150 Idaho at 552–54, 249 P.3d at 351–53. The alleged "urgency" of this matter changes nothing, as "the availability of preliminary injunctive relief is sufficiently 'speedy' as to warrant denial of the requested writ of prohibition." *Id*. at 351. Nor does the subject-matter of the claims matter, as the requirement that there be no other remedy applies even when the petition raises "a matter of public importance" like the constitutionality of a statute. *Countryman*, 118 Idaho at 45, 794 P.2d at 634. Idaho Code § 7–402's text is clear: a writ of prohibition may issue only "where there is not a plain, speedy and adequate remedy in the ordinary course of law." It does not provide for any exception.

But even if Petitioners' request for a writ of prohibition were proper, the writ could not provide the relief they seek. They ask this Court to line-edit Idaho Code § 34–1805(2) to remove the phrase "in each of the thirty-five (35) legislative districts."[4] Petition, ¶¶ 67–68; Pets.' Br. at 24. A writ of prohibition, however, "serves to preserve the status quo." *Wasden ex rel. State*, 150 Idaho at 553, 249 P.3d at 352. The status quo before Idaho Code § 34–1805(2) was an 18 district requirement, not a zero district requirement. A writ of prohibition thus cannot provide the relief Petitioners seek. And because a writ of prohibition cannot issue here, this Court does not have jurisdiction to issue a declaratory judgment. *See* IDAHO CONST. art. V, § 9; Idaho Code § 1-203; *Cf. Ybarra v. Legislature by Bedke*, 166 Idaho 902, 906, 466 P.3d 421, 425 (2020) (concluding

[4] The impropriety of Petitioners' request is also discussed in the severability argument discussed below.

that this Court has jurisdiction to issue declaratory judgments, but not answering the question of whether it has such jurisdiction when the Court cannot issue the requested writ).

III. Petitioners' facial challenge to Idaho Code § 34–1805(2) lacks merit.

Assuming that this Court had original jurisdiction and jurisdiction to issue the requested relief, Petitioners cannot overcome the strong presumption of constitutionality that is afforded to a duly enacted law. *Gomersall v. St. Luke's Reg'l Med. Ctr., Ltd.*, ___ Idaho ___, 483 P.3d 365, 371 (2021) (quotations omitted). Petitioners have a heavy burden; they must place the "nullity . . . in [the Court's] judgment," of each challenged provision of Idaho Code "beyond reasonable doubt." *Rudeen v. Cenarrusa*, 136 Idaho 560, 564, 38 P.3d 598, 602 (2001) (quotation omitted). "Every presumption is in favor of the constitutionality of the statute[s]." *State v. Orozco*, 168 Idaho 274, ___, 483 P.3d 331, 334 (2021) (quotation omitted).

Further, "[c]onstitutional challenges come in two forms[:] 'facial' and 'as applied'." *Lochsa Falls, L.L.C. v. State*, 147 Idaho 232, 240, 207 P.3d 963, 971 (2009). Petitioners, by their own admission, bring a facial challenge. *See* Reply in Support of Motion to Expedite Briefing at 2 (describing the Petition as "rais[ing] a facial constitutional challenge[]"). This admission is consistent with the relief Petitioners seek, which extends beyond Petitioners' particular circumstances, and with the fact that they have brought this suit before attempting to comply with the challenged law. Petition, ¶¶ 39–42; Petition, Prayer for Relief, (a)–(d).

To prevail on a facial challenge, "the party must demonstrate that the law is unconstitutional in all of its applications." *Id.* at 240, 207 P.3d at 971 (quoting *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 870, 154 P.3d 433, 441 (2007)). Put another way, "the challenger must establish that no set of circumstances exists under which the [law] would be valid." *Id.* at 240–41, 207 P.3d at 971–72 (quotation omitted). It is error to conclude a law is facially invalid by looking at the facts of a law applied to the particular challenger's

situation, as Petitioners would have this Court do here. *See American Falls*, 143 Idaho at 871, 872, 154 P.3d at 442, 443.

A. Idaho Code § 35–1805(2) falls squarely within the legislature's power under Article III, § 1 of the Idaho Constitution.

Because Petitioners cannot establish that Idaho Code § 34–1805(2) would be unconstitutional in every circumstance, their challenge fails. Petitioners' challenge to Section 34-1805(2)'s 35 legislative district requirement relies on an overbroad reading of Article III, § 1 of Idaho's Constitution. Any analysis of this challenge must start with the plain language of this provision, which provides in full:

> The legislative power of the state shall be vested in a senate and house of representatives. The enacting clause of every bill shall be as follows: "Be it enacted by the Legislature of the State of Idaho."
>
> The people reserve to themselves the power to approve or reject at the polls any act or measure passed by the legislature. This power is known as the referendum, and legal voters may, *under such conditions and in such manner as may be provided by acts of the legislature*, demand a referendum vote on any act or measure passed by the legislature and cause the same to be submitted to a vote of the people for their approval or rejection.
>
> The people reserve to themselves the power to propose laws, and enact the same at the polls independent of the legislature. This power is known as the initiative, and legal voters may, *under such conditions and in such manner as may be provided by acts of the legislature*, initiate any desired legislation and cause the same to be submitted to the vote of the people at a general election for their approval or rejection.

IDAHO CONST. art. III, § 1 (emphasis added).

The plain language of the second and third paragraphs of Article III, § 1 reflect a subject-matter component and a conditions-manner component in the parallel structure that sets out the right to referenda (second paragraph) and the right to initiate laws (third paragraph).

Each opening sentence of the second and third paragraphs of Article III, § 1 sets out the subject matter component of the rights. For referenda, the people have the subject-matter power to pass judgment on "any act or measure passed by the legislature." *Id.* For initiatives, the people have "the [subject-matter] power to propose laws, and enact the same at the polls independent of the legislature." *Id.*

These parallel sentences prove the error in Petitioners' strained reading of the phrase "independent of the legislature," which Petitioners incorrectly attempt to import to apply to referenda as well as to use to interpret the conditions-manner component of Article III, § 1. *See* Pets.' Br. at 15–18. The phrase "independent of the legislature," which only appears in connection with the right to the initiative, must be read in relation to the parallel sentence describing the right to the referendum: "[t]he people reserve to themselves the power to approve or reject at the polls any act or measure passed by the legislature." IDAHO CONST. art. III, § 1. The express language of Article III, § 1 limits the subject matter of referenda to acts or measures passed by the legislature. In contrast, the subject matter on which the people may propose laws is not so limited: the phrase "independent of the legislature" in the first sentence of paragraph three of Article III, § 1 distinguishes the subject matter encompassed by the right to initiate laws from the more limited subject matter available for referenda. It is only the subject matter of the laws that the people may propose and enact at the polls via the power of the initiative that is "independent of the legislature."[5] *Id.*

In contrast, the conditions-manner component of Article III, §1 is contained in the second sentences of the second and third paragraphs and—far from establishing a right "independent of the legislature"—it expressly grants power to the legislature. Notably,

[5] This interpretation is consistent with the dictionary definitions of the word "independent" offered by Petitioners. Pets.' Br. at 16.

Petitioners make no effort to interpret these sentences in blatant disregard of their own (correct) admonitions that "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[,]" "no phrase should be disregarded as surplusage[.]" Pets.' Br. at 16.

But these sentences are key to understanding the issues at play. The second sentence of each paragraph begins by assigning a name to the power contained in each paragraph. IDAHO CONST. art. III, § 1 ("[t]his power is known as the referendum" and "[t]his power is known as the initiative"). Each sentence then goes on to set out how each of the named powers may be exercised: "under such conditions and in such manner as provided by the acts of the legislature." *Id.* In short, Article III, § 1 expressly grants to the legislature the power to set the "conditions" and "manner" by which a "referendum vote" may be "demand[ed]" and any "desired legislation" may be "initiat[ed]. This is the conditions-manner component of Article III, § 1, and Idaho Code § 34–1805(2) falls squarely within it.

The history of Article III, § 1 supports this plain language reading. When Idaho's Constitution was adopted, the power of government was divided into three distinct branches, one of which was the legislative power, which was vested in a Senate and House of Representatives. *Luker v. Curtis*, 64 Idaho 703, ___, 136 P.2d 978, 980 (1943). No power was reserved to the "People." *Id.*; *see also* IDAHO CONST. art. III, § 1 (1889). "Then, as an afterthought and by way of amendment (in 1912), [the people] reclaimed certain specified powers, one of which was 'the power to propose laws, and enact the same at the polls independent of the legislature.'" *Luker*, 64 Idaho 703, 136 P.2d at 980.[6] Yet, the People themselves approved a

[6] Idaho lawmakers passed Senate Joint Resolution 13 in 1911, which was a resolution to amend the Idaho Constitution to authorize an initiative and referendum process for its citizens. 1911 Idaho Sess. Laws 786 (ratified Nov. 5, 1912). Idaho voters approved the constitutional amendment at the

limit on this reclaimed power; by the very language they approved, they could not exercise it until the legislature set its conditions and manner, which did not happen until 1933 when the legislature "by chap. 210 of the 1933 session enacted the provisions of that chapter, prescribing the manner and method of exercising the initiative and referendum privileges." *Id.*

This Court has noted that the 20-year dormancy in implementing the conditions and manner of the initiative and referendum process demonstrates that the right to set the process belongs to the legislature and not to the People. *See Luker*, 64 Idaho 703, 136 P.2d at 980. In determining whether the legislature could repeal a law enacted via initiative, this Court described Article III, § 1 as "creat[ing] an alternative method for passage of a law and, by the very terms of the reservation [contained in Article III, § 1], the alternative method can only be exercised 'under such conditions and in such manner as may be provided by acts of the legislature.'" *Id.*

In fact, this Court has already held that Article III, § 1 assigns to the legislature the duty to set the conditions and manner for the initiative and referendum process. In *Dredge Mining Control-Yes!, Inc. v. Cenarrusa*, 92 Idaho 480, 445 P.2d 655 (1968) ("*Dredge*"), the Court affirmed the trial court's conclusion that "'[t]he Legislature is charged with the duty of establishing a procedure whereby the people can place initiative matters on the ballot," holding "Idaho Const. Art. [III, §] 1 reserves to the people the right to propose legislation by initiative, but only 'under such conditions and in such manner as may be provided by acts of the legislature.'"[7] *Id.* at 483, 445 P.2d at 658 (holding the ten percent signature requirement in then-

general election in 1912. *Westerberg v. Andrus*, 114 Idaho 401, 402–03, 757 P.2d 664, 665–66 (1988)

[7] Petitioners ask this Court to give *Dredge* "limited force," apparently arguing it has been superseded by *Van Valkenburgh*, as to whether the right contained in Article III, § 1 is a fundamental right. Pets.' Br. at 14, 23. The question of whether Article III, § 1 contains a fundamental right is a separate question from the initial question of what the right contained in Article III, § 1 is. Petitioners offer no argument to explain why *Dredge* does not control as to its

Idaho Code § 34–1805 was a permissible condition on the right to initiate laws); *see also Johnson v. Diefendorf*, 56 Idaho 620, 57 P.2d 1068, 1075, 1076 (1936) (interpreting Article III, § 1 consistent with its plain language to hold that the subject matter of the right of referendum encompasses all acts or measures passed by the legislature, and also that the right of referendum is not self-executing, but instead dependent on the legislature's enactment of a statutory scheme for exercise of the right); *Westerberg*, 114 Idaho 401, 757 P.2d at 669 (reasoning "the amendment to Article III, § 1, did not itself permit initiative legislation, but only permitted the legislature to authorize the promulgation of initiative legislation 'under such conditions and in such manner and as may be provided by acts of the legislature.'").

Instead of acknowledging these precedents, the only Idaho decisions that Petitioners proffer in support of their (incorrect) interpretation of Article III, § 1 are a dissent and theorizing in a special concurrence.[8] Pets.' Br. at 17. The dissent upon which Petitioners rely was issued in *Luker*. Chief Justice Holden dissented from the conclusion that the legislature could repeal an initiated law, contending that the phrase "independent of the legislature" meant that the legislature could not repeal any law enacted via initiative. *Luker*, 64 Idaho, 136 P.2d at 984 (Holden, C.J.,

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interpretation of the right contained in Article III, § 1 other than, apparently, its age. This is not sufficient reason to discard this Court's precedent. *See AgStar Fin. Servs., ACA v. Nw. Sand & Gravel, Inc.*, 168 Idaho 358, 483 P.3d 415, 427 (2021) (stare decisis dictates that this Court must follow controlling precedent unless it concludes it is "manifestly wrong," "it has proven over time to be unjust or unwise," "or overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice").

[8] Petitioners also cite to a Michigan Court of Appeals decision that has since been vacated by the Michigan Supreme Court. Pets.' Br. at 18; s*ee League of Women Voters of Michigan v. Sec'y of State*, 957 N.W.2d 731, 745–46 (Mich. 2020) (vacating *League of Women Voters of Michigan v. Sec'y of State*, 952 N.W.2d 491 (Mich. App. 2020). But even if the decision had not been vacated, the decision to which Petitioners cite interpreted a different constitutional provision. In contrast to Article III, § 1, Michigan's relevant constitutional provision provides the signature requirement for how an initiative or referendum is invoked. MICH. CONST. art. 2, § 9. Thus, the vacated Michigan decision provides no guidance here.

dissenting). In *Gibbons v. Cenarrusa*, 140 Idaho 316, 92 P.3d 1063 (2002), this Court concluded that the legislature could repeal a law passed by initiative immediately by declaring an emergency to exist. In a special concurrence, Justice Kidwell agreed with the holding of the majority on the issues presented by the case, but offered his opinion in dicta as to the meaning of the phrase "independent of the legislature." *Id.* at 321–22, 92 P.3d at 1068–69. He disagreed with Chief Justice Holden's conclusion in his dissent in *Luker*, but offered the completely off-topic opinion that the phrase should be interpreted to mean that the legislature "cannot interfere with the initiative itself." *Id.* at 1069. Neither Chief Justice Holden's dissent nor Justice Kidwell's concurrence should be given any weight. First, neither Justice engaged with the entirety of the relevant language in Article III, § 1, particularly the conditions and manner language. Second, neither Justice was confronting a challenge to the process set by the legislature, which could explain why they did not fully grapple with the text at issue. Third, as discussed above, their cherry-picking of the phrase "independent of the legislature" from Article III, § 1 is inconsistent with the plain language of the section. And fourth, neither opinion can outweigh the majority opinions that have fully addressed the text at issue.

Further, even if the non-binding opinions that Petitioners cite could bear the weight Petitioners attempt to assign to them, Petitioners fail to advise this Court that another dissent "grappled around the edges" of the phrase "independent of the legislature," but did not read the phrase to have any bearing on the legislature's authority to set the process by which initiatives are initiated. Instead, Justice Bistline suggested that that the phrase means that the subject matter of initiated legislation is not subject to the constitutional subject matter limitations placed on representative legislation. *Westerberg*, 114 Idaho at 410, 757 P.2d at 673 (Bistline, J., dissenting).

Idaho Code § 34–1805(2) falls squarely within the legislature's power under Article III, § 1 to set the conditions and manner for the process by which initiatives are initiated and referenda

are demanded. Petitioners apparently recognize that Idaho Code § 34–1805(2) governs the "conditions" and "manner" by which the initiatives are initiated and referenda are demanded. As they must: *Dredge* has already established that the signature requirements to qualify a measure for the ballot, such as Idaho Code § 34–1805(2), are part of the "conditions" and "manner" referred to in Article III, § 1. *Dredge*, 92 Idaho at 483, 445 P.2d at 658 (analyzing signature requirements under the conditions and manner language of Article III, § 1). Similarly, this Court has indicated that statutes setting out the number of signatures required on a petition, the filing deadline for the petition, signature verification requirements, petition verification requirements, petition printing requirements and the timing of the election on the petition if it qualifies for the ballot all "provid[e] the conditions and manner governing the power of referendum and initiative. *Weldon v. Bonner Cty. Tax Coal.*, 124 Idaho 31, 38, 855 P.2d 868, 875 (1993), *overruled on other grounds by City of Boise City v. Keep the Commandments Coal.*, 143 Idaho 254, 141 P.3d 1123 (2006) (interpreting requirements for county-level initiatives and referendum).

1. A legislative enactment setting the conditions or manner under Article III, § 1 need only be reasonable and workable.

Petitioners erroneously argue that Idaho Code § 34–1805(2) implicates a fundamental right and therefore requires strict scrutiny. *Dredge* established that the standard of review for conditions and manner requirements is whether they are reasonable and workable.

In *Dredge*, the Court analyzed whether the 10% signature requirement in then-Idaho Code § 34–1805 was a permissible condition on the right to initiate laws. 92 Idaho at 481–84, 455 P.2d at 656–59. The trial court upheld the requirement, concluding "[t]he legislative procedures outlined in Chapter 18 of Title 34, Idaho Code, are not unreasonable and must be complied with. While they may be cumbersome they are nevertheless workable[.]" *Id.* at 483, 455 P.2d at 658. The appellants challenged the trial court's conclusion, arguing the certification of the signatures

by the clerks of the district courts was "a practical impossibility" and "unworkable" under Idaho voter registration laws, raising concerns about the clerks' ability to verify signatures. *Id.* This Court affirmed the trial court and concluded that the "statutory scheme set up by the legislature, although restrictive and perhaps cumbersome, is reasonable and workable." *Id.* at 484, 455 P.2d at 659 (citations omitted). It identified work-arounds to the concerns appellants raised about the ability of clerks to verify signatures and noted that no signatures in the lower court case had been rejected for lack of genuineness. *Id.* Ultimately, "the provisions of the law enacted by the legislature pertaining to the initiative procedures are reasonable." *Id.* Thus, the "conditions" and "manner" established for the exercise of the right to initiate and hold referendums need only be "reasonable and workable" to avoid violating the rights contained in Article III, § 1. *Id.*

Petitioners appear to argue that *Dredge* has been overruled by this Court's decision in *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 15 P.3d 1129 (2000), despite the absence of any language in *Van Valkenberg* to that effect. *Van Valkenberg* is inapplicable. That case addressed a completely different constitutional provision—the right of suffrage contained in Article I, § 19 of Idaho's Constitution—and addressed a completely different issue—the constitutionality of a statute passed by voter initiative regarding term limit pledges. *Id.* at 123–24, 126, 15 P.3d at 1131–32, 1134 (concluding that a statute, passed by voter initiative, that allowed candidates for the United States Congress to sign a term limit pledge and then required the Secretary of State to indicate on every ballot and all state-sponsored voter education materials when a candidate had signed the pledge and when a candidate had broken the pledge, implicated the right of suffrage). Nothing in *Van Valkenburgh* suggests that it was intended to overrule *Dredge*.

Even assuming that the test that this Court used in *Van Valkenburgh* to determine whether a fundamental right was implicated applies, Idaho Code § 34–1805(2) does not

implicate a fundamental right. "[A] right is fundamental under the Idaho Constitution if it is expressed as a positive right, or if it is implicit in Idaho's concept of ordered liberty." *Id.* at 126, 15 P.3d at 1134. To the extent that there is a positive right under Article III, § 1 related to the process by which initiatives and referenda are put on the ballot, it is at most a right to qualify an initiative or referendum for the ballot pursuant to the "conditions" and "manner" set by the legislature. This right is not put at issue by Petitioners.

Further, without justification other than their aspersion on the date *Dredge* was decided, Petitioners would also have this Court abandon its own jurisprudence in favor of other state courts' interpretations of their own constitutions.[9] *See* Pet Br. at 15 (citing *Gallivan v. Walker*, 54 P.3d 1069 (Utah 2002) and *Loonan v. Woodley*, 882 P.2d 1380 (Colo. 1994)). Neither *Gallivan* nor *Loonan* support this Court abandoning *Dredge*. Both *Gallivan* and *Loonan* conflate the right to vote with a right to qualify an initiative petition for the ballot to conclude that the latter is a fundamental right. This Court should not ignore the fact that the right of suffrage (*i.e.*, the right to vote) protected under the Idaho Constitution is different from any right to initiate legislation or demand referendum under Article III, § 1. *See* Respondent's Opposition to Petition for Issuance of a Writ of Mandamus, *Gilmore v. Denney*, Case No. 48760-2021, at 22–27 (filed May 13, 2021).

Perhaps worse, Petitioners would have this Court adopt the Utah Supreme Court's designation of a fundamental right but ignore that Utah's Supreme Court applies a reasonableness standard—not strict scrutiny—to determine whether regulations enacted by the Utah legislature on the initiative process violate Utah's substantially similar constitutional provision. In *Utah Safe to Learn-Safe to Worship Coal. Inc. v. State*, the Utah Supreme Court

[9] Colorado's relevant constitutional provision is self-executing and far different from Idaho's Article III, § 1. *See Loonan*, 882 P.2d at 1386; *compare* COLO. CONST. art. 5, § 1, *with* IDAHO CONST. art. III, § 1.

explained that the right to initiate legislation under Article IV, Section 1 of Utah's Constitution, "is a right that, though fundamental, is self-limiting in that it grants to the legislature the authority to regulate the initiative process."[10] 94 P.3d 217, 227 (Utah 2004). Thus, the Utah Supreme Court determined that the test to be applied to determine whether the right to initiate had been violated by a condition or manner requirement set by the Utah legislature is "whether the enactment is reasonable, whether it has a legitimate legislative purpose, and whether the enactment reasonably tends to further that legislative purpose," (*i.e.*, rational basis review). *Id.* at 228. Applying this test, the Utah Supreme Court upheld the requirement that initiative petition circulators collect signatures of 10% of the cumulative total of all votes cast for governor at the last regular general election at which a governor was elected in each of at least 26 of Utah's 29 senate districts against a challenge that the geographic distribution requirement violated Utah's constitutional provision guaranteeing the right to initiate legislation. *Id.* at 228–29. The court reached this conclusion because the requirement "does not unduly burden the initiative right, but is a *reasonable* means of achieving the legitimate legislative purpose of ensuring a modicum of support for an initiative throughout the statewide population." *Id.* at 229 (emphasis added).[11]

Petitioners also suggest, without support, that the legislature's power to set the conditions and manner for the initiative and referendum process is somehow limited (and the

[10] In a striking similarity to Article III, § 1 of Idaho's Constitution, the relevant portion of Article VI, section 1 of Utah's Constitution states: "The legal voters of the State of Utah *in the numbers, under the conditions, in the manner, and within the time provided by statute,* may . . . initiate any desired legislation and cause it to be submitted to the people for adoption upon a majority vote of those voting on the legislation, as provided by statute . . ."

[11] While the Utah Supreme Court evaluated the "the reasonableness of the challenged enactment and its relation to the legislative purpose," by weighing "the extent to which the right of initiative is burdened against the importance of the legislative purpose," *Utah Safe to Learn-Safe To Worship*, 94 P.3d 217 at 228, this Court should not be guided by the Utah Supreme Court's undue burden balancing gloss on reasonableness, as discussed further below.

standard of review is therefore more stringent) because Article III, § 1 confers a "trust responsibility . . . essentially a fiduciary duty" on the legislature. Pets.' Br. at 2. But nothing in Article III, § 1 suggests any trust or fiduciary responsibility hand-cuffs the legislature in determining the conditions and manner for the petition process. Notably, when this Court has held a trust responsibility was created by the Idaho Constitution, the language of the constitutional provision involved was significantly different and involved the creation of an actual fund. *See State, ex rel. Moon v. State Bd. of Examiners*, 104 Idaho 640, 640, 662 P.2d 221, 221 (1983) (interpreting Article 9 § 3, which provides in part "The public school fund of the state shall forever remain inviolate and intact."). The absence of legislative fiduciary duties and trust responsibilities in the Idaho Constitution is wholly consistent with the fact that the legislature must legislate within the bounds set by the Idaho Constitution—there is no need for this Court to read a fiduciary duty into the Constitution to prevent the legislature from doing that which it is constitutionally precluded from doing.

To the best of Respondents' knowledge, this Court has never read a fiduciary duty into Article VI, § 4, which provides in pertinent part, "[t]he legislature may prescribe qualifications, limitations, and conditions for the right of suffrage additional to those prescribed in this article," even though this Court has held that the right of suffrage is a fundamental right. *See Am. Indep. Party in Idaho, Inc. v. Cenarrusa*, 92 Idaho 356, 359, 442 P.2d 766, 769 (1968) (finding the right of suffrage violated when a statute made it a "practical impossibility" to form a new political party); *see also Rudeen v. Cenarrusa*, 136 Idaho 560, 567–68, 38 P.3d 598, 605–06 (2001) (interpreting the legislature's authority under Article VI, § 4 and collecting cases demonstrating the legislature's broad authority). Thus, in *State v. Dunbar*, this Court held that the legislature had authority under Article VI, § 4 to "pass a law which bears a *reasonable* relation to the purpose or object of regulating and conducting elections so as to insure the public welfare." 39 Idaho 691,

230 P. 33, 38 (1924) (emphasis added). This standard is entirely consistent with *Dredge* and far from the strict scrutiny standard for which Petitioners advocate. Just as with Article VI, § 4, which the People approved, the Idaho Constitution "expressly invested" the legislature "with broad powers and wide discretion in the matter of legislating in regard to the exercise of the right" with Article III, § 1 and that wide discretion must be respected with the limited scope of judicial review that is applied to laws that the legislature passes under that authority. *See id.* at 36.

Ultimately, Petitioners concede that the applicable standard is reasonableness. Pets.' Br. at 2–3 (conceding that, under Article III, Section 1, "the people retained the unqualified substantive right to make or repeal law, and the legislature was to enact *reasonable* procedures to enable this right") (emphasis added); Pets.' Br. at 13 (describing the right to initiate and pass referenda as subject "to the legislature's . . . role for enacting *reasonable* conditions by which the right could be exercised.") (emphasis added).

2. Idaho Code § 34–1805(2) is reasonable and workable.

Petitioners have not met their burden of establishing Idaho Code § 34–1805(2) is unreasonable and unworkable and thereby unconstitutional.

a. Idaho Code § 34–1805(2) is reasonable because the requirement is rationally related to a legitimate government interest.

Dredge's reasonableness test is consistent with the rational basis review standard this Court typically uses to evaluate the constitutionality of laws when fundamental rights are not at stake. *See, e.g.*, *Bradbury v. Idaho Jud. Council*, 136 Idaho 63, 69, 28 P.3d 1006, 1012 (2001) (describing the rational basis test for substantive due process as requiring that "a statute bear a reasonable relationship to a permissible legislative objective"). "Under the rational basis test, a classification will pass scrutiny if it is rationally related to a legitimate governmental purpose." *Gomersall*, 168 Idaho, 483 P.3d at 377.

Idaho Code § 34–1805(2) is rationally related to a legitimate government purpose and therefore is reasonable. It is a legitimate government interest (indeed an "important regulatory interest") to ensure that an initiative petition has support distributed throughout the State before being placed on the ballot, where it need only pass the test of aggregate majority support. *Angle v. Miller*, 673 F.3d 1122, 1134–36 (9th Cir. 2012). Idaho Code § 34–1805(2) serves this interest. *See* Appendix A to Brief ("The purpose of this legislation is to increase voter involvement and inclusivity in the voter initiative/referendum process. This will be accomplished by ensuring signatures are gathered from each of the 35 legislative districts, so every part of Idaho is included in this process."). Section 34–1805(2) rationally achieves this interest by requiring that signatures be gathered throughout the State.[12] *Id.;* Hancock Decl., ¶ 15; Declaration of Damon Cann, Ph.D. ("Cann Decl.") ¶ 12. This protects the State from localized legislation and ensures that the petition sponsors develop and demonstrate a baseline level of support throughout all 35 legislative districts before a measure can be placed on the ballot. Hancock Decl., ¶ 15; Cann Decl. ¶¶ 12, 15.

[12] *See also Minutes of the Senate State Affairs Committee – February 17, 2021*, 5, *available at* https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2021/standingcommittees/210217_ssta_0800AM-Minutes.pdf ("S 1110 is beneficial because it will require input from every legislative district instead of a few population centers.") As Senator Vick noted, Kootenai, Ada, Canyon, and Bonneville Counties, which contain Idaho's major population centers, contain 18 legislative districts making the gathering of signatures in Idaho's 17 remaining counties a moot point. *Id.* at 4; *see also* Hancock Decl., ¶¶ 12–13. The populations for these counties constitute an easy majority at the polls, meaning that, absent the Act, a measure could qualify for the ballot and become law based on support in only Idaho's major population centers because, once on the ballot, a measure needs only to garner a majority of votes at the statewide general election to become law. (Hancock Decl., ¶ 12)

The experience with initiatives in 2018, prior to the passage of Idaho Code § 34–1805(2), helps to prove this point. In 2018, two initiative petitions qualified for the ballot: (1) an initiative petition assigned the short ballot title "An initiative to provide that the state shall amend its state plan to expand Medicaid eligibility to certain persons" (referred to herein as "Medicaid Expansion") and (2) an initiative petition assigned the short ballot title "An initiative authorizing historical horse racing at certain locations where live or simulcast horse racing occurs and allocating revenue therefrom" (referred to herein as "Historical Horse Racing"). Hancock Decl. ¶¶ 9–10. Both initiative petitions were required to qualify for the ballot in just 18 legislative districts. Idaho Code § 34–1805 (2013). As a result, the petition sponsors focused on different areas with their signature gathering efforts. Historical Horse Racing did not obtain a qualifying number of signatures in any legislative district in Northern Idaho, while Medicaid Expansion did not obtain sufficient signatures in legislative districts in the midsection of the state. *Compare* Exhibit B *with* Exhibit C to Hancock Decl. Given the diverse nature of Idaho's geographic regions, the fact that these initiatives were able to qualify for the ballot without demonstrating a modicum of support statewide demonstrates the rational basis for Idaho Code § 34–1805(2).

Idaho Code § 34–1805(2) serves as part of a system of checks and balances for direct legislation, which creates a check on the will of the majority by requiring a modicum of statewide support before an initiative or referendum petition is put to the purely majoritarian test of showing aggregate support at the polls and a check on the will of powerful groups that propose initiatives and referenda. Hancock Decl., ¶ 15; Cann Decl., ¶ 23. In so doing, it also promotes grassroots legislative efforts, and promotes an informed and engaged electorate statewide as to initiative and referenda petitions. *Id.* Idaho Code § 34–1805(2) also serves a legitimate state interest by preventing voter confusion and inefficiency by keeping the ballot from being cluttered with prospective statewide laws that are of primarily local interest. Hancock Decl., ¶ 15.

b. Petitioners have not established that Idaho Code § 34–1805(2) is unworkable for all petition sponsors.

Dredge's inclusion of a separate "workability" requirement indicates that there must also be a fact-finding component to this Court's review to determine whether Idaho Code § 34–1805(2) is workable on a practical level. Notably, a statute must be found workable even when it is "restrictive" and "cumbersome." *Dredge*, 92 Idaho at 484, 445 P.2d at 659. Because this is a facial challenge, this Petitioners must establish that Idaho Code § 34–1805(2) renders the initiative and referendum process unworkable for every petition sponsor, including those who do not rely on primarily on volunteer signature gatherers. *See Lochsa Falls*, 147 Idaho at 240–41, 207 P.3d at 971–72 (To prevail on a facial challenge, "the party must demonstrate that the law is unconstitutional in all of its applications.").

Yet by Petitioners' own admission, Petitioners have presented no evidence whatsoever that Idaho Code § 34–1805(2) renders the efforts of all initiative and referendum proponents unworkable. *See* Reply in Support of Motion to Expedite at 6–7 (describing the declarations that Petitioners have filed in support of their Petition as merely providing "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" and stating that, for this reason, any contrary declarations submitted by Respondents would not create a factual dispute). This admission is consistent with the fact that the statements Petitioners' declarations that go to whether Idaho Code § 34–1805(2) is workable should be stricken as wholly and inadmissibly speculative, or as conclusions of law. *See* Respondent's Motion to Strike and Respondents' Memorandum In Support of Motion to Strike.

Petitioners' admission that they failed to present evidence that Idaho Code § 34–1805(2) renders the initiative and referendum process unconstitutional is consistent with the expert opinion

of Dr. Damon Cann, political scientist. Dr. Cann testifies that it is impossible to determine from Petitioners' declarations whether the 35 district requirement is workable for all petition sponsors. Cann Decl. ¶¶ 13–20, 22. As Dr. Cann opines, there are numerous factors that affect whether an initiative or referendum petition is successful, such as the overall support for a particular initiative or referendum, the technological aids and signature-gathering strategies 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. *Id.* The snapshots of three experiences (two initiative petitions that were required to gather signatures in 18 legislative districts and gathered the required signatures in less than four months and one set of referenda that had no geographic distribution requirement and gathered the required signatures to meet a 60-day deadline) do not provide adequate data to determine whether the 35 district requirement sets an unworkable bar.

Moreover, even in an alternative world where these three snapshots of volunteer-based campaigns could provide adequate data to evaluate the workability of the 35 district requirement on a facial challenge, one cannot reach any conclusions from the cherry-picked statements about the three petition efforts that are presented in Petitioners' declarations. Respondents must be allowed to take discovery to get answers to the tough questions that are not answered in the carefully crafted declarations that Petitioners filed.[13] For example, with regard to the Medicaid Expansion signature effort, far from taking advantage of the 18 months allowed by statute to gather signatures on Medicaid Expansion, the sponsors began their signature gathering effort just four months and 25 days before signatures were due, meaning that they could only collect signatures through the winter and spring months. Respondents must be allowed to take discovery as to

[13] As discussed above, this need for discovery demonstrates why Petitioners' challenge is not appropriate for an original action.

whether Reclaim Idaho's experience would have been different if the sponsors had given themselves the additional time allowed by statute.

But even with answers to these questions, the snapshot experiences of three past volunteer-based campaigns that were governed by different requirements cannot establish that all petition sponsors would be unable to comply with Idaho Code § 34–1805(2), as is required for the facial relief that Petitioners seek. *See Count My Vote*, 452 P.3d at 1119–20 (rejecting similar anecdotal evidence as sufficient to establish an undue burden). In fact, Dr. Cann's testimony suggests that the 35 district requirement is indeed workable. Dr. Cann has evaluated signature gathering requirements in other states. Cann Decl. ¶¶ 4–10, 21. It is his opinion that the signature gathering requirements in multiple other states are comparable to or more difficult than Idaho's requirement of gathering signatures from six percent of qualified electors in all 35 legislative districts. *Id.* Notably, under comparable signature gathering requirements in Colorado and Nevada, petition sponsors have been able to qualify multiple measures for the ballot. Cann Decl. ¶ 9. Because individuals are able to qualify measures for the ballot under comparable requirements in other states, this proves that petition sponsors will be able to qualify measures for the ballot under Idaho Code § 34–1805(2).

c. There is no undue burden component to the test for whether a condition or manner restriction is permissible under Article III, § 1, but even if there were, Idaho Code § 34–1805(2) does not unduly burden petition sponsors.

Petitioners are incorrect to suggest that this Court should consider whether Idaho Code § 34–1805(2) unduly burdens Petitioners.[14] Pets.' Br. at 18, 21–23. *Dredge* did not turn on any

[14] Petitioners' take on the history of initiative legislation in Idaho is irrelevant. Petitioners cannot impute the motivations of a legislature over 100 years ago or any legislature since to the legislatures that enacted Idaho Code §§ 34–1805(2) and –1813(2)(a), even if their aspersions on those legislatures' motivations were correct. But even if it were relevant, Petitioners' history is misleading. For example, six initiatives were adopted at the ballot during the period between 1933

alleged burden to petition sponsors, beyond asking whether the challenged requirement was workable. The Court was correct to avoid that analysis. Justice Lee of the Utah Supreme Court has recognized the unworkability of Utah's undue burden balancing standard for evaluating whether the conditions and manner imposed by the Utah legislature on the initiative process are consistent with the constitutional provision establishing the right to the initiative. *See Count My Vote*, 452 P.3d 1109, 1121–22 (Utah 2019) (Lee, J.) ("the undue burden framework is the very model of unworkability"). For example, any undue burden analysis would involve weighing the burden imposed on the Petitioners against the importance of the legislative purpose. *See id.* at 1122. But "[t]his balance . . . is a battle of incommensurables. It is not at all clear what it would mean for a burden on the initiative right to be outweighed by the importance of a legislative purpose." *Id.* (internal quotation omitted). "At its core, it seems to be nothing more than a reservation of a judicial right to second-guess the lines drawn by the legislature—a significant problem under a constitutional provision that guarantees the right *as limited* by the terms and conditions prescribed by the legislature." *Id.* (emphasis in original).

In fact, Justice Lee has suggested that the very reasonable and workable standard established by the Idaho Supreme Court in *Dredge* is a viable replacement for Utah's undue burden balancing test because "[s]uch a test could allow us to respect both the constitutional right to initiate desired legislation and the fact that the right is expressly defined as a right as limited by conditions adopted by the legislature." *Id.* ("One possibility [to replace Utah's undue burden framework] would be a test calling for deference to legislative regulation of the initiative process except in circumstances where such regulation forecloses any meaningful possibility for the people to exercise the [initiative] power." (internal quotation omitted)). This

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and 1978, yet Petitioners present no evidence of any attempt by the legislature to tighten up the process during that period. *See* Hancock Decl., Ex. A; Pets.' Br. at 4.

Court should decline Petitioners' invitation to import an undue burden analysis into *Dredge*'s reasonable and workable standard.

However, even if *Dredge*'s reasonableness and workability standard were interpreted as including an undue burden component, Idaho Code § 34–1805(2) does not unduly burden petition sponsors. Petitioners' undue burden argument is based on unsupported speculation, which should be stricken. *See* Pets.' Br. at 21–23; *see also* Respondents' Motion to Strike and Respondents' Memorandum In Support of Motion to Strike. Petitioners are incorrect to suggest that Idaho's law is unduly burdensome by comparing it to other states. There is no requirement that Idaho's law be comparable to that in other states, but even if there were, the requirements in Idaho are not the most difficult in the nation, and petition sponsors qualify measures for the ballot under more restrictive rules in other states. Cann. Decl., ¶¶ 5, 8, 9, 11, 21. The rate of qualification for the ballot in Idaho has actually increased over the time that Petitioners allege the requirements to qualify for the ballot have gotten more difficult, suggesting the rules really are not unduly burdensome. *See* Hancock Decl., ¶¶ 6–8.

Specific to Petitioners' allegations of an undue burden imposed by a "heckler's veto," only speculative evidence is offered that petition opponents might defeat a petition campaign by encouraging individuals to remove signatures. Petitioners' attempt to input nefarious intent and effect to the amendment should be disregarded.[15] Since the law was amended, the Canyon County

[15] The amendment to Idaho Code § 34–1803B(2) to allow the electronic removal of signatures via communication with the County Clerk's Office is highly rational. A petition signor's interaction with a petition circulator is transitory and fleeting. The petition circulator travels to a location where the petition signor is—whether their door or to another location where the signor is—where the petition signor signs the petition. There is no guarantee that the circulator will remain in that location if, after further consideration, the signor wishes to remove their signature based on the passage of time, new information, or the conclusion that they were misled by the statements of the circulator. Thus, the signor's only recourse may be to ask the county clerk to remove their

Clerk's Office, for example,[16] has not received a single request for a signature to be removed from an initiative or referendum petition. *See* Declaration of Haley Hicks ("Hicks Decl."), ¶¶ 2, 6. Further, if voters really support a petition, they will not be swayed by counterarguments. But even if Petitioners' theorizing were a real issue, petition sponsors have the ability to dramatically reduce the time available for signatures to be removed based on their choice of when to submit signatures for verification to the county clerks' offices. *See* Hick's Decl., ¶ 4. If petition sponsors chose to submit signatures for verification soon after obtaining the signatures, the theoretical opposition campaign could only have a window of a couple of weeks to convince the signor to request removal of his or her signature. *See* Idaho Code § 34–1803B (allowing for the removal of signatures at the signatories' request following presentation of the signed petition to the county clerk only prior to verification of the signature); Hicks Decl., ¶ 5 (signatures are typically verified by the Canyon County Clerk's Office within a couple of weeks of submission by the petition sponsor).

Further, Petitioners' argument ignores the fact that they are only required to collect signatures from 6% of the registered voters in a legislative district. Depending on the district, in 2018, this was just 1,195 to 2,202 individuals. Hancock Decl., ¶ 16. If every one of the 6% of the registered voters is convinced to remove their signature from a petition, the petition sponsors can still convince the 94% of remaining registered voters in that legislative district to sign their petition.

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signature. And in so doing, the signor should not be required to undergo a burden of travel to remove their signature that is not imposed on them to sign the petition in the first place.

[16] Given the very limited time allowed to submit briefing in this original action, Respondents were unable to canvass all the county clerk offices for their experiences with requests for signature removal. Should this Court feel that the experience of the Canyon County Clerk's Office is insufficient to reach any conclusions, this is further evidence that the arguments made in this Petition are not appropriate for an original action and should proceed through a district court action, just as the Utah Supreme Court ruled when presented by similar arguments (including arguments regarding the use of a heckler's veto) in *Count My Vote*, 452 P.3d at 1112, 1121.

Finally, it is noteworthy that the Utah Supreme Court has rejected a similar argument made in the context of an even more challenging Utah signature removal statute. In *Utah Safe to Learn-Safe to Worship Coal., Inc. v. State*, the challengers argued that the burden imposed by Utah's geographic distribution requirement was magnified by the ability of any petition signor to remove his signature from the petition by notifying the county clerk even after the signature was verified until the signatures were submitted to the lieutenant governor and in a period when the petition sponsors could not collect replacement signatures. 94 P.3d at 230. Thus, the challengers argued, "initiative opponents may defeat an initiative by focusing on one or two (or at most, four) [s]enate districts in which sponsors have cleared the 10 [percent] hurdle by the narrowest margin." *Id.* (internal quotation omitted). The Utah Supreme Court rejected this argument because the law was reasonable in light of the fact that the rights of petition signors to remove their signatures must also be protected. *Id.* at 230–31.

Just as in Utah, the Petitioners here cannot be allowed to lessen the legislature's power to set the conditions and manner for the initiative and referenda process based on unfounded speculation about what opposition campaigns might do, and particularly not when their speculation consists of weaponizing the legitimate right of initiative petition signors to remove their signatures from an initiative petition.

3. Idaho Code § 34–1805(2) passes strict scrutiny.

Respondents strenuously dispute that the 35 district requirement is appropriately subjected to strict scrutiny because there is no fundamental right at stake. To so hold would be to read the Idaho Constitution's express grant to the legislature of the power to set the conditions and manner for the initiative and referendum process out of Article III, § 1.

That said, Idaho Code § 34–1805(2) survives strict scrutiny. "Strict scrutiny requires the state to prove a compelling need for the goal of the challenged statute and that there is no less

discriminatory method available to achieve that goal." *Rudeen*, 136 Idaho at 569, 38 P.3d at 607 (citing *State v. Mowrey*, 134 Idaho 751, 755, 9 P.3d 1217, 1221 (2000)).

As stated above, the state has an "important regulatory interest" in ensuring an initiative petition has a modicum of statewide support before it is placed on the ballot. *Angle*, 673 F.3d at 1134–36. Further, the additional interests described above are similarly compelling interests given the state's interest in ensuring the integrity and electoral support of the election process and the legislature's constitutional duty to set the conditions and manner for the initiative and referenda process.

In holding that Idaho Code § 34–1805(2) is narrowly tailored, this Court should be guided by the Ninth Circuit's recognition that requiring that petition sponsors gather signatures from six percent of each of Idaho's 35 legislative districts is narrowly tailored to achieve the above compelling state interests. *See Idaho Coal. United for Bears v. Cenarrusa*, 342 F.3d 1073, 1078 (9th Cir. 2003) ("*ICUB*") (suggesting that a geographic distribution requirement based on existing State legislative districts would be a narrowly tailored way of ensuring a modicum of support statewide for direct legislation). Idaho's legislative districts are drawn, as required by law, to be substantially equal in population. Hancock Decl., ¶¶ 16–17. Thus, it is reasonable to expect that, given that each legislative district has substantially the same population, there are similar opportunities for signature gathering in each legislative district, such as fairs, community centers and similar gathering places. Cann Decl., ¶ 19 n.16. Due to how the legislative districts overlay Idaho's counties, the 35 district requirement means that initiative and referenda sponsors need only gather signatures in about a third of Idaho's 44 counties (14 of 44). Hancock Decl., ¶ 13. Scarcely populated counties need not be visited. Moreover, Idaho Code § 34–1805(2) requires only that signatures of 6% of the qualified electors in each county be gathered to satisfy its requirements. In 2018, this meant that the threshold number of signatures for each legislative district ranged from

just 1,195 to 2,202. Hancock Decl., ¶ 16. Requiring petition sponsors to travel to all of Idaho's legislative districts (which could be just 14 counties) and obtain a couple thousand signatures in each to demonstrate a modicum of state support is a narrowly tailored way to achieve the state's compelling interests.

Petitioners argue that it is not narrowly tailored to require them to obtain signatures in all of Idaho's legislative districts because, apparently, 17 legislative districts are fungible with the other 18 legislative districts because their rural or urban nature is mirrored by other districts. Pets.' Br. at 20 ("Many of Idaho districts mirror or duplicate the urban or rural character of other districts."). Petitioners' fixation on urban versus rural both misleads and mystifies. The Idaho legislature's stated intent in amending Idaho Code § 34–1805 was "to increase voter involvement and inclusivity" by including every part of Idaho in the initiative and referendum process. Appendix A. It was not limited to just ensuring that both urban and rural voters were involved in the process. The commentary of the few legislators that Petitioners cite cannot be used as evidence of the intent of the Sixty-Sixth Legislature. And the varied interests of Idahoans cannot be reduced to a cookie-cutter urban versus rural designation. There are rural districts in Northern Idaho that have different economic drivers and different interests than rural districts in Southwestern Idaho. Similarly, there are rural districts in the middle of Idaho and in Southeastern Idaho that have different interests again. The same can be said for more urban districts across the state. The Idaho Constitution and Idaho Code recognize this diversity of interests for the purpose of representative democracy, assigning one Senator and two Representatives to represent the interests of each legislative district. IDAHO CONST. art. III, § 2(1); Idaho Code § 67–401. Petitioners' effort to give the diversity of legislative districts less value for the purposes of direct democracy cannot stand.

Further, Petitioners' reading of the U.S. District Court's decision in *Isbelle v. Denney*, Case No. 1:19-cv-00093-DCN, 2020 WL 2841886 (D. Idaho June 1, 2020) is far from reasonable. Pets.'

Br. at 8. The decision in *Isbelle* addressed an equal protection challenge under the U.S. Constitution. Isbelle argued that the then-geographic distribution requirement in Idaho Code § 34–1805 (2013) (18 legislative districts) violated the "one-person, one vote" principle protected by the equal protection clause of the U.S. Constitution because it gave no weight to any signatures on an initiative petition after the 6% of registered voters requirement for that district had been reached. *Isbelle*, 2020 WL 2841886, at *3. The U.S. District Court concluded that a clear line of precedent foreclosed *Isbelle*'s challenge, allowing geographic distribution requirements based on legislative districts for initiative petitions. *Id*. at *4–5. Nothing in the court's decision turned on the number of legislative districts required. In fact, the court's recognition that the 18 legislative district requirement required petition circulators to collect signatures in both highly populated and less populous areas of the state applies with even greater force to the 35 legislative district requirement. *See id.* at * 5. Both requirements serve the interest of ensuring that "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"; that being said, the 35 legislative district requirement serves it better. *Id.*

Finally, as stated above, there is no undue burden component in Idaho's strict scrutiny test; it is error for Petitioners to attempt to import an analysis of the alleged burden imposed on petition circulators into their argued strict scrutiny analysis. *See* Pets.' Br. at 18–19. However, even if an analysis of the burden imposed by the challenged law were appropriate under a strict scrutiny review, the discussion above demonstrates that Petitioners have not presented evidence to establish that Idaho Code § 34–1805(2) imposes any sort of an undue burden on individuals desirous of qualifying an initiative or referendum petition for the ballot. This is particularly true in light of the fact that the legislature's duty to set the conditions and manner for the initiative and referendum process "does not mean . . . that the legislature may never pass regulations that have the effect of

making it more difficult to enact legislation by initiative." *Safe to Learn*, 94 P.3d at 226; *Dredge*, 92 Idaho at 484, 445 P.2d at 659 (allowing for "cumbersome" and "restrictive" requirements).

4. If this Court finds the 35-district requirement unconstitutional, former Section 34–1805(2)'s 18 district requirement must govern.

Petitioners' severability argument overreaches and should be rejected as without merit. S1110 amended Idaho Code § 34–1805(2) by repealing the requirement that proposed initiatives and referenda be supported by 6% of the voters in 18 legislative districts and replacing it with the requirement that 6% of the voters in all 35 legislative districts support the measure. Petitioners ask that the Court declare that Idaho Code § 34–1805(2), as amended by S1110, be declared unconstitutional. Verified Petition, p. 18, Prayer for Relief, (a). And even though Petitioners cannot and do not challenge former Idaho Code § 34–1805's 18-district requirement, they seek a remedy that would erase that requirement as well. *See id.*, Prayer for Relief, (b).

The Court should reject Petitioners' argument that the 35 district requirement renders Idaho Code § 34–1805(2) unconstitutional. But even if the Court granted that declaratory relief, it must reject Petitioners' overreaching request that the Court eliminate the district requirement altogether. Petitioners' request is foreclosed by well-settled law.

The U. S. Supreme Court has held that an unconstitutional legislative amendment is "powerless to work any change in the existing statute," and that the original "statute must stand as the only valid expression of the legislative intent." *Frost v. Corp. Comm'n of Okla.*, 278 U.S. 515, 526–27 (1929). The Idaho Supreme Court has adopted this same view. "[T]he law is clear that an unconstitutional amendment does not affect a previous statute, and the same remains undisturbed." *Twin Falls Canal Co. v. Huff*, 58 Idaho 587, 76 P.2d 923, 925 (1938) (citations omitted).

More recently, this Court applied the same principle in *American Independent Party in Idaho*. The plaintiff brought a constitutional challenge to legislation that increased the signature-

gathering requirements for new political parties. 92 Idaho at 358, 442 P.2d at 768. The Court held the new law unconstitutional. *Id.* at 359, 442 P.2d at 769. As a result, it held that the requirements of the repealed law remained valid, not void as Petitioners request:

> When a statute by express language repeals a former statute and attempts to provide a substitute therefor, which substitute is found to be unconstitutional, the repeal of the former statute is of no effect, unless it clearly appears that the legislature intended the repeal to be effective even though the substitute statute were found invalid.

Id. at 359, 442 P.2d at 769.

IV. Idaho Code 34–1813(2)(a) is constitutional.

Petitioners next take issue with Idaho Code § 34–1813(2)(a), which sets July 1 following an election as the default effective date for laws enacted by initiative. Petitioners contend that "[t]he effective date of an initiative remains solely within the province of those who have proposed the legislation." Pets.' Br. at 25. Their contention contradicts the Constitution's text—which allows the legislature to set the conditions and manner for the initiative process—and the Constitution's structure—which similarly sets a default effective date for laws passed by the legislature—as well as every other relevant state's understanding. The legislature has the power to set an effective date for initiatives.

Citing only the phrase "independent of the legislature," Petitioners conclude without explanation that only initiative sponsors can set the effective date for an initiative. But, as discussed above, the phrase "independent of the legislature" only applies to the subject matter of proposed initiatives. Under the key language of Article III, § 1 that Petitioners ignore, the legislature has the express power to set the conditions and manner for the initiative process.

Setting a law's default effective date falls within the conditions and manner provision of Article III, § 1. It is procedural, not substantive, because a default effective date is itself devoid of

meaning. The people (or a legislature) would never initiate and vote on a law that consists only of an effective date, as the law would serve no purpose. The effective date is always adjacent to the substantive portions of the law. This understanding is consistent with the Constitution's text, which grants the legislature the power to set manners and conditions for initiatives. A "manner" is "the way in which something is done" or "a characteristic or customary mode of acting," and a "condition" is "something essential to the appearance or occurrence of something else" or a "prerequisite."[17] By setting a consistent default effective date for all initiatives, the legislature set a prerequisite for the occurrence of an initiative's substantive legal requirements or duties (the arrival of July 1 following the pertinent election) and it set the manner in which an initiatives substantive legal requirements come to pass (on July 1).

An understanding of the default effective date as procedural, rather than substantive, is consistent with the default effective date for the laws passed by the legislature. Similar to Idaho Code § 34–1813(2)(a), Article III, Section 22 and Idaho Code § 67–510 set a default effective date for laws passed by the legislature.[18] In fact, most laws passed in Idaho need not include an effective date at all. *See* Legislative Services Office, *Legislation Drafting Manual*, 9, *available at* https://legislature.idaho.gov/wp-content/uploads/research/draftingmanual.pdf ("July 1 is the default effective date imposed by law for legislation. Therefore, no effective date clause is necessary unless a different effective date is intended.").

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[17] *Manner*, CAMBRIDGE DICTIONARY, *available at* https://dictionary.cambridge.org/us/dictionary/english/manner (last visited May 28, 2021); *Manner*, MERRIAM-WEBSTER DICTIONARY, *available at* https://www.merriam-webster.com/dictionary/manner (last visited May 28, 2021); *Condition*, MERRIAM-WEBSTER DICTIONARY, *available at* https://www.merriam-webster.com/dictionary/condition (last visited May 28, 2021); *see also Johnson*, 56 Idaho, 57 P.2d at 1078 (1936) (Givens, C.J. dissenting) (providing the 1936 definitions for conditions and manner).

[18] The legislature has set the same general deadline for itself as it set for initiatives: July 1. *See* Idaho Code § 67–510.

In fact, no other state recognizes the power to set an effective date as inherent in the power to initiate laws. Of the 21 states that have a constitutional right to initiate laws, every single one has a constitutional provision or statute that expressly states when an initiative takes effect.[19] Petitioners, therefore, ask this Court to make Idaho an outlier. And of those six states that permit the voters to alter the effective date, the power to modify the date is *expressly* granted to the people.[20] If the power to modify an effective date were inherent in the power to initiate laws, then all of those express provisions would be the type of surplusage that courts regularly reject. *Sweitzer v. Dean*, 118 Idaho 568, 572, 798 P.2d 27, 31 (1990) ("The Supreme Court will not construe a statute in a way which makes mere surplusage of provisions included therein.").

Petitioners seemingly recognize that the power to set a default effective date is not inherent in the initiative power reserved in Article III, § 1, as after only one paragraph of argument they pivot to arguing that voters should be allowed to exercise the power to declare an emergency under Article III, § 22. But Article III, §1 contains no mention of the power to declare an emergency in relation to the initiative power, nor in relation to the legislative power. Rather, discussion of the emergency power comes 21 sections later in Article III, § 22.

Article III, § 22's text applies only to the legislature. The section begins "[n]o act shall take effect until sixty days from *the end of the session* at which the same shall have been passed[.]"

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[19] Alaska Stat. § 15.45.220; ARIZ. CONST. art. IX, Part 2, § 1, ¶ 13; ARK. CONST. art. 5, § 1; CAL. CONST. art. II, § 10(a); COLO. CONST. art. V, § 1, ¶ 4; ME. CONST. art. IV, Part 3, § 19; MASS. CONST. art. XLVIII, Part IV–V and art. LXXXI, §§ 1–3; MICH. CONST. art. II, § 9 and art. XII, § 2; MISS. CONST. art. XV, § 273(10) and Miss. Code § 23-17-41; MO. CONST. art. III, § 52(b); Mont. Code § 13-27-105; Neb. Rev. Stat. §§ 32-1037 and 32-1414; NEV. CONST. art. 19, § 2 and Nev. Rev. Stat. § 293.395; N.D. Const. art. III, §§ 8–9; Ohio Const. art. II, § 1b; OKLA. CONST. art. V, § 3; OR. CONST. art. IV, § 1; S.D. Codified Laws § 2-1-12; Utah Code § 20A-7-212; WASH. CONST. art. II, §§ 1(d) and 24; WYO. CONST. art. 3, § 52(f).

[20] ARK. CONST. art. 5, § 1; CAL. CONST. art. II, § 10(a); MASS. CONST. art. XLVIII, Part IV–V and art. LXXXI, § 1–3; MISS. CONST. art. XV, § 273(10) and Miss. Code § 23-17-41; Mont. Code § 13-27-105; Utah Code § 20A-7-212.

Article III, § 22 (emphasis added). Initiatives are not passed during a "session"—they are adopted at an election. Nor is there anything comparable to the end of a legislative session in the initiative process. Tellingly, the power to declare an emergency in this section is contained in a dependent clause to the above text. Thus, the dependent clause should be read in conjunction with what precedes it, meaning power to declare an emergency, like the rest of Article III, § 22 applies only to the legislature.

Moreover, Article III, § 22's grant of the power to declare an emergency only to the legislature makes practical sense because of the differences in how direct legislation is created compared to representative legislation. Ballot initiatives are "typically drafted by the narrowly focused advocates, often members of special interest groups." Cathy R. Silak, *The People Act, the Courts React: A Proposed Model for Interpreting Initiatives in Idaho*, 33 IDAHO L. REV. 1, 3 (1996); *see also Luker*, 64 Idaho, 136 P.2d at 979–80 ("[A]n initiative measure is drafted by a single person, or group of persons, and after circulated and filed, there is no opportunity for amendment or change until after it is voted upon." (citation omitted)). Ballot initiatives do "not pass through the usual legislative drafting process, involving the scrutiny of legislative committees, legislative counsel, floor debates, and ultimately the vote of both houses of a state legislature." Silak, at 2–3. In short, "[u]nlike [representative] legislation, . . . direct legislation by the people through the initiative process is subject to virtually no formal checks and balances. . . ." *Id.* at 2. Given how initiative language is created and the absence of the types of checks and balances that apply to representative legislation, it makes sense that the power to declare an emergency is solely within the province of the legislature, particularly because the decision to exercise the emergency power under Article III, Section 22 is largely free of judicial review. *Idaho State AFL-CIO v. Leroy*, 110 Idaho 691, 698, 718 P.2d 1129, 1136 (1986) ("[W]e hold that 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."). At bottom, initiative sponsors do not have the unfettered power to set an effective date for initiatives.

A. Idaho Code § 34–1813(2)(a) is reasonable and workable.

Having established that Idaho Code § 34–1813(2)(a)'s default effective date for initiatives falls within the conditions and manner that the legislature may set under Article III, § 1, Idaho Code 34–1813(2)(a) passes conditional muster because it is reasonable and workable. *Dredge*, 92 Idaho at 484, 455 P.2d at 659. Notably, aside from the unsupported allegation of "an insidious power-play," Petitioners do not address that question. Pets.' Br. at 26.

The decision to set a default effective date is reasonable (*i.e.* rationally related to a legitimate government interest), as it prevents any ambiguities when an effective date is omitted in an initiative, recognizes that initiative drafters are unlikely to have access to detailed policy information as to effect of a proposed law on governmental entities which bear on when a law could reasonably become effective, and streamlines implementation and enforcement of initiatives as most will have the same effective date. *See* Cann Decl., ¶ 24. Those and other virtues of a default effective date are nearly self-evident, as Article III, § 22 provides a similar default for laws passed by the legislature and every state with an initiative process sets a default.

The date selected, July 1 after the election, is also reasonable. As the law's sponsor explained, the purpose of the July 1 date "was to mirror the legislative process." *Minutes of the House State Affairs Committee – February 14, 2020*, 1, *available at* https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2020/standingcommittees/200214_hsta_0900AM-Minutes.pdf; *see also* Appendix B (explaining that the law "clarifies effective dates"). Idaho Code 34–1813(2)(a) does just that, as it makes the effective date for initiatives the same as the default effective date for laws passed by the Legislature. Idaho Code § 67–510; *see also* 2017–2021 Enacted Legislation (around 70% to 90% of laws passed in each of the five past sessions effective

on July 1).[21] By setting a uniform default, the State, local government, and Idaho's citizens can reasonably set their expectations for when they need to follow a new law—regardless of whether it is passed at the Statehouse or on the ballot. Further, by setting the default effective date months in the future, the State gives itself sufficient time to appropriate any funds, set any policies or procedures, and hire any personnel that may be needed to adequately implement and enforce the new law. The need for that time is stronger during the initiative process, as most voters and initiative sponsors are less familiar with the interworking of government than legislators; thus, voters and initiative sponsors may be less able to account for the burden imposed by and the time needed for the implementation or enforcement of a new law. Finally, by setting default at July 1 specifically, any laws passed through the initiative process take effect during the State's next fiscal year. Idaho Code § 67–2201. As a result, funds can be appropriated to implement and enforce the law and any state entities that may need to incur expenses because of the law passed through the initiative have time to adjust their budgets, rather than risk incurring a funding shortage.

The default effective date is also workable, as required by Article III, § 1. Petitioners do not appear to argue otherwise, as they say the legislature "*could* set an arbitrary date far into the future that effectively nullifies an initiative passed by popular support." Pets.' Br. at 25 (emphasis added). They do not seem to say that the legislature *has* done so with Idaho Code 34–1813(2)(a). And for good reason: the legislature hasn't done that. In fact, time between the enactment and the effective date for legislation passed by the legislature early in the session is not so different from the default effective date of July 1 for laws adopted by initiative at the November general election. Any opinions Petitioners may have about whether Idaho's default effective date *should* be different

[21] Available under "Enacted Legislation" at https://legislature.idaho.gov/sessioninfo/ (last visited May 26, 2021).

are policy points, not constitutional flaws. Because Idaho Code § 34–1813(2)(a) is reasonable and workable, Petitioners' challenge fails.

V. Petitioners are not entitled to an award of attorney's fees.

Petitioners are not entitled to attorney's fees under the private attorney general doctrine for four reasons. First, they should not prevail on the merits for the reasons explained above. "[O]nly a prevailing party may receive attorney's fees under the private attorney general theory." *Joki v. State*, 162 Idaho 5, 394 P.3d 48, 54 (2017).

Second, this original action is not well suited for application of the private attorney general doctrine. As the Court explained in *Van Valkenburgh*, determining whether the "private attorney general doctrine is met requires a factual determination by the trial court." 135 Idaho at 129, 15 P.3d at 1137 (quotation omitted). Here, however, a trial court has not had the opportunity to make any factual determinations because Petitioners filed an original action with this Court. In this Court's words: "Because of the unique nature of these proceedings, there have been no factual findings by a trial court, and we do not believe it is the proper exercise of this Court's power to make such findings." *Id.*

Third, Petitioners have presented insufficient facts. Because the applicability of the private attorney general doctrine requires factual determinations, Petitioners need to present evidence that all three prongs of the test are satisfied. Aside from a few citations to declarations that were not subject to objections or cross-examination and for which Petitioners disclaim any factual import, Petitioners largely seek fees based upon unsupported allegations about the issues at stake. "[T]he evidentiary record before [the Court] is wholly insufficient to make the necessary factual determinations." *Id.*; *see also Idaho Conservation League, Inc. v. State*, 128 Idaho 155, 157–58, 911 P.2d 748, 750–51 (1995) ("There is no proof that they represent the public interest, nor that they bear the burden of sole responsibility for prosecuting in the name of the public.").

Fourth, Petitioners have not proven that they needed to act in place of the Attorney General. They say the Attorney General has a "conflict of interest" because "he is charged with advising and representing the state officials that created [the challenged laws]." Pets.' Br. at 27. But if true, that argument would suffice for all challenges to a statute. "There is no evidence that the state attorney general was given the opportunity to bring this suit and refused." *Simpson v. Cenarrusa*, 130 Idaho 609, 614, 944 P.2d 1372, 1377 (1997). As a result, Petitioners "have failed to show that it was necessary to bring a private action." *Id.*

CONCLUSION

This Court should dismiss the Petition because this Court lacks original jurisdiction. Further, the Petition's request for a writ of prohibition is procedurally improper. But even setting these fatal flaws aside, this Court should reject the Petition because neither Idaho Code § 34–1805(2) nor Idaho Code § 34–1813(2)(a) violate Article III, § 1 of Idaho's Constitution.

Dated this 2nd day of June, 2021.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

/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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APPENDIX A

STATEMENT OF PURPOSE

RS28454 / S1110

The purpose of this legislation is to increase voter involvement and inclusivity in the voter initiative/referendum process. This will be accomplished by ensuring signatures are gathered from each of the 35 legislative districts, so every part of Idaho is included in this process.

FISCAL NOTE

There will be no effect on the general fund.

Under existing law, county clerks already verify initiative/referendum signatures in every legislative district where they are gathered. This bill would increase the number of districts where signatures are gathered, but would not raise the total number of signatures gathered, so the existing work load would be more evenly spread out amongst county clerks, rather than concentrating it into a few counties.

Contact:

Senator Steve Vick
Representative Jim Addis
(208) 332-1000

APPENDIX B

STATEMENT OF PURPOSE

RS27733C1 / H0548

This legislation amends Idaho Initiative Code to improve clarity, transparency, and integrity in the initiative process. Specifically, this legislation requires each initiative to embrace a single subject, clarifies effective dates, requires that each initiative petition signer is made aware of existing Idaho Code pertaining to petition signature removal, and requires those who pay signature gatherers to report their activity to the Secretary of State's office.

FISCAL NOTE

There is no impact to the State General Fund.

Contact:

Representative James S. Addis
(208) 332-1000