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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

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

Petitioners,

v.

LAWERENCE DENNEY, the Idaho Secretary of State, and the STATE OF IDAHO,

Respondents, and

SCOTT BEDKE in his official capacity as Speaker of the House of Representatives of the State of Idaho; and CHUCK WINDER, in his official capacity as President Pro Tempore of the Idaho State Senate; SIXTY-SIXTH IDAHO LEGISLATURE,

Intervenor-Respondents.

Case No. 48784-2021

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

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INTRODUCTION

Petitioners Reclaim Idaho and the Committee to Protect and Preserve the Idaho Constitution stand on their arguments in the Verified Petition and Brief in Support. Here, they respond to new matters raised in the briefing of the Respondents and the Intervenor-Respondents.[1]

ARGUMENT

I.

Petitioners are in the proper court and are seeking the proper remedy.

The Respondents argue that this Court should not exercise its original jurisdiction. They question the urgency of the matter, and the Secretary of State suggests an adequate remedy exists in the district court through the ordinary course of civil litigation. The Court should not be persuaded.

1. This case presents an urgent constitutional question of statewide importance.

Reclaim Idaho, the Committee, and the citizens of Idaho need clarification on the constitutionality of the new law, and they need it now. Senate Bill 1110 so severely burdens their fundamental constitutional right to enact and repeal law that it is

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[1] Petitioners have combined into one brief their reply to the Respondents' and the Intervenors-Respondents' separate briefing. For ease of reference, Petitioners will refer to Respondents Lawerence Denney and the State of Idaho as "the Secretary of State" and will cite their brief as "Sec. Brf." Petitioners will refer to Intervenor-Respondents Scott Bedke and Chuck Winder as "the Legislature" and will cite their brief as "Leg. Brf."

impossible for them to meet the new geographical distribution requirements. This is a constitutional issue of statewide importance that calls for the swift judgment of this Court. A cloud of uncertainty presently hangs over the law, and Petitioners are hamstrung in moving forward with their pending initiative and referendum campaigns until the Court gives an authoritative answer.

The Secretary of State posits that there is no urgency because the new laws are presumptively constitutional. Res. Brf., p. 3. Yet, Petitioners have presented evidence to this Court that even with extraordinary effort and diligence it would be impossible to meet the 35-district rule. The Legislature's new requirements have effectively nullified the people's constitutional right. Each day that a party's constitutional rights are violated causes an irreparable injury. *Cf. Melendres v. Arpaio,* 30 F.3d 990, 1002 (9th Cir. 2012) ("the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'")(quotation omitted). Petitioners should not be required to go through a performative ritual of trying to meet an impossible standard that they cannot meet, at great cost, and in violation of their constitutional rights before coming to court to vindicate their rights.

Since the Petition was filed, the Senate voted to adjourn for the session on May 12, 2021, yet the House recessed indefinitely. Though the Secretary of State contends that this never before schism in the Idaho Legislature gives the Committee a "grace period" for its referendum until the House says it has adjourned, Res. Brf., p. 4, that

interpretation is far from legally certain and he has no authority to make that legal determination. It is also unclear when, or whether, the House will go back into session. These actions are yet another clear violation by the Legislature of the Idaho Constitution, which requires that neither house shall, without the concurrence of the other, adjourn for more than three days. Idaho Const. art. III, § 9. The unprecedented failure of the chambers to agree on whether the 66th Session of the Idaho Legislature has completed its business adds greatly to the confusion and urgency of an already uncertain situation.

2. The district court does not offer a plain, speedy, and adequate remedy.

The Secretary of State's suggestion that a plain, speedy, and adequate remedy exists in the district court is likewise incorrect. Sec. Brf., p. 6. Ordinary civil litigation in the lower courts would not offer the *speedy* and *final* relief that is needed. Any ruling on a temporary restraining order or preliminary injunction in the district court – which the Secretary offers as a potential alternative "speedy" remedy – would be appealed to this Court. It makes little sense to spend precious time and resources to follow such a circuitous route to get back where the case started. Worse, if the case were to follow a regular or even somewhat expedited track in the district court, and to include discovery, a final decision on appeal is unlikely before the May 1, 2022 deadline for initiative proponents to complete their signature gathering. The 60-day timeframe for a referendum is impossible on a district court track.

Wasden ex rel. v State Bd. of Land Com'rs, 150 Idaho 547, 249 P.3d 346 (2010) does not demand a different result. Sec. Brf., pp. 5-6. There, this Court dismissed the Attorney General's petition for a writ of prohibition brought on the Idaho Land Board's behalf. 150 Idaho at 554, 249 P.3d at 353. The Court concluded that a plain, speedy, and adequate remedy existed in the district court. *Id*. *Wasden*, however, involved detailed factual issues regarding the setting of rental rates for cottage sites on state owned land, which were best suited for resolution in the district court. 150 Idaho at 553, 249 P.3d at 352. Even if the Court had entertained the writ, the case would have still required a remand so that the district court could determine the rates of the leases.

This case does not contain any similar granular issues of fact. Although the Petitioners have provided facts and opinions in affidavits to support their Petition, that evidence is intended to show the Court how difficult signature gathering was even under the 18-district rule and, by inference, to establish the impossibility of complying with a 35 out of 35-district requirement. Petitioners have also provided expert evidence to demonstrate how severe Idaho's new restrictions are in the context of citizen initiative laws historically in this state and nationwide. None of this sets up a genuine issue of material and disputed fact.

For instance, Respondents have not offered countervailing evidence from other grassroots, volunteer-driven campaigns stating that they could surmount these or similar requirements. The Secretary contends that he wants to ask some "tough

questions" in discovery of Reclaim Idaho's volunteers about when they started signature gathering during the Medicaid expansion campaign, but that is a distraction. Sec. Brf., p. 24. If he means to suggest that Reclaim Idaho was not diligent during that signature drive in trying to meet the 18-district requirement (which would be incorrect), then that is a legal argument that he can make based on the facts that are already in the record.

What is more, this Court *requires* that Petitioners assert sufficient facts to support a petition for extraordinary relief for the Court to hear it. *See, e.g., Idaho Watersheds Project v. State Bd. of Land Commissioners*, 133 Idaho 55, 57, 982 P.2d 358, 360 (1999) ("We will exercise jurisdiction to review a petition for extraordinary relief where the petition alleges sufficient facts concerning a possible constitutional violation of an urgent nature."); *see also Sweeney v. Otter*, 119 Idaho 135, 137-39 804 P.2d 308, 310-11 (1990)("Because the petition alleges sufficient facts concerning a possible constitutional violation of an urgent nature, we accept jurisdiction in this case to review the petition for extraordinary relief.").

The Secretary of State cites a case from Utah, *Count My Vote, Inc. v. Cox*, 452 P.3d 1109 (Utah 2019), for the proposition that the district court is the most appropriate forum. Sec. Brf., pp. 3-4. But that case actually supports the Petitioners' position. There, the Utah Supreme Court declined to exercise its original jurisdiction to address whether legislative restrictions were unduly burdensome. *Id*. at 1124. What the Secretary omits is

that the Utah Supreme Court chastised the petitioners for relying solely on "anecdotal" information and for the Utah petitioner's invitation to the court to use "common sense" to conclude that the legislature's restrictions on ballot initiatives have gone too far. *Id.* at 1119-20. There was simply no evidentiary support for the petitioner's claims on which the Utah Supreme Court could rule. They had failed to submit any expert testimony or statistical evidence of the impact of the challenged statutory provisions on their ability to succeed in qualifying an initiative for the ballot.

Here, in contrast, Petitioners have offered far more than "anecdotes" and an invitation to apply "common sense." In fact, to rebut Respondents' unfounded argument that Petitioners have not come forward with sufficient concrete evidence showing how difficult qualifying for the ballot is under this new scheme, *see* Sec. Brf., p. 23, Petitioners have now filed the declaration of Dr. Joe Champion, a mathematics professor at BSU. *See* Exhibit 9, Declaration of Dr. Joe Champion.

Dr. Champion is a scholar of mathematics and statistics education with special expertise in probability, which is the mathematical study of the chance an event will occur under a given set of conditions. Champion Dec., ¶ 3. Dr. Champion calculated the probability of collecting 6% of signatures for an initiative or referendum in all 35 legislative districts in Idaho. Based on the fact that the signature-gathering potential for any initiative or referendum is unevenly distributed across legislative districts, he made the following assumptions: that Petitioners were collecting signatures for an initiative

and/or referendum that was very popular with Idaho voters, and that Petitioners' independent probability of collecting 6% of the necessary signatures in the 35 respective districts would be, at best, 75% in 20 districts, 90% in 8 districts, and 99% in the final 7 districts. In other words, Petitioners had at least a 75% of qualifying a district for the ballot in 20 of Idaho's districts, a 90% chance of qualifying 8 of the districts, and a near "sure thing" in the final 7 districts, where the Petitioners had a 99% chance of qualifying those districts. After making this set of very favorable assumptions about the likelihood of the probability of qualifying a petition for the ballot, he concludes that the overall probability of successfully meeting the requirement in all 35 districts under those assumptions would be .001, or one-tenth of one percent. *Id*. at ¶ 4.

He likens the compounding difficulty from qualifying in each district to the probability that a basketball player will make 35 out of 35 shots in a row, without a single miss, from different places on the Court, from layups to long-range jump shots. *Id*. at ¶ 5. He explains that the general multiplication principle of compounded probability, applied to a large number of events, shows why the result of his calculation is such a small number. *Id*. By requiring only success – remember each and every Idaho district must be qualified – a compounding restriction is placed on the chance of success.

3. This Court has reached the merits in other recent original jurisdiction cases.

The present case has more in common with a string of cases after *Wasden* where this Court recognized that urgent constitutional matters of public importance need the finality that comes from this Court's judgment. To that end, the Court has expressed a willingness to act in cases "requiring a determination of the constitutionality of recent legislation" and when there is an urgency to the alleged constitutional violation and a need for an immediate determination. *Ybarra v. Legislature of Idaho*, 166 Idaho 902, 906, 466 P.3d 421, 425 (2020) (citing *Coeur D'Alene Tribe v. Denney*, 161 Idaho 508, 513–14, 387 P.3d 761, 766–67 (2015)). The Court will exercise its original jurisdiction "when compelled by urgent necessity." *Regan v. Denney*, 165 Idaho 15, 20, 437 P.3d 15, 20 (2019). The present case calls for the "determination of the constitutionality of recent legislation," *Ybarra*, 166 Idaho at 906, 466 P.3d at 425, and there is an urgent need for an immediate and final ruling. It fits easily within the parameters of *Coeur d'Alene Tribe*, *Ybarra*, and *Regan*.

4. Declaratory relief and a writ of prohibition are the correct remedies.

Finally, the Secretary of State questions whether the Petitioners are seeking the appropriate remedies, particularly a writ of prohibition. Sec. Brf., p. 6. The Secretary contends that because he did not enact the statutory provisions, he is not "exceeding his powers" in a way that needs to be stopped through a writ of prohibition. *Id*. But he most certainly does not have the power to enforce an unconstitutional statute. If this

Court declares that these provisions are unconstitutional, then a writ of prohibition directing him not to enforce them is perfectly appropriate. *See Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 15 P.3d 1129 (2000)("we issue a writ of prohibition prohibiting the Secretary of State from carrying out the directions contained in subsections (3) and (4) of I.C. § 34-907B as they pertain to the placement of ballot legends on the ballot.").

II.

The Legislature's non-justiciability argument seeks to curtail this Court's power to say what the law is.

The Idaho Legislature presses a sweeping claim that its decision to impose conditions on the exercise of the people's constitutional right to make or repeal law, no matter how strict or burdensome, is unreviewable by this Court. Leg. Brf., pp. 13-19. In other words, the Legislature argues that there are no limitations to the burdens it can impose on the constitutional right of Idaho citizens to use the initiative and referendum – literally none.

This cannot be so, and it historically has not been. In the past, when the Legislature made a right established in the Constitution "a practical impossibility" this Court struck the law down. *E.g.*, *Am. Indep. Party in Idaho, Inc. v. Cenarrusa*, 92 Idaho 356, 359, 442 P.2d 766, 769 (1968) (striking down a law that would have made it a practical impossibility for a new political party to get on the ballot). Though it is true that the

Court typically does not second-guess legislative judgments in the absence of an intrusion on a constitutionally protected right, *see Idaho State AFL-CIO v. Leroy*, 110 Idaho 691, 698, 718 P.2d 1129, 1136 (1986), here the Legislature has invaded the people's right.

1. This case does not present a non-justiciable "political question."

In making its argument, the Legislature claims that this issue poses a political question that is not amendable to the application of judicial standards. Leg. Brf., pp. 13-19. It is perhaps not surprising that the same Legislature that seeks to aggrandize its own lawmaking power at the expense of the people's constitutional right to legislate would also seek to aggrandize its power at the expense of the judiciary. The Court should not fall for it. Interpreting the meaning of Article III, § 1 and applying that interpretation to the statutes at issue in this case falls within the heartland of the judiciary's powers and duties. It has long been the province of the judiciary in this country, federal or state, to say what the law is. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). This Court just reaffirmed that principle: "[p]assing on the constitutionality of statutory enactments, even enactments with political overtones, is a fundamental responsibility of the judiciary, and has been so since *Marbury v. Madison*." *Bedke v. Ellsworth*, Slip. Op. No. 48268, at *10 (Idaho Jan. 26, 2021) (citing *Miles v. Idaho Power Company*, 116 Idaho 635, 640, 778 P.2d 757, 762. (1989)).

The Legislature recasts the claim as one in which Petitioners are asking this Court to substitute its policy judgment for the policy judgment of the Legislature. Sec. Brf., p. 15. It asks, "[a]t what point does permissible conditioning of initiatives and referenda to ensure statewide support become unconstitutional?" *Id*. at 17. The Court is not called to answer that question. It is instead called to determine whether *this* statute imposing *this* severe burden is unconstitutional. That is not a policy determination; it is the essence of constitutional decision-making. If this is a political question that requires the Court to step back at the Legislature's command, then it is hard to see when a claim would be reviewable.

The Legislature relies on the United States Supreme Court's recent decision in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), in which a majority of the Court held that partisan gerrymandering is a non-justiciable issue under the federal constitution. *Rucho* is nothing like this case. The Supreme Court noted that gerrymandering had roots going back to the Country's founding. *Id*. at 2494-2496. If the Supreme Court were to apply a federal standard to review – and potentially strike down – a partisan gerrymander, it would embroil itself in a politically fraught exercise. And it had long struggled to tease out a workable standard that made sense. *Id*. at 2505. Ultimately, the Supreme Court decided that it had "no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to guide us in the exercise of

such authority." *Id*. at 2508. This Court would not be "allocating political power and influence" by deciding the issue in this case.

Moreover, in *Rucho,* Chief Justice Roberts pointed to the success of citizen reformers in many states who used the initiative to generate effective reforms. *Rucho*, 139 S.Ct. at 2507-2508. The success of Idahoans and citizens of other states who have used initiatives and referenda to effect needed laws in spite of recalcitrant legislatures "has spurred a backlash from legislatures determined to block any check on their power." Daley Dec. ¶ 19. So it goes in Idaho.

2. Courts have had little difficulty in applying clear and workable constitutional standards in similar circumstances.

More important, judicial standards have long existed for judging these types of claims. We could start right here. In *Dredge Mining Control-Yes!, Inc. v. Cenarrusa,* 92 Idaho 480, 445 P.2d 665 (1968), the Court reviewed, on the merits, a statute that required the collection of valid signatures from 10% of registered voters to qualify an initiative for the ballot. In upholding the law, the Court noted that the requirement may be "cumbersome," but it was nonetheless "reasonable and workable." 92 Idaho 484, 445 P.2d at 669. Without analysis, the Legislature claims that *Dredge Mining*'s "standard lacks the clarity required to reliably measure the constitutionality of a legislative condition." Leg. Brf., p. 18, n. 8. This is in serious tension with the Secretary of State, who believes that *Dredge Mining*'s purported "reasonable" and "workable" standard is fine and relies on it heavily throughout his brief.

Petitioners argued in their original brief that the Court was not asked to devise a constitutional test in *Dredge Mining* and that its "reasonable" and "workable" standard is of questionable utility in the wake of the Court's more modern state constitutional jurisprudence. Pet. Brf., pp. 13-14. But it is at least *a* standard, and the Court had no difficulty assessing the competing arguments and coming to a conclusion. [2]

The Legislature's claim that no judicial test could possibly work faces a steep climb against history. Scores of federal and state courts have reviewed challenges to legislative restrictions on initiatives and referendums, and have reached the merits, all applying workable judicial standards. *See*, *e.g.*, *Meyer v. Grant*, 486 U.S. 414, 420 (1988) (striking down Colorado's restrictions on petition circulation that burdened First Amendment rights after applying "exacting scrutiny"); *Angle v. Miller*, 673 F.3d 1122, 1133 (9th Cir. 2012) (applying a test that examines the severity of the legislative burden on initiative proponents' First Amendment rights); *Idaho Coalition United for Bears v. Cenarrussa*, 342 F.3d 1073 (9th Cir. 2003) (applying the strict scrutiny test to Idaho's distribution of signatures by county under the Equal Protection Clause); *Fabec v. Beck*,

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[2] The Secretary of State uses a sleight of hand to recast *Dredge Mining*'s test. In his brief, he transforms a *reasonableness* standard into *rational basis* review. *See* Sec. Brf., pp. 20-21. In doing so, he argues that the extent of the burden on Petitioners is irrelevant. *Id*. at 25-26. Even though Petitioners disagree that *Dredge Mining* sets out the appropriate test to apply, a reasonableness standard has more teeth than rational basis review. Whether a regulation is reasonable and workable must take into account both the burdens that it puts on those subjected to it and the corresponding purposes that the Legislature gives for it.

922 P.2d 330, 342 (Colo. 1996) (applying a liberal standard "so that the constitutional right reserved to the people may be facilitated and not hampered"); *Wolverine Golf Club v. Hare*, 180 N.W.2d 820, 844 (Mich. 1970) (reviewing regulations to determine whether they were unnecessary and therefore unreasonably curtailed or hampered the people's right to initiate legislation).

An illustrative example of another state court applying a state constitutional standard to invalidate a legislative regulation that impinged on the people's initiative and referendum power can be found in *State ex rel. Stenberg v. Beermann*, 485 N.W.2d 151 - 153 (Neb. 1992). In Nebraska, like here, the people reserved the right in their constitution to initiate law. 152. They also gave the legislature the authority to enact legislation that "facilitate[s]" the right. *Id*.

The Nebraska legislature enacted a statute that prohibited petition circulators from gathering signatures outside of their own counties. *Beermann*, 485 N.W.2d at 152. The *Beermann* court struck that legislation down. In doing so, it applied its own established principle that "facilitation" meant "reasonable legislation to prevent fraud or render intelligible the purpose" of the proposed law. *Id*. Anything beyond that would be unconstitutional: "'any legislation that would hamper or render ineffective the power reserved to the people would be unconstitutional.'" *Id*. at 153 (citation omitted). It wrote that the effect of the legislation before the court would "Balkanize the

initiative process in this state" by dividing what should be one statewide campaign into 38 separate campaigns. *Id*.

Beermann is notable for two reasons. First, contrary to the Legislature's argument, it is an example of how state courts can find appropriate standards to apply in these circumstances. If the Idaho Legislature's reasoning were applied to *Beermann*, the court there would have deferred to the Nebraska's legislature's decision on what did or did not "facilitate" the people's right as a "political question." The court instead understood that was a call for the judiciary to make. Second, it provides an example of a legislature exceeding its power by "Balkanizing" the process. Balkanization has also occurred here, as this new legislation effectively requires Petitioners to develop organizing campaigns in 35 separate districts.

Turning back to the present case, the appropriate standard is exacting or strict scrutiny because the right under the Idaho Constitution is fundamental. The Legislature incorrectly asserts that Petitioners have tied their argument to the constitutional right to vote as the fundamental right at stake. Leg. Brf., p. 11. Though the people's reserved right to make and repeal law is a close relative of the right to vote, it is also a fundamental right unto itself. That is so because it is expressed as a positive right in Idaho's Constitution separate and apart from the right to vote and it is implicit in Idaho's concept of ordered liberty. *See* Pet. Brf., p. 15.

Strict scrutiny is not some exotic test of uncertain provenance. It is well known to this Court. It demands that there be a compelling state interest and that the challenged law is necessary to serve that interest. *E.g.*, *Van Valkenburgh,* 135 Idaho at 126, 15 P.3d at 1135. Here, there is no compelling state interest in so dramatically increasing the geographical distribution requirement to 35 of 35 districts. That requirement is not narrowly tailored to achieve whatever interest in geographical diversity that the State claims it has. It is also worth noting that the Constitution does not require that an initiative or referendum have "statewide support" as a condition of being placed on the ballot.

Courts across the country apply various levels of scrutiny and balancing tests all the time to states' restrictions on constitutional electoral rights, assessing the severity of the burden and the purported interests furthered by the legislation. *E.g.*, *Ariz. Green Party v. Reagan*, 838 F.3d 983, 988 (9th Cir. 2016) (characterizing the Supreme Court's "*Anderson*/*Burdick*" test on state ballot access restrictions as "a sliding scale test, where the more severe the burden, the more compelling the state's interest must be ...") (citing *Anderson v. Celebrezze* , 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992)); *see also Angle v. Miller*, 673 F.3d at1133 ("[r]egulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest."). Tests like the one from *Anderson* and *Burdick* have proven workable over time.

3. This legislation has created a severe and unreasonable burden on a fundamental right and should be struck down under any level of review.

Under any well-known standard Petitioners should prevail. They have shown that the burden to comply with these requirements is beyond unreasonable, excessive, and unworkable. This is not a close call. On the other side of the balance, the Legislature's stated purposes in increasing the number of legislative districts from 18 to 35 out of 35 have no evidentiary support and are far from compelling. There is no history in Idaho of initiatives coming from or being supported by one slice of the electorate in one corner of the state. Mayville Dec., ¶¶53-63. The people have not abused their right at any point in the State's history, and there have been no "pet projects" cluttering the ballot and confusing voters. Yusura Dec., ¶ 11. Relatively few initiatives, and even fewer referendums, have made it through the already difficult gauntlet. The ultimate check, of course, is at the ballot box in a general election, where a diverse electorate across the entire state can have its say on the success or failure of a measure.

Under the Legislature's rationale, it could set a signature requirement at 99% in every legislative district and this Court would be powerless to decide whether that violates the people's rights under the Idaho Constitution. That cannot be so. The claims in this case lend themselves to the application of a clear and articulable legal standard, which courts apply in cases every day.

III.

The requirement that initiative and referendum proponents get valid signatures from 6% of registered voters in every one of Idaho's legislative districts makes Idaho an extreme outlier among states that have the right to initiate or repeal laws.

With a nothing-to-see-here wave of the hand, Respondents also assert that Idaho's all-district unanimity requirement is not an outlier among states with the right to initiate or repeal laws. Most prominently, they rely on geographical distribution requirements in Colorado, Nevada, and Utah. Leg. Brf., pp. 22-23; Sec. Brf., p. 25; *see also* Respondents' Declaration of Damon Cann, Ph.D., ¶ 9. In making this argument, they elide critical and material distinctions between those states and Idaho.

True, Colorado does have an all-district requirement, but it is only for initiatives *that seek to amend the state constitution. See* Colo. Const. art. V, § 1 (2.5). There is *no* geographical distribution requirement for initiatives that propose changes to Colorado's statutory laws. Colo. Const. art. V, § 1 (2). For those, Colorado only requires proponents to meet a 5% threshold from anywhere in the state. *Id*.

There may be a good reason to make it harder to amend the state constitution by initiative than to enact a statute by initiative. That is not even an option in Idaho, as the Constitution cannot be amended by citizens' initiatives. *See* Idaho Const., art. III, § 1. Even for constitutional amendments in Colorado, that state demands the signatures of

only 2% of registered voters in each district. Idaho now requires three times that percentage for statutory initiatives and referendums in each district.[3]

Nevada's geographical distribution requirement is based on *federal congressional* districts, not *state legislative* districts. https://www.nvsos.gov/sos/elections/initiatives-referenda. Nevada has four federal congressional districts. *Id*. If the Idaho Legislature had decided to require the valid signatures of 6% of the registered voters in each of Idaho's two *congressional* districts, we would not be in court. Moncrief Supp. Dec. ¶ 8.

Respondents also circle back to *Count My Vote, Inc*., and Utah's geographical requirement. Utah requires petitioners to get signatures from at least 8% (for direct initiatives) or 4% (for indirect initiatives) of active voters in 26 of the state's 29 senate districts. Utah does *not* require petitioners to get the signatures in each and every one of its senate districts. That is a material difference. In Idaho a minority of voters in any single district anywhere across the state holds veto power over an otherwise popular initiative or referendum. Mayville Dec., ¶¶ 70-74.

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[3] The Legislature writes that "[t]he U.S. Court of Appeals for the Tenth Circuit has upheld the constitutionality of that [Colorado] statute under the U.S. Constitution. *Semple v. Griswold*, 934 F.3d 1134, 1138–43 (10th Cir. 2019)." Leg. Brf., p. 22. Not so fast. First, it was not a statute that made the change, but an amendment to the state constitution to make it harder to amend the constitution in the future by initiative. *Semple*, 934 F.3d at 1137. Second, *Semple* involved whether that change violated the Equal Protection Clause or the First Amendment of the federal Constitution. *Id.* at 1137-43. It has nothing to say about the question of state law presented to this Court under Idaho's Constitution.

But more than that, due to differences in population density, it is easier to traverse the necessary districts in Utah to gather signatures. About 80% percent of Utah's population lives in the greater Salt Lake Metropolitan area that runs from Ogden to Provo. https://worldpopulationreview.com/states/utah-population. Twenty-three of Utah's districts are clustered in and around Salt Lake City and are interconnected by major interstates. https://elections.utah.gov/map/district-maps; Montcrief Dec., ¶ 9, Ex. D. In contrast, Idaho does not have a single metropolitan area the size and scope of Salt Lake City. Petitioners must travel hundreds of miles across the state to reach every legislative district.

Respondents are also wrong to suggest that the Utah Supreme Court has held that Utah's requirement would survive an undue burden challenge. In *Count My Vote, Inc.*, it held that the petitioners in that case did not prove it was unduly burdensome because they did not come forward with evidence. Instead, they provided anecdotes and told the court to use its "common sense." 452 P.3d at 1121. The court left open the possibility that a different set of facts might show an unconstitutional burden: "we do not foreclose the possibility that these petitioners or other claimants may be able to carry their burden in a future case." *Id*. Here, Petitioners have put the necessary and compelling admissible evidence before this Court for it to make a decision.[4]

[4] The Secretary of State's expert, Dr. Cann, offers his opinion that Idaho's requirements are in line with several other states, which he discusses. Rather than address each of those in this reply, Petitioners direct the Court's attention to the

It is simply true that Idaho is an extreme outlier among its sister states. But the Court need not wander too far into these woods. This is not a point that Petitioners need to prove or that the Court needs to find in order to rule in their favor. The question before the Court is whether the current restrictions create such a burden on the people's right that they are unconstitutional under Article III, § 1 of the Idaho Constitution. Other states' rules and regulations are informative, but not dispositive. This is an issue under the Idaho Constitution for the Idaho Supreme Court to decide.

IV.

Petitioners can meet the standard for a facial challenge to these laws.

Petitioners agree that an act of the legislature is presumed to be constitutional. *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 869, 154 P.3d 433, 440 (2007). They further agree that "[t]he judicial power to declare legislative action unconstitutional should be exercised only in clear cases." *Id*. Petitioners understand that the Court does not strike down statutory provisions lightly, but this is one of those rare and clear cases.

Respondents put heavy weight on the fact that this is a facial challenge to the law. As such, they assert that Petitioners must demonstrate that under no circumstances

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supplemental declaration of Dr. Gary Moncrief, filed herewith. Exhibit 10 to the Petition, Supp. Declaration of Gary Moncrief.

is the statute valid. *E.g*. Leg. Brf., p. 10 (citing *Hernandez v. Hernandez*, 151 Idaho 882, 884, 265 P.3d 495, 497 (2011).

Petitioners welcome that burden and have carried it here. They have offered detailed facts under oath attesting to the difficulty that an energized, well-organized group of dedicated volunteers had in qualifying a popular initiative under the 18-district requirement. They have provided declarations from individuals with decades of experience in election law and its implementation who opine that these new standards, the toughest in the nation, are effectively impossible to satisfy. And they have offered the opinion of a statistician who places the odds of successfully qualifying a petition for the ballot, in every single district, under very rosy assumptions about a petition's popularity, at .001, or a tenth of one percent.

The standard for a facial challenge in Idaho that Respondents have cited appears to mirror *United States v. Salerno*, 481 U. S. 739 (1987). In *Salerno*, a majority of the Supreme Court held that a plaintiff can only succeed in a facial challenge by "establishing that no set of circumstances exists under which the Act would be valid." *Id*. at 745.

Since *Salerno*, however, the U.S. Supreme Court has moderated the test. In *Washington State Grange v. Washington State Repub. Party,* it wrote that "some Members of the Court have criticized the *Salerno* formulation," but all agreed that a facial challenge will fail "where the statute has a 'plainly legitimate sweep.'" 552 U.S. 442, 6

(2008). It warned not to go "beyond the statute's facial requirements and speculating about 'hypothetical' or 'imaginary' cases." 552 U.S. 442, 6-7 (2008) (citation omitted).

The test for a facial challenge, then, though onerous, does not require Petitioners to disprove every struck-by-lightning hypothetical scenario. Just as someone might win the lottery, one signature drive in thousands of otherwise failed attempts could get lucky and qualify. But Petitioners have shown that it is *effectively impossible* for volunteer-led initiatives or referendums to now get on the ballot. The Legislature has regulated this right out of existence.

Further, this Court has already explicitly held that where a statute makes a constitutional right reserved to the citizens of the state a "practical impossibility" just like it has done here, the statute must fail. *American Independent Party in Idaho, Inc*, 92 Idaho at 359, 442 P.2d at 769. In *American Independent Party*, the Court held that to give effect to the challenged statute would make it a practical impossibility to form a new political party, since that section would require a "political organization" to have received 10% of the votes cast for a state office at the last general election in order to constitute such organization a "political party." *Id*. This law was struck down because it would deny Idaho citizens a right reserved to them by the Idaho Constitution, just as SB1110 does here.

Respondents' expert Dr. Cann relays to the Court the substance of a conversation that he apparently had with John Sheldon, who was President of Treasure Valley Horse

Racing. Cann Declaration, ¶ 17. Mr. Sheldon's horse racing initiative made it to the ballot in 2018 but was voted down in the general election. According to Dr. Cann, "Mr. Sheldon expressed confidence" that with the right technology and a good strategy, "they could have qualified in all of Idaho's legislative districts if they had been required to do so." *Id*. This type of double hearsay anecdote about Mr. Sheldon's "confidence" is flimsy stuff that does nothing to disprove or even put at issue Petitioners' evidence. While Dr. Cann admits that the horse racing initiative used paid signature gatherers, what he does not tell the Court is that the sponsors of that initiative spent millions to get their initiative on the ballot and then to advertise it. *See* Idaho Secretary of State, https://sos.idaho.gov/elect/finance/2018/Second%20Annual/9387_terminated.pdf.

It is hardly a defense to say that in some hypothetical future a multi-million-dollar campaign bankrolled by out-of-state money may still be able to get something on the ballot, when that would be impossible for grass-roots, Idaho-led groups. That hypothetical future would also be contrary to why the people of Idaho changed their Constitution to reserve this right to themselves over 100 years ago. They did so as a populist measure to give the common people a voice when lawmakers are captured by big money and corrupt influences, and refuse to respond to the will of the people who elected them. It also gives the game away that the Legislature's stated purpose of incentivizing input from the Idaho common folk from all corners of the state is a pretext. The real intention of the Legislature is to amass all law-making power to itself.

V.

Petitioners are entitled to an award of attorney fees.

If the Court grants Petitioners' relief, it should award attorney fees under the private attorney general doctrine. The Secretary of State fails to address the three-part test articulated in *Ada County v. Red Steer Drive-Ins of Nevada, Inc*., 101 Idaho 94, 100, 609 P.2d 161, 167 (1980) which adopted the standards established in *Serrano v. Priest*, 569 P.2d 1303, 1314 (Ca. 1977). They are: "(1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, [and] (3) the number of people standing to benefit from the decision."

Instead, the Secretary argues that because the facts will not be determined by a trial court, and the facts presented are allegedly insufficient, no fees should be awarded. Because the Court is exercising its original jurisdiction, the Court will be the factfinder in this proceeding. That should not be a bar to attorney fees. The Secretary cites to no case in support of the proposition that the private attorney general doctrine can only be evoked and fees awarded in the lower courts, and not when this Court exercises its original jurisdiction. And if the Court grants the relief requested it will be based on the facts presented, which means the Court found the facts sufficient.

The Secretary, represented by the Attorney General, also argues that there is no evidence that the Attorney General was given the opportunity to bring this suit and

refused, so Petitioners have failed to show it was *necessary* to bring a private action. The Attorney General's appearance in this action defending the law is definitive proof that the Attorney General did not intend to bring this challenge.

The societal importance of the public policy sought to be vindicated by this litigation is very high indeed. Private enforcement was the only path forward for this challenge, and the burden on the Petitioners as a result is great. Every citizen in Idaho stands to benefit from a writ preventing the enforcement of these unconstitutional statutes. This kind of case is exactly why the private attorney general doctrine exists. Because Petitioners meet or exceed the criteria to establish an award of fees, the government should bear the Petitioners' cost of this challenge. If Petitioners prevail in this action, it would be inappropriate that taxpayer funds were spent on the legislature's private counsel and on the Attorney General's unsuccessful defense of the Legislature's attempt to violate a fundamental right of Idaho voters. If Petitioners prevail, they should be awarded fees under the private attorney general doctrine.

CONCLUSION

As it stands, the citizens of Idaho do not even know if their Legislature is still in session since the actions of the two bodies of the Legislature are at odds with each other in violation of the Idaho Constitution. This underscores the dysfunction of the current Legislature and its willingness to disregard the Constitution that constrains it. Under these unprecedented circumstances, and in the face of the Legislature's repeated

disregard of the Constitution, it is urgent and necessary that the Court protect Idahoans from the Legislature's attempt to deny the people their right under their Constitution to make and repeal laws. This particular fundamental right is more important now than at any time in the history of the State, in light of these legislative abuses.

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

Respectfully submitted on this 9th day of June, 2021.

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CERTIFICATE OF SERVICE

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