Deborah A. Ferguson
Craig H. Durham
FERGUSON DURHAM, PLLC
223 N. 6th Street, Suite 325
Boise, Idaho 83702
T: (208) 724-2617
F: (208) 906-8663
daf@fergusondurham.com
chd@fergusondurham.com

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

RECLAIM IDAHO, a political action committee, and LUKE MAYVILLE,

Plaintiffs,

v.

BRAD LITTLE, in his official capacity as the Governor of Idaho, and LAWERENCE DENNEY, in his official capacity as Idaho's Secretary of State,

Defendants.

Case No. 1:20-cv-00268-BLW

REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Defendants argue that Reclaim Idaho was dilatory in pursuing its initiative, unilaterally abandoned the effort without any state action, and now seek "special dispensation" from this Court. (Dkt. 8, pp. 1-2.) Yet Defendants ignore Plaintiffs' compelling evidence of their diligence. And, in the middle of a global pandemic rapidly taking lives, Plaintiffs went to the Governor and the Secretary of State and requested a reasonable accommodation so that they could continue to safely exercise their core First Amendment rights. Defendants flatly rejected those requests. That is state action. Within a matter of days, the Governor ordered everyone to stay at home, with no exceptions for First Amendment activities. That is also state action. Plaintiffs suffered a First Amendment injury that is directly traceable to these Defendants.

Plaintiffs do not seek to rewrite any statutes. They do not seek permanent change. They simply come to this Court – as they did earlier with Defendants – and ask for a temporary and workable accommodation during an unprecedented national emergency to protect their right, and the right of all Idahoans, to engage in core political speech. The solutions they propose are doable. Plaintiffs are likely to succeed on the merits, they have suffered irreparable harm, and the equities balance in their favor.

A. Plaintiffs have standing to bring this lawsuit

1. *Plaintiffs were deprived of their right to political expression*

Initially, Defendants minimize the nature of the constitutional harm. (Dkt. 8, p. 7.) Citizens have a First Amendment right in the context of an initiative drive (1) to communicate with their fellow citizens about matters of political concern, and (2) to employ the state's initiative process to make matters of political concern the focus of statewide discussion by trying to get them on the ballot. *See Meyer v. Grant*, 486 U.S. 414, 421-22 (1988) (describing this as "core political speech."); *see also Angle v. Miller*, 673 F.3d 1122, 1132 (9th Cir. 2012). When

restrictions impinge on political speech, like here, protection "is at its zenith." *Meyer*, 486 U.S. at 425). Plaintiffs were unable to exercise these core First Amendment rights in any manner after mid-March of 2020.

Defendants would like this Court to believe that they had nothing to do with that injury. But that is incorrect.

2. The injury is traceable to Defendants

On March 13, Reclaim Idaho sent a newsletter to all supporters with guidelines for following CDC recommendations while in the field. (Mayville Decl. ¶¶ 20-21.) They had not yet suspended the initiative drive but were actively looking for alternatives on how to continue safely. Between March 13 and March 15, there was "a dramatic escalation of the public health risk." (*Id.* at ¶ 23.) On March 16, Executive Director Schroeder contacted the Governor's office to explore an accommodation. She specifically sought electronic signature gathering. (Schroeder Decl. ¶ 34.) Senior Advisor Andrew Mitzel referred her to the Secretary of State's office, which responded "we are sorry to say that there is no statute allowing electronic signatures for petitions in Idaho Statutes 34 Chapter 18." (*Id*. at ¶ 40.) When Ms. Schroeder again contacted Senior Advisor Mitzel (four times in all), he wrote to her that "the Governor's Office has no intention of taking executive action on this matter." (*Id*. at ¶ 37; ¶¶ 32-38.)

Defendants dismiss these numerous contacts as unimportant. They claim that the communication with the Governor's office was "in reality, a refusal by a staff member to arrange a meeting between Mr. Mayville and the Governor ..." (Dkt. 8, p. 7.) To the contrary, "in reality," this was the Governor's definitive refusal to provide any accommodation to Plaintiffs so that they could continue exercising their First Amendment rights. The Secretary of State's message was an equally definitive refusal of any accommodation.

It was only after these denials, and after Reclaim Idaho could find no other way to continue, that it "suspended" (not terminated) its campaign on March 18. (Supp. Mayville Decl., ¶ 9.) Even then, leadership, staff, and volunteers discussed "how the campaign might resume." (*Id*., at ¶ 15.) But, on March 25, the Governor ordered all Idahoans to stay at home, with no exceptions for First Amendment activities, on pain of misdemeanor penalties. (*Id*, at ¶ 16.)

In short, Defendants strictly enforced the in-person signature gathering and deadline requirements in the unprecedented circumstances that existed. They refused to grant reasonable accommodations. And the Governor issued the stay-at-home order that ultimately made signature collection impossible. State action is squarely implicated. *See, e.g., SawariMedia LLC et al. v. Whitmer*, Case No. 20-cv-11246, 2020 WL 3097266, at *11 (E.D. Mich. June 11, 2020) ("the root cause of Plaintiffs' inability to collect signatures was Governor Whitmer's executive orders that required Michigan residents to remain in their homes for more than two months.").

3. Plaintiffs were more than diligent

Still, to shift blame back to the Plaintiffs, Defendants paint them as slackers. This appears to be a causation argument in which Defendants try to argue that any constitutional injury was self-inflicted.

This argument has no factual foundation. Plaintiffs have offered several declarations that attest to the movement's passion, drive, and determination. It had many volunteers who worked in bad weather, at night, and on weekends. (Larson Decl., ¶ 7); (Prince Decl. ¶¶ 3); (Silver Decl. ¶ 4.) The Court can see the evidence of diligence for itself. It is sufficient to say that momentum and enthusiasm grew as the months and weeks moved toward the deadline, as is common in signature drives. (Mayville Decl., ¶ 15; Supp. Mayville Decl., ¶¶ 2-4.) By mid-February, Reclaim Idaho had 15,000 signatures. (Mayville Decl. ¶¶ 15,17.) By mid-March, it had about

30,000. (*Id*.) They were well ahead of their collection effort in the successful Medicaid expansion initiative at the same point in time, and the earlier campaign didn't even begin until December. (*Id*. at ¶ 18; Supp. Mayville Decl., ¶ 4.)

Boiled down, Defendants' real argument is that if Reclaim Idaho had just started earlier, it could have met the signature requirement earlier, and it wouldn't have needed all the time to which it was entitled by law. This argument ignores the reality of how initiative drives expand as the deadline approaches. It ignores the evidence of diligence, expressed above, during the months in which the campaign was active. It ignores that plaintiffs started even later in the Medicaid Expansion initiative and yet made the deadline there. (Supp. Mayville Decl., ¶ 4.) It ignores the unprecedented and unforeseen pandemic and its consequences on planning. Most important, it relies on the dubious notion that a citizens' initiative movement is not entitled to *the deadline provided by law.*[1]

This Court need look no further than cases with similar facts to find standing. In *Fair Maps Nevada v. Cegavske*, District Judge Du easily found standing. Case No. 3:20-cv-00271-MMD-WGC, 2020 WL 2798018 (D. Nev. May 29, 2020). Notably, she determined that the Secretary of State's letter refusing accommodations to the plaintiffs on the ground that state law allegedly prohibited them, much like here, "constitutes an action taken under color of state law as required by § 1983." *Id*. at * 15. In *Miller v. Thurston*, District Judge Holmes found "[t]he injury alleged is fairly traceable to the State, in that State initiative petition requirements prevent Plaintiffs from effectively circulating or signing the initiative petition while also complying with

[1] Defendants also fault Plaintiffs for not filing the lawsuit earlier. Luke Mayville explains those circumstances, which include that Reclaim Idaho is a grassroots organization without a legal team or funding to hire counsel. (Supp. Mayville Decl. ¶¶ 7-8.) They considered filing a lawsuit as early as March 16, but lacked the legal know-how or funding to hire lawyers. Once they found pro bono counsel, they filed the lawsuit "just twelve days after our initial meeting." (*Id*.)

the social distancing encouraged, and in some cases required, by the State." 5:20-CV-05070, 2020 WL 2617312, *2 (W.D. Ark. May 25, 2020); *accord SawariMedia LLC et al*., 2020 WL 3097266, at *11 (E.D. Mich. June 11, 2020).

Defendants cite *Morgan v. White*, No. 20 C2189, 2020 WL 2526484, at *3-4 (N. Dist. Ill. May 18, 2020), for a "decision from another court recently concluded that a substantially similar pattern of dilatory conduct established that the plaintiffs there had 'not demonstrated that their injury [was] traceable to the challenged actions of any of the Defendants.'" (Dkt. 8, p. 8.) *Morgan* is not "substantially similar." Far from it. Of the seven plaintiffs, "just one" claimed to have begun an initiative petition drive before filing the lawsuit, and even he "offered no evidence when he began those efforts or how many signatures he has collected." *Id*. at *3. The other plaintiffs alleged that they "wish[] to circulate petitions." *Id*. Those facts are nothing like these.

B. Strict scrutiny applies

The burden on the right is clear: Plaintiffs were entirely unable to continue to engage in core political expression during a critical six weeks. Had they been able to do so, there is a strong likelihood that they would have met the signature gathering requirements, and the discussion on this issue would have been publicly amplified because the initiative would have been on the fall ballot. Because the burden was severe, and because the application of the signature requirements and filing deadline were "not narrowly tailored *to present circumstances*," *SwariMedia LLC*, 2020 WL 3097266, at *12 (emphasis in original)(citation omitted), the State's application of the statutory requirements cannot survive strict scrutiny.

C. The equities tip sharply in Plaintiffs' favor

Defendants contend that if the Court grants relief they would be prejudiced because they would not have time to complete their duties to qualify the petition for the ballot. The Court must

identify the possible harm caused by the preliminary injunction against the possible harm by not issuing it. *University of Hawaii Prof. Asm. v. Cayetano*, 183 F.3d 1096, 1108 (9th Cir. 1999). The harm to Plaintiffs is severe and irreparable if relief is not granted. On the other side of the balance, the Defendants' claim of prejudice is overstated. Though a slightly compressed calendar may administratively inconvenience them, it is not "near impossible" to comply.

1. Defendants have already made exceptions to protect constitutional rights

Any suggestion by the State that election laws cannot bend to protect individual rights in the face of this emergency is undercut by its own actions in this very pandemic. On April 1st, Governor Little issued a Proclamation exercising his authority to suspend many provisions of the Idaho Code concerning elections. (Exhibit A.) For the first time in Idaho's history the polls were closed. He provided for all-absentee voting in the 2020 Primary elections due to the public health threat of COVID-19. (*Id*.) The Governor wrote, "I have worked with the Secretary of State and elected county clerks to ensure Idahoans have every opportunity to exercise their constitutional right to vote safely without risking exposure to COVID-19;" (*Id*. at 3). He also delegated to the Secretary of State the authority to suspend other statutory requirements by directive as Idaho's chief elections officer. This proclamation demonstrates that Defendants have the authority to suspend provisions of the Idaho Code to ensure that Reclaim Idaho, its supporters, and members of the Idaho public can exercise their constitutional rights to core political speech "safely without risking exposure to COVID-19."

2. The burden on Defendants is not extreme, as they claim

Defendants nonetheless contend that the temporary accommodations sought would be too great a burden. They have offered declarations from Jason Hancock, a Deputy Secretary of State,

and Phil McGrane, the Ada County Clerk. (Hancock Decl., at ¶ 9); (McGrane Decl., at ¶ 7). Factual support for these generalized conclusions is conspicuously lacking.

Both Mr. McGrane and Mr. Hancock focus on the 60 days that the Idaho Code provides county clerks to verify petition signatures, as if that period were immutable, and then project future impacts on other deadlines from a rote application of it. Mr. McGrane makes the blanket unsupported assertion that "this time is essential to allow time to review and verify signatures" (McGrane Decl., at ¶ 9). Neither entertains the idea that this period could be modified and might be far more time than needed for the task at hand for most of the clerks in the state. This assumption seems reasonable. The number of registered voters varies considerably throughout Idaho's 44 counties. Certainly, it takes less time to verify 6% of the registered voters in Camas County, where 752 citizens have registered to vote, than in Canyon County, where 97,075 are registered. And presumably larger counties have a larger burden, but also more staff to handle it. Regardless of the specific distribution of the petitions, it is a decentralized system, and the work of processing petitions is spread out across the counties.

Strikingly, neither Mr. Hancock nor Mr. McGrane acknowledge that much of the verification process for Reclaim has been completed. There is no mention that the county clerks have already verified 10,593 signatures. (Mayville Decl., at ¶ 43). Plaintiffs presume many of the verifications were conducted by Clerk McGrane's own staff. So approximately 20% of the job is already done.

Further, Reclaim is delivering to the various county clerks the vast majority of the other signatures its volunteers collected before the Governor issued his extreme emergency declaration requiring Idahoans to shelter in place, accounting for approximately another 22,000 signatures.

(Supp. Mayville Supp. Decl., at ¶ 25.) These will be available for the clerks to verify now, in June.

If e-signatures verified by DocuSign are permitted, this will further reduce the burden on the clerk's offices, who will not need to conduct a visual inspection of signatures, the most labor-intensive part of their process. Likewise, there is no mention that Reclaim Idaho is the only initiative that the clerks will handle this election cycle, further lessening their burden.

McGrane and Hancock also express vague concerns that the verification of signatures by DocuSign would create an undue burden. Mr. McGrane states "I imagine it would take time and training to learn and understand how DocuSign operates, but given preparation for two upcoming elections that would be an undue burden." (McGrane Decl., at ¶ 16). He does not explain why his staff would be required to be trained in the use of DocuSign, which would simply provide a list of the names and addresses of the registered voters it had verified. The clerk would then read this list and verify that the individual listed were indeed registered voters when the petition was signed, and that their address matched the address provided with their voter registration.

Mr. Hancock addresses more sweeping concerns with DocuSign. (Hancock Decl., ¶¶ 10-20.) He opines that use of DocuSign would not comply with legal statutory requirements. These concerns are not based upon his personal experience. As an employee of the Secretary of State's Office, neither he nor his office participates in the actual verification, but only in the counting process to determine whether the petitions include the requisite number of signatures statewide and in at least 18 districts. (Mayville Decl., at ¶ 42).

The most glaring aspect of both the McGrane and Hancock Declarations is what they omit. Neither reveal that they are already familiar with the State's official use of e-signatures in connection with elections. As noted in Governor Little's Proclamation, currently Idaho voters

can register to vote and request an absentee ballot electronically. (Exhibit A, p. 3.) Idaho citizens must provide their e-signature to the State to do so. (Declaration of Counsel, ¶ 7.) How unreliable and susceptible to corruption can an e-signature be when the State relies upon them to verify the identity of individuals and implement their sacred right to vote?

3. Plaintiffs propose a schedule and an alternative solution

Defendants also inform the Court that the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), 52 U.S.C. § 20302, and parallel Directive 2015-1 issued by Secretary Denney require that absentee ballots be mailed to Idaho overseas military members this year by September 21, 2020. (Hancock Decl., at ¶7). To meet this deadline, absentee ballots must be printed on or before September 14th. (Hancock Decl., at ¶8.) That deadline is driven by preparation of a sample ballot, which the Secretary of State must delivery to the clerks by September 7th. (Hancock Decl., ¶8).

Reclaim does *not* ask the Court to adjust these dates. Instead, working with these dates in place Reclaim proposes that the reasonable accommodations it seeks can be accomplished within the November 3, 2020 general election timeline. If the Court is able to expedite a ruling, Plaintiffs propose the following: a July 31 deadline for Reclaim Idaho to submit petitions to the county clerks; August 21 for Reclaim Idaho to retrieve the verified petitions from the clerk's offices throughout the state; August 26 for Reclaim to deliver them to the Secretary of State's Office for counting; and August 31 for Secretary Denney to announce whether Reclaim's initiative qualifies for the ballot. This schedule leaves undisturbed the existing September election deadlines.

If Defendants believe that the proposed adjustments are too burdensome, Reclaim makes an alternative proposal which imposes minimal burden upon the State. The Court could

temporarily modify the signature collection requirements to 2% of the registered 2018 general-election voters statewide and 2% of registered 2018 general-election voters in each of no fewer than 6 districts. This adjustment would require a total of no fewer than 18,352 signatures statewide. This would reduce the statutory requirements proportionally. The Court would not be breaking new ground; other courts have permitted similar reductions. *See e.g. Libertarian Party of Illinois v. Pritzker*, 20-CV-2112, 2020 WL 1951687 (N.D. Ill. Apr. 23, 2020) (authorizing the reduction of signatures needed); *see also Garbett v. Herbert*, 2:20-CV-245-RJS, 2020 WL 2064101 (D. Utah Apr. 29, 2020) (reducing the percentage to 68% of the normal signature requirement). No burdensome modifications would be needed to the election calendar and no burden imposed on the Secretary of State or the county clerks. Once the clerks complete their verification process of the petitions, Reclaim could retrieve them and deliver them to the Secretary of State's Office to be tabulated.

Assuming that Reclaim has met the criteria, the Secretary could announce whether Reclaim's "Invest in Idaho" qualifies for the ballot. Perhaps this elegant solution is the best. It is fully supportable by the diligence Reclaim has shown in its collection of over 33,000 signatures before the pandemic changed the world. It addresses the State's violation of Reclaim's First Amendment right and requires no action on the part of the State. Reclaim respectfully asks the Court to consider this alternative remedy given the State's steadfast refusal to provide a reasonable accommodation to address the State's violation of Reclaim's constitutional rights.

Respectfully submitted on this 21st day of June, 2020.

/s/ Deborah A. Ferguson

Craig H. Durham
FERGUSON DURHAM, PLLC

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify on this 21st day of June, 2020, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing

Robert A. Berry
Megan Ann Larrondo
robert.berry@ag.idaho.gov
megan.larrondo@ag.idaho.gov

Attorneys for Defendants

/s/ Craig H. Durham