

In the **Supreme Court of the United States**

BRADLEY LITTLE, in his official capacity as Governor of
Idaho; LAWRENCE DENNEY, in his official capacity as
Idaho Secretary of State,

Applicants,

v.

RECLAIM IDAHO, an Idaho political action committee; LUKE
MAYVILLE,

Respondents.

On Application to the Honorable Elena Kagan to Stay the Orders
of the U.S. District Court for the District of Idaho

REPLY IN SUPPORT OF EMERGENCY
APPLICATION FOR STAY

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO
BRIAN KANE
Assistant Chief Deputy
STEVEN L. OLSEN
Chief of Civil Litigation
MEGAN A. LARRONDO
ROBERT A. BERRY
Deputy Attorneys General
Counsel of Record
954 W. Jefferson - 2nd Floor
P. O. Box 83720
Boise, ID 83720-0010
Tel: (208) 334-2400
robert.berry@ag.idaho.gov

Counsel for Applicants

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INTRODUCTION

The emergency before this Court is due to Reclaim Idaho's voluntary choices, which culminated in its decision to ambush the State of Idaho with a lawsuit on June 6, 2020, a month **after** the deadline to submit signatures on its initiative petition expired. Reclaim Idaho created this emergency, which resulted in an unelected federal judge's decision to usurp Idaho's election laws and the roles of the Idaho Legislature and election officials. "Because the spread of [COVID-19], has not given 'unelected federal judges,' a roving commission to rewrite state election codes," this Court should stay the preliminary injunction orders by which a federal district court has assumed control of the laws governing Idaho's initiative process and delegated authority to set the rules governing that process to the initiative petitioner. *Texas Democratic Party v. Abbott*, 961 F.3d 389, 394 (5th Cir. 2020) (staying preliminary injunction order) (motion to vacate stay denied by *Tex. Democratic Party v. Abbott*, 140 S. Ct. 2015 (Jun. 26, 2020)). The Applicants, non-party Idaho election officials, the State of Idaho, and the public interest are currently suffering irreparable harm that cannot be addressed or remedied if the requested relief is delayed until after the completion of the Ninth Circuit appeal.

A. Reclaim Idaho is the sole cause of this emergency and of any harm that it may suffer if the requested stay is issued.

Reclaim Idaho would have this Court hold that the First Amendment absolves it of the consequences of its choices. *See* Respondents' Opposition to Emergency Application for Stay ("Opp.") 24. But it cannot be ignored that Reclaim Idaho is the sole author of the emergency before this Court. Reclaim Idaho chose to give itself 6

months instead of 18 months to collect signatures. Reclaim Idaho chose to employ a signature-gathering model that waited until the final two months to collect the majority of its signatures. Reclaim Idaho chose to suspend its campaign on March 18 because of concerns about the pandemic.¹ Reclaim Idaho chose to only reach out to the Governor’s and the Secretary of State’s offices on one day—March 16. Reclaim Idaho chose not to reach out to the Governor’s office about whether it might fall within an exception to the stay-home order for election workers. And Reclaim Idaho chose to wait to file suit for 36 days after the deadline to submit its signatures and 80 days after it knew of its alleged injury.

Any injury to Reclaim Idaho from the requested stay is the result of Reclaim Idaho’s choices, and Reclaim Idaho is accountable for its choices.²

B. Applicants played no part in causing the irreparable harm they are suffering as a result of the district court’s orders.

In stark contrast to Reclaim Idaho, Applicants have exercised their constitutional duties in good faith, and they will suffer irreparable harm if the requested stay is not granted. The district court took pains to point out that Applicants did nothing wrong. Supp. App. 146-47 (“I want it clearly understood I am not criticizing the governor or secretary of state.”)

¹ According to its Complaint, “Reclaim Idaho ... suspend[ed] its campaign on March 18[.]” (Supplemental Appendix to Emergency Application for Stay (“Supp. App.”) 142.)

² Reclaim Idaho tries to escape responsibility for its choices by arguing that it was COVID-19 that caused its delay. But Reclaim Idaho ignores the fact that it could have sought legal advice through technological means such as email and telephone throughout the pandemic and that it had \$17,000 in funds as of March 18 with which to pay an attorney. (Exhibit I to Opp. 88.)

The statutory deadlines that govern Idaho’s elections make clear that the State cannot wait for the Ninth Circuit to decide the appeal at some unknown point after argument on August 10th and, if the Ninth Circuit rules against it, risk the additional delay of having to return to this Court with another stay application:

Event #	Description	Date	Authority
1	Deadline for Reclaim Idaho to submit its electronic signatures for verification	August 26, 2020	App. 008
2	Last day for Secretary of State to submit sample ballots to county clerks	September 7, 2020	Idaho Code § 34-909(1)
3	Last day for Secretary of State to certify ballot questions to county clerks	September 7, 2020	Idaho Code § 34-603
4	Last day for county clerks to print absentee ballots	September 14, 2020	52 U.S.C. § 20302; Idaho Sec’y of State Dir. 2015-1
5	Last day for county clerks to mail absentee ballots requested prior to 45 days before the election	September 21, 2020	Idaho Code § 34-1003
6	Secretary of State must print voters’ pamphlet with complete initiative and a copy of the arguments and rebuttal for and against the measure. (Arguments related to Reclaim Idaho won’t be included because the statutory deadline for the submission of these deadlines will have passed.)	September 25, 2020	Idaho Code § 34-1812C(1)
7	Secretary of State must mail or distribute copies of the voters’ pamphlet to each household in the state, and to county clerks.		Idaho Code § 34-1812C(2)

Further, the irreparable harm to Applicants is occurring now. Reclaim Idaho is currently circulating its initiative petition in contravention of the Idaho Legislature’s policy judgments. The county clerks are struggling to (1) verify the tens

of thousands of physical signatures that Reclaim Idaho collected before March 18, 2020, (2) prepare for the August and November elections (which carry their own extreme burden of uncertainty and extra work related to the pandemic), (3) address the uncertainty of how they are supposed to verify Reclaim Idaho's electronic "signatures," and (4) verify those electronic "signatures" to the best of their abilities at a time when the signature verification process has normally been completed and they are handling other election responsibilities. In particular, the "signatures" submitted closer to the August 26, 2020, deadline must be verified in extremely short order as the Secretary of State must determine whether the initiative has qualified for the ballot by September 7. (Appendix to Emergency Application for Stay ("App."). 73-79, 84-89.) The only evidence is that this will be "extremely difficult to achieve." (App. 75.)

As stated by Clerk McGrane, who is in charge of elections in Idaho's largest county, "[c]onducting a fair, free, safe and accessible election is challenging anytime." (App. 74.) "Doing so during the current COVID-19 pandemic, has proven, and will continue to be extremely difficult." (*Id.*) For example, to facilitate the recent May primary election, Clerk McGrane increased elections staff from 10 to 40 in order to keep up with the demand. (App. 75.) Recruiting poll workers and securing polling locations has also proven to be significantly more difficult due to the pandemic. (*Id.*) Every indication is that all of these challenges will continue to exist through the August and November elections. (*Id.*) Clerk McGrane anticipates that the overall workload will nearly double for each of these elections; yet, the district court imposed

the significant extra workload of having to verify Reclaim Idaho's physical and electronic signatures on the county clerks in addition to this substantial and unusual burden.

There also can be no doubt that the district court's fundamental alteration of the State's election procedures immediately damages the integrity of the electoral process and causes confusion and distrust. Reclaim Idaho does not contest that the district court's orders have caused confusion for Idaho's non-party election officials, which may require the issuance of additional clarifying orders by the district court. And Reclaim Idaho never challenged the Idaho Legislature's determination that signature matching is an important component for fraud prevention. Its current speculation that there will not be any voter confusion because it has not heard of any voter confusion related to Idaho's May primary cannot carry any weight. The district court's decision to throw out the procedures and processes that the Idaho Legislature deemed important for the prevention of voter fraud is sufficient evidence of the immediate and ongoing damage to the integrity of Idaho's electoral process.

The process that Reclaim Idaho has imposed on the State of Idaho via judicial fiat does not protect against fraud in a meaningful way. The information that Reclaim Idaho will provide to the county clerks for "verification" is available to anyone upon request of a state elector list.³ See Idaho Code § 34-437A. And Reclaim Idaho's offer

³ When the State allows online voter registration, it requires the disclosure of the individual's driver's license or identification number or the last four digits of the individual's Social Security number. (App. 81). For absentee ballot requests, the State requires the disclosure of the individual's date of birth, driver license number, and the last four digits of their Social Security number. (*Id.*) Further, the absentee

to provide the data that it contends authenticates signatures only if the State enters into a protective order is meaningless as the State cannot enter into a protective order against its own public records laws. At the end of the day, Reclaim Idaho’s “one time” exception is causing voter confusion and distrust in the electoral system. The consequences of this unprecedented action should not be overlooked.

The Ninth Circuit’s ruling on the appeal will simply come too late to prevent irreparable harm to the State. This Court should follow its precedent and stay the district court’s orders that fundamentally alter Idaho’s election procedures before the Ninth Circuit decides the appeal. *See Merrill v. People 1st of Ala.*, __S. Ct.__, 2020 WL 3604049, at *1 (Mem.) (U.S. Jul. 2, 2020) (No. 19A1063).

C. This Court has stayed federal district court orders that fundamentally alter a state’s election laws, even when the district court alters a specific detail of a state’s election process.

Reclaim Idaho incorrectly characterizes the district court’s orders as being limited to just requiring the acceptance of electronic—as opposed to “wet”—signatures. As detailed by Applicants, while the district court did not acknowledge it, its orders enjoined or changed multiple Idaho statutes governing the initiative process, fundamentally altering that process.

But even if the district court’s orders were limited to just requiring the acceptance of electronic signatures, the district court’s orders should still be stayed. This Court has taken action to stay a district court’s preliminary injunction order even when the order was limited to such a detail-specific and temporary issue as

ballot itself must be physically signed by the voter. (*Id.*) The signature therefore is an authenticating factor regardless of how the absentee ballot was requested.

whether absentee ballot requests for a single Wisconsin election must be mailed and postmarked by election day, Tuesday, April 7, or by a later date as long as they were received by April 13. *See Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1207 (Apr. 6, 2020) (“*RNC*”) (staying a district court order granting a preliminary injunction in a lawsuit challenging the minutia of how Wisconsin counted absentee ballots).

This Court has also recently intervened to stay a district court’s order that changed—on a temporary basis—a few specific Alabama election laws governing absentee ballots to address concerns posed by the pandemic. *See Merrill*, __S. Ct.__, 2020 WL 3604049, at *1 (staying a district court order granting a preliminary injunction in an as-applied challenge to certain Alabama election laws). Reclaim Idaho’s contention that this Court does not stay preliminary injunction orders that address circumstances caused by the pandemic is patently incorrect.

D. There is no “industry standard” for a private company to run Idaho’s initiative process.

The only “industry standard” in this case is the one that the district court discarded: that the States set the process by which laws are initiated. The Idaho Constitution establishes that the Legislature sets the conditions and manner by which laws may be initiated. Idaho Constitution art. III § 1. And, from the perspective of the U.S. Constitution, this Court has long recognized that “States retain the power to regulate their own elections.” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citing *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986)). “Common sense, as well

as constitutional law, compels the conclusion that government,” not private industry, “play[s] an active role in structuring elections.” *Id.* (emphasis added).

In requiring original “wet” signatures on initiative petitions, Idaho’s elected representatives reasonably reached the same conclusion as the court in *In Re Mayfield*: “an individual’s handwritten signature is less easily forged than any form of software-generated electronic signature, and the presence of forgery is more easily detected and proven.” *In Re Mayfield*, No. 16-22134-D-7, 2016 WL 3958982 at *2 (Bankr. E.D. Cal. Jul. 15, 2016). This conclusion is consistent with that of all 26 states with a process for citizen initiatives and/or referendums.⁴

Thus, courts have refused to accept electronic signatures created with DocuSign as substitutes for the original “wet” signatures required by rule given “the ease with which a DocuSign affixation can be manipulated or forged.” *See In Re Mayfield*, 2016 WL 3958982 at *2; *In re Grimmett*, No. BR 16-01094-JDP, 2017 WL 2437231, at *11 (Bankr. D. Idaho June 5, 2017). The case that Reclaim Idaho cites for the proposition that courts have rejected “wet” signature matching does not help

⁴ *See* Alaska Stat. § 15.45; Arizona Const., Art. IV, part 1, section 1, ¶¶ 2-3, 7; Arkansas Const., Art. 5, section 1; California Const., Art. II, section 8(b); Colorado Const., Art. V, section 1, ¶ 2; Florida Const., Art. XI, section 3; Idaho Code § 34-1805; Illinois Const., Art. XIV, section 3; Maine Const., Art. IV, part 3, section 18; Maryland Const., Art. XVI; Mass. Const., Art. XLVIII & Art. LXXXI, section 2; Michigan Const., Art. II, section 9 and Art. XII, section 2; Mississippi Const., Art. XV, section 273; Missouri Const., Art. III, sections 50-53; Montana Const., Art. III, section 4 & 7, Art. XIV, section 9; Nebraska Const., Art. III, sections 2-3; Nevada Const., Art. 19, section 2-3; New Mexico Const., Art. IV, section 1; North Dakota Const., Art. III, sections 4, 9- & 10; Ohio Const., Art. 2, sections 1-1c; Oklahoma Const., Art. V, section 2 and 6; Oregon Const., Art. IV, section 1; South Dakota Const., Art. III, section 1; Utah Code, Title 20A, Chapter 7, sections 201, 208, 301; Washington Cons., Art. II, section 1; Wyoming Const., Art. 3, section 52(c).

its cause. In *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1320 (11th Cir. 2019), the Eleventh Circuit held that visual “wet” signature matching was problematic because it found Florida’s provisions for curing ballots rejected for mismatched signatures inadequate, not for a reason that is relevant to the issues here.

The fact that there is no “industry standard” for the collection of electronic “signatures” on initiative petitions is evidenced by Reclaim Idaho’s inability to identify anything more than the unsupported assertion that DocuSign has been used on two ballot initiatives in some unknown and unspecified context in Massachusetts. *See* Exhibit O to Opp. 130. Tellingly, the DocuSign white papers that Reclaim Idaho submitted do not identify a single initiative petition where DocuSign signatures were used. *Id.* at 132-62.

Finally, it is overly simplistic to assume that “wet” signatures on initiative petitions can be replaced by electronic signatures by application of the Uniform Electronic Transaction Act. In Idaho, the requirement that “wet” signatures be collected in-person on initiative petitions is inextricably intertwined with the affidavit that petition circulators must complete when each signor signs the petition in person in front of him or her. The petition circulator avers that the circulator believes that each person stated their name, address and residence correctly, and that each signor is a qualified elector of the State of Idaho and a resident of the applicable county. *See* Idaho Code § 34-1807. That safety mechanism, which the Idaho

Legislature deemed important for fraud prevention, does not exist with the method of electronic signature collection that Reclaim Idaho has imposed on the State.

E. This Court's precedent requires that the district court's orders be overturned.

Reclaim Idaho's attempt to distinguish this case from this Court's decision in *Purcell v. Gonzales* and from this Court's recent stay orders rests on a distinction without a difference. Reclaim Idaho's case, as Reclaim Idaho pled it and the district court analyzed it, is fundamentally about whether its First Amendment rights were burdened by the rules governing ballot access for its initiative for the upcoming November election. (See App. 33-34 (citing *Anderson v. Celebrezze* and *Burdick v. Takushi*)). Just like the cases that Reclaim Idaho fails to distinguish, the district court's orders "alter the rules of how the election [will] be conducted" because they alter the rules governing ballot access. Opp. 18. This Court's precedents govern.

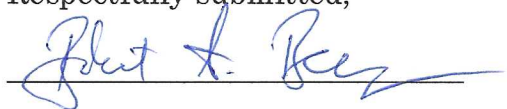
Reclaim Idaho also futilely argues that this Court has already held that content-neutral, non-discriminatory laws that regulate the initiative process and facilitate speech implicate the First Amendment's protections. But neither this Court's decisions in *Meyer v. Grant*, 486 U.S. 414 (1988) nor *Buckley v. Am. Constitutional Law Found. Inc.*, 525 U.S. 182 (1999) reached this conclusion. Reclaim Idaho's attempt to impute the Ninth Circuit's interpretation of this Court's precedent in *Angle v. Miller*, 673 F.3d 1122 (9th Cir. 2012) to this Court also does not stand up to scrutiny. This Court has never adopted the analysis set out in *Angle*. If this Court grants certiorari, there is at least a fair chance that (1) it will side with the Tenth, Seventh, and D.C. Circuits (all of whose decisions are misread by Reclaim Idaho) and

conclude no First Amendment rights are implicated by content-neutral, non-discriminatory laws that regulate the initiative process and facilitate speech; or (2) this Court will conclude that Reclaim Idaho's First Amendment rights were not violated by the laws at issue.

CONCLUSION

Applicants respectfully request that this Court stay the district court's preliminary injunction orders pending disposition of the appeal before the Ninth Circuit and of any petition for certiorari.

Respectfully submitted,



LAWRENCE G. WASDEN
ATTORNEY GENERAL STATE OF IDAHO
BRIAN KANE
Assistant Chief Deputy
STEVEN L. OLSEN
Chief of Civil Litigation
MEGAN A. LARRONDO
ROBERT A. BERRY
Deputy Attorneys General
Counsel of Record
954 W. Jefferson - 2nd Floor
P. O. Box 83720
Boise, ID 83720-0010
Tel: (208) 334-2400
robert.berry@ag.idaho.gov

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No. 20A18

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SUPPLEMENTAL APPENDIX TO
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LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO
BRIAN KANE
Assistant Chief Deputy
STEVEN L. OLSEN
Chief of Civil Litigation
MEGAN A. LARRONDO
ROBERT A. BERRY
Deputy Attorneys General
Counsel of Record
954 W. Jefferson - 2nd Floor
P. O. Box 83720
Boise, ID 83720-0010
Tel: (208) 334-2400
robert.berry@ag.idaho.gov

Counsel for Applicants

July 22, 2020

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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

DISTRICT OF IDAHO

RECLAIM IDAHO, an Idaho political action committee, and **LUKE MAYVILLE**,

Plaintiffs,

v.

BRADLEY LITTLE, in his official capacity as Governor of Idaho, and **LAWRENCE DENNEY**, in his official capacity as Idaho Secretary of State,

Defendants.

Case No.:

**COMPLAINT FOR
DECLARATORY JUDGMENT
AND PRELIMINARY INJUNCTION**

INTRODUCTION

1. Reclaim Idaho requests a declaratory judgement and preliminary injunction regarding its “Invest in Idaho” initiative, which it seeks to be included on Idaho’s November 3, 2020 general election ballot. Plaintiffs ask that the Court modify Idaho's in person signature collection requirement and the deadlines required for the gathering and presentation of collected

signatures for this initiative in light of the current public health emergency caused by COVID-19 and Defendant Little's ensuing emergency orders effectively shutting down the state.

JURISDICTION AND VENUE

2. Plaintiffs bring this action for violations of their federal constitutional rights under 42 U.S.C. § 1983 and 28 U.S.C. § 2201 and 2202 to redress the deprivation under color of state law rights secured by the First Amendment of the United States Constitution.

3. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331.

4. The Defendants reside in the District of Idaho, and Plaintiffs' claims for relief arose in this District. Accordingly, venue in the District of Idaho is proper under 28 U.S.C. § 1391 (b)(1) and (2).

5. This Court has authority to enter a declaratory judgment and to provide preliminary injunctive relief pursuant to Rules 57 and 65 of the Federal Rules of Civil Procedure, 42 U.S.C. § 1983, and 28 U.S.C. § 2201 and 2202.

PARTIES

6. Plaintiff Reclaim Idaho is an Idaho based political action committee, registered with the Idaho Secretary of State. Reclaim Idaho advocates for candidates and initiatives that strengthen public schools, protect public lands, and extend healthcare to working families. Reclaim Idaho is responsible for circulating the "Invest in Idaho" educational funding initiative for signature and otherwise qualifying it for the ballot.

7. Plaintiff Luke Mayville is the co-founder of Reclaim Idaho, and lives in Boise. He works to advance the goals of Reclaim Idaho and has a stake in Reclaim Idaho's ability to

express its political speech through the "Invest in Idaho" initiative, which is protected under the First Amendment.

8. Defendant Bradley “Brad” Little is the Governor of Idaho and is sued in his official capacity. Governor Little is responsible for issuing Idaho’s emergency orders banning gatherings, closing businesses and other public places, requiring that people shelter at home, and making it impossible for the Plaintiffs to collect the signatures required to place their initiative on the November 3, 2020 ballot.

9. Defendant Lawrence Denney is the Idaho Secretary of State and is sued in his official capacity. Secretary Denney is the Chief Election Officer for the State of Idaho. Idaho Code § 34-201. It is “his responsibility to obtain and maintain uniformity in the application, operation and interpretation of the election laws.” *Id.* Furthermore, it is the Secretary of State’s duty to “assist and advise each county clerk with regard to the application, operation and interpretation of the election laws as they apply to elections, registration of electors and voting procedures which by laws are under the direction and control of the county clerk.” Idaho Code § 34-203.

RELEVANT FACTS

THE INITIATIVE PROCESS

10. Idaho recognizes the right of its citizens to use popular democratic measures to make law at both the local and state-wide levels. Article III section 1 of the Idaho Constitution provides that “[t]he people reserve to themselves the power to propose laws, and enact the same at the polls independent of the legislature.” Subject to “such conditions and in such manner as may be provided by acts of the legislature,” legal voters may initiate any legislation and cause it to be submitted to the people for a vote at a general election. Idaho Const. Art. III, sec. 1.

11. In Idaho, the initiative process is governed by Title 34, Chapter 18 of the Idaho Code.

12. The number of signatures needed to place a measure on the ballot in Idaho is equal to 6 percent of the number of registered voters as of the state's last general election. Moreover, Idaho has a distribution requirement requiring signatures to equal at least 6% of registered voters in 18 of the state's 35 legislative districts. Currently 55,057 signatures are required to meet the statewide 6% threshold for the 2020 general election. 2013 Idaho Senate Bill No. 1108.

13. Under Idaho law, petitioners have 18 months to collect signatures after the ballot title has been granted. Signatures may not be collected after April 30 of the year in which the measure would appear on the ballot. Signatures must be filed with the county clerk by the close of business on May 1 and cannot be collected after April 30. Idaho Code § 34-1802.

14. Each signature is verified by the county clerks and transmitted to the secretary of state. Under Idaho law, this must occur within 60 calendar days of the deadline for the submission of the signatures (May 1st). Petitions with the requisite number of signatures must be filed with the secretary of state not less than four months before the general election. *Id.*

15. Idaho law mandates that signatures be collected in the presence of the circulator and that signers "personally" place their name on the petition. Idaho Code § 34-1807. This requirement persists despite Idaho's adoption of the Uniform Electronic Transactions Act, which provides, in relevant part, that:

(A) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

(B) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.

(C) If a law requires a record to be in writing, an electronic record satisfies the law.

(D) If a law requires a signature, an electronic signature satisfies the law.

Idaho Code. § 28-50-107.

16. The Secretary of State is the Chief Election Officer and “it is his responsibility to obtain and maintain uniformity in the application, operation and interpretation of the election laws.” Idaho Code § 34-201.

17. In carrying out his responsibility as Chief Election Officer, the Secretary of State must prepare and distribute to the county clerks directives and instructions relating to election laws. Idaho Code § 34-202. Furthermore, it is the Secretary of State’s duty to “assist and advise each county clerk with regard to the application, operation and interpretation of the election laws as they apply to elections, registration of electors and voting procedures which by laws are under the direction and control of the county clerk.” Idaho Code § 34-203.

18. Although the county clerks exercise general supervision of the administration of the election laws, they do so “[s]ubject to and in accordance with the directives and instructions prepared and distributed or given under the authority of the Secretary of State.” Idaho Code § 34-206.

RECLAIM IDAHO AND THE “INVEST IN IDAHO” INITIATIVE

19. Reclaim Idaho is a grassroots organization designed to protect and improve the quality of life of working Idahoans. Reclaim Idaho organizes to pass citizens’ initiatives and to elect candidates who believe in strengthening public schools, protecting public lands, and extending healthcare to working families

20. Reclaim Idaho was formed in the summer of 2017 by Luke Mayville and a few other Idaho citizens with the purpose of putting Medicaid expansion on the Idaho ballot. It grew into a grassroots movement with over 2,000 volunteers in over 25 counties.

21. In 2018, Reclaim Idaho succeeded in getting its Medicaid expansion initiative on the ballot, proving that it has the support and organizational structure necessary to advance a viable initiative. Reclaim Idaho volunteers easily surpassed the legal requirements for geographic distribution by collecting signatures from more than 6% of registered voters in well over 18 of Idaho's 35 legislative districts. They gathered the vast majority of the over 56,000 signatures needed from registered voters by the April 30, 2018 deadline. The citizens of Idaho voted overwhelmingly to pass the initiative into law.

22. In the fall of 2019, Reclaim Idaho started a new initiative drive. It filed an "Invest in Idaho" K-12 educational funding initiative with the Secretary of State which was approved and released in October 2019.

23. If passed, this initiative would invest \$170 million annually in education in Idaho. Reclaim Idaho was operating on the organizational model that it had successfully used during the Medicaid expansion drive.

24. In September of 2019, Reclaim Idaho began its first volunteer organizing tour for the "Invest in Idaho" initiative. Between then and early November, it had held 18 separate meetings in communities large and small across the state. These events were often covered by local media, laying the groundwork for the signature drive.

25. From early November through the end of the year, Reclaim Idaho continued to gather signatures, and the momentum continued to build. Based on their successful experience

with the previous initiative, Reclaim Idaho's staff believed that they had more than enough time to gather the signatures.

26. By February 15, 2020 Reclaim Idaho had 15,000 signatures. By March 12, it had doubled that number to approximately 30,000. This was well ahead of the pace set by the successful Medicaid expansion campaign.

27. Reclaim Idaho has already submitted many of those signatures to the county clerks for verification and stands ready to immediately provide the Secretary of State with the 10,593 verified signatures it has collected thus far.

**THE GLOBAL COVID-19 PANDEMIC AND THE SEVERE BURDEN
PLACED ON RECLAIM IDAHO**

28. On January 30, 2020, the World Health Organization declared that the novel coronavirus (COVID-19) constitutes a Public Health Emergency of International Concern.

29. On March 13, President Trump declared that the country was in a state of emergency because of the rapid spread of COVID-19.

30. On March 13, officials from the Idaho Department of Health and Welfare announced the first confirmed case of COVID-19 within the state of Idaho. On the same day, Defendant Little issued a "proactive emergency declaration."

31. On that same day, Reclaim Idaho emailed all supporters with guidelines for continuing to gather signatures. These included, in part, avoiding shaking hands, using sanitizer, wiping down clipboards before and after a signature gathering shift, allowing signers to keep disposable pens.

32. COVID-19 is especially dangerous to those above the age of 65. Reclaim Idaho's most active volunteers are retirees in that age group.

33. Leaders of Reclaim Idaho began receiving emails from volunteers expressing concern about continuing. For example, on March 13 retired Court of Appeals Judge Karen Lansing, an especially dedicated and active volunteer, indicated that “[a]s important as the initiative is, I reluctantly conclude that it is outweighed by my responsibility to avoid possibly putting others at risk.”

34. Public spaces for signature gathering quickly closed. The Meridian Public Library shut down on March 14. The Boise Public Library followed suit on March 16. The next day, the DMV closed. Libraries and DMVs had proven to be the most promising public locations for volunteers to collect signatures.

35. Reclaim Idaho explored all other avenues between March 13 and March 18 that would allow it to continue collecting signatures, but it struggled over those five days to adapt to rapidly changing circumstances. For example, it considered “drive through” signature collection stations, but that conflicted with the six-foot distance recommendation.

36. On March 16, Reclaim Idaho Executive Director Rebecca Schroeder emailed Andrew Mitzel, a member of Governor Little’s staff, to inquire whether Reclaim Idaho could gather signatures electronically. Mitzel referred her to the Secretary of State’s Office, which responded that “there is no statute allowing electronic signatures for petitions in Idaho Statutes 34, Title 18.” Schroeder then turned back to Mitzel, who informed her that the Governor would not be taking any executive action to allow for electronic signatures. Plaintiff Luke Mayville on behalf of Reclaim Idaho also drafted a bill to temporary modify the signature collection requirements in light of the pandemic, and approached leadership in the Legislature, which expressed no interest in it.

37. After exhausting all possibilities to move forward, Reclaim Idaho was forced to suspend its campaign on March 18.

38. On March 25, Defendant Little signed an “extreme emergency” declaration and his Department of Health and Welfare issued a statewide stay-at-home order. The order required all non-essential workers throughout the state to remain in their homes, closed all non-essential businesses, and prohibited all non-essential gatherings. A violation of this order was a misdemeanor.

39. The order included no exceptions for initiative gathering or other First Amendment activities.

40. Governor Little later extended the order through April 30. Coincidentally, that was the deadline for Reclaim Idaho to submit the signatures for the “Invest in Idaho” initiative.

41. Because of the presence of the pandemic in Idaho, the restrictions on businesses, the prohibitions on gatherings, the distancing requirements, and the mandatory stay at home order, it was impossible for Reclaim Idaho to solicit the signatures needed to support the “Invest in Idaho” petition required to place the initiative on Idaho's November 2020 election ballot.

42. As such, Idaho law, together with the COVID-19 outbreak and Defendants' orders, directly caused an injury-in-fact to the Plaintiffs and their First Amendment rights. The First Amendment is made applicable to the states through the Fourteenth Amendment

43. The Plaintiffs' injuries are traceable to the Idaho laws requiring submission of petition signatures by May 1 and in person signature collection during the COVID-19 pandemic, and Defendant Little's orders described in this action.

CAUSE OF ACTION- FIRST AMENDMENT VIOLATION

44. All previous paragraphs and allegations are incorporated herein.

45. Under present circumstances, Idaho's ballot-access requirements for the “Invest in Idaho” initiative for Idaho's November 3, 2020 election violate rights guaranteed to these Plaintiffs by the First and Fourteenth Amendments to the United States Constitution, as enforced through 42 U.S.C. § 1983.

46. Defendant Little’s emergency stay at home orders have not only placed an undue burden on Reclaim Idaho to comply with existing Idaho law, they have made it impossible to collect signatures within the time period prescribed by statute and thereby violated rights guaranteed to these Plaintiffs by the Due Process Clause of the Fourteenth Amendments to the United States Constitution, as enforced through 42 U.S.C. § 1983.

47. Defendant Denney’s refusal to exercise his authority as the Chief Election Officer by granting exceptions to the onerous requirements for initiative ballot qualification have not only placed an undue burden on Reclaim Idaho to comply with existing Idaho law, they have made it impossible to collect signatures within the time period prescribed by statute and thereby violated rights guaranteed to these Plaintiffs by the Due Process Clause of the Fourteenth Amendments to the United States Constitution, as enforced through 42 U.S.C. § 1983.

48. A real and actual controversy exists between the parties.

49. Plaintiffs have no adequate remedy at law other than this action for declaratory and equitable relief.

50. Defendants were acting under color of law.

51. Plaintiffs are suffering irreparable harm as a result of the violations complained of herein, and that harm will continue unless declared unlawful and enjoined by this Court.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs respectfully request that this Court:

A. Declare that the application of I.C. § 34-1802 on the facts and circumstances presented here violates the U.S. Constitution by unduly burdening the initiative process;

B. Declare that the application of I.C. § 34-1807 on the facts and circumstances here violates the U.S. Constitution by unduly burdening signature gathering efforts in support of the “Invest in Idaho” initiative;

C. Issue a preliminary injunction enjoining the enforcement of I.C. § 34-1802 and I.C. § 34-1807 for as long as necessary to remove the undue burden on the Plaintiffs;

D. Issue a preliminary injunction extending the deadline to submit petition signatures to the county clerks for verification to a date that does not unduly burden the Plaintiffs;

E. Issue a preliminary injunction extending the deadline to submit petition signatures to the Secretary of State to a date that does not unduly burden the Plaintiffs;

F. Issue a preliminary injunction to permit the electronic circulation of the initiative and to the State to accept electronic signatures;

G. Award Plaintiffs their costs, expenses, and reasonable attorneys’ fees pursuant to 42 U.S.C. § 1988 and other applicable laws; and

H. Grant such other and further relief as the Court deems just and proper.

I. The declaratory and injunctive relief requested in this action is sought against each Defendant; against each Defendant’s officers, employees, and agents; and against all persons acting in active concert or participation with any Defendant, or under any Defendant’s supervision, direction, or control.

Dated this 6th day of June 2020.

/s/ Deborah A. Ferguson

/s/ Craig H. Durham

Ferguson Durham, PLLC

Attorneys for Plaintiffs

1 think that would be any remedy at all given the uncertainty and
2 the ongoing effects of the pandemic.

3 So that will be my decision, Counsel. We will issue a
4 written decision hopefully more articulate than I have been able
5 to be here and will cover some of the other issues that I either
6 didn't talk about or just touched upon briefly in announcing my
7 decision.

8 I generally prefer to have time to write and reflect.
9 But in this case, I don't think that's going to be possible, at
10 least soon enough to get the parties started.

11 So that will be my decision.

12 Any questions, first of all, from the plaintiffs,
13 Ms. Ferguson?

14 MS. FERGUSON: When you said, Your Honor, week's end
15 is the deadline, so Friday by 5 o'clock?

16 THE COURT: That's what I had in mind.

17 MS. FERGUSON: Okay. Thank you.

18 THE COURT: Mr. Berry?

19 MR. BERRY: Nothing from me, Your Honor.

20 THE COURT: All right. Well, Counsel, that will be my
21 decision. As I said, we will issue something in writing here
22 forthwith.

23 I do want to make one comment. I don't fault the
24 governor or the secretary of state for taking the approach they
25 did. As I noted early on, they have a constitutional obligation

1 to enforce the laws of the state; they chose to do so. But in
2 this case, doing so brought them in conflict with, I think, the
3 plaintiffs' First Amendment rights.

4 And so from that point of view, I want it clearly
5 understood I am not criticizing the governor or secretary of
6 state. I am simply acknowledging that their exercise of their
7 state constitutional duties as they understood them
8 unfortunately resulted in a situation that I think interfered
9 with the plaintiffs' First Amendment right to participate in the
10 initiative process.

11 Before I conclude, I always inquire of my law clerk to
12 see if there is anything I have overlooked.

13 Ms. Henderson, was there anything else?

14 LAW CLERK: Judge, will you be expecting something to
15 be filed within the docket reflecting the choice on Friday?

16 THE COURT: Yes. Thank you. That's a good point.

17 I think by Friday, if you would submit something
18 indicating the state's choice here so that we have a complete
19 record, I think that's a very good point.

20 MR. BERRY: I'll file it as a notice, Your Honor.

21 THE COURT: All right. Thank you.

22 Ms. Gearhart, anything else that I overlooked?

23 THE CLERK: Not that I can think of, Your Honor.

24 THE COURT: All right. Well, thank you, Counsel. A
25 fascinating, challenging legal issue. And I compliment both