STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

April 25, 2019

The Honorable Lawerence Denney
Idaho Secretary of State
Statehouse
VIA HAND DELIVERY

Re: Certificate of Review
Proposed Initiative Repealing and Replacing Title 34, Chapter 18 and Enacting a New Title 34, Chapter 18 Relating to Initiatives and Referendums

Dear Secretary of State Denney:

An initiative petition was filed with your office on March 27, 2019. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only." The petitioners are free to "accept or reject them in whole or in part." This office offers no opinion with regard to the policy issues raised by the proposed initiative or the potential revenue impact to the state budget from likely litigation over the initiative's validity.

BALLOT TITLE

Following the filing of the proposed initiative, this office will prepare short and long ballot titles. The ballot titles should impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While our office prepares titles for the initiative, petitioners may submit proposed titles for consideration. Any proposed titles should be consistent with the standard set forth above.

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MATTER OF FORM

Section 1 of the proposed initiative contains a statement that would repeal the entire contents of title 34, chapter 18, Idaho Code, extant at the time of vote on the proposed measure.[1] Section 2 indicates that the portion of the initiative petition described as Section 3 would be codified in the Idaho Code as title 34, chapter 18. As this office understands these Sections, they would not be codified in Idaho Code. The portion of the initiative petition in Section 3 would be codified in Idaho Code as title 34, chapter 18. It appears likely that the intention of the petitioner is to have the "Findings and Purpose" section at the beginning of Section 3 replace current Idaho Code § 34-1801 as Section 34-1801. However, the petition does not clearly reflect this.

SUMMARY OF INITIATIVE AND MATTERS OF SUBSTANTIVE IMPORT

I. Summary of Proposed Initiative.

The proposed initiative would repeal the entire contents of title 34, chapter 18, Idaho Code, as existing at the time of the vote on the initiative measure. The proposed initiative would replace title 34, chapter 18, Idaho Code, with new sections, which would be known and designated as title 34, chapter 18, Idaho Code, proposed sections 34-1801A through 34-1823. In general, the new sections of the proposed initiative are largely the same as the sections currently in title 34, chapter 18, Idaho Code. The current title 34, chapter 18 establishes the process by which the people may enact initiatives and conduct referendums in Idaho.

In the interests of brevity, I will only describe the significant changes and reenactments the proposed initiative would work to title 34, chapter 18, Idaho Code.

A. <u>Proposed Section – "Findings and Purpose"</u>. The initiative proposal would replace the current Statement of Legislative Intent and Legislative Purpose in Idaho Code § 34-1801, which finds that there have been incidents of fraud and misleading practices in obtaining petition signatures and determines the steps needed to prevent and deter such behavior. It appears that the intention of petitioner was to create a new section 34-1801 titled "Findings and Purpose," however, this paragraph does not contain a section label. There is no replacement section 34-1801 in the initiative petition. There is a paragraph titled "Findings and Purpose," which states that the voters of the State of Idaho find it necessary to protect their rights to referendums and initiatives, that the

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1 The title of the proposed law stated just before Section 1 contains a typographical error misspelling Referendums.

voters "find that the idea that one group can be granted greater electoral strength than another hostile to the one person, one vote basis of our government," and states that the provisions of the initiative measure strike the "right balance" of ensuring support without disenfranchising voters.

B. Section 34-1801A. The proposed initiative would replace the current Idaho Code § 34-1801A with proposed section 34-1801A, which has two subsections. The new subsection (1) would state that an initiative petition may not contain an effective date sooner than January 1 of the year following the vote on the ballot initiative and, if no effective date is specified in the petition, the effective date of an initiative approved by the electorate is July 1 of the following year. The new subsection (2) would contain the requirements as to the form of the initiative petition currently contained in Idaho Code § 34-1801A.

C. Section 34-1802. The proposed initiative makes two notable changes to the repealed provision. Proposed subsection (1) would allow initiative proponents "twelve (13) [sic] months from the date" petitioners receive the official ballot title from the secretary of state or until "April 30 of the year of the next general election," whichever is earlier, to circulate the petition for signatures. Currently, Idaho Code § 34-1802(1) provides that proponents have 18 months, or until April 30, whichever is earlier, to circulate initiative petitions. Proposed subsection (2) would require that the petitioner submit the signatures to the county clerk for verification by "the first day of May in the year an election on the initiative will be held, or nineteen (13) [sic] months" from receipt of the official ballot title, whichever is earlier. Currently, Idaho Code § 34-1802(2) states that signatures must be submitted for verification "not later than the close of business on the first day of May in the year an election on the initiative will be held, or eighteen (18) months" from receipt of the official ballot title, whichever is earlier.

D. Section 34-1804. The proposed initiative would increase the number of signatures that the petitioner must submit to the secretary of state with the petition before circulating it for signatures to at least "twenty-five (25) qualified electors." Currently, the requirement under Idaho Code § 34-1804 is at least "twenty (20) qualified electors." However, the proposed initiative would continue to require that "[n]ot more than twenty (20) signatures on one (1) sheet shall be counted."

E. Section 34-1805. The proposed initiative would decrease the number of legislative districts from which the signatures of legal voters must be obtained in order to qualify a measure for the ballot to "at least seventeen (17) legislative districts." Currently, Idaho Code § 34-1805 requires that signatures of legal voters must be obtained in at least eighteen (18) legislative districts. The current requirements of Idaho Code § 34-1805 that "signatures of legal voters equal in number to not less than six percent (6%) of the qualified electors at the

time of the last general election" in each of the required legislative districts and that the "total number of signatures shall be equal to or greater than six percent (6%) of the qualified electors of the state at the time of the last general election" would be reenacted unchanged. It is worth noting that the initiative petition contains a duplicate section 34-1805.

F. Sections 34-1815 and 34-1821. The proposed initiative would reenact these two sections unchanged from the current Idaho Code. Section 34-1815 would make it a crime "for any person to willfully or knowingly circulate, publish or exhibit any false statement or representation, whether spoken or written, or to fail to disclose any material provision in a petition, concerning the contents, purport or effect of any petition . . . for the purpose of obtaining any signature to any such petition, or for the purpose of persuading any person to sign any such petition." Idaho Code section 34-1821 would make it a felony to "offer . . . or attempt to sell . . . any petition or any part thereof or of any signatures . . . ."

G. Sections 34-1801C. Section 34-1801C does not differ from current Idaho Code § 34-1801C. This section is notable in that the initiative petition contains a duplicate Section 34-1801C.

II. Matters of Substantive Import.

A. The Legal Standards Governing the Imposition of Conditions on the Enactment of Initiatives and Referendums Stem from the Idaho and U.S. Constitutions.

The proposed initiative measure would impose a legal framework for how the people may enact initiatives and pass referendums in Idaho.[2] While this framework would be largely unchanged from the current framework in place under title 34, chapter 18, Idaho Code, a discussion of the legal standards governing this framework is required to analyze whether the changes in the proposal would be legally permissible.

Article III, section 1 is the relevant provision of the Idaho Constitution governing the right of the citizenry to enact law via initiative. It provides, in pertinent part:

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2 It is worth noting that the Constitution provides that the initiative and referenda are established by the legislature. This initiative purports to establish those regulations through the people. It is likely that a reviewing court would permit this exercise of authority because through an initiative, the people stand in the place of the legislature and have reserved this authority unto themselves. But this is an open question of law in Idaho.

> The people reserve to themselves the power to propose laws, and enact the same at the polls independent of the legislature. This power is known as the initiative, and legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, initiate any desired legislation and cause the same to be submitted to the vote of the people at a general election for their approval or rejection.[3]

The right of the people to initiate laws and hold referendums is not self-executing.[4] This right "can only be exercised 'under such conditions and in such manner as may be provided by acts of the legislature.'"[5]

In Dredge Mining Control—Yes!, Inc. v. Cenarrusa, 92 Idaho 480, 445 P.2d 655 (1968) ("*Dredge*"), the Idaho Supreme Court examined the "conditions" and "manner" the legislature may establish for the exercise of the right to initiate laws without violating the right to initiate itself.[6] The court analyzed whether the requirement in then-Idaho Code § 34-1805 that an initiative petition be signed by "legal voters equal in number to not less than ten per cent (10%) of the electors of the state based upon the aggregate vote cast for governor at the general election next preceding the filing of such . . . petition" was a permissible condition on the right to initiate laws.[7]

The trial court had upheld the requirement, concluding "[t]he legislative procedures outlined in Chapter 18 of Title 34, Idaho Code, are not unreasonable and must be complied with. While they may be cumbersome they are nevertheless workable. . . . "[8] The appellants challenged the trial court's conclusion, arguing the certification of the signatures by the clerks of the district courts was "a practical impossibility" and "unworkable" under Idaho voter registration laws, raising concerns about the clerks' ability to verify signatures.[9]

The Idaho Supreme Court concluded the "statutory scheme set up by the legislature, although restrictive and perhaps cumbersome, is reasonable and workable."[10] It identified work-arounds to the concerns appellants raised about

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3 Idaho Const. art. III, § 1.

4 *See* Johnson v. Diefendorf, 56 Idaho 620, 57 P.2d 1068, 1075 (1936) (holding the right of referendum also provided in article III, section 1 is not self-executing, but rather its exercise is dependent upon the statutory scheme enacted by the legislature).

5 Westerberg v. Andrus, 114 Idaho 401, 404, 757 P.2d 664, 667 (1988) (quoting Idaho Const. art. III, § 1).

6 92 Idaho 480, 445 P.2d 655 (1968).

7 92 Idaho at 481, 455 P.2d at 656.

8 *Id.*, 92 Idaho at 483, 455 P.2d at 658.

9 *Id.* The trial court had interpreted "legal voters" to mean registered electors and the Idaho Supreme Court upheld this conclusion. *Id.*, 92 Idaho at 483, 455 P.2d at 658.

10 *Id.*, 92 Idaho at 484, 455 P.2d at 659 (citations omitted).

the ability of clerks to verify signatures and noted that no signatures in the lower court case had been rejected for lack of genuineness.[11] Ultimately, "the provisions of law enacted by the legislature pertaining to the initiative procedures are reasonable."[12]

Thus, under the standard established by the Idaho Supreme Court, the "conditions" and "manner" established for the exercise of the right to initiate and hold referendums must be "reasonable and workable" to avoid violating the rights contained in article III, section 1 of the Idaho Constitution, although they may be "restrictive and perhaps cumbersome."[13]

There is no corresponding federal right to initiate legislation or to hold referendums.[14] That said, restrictions on qualifying an initiative or referendum for the ballot may directly or indirectly impact core political speech and thereby violate the First Amendment of the U.S. Constitution.[15] Restrictions related to qualifying an initiative or referendum for the ballot may also violate the Equal Protection Clause of the U.S. Constitution.[16]

With regard to the First Amendment, "[t]he [U.S.] Supreme Court has identified at least two ways in which restrictions on the initiative process can severely burden 'core political speech.'"[17] First, a restriction could "restrict one-on-one communication between petition circulators and voters."[18] Second, it could make it less likely that a proponent of a measure could gather the necessary signatures to place an initiative on the ballot, thereby "'limiting their ability to make the matter the focus of statewide discussion.'"[19]

In analyzing First Amendment concerns related to initiative and referendum procedures, the court will first ask whether the law imposes a "severe burden" on plaintiff's rights.[20] Laws imposing severe burdens must be "narrowly tailored and advance a compelling state interest."[21] "Lesser burdens . . . trigger

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11 *Id.*
12 *Id.*
13 *Id.* (citations omitted).
14 Angle v. Miller, 673 F.3d 1122, 1133 (9th Cir. 2012) (citation omitted).
15 *See id.* at 1132 (citations omitted).
16 See Idaho Coal. United for Bears v. Cenarrusa, 342 F.3d 1073, 1076-77 (9th Cir. 2003), aff'd, 342 F.3d 1073 (9th Cir. 2003).
17 Angle, 673 F.3d at 1132 (quoting Meyer v. Grant, 486 U.S. 414, 422, 108 S. Ct. 1886, 1892, 100 L. Ed. 2d 425 (1988)).
18 *Id.* (citation omitted).
19 *Id.* (quoting Meyer, 486 U.S. at 423).
20 *Id.*
21 *Id.* (citation omitted).

less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions."[22]

As noted above, laws governing the exercise of the right to initiate laws and hold referendums may also run afoul of the Equal Protection Clause of the U.S. Constitution. "Voting is a fundamental right subject to equal protection guarantees under the Fourteenth Amendment."[23] When a state gives its citizens the right to enact laws by initiative and hold referendums, "it subjects itself to the requirements of the Equal Protection Clause."[24] Laws governing the process may not engage in impermissible vote dilution nor may they discriminate against an identifiable class of voters.[25]

B. Laws Setting the Conditions and Manner Governing How the Rights of Initiative and Referendum May be Exercised Are Likely a Proper Subject for Initiative.

While article III of the Idaho Constitution expressly gives the legislature the power to control the conditions and manner by which the right to initiate laws may be exercised, this is likely a proper subject for an initiative.[26] Generally, where the legislature may legislate, the people may initiate.[27]

The Idaho Supreme Court has previously found that a power explicitly granted to the legislature may be exercised by the people under the right to initiate laws. In Rudeen v. Cenarrusa, the Court upheld the Idaho Term Limits Act Initiative of 1994, which limited multi-term incumbents' right to ballot access.[28] The Court upheld the initiated laws as a valid exercise of the power vested in the legislature and the people of Idaho granted by the combination of article III, section 1 and article VI, section 4 of the Idaho Constitution.[29]

Article VI, section 4 of the Idaho Constitution provides "*[t]he legislature* may prescribe qualifications, limitations, and conditions for the right of suffrage, additional to those prescribed in this article, but shall never annul any of the

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22 *Id.* (alteration in original) (citation omitted); Burdick v. Takushi, 504 U.S. 428, 433, 112 S. Ct. 2059, 2063, 119 L. Ed. 2d 245 (1992).

23 Idaho Coal. United for Bears, 342 F.3d at 1076 (citation omitted).

24 *Id.* at 1077 n.7 (citation omitted).

25 Angle, 673 F.3d at 1128.

26 *See* Idaho Const. art. III, § 1 ("legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, initiate any desired legislation . . . .").

27 *See* City of Boise City v. Keep the Commandments Coal., 143 Idaho 254, 256, 141 P.3d 1123, 1125 (2006) ("If a subject is legislative in nature, it is appropriate for action by initiative.").

28 Rudeen v. Cenarrusa, 136 Idaho 560, 38 P.3d 598 (2001).

29 *Id.*, 136 Idaho at 567-68, 38 P.3d at 605-06.

provisions in this article contained."[30] The Rudeen Court interpreted this provision as granting the people, as well as the legislature, authority to add limitations to the right of suffrage.[31] Despite the fact that the provision specifically named the legislature as the authorized entity, the Court concluded that the authority extended to the people under the right of initiative, upholding the initiative under articles III and VI of the Idaho Constitution.[32]

The reverse is also true. In Westerburg, the Idaho Supreme Court held the people may not enact a lottery through the initiative process when the legislature is prohibited from so doing.[33] Westerburg indicates that any restrictions on the legislature's ability to set the conditions and manner for the exercise of the right of initiative also apply when the people set the conditions and manner for the exercise of the initiative.

A reviewing court would therefore likely find that the people may set the conditions and manner for the exercise of the right of initiative via initiative as long as the procedure established by the people complies with the constitutional standards discussed above.

C. The Provisions Governing the Effective Dates for Laws Enacted Via Initiative are Ambiguous.

The proposed initiative would replace the current Idaho Code § 34-1801A with proposed section 34-1801A, which has two subsections. The new subsection (1) would state that an initiative petition may not contain an effective date sooner than January 1 of the year following the vote on the ballot initiative and, if no effective date is specified in the petition, the effective date of an initiative approved by the electorate is July 1 of the following year. The new subsection (2) would contain the requirements as to the form of the initiative petition currently contained in Idaho Code § 34-1801A.[34]

However, the language of proposed subsection 34-1801A(1) directly conflicts with proposed Idaho Code section 34-1813, which provides that the secretary of state must canvass the votes for each measure within 30 days of the election, or sooner if all the returns are received, and "the governor shall forthwith issue his proclamation, giving the whole number of votes cast in the state for and against such measure and question, and declaring such measures as are approved by a majority of those voted thereon to be *in full force and effect as the*

30 Idaho Const. art. VI, § 4 (emphasis added).
31 Rudeen, 136 Idaho at 567, 38 P.3d at 605.
32 *Id.*, 136 Idaho at 567-68, 38 P.3d at 605-06.
33 Westerburg, 114 Idaho at 406, 757 P.2d at 669.
34 The (2) marking subsection (2) of proposed Idaho Code section 34-1801A has an underscore that appears to be a typographical error.

law of the state of Idaho from the date of said proclamation . . ." This conflict would result in significant ambiguity as to when laws enacted via initiative would go into effect and invite legal challenge.

Were it not for this conflict, a reviewing court would likely find proposed subsection 34-1801A(1)'s requirements related to the effective dates of initiatives to be reasonable and workable under the standard set forth above for the Idaho Constitution's right to initiate laws.

Further, given that the effective date requirements do not restrict one-on-one communication or make it more difficult to get an initiative on the ballot, a reviewing court is unlikely to find First Amendment concerns implicated by the effective date requirements.[35] And as the requirements would apply to all initiatives equally and do not affect the weight of the votes cast for initiatives, it is unlikely that federal equal protection concerns would be implicated by the changes.[36]

D. The Requirements that Petitioners Gather Signatures of 6% of the Qualified Electors in at Least 17 Legislative Districts Within 12 or 13 Months to Put an Initiative Measure or Referendum on the Ballot is Likely Constitutional.

Under current Idaho Code § 34-1802(1), initiative petitioners have 18 months from the date they receive the official ballot title from the secretary of state or until April 30 of the year of the next general election, whichever occurs earlier, to circulate their petitions and gather signatures. Referendum petitioners must file petitions with the secretary of state with the requisite number of signatures attached not more than 60 days after the final adjournment of the session of the state legislature which passed on the bill on which the referendum is demanded.[37] Current Idaho Code § 34-1805 requires that initiative and referendum petitioners collect

> . . . the signatures of legal voters equal in number to not less than six percent (6%) of the qualified electors at the time of the last general election in each of at least eighteen (18) legislative districts; provided however, the total number of signatures shall be equal to or greater than six percent (6%) of the qualified electors of the state at the time of the last general election.

35 *See* Angle, 673 F.3d at 1132-33.
36 *See id.* at 1128-29.
37 I.C. § 34-1803.

The proposed initiative would decrease the window to gather signatures for initiative petitions to "twelve (13) [sic] months from that date or April 30 of the year of the next general election, whichever occurs earlier" with proposed section 34-1802(1).[38] Proposed section 34-1805 would require that initiative and referendum petitioners gather the signatures of not less than 6% of the qualified electors at the time of the last general election in each of at least 17 legislative districts, rather than 18.[39] The total number of signatures gathered would still be required to be equal to or greater than 6% of the qualified electors of the state at the time of the last general election.[40]

Whether the proposed window is 12 or 13 months, these signature-gathering requirements would likely be found constitutional for initiative petitions. No Idaho court has yet looked at the constitutionality of signature-gathering requirements under the Idaho Constitution. As discussed above, it appears that these requirements will survive scrutiny under article III, section 1 of the Idaho Constitution if they are "reasonable and workable."[41]

Signature-gathering requirements that meet this standard are also likely to survive First Amendment scrutiny. Under First Amendment jurisprudence, as long as ballot access restrictions do not "significantly inhibit the ability of initiative proponents to place initiatives on the ballot," they will be upheld as long as the rule furthers "an important regulatory interest."[42] A ballot access restriction works a significant inhibition when "reasonably diligent" initiative proponents are unable to qualify an initiative for the ballot as a result of the restrictions.[43]

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38 There appears to be a typo in the initiative petition: it is not clear whether the window to collect signatures would be reduced to 12 or 13 months. Similarly, there is a typographical error in proposed section 34-1802(2), which states an initiative petitioner would have until the first day of May in the year an election on the initiative will be held or "nineteen (13) [sic] months" from the date the petitioner receives the official ballot title, whichever is earlier, to submit the petition containing signatures to the county clerk for verification. Currently, Idaho Code § 34-1802(2) provides until the first day of May or 18 months, whichever is earlier, to submit the petitions containing signatures to the county clerk.

39 The Ninth Circuit Court of Appeals has repeatedly indicated that states may permissibly ensure statewide support for initiative petitions by requiring initiative proponents to obtain signatures from districts having equal population, such as state legislative districts, without violating the Equal Protection Clause of the U.S. Constitution. *See* Angle, 673 F.3d at 1131; Am. Civil Liberties Union of Nev. v. Lomax, 471 F.3d 1010, 1021 (9th Cir. 2006); Idaho Coal. United for Bears, 342 F.3d at 1078. That said, a federal district court in Colorado recently struck down a Colorado requirement that an initiative proponent obtain the signatures of at least 2% of the voters in each state senate district as a violation of the Equal Protection Clause based on evidence of significant variation in registered voters in each state senate district. Semple v. Williams, 290 F. Supp. 3d 1187, 1203 (D. Colo. 2018). This decision is currently on appeal to the Tenth Circuit Court of Appeals.

40 *See* proposed Idaho Code section 34-1805.

41 Dredge, 92 Idaho at 484, 445 P.2d at 659.

42 Angle, 673 F.3d at 1133, 1135 (citation omitted).

43 *Id.* at 1134.

In short, precedent interpreting the First Amendment is instructive to analyze whether these signature-gathering requirements would survive scrutiny under the Idaho Constitution, as well as under the First Amendment.

Similar signature-gathering requirements have been approved individually on First Amendment grounds. Courts that have reviewed signature deadlines have found the far shorter deadlines reasonable: 180 days;[44] 188 days;[45] and approximately seven months.[46] Further, the U.S. Supreme Court has noted, in the context of signature-gathering requirements for candidates, "the petition period must end at a reasonable time before election day to permit nomination papers to be verified."[47]

Courts have also approved total signature requirements of 8% of the votes cast in a previous election[48] and 10% of the registered voters in a state.[49]

As for the legislative district requirement, the Ninth Circuit Court of Appeals has approved a requirement that initiative proponents collect signatures from a certain number of registered voters in *all* of the state's congressional districts.[50] Other courts have similarly approved geographic distribution requirements.[51]

The signature-gathering requirements are likely also constitutional in the aggregate under the Idaho and U.S. Constitutions.[52] Most notably, in 2004, the Utah Supreme Court upheld as constitutional under the Utah Constitution requirements that an initiative sponsor obtain the signatures of equal to 10% of the cumulative total of all votes cast for candidates for governor at the last

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44 Jenness v. Fortson, 403 U.S. 431, 433, 442, 91 S. Ct. 1970, 1972, 29 L. Ed. 2d 554 (1971).

45 Libertarian Party of Fla. v. State of Fla., 710 F.2d 790, 794 (11th Cir. 1983).

46 Libertarian Party of N.H. v. Gardner, 843 F.3d 20, 27-30 (1st Cir. 2016).

47 Storer v. Brown, 415 U.S. 724, 743, 94 S. Ct. 1285, 1284, 39 L. Ed. 2d 714 (1974).

48 Protect Marriage Ill. v. Orr, 463 F.3d 604, 605-06, 608 (7th Cir. 2006).

49 Dobrovolny v. Moore, 126 F.3d 1111, 1112-13 (8th Cir. 1997).

50 *See* Angle, 673 F.3d at 1135-36.

51 *See also* Libertarian Party v. Bond, 764 F.2d 538, 543 (8th Cir. 1985) (requirement that signatures be obtained from either all, or at least one-half, of Missouri's nine congressional districts and that party obtain signatures of at least one or two percent respectively of votes cast for Governor in last gubernatorial election to place party's name on ballot was not overly burdensome); Moritt v. Governor of N.Y., 366 N.E.2d 1285, 1287 (N.Y. Ct. App. 1977) (upheld requirement of 20,000 signatures with at least 100 signatures from each district for statewide office).

52 *See* Jenness, 403 U.S. at 438 (six months to collect the signatures of 5% of the eligible electorate for the office in question is permissible); Libertarian Party of Fla., 710 F.2d at 793-94 (188 days to collect signatures of 3% of the state's registered voters provides a realistic means of ballot access).

regular general election at which a governor was elected on a statewide level and in each of at least 26 of Utah's 29 senate districts (89.7% of districts) within one year.[53]

The requirement had been challenged under Utah Constitution, article VI, section 1, which states, "The legal voters of the State of Utah in the numbers, under the conditions, in the manner, and within the time provided by statute, may initiate any desired legislation . . . ."[54] The court determined the requirement did not "unduly burden" the right to initiative by assessing "whether the enactment [was] reasonable, whether it [had] a legitimate legislative purpose, and whether the enactment reasonably tend[ed] to further that legislative purpose."[55] In approving the one-year time requirement to obtain signatures as reasonable, the court noted that it had previously approved a 35 day signature requirement for submitting referenda.[56] The court noted that, although the signature requirements for initiatives were more exacting, it could not articulate a reason on the evidence before it that a one-year time period would be unreasonable.[57]

Based on the above precedent, it is likely that the signature-gathering requirements for initiatives would be upheld as constitutional against a facial challenge individually and in the aggregate. That said, the signature-gathering requirements could be vulnerable to an as-applied challenge if credible evidence was brought forward that the signature-gathering requirements in the aggregate prevented a reasonably-diligent initiative proponent from getting an initiative measure on the ballot.

A question remains as to whether the new signature-gathering requirements would be constitutional with regard to referendum petitions. Assuming that the measure a petitioner wished to subject to referendum was a law passed at the end of the legislative session, the petitioner would have fewer than 60 days to collect the required signatures.[58] This is because the referendum petition would be subject to certificate of review and ballot title requirements before it could be circulated for signatures and the Attorney General has 20 working days to complete the certificate of review process and 10 working days to provide ballot titles, which could leave fewer than 30 days for signature gathering.[59] It is possible that a reviewing court would find that the reduced time frame to gather signatures, combined with the increased signature-

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53 *See* Utah Safe to Learn-Safe to Worship Coal., Inc. v. State, 94 P.3d 217, 229, 231 (Utah 2004).

54 *Id.* at 226 (quoting Utah Const. art. VI, § 1) (alteration omitted).

55 *Id.* at 228.

56 *Id.* at 231 (citation omitted).

57 *Id.*

58 *See* proposed section 34-1803.

59 *See* proposed section 34-1809(1)(a) and (2)(a).

gathering requirement, renders the requirements unworkable and unconstitutional.[60]

E. The Increase in Signatures a Petitioner is Required to File with the Secretary of State is Likely Constitutional.

The proposed section 34-1804 would provide "before or at the time of beginning to circulate any petition . . . for the referendum . . . or . . . initiative" the petitioner "shall send or deliver to the secretary of state a copy of such petition duly signed by at least twenty-five (25) qualified electors of the state . . . ." This filing triggers the Attorney General's certificate of review and the subsequent assignment of ballot titles.[61]

This language is unchanged from the current Idaho Code §§ 34-1804 and 34-1809 with the exception that the proposed section 34-1804 would require the signatures of at least 25 qualified electors, rather than the current requirement of 20 qualified electors.

It is unlikely that a reviewing court would find the minor increase in signatures unreasonable or that it prevents a reasonably-diligent initiative proponent from getting a measure on the ballot. Therefore, it is unlikely that this increase in signatures would work a violation of either the Idaho Constitution or the First Amendment under the standards discussed above.

F. The Criminalization of Certain Actions Related to Circulating Initiative Petitions is Likely Unconstitutional.

The proposed initiative petition, if approved by the voters, would re-enact the current Idaho Code § 34-1815, making it a crime "for any person to willfully or knowingly circulate, publish or exhibit any false statement or representation, whether spoken or written, or to fail to disclose any material provision in a petition, concerning the contents, purport or effect of any petition . . . for the purpose of obtaining any signature to any such petition, or for the purpose of persuading any person to sign any such petition."

In Idaho Coalition United For Bears, the U.S. District Court for the District of Idaho struck down as unconstitutional identical language in Idaho Code § 34-1815.[62] The District Court found the sentence in Idaho Code § 34-1815, which is identical to the proposed language in the initiative petition, unconstitutionally

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60 *See* Storer, 415 U.S. at 739-40 (remanding requirement of 5% of voters in 24 days to see if excessively burdensome in light of the fact that the pool of available signers was diminished by the disqualification of those who voted in the primary).

61 *See* proposed section 34-1809.

62 234 F. Supp. 2d at 1167.

vague in part and, created, in another part, an unconstitutional strict liability offense that impermissibly chilled First Amendment speech.[63]

The initiative petition also proposes to re-enact Idaho Code § 34-1821 as section 34-1821, making it a felony to "offer . . . or attempt to sell . . . any petition or any part thereof or of any signatures . . . ." However, the U.S. District Court for the District of Idaho has also struck down subsection (a) of Idaho Code § 34-1821 on First Amendment grounds as unconstitutionally chilling protected speech.[64]

As the initiative petition proposes to re-enact the unconstitutional provisions of Idaho Code §§ 34-1815 and 34-1821(a), these re-enacted provisions are likely to be struck down as unconstitutional.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via copy of this Certificate of Review, deposited in the U.S. Mail to Jane Rohling, 582 Palmetto Dr., Eagle, Idaho 83616.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

Megan A. Larrondo
Deputy Attorney General

63 *Id.*
64 *See id.*, 234 F.Supp.2d at 1166.