



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

April 29, 2021

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

Re: Certificate of Review
Proposed Initiative Repealing Idaho Code § 34-1805 and Enacting New
Idaho Code § 34-1805

Dear Secretary of State Denney:

An initiative petition was filed on April 7, 2021, proposing to repeal and replace Idaho Code section 34-1805 with a new Idaho Code section 34-1805. The proposed initiative completely eliminates the existing geographic signature requirement, but keeps the current 6% total signature requirement.

Pursuant to Idaho Code section 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 petitioner is 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, if petitioner decides to proceed with sponsorship, 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, petitioner may submit proposed titles for consideration. Any proposed titles should be consistent with the above standard.

MATTER OF FORM

Section 1 of the proposed initiative contains a descriptive statement that identifies the initiative as “The Idaho Initiative Act.”¹ Section 2 repeals Idaho Code section 34-1805, extant at the time of vote on the proposed measure. Section 3 amends title 34, chapter 18, Idaho Code, by enacting a new Idaho Code section 34-1805. Section 4 provides that should the proposed initiative pass at the November 8, 2022 General Election, then it will enter into full force and effect on or after January 1, 2023.

SUMMARY OF INITIATIVE AND MATTERS OF SUBSTANTIVE IMPORT

I. Summary of Proposed Initiative.

The proposed initiative is discrete. It amends title 34, chapter 18, Idaho Code, by repealing Idaho Code section 34-1805 and replacing it with a revised Idaho Code section 34-1805.

Title 34, chapter 18, Idaho Code, establishes the processes by which the people may enact initiatives and conduct referendums in Idaho. Section 34-1805 identifies the total number of required signatures for final filing and consideration. Before April 17, 2021, initiative proponents were required to collect a certain percentage of signatures, equaling or greater than 6% of the qualified electors at the time of the last general election from at least 18 legislative districts. If those requirements were met, then the total number of signatures collected must have been equal to or greater than 6% of the qualified electors of the state of Idaho at the time of the last general election.

On April 17, 2021, Governor Little signed Senate Bill 1110, 66th Legislature, 1st Regular Session (“S.B. 1110”), into law. The bill contained an emergency clause and it became law that same date. Based upon S.B. 1110’s enactment, Idaho Code section 34-1805 now requires initiative proponents to collect a certain percentage of signatures, equaling at least 6% of the qualified electors at the time of the last general election from all 35 legislative districts in the state of Idaho.

The proposed initiative eliminates the geographic signature requirement. It decreases the number of legislative districts from which signatures of legal voters must be obtained in order to qualify a measure for the ballot from 35 districts to zero. The proposed initiative does not alter the total number of signatures that must be collected, which must be equal to or greater than 6% of the qualified electors of the state of Idaho at the time of the last general election.

¹ While not included in the title, the proposed initiative would also apply to referendums.

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 lesser burden on the legal framework for how the people may enact initiatives and pass referendums in Idaho. While the overall 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.

There is no federal right to initiate legislation or to hold referendums.² 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.³ Restrictions related to qualifying an initiative or referendum for the ballot may also violate the Equal Protection Clause of the U.S. Constitution.⁴ However, the analysis begins under Idaho's Constitution.

Idaho lawmakers passed Senate Joint Resolution 12 in 1911, which was a resolution to amend the Idaho Constitution to authorize an initiative and referendum process for its citizens.⁵ Idaho voters approved the constitutional amendment at the general election in 1912.⁶

Article III, section 1 is the relevant provision of the Idaho Constitution governing the right of the citizenry to enact law via initiative. After the provision was ratified in 1912, it provided, in pertinent part, the following:

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

² Angle v. Miller, 673 F.3d 1122, 1127-28, 1133 (9th Cir. 2012) (citations omitted).

³ See id. at 1132-33 (citations omitted).

⁴ Id. at 1127-28.

⁵ See Kristin M. Ford, *Initiative & Referendum Process in Idaho: A Research Guide*, 26 Legal Reference Servs. Q. 79, 80 (2007) ("*Research Guide*"); S.J. Res. 12, 11th Leg, 1911 Idaho Sess. Laws 786 (ratified Nov. 5, 1912).

⁶ Ford, *Research Guide*, 26 Legal Reference Servs. Q., at 80; Westerberg v. Andrus, 114 Idaho 401, 402-03, 757 P.2d 664, 665-66 (1988).

a general election for their approval or rejection provided that legislation thus submitted shall require the approval of a number of voters equal to a majority of the aggregate vote cast for the office of the governor at such general election to be adopted.⁷

The foregoing provision provides the language of the constitutional section as it read after the 1912 amendment, with the underlined clause showing the language deleted by a 1980 amendment to the Idaho Constitution, which has been the only change made to Idaho's constitutional provisions regarding initiatives and referenda since 1912.⁸

Idaho courts have determined that the right of the people to initiate laws and hold referendums is not self-operating.⁹ This right "can only be exercised 'under such conditions and in such manner as may be provided by acts of the legislature.'"¹⁰ The Legislature could not agree upon the "conditions" or "manner" of the initiative (and referendum) process until 1933, which is currently codified at title 34, chapter 18, Idaho Code.¹¹ When Idaho Code section 34-1805 was enacted, it required that a petition "have affixed 'signatures of 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 initiative...petition.'"¹²

In Dredge Mining Control—Yes!, Inc. v. Cenarrusa ("Dredge"), the Idaho Supreme Court examined the "conditions" and "manner" that the Legislature may establish for the exercise of the right to initiate laws without violating the right to initiate itself.¹³ The court analyzed whether the 10% signature requirement in then-Idaho Code section 34-1805 was a permissible condition on the right to initiate laws.¹⁴

The trial court upheld the requirement, concluding "[t]he legislative procedures outlined in Chapter 18 of Title 34, Idaho Code, are not unreasonable and must be

⁷ Westerberg, 114 Idaho at 402-03, 575 P.2d at 665-66 (emphasis added).

⁸ See Ford, *Research Guide*, 26 Legal Reference Servs. Q., at 81; S.J. Res. No. 112, 45th Leg., 2nd Reg. Sess., 1980 Idaho Sess. Laws 1028 (ratified Nov. 4, 1980).

⁹ 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-operating, but rather its exercise is dependent upon the statutory scheme enacted by the Legislature).

¹⁰ Westerberg, 114 Idaho at 404, 757 P.2d at 667 (emphasis omitted) (quoting Idaho Const. art. III, § 1).

¹¹ See id. See also H.B. 186, 22nd Leg., 1933 Idaho Sess. Laws 431.

¹² Dredge Mining Control-Yes!, Inc. v. Cenarrusa, 92 Idaho 480, 481, 445 P.2d 655, 656 (1968) (quoting Idaho Code 34-1805 (1933)).

¹³ See generally id.

¹⁴ Id. at 481-84, 455 P.2d at 656-59.

complied with. While they may be cumbersome they are nevertheless workable[.]”¹⁵ 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.¹⁶

The Idaho Supreme Court concluded the “statutory scheme set up by the legislature, although restrictive and perhaps cumbersome, is reasonable and workable.”¹⁷ It identified work-arounds to the concerns appellants raised about the ability of clerks to verify signatures and noted that no signatures in the lower court case had been rejected for lack of genuineness.¹⁸ Ultimately, “the provisions of the law enacted by the legislature pertaining to the initiative procedures are reasonable.”¹⁹

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.”²⁰

The Legislature next revised the “conditions” and “manner” of the signature percentage requirement in 1997.²¹ The 10% total signature requirement was reduced to 6%, but a geographic distribution requirement was added to require signatures from 22 counties equal to and not less than 6% of the qualified electors at the time of the last general election in each of those 22 counties.²²

While not challenged under the reasonable and workable test, the geographic distribution requirement was challenged in Idaho Coalition United for Bears v. Cenarrusa (“ICUB”) based upon the 14th Amendment’s Equal Protection Clause.²³ “Voting is a fundamental right subject to equal protection guarantees under the Fourteenth Amendment.”²⁴ When a state gives its citizens the right to enact laws by initiative and

¹⁵ Id. at 483, 455 P.2d at 658.

¹⁶ Id. The trial court had interpreted “legal voters” to mean registered electors and the Idaho Supreme Court upheld this conclusion. See id. at 482, 455 P.2d at 657.

¹⁷ Id. at 484, 455 P.2d at 659 (citations omitted).

¹⁸ Id.

¹⁹ Id.

²⁰ Id. (citations omitted).

²¹ H.B. 265, 54th Leg., 1st Reg. Sess., 1997 Idaho Sess. Laws 756, 759.

²² Id.

²³ 234 F. Supp. 2d 1159, 1160-62 (D. Idaho 2001).

²⁴ Idaho Coal. United for Bears v. Cenarrusa, 342 F.3d 1073, 1076 (9th Cir. 2003) (citation

hold referendums, “it subjects itself to the requirements of the Equal Protection Clause.”²⁵ Laws governing the process may not engage in impermissible vote dilution nor may they discriminate against an identifiable class of voters.²⁶

The district court in ICUB found the geographic distribution requirement unconstitutional because it gave rural voters preferential treatment:

Because over 60% of Idaho’s population resides in just 9 of the State’s 44 counties, it is easy to envision a situation where $\frac{3}{4}$ of Idaho’s voters sign a petition but fail to get it on the ballot because they could not collect 6% of the vote in the rural counties.²⁷

The Ninth Circuit Court of Appeals affirmed the district court’s decision in 2003 on Equal Protection grounds.²⁸ In so ruling, the Ninth Circuit found that the geographic percentage distribution requirement based upon counties of uneven population violated the Equal Protection Clause because it allocated “equal power to counties of unequal population.”²⁹ The Ninth Circuit did note, however, that Idaho’s geographic distributional requirement could be saved by basing it on existing state legislative districts (*i.e.*, districts that were equipopulous).³⁰ And that the purposes underlying a geographic distributional requirement could be accomplished through these legislative districts by “simply increasing the statewide percentage of signatures required—from six to twelve percent or to any other percentage Idaho deemed desirable.”³¹ The stated purposes underlying the geographic distributional requirement were: requiring a modicum of statewide support; preventing a long and confusing list of initiatives appearing on the ballot; protecting against fraud; informing the electorate; ensuring the “integrity” of the ballot process; and promoting “grassroots direct legislation efforts.”³²

The Idaho Legislature amended Idaho Code section 34-1805 again in 2007.³³ The geographic distribution requirement was completely removed, but the total signature percentage requirement remained the same at 6%.³⁴ Six years later, the Idaho

omitted).

²⁵ Id. at 1077 n.7 (citation omitted).

²⁶ Angle, 673 F.3d at 1128-29.

²⁷ ICUB, 234 F. Supp. 2d. at 1165.

²⁸ See ICUB, 342 F.3d at 1074.

²⁹ Id. at 1078.

³⁰ Id.

³¹ Id. at 1079.

³² Id. at 1078-79.

³³ H.B. 214, 59th Leg., 1st Reg. Sess., 2007 Idaho Laws 619, 622.

³⁴ Id.

Legislature re-imposed a geographic distribution requirement based upon equipopulous legislative districts.³⁵ The signature percentage requirement remained the same, but it required 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.”³⁶ This is the law that was in effect until April 17, 2021, when Governor Little signed S.B. 1110. The potential effect of S.B. 1110 on this proposed initiative is discussed further below.

It is worth noting that Idaho Code section 34-1805 was recently challenged in federal court again on Equal Protection grounds.³⁷ Like the proposed initiative here, the plaintiff sought to invalidate the geographic distribution requirement entirely in section 34-1805.³⁸ The court noted that this matter had not been litigated extensively, but found numerous cases on point in the Ninth Circuit and other federal circuits to conclude that the plaintiff did not have a redressable cause of action.³⁹ The court relied heavily on ICUB, which explicitly supported geographic distribution requirements for signature gathering if based upon equipopulous legislative districts.⁴⁰

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.’”⁴¹ First, a restriction could “restrict one-on-one communication between petition circulators and voters.”⁴² 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.”⁴³

In analyzing First Amendment concerns related to initiative and referendum procedures, the court will first ask whether the law imposes a “severe burden” on a plaintiff’s rights.⁴⁴ Laws imposing severe burdens must be “narrowly tailored and advance a compelling state interest.”⁴⁵ “Lesser burdens ... trigger less exacting review,

³⁵ S.B. 1108, 62nd Leg., 1st Reg. Sess., 2013 Idaho Laws 503, 504.

³⁶ Id.

³⁷ Isbelle v. Denney, Case No. 1:19-cv-00093-DCN, 2020 WL 2841886 (D. Idaho Jun. 1, 2020).

³⁸ Id. at *1, *3, *1 n.1.

³⁹ Id. at *3.

⁴⁰ Id. at *4.

⁴¹ 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)).

⁴² Id. (citation omitted).

⁴³ Id. (quoting Meyer, 486 U.S. at 423).

⁴⁴ Id.

⁴⁵ Id. (citation omitted).

and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions."⁴⁶

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.⁴⁷ Generally, where the Legislature may legislate, the people may initiate.⁴⁸

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.⁴⁹ 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.⁵⁰

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 provisions in this article contained."⁵¹ The Rudeen Court interpreted this provision as granting the people, as well as the Legislature, authority to add limitations to the right of suffrage.⁵² 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.⁵³

The reverse is also true. In Westerberg, the Idaho Supreme Court held the people may not enact a lottery through the initiative process when the Legislature is prohibited

⁴⁶ Id. (emphasis and citation omitted); Burdick v. Takushi, 504 U.S. 428, 433-34, 112 S. Ct. 2059, 2063-64, 119 L. Ed. 2d 245 (1992).

⁴⁷ 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").

⁴⁸ See City of Boise 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.").

⁴⁹ Rudeen v. Cenarrusa, 136 Idaho 560, 38 P.3d 598 (2001).

⁵⁰ Id. at 567-68, 38 P.3d at 605-06.

⁵¹ (Emphasis added.)

⁵² Rudeen, 136 Idaho at 567, 38 P.3d at 605.

⁵³ Id. at 567-68, 38 P.3d at 605-06.

from so doing.⁵⁴ Westerberg 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 Requirement that Petitioners Gather Signatures of 6% of the Qualified Electors without Any Geographic Limitations to Put an Initiative Measure or Referendum on the Ballot is Likely Constitutional.

As discussed above, until April 17, 2021, Idaho Code section 34-1805 required 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.

In light of S.B. 1110's passage, initiative proponents must now collect signatures from all 35 legislative districts. The proposed initiative seeks to eliminate the need to collect signatures on a geographic basis. The total number of signatures to be collected is equal to or greater than 6% of the qualified electors of the state at the time of the last general election.

As noted above, Dredge has already addressed whether total signature percentage requirements are permissible conditions and manners in the initiative process and it found that a 10% total signature requirement was a permissible condition on the right to initiate laws.⁵⁵ At that time, there was no geographic distribution requirement. As the trial court in Dredge concluded, "[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[.]"⁵⁶ Considering that the total signature requirement is proposed to be less, at 6%, a similar outcome would likely be reached should the proposed initiative be challenged.

Signature-gathering requirements that meet this standard are also likely to survive First Amendment scrutiny. Under First Amendment jurisprudence, as long as ballot

⁵⁴ Westerberg, 114 Idaho at 406, 757 P.2d at 669.

⁵⁵ Dredge, 92 Idaho at 481, 484, 445 P.2d at 656, 659.

⁵⁶ Id. at 483, 455 P.2d at 658.

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.”⁵⁷ 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.⁵⁸ Again, by removing the geographic distribution requirement, the burdens imposed are less than current law.

As for eliminating 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.⁵⁹ Other courts have similarly approved geographic distribution requirements.⁶⁰ However, the Ninth Circuit has not held that geographic distribution requirements *are* required.

Instead, the elimination of the geographic distribution requirements, becomes more of a policy consideration. As noted in ICUB, the policy considerations underlying a geographic requirement were: requiring a modicum of statewide support; preventing a long and confusing list of initiatives appearing on the ballot; protecting against fraud; informing the electorate; ensuring the “integrity” of the ballot process; and promoting “grassroots direct legislation efforts.”⁶¹ Finally, the court in Isbelle concluded its opinion by noting the effect of striking the geographic distribution requirement as plaintiff intended:

In fact, were the Court to strike down Section 34-1805, it would likely mean that those who wanted to place initiatives on the ballot would focus solely on the most populous areas of the state (to increase the chances of garnering the greatest number of total signatures) and leave less populous areas with little to no input on important issues. Idaho Code § 34-1805 ensures that ballot initiatives brought in Idaho enjoy broad support—not in the magnitude of the number of signatures, but in the breadth of where those signatures come from.⁶²

Based on the above precedent, it is likely that the signature-gathering

⁵⁷ Angle, 673 F.3d at 1133, 1135 (citation omitted).

⁵⁸ Id. at 1133-34.

⁵⁹ Id. at 1135-36.

⁶⁰ See 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).

⁶¹ ICUB, 342 F.3d at 1078-79.

⁶² Isbelle, 2020 WL 2841886, at *5.

requirements for initiatives would be upheld as constitutional against a facial challenge individually and in the aggregate. It is unlikely that a reviewing court would find that the elimination of a geographic signature requirement to be unreasonable or even required. Therefore, it is unlikely that these changes would constitute a violation of the Idaho Constitution, Equal Protection Clause or the First Amendment under the standards discussed above.

D. The Proposed Ballot Initiative Will Need to Meet the Signature Requirements for All 35 Legislative Districts Enacted by the Governor on April 17, 2021.

Idaho Code section 34-1805 was amended by S.B. 1110 on April 17, 2021, when the Governor signed the bill, which contained an emergency clause. Based upon the signed bill, it now requires initiative proponents to collect a certain percentage of signatures, equaling or greater than 6% of the qualified electors at the time of the last general election from all 35 legislative districts in the state of Idaho.

At this point in time, the proposed initiative, which was submitted to the Secretary of State on April 7, 2021, is currently undergoing the certificate of review process outlined in Idaho Code section 34-1809(1). Ballot titles have not been issued under Idaho Code section 34-1809(2). Under Idaho Code section 34-1802(1), no petition may be circulated until the Secretary of State issues the ballot title to the initiative sponsors. In sum, although submitted, the proposed initiative has not met the statutory procedural requirements for circulation.

It appears that the petitioner has an inchoate right, which is “a right that has not fully developed, matured, or vested.”⁶³ This scenario is similar to Matter of Hidden Springs Trout Ranch, Inc.,⁶⁴ where the appellant had filed an application for a water appropriation permit.⁶⁵ While that application was pending, the Legislature amended the statute to add a fifth criteria.⁶⁶ The district court held that the amendment applied to the appellant, who appealed, contending that applying the amendment to a pending application was a retroactive application of the statute as amended.⁶⁷ The Idaho Supreme Court disagreed: “[w]e do not find that the mere initiation of the statutory process for water appropriation immediately grants the applicant vested rights in the water. The applicant gains but an inchoate right upon filing of the application which may ripen into a vested interest following proper statutory adherence.”⁶⁸ It found that “at the time the

⁶³ Schoorl v. Lankford, 161 Idaho 628, 631, 389 P.3d 173, 176 (2017) (citation omitted).

⁶⁴ 102 Idaho 623, 636 P.2d 745 (1981).

⁶⁵ Id. at 623-24, 636 P.2d at 745-46.

⁶⁶ Id.

⁶⁷ Id. at 624, 636 P.2d at 746.

⁶⁸ Id. at 625, 636 P.2d at 747.

legislation in question was enacted, the status of the appellant had progressed no further than that of an applicant with a pending application. Appellant therefore possessed no vested right which could be interfered with by application of the legislation.”⁶⁹ The Idaho Supreme Court then upheld the district court's holding that the statutory amendment adding a fifth criteria to consider when reviewing the appellant's application for a permit applied to the consideration of that application.⁷⁰

This office's reading of the statutory requirements for an initiative petition are similar to that of the water permit, namely that because the initiative petition is pending review by the Attorney General, ballot titles must still be prepared and the petition has not yet been approved for circulation, the initiative “right” has not yet been perfected.

Courts in other states have similarly held that the right to place an initiative on the ballot is not a “vested right” protected from changes in statutory law.⁷¹ In Committee for Better Health Care for All Colorado Citizens, the plaintiff filed its proposed initiative with the appropriate office on May 5, 1989.⁷² On June 7, 1989, the Initiative Title Setting Board met and established the title, submission clause and a summary pursuant to the then-effective statute.⁷³ On June 10, 1989, amendments to the statutory scheme regulating the initiative process became effective.⁷⁴ Then the plaintiffs began collecting signatures.⁷⁵ After a number of signatures were rejected by the Secretary of State, plaintiffs attempted to exercise a curative process available under the previous statutory scheme.⁷⁶ The court approved the Secretary's application of the amended statutory scheme to all events that transpired after June 7, 1989, concluding that the plaintiffs did not have vested rights in the procedural and remedial measures available under the prior statutory scheme.⁷⁷

The Idaho Legislature implemented S.B. 1110 with an emergency clause. The Governor signed S.B. 1110 into law on April 17, 2021. The above case law demonstrates that the signature requirements in S.B. 1110 now apply to all events that occur after April 17, 2021, the effective date of S.B. 1110.

69 Id.

70 Id.

71 See Comm. for Better Health Care for All Colo. Citizens v Meyer, 830 P.2d 884, 891 (1992); Jacober v. Bd. of Comm'rs of City of Covington, 607 S.W.2d 126, 128 (1980).

72 Id. at 887.

73 Id.

74 Id.

75 Id.

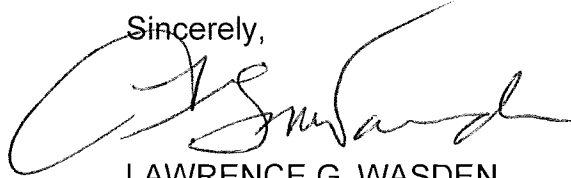
76 Id. at 888.

77 Id. at 891.

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 Luke Mayville, 419 W. Union St. Boise, Idaho 83702.

Sincerely,

A handwritten signature in black ink, appearing to read 'L. Wasden', written over a large, stylized cursive flourish.

LAWRENCE G. WASDEN
Attorney General

Analysis by:

Robert A. Berry
Deputy Attorney General