No. 20A18

In the Supreme Court of the United States

RECLAIM IDAHO, an Idaho Political Action Committee, and LUKE MAYVILLE,

Respondents,

v.

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

Applicants.

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

RESPONDENTS' OPPOSITION TO EMERGENCY APPLICATION FOR STAY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Other Authorities

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

INTRODUCTION

Respondents Reclaim Idaho and Luke Mayville ("Reclaim Idaho") oppose the Emergency Application for Stay brought by the Governor and Secretary of State of Idaho ("State Defendants"). There is no emergency that warrants this Court's intervention.

Contrary to the tenor and tone of the State Defendants' entire application, this case involves a narrow, well-supported, and fact-bound decision by a district court applying clearly established First Amendment law. It is about a minor and temporary modification to a small aspect of Idaho's initiative process in the middle of a pandemic – allowing for industry-standard electronic signature gathering and extending the deadline for doing so – which is itself one small part of Idaho's electoral laws and regulations. The district court granted temporary relief for one grassroots group trying to get one citizens' initiative on this November's ballot. The district court's order changes nothing about how people will vote in Idaho on November 3rd. The district court's order changes nothing about the statutorily required percentages of registered voters' signatures that Reclaim Idaho must still collect or the geographical distribution of the signors. And the district court's order changes nothing *permanently*.

This case does not present the same "on-the-eve-of-an-election" concerns that existed in recent cases before the Court or in *Purcell v. Gonzalez*, 549 U.S. 1 (2006). The district court entered its injunction over four months before the election. Also,

unlike the cases cited by the State Defendants, the relief in this case will not cause voter confusion or undermine voter confidence because it has nothing to do with how Idahoans will vote on election day. The court simply gave Reclaim Idaho an opportunity – far from a sure thing – to meet Idaho's rigorous standards to qualify its initiative for the fall ballot. If they are successful, voters can vote against the initiative if they so choose.

Nor does this case present any unsettled questions of constitutional law. There is no circuit split. *See* Stay App. at 25. The established law from this Court is that when states allow for citizens' referenda or initiatives, that process implicates core First Amendment rights. *See e.g.*, *Buckley v. Am. Constitutional L. Found., Inc.*, 525 U.S. 182, 186–87 (1999) ("Petition circulation, we held, is 'core political speech,' because it involves 'interactive communication concerning political change. First Amendment protection for such interaction, we agreed, is 'at its zenith.'") (quotation omitted). Neither the Tenth Circuit nor the Seventh Circuit nor the D.C. Circuit has ever said anything to the contrary. The cases cited by the State Defendants from those circuits instead found that the burdens on speech on the particular facts before them were not significant enough to cause constitutional concern. They did not find that no First Amendment right exists in this context.

On top of all that, the Court of Appeals has already set an expedited briefing and argument schedule in the State Defendants' appeal. *See* Exhibit Q to Respondents' Opposition to Stay, at 169. The appeal will be ripe for a decision on the merits in three weeks, still nearly three months before the election. The State

Defendants will not be harmed in the interim. During that time, state and county officials will be required to check handwritten and electronic signatures to make sure that they are from registered voters and that the requisite geographical distribution of signatures is met, but that is not "irreparable" harm that justifies such an extraordinary remedy. On the other hand, if this Court were to grant the requested stay, Reclaim Idaho's initiative would be dead in the water. It would have no chance of collecting the remaining signatures to qualify its initiative for the ballot. It would be irreparably harmed.

There is no reason to disrupt regular appellate procedure and stay the district court's order before the Court of Appeals has even had a chance to assess the merits. Applicants have not shown that it is likely that four members of this Court would grant a petition for certiorari (which has not yet been filed) in a case that lacks any nationwide implications or a true circuit split. They have also not shown a fair prospect that if certiorari were granted, the Court would reverse. And the equities heavily favor Reclaim Idaho.

BACKGROUND

The State Defendants have omitted material facts and have downplayed others to hype an emergency that does not exist. Respondents wish to provide the Court with a more complete story here.

A. Reclaim Idaho and its "Invest in Idaho" citizens' initiative.

Citizen initiative drives have deep roots in Idaho. For over 100 years the Idaho Constitution has granted voters authority to put initiatives on the ballot. Idaho Const. Art. III, sec. 1. Over the years, the Idaho legislature has enacted

conditions on qualifying initiatives, which are described in the State Defendants' stay application, but the basic right endures.

Reclaim Idaho is a local grassroots movement driven by passionate and non-partisan volunteers who have broad public support. *See*, *generally*, David Daley, *Unrigged: How Americans are Battling Back to Save Democracy*, pp. 23-34 (2020). It has no paid signature collectors. Its most active volunteers are retired senior citizens. Ex. D at 45.

This November, it is seeking to put before the voters its "Invest in Idaho" initiative, an option to increase funding in K – 12 education in a state that ranks dead last in school funding per pupil. *See*, "No. 51, Again: IEA Decries Per-Pupil Spending", IEA News, July 7, 2020, at https://tinyurl.com/yxk75lm5 .

The district court found that Reclaim Idaho had diligently built and doggedly pursued its campaign over several months. It modeled its petition circulation and signature-gathering strategy for "Invest in Idaho" on its previously successful initiative in 2018 "Medicaid for Idaho." Ex. A at 6-7; Ex. D at 41-43. The model included "early stage" volunteer recruitment events, where the group worked to build teams in Idaho's legislative districts. Ex. A at 6-7. The model also included a plan to gradually scale up signature collection efforts in the final months before the May 1, 2020 submission deadline. *Id*. at 7. Invest in Idaho's size, momentum, and enthusiasm grew exponentially as the April 30 deadline loomed. Ex. D at 42-44. The gradual scaling of Reclaim Idaho's efforts reached "critical mass" in early March 2020—the surge in volunteers, favorable springtime weather, and daylight hours

was anticipated to boost its organizing efforts in the final stages of its drive. Ex. I at 87-88.

By mid-March of 2020, Reclaim Idaho was ahead of the pace of its effective 2018 campaign, with over 30,000 signatures collected of the 55,057 it needed. Ex. D at 43-44. Experience showed that it would have reached the statutory threshold had the public health crisis not occurred. Ex. A at 27.

Then the COVID-19 pandemic hit, and momentum slowed considerably. Ex. D at 48. Reclaim Idaho's leadership began to communicate with its local volunteer leaders regarding a set of guidelines it developed for safer signature collection. *Id.* at 44. Around that time, the Centers for Disease Control (CDC) issued guidance to curb the spread of COVID-19. *Id* at 45. Maintaining a distance between oneself and others of at least six feet was – and is – one of the CDC's main recommendations to prevent the spread of the virus. *See Id.*[1]

B. Reclaim Idaho seeks an official accommodation to continuing exercising its First Amendment rights.

Two days before Reclaim Idaho finally determined that it had no option but to suspend (not terminate) its canvassing, it approached the Governor and the

[1] Since the district court's preliminary injunction, COVID-19 cases have continued to soar in Idaho. As of July 9, Idaho ranked third in the United States in percentage increase of COVID-19 cases since reopening - a 1491% increase. *See*, "How Coronavirus Cases Have Risen Since States Reopened," NY Times, at https://www.nytimes.com/interactive/2020/07/09/us/coronavirus-cases-reopening-trends.html.

Secretary of State of Idaho seeking an accommodation. What the State Defendants continue to dismiss as "a few token contacts" "between staffers" in which Reclaim Idaho "requested a meeting between Reclaim's founder and the Governor", Stay App. at 7, 32, was quite a bit more than that.

Reclaim Idaho's Executive Director, Rebecca Schroeder emailed Andrew Mitzel, a Senior Advisor to Governor Little on the morning of March 16, 2020. Ex. A at 9-10. The back and forth that day with state officials showed Reclaim Idaho's concern about the potential negative health effects involved with in-person signature gathering on its volunteers, many of whom are in the elderly demographic most susceptible to serious consequences from COVID-19, and the public generally. *Id*.

Ms. Schroeder indicated in her emails to Mr. Mitzel that Reclaim Idaho had already collected over 30,000 signatures and was "well on [its]way to qualifying the initiative." Ex. E at 63. Mr. Schroeder wrote that "Idahoans are no longer able to exercise their constitutional right to bring forward a ballot initiative." *Id*. She informed the Governor's Senior Advisor that "this extraordinary situation requires action by the Governor to ensure the public safety is maintained" while Reclaim Idaho exercised its Constitutional rights. *Id*. In one email, she wrote that electronic signature gathering is "**the only safe method at this point**." *Id*. (emphasis in original).

Advisor Mitzel referred her to the Secretary of State. Ex. A at 10; Ex. E at 63. Ms. Schroeder responded to Mr. Mitzel that the Secretary of State's office had

advised that "a change to electronic signature gathering would require Legislative or Executive action." Ex. E at 63. Mr. Mitzel responded with a definitive answer: "the Governor's Office has no intention of taking executive action on this matter." *Id.* at 64. Similarly, the Secretary of State's Office wrote that "we are sorry to say that there is no statute allowing electronic signatures for petitions in Idaho Statutes 34 Chapter 18." *Id.* at 65.

March 13, 2020, five days before Reclaim Idaho temporarily suspended its signature gathering campaign, Governor Little declared a state of emergency. Ex. D at 44. Responsibly following the CDC guidance and rising health concerns voiced by its volunteers, and receiving no accommodation from Idaho's executive branch, Reclaim Idaho cancelled all door-to-door canvassing events and signature gathering efforts at larger public events on or around March 18. Ex. A at 8. A week later, on March 25, Governor Little issued an executive order requiring all Idahoans who were not essential workers to stay at home. *Id.* at 8-9. There were no exceptions for petition circulators or similar First Amendment activities. He extended the order to April 30, which would have also been the deadline for Reclaim Idaho to provide all signatures to county clerks. *Id.* at 9.

Despite the Governor's response to Reclaim Idaho that he would "take no executive action" on the group's reasonable request, he did take other significant executive action to alter election statutes during the pandemic. He extended numerous election deadlines and issued an emergency proclamation that "provided

for all-absentee voting in the 2020 primary elections due to COVID-19" for the first time in Idaho's history. Ex. A at 23; Ex. M at 110-116.

C. Reclaim Idaho goes to court. The court gives Idaho officials options – which they flat refuse – and then opens a window for electronic signature gathering.

On June 6, less two weeks after it was able to secure pro-bono counsel, Reclaim Idaho filed this lawsuit seeking an injunction that would give it back the time it lost and would permit it to continue gathering signatures electronically.[2]

The district court expedited the matter and granted Reclaim Idaho's motion for a preliminary injunction from the bench. *See* Dist. Ct. Dkt. 13. It followed with a written Decision and Order four days later. Ex. A.

In its decision, the district court cited this Court's precedents in *Meyer v. Grant*, 486 U.S. 414, 422 (1988), and *Buckley v. Am. Constitutional L. Found., Inc.*, 525 U.S. at 186–87. It then applied binding Circuit precedent from *Angle v. Miller*, 673 F.3d 1122, 1132 (9th Cir. 2012). *Id.* at 18. It concluded that the circumstances created by COVID-19, the State's refusal to accommodate Reclaim Idaho with any alternative, and the Governor's stay-at-home orders severely burdened Reclaim Idaho's First Amendment right to make its initiative the focus of statewide discussion by getting it on the ballot. *Id.* at 22. The court further found that "[o]nce

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[2] The State Defendants persist in chiding Reclaim Idaho for not filing this lawsuit before June 6, 2020. Stay App at 3, 8 and 37. This argument ignores the reality of people's lived experiences during this pandemic. Until May 1, the Governor's orders required all non-essential persons to stay at home. As co-founder Luke Mayville explained, the grassroots group lacked the legal know-how or funding to hire attorneys, so they needed extra time to develop a plan for legal action. Ex. K at 97. Once they found experienced counsel willing to work pro bono, they filed for an expedited preliminary injunction in 12 days. *Id.*

the group started its drive, there is no real argument to diligence in effort." *Id* at 21. Strict scrutiny was necessary. *Id*.

The district court determined that Reclaim Idaho had "established it is likely to succeed on the merits, it will suffer irreparable harm in the absence of preliminary relief, the balance of the equities tips in its favor, and an injunction is in the interests of the public." *Id.* at 26.

The district court initially gave the State Defendants two options. First, based on the evidence that showed Reclaim Idaho was well on its way to meeting the statutory requirements when it was shut down, they could choose simply to certify the initiative. *Id.* at 27. Or, they could reopen and extend the deadline for gathering signatures by the period that Reclaim Idaho had lost – 48 days – and permit Reclaim Idaho to circulate its petition electronically and to accept electronic signatures with the assistance of DocuSign, a world leader in electronic signature gathering. *Id.* The district court gave the State four days to decide. *Id* at 28.

The State Defendants choose neither option. Two hours before their deadline, they filed a document styled, "Notice and Motion to Stay Pursuant to F.R.C.P. 62(d) and F.R.A.P. 8." *See* Dist. Ct. Dkt. 16. They informed the district court that "neither option is acceptable to the Governor nor the Secretary of State…" *Id*. at 2.

On June 30, the district court ordered that the deadline would be extended and the State would accept electronic signatures. Ex. B at 37- 38. The district court gave the parties nine days to meet and confer "to implement the process and protocol for accepting signatures gathered through the DocuSign technology" after

which Reclaim Idaho may "resume the solicitation of signatures for a period of 48 days." *Id.* at 38. Should the parties not agree, Reclaim Idaho was directed that it could proceed to implement an industry standard process and protocol" that ensures the "highest available standards are used to verify a signer's identity, legislative district, and the authenticity of the signature." *Id.*

Reclaim Idaho diligently worked with the State in several meetings to refine the process and procedure to collect electronic signatures with DocuSign's technology, and made numerous modifications to the system in response to the State's requests and inquiries. *See* Ex. N. At no time during these discussions did the State make any alternative electronic signature gathering proposals for Reclaim Idaho to consider. *Id.* It also did not accept a single part of the process Reclaim Idaho proposed. *Id.*

The State Defendants' motions to stay have failed in the district court and in the Court of Appeals. The Court of Appeals has set an expedited briefing schedule, with oral argument on August 10. Ex. Q at 169. The State Defendants come to this Court seeking, yet again, to stay the district court's preliminary injunction.

The State Defendants use considerable briefing space to challenge the district court's remedy. *See* Stay App. at 5-15, and *passim*. Respectfully, as set forth in more detail in this memorandum, they mischaracterize the remedy and grossly exaggerate its consequences. Their "sky-is-falling" rhetoric is divorced from the facts on the ground. It is necessary to note here the following:

- The district court did not "seize control" of Idaho's initiative process. *Id.* at 1. Its remedy is narrow, limited in scope, and temporary. It was also entered four months before the general election, which it does not affect.
- The only part of Idaho's initiative rules that has been temporarily enjoined is the in-person signature gathering requirement and the deadline to collect signatures. Every other stringent condition remains, and Reclaim Idaho must comply with them all to qualify for the ballot. Those include collecting signatures of 6% of the total number of registered voters in the entire state and 6% of the registered voters in at least 18 legislative districts.
- Today, technology offers a safe, secure, and reliable alternative to in-person signature gathering through electronic petition circulation and electronic signatures. Courts rely on the authenticity of electronic signatures every day. That includes Idaho courts.
- Federal Courts have found that visual "wet" signature matching, the 100-year-old practice that the State so ardently defends, is unreliable at preventing fraud and regularly disenfranchises legitimate voters. *See Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1320 (11th Cir. 2019) (holding that visual signature matching is unreliable and often disenfranchises voters because of the variable nature of signatures). Regardless, the district court did not order state officials to abandon that practice or to use electronic signatures in the future. Electronic signatures offer a reasonable and brief accommodation for Reclaim Idaho to retain its

First Amendment rights during this extraordinary public health emergency. It is limited to this one initiative, for this one group, in this one election cycle.

- Contrary to the State Defendants' claim, Stay App. at 12, Reclaim Idaho *has* offered to disclose to state officials the certificates of completion (the "audit trail") from DocuSign of all the electronic signatures that it gathers. Reclaim Idaho will also give the State the last four digits of the social security numbers it collects from signers, once a protective order is in place to protect this personal information from public disclosure. *See* Ex. N.
- It is true that the county clerks will not need to visually match wet signatures, but they will still be required to verify the signers' authenticating information on the petition, as they have normally done. All other statutory duties for state officials and county clerks remain in place.
- There is no evidence that the remedy will cause "voter confusion" or endanger "voter confidence" in Idaho's elections. The State Defendants draw no logical connection between electronic signature gathering for an initiative petition drive and voter confusion or lack of confidence in the election on November 3. That is because they cannot.

REASONS WHY THE STAY SHOULD BE DENIED

I. The Court is Unlikely to Grant Review.

Generally, "[s]tays pending appeal to this Court are granted only in extraordinary circumstances." *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers). "To obtain a stay pending the filing and disposition of a petition for

a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).

The State Defendants have not yet filed a petition for a writ of certiorari, and it is not clear when, or if, they will. They are instead seeking a stay – already twice rejected – before the Court of Appeals has heard their appeal.

Several Justices have noted that this type of premature request is "rarely granted." *Heckler v. Redbud Hospital Dist.*, 473 U.S. 1308, 1311-1312 (1985) (Rehnquist, J., in chambers); *Atiyeh v. Capps*, 449 U.S. 1312, 1313 (1981) (Rehnquist, J., in chambers) (citation omitted); *San v. Paulson*, 548 U.S. 1301 (2006) (Kennedy, J., in chambers). This is so because it is "a difficult and speculative" inquiry to try to predict "whether four Justices would vote to grant certiorari should the Court of Appeals affirm the District Court order without modification; try to predict whether the Court would then set the order aside; and balance the so-called 'stay equities.'" *INS v. Legalization Assistance Project of Los Angeles County Federation of Labor*, 510 U.S. 1301, 1304 (1993) (O'Connor, J., in chambers); *see also Heckler,* 473 U.S. at 1311-1312 (Rehnquist, J., in chambers).

This pre-certiorari application illustrates how "difficult and speculative" the inquiry is. First, the extraordinary remedy is not necessary to avoid any true harm to the Applicants. The Court of Appeals in this case has set an expedited briefing

schedule, which will be completed in two weeks. Ex. P at 164. Oral argument is scheduled for August 10. Ex. Q at 169. One can reasonably expect that the Court of Appeals' decision will be prompt. While Reclaim Idaho expects that the Court of Appeals will affirm the district court, and perhaps the State Defendants do also, *see* Stay App. at 26 ("It can only be assumed the Ninth Circuit will follow its precedents in ruling on this matter in the upcoming appeal"), they will have a chance in short order to convince the Court of Appeals otherwise. If they are successful, then that decision will occur long before the November election (and even well before the printing of ballots). There would be no lasting harm to the State Defendants in the interim. And if they are successful in the Court of Appeals, then they will not file a petition for writ of certiorari.

But even if one assumes that the Court of Appeals will affirm the district court, the State Defendants still cannot show that it is likely that four justices will vote to grant their subsequent petition for a writ of certiorari. What will that petition look like? We simply do not know because we do not know what the Court of Appeals' decision will look like. Such crystal ball gazing is "difficult and speculative," at best. *Legalization Assistance Project of Los Angeles County Federation of Labor*, 510 U.S. at 1304. The Applicants seem to assume that if the Court of Appeals affirms it will adopt all the reasoning of the district court's ruling. That is far from certain.

And yet even if the Court of Appeals *does* adopt the district court's reasoning and remedy verbatim, there still would be no reason for this Court to take the case

up. The constitutional law governing First Amendment rights as part of citizen initiative drives is well-settled. The district court applied that law to the particular facts before it. It narrowly tailored its temporary remedy to address an as-applied First Amendment violation. It does not go beyond this group and this one election cycle. The district court did not alter any procedures "on the eve of the election." There is no circuit split.

A. This Court has long held that restrictions on citizen petitions implicate core First Amendment rights – this case offers nothing new.

For over 30 years, this Court has also recognized that petition circulation is "core political speech," because it involves "interactive communication concerning political change." *Meyer*, 486 U.S. at 422. Part of the First Amendment right also includes the opportunity to turn matters of political concern into a statewide discussion by qualifying them for the ballot. *Id.* at 421-22 (1988). Petition circulation "of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change." *Id.* at 421.When restrictions impinge on political speech like this, "First Amendment protection is at its zenith." *Id.* at 425; *see also e.g., Buckley,* 525 U.S. at 186–87 (citing *Meyer*). Restrictions that burden this First Amendment right are subject to "exacting scrutiny." *Meyer*, 486 U.S. at 421; *Buckley*, 525 U.S. at 204.

The Ninth Circuit has interpreted this Court's case law in *Angle v. Miller*, 673 F.3d 1122, 1132 (9th Cir. 2012). *Angle* is faithful to the Court's precedents. There, the Court of Appeals held that if a petitioner has been reasonably diligent and if the state's regulations significantly inhibit the petitioner's ability to get on

the ballot, the petitioner's First Amendment rights have been severely burdened. *Id.* at 1132. Strict scrutiny then applies. *Id.* at 1133.

The district court broke no new ground. It cited *Meyer* and *Buckley*. Ex. A at 22-23. It applied the test from *Angle* to find that Reclaim Idaho had been reasonably diligent in pursuing its "Invest in Idaho" initiative. *Id.* at 18. It concluded that state officials' strict application of the in-person signature and deadline requirements during COVID-19, their refusal to grant any accommodation when asked coupled with the Governor's stay-at-home orders, constituted state action that injured Reclaim Idaho's ability to get the initiative on the ballot. *See Id.* at 19. As such, Reclaim Idaho's First Amendment rights were severely burdened. The district court fashioned a remedy that accounts for the state's interests while giving Reclaim Idaho a chance to meet Idaho's statutory requirements. There is nothing about the district court's decision in this case that warrants review by this Court.

B. The district court's ruling does not implicate *Purcell*.

The State Defendants repeatedly claim that the district court has interfered in its election processes at the last minute, sowing confusion and uncertainty. *See, e.g.* Stay App. at 20, 21 and 29. In support, they cite *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) and other recent cases from this Court, including *Merrill v. Alabama*, No. 19A1063, 2020 WL 3604049 (July 2, 2020), *Texas Democratic Party v. Abbott*, 140 S. Ct. 2015 (Jun. 26, 2020); and *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, ("*RNC v. DNC*"), 140 S. Ct. 1205, 1207 (2020). None of those cases are like this one.

Reclaim Idaho has no quibble with the general principle that "lower federal courts should ordinarily not alter election rules on the eve of an election,"*e.g.*, *Republican Natl. Comm. v. Democratic Natl. Comm.,* 140 S. Ct. at 1207. But the district court neither altered the rules of how the election on November 3rd will be conducted nor did it make any changes on the "eve of an election."

In *Merrill*, the district court directly changed voting procedure by removing in three counties a witness requirement for absentee voters, and a photo I.D. requirement, and by ending "the state's de facto prohibition on curbside voting.". *People First of Alabama v. Merrill*, 2020 WL 3207824, *29 (N.D. Ala. June 15, 2020). The district court's order came only 29 days before in-person voting began, and voters were already casting absentee ballots well before the order came out. Furthermore, that decision created an inconsistent patchwork of election law within Alabama that could cause confusion.

In *Texas Democratic Party v. Abbott*, the district court entered a preliminary injunction about eight weeks before the election, providing that any eligible Texas voter, not just those over age 65, could apply for, receive, and cast an absentee ballot. *Texas Democratic Party v. Abbott*, 2020 WL 2541971 at *5, 6 (W.D. Tex. May 19, 2020). The Fifth Circuit stayed that order and this Court denied an emergency request to overturn the Fifth Circuit. *See Texas Democratic Party,* 140 S. Ct. 2015 (2020).

In *RNC v. DNC*, just days before a primary election, the district court extended the date on which absentee ballots must be post-marked before the

election. *See Republican Nat'l Comm.*, 140 S. Ct. 1205, 1206-07 (2020). Also, this Court found it significant that the district court's injunctive relief went well beyond what the plaintiffs requested. *Id.* at 1207-08. The Court stayed that order. *Id.*

And in *Purcell v. Gonzalez*, the Court overturned a Court of Appeals' injunction that prevented enforcement of Arizona's law that required voter I.D. at the polls about a month before election day. 549 U.S. 1, 4-5 (2006). The Court of Appeals gave no reason for its decision. In vacating the order, this Court wrote that "orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Id.* at 5-6.

The concerns that animated *Purcell* and the other cases cited by the State Defendants do not exist here. The orders in each of those cases were issued by a district court much closer to election day, and each order altered the rules of how the election would be conducted.

Here, in contrast, the district court's order took effect nearly four and a half months before the election. More to the point, the district court's order does not change how the general election will be conducted. It does not change who may vote, when they may vote, or how they may vote. The State Defendants do not explain why a temporary modification to the way signatures are gathered during a pre-election initiative drive will cause "voter confusion" or undermine "voter confidence" in the general election.

And there is recent evidence that their concerns are exaggerated. Public confusion in Idaho did not occur this past spring when the Governor made sweeping changes to the primary elections by executive order. Ex. M. For the first time in Idaho's history physical polls were closed and voting was by absentee ballot only. Ex. M at 110-116. Further, numerous election deadlines were modified. Despite these many modifications, there was record voter turnout, the highest in decades. *See* "Idaho state primary has highest recorded turnout in decades," A.P., June 22, 2020 at https://apnews.com/7669cbfffc9e896b686b8326bd35cbca

The idea that the use of electronic signature gathering in an attempt to place a single citizen's initiative on the ballot will sow mayhem and voter distrust of the election this fall is unfounded. The voters will either see the initiative on the ballot this fall, or they will not. If it is on the ballot, they can vote it either up or down. There is no confusion.

C. There is no circuit split on the constitutional issue.

The State Defendants also try to manufacture a circuit split "as to whether state laws regulating the mechanics of the initiative process can violate the Free Speech Clause of the First Amendment." Stay App. at 25. No such split exists. This Court has unequivocally ruled that laws regulating state initiative processes can be subject to First Amendment scrutiny, as set out in *Meyer* and *Buckley* above.

The cases cited by State Defendants discuss *Meyer* and acknowledge this well-established principle. In *Initiative and Referendum Institute v. Walker*, 450 F.3d 1082 (10th Cir. 2006), the Tenth Circuit wrote, "[t]he First Amendment

undoubtedly protects the political speech that typically attends an initiative campaign, just as it does speech intended to influence other political decisions." *Id.* at 1099.

The State Defendants would have it seem that the Tenth Circuit held that all laws regulating initiatives are laws that "determine the process by which legislation was enacted," and therefore are not subject to First Amendment scrutiny. Stay App. at 25 (quoting *Initiative and Referendum Institute*, 450 F.3d at 1099-1100). In reality, the Tenth Circuit held that the particular law at issue in that case, requiring a supermajority for passing wildlife-related initiatives, was a law which "determine[d] the process by which legislation was enacted," and therefore did not violate the First Amendment. *Initiative and Referendum Institute*, 450 F.3d at 1099-1100. The Tenth Circuit clarified which initiative related laws it believed are subject to First amendment scrutiny and those which are not: "The distinction is between laws that regulate or restrict the communicative conduct of persons advocating a position in a referendum, which warrant strict scrutiny, and laws that determine the process by which legislation is enacted, which do not." *Id.*

The sections of the Idaho Code challenged here, as applied during the global pandemic, fall into the former category because their enforcement makes circulation of the petition impossible, which surely "restrict[s] the communicative conduct of persons advocating a position in a referendum."

The State Defendants similarly misconstrue the Seventh Circuit's holding in *Jones v. Markiewicz-Qualkinbush*, 892 F.3d 935 (7th Cir. 2018). Stay App. at 26.

That opinion, which held that an Illinois law limiting the number of referenda on any election ballot was not unconstitutional, stood for the uncontroversial principle that the right to propose initiatives was a state created right and not guaranteed by the First Amendment. *See Jones*, 892 F.3d at 937-938. In the Seventh Circuit's discussion of *Meyer*, it clearly signals that once the ballot has been opened to an initiative process, the First Amendment applies: "a state that does open the ballot cannot impose unconstitutional conditions—but [*Meyer*] did not reject the premise that the right to propose initiatives is an exclusively state-created right that the First Amendment does not guarantee." *Id.*

Nor does the D.C. Circuit's opinion in *Marijuana Policy Project v. United States,* 304 F.3d 82 (D.C. Cir. 2002) create a disagreement "as to whether state laws regulating the mechanics of the initiative process can violate the Free Speech Clause of the First Amendment." Stay App. at 29. The law at issue in *Marijuana Policy Project* was a federal statute that denied the District of Columbia authority to "enact any law" reducing penalties associated with possession, use or distribution of marijuana. *Marijuana Policy Project,* 304 F.3d at 83. The D.C. Circuit narrowly held that legislatures (Congress in that case) can withdraw subject matter from the initiative process without violating the First Amendment; it did not hold that laws regulating the initiative process cannot implicate the First Amendment. *Id.* at 86. The Court explained the scope of its decision while distinguishing *Meyer* and *Buckley*: "In none of these cases, however, did anyone question whether the ballot initiative at issue addressed a proper subject. The cases thus cast no light on the

issue before us—whether a legislature can withdraw a subject from the initiative process altogether." *Id*.

These cases recognize the rule established in *Meyer* and *Buckley* that laws regulating the initiative process can implicate First Amendment rights. The courts of appeal merely found that in their cases on their specific facts that the laws before them *did not*. These cases do not support the proposition that there is a circuit split "as to whether state laws regulating the mechanics of the initiative process can violate the Free Speech Clause of the First Amendment."

II. Applicants Have Failed to Show a Fair Prospect that the Court Will Reverse the Judgment.

The State Defendants also cannot show a fair prospect of a reversal. *See Hollingsworth*, 558 U.S. at 190. The State Defendants go to great lengths to make the district court's ruling on the constitutional issue and its remedy appear to be an outlier that tramples over Idaho's election laws. That is inaccurate.

A. The district court found the facts and applied the law in a well-reasoned decision to conclude that Reclaim Idaho's First Amendment rights were severely burdened.

The district court's order neither "fundamentally alters" nor "rewrites" Idaho's initiative procedures. No Idaho election regulation was altered or struck down as facially invalid. This was a narrow, as-applied challenge to select statutory provisions – specifically in-person signature gathering for initiatives and the deadline for completion – and the remedy applies only to this election cycle. The district court enjoined nothing permanently. The State Defendants utter barely a word about Reclaim Idaho's core First Amendment rights that were severely

burdened by strict application of the in-person signature gathering requirement in the middle of the worst pandemic in this country in over 100 years. The district court's decision that Reclaim Idaho's First Amendment right was severely burdened rests easily within *Meyer*, *Buckley*, and similar cases.

Still, the State Defendants press an argument again here that Reclaim Idaho lacks standing to bring the lawsuit, which the district court rejected. Ex. A at 16. In doing so, they have repeatedly minimized the nature of the contacts between Reclaim Idaho and the Governor and the Secretary of State as Idaho was rapidly starting to go dark. These were not mere "token" contacts, as Applicants suggest, between low-level staffers seeking a brief audience with the Governor. Stay App. at 3, 6, 32, and 33. Instead, the Governor's office gave a definitive "no" to accommodating Reclaim Idaho's First Amendment rights when the pandemic made compliance with in-person circulation impossible. Ex. A at 10. A matter of days later, the Governor shut everything down by official order. The district court's finding of state action is well supported factually and legally.[3]

[3] The State Defendants try to pin a concession on Reclaim Idaho's counsel that she did not make. They write that, "[c]ounsel for Reclaim Idaho admitted at oral argument that there was no state action involved in its decision to stop collecting signatures and that it would not have mattered if the Governor had made an exception for their First Amendment activities." Stay App. at 33. The context of this exchange with the district court was whether an exception for First Amendment activities in the Governor's *stay-at-home orders* would have made a difference. She admitted that, by then, it probably would not have mattered because of the severe health risk in personal contact. But she did not admit anything close to "there was no state action." Ex. R at 171-73.

The State Defendants continue to argue that Reclaim Idaho was not diligent before the shut-down, essentially claiming that any constitutional harm was self-inflicted. They point to the fact that the group did not use the full 18 months that Idaho law gave them to collect signatures. As the district court cogently observed, though, "the [constitutional] rights exist throughout the duration of the petition circulation process, whether on the first day or in the last months." *Id.* at 16. Reclaim Idaho could not have predicted that a pandemic would strike in the last six weeks, and it "began collecting signatures as soon as their data from a previous successful campaign suggested they do so." *Id.* at 21. It was well ahead of that campaign. The overwhelming evidence presented to the district court supports its finding that "[o]nce the group started its drive, there is no real argument to diligence in effort." *Id.* The State Defendants ignore the evidence that all volunteer initiatives work very differently than those with paid circulators. Grassroots campaigns like Reclaim Idaho's benefit enormously from the highly motivating sense of urgency that kicks in during the final stretch of time before a deadline. Ex. D at 42-43.

Oblivious to the real consequences that COVID-19 is inflicting on society, the State Defendants suggest that Reclaim Idaho was overly concerned that its volunteers were "uncomfortable" collecting signatures from the public during the

pandemic, when no state law prevented Reclaim Idaho's volunteers from continuing before the official shut down.[4] Stay App. at 7.

The district court credibly found the facts based on the record before it. The court applied clearly established law from this Court and the Court of Appeals to find a First Amendment violation.

B. The district court's remedy does not "seize control" of Idaho's election rules, nor does it unleash the parade of horribles that the State Defendants conjure up.

The State Defendants devote considerable briefing space to attacking the district court's remedy. Their rhetoric – an attempt to catch this Court's eye – simply doesn't match the facts on the ground.

Altogether, the district court's remedy strikes a balanced and appropriate compromise. In the short term, the State Defendants will be required to accept industry-standard electronic signatures for those that remain to be collected, in the place of "wet ink" signatures signed in person. But everything else in Idaho's election laws remains the same. The State Defendants are not required to put Reclaim Idaho's initiative automatically on the ballot. Idaho's clerks must still check all signers' authenticating information to ensure that it matches an identified registered voter at the proper address within the correct legislative district. The

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[4] State Defendants also opine that Reclaim Idaho's volunteers could have ignored COVID-19 and marched onward to collect signatures even after the Governor's stay-at-home order was in place, as "election personnel" which were exempt as "essential critical infrastructure workers" by the United States Department of Homeland Security. The Reclaim Idaho volunteers clearly were not personnel or election infrastructure workers. Stay App. at 7-8.

Secretary of State, who does not verify the signatures, must still count them, to determine whether the petition includes the requisite number of signatures statewide, and in at least 18 districts.

1. The process and protocol to collect the remaining signatures electronically is safe, reliable, and verifiable.

Reclaim Idaho did not "unilaterally decide" a process. Stay App. at 11. The district court gave the State Defendants an opportunity to confer with Reclaim Idaho on an acceptable process and protocol. The State made no alternative electronic signature gathering proposals. Reclaim Idaho responded to the State's concerns and modified the process in response. *See* Ex. N at 123-126. Because the State did not agree to any electronic signature gathering protocol, the district court's order permitted Reclaim Idaho to "implement an industry standard process and protocol…[that] must ensure the highest available standards are used to verify a signer's identity, legislative district, and the authenticity of the signature." Ex. C at 38.

Reclaim Idaho has developed a process and protocol that meets the court's order. The State Defendants introduced no evidence that the method that Reclaim Idaho has put together with the assistance of industry leader DocuSign is unreliable or subject to fraud. Reclaim Idaho's evidence on that score stands undisputed. This system was not created in nine days, as the State inaccurately claims. Stay App. at 11. Reclaim Idaho worked on a solution prior to the filing of the district court case to propose a path forward, realizing the onus would be upon it to suggest a secure alternative system. It made a detailed proposal for the use of

electronic signatures through DocuSign, "a company trusted by financial institutions with an impeccable tradition for reliability in gathering electronic signatures" when it filed for a preliminary injunction. Ex. C at 38; Ex. D a 50-56. DocuSign is officially certified by the Federal Risk and Authorization Management program (FedRAMP) a federal government service that vets technology providers for security and risk. Ex. D at 50. DocuSign has been used in other jurisdictions such as Massachusetts for petition signatures. Ex. O at 130. More than 775,000 signatures a day are verified by DocuSign. Ex. D at 50.

The State Defendants emphasize how greatly the electronic signature gathering and validation process differs from the wet ink requirement in Idaho's statutes established over a century ago, when no alternative existed. Idaho has recognized that electronic signatures have the full force and effect of a handwritten signature for the past twenty years. In fact, the provisions that the State Defendants rely upon requiring a wet signature are inconsistent with the Uniform Electronic Transactions Act, Idaho Code § 28-50-101, *et seq*. ("If a law requires a signature, an electronic signature satisfies the law." Idaho Code § 28-50-107 (D) and "A record or signature may not be denied legal effect or enforceability solely because it is in electronic form." Idaho Code § 28-50-107 (A)). There is no merit to the contention that electronic signatures are not functionally real and legally binding signatures or that by using one, "the signer does not sign the petition." Stay App. at 12. This denies the reality that electronic signatures are widespread and an accepted protocol of the 21st century.

Their position is also disingenuous. Idaho allows for voter registration and requests for absentee ballots online with the use of an electronic signature. The State Defendants assert that there is "a vital difference between registering to vote online and collecting petition signatures." Stay App. at 10. On this the parties agree. Signing a single citizen's initiative petition is less impactful to the State than indefinitely registering a voter who can cast a ballot in all future elections and sign all future petitions.

Numerous fraud protections are in place. Reclaim Idaho's DocuSign initiative petition form confirms each signer's intent to sign and their consent to do business electronically. These are the essential measures that must be taken to ensure that signatures are authentic and legally binding under the federal electronic signatures act. *See* 15 U.S.C. § 7001 *et seq*. They must provide the last four digits of their social security number. They must sign under penalty of perjury. *See, e.g.*, *Meyer*, 486 U.S. at 426–27 (finding that provisions like these "seem adequate to the task of minimizing the risk of improper conduct in the circulation of a petition, especially since the risk of fraud or corruption, or the appearance thereof, is more remote at the petition stage of an initiative than at the time of balloting.")

For every signature Reclaim Idaho collects, it is storing a certificate of completion. Ex. N at 125. This certificate is a legally binding document that provides an audit trail. *Id.* The audit trail includes a time stamp for when the person signed along with their GPS location and IP address. *Id*. Once the signing process is complete, all documents are digitally sealed using Public Key

infrastructure, an industry-standard technology. Ex. D at 51. Reclaim has offered to provide a certificate for each signature collected to the State if it desires to review or audit this data. Ex. N at 125. Contrary to the Applicants' assertion that Reclaim Idaho has refused to provide the personal authenticating data to the State it collects, it has offered to provide exactly that (pending a protective order). *Id.*

The State Defendants did not provide a scintilla of evidence in the district court questioning DocuSign's verification process. It also offered no evidence that its process of having untrained county clerks and their staff visually review petition signatures to authenticate them is superior to a state-of-the-art electronic signature verification process. There are many reasons a voter's signature might appear differently on their voter registration card versus an initiative petition. The clerks simply strike any signature they deem does not look "right." As the Eleventh Circuit has noted, "even if election officials uniformly and expertly judged signatures, rightful ballots still would be rejected just because of the inherent nature of signatures . . .. [T]he writer's body position, writing surface, type of pen, and mental and physical states, as well as the surrounding noise, can alter a person's signature and produce mismatches." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d at 1320; *see also Fla. Democratic Party v. Detzner,* 4:16CV607-MW/CAS, 2016 WL 6090943, at *7 (N.D. Fla. Oct. 16, 2016) (holding that signature matching disenfranchised voters "arguably for no reason other than they have poor handwriting or their handwriting has changed over time.")

Contrary to the State Defendants' hyperbolic concerns about a technological tool briefly replacing the manual task of visually matching hand-written signatures to those on file, signing electronically is a safe, reliable, and commonly used method to legally bind parties. All federal courts have long accepted declarations with an electronic signature signed under penalty of perjury in the place of a hand-written one.

In short, the State Defendants have never explained how having hundreds of different staffers in far-flung counties across the state fly-speck hand-written signatures in the absence of a uniform standard is *more* likely to ferret out fraud than accepting an electronic signature that requires the last four digits of the signer's social security number, that is signed under penalty of perjury, and that can be confirmed through an audit trail.[5]

2. The only temporary change is to permit electronic signature gathering for the remaining signatures needed. State and county officials retain all other statutory duties.

The State Defendants complain that the court has outsourced electoral responsibilities to a private party while also inconsistently complaining about the allegedly huge burden on clerks to process these petitions under a "new" protocol on a tight timeline. They omit that approximately 30,000 hand-written signatures

[5] The State Defendants assert that the county clerks typically reject 30 to 40 percent of signatures on initiative petitions during the verification process. Stay App. at 6. Setting aside the lack of any standard supporting this rejection rate, it is not accurate for Reclaim Idaho. Its volunteers computer check the information provided by petition signers before submission to the county clerks, and as a result of this diligence, the rejection rate is a far lower rate of 14 percent. Ex. F at 68, 70.

were collected before the pandemic, roughly half of the signatures needed. Despite the fact Reclaim Idaho began delivering batches of petition as early as last November, it appears that the county clerk of Idaho's most populated county – Ada County – never began the verification process. Ex. L at 107. Other clerks thoughout the state have already verified 10,000 signatures and Reclaim Idaho has delivered those to the Secretary of State's office, as Idaho law provides. The county clerks need to complete the verification of the remaining 20,000 handwritten petition signatures just as they have always done.

As to the electronic signatures, the State Defendants ignore that the county clerks will still be required to verify that the signers of the petition are registered voters in their county and that the address provided on the petition matches the address for which they are registered to vote. If not, these names will be stricken from the petition by the clerks, as in the past. The county clerks will still be provided with the same information they have always been provided, for other petitions: name, address, and city or zip code, only without a wet signature. Ex. N at 125. Because the names and addresses of the electronic signatures will be submitted in typewritten form, this will simplify and accelerate the clerks' validation process. This will eliminate the need for clerks to compare physical signatures with the voter's registration card and decipher the signers' hand-printed names and addresses, as they must do with physical petitions. This will reduce the administrative burden on the clerks, of which the State Defendants complain.

The State Defendants protest that the clerks will not be given the last four digits of the social security number of a signer, but Reclaim Idaho has already offered to share this information with the Secretary of State. *Id.*

The clerks have already completed or have had the opportunity to verify one half of the signatures Reclaim Idaho has submitted to them. The verification of the balance can be accomplished by the August 26 deadline. The State has provided no evidence of why this statutory duty is "near impossible' given the extra time allowed, the reduction in the task (no handwritten signatures to compare) and the fact that Reclaim Idaho is providing the clerks with the petitions on a weekly basis. Moreover, the opinion that the clerks' tasks are "near impossible" under the court's order is the opinion of a single clerk, from just one of Idaho's forty-four county clerks.[6] Likewise, the Court made no adjustments to the deadlines concerning the ballot printing and mailing, as these deadlines will still be met.

3. Voters will not be confused.

Voting will not be affected in any way by Reclaim Idaho's use of electronic signature gathering for an initiative petition, so it will not cause voter confusion or undermine voter confidence. If Reclaim Idaho's army of volunteers can work to qualify its citizen initiative under Idaho's rigorous process, then it will appear on the ballot for the consideration of the electorate in November. Because Idaho has

[6] This is the same county clerk that has not returned any of Reclaim Idaho's petitions as verified, despite the fact that approximately 10,000 petition signatures have been dropped off at his office since last November. Ex. L at 107. His sense of "near impossibility" may be of his own making.

some of the most difficult initiative requirements in the country this is hardly a forgone conclusion. If Reclaim Idaho can qualify its initiative for the ballot, then voters still have an opportunity to reject it or accept it.

This is a garden-variety case with a remedy that rests easily within the district court's discretion. There is nothing in this fact-bound and reasonable district court decision that warrants reversal.

III. The Balance of the Equities Weigh Heavily Against a Stay.

Applicants have not established that they will suffer irreparable harm in the absence of a stay or that the balance of equities tips in their favor. *See Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1304-05 (1991) (Scalia, J., in chambers).

The equities strongly favor Reclaim Idaho. If this Court were to grant the stay as requested by the State Defendants, Reclaim Idaho will not be able to repair the injury to its First Amendment rights. It will not have a chance to get its initiative on the ballot and make a matter of political concern the subject of a much larger public debate. The State Defendants argue that Reclaim Idaho can just start over and aim for the next ballot "the very next year." Stay App. at 10. Actually, the next general election is over two years from now, in 2022. The district court saw the irreparable harm in this approach, as Reclaim Idaho seeks a change in the law concerning the funding of public education. "[A] delay in this process by two years will affect tens of thousands of Idaho students, which has been the plaintiffs' concern here. And therefore, it strikes right at the heart of their advocacy under the

First Amendment." Ex. R at 174. Reclaim Idaho would be irreparably harmed, as "a constitutional delay in protecting a constitutional right is a true denial of that right." *Id.*

The State Defendants, conversely, will not be irreparably harmed in the absence of a stay. The Court of Appeals will likely decide their appeal on the merits well before the election and before ballots would need to be printed and distributed. State officials may suffer administrative inconvenience in the interim and may need to divert resources to complete these tasks, but that is not irreparable harm. *E.g. Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.") (emphasis in original) (citation omitted).

Even without the expedited schedule in the Court of Appeals, the district court's order would not cause *irreparable* harm to the State Defendants. Any intrusion into Idaho's ability to regulate its initiatives is limited to one part of Idaho's election rules. It does not dictate who may vote, how they may vote, or when they may vote. It does not dictate that Idaho must put the initiative on the ballot. And, most important, it is a reasonable and temporary fix tailored to the injury in this moment.

The Court should resolve any doubt in favor of Reclaim Idaho: "Whether or not the plaintiffs prevail in this Court, the fact is that they did in the District Court. . . .Where there is doubt, it should inure to the benefit of those who oppose grant of

the extraordinary relief which a stay represents." *Williams v. Zbaraz*, 442 U.S. 1309 at 1315-16 (1979) (Stevens, J. in chambers).

CONCLUSION

For all these reasons, the emergency application for stay should be denied.

Respectfully submitted on this 21st day of July 2020.

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Attorneys for Respondents

No. 20A18

In the Supreme Court of the United States

RECLAIM IDAHO, an Idaho Political Action Committee, and LUKE MAYVILLE,

Respondents,

v.

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

Applicants.

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

RESPONDENTS' EXHIBITS TO OPPOSITION TO EMERGENCY APPLICATION FOR STAY

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RESPONDENTS' EXHIBITS TO OPPOSITION TO APPLICATION FOR STAY

INDEX

Reclaim Idaho Exhibit A

District Court's Decision and Order Granting Preliminary Injunction

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

RECLAIM IDAHO, a political action committee, and LUKE MAYVILLE, Plaintiffs, v. BRADLEY LITTLE, in his official capacity as the Governor of Idaho, and LAWERENCE DENNEY, in his official capacity as Idaho's Secretary of State, Defendants.	Case No. 1:20-cv-00268-BLW **MEMORANDUM DECISION AND ORDER**

INTRODUCTION

On June 23, 2020 the Court heard oral argument on Plaintiffs' Expedited Motion for Preliminary Injunction. Dkt. 2. At the close of arguments, the Court orally granted the motion. As stated during the hearing, oral decision was warranted given the expedited nature of the situation and the rights at issue. This written order further details the facts, circumstances, and legal framework the Court considered in conducting its analysis of the motion and in fashioning relief.

BACKGROUND

Reclaim Idaho is a volunteer-run political action committee that is seeking to place a citizen initiative on the November 2020 general election ballot. Dkt. 2-1 at 1. Luke Mayville is the committee's co-founder. *Id.* The Court will refer to the Plaintiffs collectively as "Reclaim Idaho." Reclaim Idaho filed suit against the Governor of Idaho, Bradley Little, and Idaho's Secretary of State, Lawrence Denny. The Court will refer to the Defendants collectively as "the State." Reclaim Idaho sued the State for alleged violations of federal constitutional rights within Idaho's citizen initiative process. *See Compl.*, Dkt. 1. The complaint was accompanied by Reclaim Idaho's expedited motion for preliminary injunction seeking redress for the alleged constitutional violations.

Reclaim asks the Court to: (1) declare the State's application of I.C. § 34-1802 in the unprecedented COVID-19 pandemic scenario violates the U.S. Constitution by unfairly burdening the initiative process; (2) declare that the State's application of I.C. § 34-1807 on the facts and circumstances violates the U.S. Constitution by unduly the burdening signature gathering efforts in support of the Invest in Idaho initiative; (3) issue a preliminary injunction enjoining the State's enforcement of I.C. § 34-1802 and I.C. § 34-1807 for as long as necessary to remove the undue burden; (4) issue a preliminary injunction extending the deadline to submit petition signatures to county clerks for verification; (5) issue a

preliminary injunction extending the deadline to submit petition signatures to the Secretary of State; (6) issue a preliminary injunction to permit the electronic circulation of the initiative and to the State to accept electronic signatures. Dkt. 1 at 11.

The State filed a response in opposition, asserting Reclaim Idaho lacks standing to bring this matter due to its own dilatory conduct and, relatedly, is barred by the doctrine of laches due to its delay in bringing the suit and motion more than a month after the applicable deadline. Dkt. 8 at 1-2. In addition, the State argues Reclaim Idaho asks the "Court to aggressively invade the Idaho Legislature's constitutionally-created authority and create a signature-gathering alternative that is nowhere contemplated by the Idaho Constitution or Code." *Id.* at 2. The State argues also that, the Court should decline the request for preliminary relief because Reclaim Idaho will not be successful on the merits of its claim and the burdens the relief would impose on the State are substantial. *Id.* at 3.

The following facts and circumstances form the backdrop of this dispute.

A. Idaho's Ballot Initiative Process

Idaho citizens may enjoy the right reserved by Idaho's Constitution to propose and enact laws independent of any act of the state legislature. *See* Idaho Const. Art. III, sec. 1. Since the 1890 approval of Idaho's Constitution, the state legislature has enacted a statutory scheme to define the citizen initiative process.

See Idaho Code §§ 35-1801 *et. seq*. The laws set forth conditions that a petitioner must meet before an initiative will be placed on a general election ballot by the Secretary of State. *Id.*

A petitioner begins the process by filing a proposed ballot initiative with the Secretary of State's office. Idaho Code § 34-1801(a). After review and approval of the initiative's form, the Secretary of State provides the petitioner with a ballot title. *Id.* at § 34-1809(2)(b). With the ballot title and approval in hand, the petitioner may begin to collect signatures in support of the initiative. The statue allows petitioners up to 18 months to collect signatures—with a final submission deadline of April 30 in the election year the initiative will be held. Idaho Code § 34-1802.

Idaho law requires petitioners to gather the signatures of legal voters equal to 6 percent of the qualified electors from the last election in 18 of Idaho's legislative districts. Idaho Code § 34-1805. In this case, the last election was the November 2018 general election. Considering the number of qualified electors from 2018, a petitioner seeking to place an initiative on the November 2020 ballot must have collected 55,057 or more valid signatures. Dkt. 1 at 4. The law requires also that, any person working to gather signatures be a citizen of Idaho. Idaho Code § 34-1807. The signature gatherer must verify that they personally witnessed

each person sign the petition—in other words, Idaho has an in-person signature requirement. *Id.*

All signatures must be submitted to the appropriate county clerk for verification no later than the close of business on May 1 in the year of the election, (or 18 months from the date the petitioner receives the official ballot title from the SOS, whichever is earlier). Idaho Code § 34-1802(2). County clerks must verify the signatures by June 30 of the election year. *Id.* at § 34-1802(3). The verified signatures are submitted to the Secretary of State's office, which makes the final count to determine if enough signatures have been collected to meet the statutory requirement. *Id.* If so, the initiative is included on the general election ballot for citizen consideration and vote.

B. Reclaim Idaho's Initiative Actions

In 2019, Reclaim Idaho started "Invest in Idaho," an initiative drive aimed at getting an initiative on the 2020 general election ballot which would allow voters to approve an increase in funding for kindergarten through 12th grade education in Idaho. Dkt. 2-1 at 2. Reclaim Idaho was formed in 2017 and successfully petitioned to place an initiative to expand Medicaid on the November 2018 ballot. *Id.* at 4. Idaho citizen voters passed the initiative into law. *Id.*

Reclaim Idaho used the successful model it developed for the Medicaid petition to organize its Invest in Idaho initiative drive. *Id.* The model included

"early stage" volunteer recruitment events, where the group worked to build teams in Idaho's legislative districts. *Id.* at 4–5. The model also included a plan to gradually scale up signature collection efforts in the final months before the May 1, 2020 submission deadline. *Id.* at 5. According to declarations submitted in support of the motion, the gradual scaling of Reclaim Idaho's efforts reached "critical mass" in early March 2020—the surge in volunteers and favorable springtime weather and daylight hours was anticipated to boost its organizing efforts in the final stages of its drive. *Silver Decl.*, Dkt. 2-4 at 4.

According to its model, Reclaim Idaho began its initiative drive in September 2019. *Schroeder Decl.*, Dkt. 2-3 at 3. Reclaim Idaho held twenty-five volunteer organizing meetings and signature gathering events between September 14, 2019 and December 15, 2019. *Id.* at 2–3. Reclaim Idaho held five more events between the first of the year and January 3, 2020. *Id.* at 4. Thereafter, Reclaim Idaho's organizing leaders held signature gathering events in their own districts throughout the month of February and into early March. *Id.* In some districts, such as District 4, Reclaim Idaho held a signature gathering event each week. *Id.*; *see also Prince Decl.*, Dkt. 2-5 at 2.

These efforts slowed with the news of the COVID-19 pandemic. Dkt. 2-3 at 4–5. During the week of March 8, 2020, Reclaim Idaho's leadership began to communicate with its local volunteer leaders regarding a set of guidelines it

developed for safer signature collection. *Id.* Around that time, the Centers for Disease Control (CDC) issued guidance to curb the spread of the novel coronavirus. *Id.* at 5. Maintaining a distance between oneself and others of at least six feet was – and still is – one of the CDC's main recommendations to prevent the spread of the virus. *See id.* Provided this guidance and rising health concerns voiced by its volunteers, Reclaim Idaho cancelled all door-to-door canvassing events and signature gathering efforts at larger public events on or around March 18, 2020. *Id.* at 8.

C. Executive COVID-19 Response

Meanwhile the State of Idaho was also responding to the threat of the virus. As news of Idaho's first confirmed case broke, Idaho Governor Bradley Little quickly took executive action to curb the spread of COVID-19 in the state. *See* Dkt. 8 at 5–6. On March 13, 2020, he declared a state of emergency by proclamation due to "the occurrence and imminent threat to public health and safety arising from the effects of the 2019 novel coronavirus (COVID-19)." Dkt. 2-1 at 7. On March 25, 2020, the Governor issued an extreme emergency proclamation which contained a broad stay-at-home order for most Idahoans. *Id.* at 9. The stay-at-home order was in effect until April 15, 2020. The order required "all individuals anywhere in the State of Idaho to self-isolate – that is, stay at home – except for certain essential activities and work to provide essential business and

government services or perform essential public infrastructure construction, including housing." The order stated that failure to comply with its provisions could constitute a misdemeanor. It included exceptions for certain people or activities, but did not include an exception for First Amendment activities.[1] The stay at home order was amended on April 15, 2020 and extended to April 30, 2020. The amended order also did not include an exception for First Amendment activities. When the amended order expired, it was replaced with Idaho's first "Stay Healthy Order," which was part of the State's staged reopening plan set forth in the broader "Idaho Rebounds" action. Idaho began to reopen according to the staged plan on May 1, 2020.

D. State Response to Reclaim Idaho's Inquiries

On March 16, 2020, Reclaim Idaho contacted the offices of the Governor and Secretary of State. Dkt. 2-1 at 12; Dkt. 8 at 5. Because the parties dispute the express intent of the communications, the Court will briefly detail their content.

According to the record before the Court, the public relations director for Reclaim Idaho, Rebecca Schroeder, emailed Andrew Mitzel, Senior Advisor to Governor Little, the morning of March 16, 2020. Dkt. 2-3 at 5. Ms. Schroeder's

[1] The Court takes judicial notice pursuant to the authority granted in Federal Rule of Evidence 201(b) and (c)(1) of the full text of the Governor's emergency proclamations and stay-at-home orders to the extent they have not been fully referenced and included in the briefing on this matter.

email voiced Reclaim Idaho's concerns about the potential negative health effects involved in in-person signature collection efforts. She indicated that continuing to gather petitions face-to-face would put volunteers and the general public at risk and was contrary to the guidelines from public health officials. *Id.* at 6. Ms. Schroeder noted that, as a result of health risk posed by in-person signature gathering, "Idahoans are no longer able to exercise their constitutional right to bring forward a ballot initiative." *Id.* She asked for the opportunity for Reclaim Idaho to meet with the Governor to discuss the safest way to move forward and stated the "extraordinary situation requires action by the Governor to ensure the public safety is maintained" while Reclaim Idaho exercised its Constitutional rights. *Id.*

Mr. Mitzel's response to the email was as follows: "Thanks for reaching out. I would encourage you to reach out to the Secretary of State's office with your concerns regarding ballot initiatives as they oversee the process." *Id.* Ms. Schroeder sent a reply that she had simultaneously reached out to the Secretary of State's office, and had been advised that it would take Legislative or Executive action to extend the signature deadline. *Id.* The email exchange included a final response from Mr. Mitzel where he indicated "the Governor's Office has no intention of taking executive action on this matter." *Id.* at 7.

Ms. Schroeder also contacted the Secretary of State's office on March 16, 2020. Her email to Secretary Denny included in part:

> Dear Mr. Denney:
>
> We are faced with a global pandemic. Idahoans are responding by cancelling public events and dramatically reducing face-to-face interactions. This reality creates extraordinary obstacles for Idaho's ballot initiative process and the constitutional right of every Idahoan to participate in that process. Idaho's initiative qualification laws, which are among the strictest in the country, require tens of thousands of face-to-face interactions. In the interest of safeguarding the health of the public and protecting the constitutional rights of Idahoans, we are asking to authorize temporary online petitioning for Idaho ballot initiatives. The state of Idaho conducts much of our public business online, from voter registration to campaign finance documentation to the registration of new corporations. It is well within our capacity as a state to process petition signatures online. During these extraordinary times, online petitioning is the most effective way to protect public safety while maintaining the constitutional right of Idahoans to participate in the ballot initiative process.
>
> Please advise if this is within the realm of the SOS, or whether it would require Legislative or Executive action.

Dkt. 2-3 at 7-8.

In response to the inquiry, a member of the Secretary of State's staff replied as follows:

> Thank you and your fellow supporters for sharing your concern with us via email. While we understand the current situation we are in is unprecedented and can appreciate how the further efforts in attaining the remaining signatures for your petition will be complicated logistically, we are sorry to say that there is no statute allowing electronic signatures for petitions in Idaho Statutes 34 Chapter 18.

Dkt. 2-3 at 8.

According to the record before the Court, the exchanges detailed above represent the entirety of communications between the parties regarding the issue of signature collection during the pandemic.

The Court considered Reclaim Idaho's motion for temporary restraining order with these facts and circumstances in mind. Next, the Court will set forth the standard of law and applicable legal framework for its analysis of the motion and the State's opposition.

STANDARD OF LAW

Motions for preliminary injunctions are governed by Federal Rule of Civil Procedure 65. A plaintiff seeking a preliminary injunction must establish that: 1) it is likely to succeed on the merits; 2) it is likely to suffer irreparable harm in the absence of preliminary relief; 3) the balance of equities tips in its favor; and 4) an injunction is in the public interest. *See Winter v. Natural Resources Defense Council, Inc.,* 555 U.S. 7, 20 (2008). A preliminary injunction is "an extraordinary remedy never awarded as of right." *Id.* at 24. "In each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.' *Id.* (citation omitted).

ANALYSIS

In addition to arguing Reclaim Idaho is unlikely to succeed on the basis of its First Amendment-based claim, the State argues Reclaim Idaho lacks Article III

standing. Prior to addressing the *Winter* factors, the Court will provide greater detail regarding its finding that Reclaim Idaho has standing to bring this action and seek a preliminary injunction.

A. Standing

To establish standing under Article III, Reclaim Idaho had the burden of establishing three elements: (1) it has "suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) the injury is "fairly traceable to the challenged action"; and (3) "it [is] likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal citations and footnote omitted).

> When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred […] to establish standing depends considerably upon whether the plaintiff is […] an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.

Id. at 561–62.

As I noted during the motion hearing, the first and third elements of the standing inquiry are easily recognized and established under these facts and circumstances. Indeed, the State focused its standing argument on the second element, arguing the alleged First Amendment violation was not fairly traceable to the actions or inaction of the State. *See* Dkt. 8 at 7.

Reclaim Idaho is challenging the legality of the State's refusal to make reasonable accommodations for the continuation of its signature gathering and petition circulation activities during the pandemic, which resulted in the stay-at-home order discussed above. *See* Dkt. 1 at 11. As primary support for the contention that the State's refusal to act resulted in injury to its First Amendment rights, Reclaim Idaho cites the declaration of Ms. Schroeder. Dkt. 2-3. In the declaration, Ms. Schroeder details her communications with the offices of Governor Little and Secretary Denny. *Id.* In her communication with the Governor's office, Ms. Schroeder was clear that the impact of health concerns and the guidance of public health officials made it impossible for Idahoans to continue to exercise their constitutional rights to bring forth a ballot initiative. *Id.* at 6. She noted also that, the "extraordinary situation requires action by the Governor to ensure the public safety is maintained" while also preserving the constitutional rights within the initiative process. *Id.*

In response, the State argues that because the Governor is not involved in the oversight, management, or legislation of the initiative process, his inaction does not give Reclaim Idaho standing to sue. Dkt. 8 at 5. The Court finds the State's argument unpersuasive in light of the extraordinary situation imposed on all parties

by the COVID-19 pandemic and the Governor's authority to issue executive orders in times of declared emergency.[2]

Using similar reasoning, the State argues that the Secretary of State did not act and could not act to provide a remedy. The email correspondence between Ms. Schroeder and a staff member of the Secretary's offices shows the Secretary's only response to Reclaim Idaho's inquiry was to refer back to the limitations of the statue—in other words, to interpret the statutory conditions narrowly, even in the face of the pandemic. *See* Dkt. 8 at 7. This was the Secretary's response and a choice that arguably impacted the ability of Reclaim Idaho to continue to exercise its constitutional rights within the petition process. Provided the foregoing, the Court finds that the inaction of the State resulted in the alleged injury to Reclaim Idaho.

The Court must also address the State's arguments that it was Reclaim Idaho's own decisions that resulted in its failure to collect the requisite number of signatures. Dkt. 8 at 7. The State argues that by deciding to begin its signature collection campaign in September 2019, Reclaim Idaho failed to take advantage of the entire 18-month signature collection window permitted within the statute. *Id.*

[2] As an example of such authority, during the hearing on the motion, the undersigned noted actions taken by the Governor and the State to extend the deadline for submission of absentee ballots, revise primary election deadlines, and to all but eliminate in-person primary voting due to the pandemic and stay-at-home order.

However, reason dictates that there is no way Reclaim Idaho could have predicted the global COVID-19 pandemic when it began to plan its initiative drive—planning which necessarily must have occurred in advance of August 2019 when its petition was first submitted to the Secretary of State's office. *See* Dkt. 8 at 7.

Further, Reclaim Idaho's constitutional rights in the petition process are not forfeitable based on a timeline. The rights exist throughout the duration of the petition circulation process, whether on the first day or in the last months. The Court properly addresses these concerns by determining the severity of the burden within the context of the level of scrutiny that should be applied to evaluate the effect of the State's actions. *See infra* at pp. 17–22.

In sum, the Court finds the evidence shows Reclaim Idaho was reasonably diligent in collecting signatures until the news of COVID-19 in Idaho and the subsequent stay-at-home order made it impossible to do so. The Court finds the evidence shows also, absent a preliminary injunction, Reclaim Idaho will be unable to get the initiative on the ballot in November 2020. If the State had been willing to extend the submission deadline or accept electronic signatures as urged by Reclaim Idaho, the State could have redressed the alleged injury. As such, the Court finds Reclaim Idaho has standing to proceed in this matter.

B. Likelihood of Success on the Merits

Reclaim Idaho asserts an as-applied challenge to Idaho's initiative process laws. As detailed above, Reclaim Idaho argues the decisions by the Governor and Secretary of State to strictly enforce the conditions of Idaho's ballot initiative laws without reasonable accommodation has violated their First and Fourteenth Amendment rights by making it impossible for the initiative to appear on the November 2020 ballot. *See* Dkt. 1; Dkt. 2-1.

In response, the State argues Reclaim Idaho did not act with diligence in collecting signatures before the 2020 general election given the 18-month timeframe allowed by statute, and that Reclaim Idaho suspended its own campaign in advance of the issuance of Idaho's stay-at-home order. *See* Dkt. 8. To the merits of the motion for preliminary injunction, the State argues Reclaim Idaho cannot show the burden to their First Amendment rights was severe, due to the alleged delay and action cited immediately above, and that the State's regulatory interest outweighs any harm to Reclaim Idaho—especially because they can begin the initiative process anew for the 2022 election—and will have the entire 18-month period to do so. Dkt. 8 at 2.

1. Constitutional Framework

Courts generally apply the framework established in *Anderson v. Celebrezze*, as later refined in *Burdick v. Takushi* (the *Anderson-Burdick* framework) when

considering the constitutionality of ballot access restrictions. 460 U.S. 780 (1983); 504 U.S. 428 (1992). However, because Reclaim Idaho is not challenging the base constitutionality of Idaho's ballot access conditions, but rather their application, this Court finds, as did the U.S. District Court for the District of Nevada in *Fair Maps Nevada*, that the test set out by the Ninth Circuit in *Angle v. Miller* is the framework the Court should apply to determine whether the State's inaction amounts to an unconstitutional burden in this case. *See* 673 F.3d 1122, 1132 (9th Cir. 2012). Notably, neither party contests the law on this issue.

In *Angle*, the Ninth Circuit explained the Supreme Court of the United States has found there are two ways in which restrictions on the initiative process can burden core political speech. 673 F.3d 1122, 1132 (9th Cir. 2012). First, when regulations that restrict one-on-one communication between petition circulators and voters. *Id.* Second, when regulations make it less likely proponents will be able to get enough signatures to place an initiative on the ballot. *Id.*

The first type of restriction is largely not at issue in this case. The management of the spread of COVID-19 has foreclosed in-person one-on-one communication between Reclaim Idaho's petition circulator volunteers and voters. However, the second type of restriction is at issue because the question before the Court is whether the State's strict application of the statutory initiative conditions

make or made it less likely for Reclaim Idaho to get enough signatures to place the Invest in Idaho initiative on the ballot.

Reclaim Idaho has shown that the State refused to take executive action to ensure Reclaim Idaho could continue to safely gather signatures from March 16, 2020, when the request was made to both the Governor and the Secretary of State, through the end of the amended stay-at-home order, or April 30, 2020. Coincidently, April 30th was also the last day permitted by statute to gather signatures. Therefore, the Court finds the State's refusal to make reasonable accommodations during this time period made it less likely for Reclaim Idaho to get enough signatures to place the Invest in Idaho initiative on the November 2020 ballot. In reality, the State's refusal to act made it impossible for Reclaim Idaho to get the initiative on the ballot absent an order of relief from this Court.

Having found a burden on Reclaim Idaho's core political speech, the Court must determine whether strict scrutiny or some lesser form of review applies to the State's conduct. *See Arizonans for Fair Elections v. Hobbs*, 2020 WL 1905747, at *8 (D. Ariz. Apr. 17, 2020); *see also Ariz. Green Party v. Reagan*, 838 F.3d 983, 985 (9th Cir. 2016). Courts apply strict scrutiny when: (1) the proponents of the initiative have been "reasonably diligent" as compared to other initiative proponents; and (2) when the restrictions significantly inhibit the proponents'

ability to place an initiative on the ballot. *Fair Maps Nevada v. Cegavske*, 2020 WL 2798018, at *11 (D. Nev. May 29, 2020).

a. Reasonable Diligence

As detailed above, by the start of 2020, Reclaim Idaho had held 25 volunteer organizing and signature gathering events since receiving their ballot title a few months prior. By the middle of February 2020, Reclaim Idaho had collected approximately 15,000 signatures. By mid-March, they had collected approximately 30,000 signatures. At that time, they had qualified in 5 out of Idaho's 18 legislative districts. Dkt. 2-1 at 6. "[S]even additional districts [were] within a few hundred signatures of qualification." *Id.*

According to the committee's records, their signature collection numbers for the Invest in Idaho drive exceeded those for their successful Medicaid initiative drive in the last general election cycle. In other words, by mid-March they were on track, according to their data, to collect the necessary number of signatures, in all legislative districts, by the May 1, 2020 submission deadline.

In presenting their argument to the Court, Reclaim Idaho stressed that, in volunteer-led signature gathering campaigns, the momentum of the final months prior to submission results in a significant increase in the number of signatures gathered per week or even per day. Thus, the time Reclaim Idaho lost due to the

pandemic and the subsequent stay-at-home order, was key to reaching their goal and was anticipated in their organizing plan.

The State argues, however, that Reclaim Idaho's decision to voluntarily suspend its own signature collection efforts on or around March 16, 2020 and prior to the March 25, 2020 state-at-home order, forecloses their ability to bring this claim. The State's logic being that it was Reclaim Idaho's act, not any act of the State, that suspended their signature collection efforts. This argument ignores the elephant in the room, which is COVID-19. In reality, it was the impact of the virus that resulted in the suspension of Reclaim Idaho's in-person signature collection activities. As the record shows, Reclaim Idaho immediately sought to work with the State's officials to come up with a State-sanctioned solution so its volunteer members could continue the petition drive. Reclaim Idaho sought that relief on March 16, 2020.

The State argues also that Reclaim Idaho simply should have begun its petition drive sooner—as it had an entire 18 months to conduct the drive under law. However, under the reasonable diligence standard applicable here, the Court finds the argument unpersuasive. Reclaim Idaho began collecting signatures as soon as their data from a previous successful campaign suggested they do so. Once the group started its drive, there is no real argument to diligence in effort.

Considering the foregoing, the Court finds that Reclaim Idaho was reasonably diligent in collecting signatures.

b. Ability to Place Initiative on the Ballot

This case is about Reclaim Idaho's First Amendment rights pertaining to the 2020 election cycle. The State argues Reclaim Idaho's ability to place the initiative on the ballot is not inhibited because they may simply try again in 2022. This argument is connected to the State's laches argument—where the State argues Reclaim Idaho lost its opportunity for relief by failing to file this lawsuit before May 1, 2020, the signature submission deadline. The State's argument asks the Court to set aside the right Reclaim Idaho had to carry its initiative process through its final stages during this election cycle.

As the Supreme Court has recognized, "when an initiative fails to qualify for the ballot, it does not become 'the focus of statewide discussion.'" *Angle v. Miller*, 673 F.3d 1122, 1133 (9th Cir. 2012) (citing *Meyer*, 486 U.S. at 423). In this case, the State's action to strictly enforce Idaho's ballot access conditions, i.e. to refuse to make reasonable accommodation, during the unprecedented time of the pandemic, reduced "the total quantum of speech" on the public issue of education funding. *See id.* The State's purported remedy belies the reason Reclaim Idaho staged its initiative campaign during this cycle—which was to give Idaho voters a chance, on the November 2020 ballot, to make a change to tax law to provide

additional funding to public school students in the coming years. Delay in the process until 2022 could result in impact to tens of thousands of public students over that time—which strikes to the heart of Reclaim Idaho's First Amendment activity.

In its inquiry, the Court recognizes that the State has a significant regulatory interest in its own processes—including mandating adherence to the ballot access conditions set in statute. *See Angle*, 673 F.3d at 1135. However, that interest must be weighed against the effects of strict enforcement when an extraordinary situation arises that prevents its citizens from exercising a constitutional right. *See Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 191–92 (1999) (states have "considerable leeway" in regulating the electoral process, provided their choices do not produce "undue hindrances to political conversations and the exchange of ideas.").

As acknowledged by the State during oral argument on the motion, the State recently recognized the limits to its regulatory authority when it came to the need to provide electronic avenues for online voter registration and absentee ballot requests. *See also* Dkt. 9 at 7. The Governor provided for all-absentee voting in the 2020 primary elections due to COVID-19. *Id.* To do so, the Governor worked with the Secretary of State to suspend certain statutory requirements. *Id.* Notably, Idaho's online voter-registration processes requires the individual to attest to their

identity by way of a digital signature—which, presumably, state election officials must verify.

Ultimately, even if the State decides to include the Invest in Idaho initiative on the ballot by deeming the signatures gathered thus far sufficient, the State retains the ultimate opportunity to verify each and every vote cast for or against the initiative through the ballot review process.

For these reasons, the Court finds the State's refusal to make reasonable accommodations inhibited Reclaim Idaho's ability to place the Invest in Idaho initiative on the November 2020 general election ballot. As such, the Court finds Reclaim Idaho is likely to succeed on the merits of its claims.

C. Irreparable Harm

Absent a preliminary injunction, there is no chance their Invest in Idaho initiative will appear on the Idaho ballot. Indeed, the deadline for signature submission has expired. As such, without Court order, the initiative will not appear on the 2020 general election ballot. Therefore, the Court finds Reclaim Idaho is likely to suffer irreparable harm in the absence of preliminary relief.

D. Balance of Equities

The Court must also balance the relative hardships on the parties should it provide preliminary relief or decline the request. *Winter v. Natural Res. Def.*

Council, *Inc*., 555 U.S. 7, 20 (2008); *University of Hawaii Prof. Asm. v. Cayetano*, 183 F.3d 1096, 1108 (9th Cir. 1999).

The State cites the significant burden that will be placed on its employees and offices due to the delay in signature gathering and submission as it will take considerable resources to verify the additional signatures that will be submitted. The Court is sympathetic to the plight of the State and its officers and employees. During the course of the pandemic, the courts have likewise experienced the strain placed on employees and departments due to the need to manage new situations and scenarios. However, this Court in particular is aware of the great resource provided by technology to solve problems. The use of new technologically based processes has allowed the Court to hold hearings without exposing litgants, attorneys, or the public to the risk of COVID-19 all the while, preserving constitutional rights and liberties.

Considering the foregoing, when balancing the harm of a severe burden on core political speech and the not insignificant burden reasonable accommodation may place on the State, the Court must find in favor of preserving constitutional rights. This finding acknowledges the faith the Court has in the State's abilities to devise reasonable accommodations to preserve the rights at issue—as it has successfully done in other contexts during this trying time.

E. Public Interest

Finally, the Court must consider whether issuing preliminary relief is in the public interest. As the Court's discussion of the other *Winter* factors makes clear, it is in the public's interest to issue relief that would provide a remedy to preserve Reclaim Idaho's right to have the ability to place the Invest in Idaho initiative on the November 2020 ballot. Because the public itself would be the final arbiter of whether the initiative is passed into law, the Court finds issuing a preliminary injunction requiring the State to make reasonable accommodation to protect Reclaim Idaho's core political speech rights in the initiative process is in the public's interest.

In sum, the Court finds Reclaim Idaho has established it is likely to succeed on the merits, it will suffer irreparable harm in the absence of preliminary relief, the balance of the equities tips in its favor, and an injunction is in the interests of the public. Having so found, the Court will now discuss the issue of a remedy.

F. Remedy

The Court struggled in determining what would be an appropriate remedy. The Court is disinclined to tell the State how to run the initiative process. However, as the analysis herein explains, the First and Fourteenth Amendments do place some restrictions on the State's authority through the preservation of constitutional rights. *See supra* at pp. 20–22.

The Court considered the following facts when fashioning its remedy and order of accommodations. First, Reclaim Idaho and its volunteers were well on their way in obtaining the signatures necessary for inclusion of the initiative on the November 2020 ballot. Due to Reclaim Idaho's projected chance of success in obtaining the necessary signatures absent the extraordinary event of the COVID-19 pandemic, the first remedy the State can choose to provide is to certify the signatures that have been collected and place the initiative on the November 2020 ballot for voter consideration. In fashioning this remedy, the Court also considered, as argued by Reclaim Idaho during the hearing, that Idaho's ballot conditions are more stringent than those found in other states. As such, the State providing some leeway in its requirements in this extraordinary moment is a viable option.

However, recognizing the State's interest in upholding its conditions, specifically the numerical and geographical requirements, the Court provided that the State may instead choose to allow Reclaim Idaho an additional 48-days to gather signatures through online solicitation and submission. The Court declined to issue relief simply allowing the additional time for in-person signature collection. There is ongoing uncertainty surrounding the current and future spread of COVID-19. Close personal encounters still pose an ongoing and substantial risks to health of Idaho's citizens and Reclaim Idaho's volunteers who would be contacting and communicating with them. Finally, the State has demonstrated it is comfortable

relying on digital signature collection in both the voter registration and online ballot collection processes. Neither of these processes is different from the initiative process in that all require the verification and certification of the digital signature. The Court's order permits the State until 5:00 p.m. M.S.T. on June 26, 2020 to choose between the two alternative remedies.

ORDER

IT IS ORDERED that:

1. Plaintiffs' Expedited Motion for Preliminary Injunction (Dkt. 2) is **GRANTED**.

2. On or before June 26, 2020 at 5:00 p.m. M.S.T., Defendants must file with the Court a notice detailing the reasonable accommodation they have chosen to make to preserve Plaintiffs' core political speech rights as detailed in this Memorandum Decision and Order.

DATED: June 26, 2020

B. Lynn Winmill
U.S. District Court Judge

Reclaim Idaho Exhibit B

District Court's Order Denying Stay of Preliminary Injunction

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

RECLAIM IDAHO, a political action committee, and LUKE MAYVILLE, Plaintiffs, v. BRADLEY LITTLE, in his official capacity as the Governor of Idaho, and LAWERENCE DENNEY, in his official capacity as Idaho's Secretary of State, Defendants.	Case No. 1:20-cv-00268-BLW **ORDER DENYING MOTION TO STAY**

On June 23, 2020, the Court heard oral argument on Plaintiffs' Expedited Motion for Preliminary Injunction. Dkt. 2. At the close of arguments, the Court orally granted the motion. A written order was subsequently filed to set forth the facts, circumstances, and legal framework the Court considered in conducting its analysis of the motion and in fashioning relief. Dkt. 14.

In its oral pronouncement and written order, the Court applied the test set out by the Ninth Circuit in *Angle v. Miller,* to conclude that the State's refusal, in the face of a global pandemic, to extend the statutory deadline and permit online

solicitation and gathering of signatures to have a citizen's initiative placed on the 2020 ballot amounts to an unconstitutional burden on the Plaintiffs' First Amendment rights. *See* 673 F.3d 1122, 1132 (9th Cir. 2012). Based on that determination, the Court concluded that Plaintiff had established it is likely to succeed on the merits, it will suffer irreparable harm in the absence of preliminary relief, the balance of the equities tips in its favor, and an injunction is in the interests of the public.

The Court acknowledged in its decision that the issue of an appropriate remedy was challenging. Ultimately, however, the Court concluded that the State could either certify the signatures already gathered are sufficient to have the initiative placed on the 2020 ballot, or could allow Reclaim Idaho an additional 48-days to gather signatures through online solicitation and submission. The Court's order gave the State until Friday, June 26, 2020 to choose between the two alternative remedies.

The State declined the Court's invitation and, instead, filed a Notice and Motion to Stay Pursuant to F.R.C.P. 62(d) and F.R.A.P. 8. Dkt. 16. The State's motion challenges the Court's decision, and requests that the Court stay the effect of its decision pending an appeal.

Unless the Court orders otherwise, "an interlocutory or final judgment in an action for an injunction" is not stayed after being entered, even if an appeal is

taken. Fed. R. Civ. P. 62(c)(1). Federal Rule of Civil Procedure 62(d) governs injunctions pending an appeal. The rule provides that, "[w]hile an appeal is pending from an interlocutory order or final judgment that grants or refuses to modify an injunction" the Court may "suspend, modify, restore, or grant an injunction" on "terms that secure the opposing party's rights." Fed. R. Civ. P. 62(d). Thus, Rule 62(d) affords the Court discretion when a party requests a stay of an injunction pending appeal.

A stay pending appeal overlaps with the function of a preliminary injunction—each prevents "some action before the legality of that action has been conclusively determined." *Nken v. Holder*, 556 U.S. 418, 428-29 (2009). "A stay is an 'intrusion into the ordinary processes of administration and judicial review.'" *Id.* at 427 (citing *Virginia Petroleum Jobbers Assn. v. FPC*, 259 F.2d 921, 925 (C.A.D.C.1958) (per curium). Accordingly, a stay pending resolution on appeal "is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Virginian R. Co. v. United States*, 272 U.S. 658 (1926).

Here, the Court will exercise its discretion to deny the State's motion. Simply put, staying the effect of the Court's decision will deny the Plaintiffs an effective remedy. There is a narrow window of opportunity to provide Reclaim Idaho and the State the time necessary to establish the process and protocol for gathering signatures on-line and then provide Recall Idaho with the requested 48-

days to complete the on-line solicitation and gathering of signatures. Granting a stay of the Court's decision would effectively prevent Reclaim Idaho from having its initiative placed on the 2020 general ballot, and thereby deny it the remedy required by the First Amendment.

ORDER

IT IS ORDERED that:

1. Defendants' Notice And Motion To Stay Pursuant To F.R.C.P. 62(D) and F.R.A.P. 8 (Dkt. 16) is **DENIED**.

DATED: June 29, 2020

B. Lynn Winmill
U.S. District Court Judge

Reclaim Idaho Exhibit C

District Court's Order Granting in Part and Denying in Part Motion to Enforce the Court's Order

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

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

Plaintiffs,

v.

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

Defendants.

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

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO ENFORCE THE COURT'S ORDER

INTRODUCTION

Pending before the Court is Reclaim Idaho's Expedited Motion to Enforce the Court's Order. Dkt. 18. For the reasons that follow, the Court will grant in part and deny in part Plaintiffs' motion.

BACKGROUND

On June 23, 2020, the Court heard oral argument on Plaintiffs' Expedited Motion for Preliminary Injunction. Dkt. 2. At the close of arguments, the Court orally granted the motion. A written order was subsequently filed to set forth the facts, circumstances, and legal framework the Court considered in conducting its

analysis of the motion and in fashioning relief. Dkt. 14. Thereafter, Defendants filed a motion seeking a stay of the Court's order pending their appeal to the Court of Appeals for the Ninth Circuit. Dkt. 16. The Court denied the motion for a stay—and its order granting Plaintiff's motion for injunction stands. Dkt. 17.

The Court's decision allowed the State to choose between two options available to secure Reclaim Idaho's constitutional rights in the initiative process. The State could choose between (1) certifying the signatures already gathered are sufficient to have the initiative placed on the 2020 ballot; or (2) allowing Reclaim Idaho an additional 48-days to gather signatures through online solicitation and submission. The State has indicated it will file an appeal, and declined to choose either option. *See* Dkt. 16. Citing the State's refusal, Reclaim Idaho now asks the Court to order Defendants to certify the initiative for the November ballot. Dkt. 18 at 2.

DISCUSSION

Reclaim Idaho argues the option to gather signatures through an online process would require the State to engage in developing a "process and protocol" with Reclaim Idaho. *Id.* Reclaim Idaho argues that, "Defendants' clear response shows that they have no intention of cooperating with Reclaim Idaho" and thus the only relief available is an order that Defendants certify the initiative for the November 2020 ballot. *Id.* However, it is not clear that the State is unwilling to

work with Reclaim Idaho in fashioning an online solicitation process if ordered to do so by the Court. And, ordering an online solicitation pays greater respect to the State's right to limit the initiative process in ways which do not violate the Plaintiffs' First Amendment rights. Finally, online solicitation is the specific remedy originally sought by the Plaintiffs. For these reasons, the Court will grant the Plaintiffs' motion in directing the State to comply with the Court's order, but will not require immediate certification of the Plaintiffs initiative for the 2020 ballot.

At this point, no appeal has been filed by the State, and it necessarily follows that no stay has been granted by the Ninth Circuit Court of Appeals. Unless such a stay is granted, the State must fully comply with the Court's orders. Having declined to choose between certifying the initiative for the 2020 ballot and accepting online solicitation of signatures, the Court will direct the State to immediately begin implementation of the remedy originally requested by the Plaintiffs – online solicitation and acceptance of signature.

According to Reclaim Idaho's motion for injunction, "it has developed a plan to contract with DocuSign, a company trusted by financial institutions with an impeccable tradition for reliability in gathering electronic signatures." Dkt. 2-1 at 2. Reclaim Idaho stated that DocuSign, "stands ready to provide its service immediately." *Id.* at 10. Counsel will be ordered to meet and confer by Thursday,

July 2, to implement the process and protocol for accepting signatures gathered through the DocuSign technology. Absent an agreement of counsel to the contrary, that process and protocol shall be completed by Thursday, July 9, and Plaintiffs may thereafter resume the solicitation of signatures for a period of 48 days. Should counsel be unable to reach an agreement as to the process and protocol, Reclaim Idaho may implement an industry standard process and protocol. Such process and protocol must ensure the highest available standards are used to verify a signer's identity, legislative district, and the authenticity of the signature.

ORDER

IT IS ORDERED that:

1. Plaintiff's Expedited Motion to Enforce the Court's Order (Dkt. 18) is **GRANTED IN PART** and **DENIED IN PART** as explained in this decision.
2. The 48-day period provided for Reclaim Idaho to resume its petition gathering activities begins July 9, 2020.

DATED: June 30, 2020

B. Lynn Winmill
U.S. District Court Judge

Reclaim Idaho Exhibit D

Declaration of Luke Mayville

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

RECLAIM IDAHO, an Idaho Political Action Committee; **LUKE MAYVILLE** Plaintiffs, v. **BRADLEY LITTLE**, in his official capacity as Governor of Idaho; **LAWERENCE DENNEY**, in his official capacity as Idaho Secretary of State; Defendants.	Case No. 1:20-cv-00268-BLW **DECLARATION OF LUKE MAYVILLE IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

I, Luke Mayville, having first been duly sworn upon oath, declare as follows:

1. My name is Luke Mayville, and I am a Co-founder of Reclaim Idaho, the other plaintiff in this case.

2. I have served as a volunteer leader and organizer for Reclaim Idaho since spring 2017, when I co-founded the organization in my hometown of Sandpoint. My role with Reclaim Idaho

includes setting strategic priorities for the organization, fundraising, communicating with media, writing opinion columns, drafting initiative proposals, and traveling the state to recruit volunteers and leaders. I am an academic by training and was most recently employed by Columbia University as a postdoctoral fellow and lecturer in the fields of History and American Studies. I have also held teaching and research positions at Yale University and American University. In 2016, I published a book on the political thought of President John Adams.

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

4. Reclaim filed an "Invest in Idaho" K-12 educational funding initiative with the Secretary of State in the fall of 2019. If put on the ballot and passed, this initiative would invest $170 million in education in Idaho.

5. Reclaim was operating on the model of organizing that it had successfully used during the Medicaid expansion drive, a model of organizing we had begun to develop in 2017.

6. That year, we filed a Medicaid Expansion initiative—a proposal that eventually qualified for the ballot with well over the 56,000 signatures required. Several additional advocacy groups contributed to signature collection in the final months of petitioning, but the vast majority of required signatures were collected by Reclaim Idaho volunteers.

7. Moreover, Reclaim Idaho volunteers easily surpassed Idaho's requirements for geographic distribution by collecting signatures from more than 6% of registered voters in well over 18 of Idaho's 35 legislative districts.

8. We attribute the success of our Medicaid signature drive to a highly effective and labor intensive model of organizing.

9. In the early stages of the effort, members of our statewide team visited over 20 counties and worked to recruit volunteers and organize those volunteers into county-based teams. This method of organizing didn't yield large numbers of signatures during the early months of the drive, but it did build strong, well-trained teams capable of scaling up the operation exponentially during the final few months before the deadline.

10. By mid-March, with just six weeks left before the deadline, we had collected fewer than half of the required signatures. But we were able to accelerate the rate of signature collection rapidly in the final weeks.

11. One factor in particular contributed to our ability to ramp up signature collection in the final stretch: the sense of urgency brought about by the impending deadline. With the deadline looming, our most active volunteers grew more committed and more efficient in their work, and hundreds of new volunteers joined the effort for the first time. (The motivating effects of the looming deadline was compounded by changing weather. In the final stretch, just as volunteers were growing more motivated, the weather warmed up and enabled them to collect signatures much more effectively.)

12. In my own observations and studies of different signature-drive models, I have found that the motivating effect of a looming deadline is especially important for grassroots drives that rely mainly on volunteers. When signature drives rely mainly on paid-signature gatherers, the final stretch of a signature drive is not much different than the early months. Throughout the drive, petitioners are motivated by the wages they earn. In contrast, grassroots campaigns stand to

benefit enormously from the highly motivating sense of urgency that kicks in during the final stretch of time before a deadline.

13. The model of organizing we developed during our Medicaid drive prepared us well to capitalize on the sense of urgency during the final weeks of the effort. By investing time and resources during the early months in volunteer-recruitment and team-building, we were well-poised in the final stretch to absorb hundreds of new volunteers and scale up our work dramatically.

14. When we began the signature drive for our "Invest in Idaho" K-12 funding initiative, we made every effort to replicate the success of our Medicaid drive. Beginning in September 2019—over one month before our petition was approved for circulation by the Idaho Secretary of State, organizers visited counties in every region. They recruited volunteers, organized them into county-based teams, and trained them with effective signature-gathering tactics.

15. Our rate of signature collection was low during the first several months, comparable to what it had been during our Medicaid signature drive. By February 15th, we had collected an estimated 15,000 signatures—roughly one quarter of the signatures needed to qualify the initiative.

16. But in the weeks that followed, as the deadline began to loom on the horizon, our rate of signature collection accelerated dramatically. Our most active volunteers grew even more committed and efficient in their work. Hundreds of new volunteers were motivated by the impending deadline to join the effort.

17. During the four weeks between mid-February and March 12th, we more than doubled our total number of signatures from 15,000 to over 30,000. We progressed from zero legislative

districts qualified to 5 districts qualified and 7 additional districts within a few hundred signatures of qualification.

18. On March 12th, the day before the first case of COVID-19 was confirmed in Idaho, we were significantly ahead of where we had been by that same date during our Medicaid drive two years earlier.

19. On March 13th, the first case of COVID-19 was confirmed in Idaho and Governor Little declared a state of emergency in order to prevent the spread of the coronavirus. It was on that date that it became apparent to our team that we would need to take significant steps to adapt to changing circumstances.

20. On that same day, we sent an email newsletter to all supporters with the following guidelines:

- *Stay home if you are exhibiting any symptoms of illness.*
- *Avoid approaching anyone that is symptomatic of illness for a signature.*
- *Practice excellent hand hygiene before and after collecting signatures. Carry a small bottle of hand sanitizer if possible.*
- *Wipe down clipboards before and after a signature gathering shift.*
- *Avoid shaking hands or direct physical contact when collecting signatures.*
- *We recommend adopting a "KEEP THE PEN" policy. In an effort to reduce transmission of germs, volunteers should carry packages of "disposable" pens. If the signer doesn't have a pen of their own, simply allow them to keep the pen. Our campaign is committed to providing pens and/or reimbursing volunteers for the cost of pens.*

21. We also notified volunteers that we would be transitioning toward more outdoor signature-collection activities, considering that staying outdoors would reduce the risk of the airborne spread of germs.

22. That week, the CDC issued guidelines for individual and community organizations operating under conditions of "minimal to moderate" spread of COVID-19. Those guidelines included:

- Reduction of in-person activities, especially for organizations with individuals at increased risk of severe illness
- Cancellation of large gatherings of 250 or more people
- Implementation of personal protection measures such as staying home when sick, handwashing respiratory etiquette, and cleaning frequently touched surfaces daily

23. Over the next five days, between March 13th and March 18th, we observed a dramatic escalation of the public health risk. Relevant developments during those days included:

24. On the evening of Friday, March 13th, we received an email from retired Idaho appellate Judge Karen Lansing—one of our most active and committed volunteers—notifying us that she was suspending her efforts to gather signatures. She wrote:

> *I feel that my commitment and desire to gather signatures for this critical initiative directly conflicts with my obligation as a citizen to practice social distancing to protect my fellow Idahoans. I appreciate the suggestion that use of disposable pens and frequent cleaning of clipboards would reduce the risk of disease transmission. Those measures undoubtedly would help, but it is not possible for anyone to sign the petition without touching the page as they write, so it seems to me that the risk substantially remains. As important as the initiative is, I reluctantly conclude that it is outweighed by my responsibility to avoid possibly putting others at risk.*

Judge Lansing's email was the first of many similar messages sent to us from volunteers from all around the state.

25. Guidelines from the CDC and other public health authorities made clear that the health risk posed by the coronavirus was especially severe for older adults. This fact weighed heavily on our decision-making, considering that the majority of Reclaim Idaho's most active volunteers are retirees over the age of 60.

26. On Saturday, March 14th, Meridian Library District announced that all libraries were closing operations due to the coronavirus. Likewise, the City of Boise closed all libraries on Monday, March 16th, and in subsequent weeks libraries would close across the state. On Tuesday, March 17th, DMV offices closed in Ada and Canyon counties. This was highly significant because libraries and DMVs had proven to be the most promising public locations for volunteers to collect signatures.

27. On Sunday, March 15th, the CDC recommended cancellation or postponement of all gatherings of 50 or more. Most dramatically, the CDC also began recommending a six-foot "social distancing" rule which quickly became a widespread norm of behavior.

28. As I would later explain in an April 9th interview with *CityLab* [1], our organization struggled over those five days to adapt to rapidly changing circumstances. As a last resort, we considered setting up "drive-through" signature collection stations. (We had recently learned that the Save Our Schools Arizona initiative—an initiative that would eventually suspend operations due to the pandemic—was experimenting with drive-through signature-gathering). But it quickly became clear that in-person signature gathering of any kind was simply too hazardous in the midst of a deadly pandemic. The announcement of the six-foot rule made this especially clear.

29. As I would later explain in my interview with *CityLab* :

> *We were trying to adapt with the guidelines as they grew more and more stringent…But once the six-foot rule settled in, it just became impractical. It also became clear at that*

[1] CityLab describes itself on its web site as "a partnership between Bloomberg Philanthropies, the Aspen Institute and The Atlantic, CityLab is the preeminent meeting of city leaders and the top minds in urbanism and city planning, economics, education, art, architecture, public sector innovation, community development, and business — convened with the goal of creating scalable solutions to major challenges faced by cities everywhere."

> *point that any continuation of a signature drive would put volunteers and the wider public at risk.*

30. On Monday, March 16th, having concluded that in-person signature gathering would be too great a public health risk, we decided to appeal to Governor Brad Little with a request for the authorization of electronic signature gathering. We sent an email newsletter inviting supporters to sign our online petition to the Governor.

31. The text of the newsletter included the following:

> *This pandemic is obstructing the ability of every Idahoan to participate in the ballot initiative process…In the interest of safeguarding the health of the public and protecting the constitutional rights of Idahoans, we're calling on Governor Brad Little to exercise his executive powers to authorize temporary online petitioning for Idaho ballot initiatives.*

32. As soon as supporters signed the petition online, they were then prompted with an opportunity to email the Governor's office and ask the Governor to authorize electronic signature collection.

33. That same day, Reclaim Idaho Executive Director Rebecca Schroeder corresponded via email with Andrew Mitzel, a member of the Governor's staff. When Mitzel directed Schroeder and Reclaim Idaho to bring our request for electronic signature capabilities to the Idaho Secretary of State, Schroeder immediately made contact via email with the Secretary of State's office. The Secretary of State's office then claimed, in reply, that "there is no statute allowing electronic signatures for petitions in Idaho Statutes 34 Chapter 18," and that they were therefore unable to take action. When Schroeder then brought this information to Mitzel and the Governor's office, Mitzel replied as follow:

> *Given our intense focus on spending as much time and resources on protecting the health and safety of the broader population, the Governor's Office has no intention of taking executive action on this matter.*

34. Later that day, in a public statement given to BSU Public Radio, the Governor's Press Secretary Marissa Morrison Hyer said "Idaho statute does not allow for the suspension of rules regarding the physical collection of signatures, even in times of emergency."

35. Upon learning that the Governor did not intend to take action, we made one last attempt to save the signature drive. I contacted Representative John Gannon and asked him to propose legislation in the Idaho House of Representatives that would temporarily adjust Idaho's ballot initiative rules. The following day, Rep. Gannon reported to me that he shared a legislative proposal with at least one member of majority leadership, but that he was unable to find support for the bill. In his judgment, there was no legislative path forward for the proposal.

36. By Wednesday, March 18th, we determined that we had exhausted all avenues of action. Neither the Governor, the Secretary of State, nor the Legislature were willing to take action, and there were no available tactics for collecting in-person signatures while also preserving the safety of our volunteers and the wider public.

37. That morning, we sent the following message to our supporters via email newsletter and social media:

> *After carefully reviewing the latest recommendations of public health authorities, we have concluded that it is no longer safe for volunteers to engage in the face-to-face interactions that are necessary for effective signature gathering. In order to protect the health of our volunteers and the wider public, we are calling on all Reclaim Idaho volunteers to suspend signature collection until further notice.*
>
> *We do not make this decision lightly. Tragically, the coronavirus pandemic brought our signature drive to a standstill at the exact moment when we'd built our strongest momentum. Thanks to the hard work of volunteers across the state during the past month, our campaign cleared 30,000 signatures—more than we'd collected at this stage of the Medicaid Expansion campaign.*
>
> *But health and safety must come first. There is simply too much at risk to take chances.*

38. Governor Little's proclamation of a stay-at-home order was issued on March 25th. That order remains in partial effect today and remained in full effect through April 30th, which coincidentally was the final day before the official signature-gathering deadline on May 1st.

39. Our decision to suspend operations was based on our assessment of the risks of signature gathering in the midst of a pandemic.

40. The stay-at-home order exacerbated the risk and made signature-gathering impossible.

41. Reclaim Idaho has invested time in developing a model for an online signature-collection plan that will allow the initiative campaign to obtain sufficient and verifiable signatures of Idaho electors. Our plan will enable the county clerk offices to verify electronic signatures in a process that closely resembles the normal verification process. In order to reduce the burden on county clerks, we plan to submit all signatures currently in our possession that have not yet been verified in order to give county clerks time to process these signatures prior to the time period when electronic signatures will need to be processed. We estimate this total amount to be approximately 20,000 signatures.

42. Moreover, our plan will not impose significant additional burdens on the Idaho Secretary of State. The following email, sent to me by Deputy Secretary of State Jason Hancock on Wednesday, June 3rd, clarifies that the Secretary of State is not involved in verifying the validity of signatures, but only in counting them in order to determine whether the petition includes the requisite number of signatures statewide and the requisite number of signatures in 18 districts:

> *Since the county clerks, individually, are not in a position to know whether or not the petition includes the requisite number of valid signatures statewide, or the requisite number of valid signatures in at least 18 legislative districts, these tasks are performed by the Secretary of State after the various county clerks submit their reports showing the signatures that were submitted to them that they were able to verify.*

43. Furthermore, we are prepared to reduce the additional burden on the Secretary of State by immediately providing them with 10,593 signatures that have been verified already by county clerks.

44. Attached to this affidavit are slides that show how the electronic signature process would work. It will be under a contract with DocuSign, the country's leading company for execution of electronic signatures on legal documents.

45. Regarding the reliability of DocuSign as a system for collecting authentic signatures, the following information has been published by DocuSign, Inc.:

- In 2017, DocuSign was officially certified by the Federal Risk and Authorization Management Program (FedRAMP), a government-wide service that vets technology providers for security and risk. DocuSign is now used by 800 federal, state, and local government agencies, including the Federal Communications Commission (FCC), the state of North Carolina, the Nevada Department of Transportation, and 400 California cities.

- DocuSign is used by Fortune 500 companies and global financial institutions including T-Mobile, Apple, Aetna, VISA, and Prudential Financial.

- More than 775,000 documents are signed using DocuSign each day, yet only in 2-3 instances have DocuSign documents been challenged in court. DocuSign maintains a court admissible certificate of completion that provides proof of the signing process – including who signed what, when and where – for all parties in the transaction. A DocuSign electronic signature is more enforceable than a wet signature because of the court-admissible evidence it contains.

- Unlike wet signatures, e-signatures also come with an electronic record that serves as an audit trail and proof of the transaction. The audit trail includes the history of actions taken with the document, including the details of when it was opened, viewed and signed. Depending on the provider, and if the signer agreed to allow access to their location, the record will also show the geolocation where it was signed. If one of the signers disputes their signature, or if there's any question about the transaction, this audit trail is available to all participants in the transaction and can resolve such objections.

- As an additional layer of authentication, DocuSign signatures include certificates of completion, which can include specific details about each signer on the document, including the consumer disclosure indicating the signer agreed to use e-signature, the signature image, key event timestamps and the signer's IP address and other identifying information.

- Once the signing process is complete, all documents are digitally sealed using Public Key Infrastructure (PKI), an industry-standard technology. This seal indicates the electronic signature is valid and that the document hasn't been tampered with or altered since the date of signing.

46. Working with DocuSign, Reclaim Idaho has developed a plan to comply with Idaho's requirements for state initiative petitions, with additional safeguards to ensure that signatures are those of the persons whom they purport to be. The model will work as follows:

- Reclaim Idaho will establish a dedicated website for on-line signature collection.

- The landing page will ask for support to place the issue on the ballot to increase funding for K-12 education. The page will provide a link for the person to read the full text. It will notify persons that only Idaho registered voters are permitted to sign.

- If the person elects to proceed, they will enter their name, voter registration address, city or zip code, the last 4 digits of their social security number, and their email address.

- They will hit 'next' and be directed to a PDF of the petition that looks exactly like the paper version except that: 1. It will have only one signature line, 2. It will have fields for the last 4 digits of their SSN and the county where the elector resides, and 3. The circulator statement will have additional wording due to the on-line nature. All of the fields will populate from the information provided by the person on the prior page and they will be asked to confirm the information and authorize the placing of their signature on the petition. If they do, a cursive version of their signature will be affixed to the signature field or they can choose to draw their own signature electronically. Either way, the signature is legally binding, complying with the ESIGN Act. The document will be a self-contained single signature complete part-petition.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED ON this 5th day of June 2020.

/s/Luke Mayville

SIGN OUR OFFICIAL PETITION TO INCREASE FUNDING FOR K-12 EDUCATION. IT ONLY TAKES A COUPLE OF MINUTES.

DUE TO COVID-19, WE ARE COLLECTING SIGNATURES ELECTRONICALLY TO QUALIFY OUR K-12 INITIATIVE FOR THE BALLOT, AND WE NEED YOUR HELP!

PLEASE FILL OUT THE FORM BELOW. AFTER YOU FILL OUT THE FORM, YOU WILL BE REDIRECTED TO A SITE WHERE YOU WILL SIGN THE OFFICIAL PETITION.

Name *

First Name Last Name

Street Address *
Where you're registered to vote

City or Zip Code *

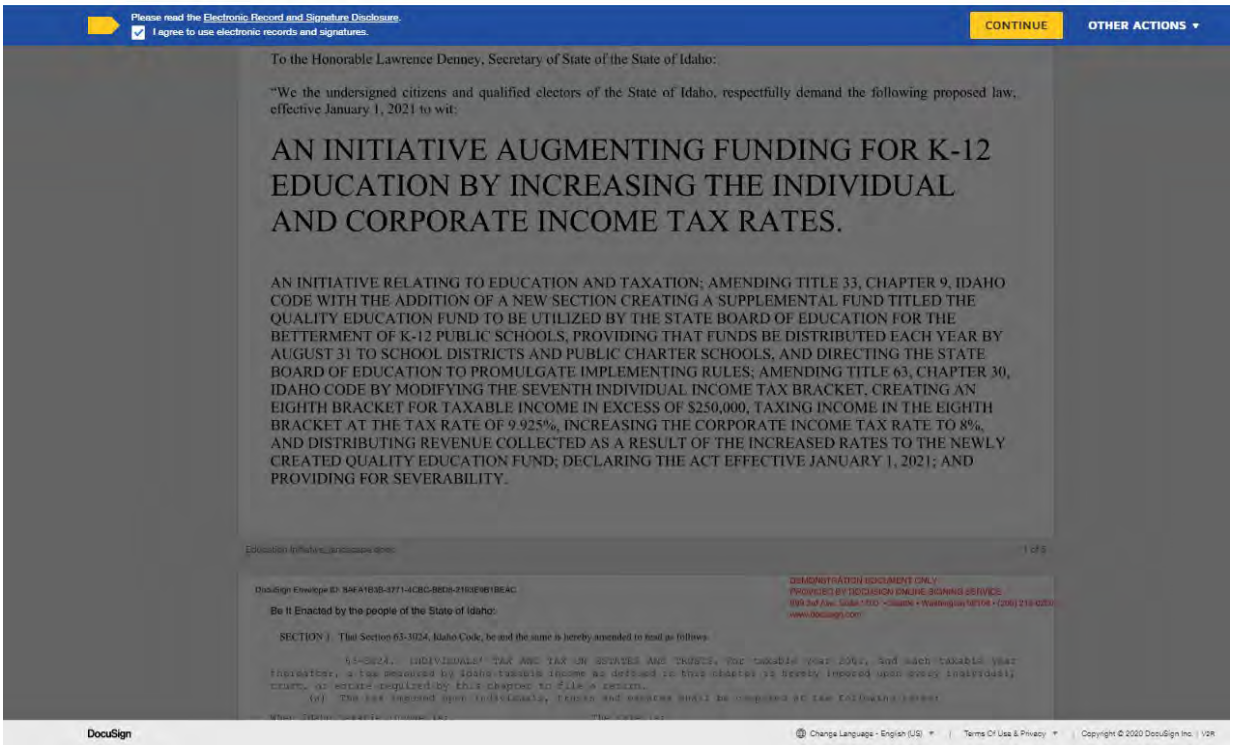
Date *

County *

Last 4 Digits of SSN
This helps the county confirm your identity to verify your signature.

Email *

I AM A REGISTERED IDAHO VOTER AND I WANT TO SIGN THE PETITION TO INCREASE FUNDING FOR K-12 EDUCATION


Please read the Electronic Record and Signature Disclosure.
I agree to use electronic records and signatures.
CONTINUE
OTHER ACTIONS
To the Honorable Lawrence Denney, Secretary of State of the State of Idaho:
"We the undersigned citizens and qualified electors of the State of Idaho, respectfully demand the following proposed law, effective January 1, 2021 to wit:
AN INITIATIVE AUGMENTING FUNDING FOR K-12 EDUCATION BY INCREASING THE INDIVIDUAL AND CORPORATE INCOME TAX RATES.
AN INITIATIVE RELATING TO EDUCATION AND TAXATION; AMENDING TITLE 33, CHAPTER 9, IDAHO CODE WITH THE ADDITION OF A NEW SECTION CREATING A SUPPLEMENTAL FUND TITLED THE QUALITY EDUCATION FUND TO BE UTILIZED BY THE STATE BOARD OF EDUCATION FOR THE BETTERMENT OF K-12 PUBLIC SCHOOLS, PROVIDING THAT FUNDS BE DISTRIBUTED EACH YEAR BY AUGUST 31 TO SCHOOL DISTRICTS AND PUBLIC CHARTER SCHOOLS, AND DIRECTING THE STATE BOARD OF EDUCATION TO PROMULGATE IMPLEMENTING RULES; AMENDING TITLE 63, CHAPTER 30, IDAHO CODE BY MODIFYING THE SEVENTH INDIVIDUAL INCOME TAX BRACKET, CREATING AN EIGHTH BRACKET FOR TAXABLE INCOME IN EXCESS OF $250,000, TAXING INCOME IN THE EIGHTH BRACKET AT THE TAX RATE OF 9.925%, INCREASING THE CORPORATE INCOME TAX RATE TO 8%, AND DISTRIBUTING REVENUE COLLECTED AS A RESULT OF THE INCREASED RATES TO THE NEWLY CREATED QUALITY EDUCATION FUND; DECLARING THE ACT EFFECTIVE JANUARY 1, 2021; AND PROVIDING FOR SEVERABILITY.
DocuSign Envelope ID: 8AFA1B3B-3771-4CBC-B8D8-2193E9B1BEAC
DEMONSTRATION DOCUMENT ONLY
PROVIDED BY DOCUSIGN ONLINE SIGNING SERVICE
Be It Enacted by the people of the State of Idaho:
SECTION 1. That Section 63-3024, Idaho Code, be and the same is hereby amended to read as follows:
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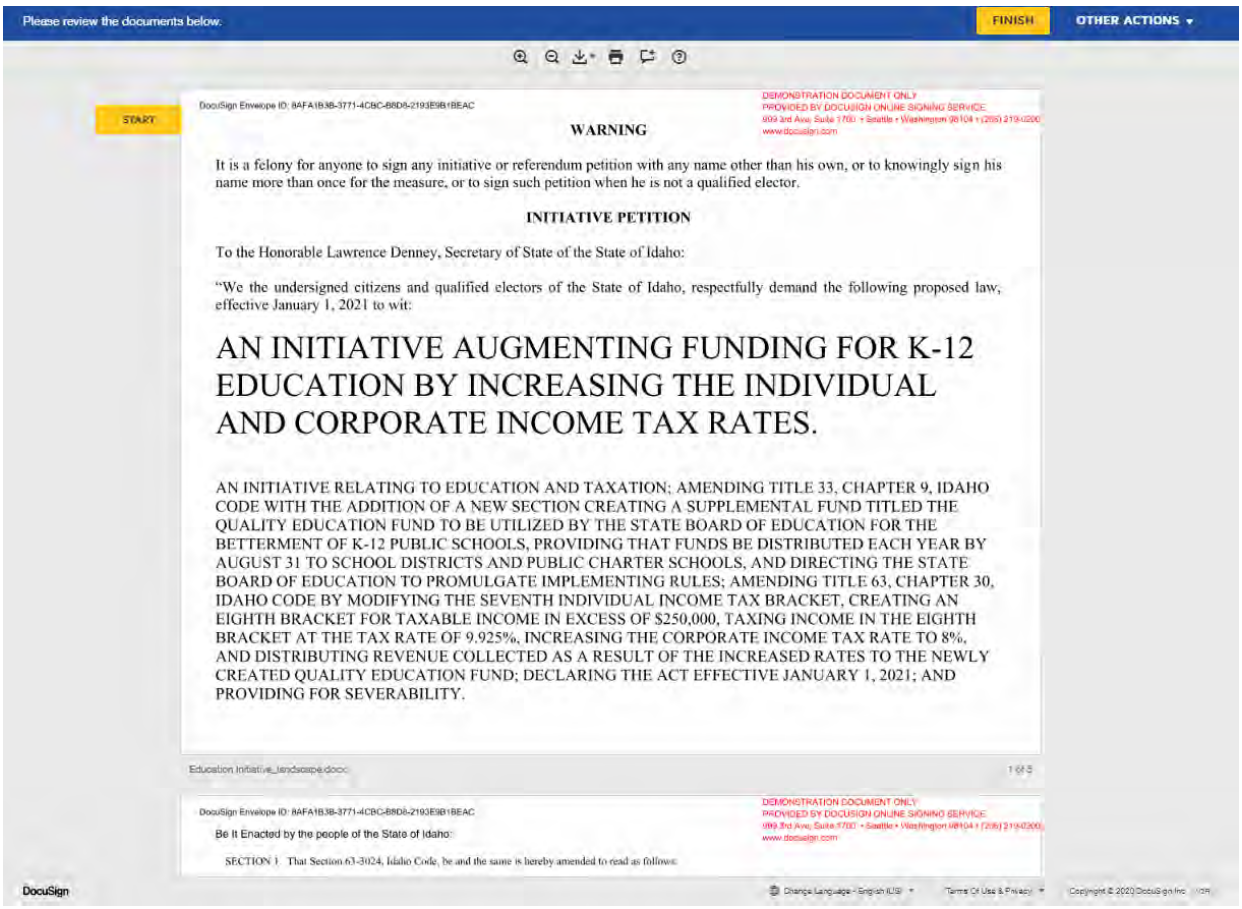
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WARNING
It is a felony for anyone to sign any initiative or referendum petition with any name other than his own, or to knowingly sign his name more than once for the measure, or to sign such petition when he is not a qualified elector.
INITIATIVE PETITION
To the Honorable Lawrence Denney, Secretary of State of the State of Idaho:
"We the undersigned citizens and qualified electors of the State of Idaho, respectfully demand the following proposed law, effective January 1, 2021 to wit:
AN INITIATIVE AUGMENTING FUNDING FOR K-12 EDUCATION BY INCREASING THE INDIVIDUAL AND CORPORATE INCOME TAX RATES.
AN INITIATIVE RELATING TO EDUCATION AND TAXATION; AMENDING TITLE 33, CHAPTER 9, IDAHO CODE WITH THE ADDITION OF A NEW SECTION CREATING A SUPPLEMENTAL FUND TITLED THE QUALITY EDUCATION FUND TO BE UTILIZED BY THE STATE BOARD OF EDUCATION FOR THE BETTERMENT OF K-12 PUBLIC SCHOOLS, PROVIDING THAT FUNDS BE DISTRIBUTED EACH YEAR BY AUGUST 31 TO SCHOOL DISTRICTS AND PUBLIC CHARTER SCHOOLS, AND DIRECTING THE STATE BOARD OF EDUCATION TO PROMULGATE IMPLEMENTING RULES; AMENDING TITLE 63, CHAPTER 30, IDAHO CODE BY MODIFYING THE SEVENTH INDIVIDUAL INCOME TAX BRACKET, CREATING AN EIGHTH BRACKET FOR TAXABLE INCOME IN EXCESS OF $250,000, TAXING INCOME IN THE EIGHTH BRACKET AT THE TAX RATE OF 9.925%, INCREASING THE CORPORATE INCOME TAX RATE TO 8%, AND DISTRIBUTING REVENUE COLLECTED AS A RESULT OF THE INCREASED RATES TO THE NEWLY CREATED QUALITY EDUCATION FUND; DECLARING THE ACT EFFECTIVE JANUARY 1, 2021; AND PROVIDING FOR SEVERABILITY.
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Be It Enacted by the people of the State of Idaho:
SECTION 1. That Section 63-3024, Idaho Code, be and the same is hereby amended to read as follows:
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in the brackets above to arrive at that year's Idaho taxable income for tax brackets above $237,958. For the $20,000 and over bracket contained in subsection (a) of this section, the state tax commission shall provide an adjustment factor for the bracket amount by multiplying the bracket amount by the percentage (the consumer price index for the calendar year immediately preceding the calendar year to which the adjusted bracket will apply divided by the consumer price index for calendar year 2022).
(b) In case a joint return is filed by husband and wife pursuant to the provisions of section 63-3021, Idaho Code, the tax imposed by this section shall be twice the tax which would be imposed on one-half (1/2) of the aggregate Idaho taxable income. For the purposes of this section, a return of a surviving spouse, as defined in section 2(a) of the Internal Revenue Code, and a head of household, as defined in section 2(b) of the Internal Revenue Code, shall be treated as a joint return and the tax imposed shall be twice the tax which would be imposed on one-half (1/2) of the Idaho taxable income.
(c) In the case of a trust that is an electing small business trust as defined in section 1361 of the Internal Revenue Code, the special rules for taxation of such trusts contained in section 641 of the Internal Revenue Code shall apply except that the maximum individual rate provided in this section shall apply in computing tax due under this chapter.
(d) The state tax commission shall compute and publish Idaho income tax liability for taxpayers at the midpoint of each bracket of Idaho taxable income in fifty dollar ($50.00) steps to fifty thousand dollars ($50,000), rounding such calculations to the nearest dollar. Taxpayers having income within such brackets shall file returns based upon and pay taxes according to the schedule thus established. The state tax commission shall promulgate rules defining the conditions upon which such returns shall be filed.
SECTION 2. That Section 63-3025, Idaho Code, be and the same is hereby amended to read as follows:
63-3025. TAX ON CORPORATE INCOME. (1) For taxable years commencing on and after January 1, 2001, a tax is hereby imposed on the Idaho taxable income of a corporation, other than an S corporation, which transacts or is authorized to transact business in this state or which has income attributable to this state. The tax shall be equal to eight percent (8%) of Idaho taxable income.
(2) In the case of an S corporation that is required to file a return under section 63-3030, Idaho Code, a tax is hereby imposed at the rate provided in subsection (1) of this section upon both:
(a) Net recognized built-in gain attributable to this state. The amount of net recognized built-in gain attributable to this state shall be computed in accordance with section 1374 of the Internal Revenue Code subject to the apportionment and allocation provisions of section 63-3027, Idaho Code.
(b) Excess net passive income attributable to this state. The amount of excess net passive income attributable to this state shall be computed in accordance with section 1375 of the Internal Revenue Code subject to the apportionment and allocation provisions of section 63-3027, Idaho Code.
(3) The tax imposed by subsection (1) or (2) of this section shall not be less than twenty dollars ($20.00); provided further that the twenty dollar ($20.00) minimum payment shall not be collected from nonproductive mining corporations.
(4) The tax imposed by this section shall not apply to corporations taxed pursuant to the provisions of section 63-3025A, Idaho Code.
SECTION 3. That Section 63-3067, Idaho Code, be and the same is hereby amended to read as follows:
63-3067. REVENUE RECEIVED – STATE REFUND ACCOUNT. (1) A sum equal to the amount withheld under section 63-3035A, Idaho Code, shall be distributed fifty percent (50%) to the public school income fund to be utilized to facilitate and provide substance abuse programs in the public school system, and fifty percent (50%) shall be distributed to the counties to be utilized for county juvenile probation services. These funds shall be distributed
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3 of 5
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quarterly to the counties based upon the percentage the population of the county bears to the population of the state
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quarterly to the counties based upon the percentage the population of the county bears to the population of the state as a whole.
(2) All moneys except as provided in subsection (1) of this section, and except as hereinafter provided, received by the state of Idaho under this act shall be deposited by the state tax commission, as received by it, with the state treasurer and shall be placed in and become a part of the general account under the custody of the state treasurer. Providing however, that certain amounts collected under chapter 30, title 63, Idaho Code, will be distributed to the quality education fund created in section 33-911, Idaho Code, as follows: from each single individual or married individual filing separately reporting Idaho taxable income that equals or exceeds the highest tax bracket starting figure, including any inflation adjustment provided in section 63-3024(a), Idaho Code, thirty percent (30%) of the amounts collected; from individuals treated as filing a joint return under section 63-3024, Idaho Code, reporting Idaho taxable income that equals two (2) times or exceeds two (2) times the highest tax bracket starting figure, including any inflation adjustment provided in section 63-3024(a), Idaho Code, thirty percent (30%) of the amounts collected; and from corporations reporting Idaho taxable income or income attributable to this state, thirteen percent (13%) of the amounts collected. For purposes of the preceding sentence, "amounts collected" means the tax imposed by section 63-3024, 63-3025, or 63-3025A, Idaho Code, as adjusted for tax credits against such tax, plus any interest, penalty, and other additions to such tax, except for the section 63-3082, Idaho Code, additional tax; provided that, such other additions are interest, tax, or recapture of a tax imposed by chapter 30, title 63, Idaho Code. For individuals, the "amounts collected" determination is reduced, but not below zero (0), by the tax adjustment base amount for the highest tax bracket contained in section 63-3024(a), Idaho Code, and for individuals treated as filing a joint return, two (2) times the tax adjustment base amount for the highest tax bracket. Providing however, that an amount equal to twenty percent (20%) of the amount deposited with the state treasurer shall be placed in the "state refund account" which is hereby created for the purpose of repaying overpayments and for the purpose of paying any other erroneous receipts illegally assessed or collected, penalties collected without authority and taxes and licenses unjustly assessed, collected or which are excessive in amount. Whenever necessary for the purpose of making prompt payment of refunds, the board of examiners, upon request from the state tax commission, and after review, may authorize the state tax commission to transfer any additional specific amount from income tax collections to the "state refund account." There is appropriated out of the state refund account so much thereof as may be necessary for the payment of the refunds herein provided. Claims for, and payment of refunds under the provisions of this section shall be made in the same manner as other claims against the state of Idaho.
(3) Any unencumbered balance remaining in the state refund account on June 30 of each and every year in excess of the sum of one million five hundred thousand dollars ($1,500,000) shall be transferred to the general fund and the state controller is hereby authorized and directed on such dates to make such transfers unless the board of examiners, which is hereby authorized to do so, changes the date of transfer or sum to be transferred.
SECTION 4. That Chapter 9, Title 33, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION to be known and designated as Section 33-911, Idaho Code, and to read as follows:
33-911. QUALITY EDUCATION FUND—RULEMAKING-DEFINITIONS. (1) There is hereby created in the state treasury a fund to be known as the quality education fund. The fund shall consist of moneys made available through legislative transfers or appropriations, from the sales tax account, from the state income tax, the state franchise tax, and from any other governmental or private sources. Interest earned from investment of idle moneys in the fund shall be returned to the fund. Moneys in the fund are continuously appropriated and shall be expended by the state board of education to invest in betterment of public schools in Idaho to achieve the following goals: Reducing class sizes and preventing class size increases; attracting and retaining highly qualified teachers and support staff, including but not limited to, providing competitive salaries, offering continuing education opportunities, and providing support for new educators; providing current and adequate classroom materials, such as textbooks and supplies for students; providing full day kindergarten; providing career technical education; providing art, music and drama programs; and providing special education services.
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(2) By not later than August 31, moneys in the fund pursuant to the distribution provided in subsection (1) of
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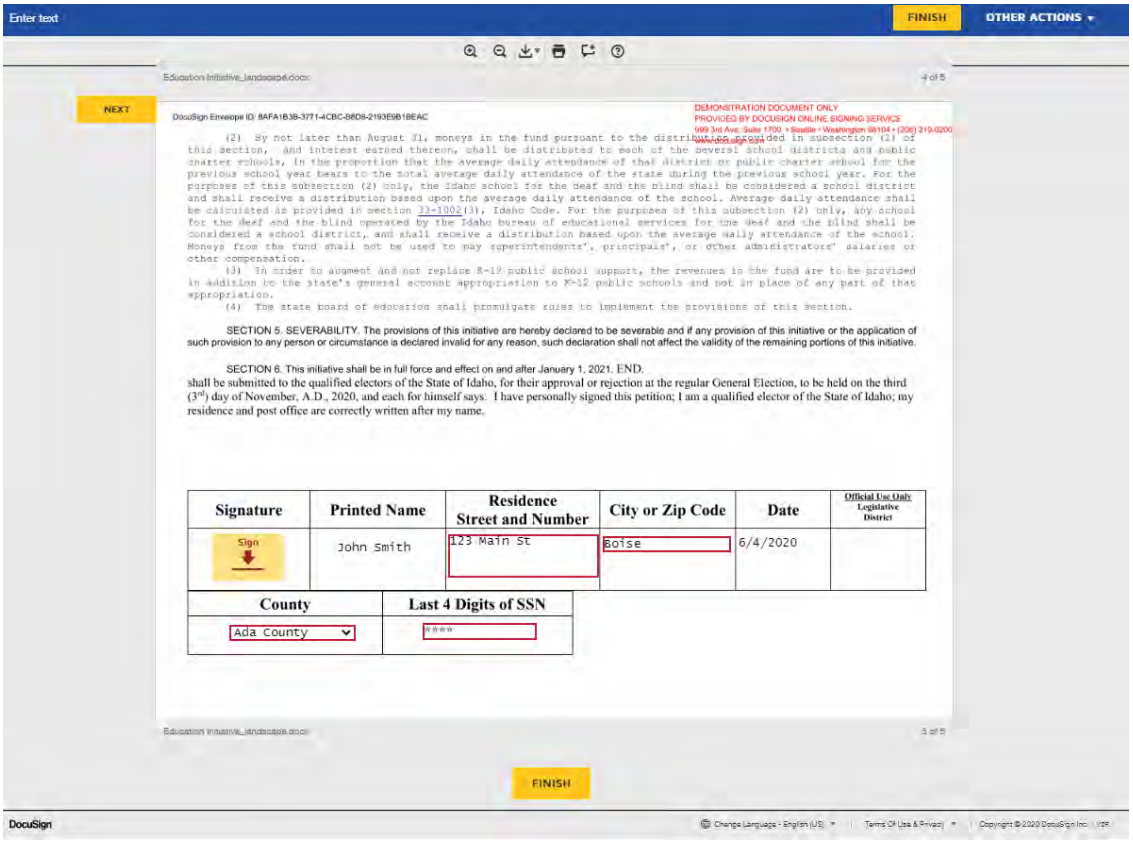
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(2) By not later than August 31, moneys in the fund pursuant to the distribution provided in subsection (1) of this section, and interest earned thereon, shall be distributed to each of the several school districts and public charter schools, in the proportion that the average daily attendance of that district or public charter school for the previous school year bears to the total average daily attendance of the state during the previous school year. For the purposes of this subsection (2) only, the Idaho school for the deaf and the blind shall be considered a school district and shall receive a distribution based upon the average daily attendance of the school. Average daily attendance shall be calculated as provided in section 33-1002(3), Idaho Code. For the purposes of this subsection (2) only, any school for the deaf and the blind operated by the Idaho bureau of educational services for the deaf and the blind shall be considered a school district, and shall receive a distribution based upon the average daily attendance of the school. Moneys from the fund shall not be used to pay superintendents', principals', or other administrators' salaries or other compensation.
(3) In order to augment and not replace K-12 public school support, the revenues in the fund are to be provided in addition to the state's general account appropriation to K-12 public schools and not in place of any part of that appropriation.
(4) The state board of education shall promulgate rules to implement the provisions of this section.
SECTION 5. SEVERABILITY. The provisions of this initiative are hereby declared to be severable and if any provision of this initiative or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this initiative.
SECTION 6. This initiative shall be in full force and effect on and after January 1, 2021. END.
shall be submitted to the qualified electors of the State of Idaho, for their approval or rejection at the regular General Election, to be held on the third (3rd) day of November, A.D., 2020, and each for himself says: I have personally signed this petition; I am a qualified elector of the State of Idaho; my residence and post office are correctly written after my name.
Signature
Printed Name
Residence Street and Number
City or Zip Code
Date
Official Use Only Legislative District
Sign
John Smith
123 Main St
Boise
6/4/2020
County
Last 4 Digits of SSN
Ada County
****
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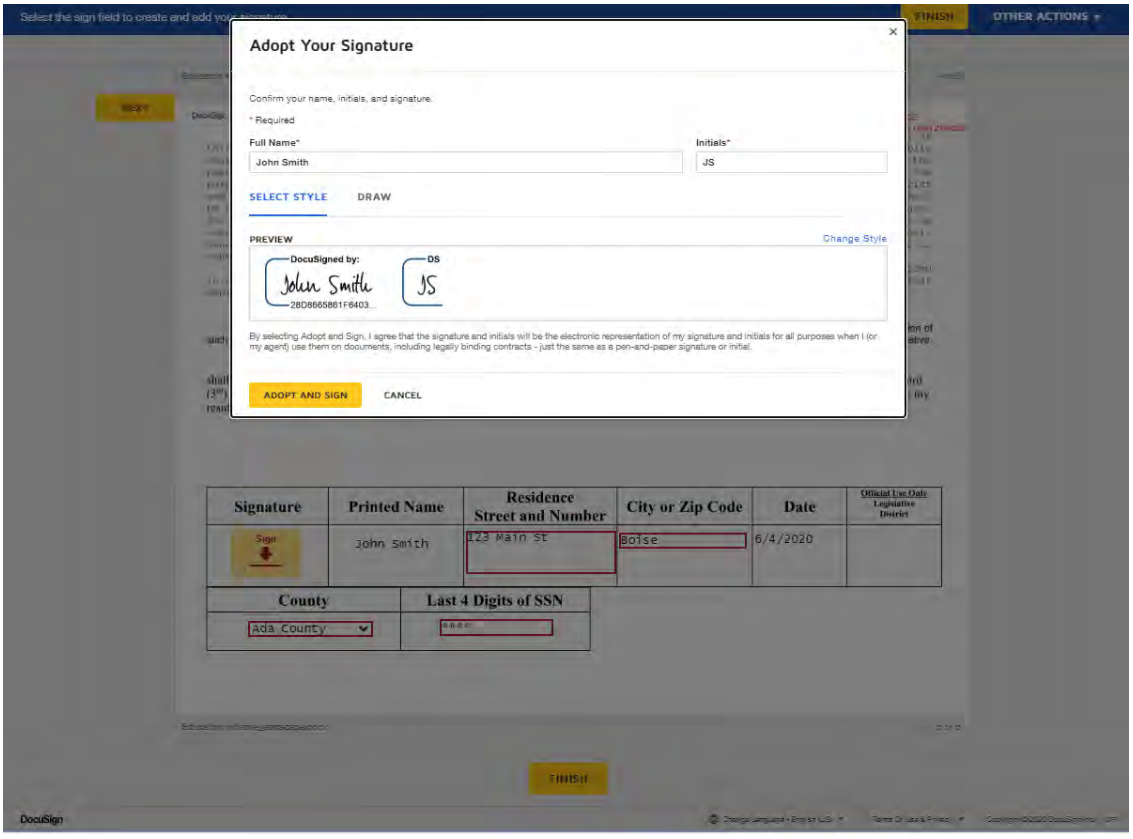
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OTHER ACTIONS
Adopt Your Signature
Confirm your name, initials, and signature.
* Required
Full Name*
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Initials*
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John Smith
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By selecting Adopt and Sign, I agree that the signature and initials will be the electronic representation of my signature and initials for all purposes when I (or my agent) use them on documents, including legally binding contracts - just the same as a pen-and-paper signature or initial.
ADOPT AND SIGN
CANCEL
Signature
Printed Name
Residence Street and Number
City or Zip Code
Date
Official Use Only Legislative District
Sign
John Smith
123 Main St
Boise
6/4/2020
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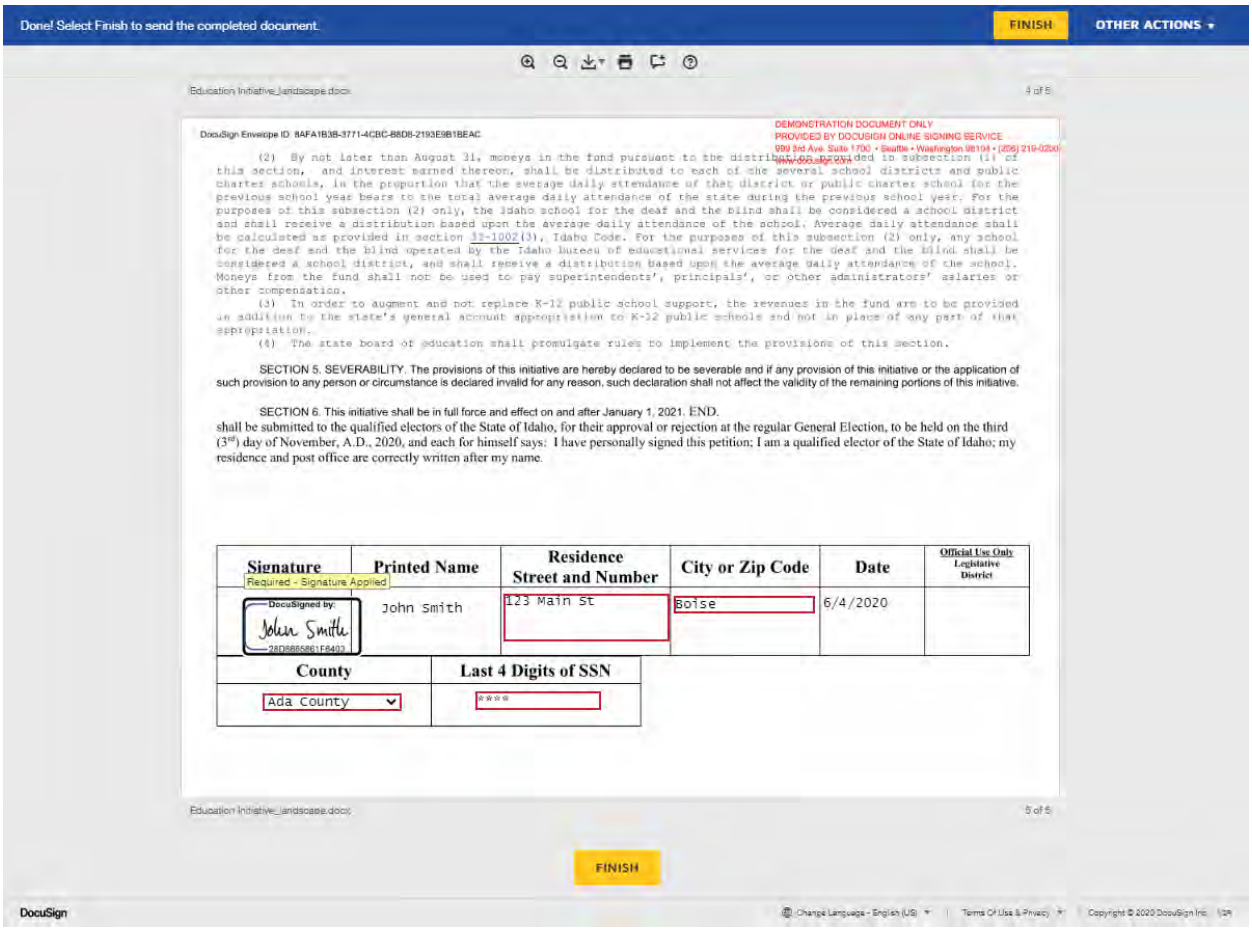
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(2) By not later than August 31, moneys in the fund pursuant to the distribution provided in subsection (1) of this section, and interest earned thereon, shall be distributed to each of the several school districts and public charter schools, in the proportion that the average daily attendance of that district or public charter school for the previous school year bears to the total average daily attendance of the state during the previous school year. For the purposes of this subsection (2) only, the Idaho school for the deaf and the blind shall be considered a school district and shall receive a distribution based upon the average daily attendance of the school. Average daily attendance shall be calculated as provided in section 33-1002(3), Idaho Code. For the purposes of this subsection (2) only, any school for the deaf and the blind operated by the Idaho bureau of educational services for the deaf and the blind shall be considered a school district, and shall receive a distribution based upon the average daily attendance of the school. Moneys from the fund shall not be used to pay superintendents', principals', or other administrators' salaries or other compensation.
(3) In order to augment and not replace K-12 public school support, the revenues in the fund are to be provided in addition to the state's general account appropriation to K-12 public schools and not in place of any part of that appropriation.
(4) The state board of education shall promulgate rules to implement the provisions of this section.
SECTION 5. SEVERABILITY. The provisions of this initiative are hereby declared to be severable and if any provision of this initiative or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this initiative.
SECTION 6. This initiative shall be in full force and effect on and after January 1, 2021. END.
shall be submitted to the qualified electors of the State of Idaho, for their approval or rejection at the regular General Election, to be held on the third (3rd) day of November, A.D., 2020, and each for himself says: I have personally signed this petition; I am a qualified elector of the State of Idaho; my residence and post office are correctly written after my name.
Signature
Required - Signature Applied
Printed Name
Residence Street and Number
City or Zip Code
Date
Official Use Only Legislative District
DocuSigned by:
John Smith
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John Smith
123 Main St
Boise
6/4/2020
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Reclaim Idaho Exhibit E

Declaration of Rebecca Schroeder

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

RECLAIM IDAHO, an Idaho Political Action Committee; **LUKE MAYVILLE** Plaintiffs, v. **BRADLEY LITTLE**, in his official capacity as Governor of Idaho; **LAWERENCE DENNEY**, in his official capacity as Idaho Secretary of State; Defendants.	Case No. 1:20-cv-00268-BLW **DECLARATION OF REBECCA SCHROEDER IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

I, Rebecca Schroeder, having first been duly sworn upon oath, declare as follows:

1. My name is Rebecca Schroeder, and I am the Executive Director of Reclaim Idaho, a Plaintiff in this case.

2. I took the role of Executive Director of Reclaim Idaho on March 15th, 2019.

3. During the spring and summer of 2019, my work was focused on advocating to keep Idaho's current ballot-initiative rules intact following a controversial legislative attempt to dramatically restrict the process for qualifying an initiative for the ballot.

4. Early in the fall, we filed our "Invest in Idaho" K-12 funding initiative with the Idaho Secretary of State and we launched our first volunteer organizing tour in September 2019 to build support for the policy and grow volunteer teams for signature gathering.

5. I hosted volunteer organizing meetings in the following Idaho locations on the dates listed. I was accompanied by my colleagues Alicia Abbott and Ashley Prince for most of these meetings. Meetings were held in private homes, cafes, and libraries. Between 2 and 20 volunteers attended each of these organizing meetings.

9/14/19: Sandpoint, ID
9/14/19: Port Hill, ID
9/16/19: Bonners Ferry, ID
9/17/19: Wallace, ID
9/18/19: Lewiston, ID
9/18/19: Moscow, ID
9/19/19: Orofino, ID
9/19/19: Grangeville, ID
9/21/19: Nampa, ID
9/24/19: Ketchum, ID
9/24/19: Twin Falls, ID
9/26/19: Salmon, ID
9/26/19: Idaho Falls, ID
9/27/19: Driggs, ID
9/27/19: Pocatello, ID
10/2/19: McCall, ID
10/3/19: Weiser, ID
11/4/19: Lewiston, ID (meeting 2)

6. These events garnered some earned media coverage and laid the groundwork for our signature drive.

7. At this point, we had identified volunteer leaders from communities all over Idaho.

8. I felt confident that we were headed toward meeting Idaho's distribution requirement of signatures from 6% of registered voters in at least 18 Idaho Districts.

9. After our first big week of signature gathering in early November, local volunteer teams continued to build volunteer capacity and host local signature gathering events.

10. The signature gathering process, in itself, helped us identify more supporters of the policy that often converted to volunteering.

11. The more signatures we gathered, the more our local volunteer teams grew.

12. Volunteer organizing meetings and signature gathering events continued in:

11/18/19: Bonners Ferry Organizing (second meeting)
12/3/19: Boise Run-off election signature gathering day at the polls
12/6/19: Idaho Falls, ID Organizing meeting (second meeting)
12/7/19: Pocatello, ID Organizing meeting (second meeting)
12/7/19: Rexburg, ID Organizing meeting
12/9/19: Kooskia, ID Organizing meeting
12/15/19: Boise, ID Holiday signature gathering at the Egyptian Theater

13. Volunteers continued to collect signatures through the holiday season. In January, local teams began ramping up for higher volumes of signatures each week.

14. We had built relationships and consistent communications with established local teams by this time, and conducted countless phone calls, Zoom calls, and emails in between our in person visits, to support volunteer efforts and help set local goals for signature collection.

15. Signature gathering goals increased as teams built volunteer capacity and leadership, and as the campaign moved closer to the April 30th deadline.

16. The earned media, and volunteer team growth assisted our fundraising capability as well—which enabled us to provide resources like clipboards, banners, literature, and petitions to our local teams and increase the advertising opportunities for the Invest in Idaho campaign.

17. In January, we continued to build the campaign by hosting a series of signature gathering events alongside established local teams.

1/19/20--Boise Meeting and Canvass
1/25/20--McCall Winter Festival signature gathering
1/30/20--Moscow Meeting and Canvass
2/1/20--Sandpoint Meeting and Canvass
2/3/20—Coeur d' Alene

18. After the Coeur d' Alene canvassing event, my colleague Plaintiff Luke Mayville took on the rest of the event tour through central, southern, and eastern Idaho. I remained in the Idaho Panhandle to continue ramping up signature gathering events in north Idaho

19. During the month of February 2020, local teams participated in more signature gathering events than ever—bringing in higher numbers of signatures each week.

20. In my home District 4, we were hosting big signature gathering events every week, as well as scheduling volunteer signature gathering shifts on most days outside the Public Library.

21. This increased level of activity was replicated by established local teams throughout the state in February and early March.

Enter Covid-19 Pandemic

22. By the beginning of the second week of March, news of the coronavirus had begun to impair our campaign efforts and negatively impact volunteer signature-gathering and fundraising.

23. With rapidly evolving information from the CDC, and a deep responsibility to the safety of our volunteers and the general public—Reclaim Idaho attempted to adapt to "clean signature gathering strategies" by recommending infection control guidelines and scrambling to provide extra supplies like disposable pens and hand sanitizer to our volunteers.

24. During the week of March 8th-14th, I reached out by phone to local volunteer leaders to communicate our new guidelines for safer signature collection, and assess volunteer concerns about safety.

25. A large percentage of Reclaim Idaho volunteers are retirees, in a high risk group for Covid-19 complications. It became clear through those conversations that volunteers were fearful of contracting the virus.

26. Volunteer-led door-to-door canvassing events were cancelled by concerned volunteers in communities all around the state that week.

27. Signature gathering at large public events also ground to an immediate halt as events were cancelled.

28. On March 12th, I removed my 12 year old son with cystic fibrosis from public school and began self-isolating on the recommendation of his pulmonologist. Many of our volunteers also received advice from their medical professionals to avoid interactions with the public.

29. By Monday March 16th, it became abundantly clear that there was NO SAFE METHOD to continue to encourage tens of thousands of face-to-face conversations with voters.

30. The CDC guideline of social distancing by at least 6 ft., made in-person signature gathering virtually impossible.

31. On March 16th, I began communicating these concerns to Governor Little and the Idaho Secretary of State.

Reclaim Idaho's Communications with Governor Little's Office Regarding Covid-19

32. At 8:02 am I emailed Andrew Mitzel, Senior Advisor to Gov. Little the following:

> Dear Andrew,
> As you know, we are facing the unprecedented circumstances of a public health crisis. Volunteers around the state have been working for months collecting signatures for the citizen ballot initiative to increase funds to Idaho K-12 schools. Collecting signatures

face-to-face puts both volunteers and the general public at risk, and goes against the guidelines that we are hearing from public health officials.
The result is that **Idahoans are no longer able to exercise their constitutional right to bring forward a ballot initiative.** Please give Reclaim Idaho co-founder Luke Mayville the opportunity to meet with the Governor about the safest way to move forward with our ballot initiative. We have already collected over 30K signatures, and were well on our way to qualifying the initiative. Hundreds of volunteers have already put in hundreds of hours. Along with the Governor, our priority is the health and safety of our Idaho communities. This extraordinary situation requires action by the Governor to ensure the public safety is maintained while we exercise our Constitutional rights.
Sincerest thanks, Rebecca Schroeder

33. Andrew Mitzel responded at 9:04 am and wrote:

Thanks for reaching out. I would encourage you to reach out to the Secretary of State's office with your concerns regarding ballot initiatives as they oversee that process.- Andrew

34. I responded that:

We have been simultaneously consulting with the SOS office. They advised us that it would take a Legislative or Executive action to extend the signature deadline. We have communicated with them about **electronic signature gathering (the only safe method at this point)** also, and await their response. I hope that if Executive action is required--that Governor Little would consider a meeting with one of us. I know you all are bombarded with trying to deal with this crisis...we are doing the same. Hundreds of volunteers have put their hearts into this effort. We understand that this is an extraordinary request--but we are certainly in extraordinary times.

35. Andrew Mitzel again referred Reclaim to the Secretary of State's office, stating:

Rebecca: We understand your concerns about the limitations that the current situation presents. The Secretary of State's office is actively working on ways to make the election process move forward in light of the concerns about spreading coronavirus, and your organization may benefit from using some of their ideas. The Governor's Office is intently focused on the health and safety of the broader population right now, and we are referring you to the Secretary of State's office to resolve these concerns.

36. I again wrote to Andrew Mitzel that we were being advised that the Secretary of State's office did not have the jurisdiction to resolve this, and requested a meeting. I wrote:

Dear Andrew: The SOS has just informed us that a change to electronic signature gathering would require Executive or Legislative action. I understand that the Governor's office is very busy dealing with this crisis--but the SOS does not have jurisdiction to

resolve this--and it absolutely falls under the realm of protecting wider public safety. We request a meeting or phone call about this urgent matter please.

37. Andrew Mitzel replied for the final time indicated the Governor would not take executive action, stating:

> Given our intense focus on spending as much time and resources on protecting the health and safety of the broader population, the Governor's Office has no intention of taking executive action on this matter.

38. I responded yet again, and indicated:

> that encouraging 100K face-to-face conversations as we exercise our constitutional rights **absolutely** falls into the category of protecting the wider public health, and requires the Governor's attention. Please consider at meeting or phone call to discuss this.
>
> One more important consideration--the Governor could face unintended liability for failing to address this urgent concern if people become ill due to his lack of action. We have an online petition circulating asking Governor Little to take action. I am speaking not just for our organization, but on behalf of the hundreds of folks who have volunteered time and energy on this. This is the right thing to do to protect public safety. Thank you.

Reclaim Idaho's Communications with Idaho Secretary of State regarding Covid-19

39. On behalf of Reclaim, I also communicated with the Secretary of State. I emailed:

> Dear Mr. Denney: We are faced with a global pandemic. Idahoans are responding by cancelling public events and dramatically reducing face-to-face interactions. This reality creates extraordinary obstacles for Idaho's ballot initiative process and the constitutional right of every Idahoan to participate in that process. Idaho's initiative qualification laws, which are among the strictest in the country, require tens of thousands of face-to-face interactions. In the interest of safeguarding the health of the public and protecting the constitutional rights of Idahoans, we are asking to authorize temporary online petitioning for Idaho ballot initiatives. The state of Idaho conducts much of our public business online, from voter registration to campaign finance documentation to the registration of new corporations. It is well within our capacity as a state to process petition signatures online. During these extraordinary times, online petitioning is the most effective way to protect public safety while maintaining the constitutional right of Idahoans to participate in the ballot initiative process.
> Please advise if this is within the realm of the SOS, or whether it would require Legislative or Executive action.
>
> As the executive director of Reclaim Idaho, I have hundreds of volunteers (many retirees and "at risk" individuals) reaching out to me for guidance. At this point, electronic signature gathering is truly the only safe path forward. Over 30K signatures have already

> been collected, and several districts have qualified with their 6% of voters. I understand that this is an extraordinary request--but we are obviously facing extraordinary times.

40. A staff member of the Secretary of State replied that electronic signatures were not allowed per the Idaho Code:

> Thank you and your fellow supporters for sharing your concern with us via email. While we understand the current situation we are in is unprecedented and can appreciate how the further efforts in attaining the remaining signatures for your petition will be complicated logistically, we are sorry to say that there is no statute allowing electronic signatures for petitions in Idaho Statutes 34 Chapter 18. Sincerely, Sheryl

Reclaim Idaho Forced to Suspend Campaign After State Refused to Modify Requirements

41. In one final attempt to salvage our signature drive, our team contacted Representative John Gannon on March 18th and asked him to propose legislation in the Idaho House of Representatives that would temporarily adjust Idaho's ballot initiative rules. After sharing a legislative proposal with at least one member of majority leadership, Rep. Gannon informed us that he was unable to find support for the bill and there was therefore no legislative path forward.

42. Without accommodations from Governor Little, the Idaho SOS, or the Idaho Legislature, Reclaim Idaho was left with no choice but to suspend signature gathering for the Invest in Idaho ballot initiative.

43. We had spent months building volunteer capacity, and were at the height of our signature gathering when COVID-19 arrived.

44. We were ahead of the pace that we had kept on our successful Medicaid Expansion initiative when we were forced to suspend our efforts.

45. Reclaim Idaho volunteers were on track to qualify the invest in Idaho initiative until Covid-19 hit.

46. It was heartbreaking to suspend the campaign that volunteers had worked so hard to build. We launched an online petition urging Governor Little to intervene, but no action was taken by Governor Little's office.

47. With signature gathering suspended—fundraising efforts also became impossible to sustain.

48. Because of the COVID-19 pandemic and public health orders, Idahoans were unable to exercise their First Amendment constitutional rights.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED ON this 5th day of June 2020.

/s/Rebecca Schroeder

Reclaim Idaho Exhibit F

Declaration of Ashley Prince

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

RECLAIM IDAHO, an Idaho Political Action Committee; **LUKE MAYVILLE** Plaintiff, v. **BRADLEY LITTLE**, in his official capacity as Governor of Idaho;**LAWERENCE DENNEY**, in his official capacity as Idaho Secretary of State Defendants.	Case No. 1:20-cv-00268-BLW **DECLARATION OF ASHLEY PRINCE IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

I, Ashley Prince, having first been duly sworn upon oath, declare as follows:

1. My name is Ashley Prince, and I am the Field Director of Reclaim Idaho, the Plaintiff in this case.

2. The Invest in Idaho campaign started with 143 volunteers in October 2019.

3. Throughout the signature drive, there were always a portion of our volunteers who collected signatures at a relatively high and frequent rate. I'll designate those volunteers here as "highly active."

4. Not including big events we had around 25 highly active volunteers around the state collecting an average of 12 signatures a week through December. By February we had around 80 highly active volunteers a week averaging 36 signatures a week.

5. By March 10th we had grown to 546 volunteers statewide with 150 being highly active, each with an average of 50 signatures per week.

6. Our volunteer network grew not only in terms of the sheer number of volunteers but also in geographic terms.

7. To give one example: On March 1st we activated a new team of volunteers in the town of Mountain Home, which is an area in which Reclaim Idaho had not previously organized. Within their first week, the newly organized Mountain Home team collected over 100 signatures.

8. We have a process to verify the signatures we collect by matching the signers of the petition against a list of registered Idaho voters provided by the Secretary of State. We have been able to do this work efficiently with the use of REACH, a smartphone app for data organization and grassroots organizing. We signed a contract for the use of REACH for $300 per month beginning in the fall of 2019.

9. The purpose of prescreening the signatures before submitting them to the local county clerks was to better keep track of how many signatures we collected so we knew as a campaign how close we were getting to the qualifying goal. This is a necessary step because the county clerks are not uniform on how quickly they verify signatures and certify petitions. The only deadline counties have to verify signatures is within 60 days of the petition turn-in deadline or no

later than June 30th of an election year. This deadline does not allow our campaign to change tactics to meet the goal or know how many signatures collected are valid until after the deadline.

10. The process of internally validating signatures is to have volunteers match the signer. We look for 3 key things. 1. Is the voters name legible? If it is not legible the clerks cannot find the voters information to certify the signature 2. Are they registered to vote in Idaho? 3. Are they registered to vote at the same address that they signed the petition with? If a volunteer finds that all 3 of these metrics are met the signature is classified as likely valid and goes towards the total of signatures needed to meet the qualifying goal.

11. Based on the campaign's internal verification of signatures we had qualified 5 legislative districts with another 7 expected to qualify by the end of March. The final 6 legislative districts were on pace to qualify in April before the deadline.

12. We collected an estimated 33,000 signatures by March 18th. Our internal verification indicated that 86% of those signatures were valid.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. EXECUTED ON this 5TH day of June 2020.

/s/ Ashley Prince

Reclaim Idaho Exhibit G

Declaration of Linda Larson

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

FOR THE 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 **LAWERENCE DENNEY**, in his official capacity as Idaho Secretary of State, Defendants.	Case No. 1:20-cv-00268-BLW **DECLARATION OF LINDA LARSON IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

I, Linda Larson, having first been duly sworn upon oath, declare as follows:

1. My name is Linda Larson, and I am the Volunteer Leader for Bonner County of Reclaim Idaho, a Plaintiff in this case.

2. The Reclaim Idaho "Invest In Idaho" campaign was abruptly halted on March 18, 2020 due to the coronavirus pandemic, after Reclaim's requests to state officials to allow electronic

signature gathering were denied. Our volunteer team in Sandpoint--working alongside a team of volunteers in Bonners Ferry--had already qualified District 1 and was ready to help add signatures to the statewide totals.

3. Had Reclaim Idaho been able to continue, there is no doubt in my mind that we would have successfully met the state requirements needed to see this put on the November ballot. I have provided a summary here of the events as they happened in Sandpoint, Idaho, Bonner County, District 1.

4. I served as a volunteer for Reclaim Idaho in the capacity of co-Leader for Bonner County during the 2017/2018 Medicaid Expansion campaign where our team collected over 4000 signatures. We easily qualified District 1 and helped collect additional signatures that went to the statewide totals needed to put Medicaid Expansion on the ballot. Our team consisted of over 100 dedicated volunteers.

5. The Invest in Idaho campaign started in November of 2019 and I accepted the volunteer position of Bonner County Leader.

6. Our team assembled quickly and collected over 300 signatures during our first one day event.

7. We began with the goal of collecting 100 signatures per week and easily exceeded that during most weeks.

8. On February 1, we held an event in Sandpoint to tell people more about the initiative and 65 people attended. We were able to recruit 55 new volunteers who committed to collect signatures at events or from friends and family.

9. The momentum from that event continued to build and we collected over 800 signatures during the month of February.

10. By early March, my team was beginning to become concerned about how the virus might affect our campaign.

11. We decided to set a new goal of qualifying no later than March 30 in case the virus disrupted our collection activities.

12. The majority of our team in Sandpoint is over 60 years old, and many had high risk family members as well, so we were on high alert for potential risks.

13. Starting in early March, we began purchasing masks, gloves, hand sanitizers and disinfectant wipes.

14. We started requiring that all volunteers use the extra hygiene precautions and provided pocketed aprons and supplies to everyone collecting at public events.

15. As the CDC guidelines began to be released, our team decided that the last public event that we would collect signatures at would be March 13 as we no longer believed that we could assure the safety of our volunteers and the public.

16. Specifically, volunteers Nancy Gerth, Jill Trick, Carol Holmes, Rebecca Holland, and Linda Byars, voiced concerns about safety for themselves and for the public.

17. We all brainstormed about different possible methods for collecting in a safe manner, but in the end Reclaim Idaho suspended the campaign on March 18 after the leadership of Reclaim Idaho were informed we could not collect signatures electronically or get an extension to the original signature deadline.

18. In the absence of a solution to collect signatures during the pandemic, we were all very discouraged, frustrated and disappointed. Reclaim Idaho's volunteers called and emailed the Governor and asked for an extension of the deadline or permission to collect signatures electronically. Governor Little denied our requests which left us feeling demoralized.

19. I believe the state of Idaho has a responsibility to protect our rights during these unprecedented times.

20. In an interview with National Public Radio that aired on March 31st, I spoke of the importance of the initiative process for addressing the underfunding of Idaho schools: "If our legislators aren't willing to solve it, then, OK, fine, we'll do this, but give us the tools to be able to do this. That's all we're asking."

21. We immediately stopped all collection activities and turned in our last petitions to the elections office on March 27.

22. Because we had increased our collection efforts in early March, we were easily able to qualify our district, five weeks before the April 30 deadline.

23. From my experience with the Medicaid Expansion efforts, the last six weeks were by far the most productive weeks during the collection window.

24. This campaign was no different except that I feel we had a stronger, more experienced team this time around.

25. I have no doubt that our team would have continued to work hard right up to the deadline to ensure that the statewide totals were met. We even had a dedicated team who was ready to travel to other districts that needed assistance. One volunteer, Rebecca Holland, offered to lead this venture and offered to fund the travel expenses as an in-kind donation to Reclaim Idaho.

26. My team of volunteers understood that the current level of funding for education in Idaho is a crisis. They recognized that this effort was critical and were ready to do the work necessary to help this initiative succeed. They were every bit as dedicated to getting this initiative onto the ballot as were my volunteers for the Medicaid Expansion effort.

27. Based on my personal experience, I believe that had we been able to continue collecting signatures our statewide team would have met the state requirements to put our initiative onto the November 3, 2020 ballot.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. EXECUTED ON this 6th day of June 2020.

/s/ Linda Larson

Reclaim Idaho Exhibit H

Declaration of Karen Lansing

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

FOR THE 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 **LAWERENCE DENNEY**, in his official capacity as Idaho Secretary of State, Defendants.	Case No. 1:20-cv-00268-BLW **DECLARATION OF KAREN LANSING IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

I, Karen Lansing, having first been duly sworn upon oath, declare as follows:

1. My name is Karen Lansing, and I am an active volunteer of Reclaim Idaho, the Plaintiff in this case.

2. I formerly sat as a judge on Idaho Court of Appeals from 1993 to 2015.

3. I became associated with Reclaim Idaho in January 2018 when I volunteered to gather signatures on the initiative petition to expand Medicaid in Idaho.

4. When the organization launched its second initiative effort, this time to increase state funding for public schools, I again participated. I began gathering petition signatures as soon as the new petition form was released in October, 2019. I simultaneously gathered signatures for a separate, unrelated initiative to raise the minimum wage in Idaho.

5. In October and November, 2020, I also composed for publication a guest opinion supporting the initiative which is attached to my declaration as Exhibit A. To gather historical information and statistical data for the piece, I researched extensively on-line and at the Idaho Law Library. This opinion piece was published in the November 17, 2019 issue of the Idaho Stateman newspaper.

6. I gathered petition signatures in a number of ways. These included going door-to-door in residential neighborhoods in Boise and Eagle, Idaho; standing in the vicinity of polling places on election days in November, 2019 and March 2020 to solicit signatures from voters, approaching people attending rallies and other political events; standing near entrances to public libraries and other public buildings in Boise and Nampa, Idaho; and requesting signatures of passers-by on public sidewalks.

7. During the winter, obtaining signatures was very challenging because of the weather. Soliciting signatures in a rain or snow storm isn't practical because the petitions will get wet. When there was no precipitation, it was nevertheless difficult because I found that I often could stand outside no longer than about an hour before I my hands became too cold to continue. I was impressed, however, by the number of people who were willing to pause in the bitter cold to write their names and addresses on the petition.

8. As the weather improved in February and early March, 2020, I was able to greatly increase time devoted to signature gathering. During that period, I spent several hours on most days gathering petition signatures and doing related data entry.

9. It became impossible to continue, however, due to the spread of coronavirus cases in Idaho.

10. Initially, when the coronavirus became a concern, Reclaim Idaho leaders considered whether we could continue the initiative effort by taking special steps to protect signature gatherers and petition signers. Ideas included having the volunteers wear gloves and providing a separate ink pen for each signer to prevent virus transmission. Ultimately it was decided that no such measures could assure participants' safety because participants would inevitably come into close contact and individuals could not sign the petition without touching the paper that had been touched by others.

11. Moreover, one of the most productive means of gathering signatures—taking positions at public facilities with heavy foot traffic such as libraries and driver's licensing offices—would become impossible as those facilities were closing.

12. For all of the above reasons, continuation of the signature drive was impossible.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED ON this 5th day of June 2020.

/s/Karen Lansing

Idaho Statesman

Let's stop starving our schools in Idaho

BY KAREN LANSING

NOVEMBER 17, 2019 07:00 AM

Our forebears who drafted the Idaho Constitution astutely recognized the importance of quality public education. In Article IX, Section 1 of that document they provided: "The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the Legislature of Idaho, to establish and maintain a general, uniform and thorough system of public free common schools."

Despite that constitutional mandate, many Idaho school districts are operating in financial crisis conditions. Forty-five of Idaho's 115 school districts have four-day school weeks because they cannot afford to heat school buildings and run school buses five days a week. Some schools have classrooms without a sufficient number of desks to seat all the students. Teachers are fleeing from rural districts to larger communities or to other states for better pay. This failure to invest in Idaho's public schools is nothing new. As a lifelong Idahoan (and a graduate of Orofino High School), I have watched with alarm for years as the adequacy of investment in our public schools has declined.

A few statistics illuminate the deficiency of this state's investment in education. According to the U.S. Census Bureau, Idaho ranked second-to-last nationally in per-pupil investment for the 2017-18 academic year. Idaho schools received $7,486 per student in state, local, and federal revenue compared to a national average of $12,201. Neighboring Montana invested about $4,000 more per student than Idaho. Wyoming expended about $9,000 more.

The perpetual inadequacy of state investment in Idaho schools is the impetus behind a new voter initiative launched by Reclaim Idaho, the group that got Medicaid Expansion on the 2018 ballot. The "Invest in Idaho" initiative would increase the corporate tax rate,

create a new marginal income tax rate for Idaho's wealthiest individuals, and place the resulting revenue into a fund earmarked for K-12 public education.

Currently, Idaho's tax rate for personal incomes over $7,500 is 6.925 percent. The initiative would add a new tax bracket, increasing the marginal rate to 9.925 percent for income exceeding $250,000 for individuals and income over $500,000 for couples. In other words, an individual making $250,000 or a couple making $500,000 would see no tax increase — only the income above those amounts would be taxed at the new rate. The initiative would also restore the corporate income tax rate to 8 percent, where it stood before 2001. If passed, this initiative will generate about $170 million annually to invest in K-12 schools.

Lest readers fear these enhanced rates for high-income Idahoans would be unfair, let's take a look at current tax burdens. First, Idaho's present income tax structure is virtually flat — people making less than $8,000 pay the same income tax rate as millionaires.

Second, low-wage earners pay a far higher percentage of their incomes for sales, excise, and property taxes than the rich do. According to the Institute on Taxation and Economic Policy, in 2018 the lowest-earning 20 percent of Idahoans paid out over 9 percent of their wages for such taxes. The top one percent of earners paid only 2.5 percent. Consequently, even when state income tax is added to those other state and local taxes, the poorest Idahoans expended a higher share of their wages for taxes (9.2%) than did the wealthiest Idahoans (7.2%). This regressive tax structure was made even worse in 2018 when the legislature altered state law to conform to federal tax changes that heavily favored the wealthy and corporations.

Lastly, consider the tax reductions enjoyed over the last several years by affluent Idahoans. Despite the financial struggles of public schools, the legislature has reduced the top income tax rates three times since 2004, when the highest rate was 8.2 percent. It was decreased to 7.8 percent in 2005, then to 7.4 percent in 2012, and to the current 6.925 percent in 2018. During that same period, Idaho left unfilled thousands of high-paying jobs worth hundreds of millions in unclaimed wages because Idaho cannot produce enough skilled workers. This is not a coincidence.

It is apparent that if our public schools are ever to be adequately funded, Idaho voters will have to create the mechanism to do it. That is why every Idahoan should get behind the

"Invest in Idaho" initiative. It's easy — just sign the initiative petition and vote for it on your 2020 ballot. Or better yet, volunteer to help with the effort!

Reclaim Idaho Exhibit I

Declaration of Deborah Silver

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UNITED STATES DISTRICT COURT

FOR THE 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; **LAWERENCE DENNEY**, in his official capacity as Idaho Secretary of State; Defendants.

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

DECLARATION OF DEBORAH SILVER IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

I, Deborah Silver, having first been duly sworn upon oath, declare as follows:

1. My name is Deborah Silver, and I am a resident of Twin Falls, ID and a Certified Public Accountant. I became the volunteer treasurer for Reclaim Idaho in 2019, and am the Reclaim Idaho volunteer district leader for legislative district 24 (Twin Falls).

2. We got a jump start the initiative by gathering signatures on November 5, election day. We collected over 300 signatures with the help of about eight volunteers.

3. On January 3 of 2020, Abi Sanford and I began doorknocking. We started around 4:30 pm and knocked on about twelve doors. Less than half of those had people at home. We gathered 8 signatures in less than an hour. It was fully dark before 5:30; and we went home. Of the people who were home, everyone signed, and a couple had more than one voter who signed.

4. We began doorknocking five-seven days a week. After the first week, we strategized that after five o'clock, more people are home. After darkness falls, fewer doors open. We decided that it is most effective to try to door knock up until total darkness, so we adjusted the start time as the sun set later and later. We were starting around 4:00 at the beginning and going until 5:30.

5. Our goal was 100 signatures a week. My personal goal was 60 and Abi and other volunteers would make up the difference. The verified signature goal for our district is 1356.

6. We used an app which showed us maps of registered voters, and we had another app which allowed us to look up registered voters.

7. We knew that some of the signatures we would collect would be people who had moved and not changed their voter registration or were not registered- so we were collecting far more than the required signatures.

8. In January and February, we met our goal of over 800 signatures. (The county elections office has been slow in verifying signatures. They verified the November and January petitions

with a combined verification rate around 80%. I turned in the February signatures around March 6. The county recently notified me that they have finished verifying those petitions, but I have yet to pick them up.)

9. At the end of February, the interest shown by volunteers was really picking up. We held a new volunteer meeting the last week of February and had about eight new volunteers. About ten people signed up to collect signatures on election day in Twin Falls.

10. Due to a health issue, I was sidelined the first week of March, but volunteers kept us on track collecting the 100 signatures per week as per our plan.

11. Also, critically, the sun was setting just a little bit later each day, so that our shifts were beginning after 5 and continuing until dark at or around 6:30. We were anticipating daylight savings time on March 8, which would allow us to door knock for an additional hour each evening. This would potentially double the amount of doors and signatures collected per shift. I now had over ten people who volunteered to doorknock with me at least one day a week.

12. March 10 was the presidential primary. Volunteers collected signatures in Twin Falls. Abi Sanford and I traveled to Hailey, Idaho (Blaine county) and gathered signatures outside the polling places there along with volunteers from the area. The success rate was incredible. This was occurring around the state.

13. By Friday of that week, we realized that continuing the effort with covid-19 looming was endangering both our volunteers and the voters we were contacting. My husband and I self - quarantined because it was evident that Blaine county was the epicenter of the pandemic.

14. From January through early March, our records show that in Twin Falls, we made 2377 attempts at the doors, with a 39% contact rate. I am especially proud of this because this was winter weather. We went in snow, wind, and cold.

15. I am confident that with the increased participation of volunteers and with the change to Daylight Savings Time, our district goal would have been achieved by April 1. Our local volunteers would then expand beyond the city of Twin Falls and continue to collect signatures in District 23-Jerome, Buhl and Kimberly.

16. I had personally committed to moving to Blaine county for the month of April to help with the signature gathering and organizing there.

17. The fundraising for Reclaim Idaho was also picking up steam. Reclaim Idaho has attracted hundreds of unique donors, which can be seen by our publicly filed campaign reports.

18. January through March we were attracting between 50-75 new donors each month. These were people who had not donated to us in 2019.

19. We were meeting our fundraising goals as well as attracting new donors. We averaged 300 donations a month January-April from our online fundraising vendor ActBlue. There were over 320 individual donations in March and April even after halting the signature gathering. For reference, May saw 106 donations through ActBlue.

20. Reclaim Idaho raised approximately $115,000 for our K-12 funding initiative. By March 18th, we had expended approximately $98,000 on the signature drive and we had approximately $17,000 additional funds in the bank.

21. Our fundraising, volunteer interest, and signature gathering events were reaching critical mass in early March.

22. The event on election day was the most successful in Reclaim Idaho's history.

23. The surge in volunteers and critically the change in weather and Daylight Savings Time would have boosted all the organizing efforts.

24. It was necessary to suspend because of Covid-19, but there is no doubt we were within striking distance of qualifying this ballot initiative.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 5th day of June 2020.

/s/ Deborah Silver

Reclaim Idaho Exhibit J

Declaration of Counsel

LAWRENCE G. WASDEN
ATTORNEY GENERAL

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Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

RECLAIM IDAHO, an Idaho political action committee, and LUKE MAYVILLE, Plaintiff, vs. BRADLEY LITTLE, in his official capacity as Governor of Idaho, and LAWERENCE DENNEY his official capacity as Idaho Secretary of State, Defendants.	Case No. 1:20-cv-00268-BLW **DECLARATION OF COUNSEL IN SUPPORT OF DEFENDANTS**

I, ROBERT A. BERRY, declare as follows:

1. I am over the age of 18 years and competent to testify on the matters herein. I make this declaration based upon my own personal knowledge.

2. I am currently one of the counsel of record for the defendants in this matter and am employed as a Deputy Attorney General for the State of Idaho.

3. Attached hereto as Exhibit A is a copy of the 1933 Idaho Sess. Laws, Chapter 210 (H.B. No. 186).

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED this 18th day of June, 2020.

/s/ Robert A. Berry
ROBERT A. BERRY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 18, 2020, I electronically filed the foregoing with the Clerk of the Court using the CMF/ECF system which sent a Notice of Electronic Filing to the following persons:

Deborah A. Ferguson
daf@fergusondurham.com

Craig H. Durham
chd@fergusondurham.com

/s/ Robert A. Berry
ROBERT A. BERRY
Deputy Attorney General

Reclaim Idaho Exhibit K

Supplemental Declaration of Luke Mayville

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

RECLAIM IDAHO, a political action committee, and **LUKE MAYVILLE**, Plaintiffs, v. **LAWERENCE DENNEY**, in his official capacity as Idaho Secretary of State; **BRADLEY LITTLE**, in his official capacity as Governor of Idaho Defendants.	Case No. 1:20-cv-00268-BLW **SUPPLEMENTAL DECLARATION OF LUKE MAYVILLE IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

I, Luke Mayville, having first been duly sworn upon oath, declare as follows:

1. My name is Luke Mayville, and I am a Co-founder of Reclaim Idaho, the plaintiff in this case. This is my supplemental declaration in support of a preliminary injunction.

2. Defendants argue that our campaign was dilatory on the grounds that we did not begin the signature-collection process a full 18 months before the deadline. My experience with grassroots political organizing—including the experience of our successful Medicaid Expansion signature drive in 2018—tells me that it is the final two months of a signature drive that are by far the most productive for signature gathering. This is because the looming deadline gives volunteers a sense of urgency, and they grow more committed and more efficient in their work. Meanwhile, supporters who had remained on the sidelines in the early months are motivated by that same sense of urgency to volunteer for the first time.

3. It is true that we would have collected more signatures had we began our signature drive several months earlier. But even with an early start, our drive still would have needed those precious final weeks in order to collect the required number of signatures. An early start would not have substituted for the loss of our final 48 days—days when the rate of signature collection was likely to accelerate dramatically.

4. In fact, we began our "Invest in Idaho" signature drive at a much earlier date on the calendar than we had begun our Medicaid Expansion signature drive. Our Medicaid Expansion signature drive did not begin until December of the year prior to the election (the petition was officially certified for circulation by the Secretary of State on December 5th, 2017). By comparison, we began our "Invest in Idaho" education initiative significantly earlier, in late October of the year preceding the election (certified by the Secretary of State on October 25th, 2019). When planning our "Invest in Idaho" drive, we chose to begin the process earlier in order to increase our chances of success.

5. However, we had learned from the Medicaid drive that the final months were by far the most productive for grassroots signature-collection, and we expected the pattern to be repeated

for our second initiative. Prior to the suspension of our "Invest in Idaho" signature drive, the pace of signature gathering very closely resembled that of our Medicaid Expansion drive, with our numbers ramping up dramatically beginning in late February and early March.

6. Defendants are very likely correct in their prediction that an earlier start would have yielded more signatures. But it would not have been enough. An early start would not have replaced those precious final seven weeks that were denied us.

7. Defendants also argue that our campaign lacked diligence on the grounds that we did not immediately file a court case prior to early June. Reclaim Idaho is a grassroots organization without a legal team or funding to hire legal representation. Since our inception, we have operated mainly on small donations of between $3 and $100. We began considering a lawsuit as early as March 16, 2020, which was the day we heard from the Governor's Senior Advisor Andrew Mitzel that the Governor did not intend to take action. At that point, we suspected that it was a violation of our rights to force us to choose between public safety and our constitutional right to petition our government. However, without legal know-how or funding to hire attorneys, we needed extra time to develop a plan for legal action.

8. As soon as we were able to articulate the outline of a legal argument, I immediately scheduled a meeting with Deborah Ferguson of Ferguson Durham PLLC for Monday, May 25th, 2020. Shortly thereafter, Ferguson Durham offered to represent Reclaim Idaho on a pro-bono basis. From that point forward, we worked swiftly with our attorneys and filed our case on June 6th, just twelve days after our initial meeting. Within the means at our disposal as a grassroots organization, we worked as swiftly as we could to file our motion.

9. Defendants argue that Reclaim Idaho willingly ended our signature drive on March 18th, prior to the March 25th Stay-at-Home order. In fact, we *suspended* our signature drive on March

18th but did not terminate all efforts to keep the effort alive. Between March 18th and the announcement of the Stay-at-Home order on March 25th, our campaign continued to explore potential means of safe signature gathering.

10. After several days of deliberating with our Bonner County volunteer team about the challenge of collecting signatures during a pandemic, one highly active volunteer named Rebecca Holland drafted a plan for safe signature gathering that she emailed to me and other members of our statewide team on March 19th. The plan (attached as an exhibit) directed volunteers to drop off packets of petitions at the homes of local teachers, who were encouraged in turn to find friends and family members to sign the petition and then bring all signed petitions to a local volunteer leader in order to be notarized.

11. Over the next several days, I discussed the plan at length with members of the Bonner County team. We discussed the practicality of the plan and whether we could possibly implement it statewide. We eventually concluded that the plan required extensive in-person contact and therefore posed too high a risk to the health of petitioners.

12. On March 20th, we sent out a survey to our statewide email newsletter. The first question was simply to ask whether our supporters and volunteers were okay in the midst of the rapidly escalating public health crisis. Our second question was the following:

13. *This past week we announced a suspension of our campaign for the Invest in Idaho ballot initiative. Do you have any ideas on how we might save the signature drive from being shut down by the coronavirus? [Note: We have already called on the Legislature to adjust the initiative rules; and we've already petitioned Governor Little to authorize online signature gathering. To date, neither the legislative majority nor the Governor is willing to take action].*

14. Close to 600 Reclaim Idaho supporters responded to the survey. Some recommended taking legal action, but none offered a clear plan for how we might build a legal case. Others urged us to collect electronic signatures or mail-in signatures, without providing a plan for how those signatures could be accepted as valid by the state. The most common response was merely to lament the unwillingness of the Legislature and Governor to take action, and many volunteers expressed hopelessness about the future of the Invest in Idaho initiative.

15. All the way up until the announcement of the Stay-at-Home order on March 25th, we continued to carry out discussions with volunteers and supporters about how the campaign might be resumed. Once the Stay-at-Home order was issued, however, it became absolutely clear that collecting signatures in-person would be impossible.

16. The Stay-at-Home order remained in full effect all the way through April 30th, which also happened to be the final day for collecting signatures. For the final 36 days before the official deadline, it was a misdemeanor in Idaho to engage in non-essential, in-person activities—including the collection of signatures.

17. Defendants have argued that electronic signatures are not necessary for the safe collection of signatures. "The State of Idaho," Defendants declare, "is already in Stage 4 of the recovery from the pandemic."

18. It is not at all clear what Defendants mean by the word "recovery." On Friday, June 19th, World Health Organization Director-General Dr. Tedros Adhanom Ghebreyesu announced that the global pandemic is accelerating rapidly. Dr. Tedros said: "The world is in a new and dangerous phase…We call on all countries and all people to exercise extreme vigilance."

19. In Idaho, at the time of this writing on June 21st, 2020, we have seen 528 new cases in the past five days. This is the largest spike in cases since the early peak of the outbreak in April. During the past month, 16 deaths were attributed to COVID-19 in Idaho.

20. All public health authorities are currently exhorting Idahoans to follow social distancing guidelines. On Tuesday, June 16th, during a statewide call-in with the AARP, Governor Little attributed the recent rise in COVID-19 cases to a failure of some Idahoans to follow guidelines to maintain social distance. (https://www.idahopress.com/coronavirus/worried-idahoans-quiz-little-about-rise-in-covid-19-cases/article_c519a4cd-f3c8-5fa4-9f92-33aa817c2635.html).

21. In seven of the counties where our signature drive was most active, our volunteer leaders are over the age of 60 and at heightened risk of contracting COVID-19. These seven counties account for 13 of the 18 districts where we expected to qualify our initiative.

22. We are certainly not in a period of "recovery" from the public health crisis brought about by COVID-19. In the summer of 2020, we continue to live in the midst of a once-in-a-century pandemic. If Reclaim Idaho is not provided with a safe, socially distant means of collecting signatures, we will again be forced to choose between our health and our constitutional right to petition our government.

23. Defendants have argued that our request to collect e-signatures using DocuSign would be "a fundamental departure from Idaho law and its Constitution." In making their case, Defendants have misconstrued the role of DocuSign in our proposed plan. We are not proposing that the private entity DocuSign will "run the election"—as Defendants repeatedly suggest. DocuSign is merely a technology for the verification of the signatures Reclaim Idaho collects, nothing more.

24. Under our proposal, the management of signature verification and the running of the election would remain entirely with the Secretary of State and the county clerks. Furthermore,

neither the DocuSign company nor its personnel would be the "circulator" of the petition. Designated Reclaim Idaho personnel—all of whom are residents of Idaho—would circulate the petition online. DocuSign would merely provide the technology required for the collection of authentic electronic signatures.

25. Regarding the authenticity of DocuSign signatures, it should be noted that the process of collecting e-signatures via DocuSign is not substantially different from the process used by the Idaho Secretary of State to receive absentee ballot requests online. In order to verify the identity of a person requesting an absentee ballot, the Secretary of State collects a driver's license number and the last four digits of a social security number. It is well within the capacity of a DocuSign platform to collect these same pieces of information for the purpose of authenticating electronic signatures. (see https://www.docusign.com/blog/can-i-see-a-photo-of-your-id-digital-verification-of-real-world-ids/)

26. Defendants have argued that the in-person requirement for signature gathering is important for the purpose of allowing citizens of Idaho "to exercise their legislative powers in an effective, valid, and informed manner." We fully agree with this principle. We are of the opinion that under ordinary conditions, the in-person requirement enhances the quality of civic engagement. This is why we are not requesting any permanent change to the in-person requirement. We are only requesting a temporary change in order to protect our First Amendment right during a once-in-a-century pandemic.

27. By Monday, June 22nd, the vast majority of Reclaim Idaho's verified signatures will be in the hands of the Secretary of State, and the vast majority unverified signatures will be *en route* to the offices of the county clerks. This means that a large portion of the required signatures will be available immediately for processing by the Secretary of State and county clerks.

28. Finally, I would like to suggest to the Court at least one alternative form of relief that would impose no burden on the Secretary of State and county clerks. Rather than permitting the collection of e-signatures with an extended deadline, the Court might simply reduce the requirements for the total amount of signatures and the geographic distribution of signatures, as has occurred in other states.

29. On March 14th, 2020, in response to COVID-19, the Governor of New York reduced the signature requirements for candidates seeking ballot access to 30% of the statutory thresholds. Likewise, this Court might temporarily reduce Idaho's required number of signatures to 2% (down from 6%) of the qualified electors of the state at the November 6th, 2018 general election; and the Court might require signatures from 2% of the qualified electors at the November 6, 2018 general election in each of at least 6 legislative districts (down from 18 legislative districts).

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED ON this 21th day of June 2020.

/s/Luke Mayville

K-12 Education Initiative with **Reclaim Idaho**

Citizens are scrambling to get enough signatures **before April 30** to qualify our ballot initiative. Statewide, we need 55,000 and we're currently now over 33,000. But we're unable to do face-to-face engagements due to COVID pandemic, so we're reaching out to educators to help us achieve this very important goal.

FACT: This Citizen-sponsored ballot initiative will raise $170-200 Million per year. That's around $600 for every student in public & charter schools awarded to their school district. Can you image the benefits for your school?

LAW: New "Quality Education Fund" will be established, when Citizens pass this initiative into law in November. The State Education Committee (?) will distribute funds directly to school districts for only these specified uses:

- Salaries for teachers and support staff
- Reduction of class sizes
- Classroom materials
- Full-day Kindergarten
- Art, music, drama programs
- Special education
- Career Technical Education

NO funding for administrative costs : "Moneys from the fund shall not be used to pay superintendents', principals' or other administrators' salaries or other compensation", by law proudly passed by Citizen lawmakers

FUNDS: Personal incomes above $250K per person or $500K per married couple, and from corporations by way of reinstatement to 2010 levels. This new funding has nothing to do with local property taxes or district levies. Only those at top of the income-ladder (estimate 5% population) will be impacted.

In 2019, Reclaim Idaho volunteers became Citizen Lawmakers passing Medicaid Expansion into law for Idaho residents. Now in 2020, we're working to increase State funding for K-12 Education a R E A L I T Y !!

Urgent Action needed by Educators to help Reclaim Idaho put new State funding for K-12 on November ballot

1- **Print 2 copies of petition** at www.reclaimidaho.org (need all 5 pages)

2- Ask another registered voter to help you. Each will **sign a petition** using black or blue ink. Next, print your legal name & address (where registered for voting) in a very legible manner (4th grade skill level)

3- **Find 11 friends to sign your petition** (with good social distancing). Tell them they will helping your school receive an additional $14,400 +/- for your classroom (based on the average of 22 students x $600 each). This is a dream that can come true for you ☺

4- **Call our local co-ordinator** (title?) Linda Larson at (208) 255-XXXX or email her at larson.linda.f@gmail.com to set-up time for delivering to her home in south Sandpoint (very convenient location)

5- **Sign in front of Linda** to verify the signatures. A table is set-up on her outside walkway for good distancing. She'll notorize petition at no charge.

6- **Deadline is Wed, April 29** to give to Linda in order for her to deliver to elections office by Thursday, April 30

Reclaim Idaho here with some final pitch

Reclaim Idaho Exhibit L

2nd Supplemental Declaration of Luke Mayville

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

RECLAIM IDAHO, a political action committee, and **LUKE MAYVILLE**, Plaintiffs, v. **LAWERENCE DENNEY**, in his official capacity as Idaho Secretary of State; **BRADLEY LITTLE**, in his official capacity as Governor of Idaho Defendants.	Case No. 1:20-cv-00268-BLW **SECOND SUPPLEMENTAL DECLARATION OF LUKE MAYVILLE IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

I, Luke Mayville, having first been duly sworn upon oath, declare as follows:

1. My name is Luke Mayville, and I am a Co-founder of Reclaim Idaho, the plaintiff in this case. This is my second supplemental declaration in support of a preliminary injunction.

2. Today I learned that of the 10,593 petition signatures that have been verified to date and returned to Reclaim Idaho, none were verified from Ada County.

3. Reclaim Idaho dropped its first batch of signatures off at the Ada County Clerk's office on November 18, 2019.

4. Reclaim Idaho then dropped off four more subsequent batches of signatures on the following dates: December 17, 2019, January 22, 2020, February 4, 2020, and in March 11, 2020.

5. Lynn Lockhart, an employee of the Ada County Clerk's office provided me with the dates the signatures were dropped off by Reclaim Idaho at the Ada County clerk's office.

6. I estimate that approximately 10,000 petition signatures have been turned in by Reclaim Idaho so far. Of that number, approximately 2,000 were turned in last year in November and December 2019.

7. To date, Ada County has not returned any verified petitions to Reclaim Idaho.

8. I called the Ada County Clerk's office to ask how many signatures had been verified to date and was advised to submit an Idaho Public Records request in order to obtain that information.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED ON this 22nd day of June 2020.

/s/Luke Mayville

CERTIFICATE OF SERVICE

I hereby certify on this 22nd day of June, 2020, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing

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

Attorneys for Defendants

/s/ Deborah A. Ferguson

Reclaim Idaho Exhibit M

Governor Little's April 1, 2020 Proclamation
Modifying Idaho Election Laws

The Office of the Governor

Executive Department
State of Idaho

Proclamation

State Capitol
Boise

WHEREAS, I issued a proclamation on March 13, 2020, declaring a state of emergency in the State of Idaho pursuant to Chapter 10, Title 46, Idaho Code, due to the occurrence and imminent threat to public health and safety arising from the effects of the 2019 novel coronavirus (COVID-19); and

WHEREAS, President Trump issued a proclamation on March 13, 2020 declaring a national emergency due to the outbreak of COVID-19 in the United States and in order to implement additional measures to successfully contain and combat the virus in the United States; and

WHEREAS, by proclamation dated March 25, 2020, I amended my proclamation dated March 13, 2020 and declared a state of extreme emergency in the State of Idaho pursuant to Chapter 6, Title 46, Idaho Code, due to the increasing occurrence and threat to public health and safety arising from the effects of COVID-19; and

WHEREAS, each of those proclamations remain in effect today; and

WHEREAS, on March 25, 2020, at my direction and in order to slow the spread of COVID-19, the Director of the Idaho Department of Health and Welfare issued a statewide Order directing all residents of Idaho to stay home and all businesses to close, with certain exceptions for Essential Activities, Businesses, and Government Functions; and

WHEREAS, that Order remains effective today; and

WHEREAS, federal, state, and local public health authorities continue to strongly recommend limited interaction between individuals in order to reduce the spread of COVID-19; and

WHEREAS, citizen participation in the act of voting is essential to our republic; and

EXHIBIT A
to Reply Brief
Dkt. 9

WHEREAS, the Idaho Secretary of State and Elected Clerks of Idaho's forty-four counties are currently preparing for the upcoming May 19, 2020 Primary and Consolidated Elections; and

WHEREAS, it takes approximately two (2) months to properly prepare for and execute an election; and

WHEREAS, Chapters 3 & 11, Title 34, Idaho Code, set out important requirements ensuring the establishment and conduct of elections via the use of polling places; and

WHEREAS, voting in polling places on May 19, 2020 (referred to hereafter as "Election Day") causes the mixed gathering of thousands of Idaho voters and poll workers, and poses a real and unacceptable risk to the lives of Idaho voters and poll workers and the spread of COVID-19 to other citizens; and

WHEREAS, the recommendations to limit interactions with others during this state of emergency has significantly decreased the availability of possible polling locations and willingness of poll workers to serve on Election Day; and

WHEREAS, according to the official information provided by the Idaho Department of Health and Welfare, as of the date of this proclamation, 525 Idahoans have tested positive for COVID-19 and 9 Idahoans have died due to COVID-19; and

WHEREAS, it is crucial to the health and safety of all Idahoans that the spread of COVID-19 be reduced so that the state's healthcare capacity is not overwhelmed by large number of cases arising simultaneously; and

WHEREAS, cases of COVID-19 have continued to increase in Idaho, necessitating additional measures to contain and combat the virus while protecting the constitutional rights of all Idahoans; and

WHEREAS, the Center for Disease Control and the State of Idaho Department of Health and Welfare have determined that individuals over the age of sixty-five (65) and individuals who are immunocompromised are more vulnerable to serious illness due to COVID-19; and

WHEREAS, I am informed by the Secretary of State that on average approximately 1,000 poll workers help carry out a primary election like this and that over sixty-five percent (65%) of those poll workers were over the age of sixty (60) as of 2019; and

WHEREAS, there is a real risk of virus spread at traditional polling places under normal election circumstances where a single precinct can see over 2,000 voters in a single day; and

WHEREAS, the equipment and supplies necessary to protect poll workers at traditional polling locations from COVID-19—such as face masks, face shields, gowns, hand sanitizer, and disinfectants—are in high demand and are needed in hospitals and health care facilities to keep

Idaho's health care workers safe, healthy and able to continue protecting and treating Idahoans at this time; and

WHEREAS, utilizing the existing statutory procedures for absentee voting by mail allows Idahoans to exercise their constitutional right to vote while keeping the public safe from the threats presented by the presence of COVID-19 in Idaho; and

WHEREAS, in addition to the use of paper application forms, the Secretary of State has already set up a website where Idaho voters can register to vote and request an absentee ballot electronically;

WHEREAS, I have worked with the Secretary of State and the elected County Clerks to ensure Idahoans have every opportunity to exercise their constitutional right to vote safely without risking exposure to COVID-19; and

WHEREAS, for all of the reasons stated herein and many others, I am convinced that the actions set out in this proclamation, including voting by mail, are necessary to protect the liberty, constitutional right to vote, lives and property of Idahoans, and to ensure necessary action to cope with the existing emergency is not prevented, hindered or delayed.

NOW, THEREFORE, I, Brad Little, Governor of the State of Idaho, by virtue of the authority vested in me by the Constitution of the United States, the Constitution of the State of Idaho, and the laws of this State, including Sections 46-601 and 46-1008, Idaho Code, do hereby find and therefore proclaim, declare, and order that:

1. *The proclamations I issued on March 13, 2020 and March 25, 2020 are hereby amended to incorporate this proclamation.*

2. *This proclamation is issued in furtherance of and compliance with the Order issued at my direction by the Director of the Department of Health and Welfare on March 25, 2020.*

3. *The requirements of the following sections of Idaho Code are suspended entirely for the duration of the 2020 Primary and Consolidated Elections:*

    a. *34-302. DESIGNATION OF PRECINCT POLLING PLACES,*
    c. *34-1006. COUNTY CLERKS SHALL PROVIDE ONE OR MORE "ABSENT ELECTORS' VOTING PLACE,"*
    d. *34-1012. ALTERNATIVE PROCEDURES FOR ABSENTEE VOTING – EARLY VOTING,*
    e. *34-1101. OPENING AND CLOSING OF POLLS*
    f. *34-1107. MANNER OF VOTING*

4. *In lieu of the use of polling places on Election Day, the May 19, 2020 Primary Election and Consolidated Elections shall be conducted in accordance with the existing absentee voting by mail process set out in Chapter 10, Title 34, Idaho Code except those provisions of*

Chapter 10 that are suspended as outlined in paragraph two (2) above or as otherwise set out herein.

5. The twenty-four (24) day requirement for the closing of the register of electors in section 34-408(1), Idaho Code, is suspended to provide for continuous registration up to and including Election Day. This is to maintain compliance with Federal election law while allowing voters maximum time to register prior to requesting an absentee ballot under section 34-1002(7), Idaho Code.

6. For the duration of the May 19, 2020 Primary Election and Consolidated Elections, the statutory requirement in section 34-1002(7), Idaho Code, below,

> *"...The application for a mail-in absentee ballot shall be received by the county clerk not later than 5:00 p.m. on the eleventh day before the election."*

is suspended and amended to read:

> *"...The application for a mail-in absentee ballot shall be received by the county clerk not later than 8:00 p.m. on election day."*

7. For the duration of the May 19, 2020 Primary and Consolidated Elections, the statutory requirement in section 34-1005, Idaho Code, below,

> *"...that an absentee ballot must be received by the issuing officer by 8:00 p.m. on the day of election before such ballot may be counted."*

is suspended and amended to read:

> *"...that an absentee ballot must be received by the issuing officer by 8:00 p.m. on Tues. June 2, 2020 before such ballot may be counted."*

8. The statutory requirement in section 34-1003(3), Idaho Code, requiring that all absentee ballot requests received prior to forty-five (45) days before an election be sent not later than forty-five (45) days prior to the election is suspended for the duration of the May 19, 2020 Primary and Consolidated Elections.

9. If any additional statutory requirements within Title 34, Idaho Code, conflict with orders or directives under the current state of emergency, those statutory requirements may be suspended by a directive of the Secretary of State as Idaho's chief elections officer.

10. All other requirements related to the administration of elections pursuant to Title 34, Idaho Code, and any other titles, remain intact and are not impacted by this action.

11. The Secretary of State and County Clerks are encouraged to take diligent steps to make all Idaho registered voters aware of these changes and ensure that every eligible Idahoan has ample opportunity to exercise his or her right to vote.

12. *For the May 19, 2020 Primary and Consolidated Elections, the Canvass of votes, along with the counting of votes under Title 34, Chapter 12, may be delayed by a period not to exceed two additional weeks after the deadline for an absentee ballot to be received by the county clerk, at the discretion of and by directive of the Secretary of State.*

13. *Accordingly, the following deadlines for the May 19, 2020 Primary and Consolidated Elections apply:*
    a. *May 19, 2020, 8 p.m.: Deadline to register to vote.*
    b. *May 19, 2020, 8 p.m.: Deadline for county clerk to receive a request for absentee ballot by mail or by in person delivery.*
    c. *May 19, 2020 – 8 p.m.: Deadline for requesting an absentee ballot online.*
    e. *June 2, 2020 – 8 p.m.: Deadline for absentee ballots to be received by the county clerk.*
    f. *June 2, 2020 – 9 p.m. Mountain – Earliest time for results to be posted for May 19 Primary Election.*

14. *These actions are necessary to protect the liberty, constitutional right to vote, health and safety of voters, poll workers, and all citizens from COVID-19 and to ensure the necessary actions being taken to cope with the existing emergency is not prevented, hindered, or delayed and by reducing the sharing of materials and space caused by the conduct of elections in polling places.*

IN WITNESS WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the State of Idaho at the Capitol in Boise on this 1st day of April in the year of our Lord two thousand and twenty.

Brad Little

GOVERNOR

Lawerence Denney

SECRETARY OF STATE

Reclaim Idaho Exhibit N

Status Report on Compliance with Court's June 30 Order

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

RECLAIM IDAHO, a political action committee registered with the Idaho Secretary of State, Plaintiff, v. BRAD LITTLE, in his official capacity as the Governor of Idaho, and LAWERENCE DENNEY, in his official capacity as Idaho's Secretary of State, Defendants.	Case No. 1:20-cv-00268-BLW **STATUS REPORT ON COMPLIANCE WITH COURT'S JUNE 30TH ORDER**

Counsel for Reclaim Idaho, along with their client Luke Mayville, met and conferred on the phone with Mr. Robert Berry, counsel for the State, to present Reclaim Idaho's plan for collection and submission of authentic e-signatures as set forth in the Court's orders dated June 30th (Dkt. 19), and June 26th, (Dkt. 14). These meetings occurred on July 1, July 3, and July 7. In addition, a fourth meet and confer was scheduled by agreement for July 8. Immediately prior to that final and fourth meeting the undersigned provided counsel for the State with a written summary of the plan presented by Reclaim Idaho and responses to the State's concerns that had been discussed with him. A copy of that letter is attached as Exhibit A. Reclaim Idaho's plan as set forth in Exhibit A details the process established, and in bolded font, the changes made by Reclaim Idaho in response to the concerns raised on behalf of the State.

The particulars of the plan had already been discussed with counsel for the State at the previous meet and confer meetings. Throughout these conferences, counsel reviewed and referred to the visual example of Reclaim Idaho's proposed landing page and the DocuSign process to walk counsel through the experience of signing the petition electronically in great detail. These documents are attached to Luke Mayville's Declaration (Dkt. 2-2).

After counsel for the State received this written summary, counsel and Luke Mayville waited an hour on July 8 for counsel to join the final meet and confer, but the State never joined the call. Instead, on the following day the State filed its "Notice Re: Dkt. 19" (Dkt. 23) which now lists myriad new concerns that were never voiced. As set forth in Luke Mayville's Fourth Declaration, many of these could have been easily addressed had the State raised them. Now they have been.

Yesterday's "Notice" is much like the State's choice to wait until the deadline to decide on a remedy by June 26, and then instead file its Notice [that it did not intend to choose] and

Motion to Stay (Dkt.16). At no time during these discussions did the State make any alternative electronic signature gathering proposals for Reclaim Idaho to consider. And in the end it has not accepted a single part of the process Reclaim Idaho has proposed. Reclaim Idaho's good faith effort to reach an agreement on these matter is outlined in the correspondence attached as Exhibit A. Further, Luke Mayville addresses the latest scattershot of the State's complaints in his fourth declaration. Attached to his declaration as Exhibits 1 and 2 are two DocuSign white papers: *Electronic Signatures and Transactions in the United States* and *Court Support for Electronic Signatures in the United States* which provide the Court with further information about the common usage and reliability of electronic signatures.

Accordingly, Reclaim Idaho will proceed as the Court has directed under these circumstances, and according to the plan it has developed as set forth in Exhibit A.

RESPECTFULLY SUBMITTED on this 10th day of July 2020.

/s/
Deborah A. Ferguson
Craig H. Durham

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify on this 10th day of July, 2020, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing

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Attorneys for Defendants

/s/ Deborah A. Ferguson

Exhibit A to Status Report

FERGUSON DURHAM, PLLC

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July 8, 2020

Via email

Robert Berry
Deputy Attorney General
Civil Litigation Division

Re: *Reclaim Idaho v. Gov. Bradley Little and Secretary of State Lawerence Denney*,
Case No. 20-cv-00268- BLW

Dear Robert:

Today will be our fourth meet and confer meeting to address the State's concerns over Reclaim Idaho's plan for collection and submission of authentic e-signatures as set forth in the Court's orders dated June 30th (Dkt. 19), and June 26th, (Dkt. 14). We have already addressed these points with you at our numerous meet and confer meetings, but wanted to provide the written summary as well as we have discussed a lot of detailed information.

- Collection of signatures

    - Reclaim Idaho will establish a dedicated website for on-line signature collection. **Note: As you requested, we have confirmed the website will be secure, with encryption built into it. It will be connected through https:// as opposed to http://.**

    - The landing page will ask for support to place the issue on the ballot to increase funding for K-12 education. The page will provide a link for the person to read the full text at this initial juncture. The potential signers will see the full screen and the long and short titles. They will have the option of clicking a "start" button that will take them to the bottom of the page , or they can scroll to the bottom manually. **Note: As you requested, at any point they can scroll up and down to see the full text of the entire initiative. In sum, the first page, with the short and long titles ballot titles will be easily viewable to all signers. Moreover,**

Reclaim can commit to sharing a link on the landing page where potential signers can review the full petition before entering their information, in response to your request for this feature.

- Before a person can proceed, they will be required to check a box verifying that they are a registered voter and that they have not previously signed this petition. **Note: In response to your concerns about informing potential signers that they are leaving Reclaim Idaho's landing page, we modified the language above the form to specifically indicate Docusign's involvement in the process as follows, with the following message: "Please fill out the form below. After you fill out the form, you will be redirected to a DocuSign form where you will sign the official petition."**

- If the person elects to proceed, they will enter their name, voter registration address, city and zip code, last 4 digits of their social security number, and their email address. **Note: The person will not be asked to enter their driver's license number. Docusign has informed Reclaim that a driver's license is not essential for meeting industry standards. In light of that, and the fact that such a requirement would overly restrict the pool of registered voters who are eligible to sign, there appears no need for this requirement.**

- They will hit 'next' and be directed to a PDF of the petition that looks exactly like the paper version except that: 1. It will have only one signature line, 2. It will have fields for the last 4 digits of their SSN and the county where the elector resides, and 3. The circulator statement will have additional wording due to the on-line nature. **Note: This PDF document will contain the Short and Long Ballot titles, which the person can read in full before signing the initiative as you have requested.**

- All of the fields in the PDF document will populate from the information provided by the person on the landing page and they will be asked to confirm the information and authorize the placing of their signature on the petition. If they elect to proceed, a cursive version of their signature will be affixed to the signature field. **Note: You have also expressed concerns about the ability to cancel the transaction, should someone chose to do so. There is also a separate button to cancel the transaction in the event a person declines to sign.**

- If a transaction is cancelled no information is retained. **Note: In response to your concern over the data entered by individuals who chose not to sign, no signer data will be retained, or even accessed by Docusign.**

- A few notes on authentication:

- The DocuSign form will capture the person's IP address and GPS location. The form will also capture the person's *intent to sign* by requiring that they check a box confirming their intention to provide an electronic signature. These three factors (IP address, GPS location, and intent to sign) all provide additional authentication. **Note: Taken together with the requirement to provide the last 4 digits of a social security number, these measures will place Reclaim Idaho's petition well above industry standards for authentication.**

- For every signature Reclaim Idaho collects, it will have on file a certificate of completion. This certificate is a legally binding document that provides an audit trail in case the authenticity of a signature needs to be reviewed. The audit trail includes a time stamp for when the person signed along with their GPS location and IP address. **Note: As set forth above, Reclaim Idaho will provide the Secretary of State with a certificate for each e-signature collected if requested, once a protective order is in place. Should the Secretary of State decide to review the authenticity of any signature, he can do so by reviewing the audit trail.**

- Submission and verification of signatures

  - Each signer's name, address, and city or zip code will be collected in CSV file format. This is the same information the county clerks currently are provided in connection with initiative petitions (absent a wet signature). It will be formatted as a spread sheet and be organized as follows:

    First name/Last name/ street address/ city/ zip code

    Note: You requested that the county clerks also be provided with the last four digits of the social security number of each signer. Reclaim declines this request for several reasons. First, the clerks have never been provided this information on petitions and have no practical use for it. Second, you have indicated that the State may have a duty to release this information in response to a Public Records Act request. According to our research the petition becomes an official public record pursuant to IC § 34-1806, as we have previously discussed with you. As such, we do not want to include these public identifiers beyond the information required by statute and inadvertently expose it to disclosure.
    However, to address your concerns and make the process as transparent as possible, we will provide this information to the State once a protective order is in place, if requested. This simple measure should protect the State from an obligation to disclose the last four digits of the social security numbers as a public record, as currently it is our understanding that the current exemptions upon which the Secretary of State relies -IC § 106 (25) and (34) - would not protect this information from disclosure.

- Reclaim Idaho will submit CSV files to each county via email, containing only the signatures collected in that county. County clerks will then verify whether each signer is a registered voter at the provided address. Clerks will also match a Legislative District to each signer, as they have always done. If this information cannot be confirmed the clerk will strike the signature, just as they have done in the past. **Note: Because the information will be provided in a typewritten spread sheet, this should facilitate an easier and faster review than the handwritten entries usually provided.**

- In order to further lighten the burden on county clerks, Reclaim Idaho will submit signatures periodically throughout the 48-day drive. At the close of each week during the signature drive, Reclaim Idaho intends to email to each county a CSV file containing all signatures collected from signers in that county during the previous seven days.

- Reclaim Idaho will take the following measures to meet the highest industry standards for verifying the identity and authenticity of each signature.

    - Reclaim Idaho's DocuSign form will confirm each signer's intent to sign and their consent to do business electronically (these are the essential measures that must be taken to ensure that signatures are authentic and legally binding under the ESIGN Act).
    - For every signature Reclaim Idaho collects, it will store a certificate of completion. This certificate is a legally binding document that provides an audit trail. The audit trail includes a time stamp for when the person signed along with their GPS location and IP address.

Thank you for working with us on compliance with the Court's orders.

Very truly yours,

/s/

Deborah A. Ferguson

Reclaim Idaho Exhibit O

Fourth Supplemental Declaration of Luke Mayville in Support of Motion for Preliminary Injunction

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

RECLAIM IDAHO, a political action committee, and **LUKE MAYVILLE**, Plaintiffs, v. **LAWERENCE DENNEY**, in his official capacity as Idaho Secretary of State; **BRADLEY LITTLE**, in his official capacity as Governor of Idaho Defendants.	Case No. 1:20-cv-00268-BLW **FOURTH DECLARATION OF LUKE MAYVILLE**

I, Luke Mayville, having first been duly sworn upon oath, declare as follows:

1. My name is Luke Mayville, and I am a Co-founder of Reclaim Idaho, and a plaintiff in this case. This is the fourth declaration I have provided to the Court. My prior declarations were my first declaration (Dkt. 2-2), my supplemental declaration (Dkt. 9-2), and my second supplemental declaration (Dkt. 10).

2. Prior to our first meet and confer with counsel for Governor Little and Secretary of State Denney, Reclaim Idaho developed a process and protocol for the collection, verification, and submission of electronic signatures. That process and protocol was developed in cooperation with DocuSign, the nation's leading company for execution of electronic signatures on legal documents.

3. Attached as Exhibits 1 and 2 to this declaration are two of DocuSign's white papers: *Court Support for Electronic Signatures in the United States* and *Electronic Signatures and Transactions in the United States.* These provide useful information about the reliability and common use of electronic signatures.

4. During several meetings with counsel for the State, Reclaim Idaho received the State's input and adjusted our process and protocol in response to the State's concerns. Unfortunately, on July 9th the State submitted to this Court several complaints regarding our process and protocol that the State did not mention during our multiple meetings. Had the State chose instead to discuss these complaints with Reclaim Idaho, each complaint would have been readily answered. Below I will provide answers to the State's most significant complaints.

5. The State argues that our online petition form was "developed in a matter of days" and is therefore unlikely to detect fraud. The truth is that the form we are using is an industry-standard form supplied by DocuSign. DocuSign forms have been officially certified by the Federal Risk and Authorization Management Program (FedRAMP), a government-wide service of the United States federal government that vets technology providers for security and risk. DocuSign forms that closely resemble our form are now used by 800 federal, State, and local government agencies, including the Federal Communications Commission (FCC), the State of North Carolina, the Nevada Department of Transportation, and 400 California cities.

6. The State suggests that the language of the petition that is provided on our online form is not accurate and may not comply with Idaho law. This is a perplexing suggestion, considering that the format of our online petition is identical in every aspect to the physical petition.

7. The State claims that our compressed schedule for meeting and conferring did not provide the State adequate time to evaluate a number of important issues with our process and protocol. The State then mentions several questions that have gone unanswered due to our compressed schedule. Yet, each of the State's unanswered questions were not raised by the State during any of our several meetings. Furthermore, each question listed is easily answerable.

8. The State asks: Has DocuSign ever accepted signatures for a ballot initiative? Yes. To give a recent example, DocuSign has accepted signatures for at least two different ballot initiatives in the State of Massachusetts.

9. Has DocuSign accepted signatures from persons it has no prior information about? Yes. It is common practice for DocuSign to accept signatures from persons without prior information.

10. The State asks: How is DocuSign being compensated? Reclaim Idaho has signed a contract for $50,162.50. To date, nearly 1,000 contributors have made donations to help cover this expense.

11. It is regretful that the State appears to doubt the very possibility of an industry standard for the authentication of electronic signatures. Reclaim Idaho has diligently worked to develop a process and protocol that meets the highest industry standards. Over the course of several meetings with the State, we received the State's input and made adjustments in response to reasonable concerns regarding security, authentication, and transparency.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED ON this 10th day of July 2020.

/s/Luke Mayville

CERTIFICATE OF SERVICE

I hereby certify on this 10th day of July, 2020, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing

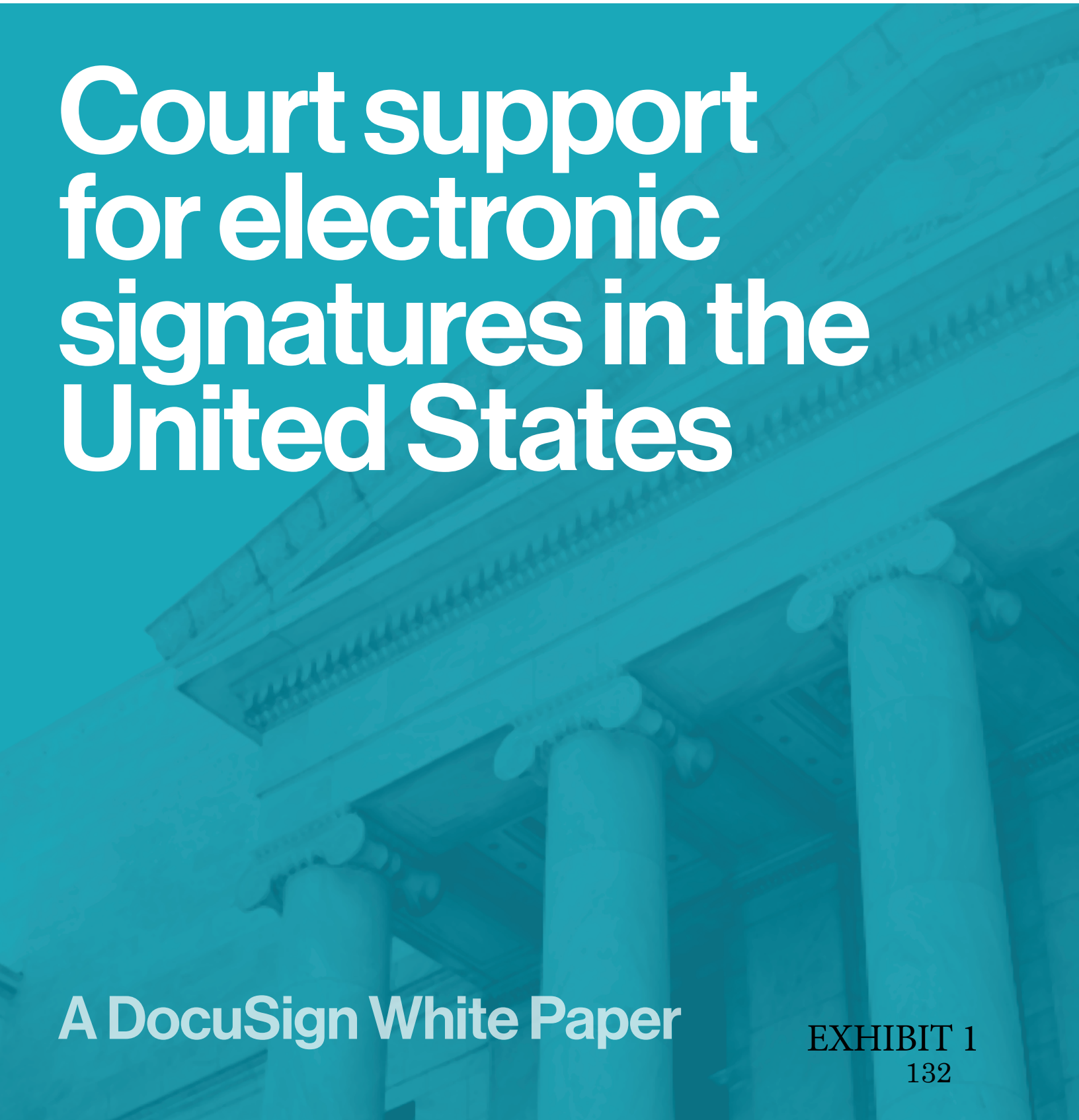
Robert A. Berry
Megan Ann Larrondo
robert.berry@ag.idaho.gov
megan.larrondo@ag.idaho.gov

Attorneys for Defendants

/s/ Deborah A. Ferguson

DocuSign®

Court support for electronic signatures in the United States



A DocuSign White Paper

EXHIBIT 1
132

Table of Contents

Overview of applicable case law

Background: electronic signatures are well established as legally binding

Judicial opinions addressing a challenge to the legality of e-signatures in the United States are relatively rare. This is likely a function of the widespread adoption of electronic signatures (over one billion signing transactions with DocuSign alone) combined with the effectiveness of the Uniform Electronic Transactions Act (UETA) and the Electronic Signatures in Global and National Commerce Act (ESIGN) in confirming their legal validity around the start of the millennium.

For the vast majority of use cases, and in nearly all jurisdictions, a properly executed electronic signature carries the same legal effect as a "wet" signature. Indeed, as the court declared in *Keller v. Pfizer, Inc*., 2018 WL 5841865 (M.D. Pa. Nov. 8, 2018):

> "Plaintiff's argument that she should not be bound by the arbitration agreement simply because she did not sign a physical paper contract is as archaic today as the notion that James Joyce is unlawfully obscene."

Analysis of U.S. case law involving DocuSign

DocuSign surveyed reported cases across all United States jurisdictions (through June 2019) where the court indicated that the DocuSign eSignature service was used. *In none of these rulings was a DocuSign signature denied the same legal effect as a paper-and-ink signature for any use case covered by ESIGN.*

DocuSign also surveyed published court orders specifying the use of DocuSign as an approved means of participating in certain kinds of legal proceedings; several such court orders have appeared from 2017 to 2019.

In effect, these cases and court orders fall into four categories:

1. **Cases where a DocuSign signature was ruled legally binding in the face of a direct challenge by a signer,** underscoring the evidentiary value of the DocuSign audit trail, which effectively logs the who, what, when, and how of the signing
2. **Cases in which the court acknowledged that DocuSign was used to create a binding contract,** although the electronic signature was not central to the issues of enforceability for the underlying agreement in dispute
3. **Cases where electronically signed court filings were deemed inadmissible based on local court rules** specifically requiring a paper-based process or other procedural requirements (such use cases are expressly excluded from ESIGN)
4. **Court orders approving DocuSign as an accepted methodology for participation in certain legal proceedings,** including class actions and settlements, Fair Labor Standards Act (FLSA) collective actions, and the interlocutory sale of real property

Below are brief summaries of these opinions and court orders, categorized as described above.

DocuSign eSignature audit trail relied upon as key evidence

In these opinions, the DocuSign audit trail was relied upon as evidence of a binding, enforceable agreement in the face of allegations by a party that it did not actually sign the agreements or did not intend to be bound by the terms contained therein.

IO Moonwalkers, Inc. v. Banc of Am. Merch. Servs., LLC

814 S.E.2d 583 (N.C. Ct. App. 2018)

Court affirmed summary judgment that plaintiff had ratified the agreement, relying on DocuSign audit trail as evidence of intent.

In this business banking dispute, the CEO of plaintiff IO Moonwalkers asserted that he had not signed defendant's agreement for credit card services. The North Carolina Court of Appeals affirmed the lower court's grant of summary judgment against plaintiff on the basis that he had ratified the agreement. In so doing, the court relied on the DocuSign audit trail showing that someone with access to the corporate email account had accessed, signed, and reviewed the agreement at specific times:

> "Were this a more traditional contract negotiation, in which the parties had mailed proposed contracts back and forth, a sworn affidavit stating that Moonwalkers never reviewed or signed the contracts might be sufficient to create a genuine issue of material fact...But this case is different because [defendant] presented evidence from the DocuSign records... Simply put, the electronic trail created by DocuSign provides information that would not have been available before the digital age...." (at 586-587)

As plaintiff had ratified the agreement, the court ruled, there was no need to rule on any further question of the signer's identity. The court also noted that plaintiff's CEO had used DocuSign previously and was thus familiar with the eSignature process, suggesting the additional value of using an industry-leading signature service.

Alliant Credit Union v. Abrego

No. 76669-4-1, 2018 Wash. App. LEXIS 2964 (Ct. App. Dec. 31, 2018)

Allegation of forged DocuSign eSignature for an auto loan was not enough to create a genuine issue of material fact as to the existence of an enforceable contract.

In this unpublished opinion, the Washington Court of Appeals affirmed summary judgment for plaintiff on a breach of contract claim over defendant's default on a 2014 auto loan. Defendant issued a series of allegations challenging the existence of a valid loan, including that the e-signature had somehow been forged. The court highlighted the extensive authentication process employed by DocuSign, agreeing that no genuine issue of material fact exists as to the existence of an enforceable agreement.

Obi v. Exeter Health Resources, Inc.

WL2142498 (D.N.H. Ct. 2019)

Plaintiff's claim of forgery was rejected in light of the fact that she had reviewed and executed the documents from her DocuSign account, creating a binding and enforceable contract.

In a breach of contract claim in the context of employment at a hospital, Plaintiff Dr. Obi alleged that one or another of the defendants had "forged" her signature onto a Placement Order, even though she did not challenge the authenticity of her signature on an overarching Client Services Agreement. In an unpublished opinion, the U.S. District Court for the District of New Hampshire granted summary judgment to the defendants, finding the plaintiff's "somewhat vague claim" of forgery to be "wholly unsupported by the record," as she had reviewed and signed the relevant documents via her DocuSign account.

In re Henriquez

559 B.R. 900 (Bankr. C.D. Cal. 2016)

Court relied on DocuSign audit trail as evidence of the signer's intent to be bound by the terms of the agreement.

In this bankruptcy matter, the court ordered the payment of legal fees to plaintiff (i.e. did not except them from discharge), rejecting Defendant Henriquez's argument that he had believed he would only need to pay if plaintiff had been successful in modifying a loan. The court relied, in part, on the DocuSign audit trail showing when plaintiff accessed and signed the documents – including initialing each page – in concluding that he was well on notice that he would need to pay even if the loan modification were unsuccessful.

Designs for Health, Inc. v. Miller

187 Conn. App. 1 (2019)

Evidence that defendant had DocuSigned an agreement containing a forum selection clause was sufficient to establish the court's personal jurisdiction over defendant.

In this breach of contract matter pertaining to an agreement to sell plaintiff's health care products, the Connecticut trial court granted dismissal on the basis that plaintiff had not met its burden to establish the court's personal jurisdiction over defendant. The appellate court reversed the dismissal in light of the forum selection clause in the DocuSigned agreement, finding that the DocuSign Certificate of Completion and other evidence provided by plaintiff met its prima facie burden to establish personal jurisdiction over defendant, who (the court noted) had used DocuSign previously to sign agreements.

ADHY Investments Properties, LLC v. Garrison Lifestyle Pierce Hill LLC

41 Misc. 3d 1211(A) (N.Y. Sup. Ct. 2013)

DocuSigned agreement, including arbitration clause, was ratified by plaintiff, rendering moot the question of whether his agent had signed the agreement without proper authorization.

Garrison Lifestyle sought to enforce a contractual requirement to arbitrate after ADHY refused to close on the purchase of real properties won in a successful bid on Auction.com. ADHY claimed that its principal did not sign the sales agreements, which contained a requirement to arbitrate. To reach its decision, the New York state trial court reviewed Auction.com's practice of using DocuSign to secure signatures for the relevant contracts. The court reasoned that, although petitioner did not sign the agreements (his assistant did), petitioner ratified or adopted as his own the acts of his agent, his assistant.

DocuSign eSignature acknowledged as legally binding

In these opinions, the use of DocuSign eSignature was not central to the dispute over enforceability of the contract terms but was acknowledged by the court as part of the facts surrounding the legal agreement.

Perez-Tejada v. Mattress Firm, Inc.

2019 WL 830450 (D. Mass. February 21, 2019)

Arbitration clause in an employment agreement was part of a binding contract executed using DocuSign.

In this effort by plaintiffs to initiate an overtime wages class action against their employer, defendant Mattress Firm, Inc. was granted its motion to compel individual arbitration instead. All but one plaintiff had accepted the arbitration clause via a DocuSign eSignature process. The remaining plaintiff had accepted the terms via inaction, after multiple warnings that failing to affirmatively opt out of the provision would indicate acceptance. Applying Massachusetts law, the court found that the arbitration provision was not unconscionable and met other requirements for an enforceable agreement.

Guidotti v. Legal Helpers Debt Resolution, LLC

74 F. Supp. 3d 699 (D.N.J. Dec. 3, 2014)

DocuSign had been used to form a binding contract, although the arbitration provision of the underlying agreement was struck down as unconscionable.

In a customer's dispute with various related debt resolution services, the trial court denied defendant's motion to compel arbitration, after which, the case went to the Third Circuit Court of Appeals. The court did not question that a binding contract had been formed but found that there were real questions about whether defendants had presented plaintiff with an agreement to arbitrate. The appeals court vacated the order denying arbitration and remanded the case to the trial court to oversee limited discovery relating to defendant's motion to compel arbitration. After additional discovery and briefing, the trial court found the arbitration requirements to be unconscionable and thereby unenforceable. However, the court agreed that when plaintiff signed agreements using DocuSign, a binding contract was formed.

Woods v. Vector Mktg. Corp.

2014 U.S. Dist. LEXIS 121165 (N.D. Cal. Aug. 28, 2014)

Arbitration clause in a sales representation agreement ruled an enforceable part of a binding contract executed using DocuSign.

Plaintiff Woods and others sought to bring a class action over alleged failures to pay minimum wages. Defendant Vector argued that the court should enforce the agreement to arbitrate (on an individual basis) contained in the contracts signed by plaintiffs. The federal trial court reasoned that because the defendant's Sales Representative Agreement (SRA) included an agreement to arbitrate disputes on an individual basis, defendant's motion to compel arbitration should be granted. In reaching its decision, the court reviewed defendant's onboarding process and determined that the SRA, which plaintiffs had signed using DocuSign, resulted in binding contracts that the court should enforce.

Newton v. Am. Debt Servs.

854 F.Supp.2d 712 (N.D. Cal. 2012)

DocuSign had been used to form a binding contract, although the arbitration provision of the underlying agreement was struck down as unconscionable.

Plaintiff Newton alleged that American Debt Services (ADS) had promised to cut her credit card debt in half but never contacted her creditors and did not settle any of her debts. Newton brought several claims and sought to establish a class action. ADS sought to compel arbitration based on Newton's DocuSigned agreement. Newton challenged the validity of the agreement, arguing she did not see or read the agreement to arbitrate, so it should not apply or, alternatively, should be voided for unconscionability. Citing the ESIGN Act and noting that an electronic signature that complies with the Act is legally binding, the federal court for the Northern District of California found that Newton "assented to the contract and the arbitration clause, and that the arbitration clause is binding on all parties to the contract." However, the court refused to enforce the arbitration clause on grounds of unconscionability.

Pavlov v. Debt Resolvers USA, Inc.

907 N.Y.S.2d 798 (N.Y. Civ. Ct. 2010)

DocuSign had been used to form a binding contract, although the underlying agreement was unenforceable due to defendant's lack of a required service license.

Plaintiff Pavlov sought a refund of money he paid to a debt resolution service, Debt Resolvers, which argued that Pavlov was not entitled to a refund because the agreement he signed using DocuSign did not permit him to obtain one. The New York City Civil Court found that the parties, who used DocuSign to apply signatures to some or all of their agreements, had formed a binding contract. However, the court voided the contract as unlawful because defendant provides services that require a license in NY, and defendant was not licensed.

Use of e-signature for court filings

As indicated above, court filings are expressly not covered under ESIGN. Whether electronic signatures are appropriate to use for documents filed in court may depend on local court and evidentiary rules that, as these opinions show, litigating parties should always heed.

Thomas v. Credit Mgmt., LP

2018 U.S. Dist. LEXIS 83685 (N.D. Ind. May 17, 2018)

While the DocuSign audit trail may have provided sufficient evidence of the date of signature of a declaration, it could not overcome statutory requirement for "under penalty of perjury" language.

In a case alleging violations of the Fair Debt Collection Practices Act, plaintiff submitted a DocuSigned affidavit from her sister in support of her motion for summary judgment. Defendant challenged the admissibility of the affidavit as undated and unsworn. The court evaluated the affidavit under 28 U.S.C. § 1746 ("Unsworn declarations under penalty of perjury") and ruled that, although the DocuSign audit trail provided evidence of the date of signature, the declaration was nonetheless inadmissible as it lacked the requisite language indicating that it had been signed "under penalty of perjury."

In re Mayfield

Nos. 16-22134-D-7, UST-1, 2016 Bankr. LEXIS 2613 (Bankr. E.D. Cal. July 15, 2016)

DocuSign could not be used to satisfy local court rule requiring debtor's counsel to maintain and provide original signed documents, excluding "software-generated" electronic signatures.

Counsel for the debtor seeking bankruptcy status filed various documents to the court with client signatures via DocuSign. The court penalized counsel for not adhering to Local Bankruptcy Court Rules 9004-1(c)(1)(C) and (D), which, it said, require that counsel maintain "originally signed" paper court documents rather than exclusively rely on "software-generated electronic signature." Though the court acknowledged that, under ESIGN, DocuSign and other electronic signature services may be appropriately used in various commercial and other transactions, it determined that "they do not comply with this court's local rule." (Note: Judge Bardwil goes on to suggest that an electronic signature may be more easily forged than a paper-based signature. This comment may best be regarded as *dictum*; it was not based on expert testimony about electronic signatures and was not required for the ruling.)

See also:

Saechao v. Landry's Inc.

No. C 15-00815 WHA, 2016 U.S. Dist. LEXIS 33409 (N.D. Cal. Mar. 15, 2016)

DocuSign could not be used to satisfy court rules for a declaration filed in the context of a class action.

Derrick Fenley v. Rite Aid Corp.

2014 Cal. Super. LEXIS 156 (Cal. Super. Ct. July 2014)

DocuSigned declarations may meet California Code of Civil Procedure requirements that they be "subscribed" (signed with one's own hand), but California Rules of Court require declarants to sign a printed document first.

Use of DocuSign for class actions and related matters

Despite the general limitation of using electronic signatures in the context of court filings, the court orders below reflect the approved use of DocuSign for participation in class actions, FLSA collective actions, and related legal actions.

Joseph v. Velocity, the Greatest Phone Company Ever, Inc.

Case No. 3:18-cv-01174 (S.D. Ohio Jan. 14, 2019)

Approved the use of DocuSign to opt in to a class action.

Weckesser v. Knight Enters. S.E., LLC

Civil Action No. 2:16-cv-02053-RMG, 2018 U.S. Dist. LEXIS 144981 (D.S.C. Aug. 27, 2018)

Approved the use of DocuSign to participate in collective actions under the FLSA.

United States v. Real Prop. Located at 6340 Logan St.

No. 2:16-CV-02259-KJM-CKD, 2018 U.S. Dist. LEXIS 19061 (E.D. Cal. Jan. 23, 2018)

Approved the use of DocuSign in the context of interlocutory sale of real property.

Titus v. The Martin-Brower Company, LLC

Case No. 2:17-cv-00558-JAM-GGH (E.D. Cal. Feb. 27, 2018)

Approved the use of DocuSign to participate in class action settlement agreement.

Brandenburg v. Cousin Vinny's Pizza, LLC

No. 3:16-cv-516, 2017 U.S. Dist. LEXIS 129955 (S.D. Ohio Aug 14, 2017)

Approved the use of DocuSign to participate in collective actions under the FLSA.

In re Anthem, Inc. Data Breach Litig.

No. 15-MD-02617-LHK, 2017 U.S. Dist. LEXIS 137281 (N.D. Cal. Aug. 25, 2017)

Approved the use of DocuSign to participate in class action settlement agreement.

Visit the DocuSign E-Signature Legality Guide to learn about current electronic signature laws, local legal systems, and technology preferences for countries around the world.

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DocuSign®

Whitepaper

Electronic signatures and transactions in the United States

An overview of key legislation and legal factors.

Table of contents

Introduction

Electronic signatures are common in the United States, but confusion still persists regarding the law at a state and federal level. This document provides an overview of:

1. **Legislation enabling electronic signature usage.**
2. **Key legal factors related to electronic transactions.**

What is an electronic contract?

Before addressing the specifics of electronic signature legislation, it may be helpful to first emphasize one point: **under U.S. law, it is absolutely possible to form a contract electronically.** The ESIGN Act and UETA (discussed below) have helped cement this conclusion, but in most scenarios, this would have been true even without this legislation. Electronic contracting is essentially contracting, and contract law fundamentals apply.

Any contract, electronic or not, requires:

- An offer
- Acceptance
- Consideration (some promised exchange of value)
- No defenses (a contract, electronic or not, will not be enforced if a successful defense can be raised; for example, if an element of the contract is unconscionable or violates public policy, or if one of the contracting parties is too young to create a contract)

The most important contribution of ESIGN and UETA is establishing that electronic records satisfy the legal requirement that certain documents be in writing.

Part 1: Legislation

Federal Law: The Electronic Signatures in Global and National Commerce Act (ESIGN)

On October 1, 2000, the ESIGN Act became effective in the United States and is codified at 15 USC § 7001. ESIGN implements a national uniform standard for all electronic transactions and encourages the use of electronic signatures, electronic contracts, and electronic records by providing legal certainty for these instruments when parties comply with its standards. ESIGN preempts any state laws to the extent they aren't consistent with it.

The ESIGN Act establishes that electronic communication and contracts are equivalent to their paper counterparts. At a high level, the key elements are:

- A contract may not be denied legal effect or enforceability solely because of its electronic form.
- If a law requires a record to be in writing, an electronic record satisfies the law.
- If a law requires a signature, an electronic signature satisfies the law.

ESIGN is intentionally neutral regarding the type of technology used, and even goes so far as to specifically preempt any state law that prescribes specific technology.

General rule regarding electronic transactions and records

ESIGN provides as follows:

> "(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation."

This establishes a baseline rule that electronic transactions are no less valid than their paper counterparts. Still courts that have examined ESIGN have consistently confirmed its broad effect.[1] Examples of relevant case law are provided in Appendix A to this document.

Electronic signatures

Electronic signature is defined in ESIGN as "an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record."

The broad definition of "electronic signature" was intended to allow many types of technology and methods for signing electronically. An electronic signature can be nearly anything produced by electronic means (for example, a symbol, result, or consequence) that has been created in order to demonstrate a party's intent to sign an electronic record.

1 See, for example, Specht v. Netscape Comm'cns Corp., 306 F.3d 17, 26 n.11 (2d Cir. 2002) (assessing whether clicking to download software created enforceable agreement to arbitrate, and noting that the matter of whether "the agreement is a 'written provision' despite being provided to users in a downloadable electronic form... has been settled by [the ESIGN Act]," although ultimately finding that consumers clicking "yes" in the context presented in that case did not manifest assent to license terms).

Examples of electronic signing include:

- Entering a password or personal information number (PIN)[2]
- Typing a name where indicated (or prompted) via computer keyboard[3]
- Responding to telephone keypad instructions (for example, press 3 to agree or 5 to hear this menu again)[4]
- Clicking a button or checkbox[5]
- Responding to an email thread in a manner that manifests assent[6]

It is important to note that while all of these methods (and potentially many others) are equally valid as signatures under ESIGN, they are not necessarily as useful in the context of enforcing an agreement. See the section titled "Common Methods of Electronic Contracting" for a discussion of some of the distinctions between electronic signature methods.

Consumer disclosures

In some transactions between businesses and consumers, the business has a statutory obligation to provide information to the consumer in writing (for example, Truth-in-Lending-Act disclosures). ESIGN permits businesses to make these disclosures electronically, so long as they meet the requirements set out in the Act.

Where a consumer would otherwise be entitled to receive information in writing, electronic information will satisfy the requirement, so long as the consumer:

- Is provided clear and conspicuous notice of the consumer's ability to receive the information on paper.
- Is provided with information about the hardware and software needed to access the information electronically.
- Affirmatively consents to receive the information electronically.

Consumers must provide this consent in a manner that "reasonably demonstrates" that the consumer can access information in the electronic form that will be used to provide the relevant information.[7] A literal reading of ESIGN indicates that the consent itself must reasonably demonstrate the consumer's ability to access the information, but the legislative history indicates that the requirement might also be met by the consumer responding affirmatively to a provider's question about their ability to access, or by showing that the consumer actually accessed the relevant information electronically.[8]

If there is a change to the hardware or software requirements to access the relevant information that creates a material risk whereby a consumer could lose access to the information, the consumer must be notified of the new requirements and of their right to withdraw consent to receive the information electronically. The reasonable demonstration requirement discussed above must also be met with respect to the new system requirements.

Though consumers may withdraw consent to receive information electronically, such withdrawal does not affect the legal effectiveness of any transactions already completed.

Also, while it is advisable to comply with the consumer disclosure requirements set out in ESIGN to the extent they apply, ESIGN states that a failure to meet those requirements will not render any contract invalid or unenforceable solely on that ground.

Electronic records

ESIGN provides that if any other law requires contracts or other records to be retained, that requirement may be met by retaining an electronic record of the applicable contract or record – so long as the electronic record accurately reflects the contract or other record and the record remains accessible to those entitled to access it in a form that can be accurately reproduced for later reference.

If a contract or record is required by law to be in writing (for example, if it is subject to the Statute of Frauds), ESIGN permits it to be completed electronically so long as the electronic record is in a form that can be retained and accurately reproduced by all parties who are entitled to retain the contract or record for future reference.

2 See, for example, the Internal Revenue Service ("IRS") Fact Sheet 2011-07 (http://www.irs.gov/uac/Taxpayers-Who-File- Electronically-Must-Use-e-Signatures), explaining the use of a PIN as e-signature on a tax return.
3 See, for example, Haywood Securities, Inc. v. Ehrlich, 149 P.3d 738 (Ariz. 2007).
4 See, for example, opinion number 04-08-15 of the Office of the General Counsel of New York, issued August 18, 2004, interpreting ESIGN to allow a life insurance agent to have an applicant sign a life insurance application by the entry of their Social Security number into an interactive voice response (IVR) system using a telephone keypad. http://www.dfs.ny.gov/insurance/ ogco2004/rg040815.htm
5 See, for example, United States v. Hair, 178 Fed. Appx 879, 882 n.3 (11th Cir. 2006).
6 See, for example, Int'l Casings Grp., Inc. v. Premium Standard Farms, Inc., 358 F.Supp.2d 863, 873 (W.D.Mo. 2005).
7 15 USC §7001 (c)(1)(C)(ii).
8 146 Cong. Rec. S5282 (daily ed. June 16, 2000) (colloquy between Senators Abraham and McCain).

State Law: Uniform Electronic Transactions Act (UETA)

The Uniform Electronic Transactions Act (UETA) was adopted in 1999 by the National Conference of Commissioners on Uniform State Law.

Forty-seven states, the District of Columbia, Puerto Rico, and the Virgin Islands have adopted UETA.[9] Most of these states have made few, if any, modifications to the model law (the most notable in terms of exceptions being California).

Only three states, New York, Illinois, and Washington, have maintained their own independently developed laws (which pre-date UETA), but all three have amended or interpreted them to be consistent with UETA in their effect. A discussion of each of these "outlier" state laws is set out in Appendix B.

Despite the slight differences among the states, there is enough consistency to permit most businesses to adopt a single process for electronically signing agreements across the country.

Preemption—which law applies?

As noted above, ESIGN preempts state laws (including those representing an adoption of UETA) to whatever extent such laws are inconsistent with ESIGN.

ESIGN also specifically preempts inconsistent state laws that are technology-centric. This eliminated or forced modification of state laws containing specific digital signature requirements which could be met only with the use of PKI-based digital certificates.

Although ESIGN and UETA provisions are similar, there are a handful of differences. Perhaps most notably, ESIGN includes additional requirements for contracting with consumers (discussed above) and is different in scope from UETA. ESIGN applies to "any transaction in or affecting interstate commerce," whereas UETA only encompasses transactions arising out of business, commercial, and governmental matters.

In practice, the requirements of the state and federal laws are so similar that businesses generally need not determine which law applies, because they can easily comply with both.

See Appendix C for an in-depth analysis of how ESIGN and UETA differ.

9 Uniform Law Commission, http://www.uniformlaws.org/Act.aspx?title=Electronic%20Transactions%20Act

Exceptions to ESIGN and UETA, and the role of other laws

While ESIGN and UETA generally promote electronic contracting, a few categories of documents are excluded from the legislation. **This does not mean these documents may not be completed electronically.** It simply means that they are not covered by ESIGN and/or UETA. As discussed on the next page, many of the documents not covered by ESIGN and UETA may be electronically completed under other legislation specific to those documents.

Exceptions

ESIGN does not apply to contracts governed by:

- Laws overseeing the creation and execution of wills, codicils, or testamentary trust.
- Laws overseeing adoption, divorce, or other matters of family law.
- The Uniform Commercial Code, as in effect in any U.S. state, other than sections 1-107 and 1-206 and Articles 2 (Sale of Goods) and 2A (Leases of Goods)

In addition, ESIGN does not apply to:

- Court orders or notices, nor official court documents (including briefs, pleadings, and other writings), required to be executed in connection with court proceedings (as these types of documents generally are governed by court rules, and **many courts permit electronically signed documents pursuant to their court rules**[10])
- Any notice of:
  - The cancellation or termination of utility services (including water, heat, and power)
  - Default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a primary residence of an individual.
  - The cancellation or termination of health insurance/benefits or life insurance benefits (excluding annuities)
  - Recall of a product, or material failure of a product, that risks endangering health or safety.
- Any document required to accompany any transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials.

Most state electronic signature laws (whether or not modeled on UETA) contain similar exceptions.

Does state law ever apply to electronic transactions?

The ESIGN Act applies to "*any* transaction in or affecting interstate commerce" (emphasis added). This raises the question of what kind of transactions would not fall into its reach. The courts have historically taken a very broad view as to what "affects" interstate commerce, including many transactions where all parties are located in the same state. For example, if a transaction is part of a "class" of transactions that affect interstate commerce, the entire class can be regulated, even if many of the individual transactions occur solely in one state.[11] Even the local real estate market has been found to be within the scope of the federal government's power to regulate commerce.[12]

In theory, it is possible that a transaction could exist that does not affect interstate commerce and thus would not be subject to ESIGN, but for practical purposes, it will likely apply to most contracts entered by companies.

10 See, for example, the "Administrative Procedures for Filing, Signing, and Verifying" provided by the U.S. District Court for the Western District of Virginia at http://www.vawd.uscourts.gov/media/3355/ecfprocedures.pdf, permitting electronic attorney signatures.
11 See Perez v. United States, 402 U.S. 146 (1971) (sustaining the application of a federal "loan-sharking" law to a local culprit because the practice of loan-sharking, in general, impacted interstate commerce).
12 Russell v. United States, 471 U.S. 858, 862 (1985) (holding that an apartment rental "unquestionably" affects interstate commerce, and that "the local rental of an apartment unit is merely an element of a much broader commercial market in real estate").

UCC exclusions and transferable records

One of the more notable exceptions in both ESIGN and UETA are contracts governed by the Uniform Commercial Code (UCC), other than sections 1-107 and 1-206 and Articles 2 (Sale of Goods) and 2A (Leases of Goods). This exclusion reflects the fact that the UCC had already been revised to include provisions for electronic processes for the categories of transactions excluded.

The following table summarizes the Articles of the UCC and how electronic records relate to each:

UCC Code	Electronic Records Use	Example Transaction
Article 1. General Provisions	N/A	General
§ 1-107[13] (renunciation)	Covered by ESIGN/UETA	Waiver of rights after a breach of contract
§ 1-206[14] (statute of frauds for personal property other than "goods")	Covered by ESIGN/UETA	Sale of personal property other than goods (for example, IP)
Article 2. Sales	Covered by ESIGN/UETA	Sales contract
Article 2A. Leases	Covered by ESIGN/UETA	Lease agreements
Article 3. Negotiable Instruments	Duplicated in ESIGN Title 2, and UETA § 16	Mortgage notes
Article 4. Bank Deposits	N/A	Checks
Article 4A. Funds Transfers	N/A	EFT systems
Article 5. Letters of Credit	Allowed under UCC Art. 5-104	Bank letter of credit
Article 6. Bulk Transfers	N/A	Liquidation notice
Article 7. Warehouse Receipts/Bill of Lading and Other Documents of Title	Allowed under Rev. Art. 7-102[15]	Vehicle title
Article 8. Investment Securities	N/A	Securities
Article 9. Secured Transactions	Allowed under Rev. Art. 9-105	Chattel paper

As noted in the chart above, UCC provisions permit electronic records for certain document types. For example, section 9-105 sets out the rule for electronic chattel paper, including a list of requirements for the electronic system employed to evidence the transfer of interests in the chattel paper. The UCC stipulates that if the system enables such management of the note in electronic format, the electronic record shall have the same rights and defenses as equivalent paper records under the UCC.

13 This section was renumbered as section 1-306 following the 2001 amendments to Article 1 of the UCC. See http://www.uniformlaws.org/shared/docs/ucc1/ucc1_am01.pdf
14 This section was removed from the UCC in the 2001 revision to Article 1, but the provision still exists in many states' adoption of the UCC.
15 See discussion of the revisions to Article 7 dealing with electronic records at http://www.uniformlaws.org/ActSummary.aspx?title=UCC%20Article%207,%20Documents%20of%20Title%20%282003%29. The revisions have been adopted by most states.

Government exclusions

ESIGN generally applies to government actors, but some special provisions apply to them.

ESIGN permits federal and state agencies with rulemaking authority to interpret the Act in connection with statutes they administer. However, any such "regulation, order, or guidance" issued by an agency must be "consistent" with the general principles of ESIGN, may not impose additional requirements, and must be supported by a substantial justification. Agencies are permitted to require retention of paper records only if doing so is essential to attaining a compelling governmental interest relating to law enforcement or national security.

Some agencies have interpreted ESIGN as expressly excluding government filings. For example, the SEC released guidance in 2001 indicating that it did not believe ESIGN applied to SEC filings, but nonetheless authorized the use of electronic records and signatures for most purposes.[16]

In practice, government agencies take a variety of approaches to electronic records, with some agencies accepting nearly everything electronically, and others accepting only selected documents, or establishing regulations that require special treatment of certain documents. For example, the IRS has adopted a framework for the use of electronic signatures by Income Verification Express Services Participants, permitting electronic signatures on forms 4506-T and 4506T-EZ. The framework involves, among other things, taking steps to authenticate the signer, obtain their consent, and obtain third-party verification of the quality of the electronic signature process.[17] The IRS also permits a number of other forms to be submitted with electronic signatures, including individual income tax returns, which may be signed using a PIN.[18]

ESIGN also permits government actors to impose specific technical requirements in order to do business electronically with them as a market participant (for example, government procurement standards). This is discussed further in Part 2 below.

16 Application of the Electronic Signatures in Global and National Commerce Act to Record Retention Requirements Pertaining to Issuers Under the Securities Act of 1933, Securities Exchange Act of 1934 and Regulation S-T, 66 FR 33175 (June 21, 2001).
17 Accessed at https://www.irs.gov/individuals/income-verification-express-services-ives-electronic-signature-requirements.
18 IRS Publication 1345.

Part 2: Electronic contracting in practice

Common methods of electronic contracting

Clickwrap

With "clickwrap" agreements, end users are required to click a button or checkbox indicating their agreement to a set of terms before being able to proceed with an electronic transaction or gaining access to services or products.[19] Courts generally enforce clickwrap agreements even when the user has not read the contract terms, because clicking indicates that the user had actual and constructive knowledge that certain agreement terms apply to the offered products and services.[20]

In determining whether to enforce a clickwrap agreement, a court may scrutinize a website's design, how the button is labeled (for example, "continue" or "next" versus "I Agree"), use of all caps, use of colors or formatting that encourage or dissuade action, font size, important terms being visually obscured by advertisements, or even what the "reasonable Internet user" would conclude were the terms of the agreement.[21] These and other considerations should be taken into account when implementing a clickwrap process, especially as clickwrap is most often employed with contracts of adhesion – "take-it-or-leave-it" contracts which are not negotiable by the customer. Nevertheless, for the right use case, an appropriately configured clickwrap solution can be a highly effective way to achieve a valid, binding, admissible and enforceable agreement.[22]

Browsewrap

"Browsewrap" terms are typically posted on a website and accessible via a hyperlink. These agreements may not involve an electronic signature at all, but instead rely on some action of the user (like continuing to visit the website) to demonstrate "acceptance" of the terms.

While the enforceability of browsewrap is much less certain than clickwrap, it may be considered "accepted" when the end user (1) has actual and constructive notice of the applicable terms; and (2) takes some action to avail herself of the products and services that are subject to those terms.[23] Enforceability will turn on the particular facts, particularly the extent to which the website operator provided notice of the terms.

For example, in *Nguyen v. Barnes & Noble, Inc.*,[24] the court found that the plaintiff had not agreed to the arbitration provision in Barnes & Noble's browse-wrap agreement, because Barnes & Noble "did not position any notice even of the existence of its 'Terms of Use' in a location where website users would necessarily see it, and certainly did not give notice that those Terms of Use applied, except within the Terms of Use" (emphasis in original). Conversely, in *Cairo, Inc. v. Crossmedia Services, Inc.*,[25] the court determined that users had actual and constructive notice because they were presented with text that read: "[b]y continuing past this page and/or using this site, you agree to abide by the [t]erms of [u]se for this site..."

19 Kwan, et. al., v. Clearwire Corporation, No. C09-1392JLR, 2011 U.S. Dist. LEXIS 150145, at *1 (W.D. Wash. Dec. 28, 2011).
20 See, generally, I-Systems, Inc. v. Software, Inc. Quantum Management Systems, LLC, No. 02-1951 (JRT/FLN), 2005 U.S. Dist. LEXIS 47592 (D. Minn. Mar. 7 2005).
21 See Berkson v. GoGo LLC, 97 F.Supp.3d 359 (E.D.N.Y. 2015) (establishing general principles for enforceability of internet agreements: (1) the evidence must show that the user had notice of the agreement, (2) the link to the terms is located where users are likely to see it and (3) a "user is encouraged by the design and content of the website and the agreement's webpage to examine the terms clearly available through hyperlinkage.") In this case, the court required that "the offeror must show that a reasonable person in the position of the consumer would have known what he was assenting to" and accordingly distinguished the noticeably smaller hyperlink for the contract terms from the large, colored "Sign In" button.
22 See The Effectiveness of Clickwrap for Legally Enforceable Agreements, available at https://www.docusign.com/sites/default/files/resource_event_files/Click-Legality-Whitepaper-US-May-2019.pdf.
23 Specht v. Netscape Communications Corp., 306 F.3d 17, 25 (2d Cir. 2002) citing Windsor Mills, 25 Cal App. 3d at 992 (2001) quoting Restatement (Second) of Contracts §19 (1981). See also, Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 429 (2d Cir. 2004) (holding that provisions disclosed solely through browse-wrap agreements are typically enforced if the website user had actual and constructive knowledge of the site's terms and conditions, and has manifested assent to them).
24 Nguyen v. Barnes & Noble, Inc., No. 8:12-cv-0812-JST (RNBx), 2012 U.S. Dist. LEXIS 122455 (C.D. Cal. Aug. 28, 2012).
25 Cairo, Inc. v. Crossmedia Services, Inc., No. 04-04825, 2005 U.S. Dist. LEXIS 8450 (N.D. Cal. Apr. 1, 2005).

Signing with an electronic signature system

The method of electronic signature that most closely resembles the familiar paper contracting process is signing with an electronic signature system. Documents are prepared by the sender within the system, then presented to the intended signer. The signer may then review the document and will be prompted to sign in the appropriate location(s). The form of the signature may be a free-form mark made with a stylus or touch screen, or may be a text version of the person's name, in a font selected by them as part of the signing process.

Case law is strongly in support of the validity of this type of process, with a range of reported cases confirming the legally binding effect of electronically signed agreements.[26] Further, the breadth of evidence collected by this process has been shown in a number of cases to be of dispositive legal value even in the face of a party's sworn allegations that they did not sign the agreements in question, leading to summary judgment for the party seeking to enforce the agreement.[27]

26 See, for example, Newton v. American Debt Service, 854 F.Supp.2d 712 (N.D. Cal. Feb 22, 2012) (finding the plaintiff had entered into a binding contract that she had signed using DocuSign, though declining to enforce an underlying provision of the contract on other grounds).
27 See, for example, IO Moonwalkers, Inc. v. Banc of Am. Merch. Servs., LLC, 814 S.E.2d 583 (N.C. Ct. App. 2018) (affirming summary judgment that plaintiff had ratified the agreement in question, relying on DocuSign audit trail as evidence of intent).

Common considerations about electronic contracting

Most of the factors that may arise in enforcing and interpreting electronic agreements are not unique to the electronic sphere. However, they may manifest themselves somewhat differently, or cause more concern than they would otherwise, because lawyers and judges may be less familiar with the technology.

The following sections attempt to shed some light on common considerations raised by attorneys about electronic signature.

Admissibility as evidence

It is important to begin by emphasizing that electronic records are absolutely admissible as evidence. Like any evidence, they must be authenticated, or the parties must agree to their authenticity.

In the federal court system, Federal Rules of Evidence 901 and 902 govern authentication. Courts have permitted electronic data to be admitted under Fed. R. Evid. 901(b)(4), which allows authentication through distinctive characteristics of the document ("Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances"),[28] and Fed. R. Evid. 902(7), which allows business emails to be self-authenticating with information showing the origin of the transmission or other identifying marks (for example, company logos and email addresses).[29]

Confusion sometimes arises in connection with requirements that an "original" document be produced, since the concept of an "original" is not very meaningful in the electronic context. Fortunately, this is addressed in Fed. R. Evid. 1001(d), which provides in pertinent part that "For electronically stored information, 'original' means any printout – or other output readable by sight – if it accurately reflects the information."

Delivery: when an electronic record is "sent" and "received"

ESIGN is largely silent regarding delivery of electronic records; however, UETA provides a set of default rules that can be modified by agreement of the parties.

An electronic record is considered "sent" when the following criteria are met:

- The record is addressed or directed to an information processing system designated or used by the recipient for receiving records of the type transmitted and from which the recipient is able retrieve the record.
- The information is in a form the recipient's system is capable of processing.
- The information enters an information system outside the sender's control or, if the sender and the recipient are using the same system, enters a part of the system under the recipient's control.[30]

An electronic record is considered "received" when the following criteria are met:

- It actually arrives at a system to which the recipient has access for retrieving the record.
- The system has been designated or actually used by the recipient for receipt of the type of record in question.
- The system is capable of processing the record.

It is not necessary for the recipient to actually open or view the electronic record in order for it to be considered received.[31]

UETA also provides that if one of the parties to a transmission is aware that a record was not actually sent or actually received, even though it met the criteria of UETA's default rules, then the effect of the electronic record and its transmission is determined by other law.[32] This provision cannot be modified by agreement of the parties. A few states have expanded on this provision, adding that

28 United States v. Safavian, 435 F. Supp. 2d 36, 40 (D.D.C. 2006), rev'd on other grounds, 528 F.3d 957 (D.C. Cir. 2008) (admitting emails based on the email addresses contained in the "to" and "from" fields, and other identifiable material such as the subject matter, signatures, and other personal and professional references).
29 Scheuplein v. City of W. Covina, No. B206203, 2009 Cal. App. Unpub. LEXIS 7805, at *26–27 (Cal. Ct. App. 2d Dist. Sept. 29, 2009) (finding emails to be authenticated when accompanied with a declaration that the emails were retrieved from the company's computers and the printouts were accurate representations of the retrieved messages).
30 UETA §15(a).
31 UETA §15(e).
32 UETA §15(f).

a "bounceback" message will automatically prevent a message from being deemed sent or received.[33]

Most judicial decisions considering delivery of information via email, whether or not they relied on the UETA rules, have determined that if the sender's business records establish that an email was transmitted to the correct email address, a "rebuttable presumption" of delivery arises.[34]

Proving the identity of the signer

As with any contract, an electronic contract will not be enforced if the identity of the party to the contract cannot be established. This can be challenging when parties are contracting remotely, either through electronic means, or by mail.

The identity of the signer is an evidentiary issue, and can be proven in a variety of ways.[35] For example, in *Zulkiewski v. Am. Gen. Life Ins. Co.*, the court found that the insurance company's authentication process, which involved association with an email address, and knowledge of certain personal information (for example, mother's maiden name) were sufficient to establish the identity of the signer.

Electronic security may also play a role in establishing identity. For example, in *Kerr v. Dillard Store Services*, the court declined to enforce an arbitration agreement purportedly signed by the plaintiff, because the defendant "did not have adequate procedures to maintain the security of intranet passwords, to restrict authorized access to the screen which permitted electronic execution of the arbitration agreement, to determine whether electronic signatures were genuine or to determine who opened individual emails."[36]

Similarly, in *Ruiz v. Moss Brothers*, the employer was unable to enforce an arbitration agreement where the court found that they failed to demonstrate how an electronically signed document had been generated, leaving it unclear whether reasonable measures were in place to verify the signer's identity.[37]

It is worth noting that, although there are potential pitfalls with an electronic signature process, it is often still superior to a paper-based system from an evidentiary standpoint. An electronic signature will frequently be associated with an email address, IP, or other elements associated with the signer, where a contract sent by mail will only be associated with a physical location (where others may reside) and a written signature (which may be forged).

Using electronic signatures with government agencies

ESIGN is made applicable to federal and state governments.[38] In practice, however, government agencies often decline to accept electronic records, or impose additional requirements upon them.[39] ESIGN does not grant a right to make electronic filings with the government, and it permits agencies to interpret ESIGN through the issuance of regulations. Some agencies have chosen to impose specific technical requirements, such as the use of public key cryptography, upon the agency's use of electronic signatures.

Over time, government agencies appear to be moving toward greater acceptance of electronic contracting and electronic signatures, though they are generally doing so more slowly than the private sector.

That said, the federal government appears poised to leap forward in its adoption of electronic signatures. On December 20, 2018, the 21st Century Integrated Digital Experience Act ("21st Century IDEA") was signed into federal law. The Act requires all executive agencies to modernize their websites, forms, and processes for improved user experience and compliance with appropriate legal standards. It specifically requires that, "[n]ot later than 180 days after the date of enactment of this Act, the head of each executive agency shall submit to the Director and the appropriate congressional committees a plan to accelerate the use of electronic signatures standards established under the Electronic Signatures in Global and National Commerce Act (15 U.S.C. 7001 et seq.)."[40]

The 21st Century IDEA can be seen as a strong endorsement of the value of modern digital services, including electronic signature, for a broad range of government use cases.[41]

33 See, for example, Pa. Stat. Ann., tit. 73 § 2260.115.
34 See, for example, American Boat Co., Inc. v. Unknown Sunken Barge, 418 F.3d 910, 914 (8th Cir. 2005) (holding that the same presumption of delivery applicable to paper communications should apply to email); Kennell v. Gates, 215 F.3d 825, 829 (8th Cir.2000) (absent evidence to the contrary, emails properly dispatched via a generally reliable method are presumed delivered and received).
35 Zulkiewski v. Am. Gen. Life Ins. Co., No. 299025, 2012 Mich. App. LEXIS 1086 (Mich. Ct. App. June 12, 2012).
36 Kerr v Dillard Store Services, Inc., 2009 WL 385863 (D. Kan. Feb. 17, 2009).
37 Ruiz v. Moss Bros. Auto Group, Inc. (2014) 232 Cal. App. 4th 836.
38 15 U.S.C. § 7004.
39 For example, the Food and Drug Administration has released regulations regarding electronic creation, maintenance, and submission of information subject to FDA regulations, which are set out at 21 CFR Part 11.
40 21st Century IDEA Act, Public Law 115-336, Sec. 5, available at https://www.congress.gov/bill/115th-congress/house-bill/5759/text].
41 For more information on the 21st Century IDEA Act, see https://www.docusign.com/21st-century-idea-act].

Appendix A

Notable case law

For a summary of all U.S. case law addressing the use of the DocuSign eSignature service, see the DocuSign white paper "**Court Support for the Use of Electronic Signatures in the United States**."[42]

For a summary of key case law surrounding clickwrap agreements, see the DocuSign white paper "**The Effectiveness of Clickwrap for Legally Enforceable Agreements**."[43]

Below are examples of instructive case law addressing a range of issues related to electronic contracting.

Signed writing requirements

Buckles Management, LLC v. InvestorDigs, LLC
No. 10-cv-00508-LTB-BNB, 728 F.Supp.2d (D. Colo. 2010)

Though email may be sufficient to meet the signed writing requirement under the statute of frauds, in this case it did not qualify as an electronic signature under ESIGN because the sender did not intend to be bound by the terms.

Kaufman v. American Family Mut. Ins. Co.
No. 05–cv–02311–WDM–MEH, 2007 WL 437641 (D. Colo. 2007)

An automated signature on a written letter could meet the statute of fraud requirement, precluding dismissal.

Barwick v. GEICO
2011 Ark. 128 (Ark. 2011)

The plain language of Arkansas UETA authorized the use of electronic records and signatures to satisfy the requirement under Arkansas insurance law that medical benefits coverage could only be rejected by a signed "writing."

Naldi v. Grunberg
80 A.D.3d 1 (N.Y. App. Div. 1st Dep't 2010)

New York Statute of Frauds may be satisfied by an electronic writing and electronic signature because, among other reasons, the Electronic Signatures and Records Act (ESRA) incorporated the substantive provisions of ESIGN, which allow for such electronic records and signatures.

Johnson v. Astrue
No. CIV S-08-0182 GGH 2009 U.S. Dist. LEXIS 130558 (E.D. Cal. June 18, 2009)

Electronic signatures are not "rubber stamp signatures" as prohibited in the Code of Federal Regulations and, as such, electronic signatures meet the requirements for submitting examination reports under CFR for disability insurance claimants.

42 "Court Support for Electronic Signatures in the United States" is available at https://www.docusign.com/white-papers/court-support-for-electronic-signatures-in-the-united-states.
43 White paper is available at https://www.docusign.com/white-papers/the-effectiveness-of-clickwrap-for-legally-enforceable-agreements.

Attribution of electronic signature and proof of consent

Espejo v. Southern California Permanente Medical Group

246 Cal. App. 4th 1047 (2016)

Use of a unique username and password is sufficient to establish the identity of the signer in the context of an employee arbitration agreement.

Labajo vs. Best Buy Stores L.P.

478 F.Supp.2d 523 (2007)

Although a valid electronic signature existed, it was not clear whether the signer had actual knowledge of the contract terms to which the signature purportedly evidenced agreement.

Kerr v. Dillard Store Services

No. 07-2604-KHV, 2009 WL 385863 (D. Kan. Feb. 17, 2009)

Court declined to enforce an arbitration agreement because the defendant "did not have adequate procedures to maintain the security of intranet passwords, to restrict authorized access to the screen which permitted electronic execution..., to determine whether electronic signatures were genuine or to determine who opened individual emails."

Ruiz v. Moss Bros. Auto Group, Inc.

232 Cal. App. 4th 836 (2014)

Court declined to enforce an employee arbitration agreement where the employer failed to demonstrate how the employee was authenticated and how the record was produced and maintained.

Zulkiewski v. Am. Gen. Life Ins. Co.

No. 299025, 2012 Mich. App. LEXIS 1086 (Mich. Ct. App. June 12, 2012)

An insurance company's authentication process, which involved association with an email address and knowledge of certain personal information (for example, mother's maiden name), was sufficient to establish the identity of the signer.

Adams v. Superior Court [Adams v. Quicksilver, Inc.]

No. G042012 2010 Cal. App. Unpub. LEXIS 1236 (Cal. App. 4th Dist. Feb. 22, 2010)

An electronic signature could not be attributed to an employee because the system used did not have sufficient controls (that is, it did not require a password, the record could be modified after the fact, it did not include an audit trail, etc.).

Email as electronic signature

JBB Investment Partners Ltd. v. Fair

232 Cal. App. 4th 974 - Cal: (Court of Appeal, 1st Appellate Dist., 2nd Div. 2014)

Although a typed name in an email may be an electronic signature, it must meet the other elements of an "electronic signature" under UETA; in this case, there was no evidence of intent to sign.

Int'l Casings Grp., Inc. v. Premium Standard Farms Inc.

358 F.Supp.2d 863, 873 (W.D. Mo. 2005)

Email messages including "a header with the name of the sender" were sufficient to satisfy the signature requirement under Missouri's version of the UCC and UETA.

Cunningham v. Zurich Am. Ins. Co.

352 S.W.3d 519, 530 (Tex. App. 2011)

Court declined to hold the mere sending of an email containing a signature block to be an enforceable electronic signature "when no evidence suggests that the information was typed purposefully rather than generated automatically, that [the sender] intended the typing of her name to be her signature, or that the parties had previously agreed that this action would constitute a signature."

Admissibility of electronic evidence

Hook v. Intelius, 10-CV-239(MTT)

2011 U.S. Dist. LEXIS 31879 (M.D. Ga. Mar. 28, 2011)

Screenshots regenerated from archive data (not actual images) were deemed admissible and offered probative value in enforcing an online agreement.

Lorraine v. Markel American Ins. Co.

241 F.R.D. 534, 538 (D. Md. 2007)

Established generally that electronic evidence can be admitted, subject to a showing of reliability.[44]

Delivery of electronic records.

Roling v. E*Trade Sec. LLC

860 F. Supp. 2d 1035, 1043 (N.D. Cal. 2012)

Court found that an email notice sent within a reasonable time before a fee increase was sufficient notice.

In re Leventhal

No. 10 B 12257, 2012 WL 1067568 (Bankr. N.D. Ill. Mar. 22, 2012)

Court extended to email the concept that "a properly addressed item mailed to someone is presumed to have been received."

Abdullah v. Am. Exp. Co.

No. 3:12-CV-1037-J-34MCR, 2012 WL 6867675 (M.D. Fla. Dec. 19, 2012)

Court found, based on presented evidence showing proper delivery of email to the plaintiff, that "a rebuttable presumption was created that Plaintiff received that email."

Ball ex rel. Hedstrom v. Kotter

746 F. Supp. 2d 940, 953 n. 10 (N.D. Ill. 2010)

Court found presumption that, because no evidence was presented to the contrary, the plaintiff had received and had knowledge of information sent to him by the defendant via email.

SEC v. Global Online Direct, Inc.

No. 1:07-cv-0767-WSD, 2007 WL 4258231 (N.D. Ga. Nov. 29, 2007)

Email notices to investors are appropriate if the process creates a reasonable expectation that the investors will (1) receive notice, (2) understand what it relates to, and (3) make a knowing and deliberate decision to read or disregard the communication.

44 For more information on the case, see http://www.lexisnexis.com/applieddiscovery/LawLibrary/whitePapers/ADI_WP_LorraineVMarkel.pdf.

Appendix B

Outlier states: Illinois, New York, and Washington

Illinois, New York, and Washington have not adopted UETA, but have passed their own legislation to support ecommerce. Each state's law is summarized below.

Illinois

The Illinois legislature adopted the Electronic Commerce Security Act[45] (ECSA) in 1998. Although it has not been updated to mirror the language of UETA or ESIGN, it is similar to both in its approach. Most importantly, the ECSA provides that electronic records and signatures shall not be denied legal effect, validity, or enforceability solely on the grounds that they are in electronic form.

ECSA also explicitly provides for the admission of electronic records and signatures as evidence in legal proceedings, prohibiting the denial of admissibility on the sole basis that the record or signature is in electronic form.

The ECSA states that it aims to "facilitate electronic communications by means of reliable electronic records," "facilitate and promote electronic commerce, by eliminating barriers resulting from uncertainties over writing and signature requirements," "minimize the incidence of forged electronic records, intentional and unintentional alteration of records, and fraud in electronic commerce," and "promote public confidence in the integrity and reliability of electronic records and electronic commerce."[46]

The exceptions to the ECSA are somewhat different than those to ESIGN and UETA. As with the other signature laws, this does not mean that electronic signatures are prohibited, but they must be supported by some other law or common law principle. The exceptions to ECSA are:

> (1)When it would be "clearly inconsistent with the manifest intent of the lawmaking body or repugnant to the context of the same rule of law[.]" (the "manifest intent" referred to in the Act requires more than a mere showing of a requirement of a "signature" or that the document be "signed")
>
> (2)The "creation or execution of a will or trust, living will, or healthcare power of attorney"
>
> (3)"[A]ny record that serves as a unique and transferable instrument of rights and obligations"

The law goes on, however, to state that electronic signature may suffice under the ECSA for a negotiable instrument or other conveyance when an electronic version of the record exists, is "stored and transferred in a manner that allows for the existence of only one unique, identifiable, and unalterable original"; and "can be possessed by only one person, and which cannot be copied except in a form that is readily identifiable as a copy."

Furthermore, ECSA differs from ESIGN and UETA in its narrower definition of electronic signature and its distinct definition of electronic and digital signatures. An electronic signature is defined as "a signature in electronic form attached to or logically associated with an electronic record."

A digital signature is defined as:

> [A] type of electronic signature created by transformingan electronic record using a message digest function and encrypting the resulting transformation with asymmetric cryptosystem using the signer's private key such that any person has the initial untransformed electronic record, the encrypted transformation, and the signer's corresponding public key can accurately determine whether the transformation was created using the private key and whether the initial electronic record has been altered since the transformation was made. A digital signature is a security procedure.

45 5 ILCS 175.
46 5 ILCS 175/1-105.

Although ECSA includes an extensive discussion of digital signatures, they are not required for enforceability or admissibility into evidence. Like many states, Illinois may require digital signatures in some cases when contracting directly with the government or submitting documentation to government agencies.

New York

New York adopted the Electronic Signatures and Records Act (ESRA) in 2000. ESRA is technology neutral, supports use of electronic signature and electronic records for business and personal use, and provides for the admissibility of electronic records into evidence. As described on the website of the New York State Office of Information Technology Services (ITS), "[ESRA] provides that 'signatures' made via electronic means will be legally binding just as hand-written signatures now are.... There is now no doubt that electronic records have the same legal force as those produced in other formats such as paper and microfilm."

Similar to ESIGN, ESRA defines electronic signature as "an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with intent to sign the record."

ESRA originally did not apply to electronic transactions involving transfer of title due to death or incompetence, or to the appointment of fiduciaries, but the legislature expanded the scope of ESRA to include such transactions in 2012. As noted on the ITS website sited above: "Effective September 23, 2012, ESRA will allow the use and acceptance of electronic signatures and records with conveyances and other instruments recordable under Article Nine of the Real Property Law, and permit recording officers to electronically accept for recording or filing digitized paper documents or electronic records of real property instruments such as deeds, mortgages and notes, and accompanying documents."

In the case of *Naldi v. Grunberg*,[47] the New York Appellate Division confirmed that the New York Statute of Frauds may be satisfied by an electronic writing and electronic signature because, among other reasons, ESRA has incorporated the substantive provisions of the ESIGN Act.

47 80 A.D.3d 1 (NY App Div 2010).

Washington

From 1997 to mid-2019, electronic signatures in Washington were primarily governed by the Washington Electronic Authentication Act (WEAA). The state repealed WEAA in its entirety effective July 28, 2019, essentially finding the law outdated (in the context of a legal and business climate that has actively embraced e-signature) and confusing (in light of inconsistencies across Washington state law arising from evolving e-signature provisions).

While the repeal of WEAA arguably leaves Washington without a singular overlay statute regarding electronic signatures, it is plainly not intended to negatively impact e-signature acceptance or enforceability in the state. The totality of legislative and judicial activity manifests Washington's recognition of ESIGN and alignment with the federal law's core principles:

- A broad definition of "electronic signature."
- The legal equivalency of electronic and wet signatures.
- Technology neutrality, that is, a lack of any legal preference for any particular e-signature methodology over any other.

Passed well before UETA or ESIGN, WEAA was originally limited in scope, conferring legal enforceability only on "digital signatures" (electronic signatures that use PKI-based digital certificates) and establishing standards for Certificate Authorities (entities that create and maintain digital certificates).[48] The emphasis on digital certificates was intended to encourage the public to become more comfortable with electronic commerce.[49] However, the use of digital certificates failed to emerge as a standard means of transacting business, mostly due to the common consensus that the limited extra assurance provided by digital certificates was not worth the added time, expense, and hassle of requiring signers to procure them.[50]

In 1999 and 2011, amendments to WEAA were passed with the intent of expanding the scope of the law to embrace a broader range of electronic signatures and to relax restrictions on government agencies that previously had limited their acceptance to only digital signatures.[51]

Then, in 2015, came new e-signature legislation, embodied in the Revised Code of Washington (RCW) as 19.360.000 et seq. This new law formally recognized that ESIGN "applies to federal and state transactions, including certain government transactions, in or affecting interstate or foreign commerce relating to [Washington] state."[52] While the law still allows state and local agencies to decide whether to accept electronic signatures for particular government use cases, it nonetheless affirms that electronic signatures carry the same force and effect as wet signatures.[53] Notably, the definition of "electronic signature" in RCW 19.360.030[54] is identical to that in ESIGN, which created a discrepancy in Washington state law between this definition and the legacy definition in WEAA.

The 2019 bill that repealed WEAA, according to state congressional reports, "cleans up confusion in existing law"[55] and recognizes the fact that the "[p]rivate sector has put [WEAA] out of business."[56] The bill also amends several other Washington statutes that previously referenced different sections of WEAA (for example, RCW 43.07.120, RCW 43.07.173, RCW 48.185.005, RCW 58.09.050, RCW 58.09.110).[57] Some of these amendments insert a definition of "electronic signature" into the amended statutes by referring the reader to RCW 19.360.030 (where the ESIGN definition of "electronic signature" was formally adopted).

Though Washington e-signature law has taken an atypical approach, its consistent trend toward recognizing and aligning with ESIGN provides a compelling legal foundation for the continued full recognition of electronic signatures for private intrastate transactions – just as ESIGN ensures the legality of e-signatures for transactions affecting interstate and foreign commerce.

As for state and local government use cases, RCW 19.360.000 et seq. still controls; it declares that wherever the use of a written signature is authorized or required by a state or local agency, an electronic signature may be used with the same force and effect as a wet signature unless specifically provided otherwise by law or agency rule.[58]

48 Stephanie Curry, Washington's Electronic Signature Act: An Anachronism in the New Millennium, 88 Wash. L. Rev. 559 (2013), available at http://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/1252/88WLR559.pdf?sequence=1
49 Id.
50 Id.
51 Id.
52 RCW 19.360.010, available at https://app.leg.wa.gov/RCW/default.aspx?cite=19.360.010
53 RCW 19.360.020, available at https://app.leg.wa.gov/RCW/default.aspx?cite=19.360.020
54 RCW 19.360.030, available at https://app.leg.wa.gov/RCW/default.aspx?cite=19.360.030
55 H.B. Rep. No. 1908 (2015), available at http://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Bill%20Reports/House/1908%20HBR%20PL%2019.pdf
56 H.B. Rep. No. 5501 (2019), available at http://lawfilesext.leg.wa.gov/biennium/2019- 20/Pdf/Bill%20Reports/Senate/5501%20SBR%20APS%2019.pdf
57 Id.
58 RCW 19.360.020, available at https://app.leg.wa.gov/RCW/default.aspx?cite=19.360.020

Appendix C

Comparison of ESIGN and UETA (as drafted by the Uniform Law Commission)

1 Excluded state laws

ESIGN explicitly excludes more state laws from its reach, but UETA gives the states the flexibility to exclude additional state laws. Compare ESIGN 103 with UETA 3(a)-(c).

2 Government affairs

UETA covers government affairs, rather than just the commercial transactions covered by ESIGN. Compare ESIGN 101(a), 106(13) and UETA 2(16). Its inclusion of government affairs would appear to provide the state's agencies with the enabling legislation that they may need should they choose to conduct their own business electronically. Because many state statutes and regulations implicitly or explicitly require that the government conduct its business in writing, and the enabling legislation for state agencies is silent with respect to electronic activity, UETA provides an essential foundation for the transition to e-government.

3 Consumer protections

UETA does not contain explicit consumer protection provisions as set forth in section 103 of ESIGN, but it leaves in place existing consumer protection laws and makes clear that they will still apply in electronic transactions (UETA 5(b), (e); 8(a), (b), (d)(1)-(2); 15). ESIGN anticipates some of the consumer problems unique to electronic transactions, and deals with them explicitly, while UETA does not.

4 Record retention

UETA enables parties who are required to keep written records to have an agent keep the records for them (UETA 12(c)). ESIGN lacks such a provision.

5 Electronic agents

UETA is clearer and more specific with respect to this topic. Compare ESIGN 101(h) and UETA 14.

6 Insurance

ESIGN provides a liability exemption for agents or brokers; see ESIGN 1010(j). UETA does not.

7 Record retention

ESIGN forbids states to impose written record keeping requirements on persons required to keep records of particular transactions, unless the requirement of a written record serves a compelling government interest related to national security or public safety (ESIGN 101(b)(1); 101(d)(1); 101(d)(3); 101(d)(4); 102(c); 104(c)(1); 104(b)(3)(B)). UETA would permit states to require paper record keeping, but only if they pass a law after UETA is enacted specifically permitting the same (UETA 7(c)(d); 12(f); 12(a)(1)-(2); 12(d)-(e)). Given the preemptive effect of ESIGN, any such after-adopted legislation would probably have to meet ESIGN's test for written record requirements.

8 Additional provisions

ESIGN does not contain provisions addressing the following issues, which are addressed in UETA:

- Temporal application, that is, what transactions the statute will apply to (UETA 4)
- Parties' ability to vary some of the terms of UETA by agreement (UETA 5, 8(d), 10(4), 15(g))
- Attribution of electronic signatures (UETA 9(a)-(b))
- Change or error in electronically conducted transactions (UETA 10)
- Rules governing the time and place of sending and receipt of electronic records (UETA 15)
- Admissibility of electronic records and signatures as evidence (UETA 13)

9 Transferable records

ESIGN limits transferable records to notes secured by real estate, while UETA would apply to a broader range of commercial paper. Compare ESIGN Title II and UETA 16.

10 Federally mandated vs. voluntary state e-procurement

ESIGN appears to require government entities to use or accept electronic records and signatures in the procurement process where they engage in transactions affecting interstate or foreign commerce with private parties who choose to conduct business electronically (except with respect to a contract to which the state is a party). See ESIGN 101(b)(2).

In other words, ESIGN appears to require that state governments accept electronic records and signatures on all documents related to procurement processes except for contracts to which the state is a party (ESIGN 101(b)(2); 102(b); 104(b)(4)). This follows because ESIGN indicates implicitly in section 101(b)(2) that states are required to accept electronic records or signatures except with respect to contracts to which states are parties. Furthermore, ESIGN explicitly exempts state procurement from only one of the two requirements that it imposes on states that have not adopted UETA and want to specify alternative means of conducting electronic transactions (see ESIGN 102(b)) and only one of the three requirements imposed on states exercising their interpretive authority by interpreting their laws and regulations in light of ESIGN. See ESIGN 104(b)(4). Both of these explicit exemptions for state procurement extend only to ESIGN's requirement that states adhere to technological neutrality. Thus, provisions of state procurement laws mandating the use of written documents "relating to" procurement transactions are preempted to the same extent as other laws and regulations requiring written documents, except to the extent that they apply to contracts entered by a state and/or specify the technology to be used in the conduct of the procurement process.

By comparison, UETA gives states the option to use and accept electronic records in such circumstances (UETA 5(a)(c), 18). Therefore, UETA provides states with far more flexibility in determining the degree to which they want to conduct business transactions electronically, and the time frame during which they will migrate to electronic commerce.

11 Enabling e-government

In addition, optional provisions of UETA, which do not appear in ESIGN, pertain specifically to states' creation and retention of their own electronic records, conversion of their written records to electronic records, acceptance and distribution of electronic records, and the interoperability of systems adopted by state governments to facilitate e-government (UETA 17-19). While section 17 of UETA does not appear to be appropriate because it could result in multiple interpretations of records retention laws by different agencies, sections 18 and 19 may provide needed guidance to state agencies faced with questions about their authority to conduct their own business electronically after UETA.

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Case No. 3:18-cv-01174 (S.D. Ohio Jan. 14, 2019)

Approved the use of DocuSign to opt in to a class action.

Weckesser v. Knight Enters. S.E., LLC

Civil Action No. 2:16-cv-02053-RMG, 2018 U.S. Dist. LEXIS 144981 (D.S.C. Aug. 27, 2018)

Approved the use of DocuSign to participate in collective actions under the FLSA.

United States v. Real Prop. Located at 6340 Logan St.

No. 2:16-CV-02259-KJM-CKD, 2018 U.S. Dist. LEXIS 19061 (E.D. Cal. Jan. 23, 2018)

Approved the use of DocuSign in the context of interlocutory sale of real property.

Titus v. The Martin-Brower Company, LLC

Case No. 2:17-cv-00558-JAM-GGH (E.D. Cal. Feb. 27, 2018)

Approved the use of DocuSign to participate in class action settlement agreement.

Brandenburg v. Cousin Vinny's Pizza, LLC

No. 3:16-cv-516, 2017 U.S. Dist. LEXIS 129955 (S.D. Ohio Aug 14, 2017)

Approved the use of DocuSign to participate in collective actions under the FLSA.

In re Anthem, Inc. Data Breach Litig.

No. 15-MD-02617-LHK, 2017 U.S. Dist. LEXIS 137281 (N.D. Cal. Aug. 25, 2017)

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Visit the DocuSign E-Signature Legality Guide to learn about current electronic signature laws, local legal systems, and technology preferences for countries around the world.

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Reclaim Idaho Exhibit P

Court of Appeals Order Denying Emergency Stay and Dissent

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 9 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

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

Plaintiffs-Appellees,

v.

BRAD LITTLE, in his official capacity as Governor of Idaho; LAWERENCE DENNY, in his official capacity as Idaho Secretary of State,

Defendants-Appellants.

No. 20-35584

D.C. No. 1:20-cv-00268-BLW
District of Idaho,
Boise

ORDER

Before: THOMAS, Chief Judge, SCHROEDER and CALLAHAN, Circuit Judges.

Appellants' motion (Docket Entry No. 2) to stay the district court's June 26, 2020 and June 30, 2020 orders pending appeal is denied. *See Nken v. Holder*, 556 U.S. 418, 425–26 (2009).

The court sua sponte expedites this appeal. The opening brief is due July 17, 2020. The answering brief is due July 29, 2020. The optional reply brief is due August 3, 2020.

No streamlined extensions of time will be approved. *See* 9th Cir. R. 31-2.2(a)(1). No written motions for extensions of time under Ninth Circuit Rule 31-2.2(b) will be granted absent extraordinary and compelling circumstances.

The Clerk shall place this case on the calendar for August 2020. *See* 9th Cir. Gen. Order 3.3(g).

CALLAHAN, Circuit Judge, dissenting:

I respectfully dissent. The appellants have demonstrated the requisite likelihood of success on the merits and probability of irreparable harm to warrant a stay pending appeal, and the remaining stay factors weigh in their favor. *See Nken v. Holder*, 556 U.S. 418, 425–26 (2009).

The appellants have made a substantial showing that the district court exceeded its authority by awarding relief that effectively rewrites Idaho's election laws, particularly its law designed to protect against fraud in the initiative process. *See Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (explaining that states have a vital interest in regulating their election processes); *see also Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (reiterating that the Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election"). The district court cannot create by judicial fiat a process for electronic signature gathering that is not otherwise permitted under Idaho's laws. That is up to the state's legislature.

The appellants also have made a substantial showing that the appellees failed to act with the necessary diligence to trigger the heightened standard of review applied by the district court. *See Angle v. Miller*, 673 F.3d 1122, 1133–34 (9th Cir. 2012).

The remaining factors support granting the stay as well. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (explaining that absent a constitutional violation, an injunction that bars a "State from conducting [its] elections pursuant to a statute enacted by the Legislature . . . would seriously and irreparably harm the State"); *Purcell*, 549 U.S. at 4 ("A State indisputably has a compelling interest in preserving the integrity of its election process.").

Accordingly, I would grant the appellants' motion to stay.

Reclaim Idaho Exhibit Q

Notice of Oral Argument Scheduled for August 10, 2020

United States Court of Appeals for the Ninth Circuit
Calendar for Old Federal Building, Anchorage Alaska

Oral Argument Notice

Note: Calendar entries may change up until the hearing date. Please remember to check the docket report for updates. Case synopses are prepared by court staff for the convenience of the reader.

2020-08-10 9:30 am Herbert A. Ross Historic Courtroom, Old Federal Building, Anchorage Alaska

Case No.	Title	Nature	Origin	Time / Side
19-30045	**USA v. Colter O'Dell** - Appeal from conviction for being a felon in possession of a firearm. [3:17-cr-00145-TMB-1]	Criminal	AK	Subm.
19-30088	**USA v. Gerardo Valenzuela** - Appeal from sentence for theft of bank funds. [3:11-cr-00074-TMB-1]	Criminal	AK	Subm.
19-30211	**USA v. Michael Moore, Jr.** - Appeal from conviction for conspiracy to commit credit union robbery, armed robbery of a credit union, and brandishing a firearm in furtherance of a credit union robbery. [3:18-cr-00040-SLG-1]	Criminal	AK	Subm.
18-30126	**USA v. Zerisenay Gebregiorgis** - Appeal from conviction and sentence for conspiracy to distribute heroin and methamphetamine. [1:17-cr-00003-TMB-1]	Criminal	AK	Subm.
18-72796 19-70403	**Denge Gahano v. William Barr** - A citizen of Ethiopia and U.S. lawful permanent resident challenges: 1) an agency decision finding him removable for an aggravated felony and denying relief from removal; and 2) denying a motion for reconsideration.	Immigration	BIA	15 min
20-35584	**Reclaim Idaho v. Brad Little** - An appeal from the district court's order granting a motion preliminary injunction brought by Reclaim Idaho, a volunteer-run political action committee that is seeking to place a citizen initiative on the November 2020 general election ballot. [1:20-cv-00268-BLW]	Civil	ID	20 min

Location Address

Old Federal Building
605 West 4th Avenue
Anchorage AK 99501-2253

Reclaim Idaho's Exhibit R

Selected Excerpts from the Oral Argument Transcript

reading these -- these cases, reading *Angle* and other cases about initiatives when they arise in the context of the government, state legislatures making it more difficult and then the courts grasping -- you know, looking at, you know, how severe is this burden.

Well, we have got a totally different paradigm here. I mean, the burden with the stay-at-home order subject to criminal misdemeanor penalties is -- is absolute. It's -- it's -- it's severe. So I don't think there is any -- any doubt that this has inflicted just an incredible burden and really made it impossible for Reclaim Idaho to continue to get this important initiative on the ballot.

THE COURT: All right. One of the comments that were made in the briefing was that the governor did not make an exception for First Amendment activities.

I guess I was a little skeptical whether that would have made any difference because just people -- well, I mean, maybe it's belied by the fact that people were willing to go out and protest, obviously, after the Black Lives Matter issue arose. But it's a little bit different to collect signatures than to take to the streets to protest something as dramatic as what occurred in Minneapolis.

(Inaudible) had exempted First Amendment activity from his stay-at-home order?

MS. FERGUSON: In all candor, no. I don't think so.

I think that -- but I think the important take-home message is that these volunteers shouldn't have to choose between their physical safety and perhaps their life or expressing their First Amendment rights. I think there -- there should be a reasonable accommodation made for these extraordinary circumstances, and we don't have to have one or the other.

THE COURT: One other question: In terms of irreparable harm, you know, it's -- I guess I'm echoing a Chicago Cubs fan: Wait until next year.

You know, why can't we just wait until 2022? Being from -- an ISU fan, the Idaho State Bengals pretty much we say that every year as well. But why not wait until 2022 and pick up the mantle then? Why does that not kind of undermine your argument that it's irreparable injury that you're suffering?

MS. FERGUSON: Well, it is irreparable because it's a violation of our constitutional rights. And that just inherently is. And this is an extreme -- a severe violation, an extreme burden.

In terms of, on a practical matter, why not wait until the next general election, two more years, this is a -- an issue that Reclaim volunteers feels incredibly passionate about, as -- as witnessed by their diligence. And the governor is already talking about cuts that will take place, education.

So if we're already in last place in the country, we feel that the need for this initiative is more pressing now than

ever. And the response should not be, you know, like some of our favorite sports teams, let's wait until next year.

THE COURT: And I guess thinking about my analogy and how bad the analogy was, assuming that you're successful in getting it on the ballot, it passes, and it, in fact, has the effect of law, presumably it will change the funding for education and all the children attending school. And delaying that by two years means a -- two classes will leave the Idaho public schools without the funding that your group thinks should be made available.

So I assume maybe that's part of the argument, as well, is the loss of a few years is a real loss for children of Idaho.

MS. FERGUSON: That's -- that's correct. All -- all children of Idaho who attend public schools K through 12.

THE COURT: All right.

MS. FERGUSON: And I think I will just reserve my time. I think I have about 5 minutes remaining.

THE COURT: Yes, you do. That's great.

All right. Then, Mr. Berry.

MR. BERRY: Thank you, Your Honor, Counsel.

You know, as a starting point, I just wanted to go back up to the signature verification. There was a question about how many signatures would be rejected or accepted. And Phil McGrane has a different point of view. If you look at

So since the state had the ability and, in fact, had demonstrated that through the way it had conducted the most recent primary election, there -- I think there has been a -- there is a likelihood of success on the merits for the plaintiffs; and therefore, some remedy has to be considered.

Addressing the other requirements under Rule 65, I would indicate that clearly the irreparable harm standard -- we had the discussion during oral argument about why not wait until 2022. And I think the real answer lies in the fact that the plaintiffs want -- seek a change in the law concerning the funding of public education. And this is one of those instances where one could say that justice delayed would be justice denied, or perhaps a constitutional delay in protecting a constitutional right is a true denial of that right.

Two classes, presumably, two years -- a delay in this process by two years will affect tens of thousands of Idaho students, which has been the plaintiffs' concern here. And therefore, it strikes right at the heart of their advocacy under the First Amendment.

The third requirement, I see no real harm to others, as we discussed here. This is not an issue in which I am compelling in any way that the state approve what the proponents of the initiative seek. I am simply indicating that their rights to have something placed on a ballot for the Idaho citizens to vote on is -- is what needs to be protected. And