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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

RECLAIM IDAHO, an Idaho political action committee, and LUKE MAYVILLE, Plaintiffs, 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 **GOVERNOR LITTLE AND IDAHO SECRETARY OF STATE'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION (Dkt. 2)**

I. INTRODUCTION

Plaintiffs' own voluntary choices and dilatory conduct caused Reclaim Idaho to miss the deadline to gather the required signatures for its initiative petition. Now, over two months after Plaintiffs knew Reclaim Idaho would miss the deadline and over a month after it actually missed the deadline, Plaintiffs ask this Court for special dispensation from the deadline and from the in-

person signature gathering requirements that have been in place for almost 100 years. This case turns on a series of choices that the Plaintiffs made: to gather signatures within a six month timeframe rather than the generous 18 months permitted by statute (Idaho Code § 34-1802(1); to voluntarily quit gathering signatures on March 18, 2020, a week before the Governor issued the state-wide stay-at-home order; and to not take any steps regarding the legal effect of their choices until they filed this suit on June 6, more than a month after the May 1, 2020 deadline to submit their signatures passed. And perhaps most troubling, Plaintiffs ask this 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 and that has never even been introduced for legislative consideration. This suit should be dismissed in its entirety, particularly since Plaintiffs have a remedy: they can now restart their petition and have a full 18 months in which to gather signatures.

Plaintiffs' dilatory posture is opposite the plaintiffs' diligence in *Fair Maps Nevada et al v. Cegavske*, the case on which Reclaim Idaho heavily relies. In that case, the plaintiffs filed their action on May 6, almost two months prior to the running of the June 2, 2020 deadline. In contrast, the Plaintiffs here gave up on circulating their petition, let the deadline run, and, a month later, now request court intervention and seek an extension of 48 days plus the time they wasted after the deadline ran before filing this lawsuit. Plaintiffs' requested relief cannot issue. Particularly within the election context, deadlines have meaning. Ballots must be prepared, absentee ballots must be mailed and the state must have election materials prepared in order to fully comply with the requirements of the federal Uniform Military and Overseas Voters Act. Even more extraordinarily, Plaintiffs ask this Court to legislate an entirely new manner of gathering signatures on initiative petitions.[1]

[1] Reviewing the Legislature's website, there is no indication that Plaintiffs attempted to introduce the signature gathering alternative they now ask this court to author. In sum, Plaintiffs propose an alternative that the Idaho Legislature has never had the opportunity to consider or debate. Plaintiffs approach runs counter to every fundamental premise of separation of powers, state sovereignty, and this republic.

This Court should refuse to grant the requested preliminary injunction because Plaintiffs lack standing and they cannot show the necessary elements to obtain a preliminary injunction. Among other considerations, their claim is barred by the doctrine of laches. This Court must deny Plaintiffs' request that this Court sweep aside the legislatively-set deadlines and the legislatively-created manner in which signatures are gathered and authenticated in favor of a new judicially-created system. The Idaho Legislature—not the unelected federal judiciary—is charged by Idaho's Constitution with determining the manner under which initiatives proceed.

For these reasons, which are discussed in more detail below, Plaintiffs' motion should be denied and the case should be dismissed.

II. BACKGROUND

A. Reclaim Idaho Voluntarily Shortened the Time Available to Collect Signatures and then Voluntarily Suspended its Campaign before Any Relevant State Action Occurred.

The right to an initiative is found in the Idaho Constitution and it provides that legal voters may initiate legislation or cause the same to be submitted to vote at a general election "**under such conditions and in such manner as may be provided by acts of the legislature.**" Idaho Const. art. III, § 1 (emphasis added). In order to begin the initiative process, a proponent crafts an initiative and collects twenty signatures. Idaho Code § 34-1804. The proposed initiative is delivered to the Secretary of State.

Reclaim Idaho filed the initiative at issue here, referred to herein as "Invest in Idaho," with the Secretary of State by petition on August 30, 2019. (Declaration of Jason Hancock ("Hancock Decl.") ¶ 5.) After review by the Secretary of State and Attorney General's office, Reclaim Idaho received the ballot titles and sample petition on October 25, 2019. *Id.*; *see* Idaho Code § 34-1809.

Petitioners may circulate an initiative petition for up to 18 months following the issuance of the ballot titles. Idaho Code § 34-1802(1)-(2). Rather than giving itself the full 18 months allowed by statute, Reclaim Idaho chose to seek to place the "Invest in Idaho" initiative on the ballot in November 2020, leaving itself approximately six months between October 25, 2019 and

May 1, 2020 to collect the necessary signatures. (Hancock Decl. ¶ 6.) By its own admission, Reclaim Idaho left the vast majority (almost three-quarters) of its signature gathering efforts for the months of March and April. (Dkt. 2-2 ¶ 15.)

In circulating the petition for signatures, Reclaim Idaho was bound by a statutory subsection that has been in effect since 1933. (See Declaration of Counsel ("Counsel Decl."), Exhibit A, 1933 Idaho Sess. Laws 435.) It requires that "[a]ny person who circulates any petition for an initiative…shall be a resident of the state of Idaho and at least eighteen (18) years of age." Idaho Code § 34-1807. Each sheet of a petition containing signatures "shall be verified on the face thereof" by the person circulating the petition in a statutory prescribed form as follows.

> That I am a resident of the State of Idaho and at least eighteen (18) years of age: that every person who signed this sheet of the foregoing petition **signed his or her name thereto in my presence**: I believe that each has stated his or her name, address and residence correctly, that each signer is a qualified elector of the State of Idaho, and a resident of the county of…..

Id. (emphasis added). This requirement applies equally to all petitioners.

By April 30, 2020, Reclaim Idaho was required to gather the signatures of legal voters equal to at least six percent (6%) of the qualified electors at the time of the last general election in each of at least eighteen (18) legislative districts; the total number of signatures must be equal to or greater than six percent (6%) of the qualified electors of the state at the time of the last general election. Idaho Code § 34-1805.

Reclaim Idaho's signatures had to be submitted to the appropriate county clerk for verification by May 1, 2020. Idaho Code § 34-1802(2). County clerks verify the signatures within 60 days of the deadline for submission of the signatures, "but in no event shall the time extend beyond" June 30, 2020. Idaho Code § 34-1802(3). The county clerks have until July 6, 2020 to submit the signatures to the Secretary of State. Idaho Code §§ 34-1802(4), 34-116.

Reclaim Idaho missed its May 1 deadline because it voluntarily suspended its campaign on March 18, 2020, after trying briefly to figure out a way that it felt comfortable collecting signatures

due to concerns about the exposure and spread of COVID-19 and federal public health guidance. *See* Dkt. 2-2 ¶¶ 23, 28.

Reclaim Idaho has stated that it has collected approximately 30,000 signatures. Plaintiffs' briefing asserts that Reclaim Idaho has collected 10,593 signatures which have already been verified by the county clerks and that it stands ready to provide an additional 20,000 signatures to the county clerks.[2] (Dkt. 2-1 at 10). Ashley Prince, Field Director of Reclaim Idaho, declares that Reclaim Idaho "collected an estimated 33,000 signatures by March 18th" and that Reclaim Idaho estimates only 86% of those signatures are valid.[3] (Dkt. 2-5 at ¶ 12.) Ms. Prince guesses that Reclaim Idaho had collected sufficient signatures to qualify only five of the necessary 18 legislative districts. (Dkt. 2-5 at ¶ 11.)

Rebecca Schroeder had email exchanges with a member of Governor's Little's staff for a few hours on the morning of March 16 requesting a meeting between Mr. Mayville and the Governor to discuss "the safest way to move forward with the ballot initiative." (Declaration of Andrew Mitzel ("Mitzel Decl."), Exhibit A.) There were no other communications with the Governor's office before this day or after. (*Id.*) Ms. Schroeder emailed the Secretary of State's office once on March 16 to ask about electronic signature gathering and was correctly informed that the Secretary of State's office did not have jurisdiction to make the change. (Declaration of Sheryl Millard, Exhibit A.) Reclaim Idaho made one last minor effort on March 18 to contact Representative Gannon about legislative change. (Dkt. 2-3 ¶ 41.)

The Governor is not involved in the initiative process. (Mitzel Decl., Ex. A.) His office's only involvement in this matter was the March 16th email correspondence with a member of his staff described above. (Dkt 2-3 ¶¶ 32-38.) While Governor Little did issue emergency

[2] At no point does Reclaim Idaho or any declarant explain why it did not provide the 20,000 unverified signatures to the county clerks for verification on March 18th or at any point thereafter.
[3] While Reclaim Idaho asserts that it has used an internal verification process on the signatures it has collected, it cannot be sure that the county clerks will agree with their conclusions. According to Ada County Clerk Phil McGrane, approximately 30 to 40 percent of signatures on initiative petitions are rejected. (Declaration of McGrane ("McGrane Decl.") at ¶ 10).

proclamations on March 25, 2020 and April 30, 2020, Reclaim Idaho had already suspended its campaign a week before the first proclamation issued. (*See* Dkt. 2-1 at 8-9.)

B. The May 1, 2020 Deadline for Signature Submission is Only One Deadline in a Series of Deadlines Leading Up to the November 3, 2020 Election.

Once the signatures submitted by the County Clerks are filed with the Secretary of State, arguments concerning initiative measures are due July 20, 2020; rebuttal arguments are due August 1, 2020; and voter pamphlets about the initiative must be printed and distributed to all households in the State no later than September 25, 2020. Idaho Code §§ 34-1812A, 1812B, 1812C.

Sample ballots from the Secretary of State are due September 7, 2020 to the county clerks, along with certified copies of the names of State office candidates, and a certified copy of the ballot titles and number of measures to be voted upon at the next general election. Idaho Code § 34-909.

All absentee ballots must be printed no later than September 14, 2020. This deadline comes from the federal Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), in particular 52 U.S. Code § 20302, and Directive 2015-1 issued by Secretary of State Lawerence Denney. (Hancock Decl. ¶ 7; McGrane Decl. ¶¶ 14-15.) Further, pursuant to the UOCAVA and Directive 2015-1, absentee ballots, if requested, must be mailed by September 21, 2020 to those who request it.

III. ARGUMENT

A. This Court Should Deny Plaintiffs' Motion Because Plaintiffs Lack Standing to Bring this Challenge; Their Alleged Injuries Cannot be Attributed to Action by the Governor or the Secretary of State.

"Article III of the Constitution limits federal-court jurisdiction to 'Cases' and 'Controversies.'" *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007). Among other elements, to establish Article III standing, "a plaintiff must show . . . (2) the injury is fairly traceable to the challenged action of the defendant; . . . ." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). The party invoking federal jurisdiction bears the burden of establishing these elements. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (citations omitted).

Plaintiffs cannot establish that their alleged injury is fairly traceable to the challenged actions of either Defendant. Plaintiffs' alleged injury is their failure to meet the May 1, 2020 deadline to submit their signatures. Plaintiffs argue that their injury resulted from the Governor's emergency orders, the Governor's office's ostensible refusal to grant exceptions for Reclaim Idaho signature gathering (in reality, a refusal by a staff member to arrange a meeting between Mr. Mayville and the Governor at a time of great crisis when the demands on the Governor's time were extreme), and the Secretary of State's refusal to grant exceptions for signature gathering (in reality, a recognition by the Secretary of State's staffer about the limits of the Secretary's statutory authority). *See* Dkt. 2-1 at 10-12. The allegations in the Complaint establish that Plaintiffs' failure to meet the statutory deadline was unrelated to Governor Little or Secretary Denney.

The alleged facts demonstrate that Plaintiffs' failure to meet the deadline was the result of their own choices to significantly shorten their timeline for collecting signatures, to employ an approach that left most of the signature-gathering to the end of the statutory period, and to voluntarily cease all signature-gathering activities in response to federal public health guidance.

Plaintiffs admit they could have had a total of 18 months to gather the necessary signatures by the May 1, 2020 deadline. (*See* Dkt. 1 ¶ 13.) However, their "attention" was "diverted" in the spring and summer of 2019. (Dkt. 2-1 at 5; Dkt. 2-3 ¶ 3.) They chose to file the initiative petition with the Secretary of State on a date that meant they could begin collecting signatures on October 25, 2019, leaving them with a little over six months, instead of 18 months, to collect the necessary signatures. (*See* Dkt. 1 ¶ 22; Hancock Decl. ¶ 5.) Plaintiffs <u>voluntarily</u> ceased their signature-gathering efforts on March 18, 2020, before any State action that might have limited their ability to collect signatures.

Mr. Mayville attests that Reclaim Idaho's petition efforts ceased on its own volition on March 18, 2020:

> After carefully reviewing the latest recommendations of public health authorities, we have concluded that it is no longer safe for volunteers to engage in 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.

(Dkt. 2-2 ¶ 37.) Further, "Our decision to suspend operations was based on our assessment of the risks of signature gathering in the midst of a pandemic." (*Id.* ¶ 39.) Mr. Mayville's declaration shows his organization stopped collecting signatures due to the pandemic, not due to state action.

Statements submitted by Reclaim Idaho team members corroborate this. "It was necessary to suspend because of Covid-19." (Dkt. 2-4 ¶ 24.) "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." (Dkt. 2-3 ¶ 29.) In a March 13th email, Judge Lansing, who was one of their "most active and committed volunteers" wrote the following:

> *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 . . . . 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.

(Dkt. 2-2 ¶ 24.) Further, Linda Larson, the Bonner County Volunteer leader, and her team, stopped collecting signatures on March 13th because of safety concerns. (Dkt. 2-6 ¶¶ 16-17.)

A recent decision from another court recently concluded that a substantially similar pattern of dilatory conduct established that the plaintiffs there had "not demonstrated that their injury [was] traceable to the challenged actions of any of the Defendants." *Morgan v. White*, No. 20 C 2189, 2020 WL 2526484, at *3-4 (N. Dist. Ill. May 18, 2020) (expressing grave doubts about plaintiffs' standing in an initiative matter).

Given that Plaintiffs' failure to meet the deadline to collect the necessary signatures was the product of the pandemic and their own voluntary choices, Plaintiffs' failure to meet the deadline cannot be attributed to State action. *See Thompson v. DeWine*, 959 F.3d 804, 810 (citations omitted) (6th Cir. May 26, 2020) (citations omitted) ("[J]ust because procuring signatures is now harder (largely because of a disease beyond the control of the State) doesn't

mean that Plaintiffs are *excluded* from the ballot. And we must remember, First Amendment violations require state action."). Because no state action is at issue, Plaintiffs lack standing.

B. Plaintiffs Cannot Carry the Heavy Evidentiary Burden Necessary to Obtain a Preliminary Injunction.

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing,* carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (citation omitted). The elements for it are already set forth above. "The Ninth Circuit has held that the trial court can utilize a 'sliding scale' in weighing the [*Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20-23 (2008)] factors, such that 'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met.'" *Big Sky Scientific LLC v. Idaho State Police*, Case No. 1:19-cv-00040-REB, 2019 WL 438336, at *4 (D. Idaho Feb. 2, 2019). The "purpose of a preliminary injunction is to preserve the status quo." *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1023 (9th Cir. 2009) (internal quotation omitted). Plaintiffs seek to change the status quo, not preserve it.

1. Plaintiffs Cannot Establish the Requisite Likelihood of Success on the Merits.

Under the two governing Ninth Circuit decisions that have interpreted the analysis that applies to First Amendment challenges for regulations governing the signature-gathering process for initiative petitions—*Angle v. Miller*, 673 F.3d 1122 (9th Cir. 2012) and *Prete v. Bradbury*, 438 F.3d 949 (9th Cir. 2006)—"Plaintiffs bear the initial burden of showing that the challenged provisions . . . impose a severe burden on their First Amendment rights." *Arizonans for Fair Elections v. Hobbs*, No. CV-20-00658-PHX-DWL, 2020 WL 1905747, at *8 (D. Ariz. Apr. 17, 2020); *see also Fair Maps Nevada v. Cegavske*, Case No. 3:20-cv-00271-MMD-WG, 2020 WL 2798018, *11 (D. Nev. May 29, 2020). In other words, "under the First Amendment, election "[r]egulations imposing *severe burdens* on plaintiffs' rights must be narrowly tailored and advance a compelling state interest." *Arizonans*, at * 8 (emphasis in original). By contrast "[*l*]esser *burdens* ... trigger less exacting review, and a State's important regulatory interests will usually be enough

to justify reasonable, nondiscriminatory restrictions." *Angle*, 673 F.3d at 1132 (emphasis in original). "In applying this standard, we bear in mind that 'States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally.'" *Id.*

a. Plaintiffs Cannot Demonstrate the Burden is Severe.

"[T]he burden on plaintiffs' rights should be measured by whether, in light of the entire statutory scheme regulating ballot access, 'reasonably diligent' initiative proponents can normally gain a place for their proposed initiative on the ballot[.]" *Angle*, 673 F.3d at 1133 (citations omitted). The party challenging the regulation bears the burden of establishing severity. *Ariz. Green Party v. Reagan*, 838 F.3d 983, 989 (9th Cir. 2016).

Plaintiffs cannot meet their burden of showing a burden—severe or otherwise—on their First Amendment rights. The only "burdens" that Plaintiffs allege that occurred before Reclaim Idaho suspended its campaign on March 18, 2020, and thus could possibly have any causal relationship to their signature gathering efforts, were (1) a staffer at the Governor's office declining to arrange a meeting between Mr. Mayville and the Governor in an email exchange on the morning of March 16; and (2) a staffer at the Secretary of State's office correctly informing Plaintiffs that the Secretary of State lacks statutory authority to change an almost 100 year-old signature gathering requirement in favor of an electronic system. These cannot possibly be construed as burdens on Plaintiffs' First Amendment rights, let alone severe burdens.

Further, taking plaintiffs' claims regarding the signature gathering deadline and in-person signature gathering at face value, Plaintiffs cannot show a severe burden. The signature gathering deadline applies uniformly to all initiatives. The State gives a generous 18 months to collect signatures. Further, the burden of in-person signature gathering can hardly be construed as severe. It applies to all initiative campaigns and, by Plaintiff's own admission, had they given themselves more time, they would have easily gathered the necessary signatures in-person.

Plaintiffs cannot show a reasonably diligent initiative proponent could not have gotten its initiative on the ballot. As described above, Plaintiffs were far from reasonably diligent. Plaintiffs' actions here cost them 44 weeks (11 months). Yet they ask this Court to legislate from the bench because, they allege, they lost six weeks of signature gathering to the pandemic. In addition to the dilatory conduct described above, there is no evidence that they continued to work or take action towards getting their initiative on the ballot between March 18 and May 1 to extend their deadline. Plaintiffs did not even submit the 20,000 unverified signatures they allege to have to the county clerks for verification. And they waited from March 18, 2020 until June 6, 2020—five weeks after the deadline to submit signatures had passed to seek any accommodation for signature gathering.

Plaintiffs failed to act—unlike the plaintiffs in the Nevada case who sought prospective relief before the time to collect signatures expired. *See Fair Maps Nevada v. Cegavske*, Case No. 3:20-cv-00271-MMD-WGC, 2020 WL 2798018 at *2, 5 (D. Nev. May 29, 2020); *Id.* Dkt. 2 (filing a preliminary injunction on May 6, 2020 requesting a prospective extension of the June 24, 2020 deadline). It is clear from the decision in that matter that plaintiffs filed for relief before their June deadline as the court was able to issue a decision in May. *See generally id.* In another matter, the court found that plaintiffs were not diligent in pursuing their initiative efforts through the full time provided to them after waiting close to a year before beginning their efforts. *Arizonans for Fair Elections*, 2020 WL 1905747, at *10-11 ("This analysis, to be clear, should not be interpreted as a criticism of Plaintiffs. They are hardly the only members of our community who failed to anticipate and plan for a once-in-a-century pandemic. But the relief they are seeking in this case is profound—the displacement of a bedrock component of Arizona law. Such laws should not be wantonly overturned, and that is why courts (including the Ninth Circuit) require parties raising constitutional challenges to state ballot access laws to show not only that *they* have been thwarted by the law, but that a reasonably diligent party would have been thwarted, too.") The Nevada and Arizona cases provide the appropriate guidance. Plaintiffs cannot meet their burden of showing a reasonably diligent initiative proponent could not have gotten an initiative on the ballot.

b. The challenged laws further an important regulatory interest.

As described in the following subsection, the deadline for the submission of signatures is fundamental and furthers important interests.

Further, Idaho's in-person signature requirement is a part of Idaho's statutory scheme to allow citizens to exercise their legislative powers in an effective, valid, and informed manner. (Hancock Decl. ¶ 16.) Notably, the Idaho legislature has maintained Idaho's in-person signature gathering requirement throughout the various crises that have faced the State since 1933, despite the availability of mail, and later, telephonic substitutes. The circulator is an integral part of the scheme and the attesting affidavit helps verify that the person signing the petition indeed is the person signing and in this way helps to prevent fraud. (*Id.* ¶ 17.) Yet Plaintiffs would have this Court step in and replace the in-person signature gathering requirement with an internet-based system, despite the fact that recent years have shown that the internet is highly subject to fraud and abuse in the election context, even with the best intentions.

Suggesting to use DocuSign also overlooks the necessary component of in-person verification and changes the geographic scope of the initiative process from physical to virtual. (*Id.* ¶ 13.) Volunteers would no longer be necessary in legislative districts and instead virtual contact from one central location could be used. (*Id.* ¶ 14.) There no longer would be a "grass roots" component to any such campaign and there would be no opportunity for face-to-face interactions in legislative districts throughout the state, replacing it with an impersonal electronic process with minimal, if any, opportunity for questions, education, or explanation, thus making a less informed electorate. (*Id.* ¶ 15.) An initiative campaign could be run entirely by out-of-state actors circulating a petition on the internet.

Angle found an important regulatory interest is "in making sure that an initiative has sufficient grass roots support to be placed on the ballot." 673 F.3d at 1135 (citation omitted) and it appears that *Idaho Coal. United for Bears v. Cenarussa*, 342 F.3d 1073, 1079 (9th Cir. 2003) would have found these interests important too. And perhaps most importantly, this Court has already found that "the residency requirement of I.C. § 34-1807 passes muster under the

reasonableness test." *Idaho Coal. United for Bears v. Cenarussa*, 234 F. Supp.2d 1159, 1164 (D. Idaho 2001). DocuSign's participation in the circulation process violates Idaho Code § 34-1807 as it is a non-resident of Idaho. And per the plain language of Idaho Code § 34-1807, a circulator is required to be a "person," "resident of state of Idaho," "at least (18) years of age" and the person who circulated the petition must sign "by his or her affidavit." DocuSign is none of these things. The change would negate the geographic, in-person requirement, which the Legislature deemed necessary to ensure the integrity of the ballot process. (*Id.* ¶ 19.)

In short, the state's interests in the challenged deadline and the in-person signature requirement far outweigh any alleged burden and support important interests.

c. Plaintiffs' claim is barred by the doctrine of laches.

Separate from the importance of Plaintiffs' diligence to determining of the severity of the burden imposed, Plaintiff's lack of diligence results in their claim being barred by the doctrine of laches. "When an emergency appears likely to arise prior to an election, but a litigant waits until afterwards to press its claims, it has failed to act with the diligence the circumstances require." Michael T. Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 Emory L.J. 545, 596 (2018). "To establish laches, a 'defendant must prove both an unreasonable delay by the plaintiff and prejudice to itself.'" *Arizona State Leg. v. Ariz. Indep. Redistricting Comm'n*, 997 F. Supp. 2d 1047, 1050 (D. Ariz. Feb. 21, 2014) (citation omitted).

Plaintiffs' delay is unreasonable. In addition to the conduct described above, while they now fault the Governor's stay at home orders, they did not evaluate whether the orders allowed for signature gathering, even if the Governor's orders caused them to suspend their signature gathering efforts (they did not). Effectively, Plaintiffs are claiming that their activities to collect signatures are essential, but essential services were excepted. Further, as noted in Mr. Mitzel's declaration, the time leading up to the end of the 2020 legislative session was extraordinarily busy in the Governor's Office. (Mitzel Decl. ¶ 6.) Had a representative of Reclaim Idaho contacted the Governor's office again after the Legislature finished its session, Mr. Mitzel believed her concerns would have been considered and she would have received a response. (*Id.* ¶ 8.) Reclaim Idaho did

not do this. Moreover, they did not file this lawsuit back in March when they knew of the alleged injury. Only now, seven weeks after the deadline has passed, Plaintiffs expect this Court to rescue them from the consequences of their own decisions. Plaintiffs' unreasonable delay is fatal.

This matter has been brought far too late and it seeks to usurp Constitutional authority in an unprecedented manner, which is inherently prejudicial to the State of Idaho. The burden that would be placed on the entire State and all of its clerks would be extraordinary, and in light of Idaho and federal law, impossible. (McGrane Decl. ¶¶ 5, 7, 12, 18.) As set forth above, the deadlines to get this State ready to vote by November 3, 2020 have long been set. While Reclaim Idaho claims its proposed remedy would result in minimal harm to the State, nothing could be further from the truth. Assuming the Court grants the requested relief on June 23, 2020, August 10, 2020 would be the deadline for Reclaim Idaho to submit its signatures. The clerks then would have 60 days to verify the signatures (until October 9, 2020) and four days to submit the signatures to the Secretary of State.[4] (*Id.* ¶ 11.) Any argument regarding the initiative would then need to be submitted October 23, 2020 and rebuttal would be November 4, 2020, the day after the election. The clerks and the Secretary of State still must keep preparing the ballots for the election, coordinating volunteers, and informing the public that every candidate for office has a fair and proper election, including getting ballots ready by the September 21, 2020 so that they could go out in the mail. (*Id*. ¶ 4, 12, 13, 14.) Again, per federal law, the ballots must be ready to go out by September 21, 2020 for absentee ballots, and it takes ten to 14 days to prepare these ballots to meet the deadline. (*Id.* ¶ 12.) This request will throw a wrench into the entire State's election. (*Id.* ¶ 18.) If this were an appeal, it would be dismissed outright as untimely.

[4] Plaintiffs cannot be heard to argue that DocuSign would relieve this burden. Even if this Court were to allow DocuSign to play a role—and it should not—the county clerks would have figure out how best to fit this electronic system within their statutory responsibilities, learn how to use the software, and deal with the inevitable delays and problems that crop up when working with a new system. But more importantly, as detailed herein, the myriad issues with the use of DocuSign compel this Court to deny that portion of Plaintiffs' requested relief.

In short, Plaintiffs cannot establish a likelihood of success on the merits. Under the more relaxed scrutiny that must apply here, the State's interest justifies the burdens that are imposed on the initiative process. Even if the challenged State action failed the applicable level of scrutiny, Plaintiffs' claims are barred by the doctrine of laches.

2. Plaintiffs Submitted No Competent Evidence to Support Their Assertion That They Will Suffer Irreparable Harm.

Plaintiffs have the burden of demonstrating that "irreparable injury is *likely* in the absence of an injunction," not just a mere "possibility." *Winter*, 555 U.S. at 22 (citations omitted). Further, "[a]bstract injury is not enough. The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be 'both real and immediate,' not 'conjectural' or 'hypothetical.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983) (citations omitted). Plaintiff cannot establish an injury. Plaintiffs failed to obtain the required number of signatures and it remains speculative whether, if allowed, they even could meet a new deadline. But even if they did, their injury is not irreparable. They could try again in the future or they could advocate for legislative changes to the statutes they seek to alter.

3. The Balancing of Equities and Public Interest Favors the State and the State Will Suffer Irreparable Harm As A Matter of Law From The Relief That Plaintiffs Have Requested.

a. The public interest favors the State, because it has a vested interest in conducting elections pursuant to its own statutes.

The facts set forth in the latches argument show that the harm to the State will affect the entire State election. The States' irreparable injury is further established by *Purcell*. Courts should not change election rules in the middle of an ongoing election, as such changes "can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam). "As an election draws closer, that risk will increase." *Id.* Moreover, any time a state is enjoined from effectuating statutes enacted by the representatives of its people it suffers a form of irreparable injury. *Abbott v. Perez*, 138 S. Ct.

2305, 2324 & n.17 (2018) (citations omitted). Further, given that the "State indisputably has a compelling interest in preserving the integrity of its election process," *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) (citation omitted), and in the "orderly administration" of its elections, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196 (2008) (controlling plurality of Stevens, J.), the irreparable harm to the State is particularly grave here.

In authorizing the initiative process in the Constitution, Idaho specified that the Legislature would determine the manner of how the initiative process would be conducted. Granting the requested relief will irreparably harm by the State by creating disorder, undue hardship and a lack of integrity in future initiative proceedings where a petitioner sleeps or gives up on their rights and then blames the State.

b. The equities favor the State, because Plaintiffs' own decisions on when to start their campaign and when to end it should not be rewarded.

The equities favor the State. Disrupting an entire State's election scheme so that Plaintiffs might be able to get enough signatures on an initiative when they chose to shorten their timeframe and then stop their campaign places the balance of the equities squarely in favor of the State's clerks and election workers. These workers should not have an increased burden and pressure to conduct an election on a truncated basis when every other candidate for office campaigned for their primary. Compounding that is Plaintiffs' request to utilize a private vendor without State ties and where clerks would have no experience in using its service. Plaintiffs' own inaction caused any injury. Plaintiffs cannot be allowed to sow confusion on this election and deeply disrespect Idaho's sovereign judgments. The harm is evident to State of Idaho, its Legislature, and its citizens.

c. Plaintiffs' requested electronic signature relief would result in grave harm to the State.

The request to collect signatures electronically by a private entity is a fundamental departure from Idaho law and its Constitution. (Hancock Decl. ¶ 11.) In Idaho, the running of and integrity of elections is done by the state and its counties—not a private out-of-state company. (*Id.*)

"[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974); *see also Navarro v. Neal*, 716 F.3d 425, 430-31 (7th Cir. 2013). As noted above, the Legislature is vested with the authority to provide the manner in which initiatives occur. Idaho Const., art. III, § 1. Since 1933, Idaho Code § 34-1807 has required in-person circulation. (Counsel Decl. Ex. A.) The requested relief also usurps Idaho Code § 34-1802(3), which requires signatures—not a private entity such as DocuSign—be verified by County Clerks. Again, this abrogates the government's responsibility all the while requiring the State to use and trust a particular vendor selected by Plaintiffs.

The move to this electronic medium usurps the Secretary of State's statutory authority. See Idaho Code § 34-1804. Serious transparency concerns are raised with taking the signature verification responsibility from the county clerks (as per I.C. 1802(3)) and handing it to an out-of-state private vendor selected by Plaintiffs. Private entities do not conduct elections; states conduct the elections. *Libertarian Party of Ill. v. Rednour*, 108 F.3d 768, 774 (7th Cir. 1997) ("States have not only an interest, but also a duty to ensure that the electoral process produces order rather than chaos.")

From a practical standpoint, there is no need for such a drastic change. The State of Idaho is already in Stage 4 of the recovery from the pandemic and in-person interactions are allowed and occurring. Moreover, most of Ada County's staff do not have experience using DocuSign and it takes time and training to understand; given preparations for the upcoming two elections in Ada County that would be an undue burden. (McGrane Decl. ¶ 16.) It also appears that the process may take additional time to review each signature. (*Id.*) When reviewing petition signatures, in addition to confirming registration, the Ada County clerk compares the signature on the petition to the signature on the voter's original registration card. (McGrane Decl. ¶ 17.) The DocuSign example provided by the petitioner shows a signature being submitted that is not a signature that would match for a voter, but a signature that is computer generated and would not possibly match

the signer's original signature on their registration card. (*Id.*) Under Ada County's existing procedures, these signatures would then be rejected. (*Id.*)

While Plaintiffs suggest a one-time exception to use DocuSign, as discussed above, this suggestion overlooks the necessary component of in-person verification, it changes the geographic scope of the initiative process from physical to virtual, and it eliminates the need for people to travel to legislative districts. Instead, an initiative could be conducted by actors working entirely out of state. The change would negate the geographic, in-person requirement, which the Legislature deemed necessary in the initiative process.

Ultimately, this motion "raises significant federalism and separation-of-powers concerns." *Arizonans for Fair Elections*, 2020 WL 1905747, at *16. "[L]ower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (citations omitted). It is the place of the people of the State of Idaho, or their elected representatives, to make the policy choices at issue here.

IV. CONCLUSION

This Court should dismiss this case and/or deny Plaintiffs' motion rather than reward Plaintiffs' dilatory conduct.

DATED: June 18, 2020.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

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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:

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