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

March 11, 2019

TRANSMITTED VIA HAND DELIVERY AND EMAIL

The Honorable Michelle Stennett
Idaho State Sentate
Statehouse
Email: mstennett@senate.idaho.gov

Re: Request for Analysis on SB1159

Dear Senator Stennett:

You have requested an opinion on SB1159 and "whether it unconstitutionally over-restricts the citizens' right to implement ballot initiatives." We were recently asked the following questions, which I believe go to the same point as your original question. Specifically, we were asked:

1. Do the increased restrictions and reduced time frames contained in the bill violate the Idaho Constitution?

2. Is the right of the people to enact legislation through the initiative process and to repeal the same through referendum impeded by the increased restrictions in the bill?

We believe the answer to both questions also answers your original question, and our conclusion and analysis follows.

CONCLUSION

1. The increased restrictions and reduced time frames contained in the bill likely do not violate the Idaho Constitution. While more cumbersome, the restrictions still appear to be reasonable and workable, although the restriction in time to collect the required

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signatures could be problematic if evidence demonstrates that an initiative sponsor could not reasonably collect the required signatures within 180 days.

2. The right to initiate legislation does not appear to be impeded by the restrictions in SB1159, because such right is not self-executing and the legislature may impose conditions upon the exercise of that right so long as such conditions are reasonable and workable.

SUMMARY OF PROPOSED LEGISLATION ANALYZED

The following is a brief summary of the relevant portions of SB1159, which changes the requirements for initiative petitions themselves and for how initiatives may be placed on the ballot.

SB1159 would amend Idaho Code § 34-1801A to impose certain requirements on the initiative petition itself. It would require that an initiative petition embrace only one subject and matters properly connected therewith. The effective date of the initiative could be no sooner than July 1 of the year following the vote on the ballot initiative. The sponsor of the initiative would also have to propose a funding source for the cost of implementing the measure, which would have to accompany a copy of the initiative when circulated for signature and filed with the secretary of state. The proposed funding source would not be part of the initiative and would not have binding effect.

SB1159 would also amend current law to change the requirements for an initiative to be placed on the ballot. It would amend Idaho Code § 34-1802 to reduce the time to circulate a petition for an initiative and gather signatures from 18 months to 180 days. It would also amend Idaho Code § 34-1805 to require that the signatures of at least 10 percent of the qualified electors at the time of the last general election in each of at least 32 legislative districts be affixed to the petition when it is submitted to the secretary of state. The current requirement is 6 percent of the qualified voters in at least 18 legislative districts. The total number of signatures required would be increased to at least 10 percent of the qualified electors from 6 percent.

ANALYSIS

1. The increased restrictions and reduced time frames contained in the bill likely do not violate the Idaho Constitution.

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

> The people reserve to themselves the power to propose laws, and enact the same at the polls independent of the legislature. This power is known as the initiative, and legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, initiate any desired legislation and cause the same to be

> submitted to the vote of the people at a general election for their approval or rejection.

The right contained in this provision is not self-executing.[1] Idaho Const., art. III, § 1 was added via amendment in 1912 to reclaim the power to enact laws independent of the legislature, but within constraints established by the legislature.[2] "'This created an alternative method for passage of a law and, *by the very terms of the reservation, the alternative method can only be exercised 'under such conditions and in such manner as may be provided by acts of the legislature.*' The initiative and referendum provision . . . lay dormant for more than twenty years until the legislature by chap. 210 of the 1933 session enacted the provisions of that chapter, prescribing the manner and method of exercising the initiative and referendum privileges."[3]

In Luker v. Curtis, the Idaho Supreme Court analyzed whether the legislature could repeal an initiative enacted by the people, or whether, once enacted, it was subject only to amendment or repeal by further initiative.[4] In concluding the legislature had the power to repeal a law enacted by initiative, the Court noted "[s]o it can readily be seen that the people, in reclaiming and retaining the initiative legislative power, were nevertheless content to leave the *manner and conditions* of its exercise to their chosen senators and representatives; and in no form or manner limited the power of the legislature in time, manner or method of legislating on any subject upon which the lawmaking power can operate."[5]

That said, "[t]he legislature cannot violate the reserved right of the people to propose laws and enact them at the polls."[6]

The Idaho Supreme Court has directly addressed what types of "manners and conditions" the legislature may provide for the exercise of the right to initiate laws. In Dredge Mining Control—Yes! Inc. v. Cenarrusa, the court analyzed whether the requirement in then Idaho Code § 34-1805 that an initiative petition be signed by "legal voters equal in number to not less than ten per cent (10%) of the electors of the state based upon the aggregate vote cast for governor at the general election next preceding the filing of such . . . petition" was a permissible condition on the right to initiate laws.[7] The court had interpreted "legal voters" to mean registered electors.[8]

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

[2] Westerberg v. Andrus, 114 Idaho 401, 404, 757 P.2d 664, 667 (1988) (quoting Luker v. Curtis, 64 Idaho 703, 707-708, 136 P.2d 978 (1943))

[3] Westerberg, 114 Idaho at 404, 757 P.2d at 667 (1988)(emphasis added).

[4] 64 Idaho 703, 136 P.2d 978, 980 (1943).

[5] *Id.*

[6] Gibbons v. Cenarrusa, 140 Idaho 316, 320, 92 P.3d 1063, 1067 (2002).

[7] *See* 92 Idaho 480, 482, 455 P.2d 655 (1968)

[8] *Id.* at 482.

The trial court had upheld the requirement, concluding "[t]he legislative procedures outlined in chapter 18 of title 54, Idaho Code, are not unreasonable and must be complied with. While they may be cumbersome, they are nevertheless workable . . ."[9] On appeal, the appellants challenged the trial court's conclusion, arguing the certification of the signatures by the clerks of the district courts was "a practical impossibility" and "unworkable" under Idaho voter registration laws.[10] They raised concerns about the clerks' ability to verify signatures.

The Idaho Supreme Court concluded the "statutory scheme set up by the legislature, although restrictive and perhaps cumbersome, is reasonable and workable."[11] It identified work-arounds to the concerns appellants raised about the ability of clerks to verify signatures and noted that no signatures in the lower court case had been rejected for lack of genuineness.[12] Ultimately, "the provisions of law enacted by the legislature pertaining to the initiative procedures are reasonable."[13]

Thus, it appears that the standard a court would apply to the changes proposed in SB1159 in reviewing any challenge brought under the Idaho Constitution is whether they are "reasonable and workable." It appears that, if this standard is applied to the changes proposed by SB 1159, they will likely be upheld under the Idaho Constitution.

Certainly, there can be no problem with the provision in SB1159 regarding the effective date of initiatives under the Idaho Constitution. In Gibbons v. Cenarrusa, the Idaho Supreme Court suggested the legislature could change the effective date of legislation enacted via initiative, which must mean that the legislature can establish the effective date of such legislation preemptively.[14]

Similarly, there can be no problem with the proposed requirement that an initiative petition embrace only one subject and matters properly connected with it under the Idaho Constitution. Courts have treated laws enacted by initiative as equal in regard to force, effect and limitations.[15] Given that the restriction that legislation embrace only one subject and matters properly connected therewith, it is highly unlikely that a reviewing court would be troubled by the fact that the proposed legislation makes this restriction explicit as to laws enacted by initiative.[16]

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[9] *Id.* at 483.
[10] *Id.*
[11] *Id.* at 484.
[12] *Id.*
[13] *Id.*
[14] 140 Idaho 316, 320, 92 P.3d 1063, 1067 (2002)
[15] *See* Westerberg, 114 Idaho at 407, 757 P.2d at 670.
[16] See Idaho Const., art. III, § 16.

It is highly unlikely that a reviewing court would find the requirement that the initiative proponent identify a proposed funding source, which would be shared with the voters but not be part of the initiative, unreasonable or unworkable.

With regard to the increased requirement that 10% of the qualified voters sign the petition, this was the requirement addressed in Dredge Mining Control—Yes! Inc. While the Court in Dredge was focused on arguments pertaining to the ability of clerks to verify voter signatures, it did approve the statute with its 10% of qualified elector's requirement. It is likely that a reviewing court would follow Dredge's conclusion that this requirement was reasonable and workable if faced with a direct challenge to the number of total signatures required to place an initiative petition on the ballot.

The most vulnerable proposed changes in SB1159 are the decrease in time available to gather signatures to 180 days and the requirement to obtain signatures of 10 percent of the qualified electors in each of at least 32 of the 35 legislative districts (91.4% of districts). That said, it appears that, under the standard used by the Idaho Supreme Court in Dredge, that the changes would be upheld as long as they are "workable," despite being "restrictive and perhaps cumbersome."[17] As long as credible evidence can be obtained that an initiative petition proponent could reasonably obtain the required signatures in 180 days, the changes will likely be upheld under Dredge standard.

A reviewing court would likely look to case law from other jurisdictions for guidance in interpreting the Idaho Constitution's right to initiative. This guidance is consistent with Dredge's standard and suggests the changes are not inconsistent with the Idaho Constitution's right to initiative.

In 2004, the Utah Supreme Court upheld as constitutional under the Utah Constitution requirements that an initiative sponsor obtain the signatures of equal to 10% of the cumulative total of all votes cast for candidates for governor at the last regular general election at which a governor was elected on a statewide level and in each of at least twenty-six of Utah's twenty-nine senate districts (89.7% of districts) within one year.[18] The requirement had been challenged under Utah Constitution, Article VI, Section 1, which states, "The legal voters of the State of Utah in the numbers, under the conditions, in the manner, and within the time provided by statute, may [ ] initiate any desired legislation. . . . " The court determined the requirement did not "unduly burden" the right to initiative by assessing "whether the enactment [was] reasonable, whether it [had] a legitimate legislative purpose, and whether the enactment reasonably tend[ed] to further that legislative purpose."[19] In approving the one-year time requirement to obtain signatures as reasonable, the court noted that it had previously approved a 35 day signature requirement for

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[17] *Id.* at 484.

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

[19] *Id.* at 228.

submitting referenda.[20] The court noted that, although the signature requirements for initiatives were more exacting, it could not articulate a reason on the evidence before it that a one year time period would be unreasonable.[21]

Further, as discussed in greater detail below, the Ninth Circuit has upheld an even more stringent Nevada law requiring initiative proponents to meet the 10 percent signature threshold in each of the state's congressional districts under a similar analytical structure in a First Amendment challenge.[22]

Based on the above, I think it is likely that a reviewing court would find the restrictions and time requirements imposed by SB1159 constitutional under the Idaho Constitution. I offer the caveat though that if credible evidence could be developed that an initiative sponsor could not reasonably collect the required signatures in the allotted time period, the proposed signature requirements and/or time requirements could fall to a constitutional challenge.

2. The right to initiate legislation does not appear to be impeded by the restrictions in this bill.

You asked whether the right of the people to enact legislation through the initiative process and to repeal the same through referendum was impeded by the increased restrictions in the bill. I confine my analysis to the right to initiate as this is what is addressed by SB1159.

It appears that there is a right to initiate legislation under the Idaho Constitution's art. III, § 1. As discussed above, however, that right is not self-executing and the legislature may impose conditions upon the exercise of that right as long as they are reasonable and workable.[23] As discussed above, it appears that without good evidence that initiative sponsors cannot reasonably obtain the requisite signatures in the time allotted, a reviewing court would find the restrictions imposed by SB 1159 to be reasonable and not impediments to the right to initiate legislation under the Idaho Constitution.

There is no federal right to initiate legislation.[24] That said, restrictions on qualifying an initiative for the ballot may indirectly impact core political speech and thereby violate the First Amendment to the U.S. Constitution. The U.S. Supreme Court has stated when "a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions."[25] In the Ninth Circuit, one must first ask whether the law imposes a

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[20] *Id.* at 231.

[21] *Id.*

[22] *See* Angle v. Miller, 673 F.3d 1122, 1131-33 (9th Cir. 2012).

[23] Dredge Mining Control—Yes! Inc., 92 Idaho at 482.

[24] Angle v. Miller, 673 F.3d 1122, 1133 (9th Cir. 2012).

[25] Burdick v. Takushi, 504 U.S. 428, 432 (1992).

"severe burden" on plaintiff's rights.[26] Laws imposing severe burdens must be narrowly tailored and advance a compelling state interest.[27] "Lesser burdens . . . trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.[28]

The Ninth Circuit Court of Appeals has upheld an even more stringent Nevada law requiring initiative proponents to meet the 10 percent signature threshold in all of the state's congressional districts against First Amendment and equal protection challenges under the U.S. Constitution.[29] As to the First Amendment challenge, the Ninth Circuit concluded the signature requirements did not impose a severe burden on core political speech by making the process more expensive because there was no First Amendment right to qualify an initiative for the ballot and, the court held, there was no credible evidence that the All Districts Rule significantly inhibited the ability of proponents to place initiatives on the ballot.[30] The Ninth Circuit upheld the law as a lesser burden because the state showed an important regulatory interest in requiring a modicum of state-wide support for changes to statewide law.[31]

The Utah court in Utah Safe to Learn-Safe to Worship Coal., Inc., also upheld the signature gathering requirements of 10% of the votes cast for governor in 89.7% of Utah's legislative districts within one year against challenges under the First and Fourteenth Amendments to the U.S. Constitution.[32] The Utah court applied Burdick's standard to a First Amendment challenge to the initiative petition signature and time requirements discussed above and found they did "not impose unreasonable or discriminatory burdens on the rights of voters to participate in the initiative process. Hence, the legislative purposes [of ensuring statewide support of an initiative and in ensuring an orderly process] would be sufficient to justify any minimal restrictions arguably imposed by the provisions."[33]

Legislation regulating how an initiative may qualify for the ballot may also run afoul of the equal protection clause of the U.S. Constitution if it discriminates against or authorizes discrimination against any identifiable class.[34] However, it is unlikely that an equal protection challenge would be successful here. In Angle, the Ninth Circuit upheld the All District Rule against an equal protection challenge, finding it did not discriminate against an identifiable class even though it was

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[26] Angle, 673 F.3d at 1132.
[27] *Id.*
[28] *Id.*
[29] *See generally* Angle v. Miller, 673 F.3d 1122 (9th Cir. 2012)
[30] *Id.* at 1133-34.
[31] *Id.* at 1136.
[32] *Id.* 94 P.3d at 23.
[33] *Id.* 94 P.3d at 233.
[34] Angle, 673 F.3d at 1131.

argued that the legislative district requirements gave rural voters effective veto power over urban voters.[35]

CONCLUSION

SB1159's restrictions on the initiative process are certainly more cumbersome. Nevertheless, the restrictions and reduced time frames do not appear to violate the Idaho Constitution and appear to be workable and within reason, although it is somewhat unclear as to the time to collect the required signatures within 180 days. The right to initiate legislation does not appear to be impeded by the restrictions in SB1159, because such right is not self-executing and the legislature may impose conditions upon the exercise of that right so long as such conditions are reasonable and workable.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

[35] *Id.* at 1132.