



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

August 26, 2022

TRANSMITTED VIA EMAIL

The Honorable Melissa Wintrow
Idaho Senate
Idaho State Capitol
700 W. Jefferson Street
Boise, ID 83720
mwintrow@senate.idaho.gov

Re: Potential Legal Issues Presented by RS29902

Dear Senator Wintrow:

You requested an analysis of potential legal issues presented by RS29902. In short, RS29902, if passed, is likely to survive a challenge under the “one-subject” rule. Its enactment would not prevent Proposition 1 (Prop 1), the Quality Education Act Initiative, from also appearing on the November ballot. There is no process identified in law for governmental action to remove an initiative once approved for a ballot by the Secretary of State. Idaho law secures the people’s right to introduce law by initiative, without interference from the legislature; but once enacted, the legislature has authority to repeal or otherwise impact an initiative-made law as with any other law. Finally, there are no provisions in law prohibiting statewide advisory ballot questions. Your questions, reordered and slightly rephrased, are addressed in more detail below.

1. RS29902 and Proposition 1

In light of your questions, it is useful at the outset to briefly describe RS29902 and Prop 1 and their effective dates. The stated purpose of RS29902 is to “quickly and efficiently respond to historic inflation and the harm it is inflicting on Idaho taxpayers and on the education system . . .” The short ballot title of Prop 1 states it is “An Initiative Supplementing Funding For K-12 Education By Increasing The Individual And Corporate Tax Rates.” RS29902, like Prop 1, implicates Idaho Code sections 63-3024, -3025, -3067, and chapter 9, title 33, Idaho Code. If passed, certain portions of RS29902 would become effective immediately, and others on January

3, 2023. Section 7 of Prop 1 provides that it “shall be in full force and effect on and after January 1, 2023.”

2. Does RS29902 meet the single subject test?

Article III, section 16 of Idaho’s Constitution provides, “Every act shall embrace but one subject and matters properly connected therewith” Idaho Const. art. III, § 16. An act is in harmony with this provision if it has but “one general subject, object, or purpose” and all of its provisions are “germane” to that general subject, and have “a necessary connection therewith.” *Cole v. Fruitland Canning Ass’n*, 64 Idaho 505, 134 P.2d 603, 606 (1943). Similarly, where all the provisions of an act “relate to and have a natural connection with the same subject, they may be united in one statute.” *Lyons v. Bottolfsen*, 61 Idaho 281, ___, 101 P.2d 1, 4 (1940). The provisions of an act do not need to relate directly to the same subject. Rather, if the provisions relate “directly or indirectly” to the same subject, have a “natural connection” therewith, and are “not foreign to the subject expressed in the title,” they may be united. *Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 188, 52 S. Ct. 548, 554, 76 L. Ed. 1038 (1932) (emphasis added).

This “one-subject” rule “prevent[s] the inclusion in title and act of two or more subjects diverse in their nature and having no necessary connection.” *Utah Power & Light Co.*, 286 U.S. at 188. The purpose of the rule is to “prevent the inclusion of incongruous and unrelated matters ... and to guard against inadvertence, stealth and fraud in legislation.” *Id.* at 187. Courts disregard “mere verbal inaccuracies, resolve doubts in favor of validity, and hold that, in order to warrant the setting aside of enactments for failure to comply with the rule, the violation must be substantial and plain.” *Id.* at 187 (internal citations omitted).

The Idaho Supreme Court has indicated that an act cannot merely have *something to do with* a particular topic, but must have a unity of purpose. See *Am. Fed’n of Labor v. Langley*, 66 Idaho 763, 769, 168 P.2d 831, 834 (1946). That “unity of purpose” must be “disclosed” directly or indirectly. *Id.* In *Langley*, the court found that each provision of the labor union act “revolve[d] in its own orbit, and whether gravitating about a central theme or pole star,” the Court could not say, “because the statute does not disclose any *clear and unified scheme*.” *Langley*, 66 Idaho at 769 (emphasis added).

RS29902 proposes a one-time tax rebate to Idahoans, consolidates and creates a flat tax at 5.8%, and provides for funding from the State’s sales tax to the public-school income fund. It also provides for an advisory question as to whether the ongoing elements of RS29902 shall continue. Although RS29902 mixes income tax provisions with sales tax distribution provisions, all provisions pertain directly to, and have a necessary connection with, the core subject of taxation. Given Idaho case law, a challenge to RS29902 for violation of the one-subject rule is unlikely to prevail.

3. What are the requirements to remove an initiative that has been approved by the Idaho Secretary of State to appear on a ballot? And if RS29902 is enacted, will Prop 1 still appear on the November 2022 ballot?

Article III, section 1 of Idaho's Constitution provides:

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.

Idaho Const. art. III, § 1.

Title 34, chapter 18, Idaho Code outlines the procedural requirements to put an initiative on a ballot. These requirements include a requisite threshold for signatures, Idaho Code section 34-1805, and review and recommendations – advisory only – by the Attorney General on “matters of substantive import.” Idaho Code § 34-1809(1). The Attorney General must issue a certificate to the Secretary of State that he has reviewed and made recommendations to the petitioner “whether or not the petitioner accepts such recommendations.” *Id.* “Within fifteen (15) working days after the issuance of the certificate of review, the petitioner, if he desires to proceed with his sponsorship, shall file the measure . . . with the secretary of state for assignment of a ballot title, and the secretary of state shall thereupon submit to the attorney general two (2) copies of the measure filed.” Idaho Code § 34-1809(2).

Prop 1 met all requirements under title 34, chapter 18, Idaho Code, and the Secretary of State accepted the measure for filing. However, the deadline to submit a sample ballot, which would include the statewide ballot question (i.e., Proposition 1) by the Idaho Secretary of State to Idaho's county clerks is September 7, 2022. Idaho Code § 34-909. While there is nothing in title 34, chapter 18, Idaho Code, or elsewhere in Idaho law, identifying or discussing a process for removal of an initiative from the ballot by governmental action once the petition is properly filed by the Secretary of State, that is not to say that the petition sponsor could not withdraw their petition from the ballot before sample ballots are provided to the county clerks. This appears analogous to a bill sponsor being allowed to withdraw proposed legislation before it is referred to the House or Senate where withdrawal after that point would require unanimous consent or two-thirds majority of those present in the House and two-thirds majority in the Senate. *See* S.R. 15; H.R. 14. Once the sample ballots are provided to the county clerks, there does not appear to be a mechanism for an initiative's withdrawal by either government or sponsor. Also, there is nothing in the statute or case law to suggest that passage of RS29902 would cause Prop 1 to be removed from the November 2022 ballot.

4. If RS29902 passes in the Special Session, the Governor signs it into law, and it becomes effective January 3, 2023, would it supersede the approved initiative?

If voted into law, Section 7 provides that Prop 1's effective date would be January 1, 2023. *See Reclaim Idaho v. Denney*, 169 Idaho 406, 439, 497 P.3d 160, 193 (2021) (giving initiative drafters the right to set the effective dates of their initiatives). If RS29902 is passed by the legislature in the Special Session, Sections 1, 2, 3, 4, 13, 14 and 15 would take effect immediately, and Sections 5, 6, 7, 8, 9, 10, 11 and 12 would take effect on January 3, 2023. *See Gibbons v. Cenarrusa*, 140 Idaho 316, 319-321 92 P.3d 1063, 1066-1068 (2002) (legislature has the authority to decide when legislation may be enacted). Because Prop 1 and RS29902 amend the same sections of Idaho Code, if both Prop 1 and RS29902 are enacted, then on January 3, 2023, RS299002 would override the statutory changes made effective by Prop 1.

5. Are there legal concerns about the legislature undercutting initiatives by drafting legislation with effective dates later than ballot initiatives?

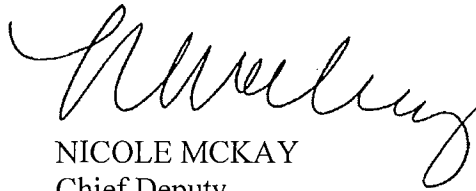
As discussed above, Idaho's Constitution establishes the people's power to enact laws "at the polls independent of the legislature." Idaho Const. art. III, § 1. However, the Idaho Supreme Court has recognized, "once a law is enacted in the initiative process it is like any other law. It may be amended or repealed by the legislature or subsequent initiative." *Gibbons*, 140 Idaho at 320, 92 P.3d at 1067. More recently in *Reclaim Idaho v. Denney*, 169 Idaho 406, 439, 497 P.3d 160, 193 (2021), the court recognized that the people's right to pass laws by initiative is a fundamental right and held that efforts to infringe upon the right to pass laws through an initiative would be subject to strict scrutiny. *Id.* at 427-31. One issue in *Reclaim* was an amendment to Idaho Code section 34-1813(2)(a), "effectively granting the legislature time to repeal any initiative passed by a majority of the state's voters before it ever takes effect." *Id.* at 426. Because the impact to Prop 1 would occur *after* Prop 1 has become a law and taken effect, and as recognized in *Gibbons*, impacts to laws – once enacted – are within the legislature's authority, RS29902 appears consistent with existing Idaho precedent.

6. What is the legal authority for the legislature to submit an advisory question on a general election ballot and is there any precedent?

There are no provisions in Idaho law providing authority for or prohibiting a statewide advisory ballot question at a general election. But notably, Idaho has previously submitted advisory votes to the public under chapter 66, title 67, Idaho Code as "measures". Citing that chapter of Idaho Code, a question concerning term limits for state officials was submitted to the people of Idaho in the November 1998 election. In November 2006, the ballot included an advisory question whether Idaho should keep the property tax relief previously adopted in August 2006. Thus, despite the absence of specific legal authority for statewide advisory ballot questions, their submission is consistent with historical precedent.

In summary, RS29902 does not appear to be vulnerable to a challenge under the one-subject rule, and the advisory ballot question in RS29902 is supported by historical precedent. The bill would not interfere with Prop 1 being on the November 2022 ballot, and there are no provisions in law otherwise addressing removal of an initiative before the sample ballots are provided to the county clerks by the Secretary of State. If both Prop 1 and RS29902 are enacted, the effective dates in both laws would result in RS29902 supplanting Prop 1 on January 3, 2023.

Sincerely,

A handwritten signature in black ink, appearing to read 'Nicole McKay', written in a cursive style.

NICOLE MCKAY
Chief Deputy

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