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IN THE SUPREME COURT OF THE STATE OF IDAHO

In Re: Petition for Writ of Prohibition.

RECLAIM IDAHO, and the COMMITTEE TO PROTECT AND PRESERVE THE IDAHO CONSTITUTION, INC.,

Petitioners,

v.

LAWERENCE DENNEY, Idaho Secretary of State, in his official capacity; and STATE OF IDAHO,

Respondents,

and

Supreme Court Docket No. 48760-2021

Supreme Court Docket No. 48784-2021

OPPOSITION TO MOTION TO REVISE

SCOTT BEDKE in his official capacity as Speaker of the House of Representatives of the State of Idaho; CHUCK WINDER, in his official capacity as President Pro Tempore of the Idaho State Senate; SIXTY-SIXTH IDAHO LEGISLATURE,

Intervenor-Respondents

In Re: Petition for Writ of Mandamus

MICHAEL STEPHEN GILMORE, a Qualified Elector of Ada County,

Petitioner,

v.

LAWERENCE DENNEY, Idaho Secretary of State, in his official capacity,

Respondent,

and

SCOTT BEDKE, in his official capacity as Speaker of the House of Representatives of the State of Idaho; CHUCK WINDER, in his official capacity as President Pro Tempore of the Idaho State Senate; SIXTY-SIX IDAHO LEGISLATURE,

Intervenors-Respondents.

INTRODUCTION

The alleged tension in the Court's standing jurisprudence argued in Petitioner Gilmore's Motion to Revise Part of Opinion Filed August 23, 2021 ("Motion to Revise") does not exist.

Petitioner Gilmore's argument misreads the Court's standing jurisprudence. For this reason alone, the Court should decline Petitioner Gilmore's Motion to Revise. But even if the alleged tension did exist, there is no procedural mechanism by which this Court can properly rule on Petitioner Gilmore's Motion to Revise. Petitioner Gilmore does not identify any rule under which his motion is brought, and the alleged issue raised in the Motion to Revise was not raised in any of the earlier briefing before the Court. Finally, the Court should decline Petitioner Gilmore's request to add an advisory opinion to the Opinion addressing his mistaken concerns with the phrasing of the Court's past articulation of the well-established rule that a litigant must have something more than a generalized grievance to bring suit.

ARGUMENT

A. The alleged tension in the Court's standing jurisprudence argued in Petitioner Gilmore's Motion to Revise does not exist.

Petitioner Gilmore's Motion to Revise is solely based on his quibbles with the language that the Court used in *Selkirk-Priest Basin Ass'n v. State*, 128 Idaho 831, 834, 919 P.2d 1032, 1035 (1996) ("*Selkirk-Priest Basin*"), which the Court quoted in the Opinion to articulate the well-established rule that a litigant must have some injury beyond a generalized grievance to have standing.[1] *See* Motion to Revise, 3; *Opinion*, at 15 (Aug. 23, 2021, as corrected Aug. 25, 2021). Petitioner Gilmore appears to misread the quoted sentence from *Selkirk-Priest Basin* to glean from

[1] The Court quoted this language in *Selkirk-Priest Basin Ass'n v. State*, 128 Idaho 831, 834, 919 P.2d 1032, 1035 (1996) via *Noh v. Cenarussa*, 137 Idaho 798, 800, 53 P.3d 1217, 1219 (2002). *See Opinion*, 15.

it the proposition that a litigant must have an injury that is different from every other individual and legal entity ever to have standing. But this is not what *Selkirk-Priest Basin* says.

In *Selkirk-Priest Basin*, the Court asked whether "the alleged injury to SPBA's members' recreational and aesthetic use of land confer[ed] upon them standing to challenge the administration of endowment trust lands." 128 Idaho at 833, 919 P.2d at 1034. The Court looked to its recent opinion in *Boundary Backpackers v. Boundary County*, 128 Idaho 371, 913 P.2d 1141 (1996), where it had concluded alleged injury to environment, aesthetic and recreational injuries in state lands, waters, and natural resources was not enough to confer standing, to decide the issue. *Selkirk-Priest Basin*, 128 Idaho at 834, 919 P.2d at 1035. The Court had held in *Boundary Backpackers* that a commercial guide's affidavit that enforcement of the challenged ordinance would result in a substantial loss of open space used for his guided tours was sufficient to establish standing. *Id.* The Court then wrote in *Selkirk-Priest Basin*:

> The injury suffered by SPBA's members is at best a generalized grievance distinguishable from the injury suffered by the professional guide in *Boundary Backpackers*. SPBA's affidavits do not establish a peculiar or personal injury that is different than that suffered by any other member of the public.

128 Idaho at 834, 919 P.2d at 1035.

In other words, the Court did not require that the SPBA's members have suffered an injury not suffered by any other individual or legal entity with the language that concerns Petitioner Gilmore—it merely indicated that the litigants had not established that their alleged injury was not shared by anyone. This is just another way of phrasing Petitioner Gilmore's accepted "proposition alpha." *See* Motion to Revise, 2-3. And the same can be said of the relevant portion of the

discussion in *Young v. City of Ketchum*, 137 Idaho 102, 44 P3d 1157 (2002), to which Petitioner Gilmore apparently objects based on his proposal to strike the discussion of that case in the Opinion. *See* Appendix to Motion to Revise, 1-2.

Despite Petitioner Gilmore's quibbles with linguistic choices, neither this Opinion, nor the preceding jurisprudence to which Petitioner Gilmore objects, establish that a litigant must have sustained an injury different from that suffered by every other person or entity ever to establish standing. For this substantive reason alone, the Court should decline to grant any of the relief requested in the Motion to Revise.

B. Petitioner Gilmore's Motion to Revise is not properly before the Court.

Petitioner Gilmore's Motion to Revise is also procedurally deficient. The Idaho Appellate Rules neither contemplate nor provide for a post-opinion motion to clean-up perceived inconsistencies in the Court's prior jurisprudence. This is made evident by the fact that Petitioner Gilmore does not identify any rule of Idaho Appellate Procedure under which his Motion to Revise is brought.

Clearly, the Motion to Revise is not a petition for rehearing, which would be allowed under I.A.R. 42. Indeed, Petitioner Gilmore begins by acknowledging that he is not asking the Court to "revisit its decision to dismiss my Petition for a Writ of Mandamus for lack of standing[.]" Motion to Revise, 2. Instead, it appears that Petitioner Gilmore, being troubled by a perceived inconsistency in Court's standing jurisprudence, has seized upon this moment to bring the issue to the Court's attention for the sake of "future standing litigation and . . . accuracy." Motion to

Revise, 2. These are not grounds that are anywhere contemplated in the Court's rules as being sufficient to justify the relief Petitioner Gilmore requests.

The issues with Petitioner Gilmore's *carpe diem* approach in this motion are evident in the fact that the perceived issues that he raises have, according to Petitioner Gilmore, "been around for a long time" and "[i]t will be a big task to fix them," involving "a possible heavy lift of reconciling conflicting lines of standing case law[.]" Motion to Revise, 5, 7. Yet, even if these issues exist (and they do not), they were not briefed by the parties. *See* Brief in Support of Petition for Issuance of a Writ of Mandamus, 4-5; Respondent's Opposition to Petition for Issuance of a Writ of Mandamus ("Opposition"), 4-8; Reply Brief in Support of Petition for Issuance of a Writ of Mandamus ("Reply"), 1-3. The Secretary of State never once argued that Petitioner Gilmore was required to sustain an injury different from that suffered by every other individual or legal entity in order to have standing. Rather, the Secretary of State argued that Petitioner's injury was "a generalized grievance equally affecting all Idahoans," Opposition, 4, because "supporters and detractors of [SB No. 1110] are all affected equally." Opposition, 6. "Voters who support [SB No. 1110] have the same chance of having an initiative or referendum they support placed on the ballot as voters who oppose [SB No. 1110]" and voters who oppose [SB No. 1110] do not "belong to a class of citizens who uniquely have a lesser chance of having an initiative or referendum they support placed on the ballot." Opposition, 6. And in reply, Petitioner Gilmore argued different classes of voters that, he contended, would result in him having a non-generalized grievance: "voters supporting Referenda and Initiatives and voters opposing Referenda and Initiatives." Reply, 1. Ultimately, the Court agreed with the Secretary of State's position. *Opinion*, 15-18.

And even if Petitioner Gilmore's Motion to Revise were brought under a rule, he has waived any ability to raise the alleged tension that troubles him. In *AIA Servs. Corp. v. Idaho State Tax Comm'n*, the Court reiterated its prior holding that "an issue may be considered waived for the purposes of appeal if raised for the first time on a motion for reconsideration." 136 Idaho 184, 188, 30 P.3d 962, 966 (2001) (citing *State v. Rubbermaid, Inc.,* 129 Idaho 353, 357, 924 P.2d 615, 619 (1996)). If Petitioner Gilmore's Motion to Revise were to actually present an issue for resolution, it would present an analogous situation to that addressed in *AIA Servs. Corp.* because this is an original action before the court of last resort and post-opinion briefing is the closest thing to an appeal available. The Court should apply the principle articulated in *AIA Servs. Corp.* and conclude that Petitioner Gilmore has waived any ability to argue this new issue of "unique" versus "distinct" injury as it was not raised in his opening brief, in either opposition brief, or in his reply brief.

C. <u>Petitioner Gilmore's Motion to Revise asks this Court to issue an impermissible advisory opinion</u>.

As this Court identified here, the doctrines of justiciability and standing mandate that the Court may only wade into a controversy that is "real and substantial" and "admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical set of facts." *Opinion,* 13 (quoting *State v. Phillip Morris, Inc.*,

158 Idaho 874, 881, 354 P.3d 187, 194 (2015) (quoting *Davidson v. Wright*, 143 Idaho 616, 620, 151 P.3d 812, 816 (2006))).

Petitioner Gilmore's Motion to Revise asks this Court to revise the Opinion to advise as to what the law of standing would be based upon a hypothetical set of facts. Petitioner Gilmore does not contest that he does not have standing because he has failed to establish an injury that is different or distinct from any other individual or legal entity or class thereof. Instead, he takes issue with a linguistic choice that is unnecessary to the question of whether he has standing upon his particular set of facts.

If there were a real issue with this Court's standing jurisprudence, and there is not, the Court should wait to resolve it until a case is presented where the defendant argues that a litigant lacks standing because the litigant has not suffered an injury that is different from that suffered by every other individual or legal entity. As Petitioner Gilmore notes, he could then raise his perceived issue in an amicus brief if the Court were to grant leave. *See* Motion to Revise, 7 ("If this is not the appropriate case in which to resolve these tensions in the Court's standing law, I stand ready to accept an invitation from the Court to file an amicus addressing these issues in standing law if the appropriate case should later appear on the Court's docket.").

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CONCLUSION

For the aforementioned reasons, the Secretary of State requests that the Court deny Petitioner Gilmore's Motion to Revise.

DATED this 13th day of September, 2021.

STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

By: *_/s/ Megan A. Larrondo_*
MEGAN A. LARRONDO
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that on this 13th day of September, 2021, I filed the foregoing document electronically through the iCourt E-File system, which caused the following iCourt-registered counsel to be served by electronic means, as more fully reflected on the Notification of Service.

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