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Idaho Supreme Court
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BEFORE THE SUPREME COURT OF IDAHO

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.	Supreme Court Docket No. 48760-2021 **RESPONDENT'S OPPOSITION TO PETITION FOR ISSUANCE OF A WRIT OF MANDAMUS**

RESPONDENT'S OPPOSITION TO PETITION FOR ISSUANCE OF A WRIT OF MANDAMUS

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TABLE OF CONTENTS

TABLE OF AUTHORITES

Cases

Idaho Constitution

Idaho Statutes

Session Laws

Other Authorities and Sources

STATEMENT OF THE CASE

While reserving to the people the power to propose and vote on referenda and initiatives, Article III, § 1 of the Idaho Constitution expressly grants the Idaho Legislature the power to provide for the "conditions" and "manner" under which the people may exercise this right. By requiring initiative and referendum petition sponsors to gather signatures from all 35 legislative districts via Senate Bill No. 1110 (now Idaho Code § 34–1805(2)) (referred to herein as the "Act"), the Idaho Legislature has properly exercised its power. The Act is constitutional. It neither violates the equal protection guarantees nor the right of suffrage contained in the Idaho Constitution, nor does it exceed the Legislature's power under Article III, § 1.

However, this Court need not even address these issues. This Petition should be dismissed for lack of justiciability: Petitioner lacks standing, his request for a writ of mandamus is improper as other avenues of relief are available, and the invocation of this Court's original jurisdiction is improper. This case is a run-of-the-mill constitutional challenge devoid of any urgency, which district courts handle all the time. The relief that Petitioner seeks is readily available to any individual with standing through the ordinary course of litigation under Idaho's well-crafted Rules of Civil Procedure. Exercising jurisdiction over this Petition risks opening the flood gates and turning the "extraordinary" relief that Petitioner seeks into quite ordinary relief available to any litigant who wishes to shortcut the litigation process (i.e. most litigants). I.A.R. 5(a). Nothing justifies the extraordinary treatment that Petitioner seeks.

Senate Bill No. 1110 was introduced during the 2021 Session of the Idaho Legislature on February 12, 2021. The bill traveled through the Senate State Affairs Committee, was passed by

the Idaho Senate on a 26 to 9 vote, passed the Idaho House of Representatives on a 51 to 18 vote, and was signed by the Governor into law on April 17, 2021, becoming 2021 Idaho Session Law Chapter 255 and Idaho Code § 34–1805(2). *2021 Legislation – Senate Bill 1110*, IDAHO LEGISLATURE, https://legislature.idaho.gov/sessioninfo/2021/legislation/S1110/ (last visited May 12, 2021). Because the Act contained an emergency clause, it became effective immediately upon passage and approval. (Exhibit to Petition.)

The Act modified an existing requirement for initiative and referenda petitions to appear on the ballot at a statewide general election. Prior to the Act, petition sponsors were required to gather signatures from "not less than six percent (6%) of the qualified electors at the time of the last general election in each of at least eighteen (18) legislative districts; provided however, the total number of signatures shall 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 (2013). The Act changed this requirement: petition sponsors must now gather signatures from no less than six percent of the qualified electors at the time of the last general election in each of Idaho's 35 legislative districts, rather than 18 legislative districts. (Exhibit to Petition.) The Act also eliminated the clause that set a minimum number of total signatures. *Id.* In short, while the Act changed which signatures must be collected, it did not change the total number of signatures required to qualify a measure for the ballot. (Declaration of Jason Hancock ("Hancock Decl.") ¶ 7.)

Idaho is divided into 35 legislative districts. (*See* Hancock Decl. ¶ 10 and Exhibit A to Hancock Decl.); Idaho Const. art. III, § 4. The legislative districts are drawn by the Commission

for Reapportionment every ten years based on the total State population as reported by the U.S. Census Bureau. Idaho Const. art. III, § 2; Idaho Code §§ 72–1501, 1506(1); (Hancock Decl. ¶ 9). In addition to requirements to preserve traditional districting objectives, such as creating geographic compactness and preserving the integrity of political subdivisions, districts must be "substantially equal in population" and comply with federal law, which generally requires districts to have a maximum population deviation of no more than 10%. Idaho Code § 72–1506(3); *Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016). Idaho's current legislative districts were drawn to be substantially equal in population; the largest variances were 4.84% and -4.86%. (Hancock Decl. ¶¶ 8, 10.) Each of Idaho's 35 legislative districts elects one senator and two representatives to the Idaho Legislature for the purpose of enacting laws via representative democracy. Idaho Const. art. III, § 2(1); Idaho Code § 67–401.

On April 26, 2021, Petitioner Michael Gilmore filed his Petition for Issuance of a Writ of Mandamus to Order the Secretary of State Not to Implement an Unconstitutional Law ("Petition") as an original action before this Court. He also filed a Brief in Support of Petition for Issuance of a Writ of Mandamus (Petitioner's Brief). Petitioner seeks an order declaring the Act unconstitutional to the extent that it requires supporters of referendum and initiative petitions to gather signatures from each of Idaho's 35 legislative districts in order to qualify the petition for the ballot, as well as a writ of mandamus ordering the Idaho Secretary of State not to implement the Act's challenged requirement. Petition at 1–2. Petitioner did not challenge the Act in the district court.

ADDITIONAL ISSUES PRESENTED ON APPEAL

A. Should the Court dismiss the Petition because Petitioner lacks standing?

B. Should the Court dismiss the Petition because the requested writ of mandamus is improper as Petitioner has not shown that he lacks other avenues of relief?

C. Should the Court dismiss the Petition because the Court lacks original jurisdiction to consider it?

ARGUMENT

I. Petitioner lacks standing.

"It is a fundamental tenet of American jurisprudence that a person wishing to invoke a court's jurisdiction must have standing." *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002). The importance of the issues at stake does not confer standing, as "[s]tanding focuses on the party seeking relief and not on the issues the party wishes to have adjudicated." *Id.* Focusing "on the party seeking relief"—Petitioner—reveals that the Act affects him the same as all other Idahoans and that his perceived "injury" is hypothetical. Petitioner thus lacks standing, and his Petition must be denied.

A. Petitioner's "injury" is a generalized grievance equally affecting all Idahoans.

Petitioner lacks standing because the Act affects him the same as all other Idahoans. To have standing, Petitioner must have a "particular interest or injury." *State v. Philip Morris, Inc*., 158 Idaho 874, 881, 354 P.3d 187, 194 (2015). An individual does not have a particular interest or injury when a law affects him the same as everyone else. It is a "basic proposition[] of the doctrine of standing" that a "citizen and taxpayer may not challenge a governmental enactment

where the injury is one suffered alike by all citizens and taxpayers of the jurisdiction." *In re Jerome Cty. Bd. of Comm'rs*, 153 Idaho 298, 308, 281 P.3d 1076, 1086 (2012) (quoting *Boundary Backpackers v. Boundary Cty.*, 128 Idaho 371, 375, 913 P.2d 1141, 1145 (1996)). That limitation applies even when, as here, a litigant alleges that the government has "failed to comply with" the law. *Coal. for Agric.'s Future v. Canyon Cty.*, 160 Idaho 142, 146, 369 P.3d 920, 924 (2016). Simply put, "a concerned citizen who seeks to ensure the government abides by the law does not have standing." *Young*, 137 Idaho at 105, 44 P.3d at 1160.

Petitioner claims that he is injured because the Act makes it harder for an initiative or referendum he supports to be placed on the ballot. But the Act's requirements apply equally to all Idahoans, thus Petitioner merely offers "a generalized grievance shared by a large class of citizens." *Troutner v. Kempthorne*, 142 Idaho 389, 392, 128 P.3d 926, 929 (2006). As this Court has "consistently held," that means Petitioner lacks standing. *Id.*

Petitioner's reliance on *Van Valkenburgh v. Citizens for Term Limits* is misplaced. 135 Idaho 121, 15 P.3d 1129 (2000). There, this Court held that voters who opposed a statute requiring ballots to convey whether candidates for federal office had taken and complied with a term-limit pledge had standing. *Id.* at 123–25, 15 P.3d at 1131–33. Petitioner says that because he opposes the Act, he too must have standing. Pet. Br. at 4–5. Not so.

Setting aside the fatal flaw that Petitioner's argument would invalidate the standing doctrine altogether (only those who oppose a law are motivated to file suit to invalidate it), this Court has since clarified that, to invoke standing under *Van Valkenburgh,* litigants must "allege the law infringes on their right to vote because it constitutes a state invasion of the privacy and

sanctity of the voting booth." *Ameritel Inns, Inc. v. Greater Boise Auditorium Dist.*, 141 Idaho 849, 852, 119 P.3d 624, 627 (2005). Petitioner has not done so—nor can he, because the Act's provisions apply *before* citizens enter a voting booth—thus he cannot rely on *Van Valkenburgh*.

Further, Petitioner ignores why opposition to the statute at issue in *Van Valkenburgh* conferred standing. There, voters were affected differently by the statute depending on whether they supported the term limits pledge. If most Idahoans supported the pledge and preferred candidates who took and honored it, then the voter who opposed the pledge likely had a lesser chance of having their preferred candidate elected (and vice versa). The voters' reduced chance of having their preferred candidates elected constituted a "distinct palpable injury," and that injury was a product of their opposition to the statute at issue. *Young*, 137 Idaho at 106, 44 P.3d at 1161. Put differently, there were at least two classes of citizens depending on whether they supported or opposed the statute at issue: (1) those who had a better chance of having their preferred candidate elected, and (2) those who had a lesser chance of having their preferred candidate elected.

By contrast, here, supporters and detractors of the Act are affected equally. If they want an initiative or referendum placed on the ballot, they face exactly the same obstacles regardless of their support for the Act. Voters who support the Act have the same chance of having an initiative or referendum they support placed on the ballot as voters who oppose the Act. As a result, voters who oppose the Act do not suffer a "distinct palpable injury." Nor do they belong to a class of citizens who uniquely have a lesser chance of having an initiative or referendum they support placed on the ballot.

By ignoring why opposition to the statute at issue in *Van Valkenburgh* led to a unique injury, Petitioner argues that opposition to a law is itself always enough to confer standing. That suggestion not only contradicts this Court's holdings, *Troutner*, 142 Idaho at 392, 128 P.3d at 929, it would render the standing doctrine meaningless because only those who oppose a law sue to invalidate it. Further, it ignores "the essence of a democratic form of government." *Miles v. Idaho Power Co.*, 116 Idaho 635, 642, 778 P.2d 757, 764 (1989). When, as here, detractors of a law "stand on equal footing with the voting populace[,]" they "can attempt to influence public opinion and bring about change" to the law at issue. *Id.* If they cannot do so (or in this case, have not even tried to do so), they are not entitled to circumvent that process by filing a lawsuit, let alone in an extraordinary original action.

B. Petitioner's "injury" is hypothetical.

Petitioner also lacks standing because his alleged injury is hypothetical. Although the Idaho and federal standing doctrines have different sources, this Court looks to federal law to apply Idaho's standing doctrine. *Philip Morris*, 158 Idaho at 881, 354 P.3d at 194. As a result, Petitioner must allege an "injury in fact" meaning his injury must be "actual or imminent, not conjectural or hypothetical." *Id.*; *Tucker v. State*, 162 Idaho 11, 19, 394 P.3d 54, 62 (2017). "[M]ere allegations are not sufficient" to meet this standard; Petitioner instead "must demonstrate facts" supporting his allegations. *Philip Morris*, 158 Idaho at 882, 354 P.3d at 195; *see also Tucker v. State*, No. 46882, 2021 WL 1307404, at *11 (Idaho Apr. 8, 2021).

Petitioner claims he is injured because he might support unspecified initiatives and referenda that may not be placed on the ballot because of the Act. Petition, at ¶¶ 4, 6 ("I intend to

continue to sign [and vote for] petitions . . . **if I support the Measure"** and "[I] would sign a Petition to put a Referendum on [the Act] on the ballot . . . **if it were necessary to do so[.]**" (emphasis added); *see also* Pet. Br. at 4–5. Petitioner, however, has not offered or identified any initiative or referendum that he currently supports nor does he offer any evidence that a current or future initiative or referendum he supports would not be placed on the ballot because of the Act.[1] *Id.* Petitioner did not even sign the initial petition that was filed with the Secretary of State's Office on April 26, 2021 to start the process to be able to circulate a referendum petition on the Act. (Hancock Decl. ¶ 12.) In short, Petitioner offers mere allegations of a hypothetical initiative or referendum and of hypothetical difficulties.[2] Standing, however, "can never be assumed based on a merely hypothetical injury." *Philip Morris*, 158 Idaho at 882, 354 P.3d at 195.

C. "Relaxed" standing is inappropriate here.

At times, this Court has "relaxed" the standing requirements where "(1) the matter concerns a significant and distinct constitutional violation, and (2) no party could otherwise have

[1] Petitioner's claims about his occasional past support of initiatives does not establish that he will support future hypothetical initiatives or referenda. *See Selkirk-Priest Basin Ass'n, Inc. v. State ex rel. Batt*, 128 Idaho 831, 834, 919 P.2d 1032, 1035 (1996) (recognizing that past "occasional use" does not create "a particularized injury"). But even if it did, he still needs to provide evidence that the hypothetical initiatives or referenda he will support would be placed on the ballot absent the Act.

[2] For similar reasons, Petitioner's claim is not ripe. "[R]ipeness asks 'whether there is any need for court action at the present time.'" *Philip Morris*, 158 Idaho at 883 n.6, 354 P.3d at 196 (*quoting Miles*, 116 Idaho at 642, 778 P.2d at 764). "When no controversy has actually arisen, and it is shown that a controversy might never arise, the case is not ripe for judicial review." *Id*. (citation omitted). Until Petitioner provides evidence that he supports an initiative or referendum that would be placed on the ballot absent the Act, no controversy has arisen and one might never arise.

standing to bring a claim." *Emps. Res. Mgmt. Co. v. Ronk*, 162 Idaho 774, 777 n.1, 405 P.3d 33, 36 (2017).

The Act does not present a constitutional violation for the reasons explained below. But even if it did, individuals exist that could have standing under the traditional standard. One potential example is an individual who organized an initiative or referendum that would be placed on the ballot but for the Act. Unlike Petitioner and all other Idahoans, that individual would suffer a distinct palpable injury because he or she dedicated time and resources to support an initiative or referendum that failed to be placed on the ballot. And that individual's injury would not be hypothetical because the initiative or referendum would be real and the individual could provide evidence that the Act prevented the initiative or referendum from being placed on the ballot. Unlike Petitioner, the Committee to Protect and Preserve the Idaho Constitution, Inc. ("Committee") has already begun the referendum process. (Ex. B, Hancock Decl.) It remains to be seen whether the Committee will be injured by the Act, but it represents an entity that is moving closer to having standing (unlike Petitioner).

II. A writ of mandamus is improper.

It is unclear whether a writ of mandamus can provide the relief that Petitioner seeks. Typically, a writ of mandamus requires a public officer to take an affirmative action that he or she has a "clear legal duty" to perform. *Coeur d'Alene Tribe v. Denney*, 161 Idaho 508, 512, 387 P.3d 761, 765 (2015). Petitioner does not want Secretary Denney to take an *affirmative* action. Instead, Petitioner wants this Court to *prevent* Secretary Denney from discharging his duty to implement a duly passed law. Secretary Denney does not have a clear legal duty to refrain from

enforcing the law, so a writ of mandamus is seemingly unable to provide the relief sought. *Regan v. Denney*, 165 Idaho 15, 30, 437 P.3d 15, 30 (2019) (Brody, J., concurring in part and dissenting in part); *see also Nez Perce Tribe v. Cenarrusa*, 125 Idaho 37, 39, 867 P.2d 911, 913 (1993) ("[W]e question the propriety of a writ of mandamus directed at the Secretary of State to invalidate a constitutional amendment[.]").

In any event, Petitioner cannot seek a writ of mandamus because he has failed to show that alternative remedies are unavailable. "[T]he existence of an adequate remedy in the ordinary course of law, either legal or equitable in nature, will prevent the issuance of a writ of mandamus." *Leavitt v. Craven*, 154 Idaho 661, 665, 302 P.3d 1, 5 (2012) (quoting *Edwards v. Indus. Comm'n*, 130 Idaho 457, 459–60, 943 P.2d 47, 49–50 (1997)). That limitation applies even when the petition raises "a matter of public importance" like the constitutionality of a statute. *Idaho Falls Redevelopment Agency v. Countryman*, 118 Idaho 43, 45, 794 P.2d 632, 634 (1990). Petitioner bears the burden of proving that no alternative remedies exist. *Leavitt*, 154 Idaho at 665, 302 P.3d at 5 (quoting *Edwards*, 130 Idaho at 459–60, 943 P.2d at 49–50). To discharge that burden, he needs to provide more than allegations—he needs "to *prove* that a writ of mandamus is [his] only adequate remedy under the circumstances." *Idaho Falls Redevelopment Agency*, 118 Idaho at 45, 794 P.2d at 634 (emphasis added). Petitioner has not alleged—let alone proven—why, for example, a declaratory action or an injunction issued by the district court would be inadequate. Similarly, Idaho Code § 34–1808 provides "any citizen" with a process for expedited relief at the district court when the Secretary of State refuses to accept and file a petition based on signatures.

If Petitioner would wait until he has standing to challenge the Act, this process would be available to him.

III. Original jurisdiction is not warranted.

Even if Petitioner can seek a writ of mandamus, he has not established that this Court should review his petition in the first instance. This Court exercises its original jurisdiction to review a petition for a writ of mandamus "when compelled by urgent necessity." *Regan*, 165 Idaho at 20, 32 n.2, 437 P.3d at 20, 32 n.2. Petitioner thus needs to provide "evidence or proof of a crisis or urgent situation." *See Idaho Falls Redevelopment Agency*, 118 Idaho at 45, 794 P.2d at 634. He has not provided any evidence that the "extraordinary" relief he seeks to invoke should be utilized to address this highly ordinary situation. I.A.R. 5(a).

Even if Petitioner actually sought to place an initiative or referendum on the ballot at the next election (there is no evidence that he does), there is no urgency created by uncertainty about whether he needs to comply with the Act's requirements. The Act is a duly passed law that has taken effect. It is presumptively constitutional, *Regan*, 165 Idaho at 19, 437 P.3d at 19; *Rich v. Williams*, 81 Idaho 311, 316, 341 P.2d 432, 435 (1959), and Petitioner needs to plan to follow it. Until he does, it is speculative whether any initiative or referendum that he supports would be placed on the 2022 ballot if not for the Act. He has provided no evidence that the Act will prevent future initiatives or referenda from being placed on the ballot. Until he can show this, there is no need for review—let alone an urgent need.

Moreover, if Petitioner really needs temporary relief while his claims are adjudicated, he could ask the district court for a temporary restraining order or a preliminary injunction. Idaho's

Rules of Civil Procedure provide multiple means of expedited relief at the district court. *See, e.g.*, *Wasden v. Idaho State Bd. of Land Comm'rs*, 150 Idaho 547, 551–54, 249 P.3d 346, 350–353 (2010) (granting Land Board's motion to dismiss where a "plain, speedy, and adequate remedy in the ordinary course of law" existed by means of joining an action for declaratory relief with a request for injunctive relief). Moreover, Idaho Code § 34–1808 provides a specific process for expedited relief related to initiatives and referenda for a litigant with standing.[3]

Petitioner does not need urgent clarity to meet the deadline for a referendum, where the only evidence is that he might possibly sign a referendum petition. *See* Petition ¶¶ 4, 6. But even if he did, as Petitioner notes, a referendum on the Act must be filed within 60 days from when the Legislature adjourns *sine die*. Idaho Code § 34–1803. While the Senate has adjourned *sine die*, the House of Representatives has adopted a concurrent resolution suggesting that it may not adjourn *sine die* until after September 1, 2021. Idaho Senate Journal (May 12, 2021) at 8 (https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2021/journals/sday122.pdf); *2021 Legislation – House Concurrent Resolution 23*, IDAHO LEGISLATURE, https://legislature.idaho.gov/sessioninfo/2021/legislation/HCR023/ (last visited May 13, 2021 at 10:34 am). The unusual posture of this year's legislative session has given any sponsor ample

[3] As an aside, this point also illustrates why Petitioner's claims are premature. If Petitioner were to sponsor an initiative or referendum petition and face difficulties satisfying the Act's requirements, those difficulties would be evidence for this Court to consider. Idaho Code § 34–1808 reflects that reality, as its process begins *after* the Secretary of State refuses to accept and file a petition for an initiative or referendum, so there would be evidence, rather than speculation, for this Court to consider. By filing suit before suffering an injury, Petitioner asks this Court to speculate about the effects of the Act. Standing and ripeness doctrines—and the expedited relief provided for by Idaho Code § 34–1808—exist, in part, to prevent such speculation.

time to organize a referendum and collect signatures—almost certainly months longer than 60 days—defeating any argument for rushed adjudication. Nothing precludes a sponsor from organizing a referendum while litigation is pending. Indeed, as noted above, the Committee to Protect and Preserve the Idaho Constitution, Inc., has already begun the process and is using the unusual grace period provided by the Legislature's posture for their referendum effort. (Hancock Decl. Ex. B. and Hancock Decl. ¶ 12.)

Moreover, the re-drawing of the legislative districts does not create any urgency. The districts are redrawn every ten years. (Hancock Decl. ¶ 9.) It is a normal process, and the re-drawing by definition affects upcoming elections every time it happens. That does not mean, however, that every ten years litigants have a right to invoke this Court's original jurisdiction for claims related to elections. Re-drawing the legislative districts is a regular and ordinary event, it does not warrant extraordinary relief. (*Id.*) Further, any initiatives or referenda currently circulating, and any that begin circulating prior to the approval of a new legislative district map by the next Commission on Reapportionment, will have their signature sufficiency determined based on the current legislative districts. Lawerence Denney's Verified Answer to Petition for Issuance of a Writ of Mandamus, ¶ 11. Any initiatives or referenda approved to begin circulating after the next Commission on Reapportionment approves the new legislative districts will be evaluated based on the new legislative districts. *Id.*

This Petition is a routine challenge to the constitutionality of a duly passed statute. There is nothing noteworthy or extraordinary about it. Petitioner's claims are not urgent. This Court

should clearly signal that original jurisdiction is not available to every litigant who wishes to shortcut the litigation process and decline to exercise original jurisdiction here.

IV. Article III, § 1 of the Idaho Constitution reserves to the Legislature the power to set the manner and conditions of the initiative and referenda process.

Even if this Court had original jurisdiction, and a writ of mandamus were proper here, and the Court determined that Petitioner had standing, the petition lacks merit. Petitioner bears the burden of showing the Act is unconstitutional, and "must overcome a strong presumption of validity." *Gomersall v. St. Luke's Reg'l Med. Ctr., Ltd.*, ___ Idaho ___, 483 P.3d 365, 371 (2021) (quotations omitted). This Court must uphold the Act as long as it does not clearly violate the constitution. *Id*. Petitioner must place the Act's "nullity . . . in [the Court's] judgment, beyond reasonable doubt." *Rudeen v. Cenarrusa*, 136 Idaho 560, 564, 38 P.3d 598, 602 (2001) (quoting *Hellar v. Cenarrusa*, 104 Idaho 858, 860, 664 P.2d 765, 767 (1983)).

The Petition must fail because the Act falls within the Legislature's constitutional right and obligation to set the manner and conditions for the initiative and referendum process. The relevant provision of the Idaho Constitution, Article III, § 1, provides in full:

> The legislative power of the state shall be vested in a senate and house of representatives. The enacting clause of every bill shall be as follows: "Be it enacted by the Legislature of the State of Idaho."
>
> The people reserve to themselves the power to approve or reject at the polls any act or measure passed by the legislature. This power is known as the referendum, and legal voters may, **under such conditions and in such manner as may be provided by acts of the legislature**, demand a referendum vote on any act or measure passed by the legislature and cause the same to be submitted to a vote of the people for their approval or rejection.
>
> 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.

(emphasis added).

The plain language of Article III, § 1 reflects a subject-matter component and a conditions-manner component. As to the subject-matter component, the people have the power to approve or reject any act or measure or to propose laws on any subject appropriate for legislation. In other words, the subject matter of a proposed referendum or initiative is not limited, except for subjects prohibited by Idaho's Constitution. *See Westerberg v. Andrus*, 114 Idaho 401, 407, 757 P.2d 664, 670 (1988).

However, the second sentence of each paragraph provides that such power may be exercised only "under such conditions and in such manner as may be provided by acts of the legislature." This is the conditions-manner component. The Idaho Legislature determines the conditions and manner for how the People's initiative or referendum power may be exercised (currently codified at title 34, chapter 18, Idaho Code). Petitioner's attempts to restrict this explicit right are contrary to the plain language of Article III, § 1.

Article III, § 1 thus does not contain an unqualified right to propose initiatives or referenda outside of the process created by the Legislature, let alone a fundamental right. "A right is a fundamental right under the Idaho Constitution . . . . if it is expressed as a positive right, or if it is implicit in Idaho's concept of ordered liberty." *Van Valkenburgh*, 135 Idaho at 126, 15 P.3d at 1134 (citing *Idaho Sch. For Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 581–

82, 850 P.2d 724, 732–33 (1993) and *Simpson v. Cenarussa*, 130 Idaho 609, 615, 944 P.2d 1372, 1378 (1997)). To the extent that there is a right related to the process by which initiatives and referenda are put on the ballot, it is a right to qualify an initiative or referendum for the ballot pursuant to the "conditions" and "manner" set by the Legislature. This right is not put at issue by Petitioner's claims, as his arguments turn on an alleged right to a process that is different than that provided by the Legislature.

When setting the manner and conditions for an initiative or referendum, the Legislature need only create a process that is "reasonable and workable."[4] *See Dredge Mining Control—Yes!, Inc. v. Cenarrusa*, 92 Idaho 480, 484, 445 P.2d 655, 659 (1968) (holding the ten percent signature requirement in then-Idaho Code § 34–1805 was a permissible condition on the right to initiate laws because the "statutory scheme set up by the legislature, although restrictive and perhaps cumbersome, is reasonable and workable.").

The history of the initiative and referendum process and prior precedent further contradict Petitioner's reading of Article III, § 1. When Idaho's Constitution was adopted, the power of government was divided into three distinct branches, one of which was the legislative power, which was vested in a Senate and House of Representatives. *Luker v. Curtis*, 64 Idaho 703, 136 P.2d 978, 980 (1943). No power was reserved to the "People." *Id.*; *see also* Idaho Const. art. III, § 1 (1889). "Then, as an afterthought and by way of amendment (in 1912), [the people] reclaimed certain specified powers, one of which was 'the power to propose laws,

[4] Petitioner does not offer any argument or evidence that the Act is not reasonable or workable.

and enact the same at the polls independent of the legislature.'" *Luker*, 64 Idaho 703, 136 P.2d at 980[5] (emphasis added). Yet, the People could not exercise this reclaimed power until 1933 when 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." *Id.*

This Court has noted that the 20 year dormancy in implementing the conditions and manner of the initiative and referendum process demonstrates that the right to set the process belongs to the Idaho Legislature and not the people:

> So 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.

Luker, 64 Idaho 703, 136 P.2d at 980 (emphasis in original); *see also Johnson v. Diefendorf*, 56 Idaho 620, 57 P.2d 1068, 1075 (1936) (holding the right of referendum also provided in Article III, § 1 is not self-operating, but rather its exercise is dependent upon the statutory scheme enacted by the Legislature); *Westerberg*, 114 Idaho at 404, 757 P.2d at 667 (quoting Idaho Const. art. III, § 1) (concluding the initiative right "can only be exercised 'under such conditions and in such manner as may be provided by acts of the legislature.'" (emphasis omitted) (quoting *Luker*, 64 Idaho 703, 136 P.2d at 980)).

[5] Idaho lawmakers passed Senate Joint Resolution 13 in 1911, which was a resolution to amend the Idaho Constitution to authorize an initiative and referendum process for its citizens. 1911 Idaho Sess. Laws 786 (ratified Nov. 5, 1912). Idaho voters approved the constitutional amendment at the general election in 1912. *Westerberg*, 114 Idaho at 402–03, 757 P.2d at 665–66.

Because the Act falls within the Legislature's express constitutional power and obligation to set the conditions and manner for the initiative and referenda process, it is constitutional.

V. The Act does not violate the Idaho Constitution's guarantees of equal protection.

Petitioner has not met his burden of showing the Act is unconstitutional as a violation of the Idaho Constitution's guarantees of equal protection (contained in Article I, § 2 and Article I, § 1 of the Idaho Constitution). *Rudeen*, 136 Idaho at 568 n.3, 38 P.3d at 606 n.3. "The principle underlying the equal protection clauses of both the Idaho and U.S. Constitutions is that all persons in like circumstances should receive the same benefits and burdens of the law." *Alpine Vill. Co. v. City of McCall*, 154 Idaho 930, 937, 303 P.3d 617, 624 (2013) (quoting *Bon Appetit Gourmet Foods, Inc. v. State, Dep't of Emp't*, 117 Idaho 1002, 1003, 793 P.2d 675, 676 (1989)).

The first step in any equal protection analysis is to identify "the classification under attack." *Gomersall*, 483 P.3d at 375 (citing *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 395, 987 P.2d 300, 307 (1999)). The second step is "identifying the level of scrutiny under which the classification will be examined." *Id.* And the third step is "determining whether the applicable standard has been satisfied." *Id.*

The classifications that Petitioner alleges are not clear.[6] However, it appears that Petitioner alleges two classifications: (1) groups of citizens organizing themselves to put

[6] While initially suggesting a classification in the form of rural voters versus urban voters, Pet. Br. at 7–8, Petitioner appears to go on to disclaim this classification and theorizes about other classifications of voters, all without suggesting that the Act actually employs these classifications. Pet. Br. at 8. It is merely instructing in constitutional doctrine to suggest that

initiatives or referenda on a statewide ballot versus those who are organizing to put candidates, new political parties or recall elections on a statewide ballot,[7] Pet. Br. at 10–11, and (2) individual Qualified Electors whose signature on an initiative or referendum petition contributes toward the measure qualifying for the ballot versus those whose signature on an petition does not contribute toward the measure qualifying for the ballot. Pet. Br. at 10, 13. Neither classification supports invalidating the Act.

A. The Act permissibly treats individuals who wish to qualify an initiative or referendum petition for the statewide ballot differently than individuals seeking ballot access for other candidates or measures.

The first classification that Petitioner alleges is individuals who wish to qualify an initiative or referendum petition for the statewide ballot versus individuals who wish to qualify some other measure or candidate for the statewide ballot. This classification does not violate Idaho's equal protection guarantee.

1. The Act does not treat similarly situated individuals differently with regard to qualifying statewide ballot measures.

As an initial matter, "no equal protection analysis is required and no violation of equal protection will be found in situations where the State has not engaged in the disparate treatment of similarly situated individuals." *Alpine Vill. Co*., 154 Idaho at 937, 303 P.3d at 624 (citing *Shobe*

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it could be constitutionally problematic if a class of voters is favored over another—it does not identify any problematic classifications created by the challenged Act.

[7] Petitioner gestures at another iteration of this classification in a footnote: supporters of statewide initiatives and referenda versus supporters of local referenda and initiatives. Pet. Br. at 12 n. 4.

v. Ada Cty., Bd. of Comm'rs, 130 Idaho 580, 585–86, 944 P.2d 715, 720–21 (1997)). This classification does not treat similarly situated individuals differently.

Contrary to Petitioner's suggestion, supporting direct legislation is different from supporting efforts to qualify candidates for statewide office, organize a new political party, or qualify recall elections. Pet. Br. at 11–12. First, the activities are different. In a proper equal protection claim, *different* individuals are treated differently when engaging in the *same* activity. Under Petitioner's theory, he can bring an equal protection claim because he will be treated differently when he supports an initiative compared to when he supports a recall election. For equal protection purposes, though, an individual cannot be a comparator to himself. For example, there would not be an equal protection claim because a person was subject to different regulations when he rides his bike compared to when he drives his car. The same is true here.

Second, the Idaho Constitution recognizes that supporters of ballot initiatives and referenda are not similarly situated to Petitioner's alleged comparators. Article III, § 1 expressly permits the Legislature to set the manner and conditions for ballot initiatives and referenda. Article VI, § 6 utilizes different language for recall elections: "The legislature shall pass the necessary laws to carry this provision into effect." And, there is no provision in the Idaho Constitution that expressly gives the Legislature power specific to the process for qualifying independent candidates for statewide office or organizing a new political party. This differing treatment in the Idaho Constitution disposes of Petitioner's effort to treat all individuals seeking statewide ballot access as similarly situated.

Third, ballot initiatives and referenda serve a different purpose. The initiative and referendum process allows any pet policy to be placed on the ballot, where it could become law, without any of the compromise, negotiation, or give-and-take that is part of the representative legislative process. *See Luker*, 64 Idaho 703, 136 P.2d at 980. In contrast, if one runs for statewide office and is elected, that candidate's undiluted platform does not become law. A governor does not make law—his obligation is to ensure the faithful execution of the law. Idaho Const. art. IV, § 5. Similarly, if a recall petition is placed on the ballot and passes, nothing becomes law or is removed from the law. And a political party coming into existence has even less direct consequence on the laws that govern society—a political party does not hold elected office, let alone become law. Finally, when the Legislature makes law, it must command support from a majority of the senators and representatives, who are elected based on legislative districts.[8] Article III, § 15. The initiative and referendum process is the only time when the ability to make law bypasses the representative democratic process—which is based on the input of 35 legislative districts—and goes straight to the people.[9]

[8] While Petitioner may take issue with the fact that the Legislature can make law based on a concurrence of a majority of the representatives of the 35 legislative districts and an initiative petition must demonstrate support from a percentage of the qualified electors in all legislative districts, Petitioner takes issue with the Idaho Constitution itself, which imposes this requirement on representative legislation but not direct legislation. *Compare* Article III, § 1, *with* Article III, § 15.

[9] Petitioner's objection to the difference in treatment between statewide initiatives and local initiatives also fails on this point. Statewide initiatives affect a much larger geographic area covering multiple different regional interests—indeed, the entire State—while city and countywide initiatives necessarily implicate a significantly smaller geographic scale where interests are more likely to be uniform.

Because the Act does not treat similarly situated groups differently, there is no equal protection issue to address with regard to qualifying statewide ballot measures.

2. Even if similarly situated individuals were treated differently under the Act under this alleged classification, rational basis review applies.

Assuming the equal protection guarantee were implicated by Petitioner's asserted classification, the next step in the equal protection analysis is to identify the level of scrutiny that applies. "If a suspect class or a fundamental right is involved, the statute is given strict scrutiny." *Rudeen*, 136 Idaho at 569, 38 P.3d at 607 (citations omitted). When no suspect class or fundamental right is involved and "[w]here the discriminatory character of a challenged statutory classification is apparent on its face and where there is also a patent indication of a lack of relationship between the classification and the declared purpose of the statute," means-focus scrutiny applies. *Gomersall*, 483 P.3d at 375 (quoting *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 710, 791 P.2d 1285, 1289 (1990)). In all other situations, rational basis review applies. *Id.*

Petitioner correctly refrains from arguing that a suspect class is involved[10] or that Article III, § 1 contains a fundamental right to qualify an initiative or referendum petition for the ballot. Instead, he argues that the right of suffrage contained in Article I, § 19, which includes voting, is a fundamental right that is implicated by this alleged classification. Pet. Br. at 7–9. While "voting is a fundamental right under the Idaho Constitution" "[b]ecause the Idaho Constitution expressly guarantees the right of suffrage," Petitioner is incorrect in his

[10] Petitioner is correct to not argue that a suspect class is implicated by the Act. As discussed further below, the populous urban areas of the State could hardly be considered a suspect class.

expansive interpretation of the right of suffrage. *See* Pet. Br. at 10 (quoting *Van Valkenburgh*, 135 Idaho at 126, 15 P.3d at 1134).

Article I, § 19 provides "No power, civil or military, shall at any time interfere with or prevent the free and lawful exercise of the right of suffrage." This Court has indicated that, "while the right of suffrage *might* be broader than simply the right to vote," the right of suffrage must be given a nuanced and narrowing interpretation. *See Rudeen*, 136 Idaho at 567, 38 P.3d at 605 (emphasis added). Thus, in *Van Valkenburgh*, the Idaho Supreme Court concluded that a statute, passed by voter initiative, that allowed candidates for the United States Congress to sign a term limit pledge and then required the Secretary of State to indicate on every ballot and all state-sponsored voter education materials when a candidate had signed the pledge and when a candidate had broken the pledge, implicated the right of suffrage. *Van Valkenburgh*, 135 Idaho at 123–24, 126, 15 P.3d at 1131–32, 1134. The Court reached this conclusion by analyzing the statute based on its effect on voters engaged in the act of voting: the "statute dictate[d] the way the ballot [was] written, and therefore violate[d] the integrity of the ballot, as well as the sanctity and privacy of the voting booth." *Id.* at 125–26, 15 P.3d at 1133–34.

Just one year later, in *Rudeen*, this Court concluded that an initiative that established term limits for certain elected officials and thereby prohibited the names of certain incumbents from appearing on the ballot did not violate the right of suffrage. *Rudeen*, 136 Idaho at 563–64, 566–67, 38 P.3d at 601–602, 604–05. Looking at the issue from the perspective of the candidates, rather than the voters, the Court concluded that the district court "incorrectly

found that the right of suffrage included the right to access the ballot and the right to hold public office." *Id.* at 566–67, 38 P.3d at 604–05. Together, *Van Valkenburgh* and *Rudeen* indicate that Petitioner's sweeping interpretation of the right of suffrage under the Idaho Constitution is incorrect.

Rudeen makes it clear that there is no fundamental right for initiative supporters to qualify an initiative for the ballot based on its related conclusions that (1) the right of suffrage does not include "the right to access the ballot," *Rudeen*, 136 Idaho at 566, 38 P.3d at 604, and (2) "being listed on a ballot is not a fundamental right." *Id.* at 570, 38 P.3d at 608; *see also Lansdon v. State Bd. of Canvassers*, 18 Idaho 596, 111 P. 133, 137 (1910) ("no man has any vested right . . . in the right to run for office"). If it is not a fundamental right for an individual to have their name listed on a ballot, it certainly cannot be a fundamental right for an initiative sponsor to have their initiative listed on the ballot.

In fact, the right of suffrage does not even encompass a right to vote for the candidate of one's choice. *See Fisher v. Masters*, 59 Idaho 366, 83 P.2d 212, 218 (1938) ("The contention that the *voter* or *elector* is denied the right to vote for any one he desires to support for the office of district judge, whether he has been placed on the ballot in the method prescribed by the statute or not, is fully answered by the fact that any qualified elector has the right to place a candidate in nomination, or at least to participate in placing him in nomination; and if he can secure the requisite number of signatures and the consent of his nominee to run for the office, he can have his name printed on the ballot.") (emphasis in original). *Fisher* compels the conclusion that the right of suffrage also does not include the right to vote for an initiative or referendum of one's

choosing, let alone to a right to have one's signature on a petition help qualify that measure for the ballot. Petitioner may argue that *Fisher* is distinguishable because the Court relied on the ability of a qualified elector to participate in nominating the candidate of his choosing for the ballot to reach its conclusion. However, Petitioner is equally able to sponsor an initiative or referendum and, if he can secure the requisite number of signatures as specified by the Act, have the initiative or referendum placed on the ballot. Petitioner presents no argument that such an option is not available; his contention is that the signature requirements for an initiative or referendum are different from those required to get other items on the ballot.

An examination of the history of Article I, § 19 reinforces this conclusion. When Article I, § 19 was adopted as part of Idaho's Constitution in 1889, Article III, § 1 vested all legislative power of the State in a Senate and House of Representatives. *Luker*, 64 Idaho 703, 136 P.2d at 980. The authority for the use of the initiative and referenda process found in Article III, § 1 came later, as an amendment proposed by the Legislature in 1911, which was ratified by the voters in November 1912. *Id.* Given that the power of initiatives and referenda was not even a twinkle in the Constitutional Convention's eye, it can hardly be inferred that the right to suffrage they adopted was intended to encompass signing an initiative or referendum petition or qualifying an initiative or referendum petition for the ballot. *Id.*; PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO, 1889 (I. W. Hart ed., 1912), *available at* https://legislature.idaho.gov/statutesrules/idconst/ (last visited May 12, 2021).

In fact, relatively soon after the provision's adoption, the Idaho Supreme Court described Article I, § 19 as "evidently refer[ing] to officers, civil or military, being about the

polls to meddle with or intimidate electors, and thus to interfere with and prevent them from the free and lawful exercise of the right of suffrage," indicating an understanding of the right of suffrage as confined to the act of voting at the polls. *Adams v. Lansdon*, 18 Idaho 483, 110 P. 280, 282 (1910). This understanding is consistent with the definition of suffrage that this Court looked to in *Rudeen* to analyze what was encompassed by the right of suffrage. *Rudeen*, 136 Idaho at 566, 38 P.3d at 604 (quoting BLACK'S LAW DICTIONARY as defining suffrage as "A vote; the act of voting; the right or privilege or casing a vote at public elections[.]")).

Multiple federal Circuit Courts of Appeals, as well as at least four Justices of the U.S. Supreme Court, agree that there is a clear distinction between voting and the process of how measures are placed on the ballot. *See Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2617 (2020), (Roberts, C.J. and Alito, Gorsuch, and Kavanaugh, JJ., concurring in the grant of stay) ("This is not a case about the right to vote, but about how items are placed on the ballot in the first place."); *Kendall v. Balcerzak*, 650 F.3d 515, 523 (4th Cir. 2011) ("The basis for distinguishing the right to vote in a representative election, on the one hand, from the right to petition for referendum and initiative, on the other, is a sound one."); *Niere v. St. Louis Cty., Missouri*, 305 F.3d 834, 838 (8th Cir. 2002) ("Signing a petition is not entitled to the same protection as exercising the right to vote."); *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 296 (6th Cir. 1993) (holding that the signing an initiative petition is different from voting and entitled to lesser protections). Even the Ninth Circuit, which had earlier held that the ballot initiative is subject to the same equal protection guarantees as voting under the federal constitution, has acknowledged the a fundamental difference between the two processes: "ballot access requirements and elections

serve different purposes. A ballot access requirement determines whether there is a minimum level of grassroots support for an initiative to warrant its inclusion on the ballot. An election, by contrast, measures the collective, aggregate will of the electorate." *Angle v. Miller*, 673 F.3d 1122, 1130 (9th Cir. 2012).

Thus, because there is no fundamental right and no suspect class at issue, rational basis review applies. "A classification will survive rational basis review if the classification is rationally related to a legitimate legislative purpose." *State v. Hart*, 135 Idaho 827, 830, 25 P. 3d 850, 853 (2001) (citing *Coghlan*, 133 Idaho at 396, 987 P.2d at 308). "Under the 'rational basis test,' a classification will withstand an equal protection challenge if there is any conceivable state of facts which will support it." *Meisner v. Potlatch Corp.*, 131 Idaho 258, 262, 954 P.2d 676, 680 (1998) (quoting *Bint v. Creative Forest Prod.*, 108 Idaho 116, 120, 697 P.2d 818, 822 (1985)). The Court does "not evaluate the fairness or efficacy of the statute being challenged." *Gomersall*, 483 P.3d at 375 (citing *McLean v. Maverik Country Stores, Inc.*, 142 Idaho 810, 814, 135 P.3d 756, 760 (2006)).

The Act serves the legitimate legislative purpose of ensuring that ballot initiatives and referenda have sufficient support throughout the State to be placed on the statewide ballot. *See* Appendix to Brief ("The purpose of this legislation is to increase voter involvement and inclusivity in the voter initiative/referendum process. This will be accomplished by ensuring signatures are gathered from each of the 35 legislative districts, so every part of Idaho is included in this process."); (Hancock Decl. ¶ 5). The Act achieves this interest by requiring that

signatures be gathered throughout the State.[11] *Id.* This protects the State from localized legislation. (Hancock Decl. ¶ 5.) Related to this, the Act serves as part of a system of checks and balances for direct legislation, which creates a check on the will of the majority, because it ensures sufficient statewide support before an initiative or referendum petition is put to the purely majoritarian test of showing aggregate support at the polls. *Id.* The protection of minority interests from the will of the majority is an essential part of our republican system of government. Finally, the Act also prevents voter confusion and inefficiency by preventing the ballot from being cluttered with prospective statewide laws that are of primarily local interest, promotes grassroots legislative efforts, and promotes an informed and engaged electorate statewide as to initiative and referenda petitions. *Id.* The Act rationally achieves this interest by ensuring that the petition sponsors develop and demonstrate a baseline level of support throughout all 35 legislative districts before a measure can be placed on the ballot.

[11] *See also Minutes of the Senate State Affairs Committee*, February 17, 2021, 5, https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2021/standingcommittees/210217_ssta_0800AM-Minutes.pdf ("S 1110 is beneficial because it will require input from every legislative district instead of a few population centers.") As Senator Vick noted, Kootenai, Ada, Canyon, and Bonneville Counties, which contain Idaho's major population centers, contain 18 legislative districts making the gathering of signatures in Idaho's 17 remaining counties a moot point. *Id.* at 4; *see also* Hancock Decl. ¶ 6. The populations for these counties constitute an easy majority at the polls, meaning that, absent the Act, a measure could qualify for the ballot and become law based on support in only Idaho's major population centers because, once on the ballot, a measure needs only to garner a majority of votes at the statewide general election to become law. (Hancock Decl. ¶ 6)

3. The Act also survives heightened levels of scrutiny.

While the "right" at issue with Petitioner's first classification is not a fundamental right, even if it were, the Act passes strict scrutiny. "Strict scrutiny requires the state to prove a compelling need for the goal of the challenged statute and that there is no less discriminatory method available to achieve that goal." *Rudeen*, 136 Idaho at 569, 38 P.3d at 607 (quoting *State v. Mowrey*, 134 Idaho 751, 755, 9 P.3d 1217, 1221 (2000)). The Ninth Circuit has recognized the State's interest in ensuring an initiative petition has support distributed throughout the State before being placed on the ballot and subjected to a straight majority vote is an "important regulatory interest." *Angle*, 673 F.3d at 1134–36. The additional interests described above in support of the Act are similarly compelling interests given the State's interest in ensuring the integrity and electoral support of the election process and the Legislature's constitutional duty to set the conditions and manner for the initiative and referenda process.

As the Ninth Circuit has recognized, by requiring that initiative and referendum sponsors obtain signatures from six percent of the qualified electors in each of Idaho's 35 legislative districts, the Act is narrowly tailored to achieve these interests. *Idaho Coalition United for Bears v. Cenarrusa*, 342 F.3d 1073, 1078 (9th Cir. 2003) ("*ICUB*"), (suggesting that a geographic distribution requirement based on existing State legislative districts would be a narrowly tailored way of ensuring a modicum of support statewide for direct legislation). Petitioner's own hypotheticals demonstrate how the Act achieves its interest of ensuring statewide support for an initiative or referendum petition before the petition is tested only on its ability to gather aggregate support. *See* Pet. Br. at 16–17. As Petitioner demonstrates, absent the Act, highly populous areas

of the State could get their policy preferences on a statewide ballot, where they could become law with the support of only those highly populous areas. (*See also* Hancock Decl. ¶ 6.) The Act serves a vital gatekeeping function against the tyranny of the majority. *Id.* The Act also ensures that petition circulators travel to more rural areas of the State to engage with and educate the electorate there on the content of their petitions, rather than staying in the more populous areas of the State. *Id.* The geographic distribution requirement ensures that initiative and referendum petition sponsors prove a certain level of support for the petition across the same distributions as are used for the purposes of representative democracy. *Id.*; Appendix. The Act is a narrowly tailored gatekeeping measure necessary to ensure a measure of statewide support before an initiative or referendum gets on the ballot and is enacted based on its level of aggregate support.

Petitioner does not allege that means-focus scrutiny applies to this alleged classification, and, indeed, he could not.[12] The Act is not blatantly discriminatory on its face. *Gomersall*, 483 P.3d at 375 (quoting *Olsen*, 117 Idaho at 710, 791 P.2d at 1289). It does not distinguish between groups odiously or in a way that is calculated to excite ill-will. *McLean*, 142 Idaho at 814, 135 P.3d at 760. The Act applies equally to all initiative and referendum petition sponsors and supporters statewide. The fact that the legislative history for the Act includes some discussion of the potential impact of the Act on rural voters does not affect this analysis.

[12] This standard is similar to federal intermediate scrutiny, and scrutinizes the "means by which the challenged legislation is said to affect its articulated and otherwise legitimate purpose." *Jones v. State Bd. of Med.*, 97 Idaho 859, 871, 555 P.2d 399, 411 (1976).

The Act, on its face, does not treat rural and urban voters differently, and, even if it did, it does not treat them differently in a way that is odious or designed to excite ill-will. Even looking to the legislative history that Petitioner cites merely shows a desire to ensure rural voices are engaged in the initiative and referendum process, not a desire to afford rural voters advantages that are denied to urban voters. *See* Petition at ¶ 13; Pet. Br. at 8.

B. The Act permissibly gives potentially greater weight to some initiative and referendum petition signatures than others.

Unlike his first classification, Petitioner's second alleged classification—individual Qualified Electors whose signature on an petition contributes toward the initiative or referenda qualifying for the ballot versus those whose signature does not contribute toward the measure qualifying for the ballot—does arguably identify a group of similarly situated individuals who are treated differently by the Act. Regardless, his claim still fails.

1. Regardless of Petitioner's exact argument with regard to this classification, rational basis review applies.

Again, Petitioner's exact argument is unclear. Petitioner may be relying on legislative history to argue that voters are treated differently based on whether they live in urban or rural districts in an effort to favor rural voters. The legislative history does not support this. However, even if true, urban voters are not a suspect classification—they are not an insular minority with limited political power. *See Angle*, 673 F.3d at 1132. The four most populous counties in the State contain 56% of eligible voters and a majority of the legislative districts. (Hancock Decl. ¶ 6.) Accordingly, rational basis review is proper.

Alternatively, Petitioner may be making a signature dilution argument with this argument, *i.e.* that the Act violates an alleged principle of "one man, one signature." This classification is also properly reviewed under rational basis review both because no fundamental right is implicated and because the Act weights signatures based on legislative districts of substantially equal population.

First, no fundamental right under the Idaho Constitution is implicated. While in *Hellar v. Cenarrusa*, 106 Idaho 586, 590, 682 P.2d 539, 543 (1984) this Court concluded that the Idaho Constitution's equal protection guarantee and right of suffrage rendered a districting plan unconstitutional because population deviation among districts would have given voters in some districts more voting power than voters in others, Respondents have not found a single case where Idaho's equal protection guarantees or the right of suffrage have been invoked to protect against initiative or referendum petition signature dilution. As discussed above, the right of suffrage under the Idaho Constitution does not encompass signing an initiative or referendum petition; voting and signing ballot measure petitions are inherently different acts.

But even if this Court were to conclude a fundamental right under the Idaho Constitution were implicated, this Court should be guided by the fact that the federal courts have applied rational basis review to alleged vote dilution—a far more significant issue—under the federal equal protection clause, and conclude using rational basis review that the

Act does not violate any ostensible guarantee of one-person, one-signature under the Idaho Constitution.[13]

In *ICUB*, the Ninth Circuit concluded that a previous Idaho statute that required initiative and referendum petition sponsors to collect signatures from qualified voters in each of at least half of Idaho's counties violated the Fourteenth Amendment's equal protection guarantee. 342 F.3d at 1074–79. The Court concluded that the geographic distribution requirement failed strict scrutiny because "they allocate[d] equal power to counties of unequal population," but suggested that geographic distribution requirements based on "existing state legislative districts" would be permissible. *Id*. at 1078.

Subsequently, in *Angle v. Miller*, the Ninth Circuit upheld a Nevada law requiring that initiative and referendum petition proponents obtain signatures from a number of registered voters equal to ten percent of the votes cast in the previous general election in each of the State's congressional districts against an equal protection challenge. 673 F.3d at 1126, 1128–

[13] Petitioner provides no argument as to why this Court should not be guided by the relevant federal court decisions in the absence of precedent in Idaho on the issue, other than to say that they interpret the U.S. Constitution, rather than the Idaho Constitution. Pet. Br. at 13 n. 5. However, this Court has stated that the equal protection guarantee of the Idaho Constitution is substantially equivalent to that of the federal Constitution, as is the framework that is applied to determine whether an equal protection violation has occurred. *Rudeen*, 136 Idaho at 568–69, 38 P.3d at 606–607; *Gomersall*, 483 P.3d at 375. "When analyzing equal protection challenges under the United States Constitution, this Court utilizes three levels of scrutiny: strict scrutiny, intermediate scrutiny, and rational basis." *Gomersall*, 483 P.3d at 375 (quotations omitted). "The levels of scrutiny employed by this Court when analyzing equal protection challenges under the Idaho Constitution are substantially similar: strict scrutiny, means-focus, and rational basis." *Id.* This Court "may look to the rulings of the federal courts of the United States Constitution for guidance in interpreting [Idaho's Constiution[.]" *Rudeen*, 136 Idaho at 568, 38 P.3d at 606 (quotation omitted).

32. The Ninth Circuit applied rational basis review because the Nevada law "grant[ed] equal political power to congressional districts having equal population" and concluded the law "surviv[ed] rational basis review because it serv[ed] the state's legitimate interest in ensuring a minimum of statewide support for an initiative as a prerequisite for placement on the ballot." *Id.* at 1129. The Ninth Circuit also held that counting initiative petition signatures on a district by district basis was distinguishable from precedent invalidating counting votes on such a basis based on the different purposes of ballot access requirements and elections. *Id.* at 1131 (concluding "whatever limits *Gray*, *Gordon*, and *Reynolds* may place on counting votes for a statewide initiative, we hold that they do not prohibit a state from requiring petition signatures to be distributed among districts of equal population" and noting that it appeared that "courts have addressed the issue have uniformly upheld geographic distribution requirements for signature collection when they have been based on equipopulous districts."). Finally, the Ninth Circuit rejected the argument that the geographic requirement violated the constitution by "allowing a small minority of the population of the state to veto the overwhelming wishes of the majority with regard to a particular ballot initiative" because the law did not single out any discrete minority for special treatment. *Id.* at 1131–32.

The Eighth and Tenth Circuits have also addressed similar requirements and similarly held that per-district signature requirements that are based on the percentage of votes cast in the legislative district in the last election, or on the number of registered voters residing in a legislative district, do not violate the Equal Protection Clause so long as the districts are

approximately equal in population. *Libertarian Party v. Bond*, 764 F.2d 538, 544–45 (8th Cir. 1985); *Semple v. Griswold*, 934 F.3d 1134, 1141–42 (10th Cir. 2019).

Petitioner does not allege that Idaho's legislative districts are anything other than substantially equal in total population, which they are, as required by state and federal law. Hancock Decl. ¶¶ 8, 10. Thus, as the U.S. District Court for the District of Idaho concluded in upholding Idaho's requirement that initiative and referenda petition sponsors collect signatures in at least 18 of Idaho's 35 legislative districts against an equal protection challenge just last year,

> Yes, to a certain degree, some signatures may not "count" in ultimately getting an initiative on the ballot, but such a model does not violate a citizen's constitutional rights, nor does it violate principles of fairness in voting. In fact, were the Court to strike down Section 34–1805, it would likely mean that those who wanted to place initiatives on the ballot would focus solely on the most populous areas in the state (to increase the chances of garnering the greatest number of total signatures) and leave less populous areas with little to no input on important issues. Idaho Code 34–1805 ensures that ballot initiatives brought in Idaho enjoy broad support—not in the magnitude of number of signatures, but in the breadth of where those signatures come from.

Isbelle v. Denney, Case No. 1:19-cv-00093-DCN, 2020 WL 2841886, at * 5 (D. Idaho June 1, 2020).

This Court should follow the well-reasoned decisions of multiple federal courts and conclude that though the Act means that some signatures on initiative and referendum petitions may carry less weight than others, this does not violate Idaho's equal protection clause because the geographic distribution requirement is tied to legislative districts of substantially equal population. Taken to its logical conclusion, Petitioner's argument would

mean no geographic distribution requirement would be permissible, leaving direct legislation, unlike laws made via representative democracy, without any leavening of geographic distribution or check against the will of the majority. This cannot be the answer.

VI. The Act does not interfere with citizens' rights to organize.

While Petitioner states in sweeping language that the Act "interferes with citizens' rights to organize" by imposing the 35 legislative district requirement on the signatures required to qualify a petition for the ballot, a careful reading of Petitioner's brief shows that he does not actually argue that the challenged Act impermissibly prevents citizens from organizing to get initiatives or referenda on the ballot. Pet. Br. at 14–15. Instead, Petitioner argues that the Act imposes criteria for an organized group desirous of getting an initiative or referendum on the ballot that are not imposed on other groups trying to qualify for the statewide ballot. *See* Pet. Br. at 10–12, 14–15.

Petitioner's issue is that the criteria imposed to qualify for the ballot are different, not any difficulty caused in the ability to organize in support of an initiative or referendum petition. Thus, *American Independent Party in Idaho, Inc. v. Cenarrusa*, which concluded that the right of citizens to organize into political parties is part of the right of suffrage, is unenlightening. 92 Idaho 356, 358, 442 P.2d 766, 769 (1968) (holding that a statute that would make it a practical impossibility to form a new political party would deny citizens of the State the right of suffrage). Tellingly, Petitioner offers no argument or evidence as to how or why the Act allegedly makes it a "practical impossibility" for initiative and referendum supporters to coordinate and work together to gather the signatures necessary to qualify a petition for the

ballot. Pet. Br. at 14. Indeed, Petitioner can make no such argument, as it cannot reasonably be argued the Act prevents supporters of an initiative or referendum petition from grouping up and coordinating to attempt to get the necessary signatures. The only requirement that Idaho imposes on supporters to be recognized as supporters of a particular initiative or referendum is delivering the initiative petition signed by at least twenty qualified electors to the Secretary of State. Idaho Code § 34–1804(1); (Hancock Decl. ¶ 11.)

VII. Petitioner's arguments for implicit limitations on legislative power are without merit.

Petitioner's arguments that there are implicit limits on the power of the Legislature under Article III, § 1, separate from and beyond the "reasonable and workable" standard set in *Dredge Mining Control—Yes!, Inc.*, are without merit, both based on the plain language and history of Article III, § 1 discussed above, and based on the additional considerations discussed below.

As discussed above, the plain language of Article III, § 1 expressly gives the Legislature the power to set the conditions and manner for the initiative and referendum process. "'[W]here a statute or constitutional provision is plain, clear, and unambiguous, it 'speaks for itself and must be given the interpretation the language clearly implies.'" *Coeur d'Alene Tribe*, 161 Idaho at 518, 387 P.3d at 771 (quoting *Verska v. St. Alphonsus Reg'l. Med. Ctr.*, 151 Idaho 889, 895, 265 P.3d 502, 508 (2011)). "The general rules of statutory construction apply to constitutional provisions as well as statutes." *Rudeen*, 136 Idaho at 567, 38 P.3d at 605. "This Court reviews the provision's language as a whole, considering the meaning of each word, so as not to render any word superfluous or redundant." *Coeur d'Alene Tribe*, 161 Idaho at 518, 387 P.3d at 771. It is therefore

illogical for Petitioner to claim there are "implicit limits on the legislative power" in the context of the Legislature setting the conditions and manner of the initiative and referendum process beyond the "reasonable and workable" standard expressed in *Dredge Mining Control—Yes!, Inc*. Pet. Br. at 18–21.

Petitioner incorrectly claims that the conditions and manner set forth in the Act constitute a legislative act binding the "future exercise of the legislative power." (Pet. Br. at 18–19.) The Act does not bind the future exercise of legislative power; it exercises constitutionally reserved legislative power to require that the initiative and referendum process include a demonstration that support for a petition exists statewide before the petition is placed on the ballot. If Petitioner's argument were correct, any law setting the conditions and manner for placing an initiative or referendum on the ballot would violate his asserted principle. Petitioner offers no guidance in support of his principle as to which conditions the Legislature may constitutionally impose and which conditions it may not set. The express language of Article III, § 1 makes it clear that Petitioners argument cannot be correct.

To the extent that Petitioner implies that the Act's requirements make it too difficult for an initiative or referendum to ever make it on the ballot in violation of *Dredge Mining Control—Yes!, Inc.*, and therefore binds the future exercise of legislative power, this is a highly fact-specific proposition, for which Petitioner offers no argument or evidentiary support, thus this Court should decline to engage on the issue.[14] Unlike a statute setting requirements for future statutes, the Act

[14] Such a fact-specific question is not appropriate for an original action, at least in part because it cannot be decided on briefing.

exercises the Legislature's specific constitutional grant of power to set the conditions and manner for the initiative process.

Petitioner's effort to impose Article III, § 15's majoritarian requirement for the passage of bills by the Legislature onto the threshold signature gathering requirement for initiatives and referenda is not well-taken; the purpose of the signature requirement is fundamentally different from the purpose of demonstrating aggregate electoral support at the polls. *See above*. In any case, given Article III, § 1's more explicit and specific reservation of power to the Legislature in setting the conditions and manner for initiatives and referenda, it controls over any requirement imposed by Article III, § 15. *See Mickelsen v. City of Rexburg*, 101 Idaho 305, 307, 612 P.2d 542, 544 (1980) ("[T]o the extent of a conflict between the earlier and later statute with respect to the location of beer taverns, the more recent expression of legislative intent prevails. Finally, it is also established that a specific statute will control over a general or vague statute when the two are in conflict.").

Further, Petitioner provides no support for his contention that the "People as a whole" and not a subset of the People reserved the legislative power under Article III, § 1. Pet. Br. at 20. Petitioner presumes the legislative power of the "People" in Article III, § 1 is in "the People, not subdivisions of the People." *Id.* However, no definition is provided in Idaho's Constitution as to what constitutes "the People." In reading both Idaho's Constitution and relevant statutes, there is an inherent limitation on what is meant by "the People" that has long been contained in Idaho Code § 34–1805, and that is reflected in the use of "People" throughout Idaho's Constitution.

When Idaho Code § 34–1805 was enacted in 1933, it required that a petition "have affixed 'signatures of 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 initiative…petition." *Dredge Mining Control-Yes!, Inc.*, 92 Idaho at 481, 445 P.2d at 656 (emphasis added). Accordingly, when enacted, only those people who were "legal voters" could participate in the process—not the "People as a whole." This Court previously noted that the phrase "legal voter" excluded at least those individuals under 21 years of age who had not resided in the State for six months, and in the county where they offered to vote for 30 days preceding the day of election. *Id.* at 482, 445 P.2d at 657 (discussing Idaho Const. art. 6, § 2). Currently, the term "legal voter" excludes "People" under the age of 18, people who are not United States citizens, people who have not resided in an Idaho county for at least 30 days prior to the election, people not finally discharged from a felony conviction, and people in custody of the Idaho State Board of Correction. Idaho Code §§ 34–104, 18–310. Yet Petitioner takes no issue with this "carve out" that only legal voters may participate in the initiative and referenda process. The "People" cannot be understood to be "the People as a whole" as Petitioner suggests.

Idaho's Constitution similarly demonstrates that the phrase "the People" has various meanings throughout the document, some of which are subject to limitations imposed by the Legislature. *See*, *e.g.*, art. I, §§ 10, 11; Art. VI, § 4. Both sections 10 and 11 of Article 1 speak to specific conditions in which a right may be exercised where the "People as a whole" are not exercising that right at a particular point in time. For instance, the right to assemble does not envision all people within Idaho gathering at one specific time and place; rather, that right

envisions subsets of people gathering at particular places and times. Further, in the context of "the People" and suffrage, the Legislature is empowered to "prescribe qualifications, limitations for the right of suffrage." Idaho Const. art. VI, § 4; *Rudeen*, 136 Idaho at 567, 38 P.3d at 605 ("Article VI, § 4 specifically grants the authority to add limitations to the right of suffrage . . . ."). The "People" are therefore are both not as broad as Petitioner suggests and also subject to limitations set by the Legislature in the context of voting (art. VI, § 4) and participating in the initiative and referenda process (art. III, § 1.).

Finally, where the Legislature has been given the power to determine the conditions and manner of the initiative and referenda process, it is well within its discretion and rights to require a geographic distribution requirement as a condition and manner for the People to conduct initiatives and referenda. *Koelsch v. Girard*, 54 Idaho 452, 33 P.2d 816, 817 (1934); *ICUB*, 342 F.3d at 1078 ("Idaho could achieve the same end through a geographic distribution requirement that does not violate equal protection, for example, by basing any such requirement on existing state legislative districts."); *see generally Isbelle*, 2020 WL 2841886.

While Petitioner takes issue with geographic distribution requirements, they are consistent with the composition of power set by Idaho's Constitution. The powers of Government within the State of Idaho are divided into three departments: the legislative, executive, and judicial. Idaho Const. art. II, § 1. Idaho's Constitution then apportions the Legislature into 35 legislative districts within the State. Idaho Const. art. III, § 4. The Act had to generate the constitutionally dictated amount of support from this distribution of power, plus from the Governor, who is elected statewide, to become law.

The geographic distribution signature requirement to *place* initiatives and referenda on the ballot (and not *voting* on initiative petition) is in accord with the Legislature's apportionment into 35 districts for laws enacted through representative democracy. The entire "People" are represented though representatives throughout the State so that all voices may be heard. Because the deliberative process is absent in the initiative and referenda process, requiring a modicum of statewide support to place an initiative on the ballot is reasonable. *See Luker*, 64 Idaho 703, 136 P.2d at 980. ("On the other hand, an initiative measure is drafted by a single person, or group of persons and after circulated and filed, there is no opportunity for amendment or change until after it is voted upon. Indeed, the public, except the signers of the initiative petition, have no ready opportunity of seeing or reading an initiative measure until the Secretary of State mails copies out to the auditors of the several counties for distribution, preceding the general election.").

This is not a case where Petitioner is deprived of an ability to sign a petition or participate in the initiative and referendum process. The Legislature is not setting limitations on the "People's" ability to file and pursue initiatives or referendum on any subject matter. It therefore does not run afoul of Justice Kidwell's concurrence as Petitioner argues. (*See* Pet. Br. at 21–22.) Consistent with Article III, § 1, the Legislature has determined the conditions and manner of how the People may pursue this right. Since any enacted initiative or referendum will affect the entire State, the Legislature has reasonably determined that such a measure must have a modicum of support from the entire State before it reaches the ballot. Idaho Code § 34–1805 is constitutional.

CONCLUSION

This Court should dismiss the petition for lack of justiciability: Petitioner lacks standing, a writ of mandamus is not appropriate, and this Court lacks original jurisdiction. But even setting these fatal flaws aside, the Court should reject the petition because the Act does not violate the Idaho Constitution.

DATED this 13th day of May, 2021.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 13th, 2021 I filed electronically the foregoing with the Clerk of the Court using the CMF/ECF filing system that served a true and correct copy of the foregoing to the CMF/ECF participants listed: N/A

I FURTHER HEREBY CERTIFY that the non-CMF/ECF participant was served a true and correct copy of the foregoing via U.S. Mail and email.

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Petitioner

/s/ Megan A. Larrondo
MEGAN A. LARRONDO

APPENDIX

STATEMENT OF PURPOSE

RS28454 / S1110

The purpose of this legislation is to increase voter involvement and inclusivity in the voter initiative/referendum process. This will be accomplished by ensuring signatures are gathered from each of the 35 legislative districts, so every part of Idaho is included in this process.

FISCAL NOTE

There will be no effect on the general fund.

Under existing law, county clerks already verify initiative/referendum signatures in every legislative district where they are gathered. This bill would increase the number of districts where signatures are gathered, but would not raise the total number of signatures gathered, so the existing work load would be more evenly spread out amongst county clerks, rather than concentrating it into a few counties.

Contact:

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Representative Jim Addis
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