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Idaho Supreme Court
Melanie Gagnepain, Clerk
By: Kimber Grove, Deputy

BEFORE THE SUPREME COURT OF IDAHO

MICHAEL STEPHEN GILMORE, a Qualified Elector of Ada County,
Petitioner,

No. 48760-2021

v.

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

BRIEF IN SUPPORT OF PETITION FOR ISSUANCE OF A WRIT OF MANDAMUS an ORIGINAL PROCEEDING BEFORE THE SUPREME COURT OF IDAHO

Michael Stephen Gilmore
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Residing at Boise, Idaho, for Respondent Secretary of State Lawerence Denney in his official capacity

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STATEMENT OF THE CASE

Nature of the Case

This case presents a simple question: Who is entitled to choose which voters must sign a Petition to put a Referendum or an Initiative on a statewide ballot — (1) the Legislature, whose action or inaction would be overturned by the Referendum or the Initiative, or (2) the ***People themselves*** as individuals, as they sign a Petition to put a Referendum or Initiative on the statewide ballot?

The vehicle for presenting this question is an Original Proceeding before the Supreme Court of Idaho, namely a Petition for Issuance of a Writ of Mandamus asking this Court to:

> (1) declare the Act known as 2021 Senate Bill No. 1110, 2021 Idaho Session Law Chapter 255, unconstitutional to the extent that it requires supporters of Referenda or Initiatives to gather a certain number of signatures of Qualified Electors from each of Idaho's thirty-five Legislative Districts in order to qualify the Referendum or Initiative for the statewide general election ballot, and
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> (2) issue a Writ of Mandamus to Respondent Secretary of State Denney in his official capacity that orders the Secretary of State not to implement the Act's requirement that a certain number of qualifying signatures for a Referendum or an Initiative Petition must come from each of Idaho's thirty-five Legislative Districts.

Throughout this Brief I refer to this Act as the Supermajoritarian Signature Act.

Course of the Proceedings

This is a Petition for Issuance of an Original Writ by the Supreme Court of Idaho. This proceeding was initiated by the Petition itself, which was filed on the same day as this Brief.

Concise Statement of the Facts

This Brief adopts by reference the allegations contained in the Petition for Issuance of a Writ of Mandamus as its Statement of the Facts.

ISSUES PRESENTED BY THE PETITION

1. Is the Supermajoritarian Signature Act unconstitutional as a violation of the Idaho Equal Protection and/or Suffrage Guarantee Clauses?

2. Is the Supermajoritarian Signature Act unconstitutional because it is in excess of or contradicts the Legislative Power and, more specifically, does it interfere with the People's right to propose and enact laws independent of the Legislature?

3. The Petition does not request award of Attorney's Fees.

ARGUMENT

I.

The Court Should Take Up the Petition for Issuance of a Writ of Mandamus Because the Petition Alleges a Constitutional Violation of an Urgent Nature Whose Issues Are Inextricably Intertwined with Issuance of the Writ

"All political power is inherent in the people" of Idaho, who are "by nature free and ***equal***" and for whom "Government is instituted for their ***equal*** protection and benefit." Idaho Constitution, Article I, §§ 1 & 2 (emphasis added). As part of the political power inherent in the People, the "people reserve to themselves" the rights of Referendum and Initiative. Article III, § 1. The Supermajoritarian Signature Act's infringement on the People's rights of Referendum and Initiative described in the Petition presents issues concerning the possibility of a serious constitutional violation.

This Court has exercised its authority to consider Petitions for Issuance of a Writ of Mandamus when allegations of a possible constitutional violation need urgent resolution:

> We have recognized that "this Court may 'exercise jurisdiction to review a petition for extraordinary relief where the petition alleges sufficient facts concerning a possible constitutional violation of an urgent nature.'" *Coeur d'Alene Tribe v. Denney*, 161 Idaho 508, 513–14, 387 P.3d 761, 766–67 (2015).

Regan v. Denney, 165 Idaho 15, 20, 437 P.3d 15, 20 (2019) (some citations omitted).

The issue presented by this Petition is urgent because the emergency clause contained in the Supermajoritarian Signature Act would make the Act apply to any Referendum to repeal it if the Act were constitutional. *Idaho AFL-CIO v. Leroy*, 110 Idaho 691, 696–98, 718 P.2d 1129, 1134–36 (1986). As *Leroy* explained, under Idaho Code § 34–1803 a statute that is subject to a timely Petition for a Referendum, which must be filed with sixty days of the Legislature's adjournment, will not take effect before the next general election, but statutes with emergency clauses that are subject to a timely Petition for a Referendum can immediately take effect even though there will be a Referendum on the statute in the next general election.

Qualified Electors like me who oppose the Supermajoritarian Signature Act and who would sign a Petition for a Referendum to repeal that Act if the Act were constitutional need to know whether the Act is constitutional or unconstitutional in order to plan their efforts to circulate a Referendum Petition if that were to be necessary. That is because Petitions for a Referendum must be filed with sixty days of adjournment of the 2021 Legislature. Idaho Code § 34–1803. Not only is the constitutional issue urgent, but the constitutional issue is also inextricably intertwined with the question of whether the Writ of Mandamus should issue and must be answered in order to decide whether to issue the Writ itself. *Regan*, 165 Idaho at 31, 437 P.3d at 31 (Brody, J., concurring and dissenting). Waiting for resolution of the issues presented by the Petition to work their way up to this Court from a District Court would not leave enough time for citizens who oppose the Supermajoritarian Signature Act to plan whether it is necessary to circulate a Petition for a Referendum in all thirty-five Legislative Districts. This is even more complicated during the upcoming 2022 general election cycle. That is because the boundaries for the Legislative Districts for the 2022 election will not be known until much later this year, or possibly even in 2022, after the Commission for Reapportionment completes its revision of the Idaho Legislative District boundaries for the 2022 election to comply with the 2020 Census. See Article III, § 2, regarding the reapportionment process. Accordingly, this Court should take up the urgent issues presented by the Petition for Issuance of a Writ of Mandamus.

II.

I Have Standing to Petition for the Writ of Mandamus

This Court reviewed voter standing in *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 15 P.3d 1129 (2000). *Van Valkenburgh* involved a statute requiring the Secretary of State to include on ballots and in State-sponsored voter education pamphlets a statement saying whether a candidate for Federal office in Idaho had taken a term-limit pledge and, if so, whether the candidate had complied with the term-limit pledge. *Id.* at 123–24, 15 P.3d at 1131–32.

The Petitioners in that case were private citizens who opposed this requirement because, among other things, they "allege[d] the law violate[d] their right to vote because the law will infringe on the rights of qualified voters to cast their votes effectively by greatly diminishing the likelihood the candidate of their choice will prevail in the election." *Id.* at 125, 15 P.3d at 1133 (citation and internal punctuation omitted). Those allegations showed injury in fact, the first prong of standing. *Id.* Likewise, in my Petition I allege that the Supermajoritarian Signature Act violates my right to vote because it infringes on my right to cast my vote effectively by greatly diminishing the likelihood that Referenda and Initiatives that I support will be able to appear on the statewide general election ballot. Thus, under *Van Valkenburgh*, I allege an injury in fact.

The second prong of standing asks whether a Petitioner "allege[s] an injury not suffered by all citizens and taxpayers of the State." *Van Valkenburgh*, 135 Idaho at 125, 15 P.3d at 1133.

Van Valkenburg held that its Petitioners suffered a distinct injury not shared by all citizens and taxpayers alike because the statute at issue there "adversely impact[ed] only those registered voters who oppose the term limits pledge, or who support candidates who oppose the term limits pledge," not all voters, some of whom supported the challenged statute. *Id.* Likewise, the Supermajoritarian Signature Act adversely affects only those Qualified Electors like me who oppose it, not all voters alike.[1] Thus, I satisfy the second prong of standing analysis.

The third prong of standing — "the judicial relief requested will prevent or redress the claimed injury," *Van Valkenburgh*, 135 Idaho at 124, 15 P.3d at 1132 — is apparent on its face. A declaration that the Supermajoritarian Signature Act is unconstitutional and issuance of a Writ of Mandamus directing the Secretary of State not to implement the Act will redress the injury in fact that I allege. Thus, I have established all three elements of standing: injury in fact, personal injury not shared by all, and redress of injury. *Id.* at 124–25, 15 P.3d at 1132–33.

III.

The Legislature's Authority Over the Referendum and Initiative Process Must Be Exercised Consistently with the Idaho Constitution

Article III, § 1, of the Idaho Constitution allows the Legislature to provide "conditions" and "manner" by which the People may exercise their reserved power of Referendum and Initiative. For Initiatives the People further "reserve to themselves the power to propose laws, and enact the same at the polls independent of the legislature." This section provides in full:

> **§ 1. Legislative power — Enacting clause — Referendum — Initiative.** — The legislative power of the state shall be vested in a senate and

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[1] Minutes of Senate State Affairs Committee for February 17 and 19, 2021, and of the House State Affairs Committee for March 8, 2021, show that there are supporters of the Supermajoritarian Signature Act, *i.e.*, not all Idaho citizens oppose the Act. Senate State Affairs Committee Minutes are found at:

https://legislature.idaho.gov/sessioninfo/2021/standingcommittees/SSTA/

House State Affairs Committee Minutes are found at:

https://legislature.idaho.gov/sessioninfo/2021/standingcommittees/HSTA/

> 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 second and third paragraphs of Section 1 were proposed by 1911 S.J.R. No. 12, 1911 Idaho Sessions Laws, pp. 785–86, & 1911 S.J.R. No. 13, 1911 Idaho Session Laws, pp. 788–87, respectively, and were added to Article III, § 1, upon their approval by the People in the general election of 1912. 1913 Idaho Session Laws, Amendment Nos. 15 & 16, p. 675.[2]

The legislative power to provide "conditions" and "manner" for qualifying Referenda and Initiatives for the statewide ballot is not explicitly constrained by the language of Article III, § 1 itself, except for the People's reserved power to propose and enact laws "independent of the legislature." However, case law holds that Article III, § 1's legislative power must be exercised consistently with other requirements of the Idaho constitution, *i.e.*, Article III, § 1, does not authorize the Legislature to enact "conditions" and "manners" for Referenda and Initiatives that are otherwise unconstitutional. That is because constitutional provisions are construed in *pari ma-*

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[2] The paragraph on Initiatives said the following in the 1912 amendment: "provided that legislation thus submitted shall require the approval of a number of voters equal to a majority of the aggregate vote cast for the office of governor at such general election to be adopted." These words were proposed for repeal by 1980 S.J.R. No. 122, 1980 Idaho Session Laws, pp. 1028–29, and removed by the People in the 1980 general election. The presence or absence of these words plays no part in my argument.

teria, i.e., consistently with other sections of the Idaho Constitution. *Westerberg v. Andrus*, 114 Idaho 401, 403–04, 757 P.2d 664, 666–66 (1988).

Westerberg is especially relevant here. When it was decided in 1988, Article III, § 20 of the Idaho Constitution provided, "The legislature shall not authorize any lottery …." Nevertheless, the People had created a State Lottery by Initiative. Supporters of the Initiative argued that § 20's proscription against authorizing a lottery applied only to the Legislature, not to the People under their reserved power of Initiative. This Court disagreed. It said that "constitutional provisions cannot be read in isolation, but must be interpreted in the context of the entire document," *id.* at 403, 757 P.2d at 666, and held that limitations on Article III, § 1's legislative power applied to all forms of legislation alike: "Initiative legislation is on an equal footing with legislation enacted by the state and must comply with the same constitutional requirements as legislation enacted by the Idaho legislature." *Id.* at 405, 757 P.2d at 668.

Westerberg held that the amendment to Article III, § 1, that adopted the Referendum and Initiative paragraphs did not give the People authority to legislate in violation of other constitutional provisions. *Id.* at 406, 757 P.2d at 669, citing *State v. Finch*, 79 Idaho 275, 280, 315 P.2d 529, 534 (1957). It follows that the same amendment did not give the Legislature authority to impose "conditions" and "manner" for Referenda and Initiatives that are contrary to other constitutional provisions. Part IV of this Argument discusses the Supermajoritarian Signature Act's violations of other provisions of the Idaho Constitution. Part V of this Argument discusses the Supermajoritarian Signature Act's violations of Article III, § 1, itself.

IV.

The Supermajoritatian Signature Act Violates the Idaho Constitution's Equal Protection and Suffrage Guarantee Clauses

The stated reasons for enacting the Supermajoritarian Signature Act were to favor the political rights of one set of voters over another, namely rural voters who would in effect be given a "veto" over whether the populace as a whole may vote in favor of a Referendum or an Initiative. As Paragraph 11 of the Petition summarized:

> Senator Vick, one of the Supermajoritarian Signature Act's sponsors, testified before the Senate State Affairs Committee that the purpose of the Act was to favor certain voters: "S 1110 aims to ensure that voters in rural areas are represented as the population in Idaho grows in urban areas," "S 1110 is beneficial because it will require input from every legislative district instead of a few population centers," and "all voices should be a part of the initiative process." Minutes of the Senate State Affairs Committee, February 17, 2021, pages 4–5. In the House State Affairs Committee, representative Barbieri added, "While it is important to recognize citizens are the essential aspect of the state, rural counties are losing political influence." House State Affairs Committee, Minutes, March 8, 2021, p. 3.[3]

These stated reasons for the Act's passage — to prevent an identified set of voters from losing political influence —are inconsistent with the Idaho Equal Protection and Suffrage Guarantee Clauses because they select one set of voters among the People for favored treatment as the People attempt to exercise their right of Referendum and Initiative and impair the right of other voters to organize and to give expression and effect to their political or policy goals. The constitutional violation is not that a purpose of the Act is to favor rural voters when the People exercise their political rights by trying to qualify a Referendum or an Initiative for the ballot; it is that ***any*** class of voters is favored when it comes to exercising these political rights. It would also be unconstitutional to favor urban voters; or voters who prefer one political philosophy to another; or voters who are aligned with a political party or who are independent of all political parties; or any other subset of voters smaller than the People of Idaho as a whole.

Favoring one set of voters over another and restricting the People's right to organize to exercise their rights of suffrage are not a compelling state interest that justifies infringing upon the fundamental right to vote. The means by which the Supermajoritarian Signature Acts accom-

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[3] See n.1, p. 4, *supra*, for links to Minutes of these Committees.

plishes its goal of favoring one subset of voters is by fragmenting the People into thirty-five distinct pools for gathering signatures to qualify a Referendum or an Initiative for the statewide general election ballot — one pool for each Legislative District —and by requiring the Referendum or Initiative to separately qualify in each pool. As explained in the following sections of this Brief, this method of favoring one class of voters over other classes of voters violates both the Equal Protection and Suffrage Guarantee Clauses.

A. Voting Is a Fundamental Right; the Supermajoritarian Signature Act Prefers Some Voters' Interests over Others Without Any Compelling State Interest and Thus Violates Idaho's Equal Protection Clause

Article I, § 2, of the Idaho Constitution contains its Equal Protection Clause, which says:

> **§ 2. Political power inherent in the people.** — All political power is inherent in the people. Government is instituted for their ***equal protection*** and benefit, and they have the right to alter, reform or abolish the same whenever they may deem it necessary; .... [Emphasis added.]

See also Idaho Constitution, Article I, § 1: "All men are by nature free and ***equal***, ..." (Emphasis added.)

Jones v. State Board of Medicine, 97 Idaho 859, 555 P.2d 399 (1976), decided forty-five years ago, may still contain this Court's most thorough and extensive discussion of Article I, § 2's equal protection provision. *Jones* explains that the first step of equal protection analysis is determining whether the challenged classification involves a fundamental right or a suspect class, in which case strict scrutiny analysis is applied, and the State bears a heavy burden to show that the suspect classification is justified by a compelling state interest:

> If the classification involves a fundamental right or a suspect classification such as race, the state bears a heavy burden to justify the classification by a compelling state interest. That has been termed the strict scrutiny test.
>
> In other classifications, particularly in the areas of social welfare legislation, a restrained standard of review is applied.

Id. at 866, 555 P.2d at 406. If a classification "infringe[s] upon a fundamental right, [it] thus necessitat[es] the application of the 'strict scrutiny test' standard ...." *Id.* at 870, 555 P.2d at 410.

The issue of whether a classification involves a fundamental right is still the touchstone of equal protection analysis under Article I, § 2. *E.g.*, "Different levels of scrutiny apply to equal protection challenges. ... For [equal protection] analyses made under the Idaho Constitution, ... [s]trict scrutiny, as under federal law, applies to fundamental rights and suspect classes." *State v. Doe*, 155 Idaho 99, 104, 305 P.3d 543, 548 (Ct.App. 2013).

Voting and the right of suffrage are fundamental rights under the Idaho Constitution:

> The Idaho Constitution provides protections for the right of suffrage in two places. First, Article I, § 19 of the Idaho Constitution provides, "[n]o power, civil or military shall at any time interfere with or prevent the free and lawful exercise of the right of suffrage." Additionally, all of Article VI of the Idaho Constitution is dedicated to suffrage and elections. Because the Idaho Constitution expressly guarantees the right of suffrage, we hold that voting is a fundamental right under the Idaho Constitution.

Van Valkenburgh v. Citizens for Term Limits, 135 Idaho 121, 126, 15 P.3d 1129, 1134 (2000).

There are two distinct equal protection violations caused by the Supermajoritarian Signature Act — one at the level of groups of citizens organizing themselves to put something on a statewide ballot and one at the level of individual Qualified Electors who wish to sign a petition to put something on a statewide ballot. Both equal protection violations arise because the Act regulates not only ***how many*** Qualified Electors are necessary to qualify a Referendum or an Initiative for the statewide ballot, but ***which*** Qualified Electors are necessary do so. By treating some Qualified Electors differently from others, the Act denies equal protection.

I begin with groups of citizens organizing themselves to qualify something for a statewide ballot. The following paragraphs show that the Supermajoritarian Signature Act has one kind of requirement for citizens organizing to give expression and effect to their political aspirations by placing Referenda or Initiatives on a statewide ballot and a different kind of requirement for those organizing to give expression and effect to their political aspirations by placing candidates, new political parties, or recall elections on a statewide ballot.

When it comes to citizens' organizational rights to qualify candidates for statewide office for the ballot, the process is easy. Candidates for statewide office need not show any support among Qualified Electors in any of Idaho's Legislative Districts to qualify for the primary election ballot; candidates can simply pay a filing fee without gathering signatures from any Qualified Electors in any particular Legislative District. Idaho Code § 34–604 (United States Senate); § 34–607 (Governor); § 34–608 (Lt. Governor); § 34–609 (Secretary of State); § 34–610 (Controller); § 34–611 (Treasurer); § 34–612 (Attorney General); § 34–613 (Superintendent of Public Instruction); § 34–615 (Supreme Court Justice); § 1–2404 (Court of Appeals Judge). However, if candidates for these statewide offices do not wish to pay a filing fee, they may file a nominating petition with 1,000 Qualified Electors' signatures, with absolutely no requirement to show any particular distribution of the signers among the Legislative Districts. Idaho Code § 34–626. Independent candidates for non-judicial statewide offices who wish to appear on the statewide general election ballot must file a petition with the signatures of 1,000 Qualified Electors, again with absolutely no requirement for any particular distribution of the signers among the Legislative Districts. Idaho Code § 34–708.

If groups of citizens wish to organize a new political party and to qualify that party for the statewide ballot, they must obtain the signatures of Qualified Electors representing two percent of the votes cast for President in the most recent presidential election, with absolutely no requirement for any particular distribution of the signers among the Legislative Districts. Idaho Code § 34–501. If groups of citizens wish to recall the Governor, Lt. Governor, Secretary of State, Controller, Treasurer, Attorney General, or Superintendent of Public Instruction in a statewide recall election, they must obtain the signatures of at least twenty percent of the persons who were registered to vote in the previous gubernatorial election, again with absolutely no requirement for any particular distribution of the signers among the Legislative Districts. Idaho Code §§ 34–1701 & 34–1702. Groups of citizens supporting candidates, new political parties, and recall elections can qualify their candidate, new political party, or recall election for the statewide ballot based upon ***how many*** Qualified Electors sign a petition, not upon ***which*** Qualified Electors sign a petition.

It is only when the Legislature itself has some "skin in the game" — *i.e.*, when its own laws or absence of laws are at stake because of a possible statewide Referendum or Initiative — that ***any*** distribution of petition signers among the Legislative Districts, let alone among ***all*** of them, is required to qualify for the statewide ballot. The Supermajoritarian Signature Act's thirty-five-Legislative-District signature requirement imposes on groups of citizens who want to qualify Referenda or Initiatives for the statewide ballot additional requirements that are not imposed on other groups seeking statewide ballot access and thus violates equal protection among groups of persons trying to qualify for the statewide ballot: Supporters of candidates, new political parties, and recall elections may collect the required number of signatures from any Qualified Elector in Idaho, but supporters of Referenda or Initiatives must collect their signatures of Qualified Electors from an electorate ***that has been divided*** into thirty-five separate pools.

The different treatments among organized groups' abilities to obtain statewide ballot access is invidious discrimination among viewpoints. Petitioners challenging legislative action or inaction need not show support in every Legislative District; those who do must. These differences do not survive strict scrutiny and violate Article I, § 2's Equal Protection Clause.[4]

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[4] If the Legislature's favoritism when it comes to its own ox being gored were not already apparent, it has exempted petitions for Referenda and Initiatives in cities and counties from any requirement of geographical distribution. Idaho Code § 34–1801B(8) (cities), § 34–1801C(8) (counties). This shows equal protection violations between state and local supporters of Referenda and Initiatives — only the former must show geographical distribution to qualify for the ballot.

The second equal protection violation is at the level of individual Qualified Electors. If a Petition to put a Referendum or an Initiative on the statewide ballot has not yet garnered signatures from six percent of the Qualified Electors in every Legislative District, but has signatures of six percent of the Qualified Electors in, for example, twenty Legislative Districts, the following would happen. Under the Supermajoritarian Signature Act, if another Qualified Elector from any of those twenty Legislative Districts signs the Petition, that does not advance the Petition's attempt to qualify for the statewide ballot. But a Qualified Elector from any of the other fifteen Legislative Districts who signs the Petition ***would*** advance the attempt to qualify the Petition for the ballot. This disparate treatment of Qualified Electors' abilities to contribute to the number of signatures needed to qualify a Referendum or an Initiative for a statewide ballot discriminates among them in their exercise of a fundamental right to vote on a Referendum or an Initiative of their choice without being justified by any compelling state interest and thus violates Article I, § 2's Equal Protection Clause.[5]

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[5] Somewhere in my Equal Protection analysis, I must anticipatorily address *Idaho Coalition United for Bears v. Cenarrusa*, 342 F.3d 1073 (9th Cir. 2003) (*ICUB*). I do it here. *ICUB* considered an earlier version of § 34–1805 in which "signatures in support of the initiative must be collected from six percent of the qualified voters in each of at least half of the state's counties." *Id.* at 1074. Because of the large differences in county populations, the Ninth Circuit held that this requirement violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Id.* at 1076–79. In *dicta* the Ninth Circuit suggested that basing a signature requirement on legislative districts would not violate the Federal Equal Protection Clause. *Id.* at 1078.

ICUB is neither controlling nor persuasive in this case for two reasons: (1) It was based on the Ninth Circuit's construction of the Fourteenth Amendment, not the Idaho Constitution, but my Petition is based solely on the Idaho Constitution, and (2) it was discussing its hypothetical in terms of a statute requiring signatures from a majority of counties, not every county, and presumably provided its legislative district *dicta* in that context, not in the context of requiring signatures from every legislative district. But *cf. Angle v. Miller*, 673 F.3d 1122, 1127 (9th Cir. 2012) (under Federal Equal Protection analysis Nevada may require signatures for an initiative to be gathered from each of the State's ***congressional*** districts (which are much larger than legislative districts), citing *ICUB*).