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Idaho Supreme Court
Melanie Gagnepain, Clerk of the Court
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Michael Stephen Gilmore, ISB #1625
An attorney on Senior Status
204 West Village Lane
(208) 949-4120
mgilmore@cableone.net
Petitioner representing himself

BEFORE THE SUPREME COURT OF IDAHO

In Re: Petition for Writ of Prohibition. ---------- RECLAIM IDAHO, and the COMMITTEE TO PROTECT AND PRESERVE THE IDAHO CONSTITUTION, INC., Petitioners, v. LAWERENCE DENNEY, Idaho Secretary of State, in his official capacity, Respondent, and SCOTT BEDKE, in his official capacity as Speaker of the House of Representatives of the State of Idaho; CHUCK WINDER, in his official capacity as President Pro Tempore of the Idaho State Senate; and the SIXTY-SIXTH IDAHO LEGISLATURE, Intervenor-Respondents.	Docket No. 48784-2021 Docket No. 48760-2021 **PETITIONER GILMORE'S MOTION TO REVISE PART OF OPINION FILED AUGUST 23, 2021 (As corrected on August 25, 2021)**
In Re: Petition for a Writ of Mandamus. ---------- MICHAEL STEPHEN GILMORE, a Qualified Elector of Ada County, Petitioner, v. LAWERENCE DENNEY, Idaho Secretary of State, in his official capacity, Respondent, and SCOTT BEDKE, in his official capacity as Speaker of the House of Representatives of the State of Idaho; CHUCK WINDER, in his official capacity as Presi-	

dent Pro Tempore of the Idaho State Senate; and the SIXTY-SIXTH IDAHO LEGISLATURE,

Intervenor-Respondents.

Petitioner Michael Stephen Gilmore (Petitioner in No. 48760-2021) respectfully moves the Court to revise part of the Opinion filed August 23, 2021, as corrected August 24, 2021, and August 25, 2021, in the manner set forth in the following paragraphs. All references to the Opinion in this Motion are to the second corrected Opinion issued August 25, 2021.

ARGUMENT

First, I wish to emphasize that I am not asking the Court to revisit its decision to dismiss my Petition for a Writ of Mandamus for lack of standing based on having no palpable injury. In particular, I do not contest or ask the Court to review the Opinion's determination at pp. 16–17 that that the injuries that I alleged in my Petition were conjectural or hypothetical, because, among other things, I was not actively engaged in referendum or initiative drives, *i.e.*, I do not contest or ask the Court to review the Opinion's determination that I lacked standing because my injury was not "palpable". I pled my case the way I pled it, and I must abide by the results.

Second, for the sake of the Opinion's effect on future standing litigation and for the sake accuracy I ask the Court (a) to revise the Court's analysis regarding whether "uniqueness" of injury, in contrast to "distinctness" of injury, is an element of standing, and (b) to correct what I believe are inadvertent misdescriptions of my argument. Specifically, I ask the following:

(a) Standing. There is an internal inconsistency within the Opinion in circumstances that differ from those in which everyone agrees there is no standing. First, let me identify the area of agreement. The Opinion quotes from *Noh v. Cenarrusa*, 137 Idaho 798, 800, 53 P.3d 1217, 1219 (2002) (quoting *Miles v. Idaho Power Co.*, 116 Idaho 635, 641, 778 P.2d 757, 763 (1989)), for what I will call Proposition alpha: "a citizen and taxpayer may not challenge a gov-

ernmental enactment where the injury is one suffered alike by all citizens and taxpayers of the jurisdiction." Opinion, pp. 14–15 (internal quotations omitted.) I fully agree with Proposition alpha — to have standing to challenge a statute the plaintiff cannot claim an injury caused by the statute that is no different than that statute's effect upon everyone else.[1]

The Opinion's inconsistency comes where there are persons who suffer injuries from the statute that are not shared alike by all citizens, taxpayers, or voters. One the one hand, the Opinion states at p. 15 what I will call Proposition beta: to have standing one must "establish a peculiar or personal injury that is different than that suffered by ***any other*** member of the public," quoting *Noh* and *Selkirk-Priest Basin Ass'n v. State*, 128 Idaho 831, 834, 919 P.2d 1032, 1035 (1996) (emphasis added), *i.e.*, to have standing not only must one have an injury not be shared by ***all*** other members of the public, but one's injury must also be ***unique*** and different from every other member of the public's injury. But on p. 16 the Opinion offers a different prescription for standing that I will call Proposition gamma: one must merely have "an injury not suffered by all citizens and taxpayers alike," quoting *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 125, 15 P.3d 1129, 1133 (2000), *i.e.*, to have standing one must merely identify an injury not shared by all citizens, taxpayers, and voters, not a unique injury not shared by any other citizens,

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[1] Noh and several other Petitioners asked this Court to hold that a so-called Indian Gaming Initiative, which had qualified for the ballot, was unconstitutional and to issue a writ to prevent it from appearing on the ballot. The injuries that Petitioners described were that additional Tribal Gaming that would be authorized by the Initiative, if it passed, "will require additional funding of social services and law enforcement," cause "increased incidents of bad checks and the inability of customers to pay bills to businesses," and result in "a decline in moral values and … a greater need for charitable services." 137 Idaho at 800, 53 P.3d at 1219. holding The Petitioners have not alleged an injury in fact at this point. Proposition One may not pass. Any injury suffered is speculative." *Id*. The Petitioners in *Noh*, like me, alleged speculative harm and lacked standing for that reason. Thus, it was not necessary for *Noh* to decide whether their alleged harms were shared alike by all other citizens and taxpayers.

[2] There were three Petitioners in *Van Valkenburgh*, which held:

taxpayers, or voters.[2]

Propositions beta and gamma are inconsistent; to have standing beta requires a unique injury not shared with ***anyone*** else while gamma requires distinct injuries that are not shared with ***everyone*** else. Proposition gamma is correct; to have standing the effect of the statute at issue on the plaintiffs or petitioners needs to be distinct from its effect on the citizens, taxpayers, or voters as a whole, but the effect does not need to be unique to any one citizen, taxpayer, or voter. A subset of citizens, taxpayers, or voters who share a common injury may have standing so long as the injury is not shared by all citizens, taxpayers, or voters alike.

Idaho will have two Congressional districts to apportion for the 2022 election. To illustrate why Proposition gamma is a correct statement of the law and Proposition beta is not, posit that the Reapportionment Commission were to engage in egregious voter dilution by putting 40% of the population in District 1 and 60% of the population in District 2. Every voter in District 2 would have a voter dilution claim shared alike with every other voter in District 2; indeed, their claims would be shared alike with hundreds of thousands of voters and by ***a majority*** of the voters in the State. None of their voter dilution claims would be ***unique*** to any one of them and

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[2] There were three Petitioners in *Van Valkenburgh*, which held:

> Petitioners have met the requirement of demonstrating a ***distinct*** injury because they have alleged I.C. § 34–907B adversely impacts only those registered voters who oppose the term limits pledge, or who support candidates who oppose the term limits pledge. Those who support the specific term limits pledge contained in the law are not injured by the use of the ballot legend, and it in fact benefits those who support the term limits pledge by increasing the likelihood their candidate will be elected. ***Therefore, the Petitioners have alleged an injury not suffered by all citizens and taxpayers alike, and we find the Petitioners have standing to contest the constitutionality of I.C. § 34–907B***.

135 Idaho at 125, 15 P.3d at 1133 (emphasis added). The three *Van Valkenburgh* petitioners could not have had ***unique*** injuries because all three claimed the ***same*** injury. They did not have standing because their injuries were unique; they had standing because their injuries were not shared by all citizens, taxpayers, and voters alike, *i.e.*, their injuries were distinct from those of the general populace, although they were not unique only to themselves.

no voter in District 2 could "establish a peculiar or personal injury that is different than that suffered by ***any other*** member of the public," Opinion, p. 15 (emphasis added).

However, every voter dilution claim in District 2 would be ***distinct*** from those of the citizens, taxpayers, and voters as a whole because those voter dilution claims would not be shared with the citizens, taxpayers, and voters in District 1. Any voter in District 2 would have standing to challenge the malapportionment despite none of them being uniquely injured.[3] This example shows why Proposition gamma is a correct statement of the law. Indeed, if Proposition beta were a correct statement of the law, it would be impossible for plaintiffs to ever bring a class action challenging a statute because in class actions plaintiffs' claims are not unique, but are pursued based on common (not unique) issues of law or fact. I.R.C.P. 77.

The contradictions in Idaho standing law that I have identified have been around for a long time, dating back at least to *Selkirk-Priest Basin Ass'n v. State*, 128 Idaho 831, 919 P.2d 1032 (1996). It will be a big task to fix them. Nevertheless, I move the Court to revise the Opinion to resolve the inconsistencies in it and in the case law. One solution would be to limit the discussion of my standing to my lack of a palpable injury, which is sufficient reason to dismiss my Petition, and not to discuss whether standing requires a "unique" or a "distinct" injury at

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[3] The "granddaddy" of current Idaho standing law — *Miles v. Idaho Power Co.*, 116 Idaho 635, 778 P.2d 757 (Idaho 1989) — did not involve a plaintiff with a unique injury; instead, its lead plaintiffs purported to represent every customer of Idaho Power Company, a large group indeed.

> The parties allegedly injured by the agreement are the ratepayers and customers of Idaho Power, and not the general populace of the state of Idaho. This is more than a generalized grievance. It is a specialized and peculiar injury, although it may affect a large class of individuals. The political process obviously will be more unkind to injured ratepayers seeking to change legislation affecting the whole state of Idaho than to injured citizens and taxpayers. When the impact of legislation is not felt by the entire populace, but only by a selected class of citizens, the standing doctrine should not be evoked to usurp the right to challenge the alleged denial of constitutional rights in a judicial forum.

116 Idaho at 642, 778 P.2d at 764.

all. I show how to do this in my attachment, which proposes revisions to several pages of the Opinion. The other solution would involve a comprehensive revision of much of pages 12 through 19 of the Opinion, explaining these two contradictory lines of cases and how the Court resolves them. As an alternative to my proposed revisions of several pages of the Opinion, I urge the Court to undertake the larger task of resolving these inconsistencies.

(b) Mistakes. The Opinion has two errors regarding my position that I move to correct. To begin, on Page 17 the first full paragraph of the Opinion states:

> Second, Gilmore further claims that he has standing because he is in a class of injured Idahoans ***that is unique***: those who generally favor initiatives and referenda.

Emphasis added. I did not argue that my injury was "unique"; I argued that it was "distinct" and not shared alike by all citizens, taxpayers, or voters. Neither the word "unique" or any of its derivatives like "uniquely" or "uniqueness" appeared in the my Opening or Reply Briefs. When I was asked at oral argument whether I had a unique injury, I said that I did not.[4] My Attachment proposes to revised this sentence to read: "~~Second,~~ Gilmore further claims that he has standing because he is in a class of injured Idahoans ~~that is unique: those~~ who generally favor initiatives and referenda." This would accurately reflect my position. I also move to strike the words "and is unique to him" from the seventh line of Opinion, p. 18.

Second, the third line from the bottom of page 18 refers to "Gilmore's argument for us to exercise relaxed standing …." Although the Court may raise my eligibility for relaxed standing *sua sponte*, I did not ask for it in my Opening or Reply Briefs. This description can be corrected by replacing "Gilmore" with "an" or "any" or some other similar modifier.

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[4] See https://isc.idaho.gov/appeals-court/archive, June 29, 2021, Gilmore v. Denney / Reclaim Idaho v. Denney, #48760/48784. My answer appears at time 0:38:37 through 0:39:38 of the video archive, where I eschew the position that I am unique and say that I am part of a distinct bloc of voters that support Initiatives and Referenda.

SUMMARY

This Motion to Revise the Opinion has presented the Court with a possible heavy lift of reconciling conflicting lines of standing case law concerning whether an injury must be "unique" or "distinct" to establish standing. I have nothing to gain by the Court taking on this extra work; my Petition for a Writ will be dismissed whether my Motion to Revise is granted or denied. However, I think the extra work is worth it.

I have had the pleasure and the privilege of appearing before this Court more than forty times in six different decades, beginning in the 1970s and now in the 2020s. In that time I have learned how to recognize a landmark decision. This is a landmark decision. It will be cited for years, indeed, probably decades to come, not only in Idaho, but around the country. It will be all the more cited and all the more powerful if it lays to rest the inconsistency and tension between these two different lines of Idaho standing law, or at a minimum, if it does not continue them. If this is not the time or place to take on that task, the inconsistencies in the Opinion can be eliminated as I have shown in the Attachment.

I move the Court to revise the Opinion so that the reasoning of this landmark case is not lessened by the inconsistencies that I have identified. If this is not the appropriate case in which to resolve these tensions in the Court's standing law, I stand ready to accept an invitation from the Court to file an amicus addressing these issues in standing law if the appropriate case should later appear on the Court's docket.

DATED THIS 30th day of August, 2021.

/s/ Michael Stephen Gilmore
Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on August 30th, 2021, I e-mailed this Petition or Revise Part of Opinion to the following attorneys at the following e-mail addresses:

Chief Deputy Attorney General Brian Kane, brian.kane@ag.idaho.gov
Chief of Civil Litigation Steven Olsen, steven.olsen@ag.idaho.gov
Deputy Attorney General Megan A. Larrondo, megan.larrondo@ag.idaho.gov
Deputy Attorney General Robert A. Barry, robert.berry@ag.idaho.gov
Deputy Attorney General Cory M. Carone, cory.carone@ag.idaho.gov
Attorneys for Respondent

William G. Myers III, wmyers@hollandhart.com
Alison C. Hunter, achunter@hollandhart.com
Christopher C. McCurdy, ccmccurdy@hollandhart.com
Attorneys for Intervenor-Respondents

DATED THIS 30th day of August, 2021.

/s/ Michael Stephen Gilmore
Petitioner

Appendix
of Proposed Changes
to Pages 15 through 18
of the Opinion
Issued August 25, 2021

763). A petitioner must " 'establish a peculiar or personal injury that is different than that suffered by any other member of the public.' " Id. (quoting *Selkirk-Priest Basin Ass'n v. State*, 128 Idaho 831, 834, 919 P.2d 1032, 1035 (1996)).

C. Gilmore's petition fails to raise a justiciable claim.

1. Gilmore does not meet the requirements for standing.

The SOS asserts that Gilmore lacks standing for this Court to hear his petition. The SOS argues Gilmore's alleged injury is generalized in that SB 1110 affects Gilmore in an identical fashion to all other Idahoans. We agree with the SOS's assessment and conclude that Gilmore lacks standing because he has failed to present a " 'peculiar or personal injury that is different than that suffered by any other member of the public.' " *Noh*, 137 Idaho at 800, 53 P.3d at 1219 (quoting *Selkirk-Priest*, 128 Idaho at 834, 919 P.2d at 1035).

In *Young*, plaintiffs filed a complaint against the City of Ketchum for declaratory relief and a writ of prohibition regarding the City's involvement in a professional services contract and a related lease. *Young*, 137 Idaho at 103, 44 P.3d at 1158. The City entered into a contract with the Sun Valley-Ketchum Chamber of Commerce ("Chamber"), which provided that the Chamber would provide tourist information to the public and marketing services to promote the area. *Id.* In consideration of the services provided, the City was required to pay the Chamber money, which was raised via the local option nonproperty tax.[8] *Id.* A group of plaintiffs, consisting of concerned citizens who resided in and paid property taxes to the City, unsuccessfully challenged the contract in district court. *Id.* On appeal to this Court, we held that the plaintiffs lacked standing.

Plaintiffs alleged they suffered a distinct and palpable injury as concerned citizens and property owners living in the city. *Id.* at 105, 44 P.3d at 1160. The plaintiffs complained:

> (1) the option tax expenditures attract visitors and second homeowners to the area, which in turn has driven up the value of land and increased the amount they pay in property taxes; (2) the option tax is not actually paid by local businesses, but are paid by both residents and visitors; and (3) the City raised cash to make payments to the Chamber by reducing option tax expenditures for basic government functions . . . .

Id. This Court rejected the plaintiffs' assertions, reasoning that their alleged injury is more akin to an indirect effect that all citizens and taxpayers in the City share. We noted that none of the plaintiffs were business owners. *Id.* Therefore, the Court held, "Plaintiffs have made no

[8]. This was essentially a municipal sales tax.

~~allegations that such an injury is any different or distinct from any other citizen or property owner in the Ketchum area. This is insufficient to confer standing." *Id.*~~

~~Gilmore points to this Court's opinion in *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 15 P.3d 1129 (2000), in support of his assertion that he meets the standing requirements. In *Van Valkenburgh*, petitioners sought a writ of prohibition and a declaratory judgment to prevent the Secretary of State from carrying out any action regarding a new ballot initiative—"The Congressional Term Limits Pledge Act of 1998" ("Term Limits Act"). *Id.* at 123, 15 P.3d at 1131. The Term Limits Act required the Secretary of State to place information on ballots for voters on whether a particular Congressional candidate had taken or broken a term limits pledge. Petitioners alleged that the law violated their right to vote because it "greatly diminishes the likelihood the candidate of their choice will prevail in the election." *Id.* at 123–25, 15 P.3d at 1131–33. The State, defending the Term Limits Act, argued the petitioners' injury is no different from the injury suffered by any other Idaho citizen. *Id.* However, the Court rejected the State's argument and agreed with the petitioners, reasoning:~~

> ~~We believe the Petitioners have met the requirement of demonstrating a distinct injury because they have alleged I.C. § 34-907B adversely impacts only those registered voters who oppose the term limits pledge, or who support candidates who oppose the term limits pledge. Those who support the specific term limits pledge contained in the law are not injured by the use of the ballot legend, and it in fact benefits those who support the term limits pledge by increasing the likelihood their candidate will be elected.~~

~~*Id.* Accordingly, this Court found the petitioners alleged an injury not suffered by all citizens and taxpayers alike, thus they had standing. *Id.*~~

~~Gilmore's reliance on Van Valkenburgh is misplaced. Gilmore argues he is akin to the petitioners in Van Valkenburgh because: (1) he has established an injury in fact—SB 1110 diminishes the chance that hypothetical, future initiatives and referenda Gilmore might support will ever make it to the ballot; and (2) his injury is not an injury suffered by all citizens of Idaho—SB 1110 only negatively impacts those who are opposed to it.~~

~~First, i~~It is certainly true that SB 1110 may diminish the chance an initiative or referendum Gilmore supports makes it to the ballot in the future; however, Gilmore's claimed injury is based on pure conjecture. Gilmore suggests that all Idahoans do not share his injury because SB 1110 only makes it harder for Idahoans like Gilmore, who may support a hypothetical future initiative or referendum, to qualify it for the ballot; whereas, it causes no injury to those who would

oppose a hypothetical future initiative or referendum. Gilmore's analogy is too speculative and generalized. Gilmore has not identified any initiative or referendum he currently supports, which SB 1110 makes more difficult to qualify for the ballot. Gilmore merely alleges that it will be harder for initiatives and referenda he might support in the future to reach the ballot because of SB 1110. Simply put, while Gilmore has shown that he is personally vexed by the passage of SB 1110, he has not effectively demonstrated that he currently has a dog in this fight. The Court's analysis might be different had Gilmore demonstrated his participation in a pending initiative or referendum drive in Idaho. Here, however, Gilmore can only claim that there might be some hypothetical initiative or referenda in the future that he desires to support, which SB 1110 may prevent from qualifying for the ballot.

~~Second,~~ Gilmore further claims that he has standing because he is in a class of injured Idahoans ~~that is unique: those~~ who generally favor initiatives and referenda. Gilmore asserts that SB 1110 does not injure those opposed to "citizen legislation" because it aligns with their core values—it only injures those who favor it. Gilmore's distinction is creative, but if this Court were to adopt his view, it would essentially grant standing to almost every citizen that opposes any newly passed law. It is hardly a stretch to assume that almost every bill passed by the legislature has an opponent somewhere who feels personally aggrieved, yet standing requires more than mere disappointment. In comparison, the Term Limits Act in *Van Valkenburgh* did not affect all citizens in Idaho equally. It made it more difficult for specific candidates and their supporters who oppose term limits pledges to be successful in the next election. This is an actual and discernible injury.

For example, if the legislature enacted a new law that capped Idaho's speed limit to a maximum of 55 miles per hour statewide, some may be opposed to the law and some may favor it. However, would citizens in the former group have standing to challenge the law in court based solely on their personal disagreement with the legislature's action? Likely no, because standing is rooted in the injury suffered by the party challenging the law, not whether the party is merely opposed to the law on principle. To have standing, an opponent of the new speed limit would at least have to demonstrate a "distinct and palpable" injury related to the speed limit change, such as an Uber driver or a commercial trucking firm whose livelihoods were adversely affected by

the change, in order to make an arguable case for standing.[9] *See Miles*, 116 Idaho at 639, 778 P.2d at 761.

Here, Gilmore's proposed distinction is too similar to the hypothetical above. Just because Gilmore favors citizen legislation and SB 1110 impedes citizen legislation, Gilmore argues he has standing. This is not a proper basis for standing. Mere disagreement with a law is not sufficient to establish standing. Gilmore fails to meet the test set forth by this Court in *Phillip Morris* by pointing to a "distinct and palpable injury" that he has suffered ~~and is unique to him, and one~~ "that is easily perceptible, manifest, or readily visible." *Phillip Morris*, 158 Idaho at 881, 354 P.3d at 194. Aside from his argument that SB 1110 makes it generally more difficult for all initiatives and referenda to qualify for the ballot, Gilmore cannot point to an injury personal to him that is "concrete and particularized." *Id*. (quoting *Driehaus*, 537 U.S. at 157–58). Therefore, we conclude that Gilmore lacks standing.

2. Gilmore's petition does not meet the requirements for relaxed standing.

Over the last few decades this Court has relaxed traditional standing requirements in order to hear cases involving alleged constitutional violations that would otherwise go unaddressed because no one could satisfy traditional standing requirements. *See, e.g., Coeur d'Alene Tribe*, 161 Idaho 508, 387 P.3d 761; *Regan*, 165 Idaho 15, 437 P.3d 15. Where petitioners have not met the traditional standing requirements, we have nevertheless held that we 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*, 161 Idaho at 513, 387 P.3d at 766 (quoting *Idaho Watersheds Project*, 133 Idaho at 57, 982 P.2d at 360).

To qualify for relaxed standing, one still must show: (1) the matter concerns a significant and distinct constitutional violation, and (2) no party could otherwise have standing to bring a claim. *Id*. Here, Gilmore essentially raises the same issues as Reclaim and the Committee. However, inasmuch as we hold below that Reclaim and the Committee have demonstrated they have standing, ~~Gilmore's~~ an argument for us to exercise relaxed standing is undermined because he can no longer meet the second prong of our relaxed standing test—that *no other party* could have standing to bring a claim. Therefore, because Reclaim and the Committee have shown that they

[9] This is not to say that there may not be other significant impediments to bringing such a case.