IN THE SUPREME COURT OF THE STATE OF IDAHO

BABE VOTE and LEAGUE OF WOMEN VOTERS OF IDAHO,

Plaintiffs-Counterdefendants-Appellants,

vs.

PHIL MCGRANE, in his official capacity as the Idaho Secretary of State,

Defendant-Counterclaimant-Respondent.

Docket No. 51227-2023

Ada County
District Court No. CV01-23-04534

RESPONSE BRIEF OF THE SECRETARY OF STATE

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INTRODUCTION

Since 1889 when the people of Idaho ratified their Constitution, Idahoans have directed the legislature to regulate how persons in Idaho register and vote. They understood that elections must be well-structured and regulated if they are to remain free and lawful. So they gave the legislature the authority—and the duty—to "prescribe qualifications, limitations, and conditions for the right of suffrage." IDAHO CONST. art. VI, § 4. The legislature has undertaken that duty from the first days of statehood, consistently enacting laws requiring voters to register and prescribing the manner of registration and voting.

This case concerns the legislature's latest exercise of its constitutional role in this area. In 2023, the legislature passed HB 124 and HB 340 to standardize and simplify voter registration, protect elections by removing student identifications that posed security and consistency concerns, and broaden access to voting by creating a secure, official no-fee state identification option. The Secretary supported these laws as commonsense reforms that only minimally impacted students—in 2022, according to e-pollbook data, only approximately 104 voters used student identifications to vote. *See* R. at 558-59. And most fair-minded Idahoans would agree that forms of identification that permit the cardholder to choose the photograph appearing on the identification without any verification undermine the purpose for which photo identification is required in the first place. Nevertheless, Plaintiffs say the removal of

student identifications violates the Idaho Constitution's equal protection clause and right of suffrage.

But context here is important. Rewind back to 2010, when Idaho joined a spat of states implementing voter identification requirements. Those enactments followed the findings of an election reform commission chaired by former President Jimmy Carter and former Secretary of State James A. Baker, III, which emphasized that "[t]he electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters. Photo [identification cards] currently are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important." United States Election Assistance Commission, Building Confidence in U.S. Elections 18 (2005).

The people of Idaho agreed with that practical finding and required voters to prove their identity with a valid form of photo identification. In 2010, when that requirement was first imposed, the legislature chose to allow student identifications as an authorized identification, but in 2023, the legislature removed student identifications from the statutory list that it had originally compiled. That sequence brings into focus the challenge Plaintiffs raise in this case: they are *not* contending that voter identification violates a voter's fundamental rights, but they instead are arguing that the legislature's removal of its own inclusion of student identifications as an acceptable method of proving identification violates those rights. It surely does not.

The district court properly rejected Plaintiffs' claims and applied rational basis review. Although Plaintiffs derisively call the district court's decision "facile," *see* Opening Br. at 25, the plain text of the Idaho Constitution, this Court's precedents, and the majority approach of other jurisdictions all confirm that the district court got it right. On appeal, Plaintiffs contend that their claims automatically subject HB 124 and HB 340 to strict scrutiny—in effect, crafting a right to plead application of a standard that starts with the presumption that a law is unconstitutional. But that is not the law in Idaho. And the two Idaho cases that Plaintiffs insist decide this case do not even approach controlling the questions presented here.

STATEMENT OF THE CASE

A. The History of Voter Registration and Identification in Idaho.

In 1889, the people of Idaho ratified the Constitution and addressed the right of suffrage in several places. The first reference appears in Article I, Section 19, which provides that "[n]o power, civil or military, shall at any time interfere with or prevent the free and lawful exercise of the right of suffrage." IDAHO CONST. art. I, § 19. The Constitution later defines in Article VI the contours of "the free and lawful exercise of the right of suffrage." For instance, Section 2 of Article VI sets forth the constitutional minimum qualifications for Idaho voters, specifying that a "qualified elector" must meet age, residency, and registration requirements. Section 3 of the same article specifies who is disqualified from voting in Idaho. And Section 4 provides an unambiguous delegation to the legislature to "prescribe qualifications, limitations, and

conditions for the right of suffrage, additional to those prescribed in this article, but shall never annul any of the provisions in this article contained." IDAHO CONST. art. VI, § 4. Each of these sections contribute to defining the scope of the right to suffrage under Idaho's Constitution.

From the beginning of statehood, the Idaho legislature has acted pursuant to the Constitution's express delegations to ensure that voting in Idaho is "free and lawful." In 1890 during the first legislative session, the legislature enacted a law requiring voters to be "duly registered"[1] before being allowed to vote. *See* 1890-91 Idaho Sess. Laws at 57, 83. The law provided that "[n]o person is permitted to vote who is not registered as provided by law." *Id.* at 58. The statutory registration requirements were detailed and specified matters that the Constitution did not, for example regarding residency: a "qualified elector" must have resided in Idaho for at least six months before the election. *Id.* The law permitted the registrar of electors to examine under oath the qualifications of each applicant and required the registrar to administer an oath in a specific form to every applicant. *Id.* at 69-70. And the law also provided the public with an opportunity to challenge the qualifications of an elector and specified a detailed process, including "challenge" questions, for disqualifying a purported elector. *Id.* at 83-84 (requiring election judges to "pronounce in an audible

[1] The phrase "duly registered" was a common term employed by other jurisdictions and entailed a grant of legislative authority. *See, e.g.,* KAN. CONST. sched., § 12; MISS. CONST. art. XII, §§ 241, 242, 249; COLO. CONST. art. VII, §§ 1, 11; *see also League of Women Voters of Ind., Inc. v. Rokita*, 929 N.E.2d 758, 765 (Ind. 2010).

voice the name of the elector, and if no objection shall be made to him, and the judges are satisfied that he is a legal voter, . . . [to] immediately deposit the ballot").

In 1899, the legislature added additional regulations for voting and modified others. It revised the oath requirement for electors to remove the need to disavow plural marriage and prescribed a revised form of the oath. *See* 1899 Idaho Sess. Laws at 33. The oath stated, amongst other things, that the registrant met the residency requirements to vote at the next election and was not registered elsewhere in the state nor convicted of a disenfranchising crime. *Id.* The new voting regulations also addressed transferring an elector's registration from one precinct to another. *Id.* at 41. The law even limited the amount of time electors could complete their ballot, disallowing electors from "occupy[ing]" the voting booth for more than 10 minutes in general and 5 minutes if others were waiting. *Id.* at 50. The law still required voters to be "duly registered" and still defined the residency requirements for voting. *Id.* at 33-34, 49-50.

In 1913, the legislature enacted additional laws regulating voting. The new laws required electors to register before nine o'clock p.m. on the thirtieth day before an election. *See* 1913 Idaho Sess. Laws ch. 92, § 3. The law also required naturalized citizens to provide evidence of naturalization. *Id.* § 4. And the law provided for election-day registration but only where the applicant was "identified and vouched for by some freeholder in such precinct" willing to swear a prescribed oath. *Id.*

In 1970, the legislature repealed and revised the entire Idaho election code,

enacting the general structure found today. *See* 1970 Idaho Sess. Laws ch. 140. The revised law defined qualified electors and specified the age, residency, and registration requirements. *Id.* §§ 37-38. Regarding registration, the legislature provided for in-person and absentee registration and delineated the information electors would be required to provide. *Id.* §§ 45-46. The law also required registration officials at permanent and temporary locations to process elector registrations. *Id.* § 47. And as with previous versions, the law provided a process for challenging the qualifications of an elector. *Id.* § 183.

In 1994, the legislature amended the statutory voter qualification and registration requirements. Electors could register by mail, in person with a county registrar, or in person on election day. *See* 1994 Idaho Sess. Laws ch. 67. To register on election day, electors needed to provide proof of residence. *Id.* § 5. For all other electors, the amended law closed registration 24 days before an election—registration had been permitted up until 10 days before an election. *Id.* § 4.

In 2010, the legislature again amended the statutory voter qualification and registration requirements. This time, the legislature added a voter identification requirement for voting. 2010 Idaho Sess. Laws ch. 246, § 1. The law required all electors "to provide personal identification before voting at the polls or at absent electors polling places." Idaho Code § 34-1113 (2010). The law originally permitted four forms of acceptable photo identification: an Idaho driver's license or identification card, a United States passport or identification card, a tribal identification card, and an Idaho

high school or post-secondary student identification card. *Id.*[2] The law alternatively permitted a voter to demonstrate personal identification by signing an affidavit swearing to the voter's name and address if the voter could not present a photo identification. Idaho Code § 34-1114 (2010).

Several other changes were made between 2010 and 2023. During this time, the personal identification requirements for *voting* remained plain enough, but the *registration* requirements were different and, admittedly, somewhat confusing. For example, in-person, mail-in, and election-day registration all had varying and inconsistent requirements. To comply with the Help America Vote Act of 2002, the law required a person registering by mail to present "[a] current and valid photo identification" or a bill, bank statement, or government document showing the applicant's name and address. Idaho Code § 34-410 (2022). Because any "current and valid identification" was permitted, presumably an applicant could register with a Costco card, fitness membership badge, or scuba license—so long as each included a photograph.

By contrast, the law required an election-day registrant to provide a driver's license or Idaho identification card, a document with an address together with a photo identification, or an Idaho postsecondary student photo identification card together with a fee statement listing an address. Idaho Code § 34-408A (2022). To register in-

[2] In 2017, the legislature added concealed weapons licenses as an acceptable form of photo identification for voting. 2017 Idaho Sess. Laws ch. 132 § 1.

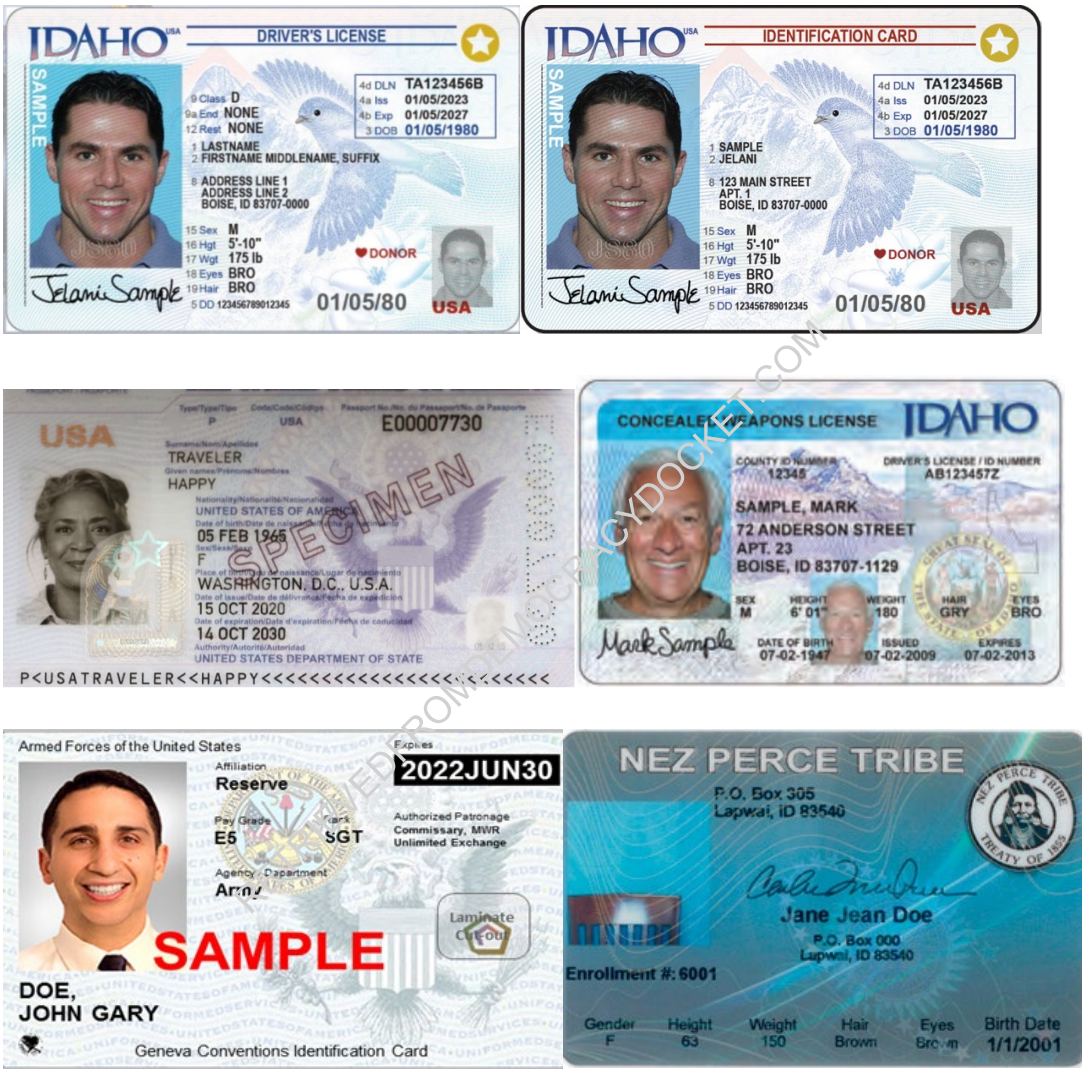
person, the law did not contain any photo identification requirements, but voters had to identify themselves by personally appearing at a county clerk's office and providing a driver's license number, identification card number, or the last four digits of the applicant's social security number. Idaho Code §§ 34-407 (2022); 34-411 (2022). To register electronically, an applicant needed a valid Idaho driver's license or Idaho identification card both to prove identification and to allow the Secretary of State's office to obtain a digital copy of the applicant's driver's license or identification card signature from the Idaho Transportation Department. Idaho Code § 34-409 (2022).

Thus, the forms of acceptable identification for registration differed depending on the method of registration and all also differed significantly from the forms acceptable for voting. These conflicting requirements made administration of the voter registration system inefficient and invited confusion from voters and poll workers alike. The differing requirements also added to the complexity of administering elections and increased the likelihood of inconsistent application depending on the county clerk's interpretation of the statute and training of poll workers.

B. The Legislature Standardizes Voter Registration and Identification.

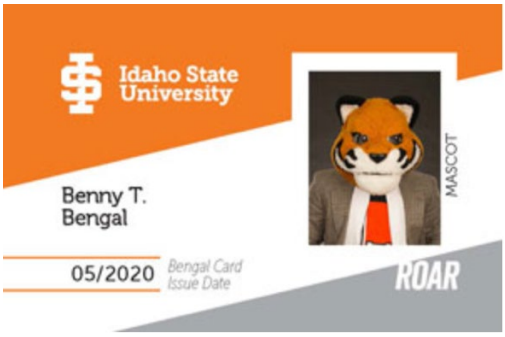
In 2023, the legislature enacted HB 124 and HB 340. Both bills simplified voting in Idaho by standardizing registration and identification requirements. With HB 124, the legislature amended Idaho Code § 34-1113 to remove a high school or postsecondary student identification from the acceptable forms of photo identification. In other words, a voter may now prove identification with a driver's

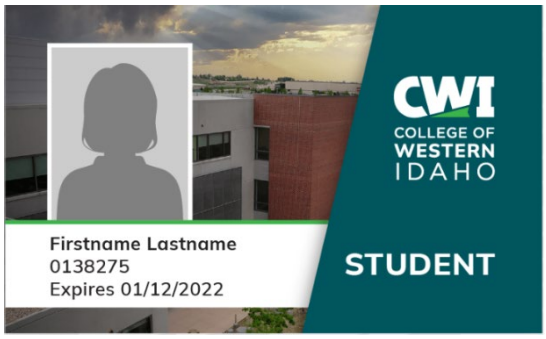
license or identification card (including the no-fee identification card created by HB 340), passport or other federal photo identification, or a concealed weapons license. Here is what those forms of identification look like:[3]



[3] *Star Card*, Idaho Transp. Dep't, (https://tinyurl.com/mwvweaxh); *DMV Free ID for Voting*, Idaho Transp. Dep't, (https://tinyurl.com/2vhh8ys4); *Next Generation Passports*, U.S. Dep't of State (https://tinyurl.com/u4zw5z2m); *Central Issuance Brochure*, Idaho Transp. Dep't, (https://tinyurl.com/yc7ww6t4); *Next Generation Uniformed Services ID Card*, Dep't of Def., (https://tinyurl.com/ya5cthmm); *Tribal ID Cards as Identification*, Wash. State Liquor and Cannabis Bd., (https://tinyurl.com/3wfuaxd6).

And the only change HB 124 made was to remove student identifications like the following from the acceptable forms of identification:[4]





It is not difficult to see from the above examples that student identifications lack basic standards for uniformity and security. But even more concerningly, many schools permit students to virtually upload the photograph of their choice for the identification.[5] The whole point of Idaho Code § 34-1113 is to validate the identity of the person appearing at the polls to vote, and student identifications did not serve that purpose very well. HB 124 becomes effective January 1, 2024.

With HB 340, the legislature harmonized the residency and identification requirements for registration. For all methods of registration, applicants must now provide "proof of identity and residence" with their registration application. *See* Idaho Code § 34-404 (2023). The amended law outlines the valid documents registration applicants may use to prove residency in Idaho Code § 34-411(4), and those documents

[4] *Get Your Bengal ID*, Idaho State Univ., (https://tinyurl.com/yfxy99pk); *CWI Rolls Out New ID Cards,* Coll. of W. Idaho, (https://tinyurl.com/3vrys48p).

[5] *Preferred First Name Data Standard*, Idaho State Univ., (https://tinyurl.com/28kjjv3m); *VandalCard – Frequently Asked Questions* (https://tinyurl.com/4ymyhbub).

are the same for in-person, mail-in, electronic, and election-day applicants. *See* Idaho Code §§ 34-404(1); -408; -408A, -410, -411. And an applicant proves identity for registration purposes using the same forms of photo identification that a voter uses to prove identity for voting.[6] *Compare* Idaho Code § 34-411(3) *with* Idaho Code § 34-1113. The amended law also provides a no-fee identification card for voters otherwise unable to meet the registration and voting requirements. Idaho Code § 49-2444(22). HB 340 became effective on July 1, 2023.

C. Plaintiffs Challenge HB 124 and HB 340 but Only Based on the Removal of Student Identification as an Acceptable Form of Identification.

On March 16, 2023, Plaintiffs commenced this suit challenging first just HB 124. Plaintiffs did not challenge Idaho's existing photo identification law, but instead alleged that HB 124 unconstitutionally discriminated against young voters, and unconstitutionally burdened their right to vote, under the Idaho constitution by removing student identifications as a valid form of identification at the polls. R. at 19-20, ¶ 41 ("HB 124's prohibition on the use of student ID cards . . . will disproportionately and disparately abridge the right to vote of young Idaho voters."); R. at 19-20, ¶ 47 ("HB 124's exclusion of photo ID cards issued by Idaho high schools and higher education institutions as acceptable forms of voter ID burdens the right to vote, particularly for young voters."). In other words, Plaintiffs took no issue with the

[6] Voters may still identify themselves at the polls in order to vote by signing an affidavit and providing their name and address. *See* Idaho Code § 34-1114.

constitutionality of voter identification generally and claimed only that the Idaho constitution guarantees a right to use student identifications to prove identity for voting purposes.

On April 26, 2023, Plaintiffs amended their complaint to allege that HB 340's standardized proof of identity and residency requirements were unconstitutional for the same reasons they alleged HB 124 was unconstitutional. As Plaintiffs framed it, "HB 124 and HB 340's prohibitions on the use of student ID cards . . . will disproportionately and disparately abridge the right to vote of young Idaho voters." R. at 38, ¶ 52. Assuming that strict scrutiny would apply, Plaintiffs asserted that the Secretary could not show that "the prohibition on student IDs is the least onerous path the state can take to ensure electoral integrity." R. at 38, ¶ 54. Plaintiffs' sole theory of unconstitutionality remained the removal of student identification.

D. The District Court Grants Defendants Motion for Judgment on the Pleadings and Denies Plaintiffs' Motion for a Preliminary Injunction.

On May 8, 2023, the Secretary answered the Amended Complaint and then moved for judgment on the pleadings. R. at 64. The motion's briefing addressed both of Plaintiffs' claims, analyzing at length the law and arguments related to each. Plaintiffs tell this Court that "the Secretary failed to present *any* argument as to [their] right to vote claims," Opening Br. at 39 (emphasis added), but that is simply inaccurate. The following arguments appear in the Secretary's opening brief verbatim:

- "First, as a threshold matter, Plaintiffs' central claim that Idaho voter registration laws burdens newly relocated students' ability to vote misunderstands

Idaho's lawful authority to qualify new voters." R. at 69.

- "In *Rudeen*, which concerned the legislature's decision to add term limits for elected officials in Idaho, the Idaho Supreme Court concluded that the drafters of the Idaho Constitution intended that the legislature should have 'the authority to add limitations to the right of suffrage.' *Id.* at 567, 38 P.3d at 605 (emphasis added). Thus, limitations on the right to vote are inherent to its protection and its exercise." R. at 74-75.

- "Thus, Plaintiffs' alleged violations of equal protection and undue burden on the right of suffrage necessarily fail because a person who has not established residency prior to registration does not have a constitutionally-protected right to vote in Idaho." R. at 76.

On July 6, 2023, Plaintiffs moved to preliminarily enjoin HB 124 and HB 340. That motion was prompted by the Secretary of State's website undergoing maintenance for a period of 10 days over the summer. While the Secretary was implementing the changes from HB 124 and HB 340 to the website, registration applicants could not electronically submit voter registrations. Plaintiffs claimed that the website maintenance and the purported "uncertainty" introduced by the new laws caused them to cease all voter registration efforts. *Compare* R. at 138-39; 519-20. Once again, Plaintiffs only took issue with the new laws' removal of student identification: "The Challenged Provisions impose heightened burdens on new and young voters (often college students) by striking from the list of acceptable IDs the very form of identification they are most likely to have." R. at 132.

On October 2, 2023, the district court granted the Secretary's motion for judgment on the pleadings. R. at 610. The court held that the appropriate level of scrutiny for Plaintiffs' equal protection and right to vote claims was rational basis, not

strict scrutiny as Plaintiffs argued. R. at 620-21. The law did not discriminate against any suspect classification (or any group, for that matter), R. at 626; it did not infringe on a fundamental right or unduly burden qualified electors' ability to vote but instead imposed only time, place, and manner restrictions on the electoral process, R. at 629; and Plaintiffs failed to demonstrate that the law was not rationally related to a legitimate state interest, namely election integrity, R. at 636. For the same reasons, the district court denied Plaintiffs' motion for a preliminary injunction. *Id.*

Plaintiffs filed a notice of appeal on October 12, and the Court granted their subsequent motion to expedite on October 24.

ISSUES PRESENTED ON APPEAL

(1) Whether—given the people of Idaho's express delegation to the legislature to "prescribe qualifications, limitations, and conditions for the right of suffrage" in Article VI, Section 4 of the Idaho Constitution—Idaho law subjects all election-related regulations to strict scrutiny.

(2) Whether, under the appropriate standard of review which gives force to Article VI, Section 4's delegation of power to the legislature, Plaintiffs have satisfied their burden to show that HB 124 and HB 340 violate Idaho's equal protection and suffrage rights.

(3) Whether the district court committed reversible error when it set out the appropriate standards of review, cited HB 340's Statement of Purpose, which Plaintiffs specifically referenced in their Amended Complaint, and considered the Secretary's

arguments and each parties' fulsome briefing regarding Count II, Plaintiffs' right of suffrage claim.

(4) Whether, and the extent to which, Plaintiffs have standing to bring suit.

STANDARD OF REVIEW

As a threshold matter, Plaintiffs' claims turn on constitutional questions, which "are purely questions of law over which this Court exercises free review." *State v. Forbes*, 152 Idaho 849, 851, 275 P.3d 864, 866 (2012). Because Plaintiffs are challenging the constitutionality of HB 124 and HB 340, they bear the "burden of showing [the laws'] invalidity and must overcome a strong presumption of validity." *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 709, 791 P.2d 1285, 1288 (1990). This Court takes that presumption seriously and has explained that "[i]t is a well established rule that a legislative act should be held to be constitutional until it is shown beyond a reasonable doubt that it is not so, and that a law should not be held to be void for repugnancy to the Constitution in a doubtful case." *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 90, 982 P.2d 917, 925 (1999) (citation and internal quotation marks omitted). Thus, "[a]ppellate courts are obligated to seek an interpretation of a statute that upholds its constitutionality." *State v. Korsen*, 138 Idaho 706, 711, 69 P.3d 126, 131 (2003).

With that critical framing, this Court reviews the district court's judgment on the pleadings decision using the same standard of review applicable to a motion for summary judgment. *Union Bank, N.A. v. JV L.L.C.*, 163 Idaho 306, 311, 413 P.3d 407, 412 (2017). Under that standard, "[s]ummary judgment is proper if the movant shows

that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Breckenridge Prop. Fund 2016, LLC v. Wally Enterprises, Inc.*, 170 Idaho 649, 654-55, 516 P.3d 73, 78-79 (2022) (internal quotations and citations omitted). And "conclusory assertions unsupported by specific facts are insufficient to raise a genuine issue of material fact precluding summary judgment." *Kootenai Cnty. v. Harriman-Sayler*, 154 Idaho 13, 17, 293 P.3d 637, 641 (2012).

Plaintiffs also appeal the district court's denial of their preliminary injunction motion, which "is a matter for the discretion of the trial court." *Brady v. City of Homedale*, 130 Idaho 569, 572, 944 P.2d 704, 707 (1997) (citation omitted). "An appellate court will not interfere with the trial court's decision absent a manifest abuse of discretion." *Id.* This Court considers the following factors to determine whether a trial court has committed a manifest abuse of discretion: "(1) whether the trial court correctly perceived the issue of one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion, consistently with applicable legal standards; and (3) whether the trial court reached its decision by exercise of reason." *Id.* (citation omitted). And ultimately, a party is not entitled to a preliminary injunction except "in extreme cases where the right is very clear and it appears that irreparable injury will flow from its refusal." *Id.* (citation omitted).

Finally, this Court is not in the business of reversing on technicalities. "[I]t is well-settled that where an order of a lower court is correct, but based on an erroneous theory, the order will be affirmed upon the correct theory." *Syringa Networks, LLC v.*

Idaho Dep't of Admin., 159 Idaho 813, 827, 367 P.3d 208, 222 (2016) (citations omitted). So long as "any alternative legal basis can be found to support" the district court's order, this Court will uphold that decision. *Id.*

ARGUMENT

This case is about whether the legislature can do what the people of Idaho entrusted it to do when they formed their constitution and entered the Union. The people of Idaho guaranteed themselves a constitutional right of suffrage, but from the beginning they have also conditioned that right to ensure that it is meaningful. "Every male or female citizen of the United States, eighteen years old, who has resided in this state and in the county where he or she offers to vote for the period of time provided by law, if registered as provided by law, is a qualified elector." IDAHO CONST. art. VI, § 2. The Constitution does not prescribe the manner and means of registering and proving that one is a "qualified elector." It has instead sensibly granted the legislature the power to "prescribe qualifications, limitations, and conditions for the right of suffrage, additional to those prescribed in this article." IDAHO CONST. art. VI, § 4. And the only limitation on that delegation is a command that the legislature "shall never annul any of the provisions in this article contained"—in other words, the legislature may not enact laws that, for example, extend the vote to persons who are not citizens of the United States or residents of Idaho, shrink the voting class by raising the minimum voting age, or permit persons disqualified under Section 3 to vote. *Id.*

Plaintiffs barely acknowledge these provisions and instead advance a remarkably

atextual claim. They contend that the Idaho Constitution implicitly guarantees voters the right to use a student identification card for registration and voting purposes. That is plenty wrong all on its own, but Plaintiffs compound their error by inviting this Court to subject the legislature's exercise of its Article VI, Section 4 powers to strict scrutiny. Any law that prescribes the manner of voter registration and qualification, they argue, must be presumed unconstitutional unless first shown necessary to serve a compelling state interest and narrowly tailored to that interest. That is not the law.

For nigh on a century, this Court has held that the "Legislature has been expressly invested with broad powers and wide discretion in the matter of legislating in regard to the exercise of the right of suffrage," and therefore "the Legislature has power to pass a law which bears a reasonable relation to the purpose or object of regulating and conducting elections so as to insure the public welfare." *State v. Dunbar*, 39 Idaho 691, 701, 705, 230 P. 33, 36, 38 (1924). Laws that fall within "the clear meaning of the language" of Article VI, Section 4 "are a valid exercise of the power granted." *Rudeen v. Cenarrusa*, 136 Idaho 560, 567, 38 P.3d 598, 605 (2001). Plaintiffs do not address these on-point precedents anywhere in their brief, laboring instead to shoehorn this case under *Reclaim Idaho v. Denney*, 169 Idaho 406, 497 P.3d 160 (2021), and *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 15 P.3d 1129 (2000). But they distort those decisions and ignore their case-specific reasoning, which when read properly confirm the constitutionality of HB 124 and HB 340.

The people of Idaho understood that their right of suffrage depends on well-

regulated and structured elections. So they gave the legislature the power to protect that fundamental right. To be sure, the legislature's broad powers and wide discretion do not permit it to enact "legislation that effectively prevents the people from exercising" their right to vote. *See Denney*, 169 Idaho at 430, 497 P.3d at 184. But that is not at issue here. The challenged laws do not disenfranchise anyone and, in fact, make voting *more* accessible by providing Idahoans without suitable identification with a no-fee voter identification card. Because HB 124 and HB 340 are reasonable exercises of the legislature's express constitutional power, the district court should be affirmed.

I. HB 124 And HB 340 Are Lawful Exercises Of The Legislature's Authority Under Article VI, Section 4 Of The Idaho Constitution.

Although Plaintiffs raise various, indistinct complaints about HB 124 and HB 340 in their pleadings and on appeal, this case is really *only* about whether the Idaho Constitution forbids the legislature from removing student identifications as a statutorily acceptable form of voter identification. That narrow question has a straightforward answer under Idaho law: the legislature plainly has the constitutional authority to prescribe voter qualifications, and HB 124 and HB 340 do nothing more than regulate the manner of registering and voting in Idaho. Both laws are constitutional under Idaho law.

A. The district court properly dismissed Plaintiffs' equal protection claim.

The Plaintiffs' first claim for relief alleges that HB 124 and HB 340 violate the Equal Protection Clause of Article I, Section 2 of the Idaho Constitution. *See* R. at 38

¶¶ 50, 51. The "equal protection analysis involves three steps: (1) identifying the classification under attack; (2) identifying the level of scrutiny under which the classification will be examined; and (3) determining whether the applicable standard has been satisfied." *Planned Parenthood Great Nw. v. State*, 171 Idaho 374, 439, 522 P.3d 1132, 1197 (2023) (citation omitted).

As for the first step in the equal protection analysis, Plaintiffs alleged in their Amended Complaint that the applicable classification is "young Idahoans" since student identification is at issue. *See* R. at 38, ¶ 55 ("For these reasons, HB 124 and HB 340 violate young Idahoans' constitutional right to equal protection under the law."). That is wrong and ignores the reality of education today. The law applies equally to all voters, regardless of age, regardless of status as a student, and regardless of any other classification. Anyone registering or voting must show one of the defined means of identification. And as the district court rightly noted "not all young people are students and not all students are young people." R. at 636. Thus, there is no applicable classification.

On appeal, Plaintiffs have abandoned any argument that the laws require heightened scrutiny based on a purported classification amongst voters. And that is no surprise given that the laws apply the same requirements to all voters regardless of their age, regardless of whether they are students, and regardless of any other classification. And even if Plaintiffs attempt to reassert their "young Idahoans" classification, that classification is not a suspect class and does not warrant strict

scrutiny. *See Osick v. Pub. Emp. Ret. Sys. of Idaho*, 122 Idaho 457, 462, 835 P.2d 1268, 1273 (1992) (defining suspect classes as classifications based on nationality, race, or religion).

At the second step, there are "three standards of review for equal protection challenges to a statute under the Idaho Constitution: strict-scrutiny, means-focus, and rational basis." *Planned Parenthood*, 171 Idaho at 439, 522 P.3d at 1197. "Strict scrutiny applies if the statute discriminates on the basis of a suspect classification" or where the court reviews "the constitutionality of a statute that involves a fundamental right." *Id.* (quotations and citations omitted). Plaintiffs contend that HB 124 and HB 340 infringe on the suffrage right, which is fundamental, and so are subject to strict scrutiny. Opening Br. at 21. But that oversimplifies and mischaracterizes the law.

Strict Scrutiny Does Not Apply. The Secretary of course agrees that voting is a fundamental right. *See Van Valkenburgh*, 135 Idaho at 126, 15 P.3d at 1134. And it is true enough that HB 124 and HB 340 regulate certain aspects of the voting process. But the Court has never said that strict scrutiny applies any time a statute has some relationship to a fundamental right. Rather, strict scrutiny applies when the challenged legislation "effectively prevents the people from exercising" a fundamental right. *See Denney*, 169 Idaho at 430, 497 P.3d at 184. Here, nothing in HB 124 or HB 340 "effectively prevents" or "nullif[ies]" the right of suffrage. *Id.* at 430, 437, 497 P.3d at 184, 191.

A different and more deferential standard applies when, as here, the legislature

is acting pursuant to an express constitutional delegation. The Court squarely held so in both *Dunbar* and *Rudeen*. And the Court acknowledged as much in *Van Valkenburgh*.

In *Dunbar*, the petitioner challenged a law that prohibited a candidate's name from appearing on a ballot more than one time. *Dunbar*, 39 Idaho at 694, 230 P. at 34. The Court upheld that law based on Article VI, Section 4, and its analysis is instructive. It applied the plain text of the Idaho Constitution, without elevating one provision above another. It found on the one hand that no "express provision of our Constitution . . . is violated by the law in question," and on the other hand that "[u]nder our constitutional provisions the Legislature has power to pass a law which bears a reasonable relation to the purpose or object of regulating and conducting elections so as to insure the public welfare." *Id.* at 705, 230 P. at 38. Those constitutional provisions, the Court explained, "expressly invested [the legislature] with broad powers and wide discretion in the matter of legislating in regard to the exercise of the right of suffrage." *Id.* at 701, 230 P. at 36. So it held "the law to be constitutional." *Id.* at 706, 230 P. at 38.

Likewise, in *Rudeen*, this Court applied the "plain meaning" of Article VI, Section 4 to uphold a term limits law from constitutional challenge. *Rudeen*, 136 Idaho at 567, 38 P.3d at 605. The text of the Constitution alone resolved the case: "Article VI, § 4 specifically grants [the legislature] the authority to add limitations to the right of suffrage, provided none of the other provisions of Article VI . . . are made a nullity." *Id.* The term limits law did not annul any other provision of Article VI, so it was a lawful exercise of the legislature's power. That holding also directed the Court's equal

protection analysis. Despite the plaintiff's claim that the term limit law infringed on his right of suffrage and required strict scrutiny, the Court applied rational basis review to the Idaho equal protection claim. *Id.* at 570, 38 P.3d at 608. And significantly, the Court declined to broadly define the right at issue as the right of suffrage but instead more narrowly held that the right at issue was "holding public office and being listed on a ballot," which "is not a fundamental right." *Id.*

More recently, the Court touched on these issues in *Van Valkenburgh*. There, this Court struck down a law that required a legend to be placed on ballots that "convey[ed] a particularized political message from the State." *Van Valkenburgh*, 135 Idaho at 127, 15 P.3d at 1135. Although the Court applied strict scrutiny, it distinguished the law at issue from "a time, place or manner voting restriction to which a more deferential standard of review might be applied." *Id.* at 126, 15 P.3d at 1134.

Under these precedents, rational basis (or its equivalent) rather than strict scrutiny applies to HB 124 and HB 340. As this Court recognized in *Dunbar* and *Rudeen*, Article VI, Section 4 grants the legislature broad powers and wide discretion to regulate the suffrage right. Those holdings cannot be squared with strict scrutiny, which inverts the presumption of legislative discretion and power.

Other jurisdictions also do not reflexively apply strict scrutiny when reviewing similar laws. When the League of Women Voters of Indiana challenged Indiana's voter identification law under the Indiana Constitution, the Indiana Supreme Court reviewed the law under a "uniformity and reasonableness" standard and expressly rejected the

League's contention that strict scrutiny should apply. *See Rokita*, 929 N.E.2d at 767, 775. When a voter challenged Oklahoma's voter identification requirements under the Oklahoma Constitution, the Oklahoma Supreme Court held that the law "is a reasonable procedural regulation to ensure that voters meet identity and residency qualifications to vote and does not cause an undue burden"—a conclusion that was unchanged by the fact that "Oklahoma does not provide free photo identification cards for voters." *Gentges v. Okla. State Election Bd.*, 2018 OK 39, 46, 419 P.3d 224, 231 (Okla. 2018). And when a voter challenged New Jersey's voter registration requirements under the New Jersey Constitution, the New Jersey Supreme Court held that they were "a legitimate, reasonable, and constitutional regulation" of elections. *Lesniak v. Budzash*, 133 N.J. 1, 12, 626 A.2d 1073, 1078 (N.J. 1993).

Even the cases on which Plaintiffs rely from other jurisdictions do not support their argument here. In *League of Women Voters of Kan. v. Schwab*, 63 Kan. App. 2d 187, 208-09, 525 P.3d 803, 822 (Kan. Ct. App. 2023), the court distinguished between election regulations that fall within the legislature's "exercise of police powers to regulate and preserve the purity of the election" (which are usually upheld) and "statutes that restrict the constitutional right to vote" (which are usually void).[7] In

[7] This case is under review by the Kansas Supreme Court, which held oral argument on November 3, 2023. During oral argument, several justices raised questions regarding the implications of applying strict scrutiny, including how such a standard would impact dozens of Kansas elections laws, like polling times and locations. *See*, *Schwab,* Oral Argument at 41:20 (Rosen, J.: "Let's say we adopt your position of strict

Weinschenk v. State, 203 S.W.3d 201, 215-16 (Mo. 2006), the Missouri Supreme Court applied strict scrutiny because the law at issue "represent[ed] a heavy and substantial burden on Missourians' free exercise of the right of suffrage," but the court acknowledged that strict scrutiny often does not apply to election laws because "reasonable regulation of the voting process and of registration procedures is necessary to protect the right to vote." In *Orr v. Edgar*, 283 Ill. App. 3d 1088, 1103, 670 N.E.2d 1243, 1253 (Ill. Ct. App. 1996), the Illinois Court of Appeals[8] applied strict scrutiny because the law created "two separate electorates with disparate voting rights," not merely because the law at issue affected voting in some way. And in *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2014 WL 184988, at *19 (Pa. Commw. Ct. Jan. 17, 2014), the court applied strict scrutiny to a voter identification law because the "regulation denies the franchise, or make[s] it so difficult as to amount to a denial." A further—and crucial—distinguishing feature between all of these cases and the present case is that Plaintiffs' challenge is far narrower and does not contest Idaho's general voter identification requirements. They are instead asking this Court to apply strict

scrutiny. Where I'm having a challenge here . . . How is it we decide whatever law or regulation impairs the right to vote. Right now there exist many laws on the books . . . in the state of Kansas that could fit your argument that that impairs the right to vote. Polls open at 7 in the morning and close at 7 in the evening.") (available at https://tinyurl.com/4pwb43b4). The Arkansas Supreme Court is likewise reviewing the decision in *League of Women Voters of Ark. v. Thurston*, 60CV-21-3138, at *15 (Ark. Cir. Ct. Mar. 24, 2022), so Plaintiffs' reliance on that case is also premature.

[8] Plaintiffs erroneously attribute this case to the Illinois Supreme Court. *See* Opening Br. at 24 n.10.

scrutiny to the legislature's decision to remove student identifications as one of the forms of acceptable identification. And for *that* proposition, Plaintiffs cite no case in support.

The laws at issue here do not limit the right of suffrage any more than the bare requirement to register in the first place or the requirement to prove identity with some form of photo identification, neither of which Plaintiffs challenge. All understand that any voting regulation "will invariably impose some burden upon individual voters" and "inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). But "to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest," as Plaintiffs argument logically demands, "would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *See id.*

That consequence is inescapable and bears emphasis: Applying strict scrutiny here will subject *every* election-related law that touches on the voting process to strict scrutiny. Should the legislature provide additional forms of acceptable photo identification, courts will be forced to apply strict scrutiny to claims alleging voter dilution. Any change of polling locations or the hours during which to vote, and courts again will be forced to subject such laws to strict scrutiny. The Secretary will not even be able to update the registration application unless the changes can withstand strict scrutiny. Under the Plaintiffs' "calculus of voting" theory, any change in the election

process will impact an individual's decision to turn out to vote and thus will always impact the right of suffrage enough to trigger strict scrutiny if Plaintiffs' logic holds.

Strict scrutiny is especially inappropriate here because the Court is not merely looking at a law that involves a legislative exercise of its general police power that must be weighed against a fundamental right. Rather, the Court is analyzing a law that is passed pursuant both to the legislature's general police power and to the specific authorization contained in Article VI, Section 4 of the Idaho Constitution. Applying strict scrutiny here disregards the people's delegation of power and turns this Court's precedents on their head.

Van Valkenburgh and Denney Don't Require Strict Scrutiny. Plaintiffs wrongly contend that in *Van Valkenburgh* and *Denney* this Court decided that strict scrutiny applies here. Not so. As mentioned, *Van Valkenburgh* did not involve a "time, place or manner voting restriction," which HB 124 and HB 340 are. Plaintiffs say otherwise, but regulating what type of identification one must present to register and vote obviously regulates the "manner" of voting. *Van Valkenburgh*, 135 Idaho at 126 (describing *Burdick's* prohibition on write-in voting as a manner restriction); *see also Democratic Party of Ga., Inc. v. Perdue*, 288 Ga. 720, 726-27, 707 S.E.2d 67, 72-73 (Ga. 2011) ("[A] qualified elector is guaranteed the fundamental right to vote provided he or she uses one of the procedures put forth by the legislature, assuming those procedures do not offend the constitution.").

The law at issue in *Van Valkenburgh* was very different than the laws at issue

here. That law invaded the privacy of the voting booth and effectively permitted the state to "meddle" with electors in violation of Article I, Section 19. 135 Idaho at 128, 15 P.3d at 1136. This Court applied strict scrutiny because the ballot legend at issue infringed on "the very basic right of a voter to express support for a candidate within the sanctity of the voting booth." *Id.* at 126, 15 P.3d at 1134.

The *Denney* case is just as inapposite. The right at issue was the initiative and referendum power, which the Constitution made "independent of the legislature." 169 Idaho at 412 (quoting IDAHO CONST. art. III, § 1). But the legislature passed a law that gave it veto authority before any successful initiative would take effect and also imposed a signature requirement that "effectively nullif[ied]" the constitutional initiative power reserved to the people. *Id.* at 191, 497 P.3d at 437. True, the constitutional provision gave the legislature the authority to regulate the conditions and manner of voter initiatives, but the law fell outside that grant of authority because it "effectively prevent[ed] the people from exercising [the initiative] right by placing onerous conditions on the manner of its use." *Id.* at 183, 497 P.3d at 429. The laws at issue here involve different, more express, constitutional provisions and do not effectively prevent the people from exercising their right to vote.

Apart from these important differences, Plaintiffs' reliance on *Van Valkenburgh* and *Denney* falls apart when the right at issue is identified properly. Plaintiffs repeatedly conflate the ability to demonstrate identity with a student identification with the right to vote. But they are very different, and as *Rudeen* demonstrated, the right at issue must

be carefully set out. The right at issue here is the right to register and vote using a student identification, and that purported right is not fundamental. *See Tully v. Okeson*, 977 F.3d 608, 613 (7th Cir. 2020) ("[T]he fundamental right to vote means the ability to cast a ballot, but not the right to do so in a voter's preferred manner.").

Considering the genesis of student identifications in the voting process explains why. In 2010, the legislature enacted a law that requires voters to prove their identity with a photo identification. At the same time, the legislature also defined several statutorily approved forms of photo identification, one of which was a student identification. In 2023, the legislature removed what it had 13 years prior granted. And Plaintiffs want this Court to enjoin that removal. But if the legislature has the authority to require photo identifications—and Plaintiffs concede that it does and, in fact, the relief they seek confirms that authority—then it has the authority to reasonably determine the acceptable forms of photo identification. The legislature granted student identifications a status in the voting process pursuant to its Article VI, Section 4 authority, and nothing prevents it from removing that status. That is all the more so given the legislature's creation of the no-fee identification option.

Means-Focus Review Also Does Not Apply. Plaintiffs do not contend that means-focus review applies, and for good reason. "The means-focus test only applies when the discriminatory character of a challenged statutory classification is (1) apparent on its face and (2) where there is also a patent indication of a lack of a relationship between the classification and the declared purpose of the statute." *Planned*

Parenthood, 171 Idaho at 440, 522 P.3d at 1198 (quotations and citations omitted).

To satisfy the first prong in determining whether the means-focus test applies, "the classification created by the statute must be obviously and invidiously discriminatory." *Id.* (internal quotations omitted). Not every "legislative classification which treats different classes of people differently can be said to be discriminatory, much less obviously invidiously discriminatory." *Id* (internal quotations omitted). "For a classification to be obviously and invidiously discriminatory it must distinguish between individuals or groups either odiously or on some other basis calculated to excite animosity or ill will." *Id.* (internal quotations omitted).

In the instant case, as discussed above, there is no classification, much less an obvious and invidiously discriminatory classification. But, even if the laws do classify "young Idahoans" versus non-young Idahoans, it does not treat the classes differently. As the district court noted, "not all young people are students and not all students are young people." R. at 636. Thus, the removal of student identification as an acceptable means of photo identification does not treat the classes differently. The laws are also not odious or calculated to excite animosity or ill will. Plaintiffs do not suggest otherwise, and the legislature's policy decision legitimately accounts for the lack of uniformity and sophistication of student identifications and the prior inconsistencies across the law. Thus, the means-focus test also does not apply.

Because neither strict scrutiny nor the means focus test apply, HB 124 and HB 340 are subject to rational basis review.

Rational Basis Applied. Under the third step of the equal protection analysis, the Court determines whether the applicable standard has been satisfied. For rational basis review, "a classification will pass scrutiny if it is rationally related to a legitimate governmental purpose." *Planned Parenthood,* 171 Idaho at 442, 522 P.3d at 1200 (internal quotations omitted). "Only when a classification is based solely on reasons totally unrelated to the pursuit of the state's goals and only if no grounds can be advanced to justify those goals will [the Court] conclude the challenged statute violates the Equal Protection Clause." *Id.* (internal quotations omitted). "The party asserting the unconstitutionality of a statute bears the burden of showing its invalidity and must overcome a strong presumption of validity." *Id.* at 439, 522 P.3d at 1197 (internal quotations omitted). "It is generally presumed that legislative acts are constitutional, that the state legislature has acted within its constitutional powers, and any doubt concerning the interpretation of a statute is to be resolved in favor of that which will render the statute constitutional." *Id.* (internal quotations omitted).

This Court has already determined that the State has a legitimate purpose and even "a compelling interest in protecting the integrity of the electoral process." *Van Valkenburgh*, 135 Idaho at 128, 15 P.3d at 1136. Other jurisdictions have likewise recognized a state's legitimate interest in protecting the integrity of the vote. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196-97 (2008) ("[T]here is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters."); *Purcell v. Gonzalez*, 549 U.S. 1, 4, (2006) ("A State indisputably has a

compelling interest in preserving the integrity of its election process."); *City of Memphis v. Hargett*, 414 S.W.3d 88, 103 (Tenn. 2013) (state has compelling interest in preventing fraud); *Alaskan Indep. Party v. Alaska*, 545 F.3d 1173, 1180 (9th Cir. 2008); *In re Request for Advisory Op. Regarding Constitutionality of 2005 PA 71*, 479 Mich. 1, 20, 740 N.W.2d 444, 455 (Mich. 2007).

The laws are rationally related to those purposes. Standardizing the methods of proving one's identity for registering advances the orderly administration of the election system and safeguards the integrity of the electoral process. Requiring only select methods of identification which meet acceptable security requirements helps prevent and detect voter fraud and safeguards the integrity of the electoral process. Ensuring that only those who are qualified to vote can register to vote, and that only those who are registered actually vote likewise safeguards the integrity of the electoral process. In fact, it is "the duty of the legislature to secure freedom and equality [of elections] by such regulations as will exclude the unqualified and allow the qualified only to vote." *People v. Hoffman*, 116 Ill. 587, 616-17, 5 N.E. 596, 611 (Ill. 1886) (citation omitted).

Plaintiffs claim that because there has been no documented fraud relating to student identification in Idaho, the laws are not justified. Opening Br. at 30. But the legislature can act prophylactically and need not justify every regulation with a concrete and historical instance of the harm sought to be prevented. *See City of Memphis*, 414 S.W.3d at 104-106 ("Because of the nature of the state's constitutionally mandated role

in the election process, a showing of harm is not a prerequisite to legislative action."). Just as a homeowner need not wait to be burglarized before locking the door, the legislature need not regulate only in response to demonstrated instances of voter fraud. The legislature can also take measures to deter future fraud. *See Gentges*, 2018 OK at 44, 419 P.3d at 229 ("Neither the Legislature, nor the People of the State of Oklahoma, have to wait for a problem to directly arise before they take action to address it."); *In re Advisory Op.*, 479 Mich. at 26-27, 740 N.W.2d at 458-59 ("[T]he state is not required to provide *any* proof, much less 'significant proof,' of in-person voter fraud before it may permissibly take steps to prevent it."). "[T]he lack of evidence of in-person voter fraud in the state is not a barrier to reasonable preventative legislation." *Gentges,* 2018 OK at 46, 419 P.3d at 231. Sadly, "the risk of voter fraud is real" and it can "affect the outcome of a close election." *Crawford*, 553 U.S. at 195-96. Specifying forms of photo identification that meet acceptable security requirements is rationally related to the legitimate state interest in preventing voter fraud.

Because HB 124 and HB 340 meet the rational basis test, the Court should affirm the district court's decision dismissing the Plaintiffs' equal protection claim.

B. The district court properly dismissed Plaintiffs' right of suffrage claim.

Plaintiffs also claim that HB 124 and HB 340 "unconstitutionally violate the right to suffrage under the Idaho Constitution." R. at 40, ¶ 62. According to Plaintiffs, HB 124's "exclusion of photo ID cards issued by Idaho high schools and higher education institutions as acceptable forms of voter ID burdens the right to vote" and

HB 340's "limitations on the forms of ID and residency for voter registration burdens the right to vote." R. at 39, ¶¶ 58, 60. For the reasons explained in the previous section, the laws merely regulate the time, place, and manner of voting. They do not infringe on the right to vote.

To the extent Plaintiffs are arguing that the legislature may not place any "burden" on the right to vote, they are mistaken. Nearly any regulation concerning voting could be characterized as a burden on the right to vote. "Requiring voters to appear at the polling booth between certain hours on election day and to cast their ballots in person involves inconvenience, and some voters find themselves unable to attend at the time fixed." *Simmons v. Byrd*, 192 Ind. 274, 278, 136 N.E. 14, 18 (Ind. 1922). "And since the Legislature has power to provide by law for the registration of all voters, it has power to exclude from the privilege of voting those persons who refuse or neglect to register a reasonable number of days before the election." *Id.* The fact that the vote of some is burdened by laws like these does not make them unconstitutional. *Id.*

Here, Plaintiffs complain only about HB 124's and HB 340's designation of certain types of acceptable photo identification and proof of residency. R. at 39, ¶¶ 58, 60. But those regulations are "not forbidden by the state or federal constitutions," so they "must be held valid." *Eberle v. Nielson*, 78 Idaho 572, 578, 306 P.2d 1083, 1086 (1957). That is doubly the case here because these are exactly the types of provisions expressly authorized by Article VI, Section 4. Defining the acceptable types of photo

identification and documents used to prove residency to establish that one is a qualified elector and, while at the polls, to prove one's identity as a registered voter, are the quintessential types of laws that Article VI, Section 4 authorizes. HB 124 and HB 340 do not annul, or even change at all, the right to vote by secret ballot. They do not change the qualification of electors in Section 2, since every citizen eighteen years of age or older who is a resident of the State is still allowed to register to vote and to vote. They do not nullify the disqualification of voters provision contained in Section 3. And they do not modify the residence requirement of Section 5, or modify Sections 6 or 7 either.

This Court has already held that when the "clear meaning of the language" of Article VI, Section 4 authorizes legislative action, the Court will not declare that action unconstitutional. *Rudeen*, 136 Idaho at 567, 38 P.3d at 605. That is the case here. The clear meaning of the language authorizes the legislature to place limitations on the types of photo identification and proof of residency that can be used for registration and voting. The laws are therefore a valid exercise of constitutional power granted to the legislature and do not violate the right of suffrage.

C. The federal *Anderson-Burdick* standard would not change the outcome.

Plaintiffs fall back from their overextension of *Van Valkenburgh* and *Denney* by alternatively asking this Court to apply the federal *Anderson-Burdick* standard to both of their claims. Opening Br. at 33-35. But the result would not be different under that standard, and the Court should moreover hesitate to import that standard into Idaho

law. It is fraught with uncertainty and lacks workability.

The Supreme Court's application of the *Anderson-Burdick* framework in *Crawford* makes quick work of Plaintiffs' claim that HB 124 and HB 340 fail under the federal standard. The Supreme Court in *Crawford* addressed the same complaints Plaintiffs raise here regarding burdens a voter photo identification requirement imposes on a small class of voters and held that the law was "amply justified by the valid interest in protecting the integrity and reliability of the electoral process." *Crawford*, 553 U.S. at 204. Plaintiffs do not even alert this Court to *Crawford*, let alone address its holding and relevance to their argument. Nor do they address *Perdue*, 288 Ga. at 730, 707 S.E.2d at 75, which upheld Georgia's voter identification law and explained that along with "virtually every other court that considered this issue, we find the photo ID requirement as implemented in the 2006 Act to be a minimal, reasonable, and nondiscriminatory restriction which is warranted by the important regulatory interests of preventing voter fraud."

Plaintiffs instead cite to and rely on a vacated decision from the Sixth Circuit—neglecting to mention that that decision isn't even good law in the Sixth Circuit. *See* Opening Br. at 34 (citing *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 546 (6th Cir. 2014), *vacated Ohio State Conf. of NAACP v. Husted*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014)). Plaintiffs apparently believe that under *Anderson-Burdick*, courts assume a law is unconstitutional unless a state can first put forward "specific" interests and justify the regulation as a "necessary" restriction. *See* Opening

Br. at 34. But that misstates the test badly and is just strict scrutiny repackaged, which is exactly what both *Anderson* and *Burdick* rejected. The appropriate test instead provides that when, as here, "a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the . . . rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." *Burdick v*, 504 U.S. at 434 (1992). That standard is akin to rational basis review. *See Ohio Democratic Party v. Husted*, 834 F.3d 620, 627 (6th Cir. 2016). Under the federal standard, the Secretary would not bear the burden to advance specific interests and prove any restriction necessary. *See Burdick*, 504 U.S. at 440 (finding Hawaii's "legitimate interests . . . outweigh the limited burden that the write-in voting ban imposes upon Hawaii's voters").

Plaintiffs seem to recognize that HB 124 and HB 340 impose only minimal, nondiscriminatory restrictions on voters, but they erroneously contend that *Anderson-Burdick* requires courts to weigh a generally applicable regulation's burdens on individuals and subgroups. Opening Br. at 34-35. But the *Crawford* Court rejected "a unique balancing analysis that looks specifically at a small number of voters who may experience a special burden under the statute." *Crawford*, 553 U.S. at 200. Because Plaintiffs are "seeking relief that would invalidate the statute in all its applications, they bear a heavy burden of persuasion." *Id.* Plaintiffs cannot meet that burden, particularly given courts' rightful caution against "frustrat[ing] the intent of the elected representatives of the people." *Id.* at 203.

The Court should also think twice before importing the *Anderson-Burdick* standard to Idaho. Its application is plain enough here, but the standard has proven difficult for lower federal courts to apply. Questions abound regarding *how* to workably apply it and even *when* it applies in the first place. *See, e.g., Crawford*, 553 U.S. at 204-05 (Scalia, J. concurring) (disagreeing with the "lead opinion" regarding application of *Anderson-Burdick* standard and describing the "flexible standard" as "amorphous"); *Mazo v. N.J. Sec'y of State*, 54 F.4th 124, 137 (3d Cir. 2022) (struggling to determine whether the *Anderson-Burdick* standard applies because "the Supreme Court has never laid out a clear rule or set of criteria to distinguish between these two categories of election laws, nor has any Court of Appeals to our knowledge"); Demian A. Ordway, Disenfranchisement and the Constitution: Finding A Standard That Works, 82 N.Y.U. L. Rev. 1174, 1192 (2007) ("The word 'burden' is exceedingly vague when left unqualified, inviting courts to make ad hoc judgments concerning what is 'excessive' and what is 'reasonable.'").[9]

In this case, the Court is called upon to interpret the Idaho Constitution. It need not do so in "lockstep[]" with the federal constitution, and indeed, doing so here "in reflexive imitation" would "diminish" the Idaho Constitution. Jeffery S. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law 174

[9] The Secretary also agrees with the district court that *Anderson-Burdick* is inapplicable here because Plaintiffs have not alleged any claim similar to the hybrid claims under the First and Fourteenth Amendments that gave rise to the *Anderson-Burdick* framework. R. at 631, n.26; *see also Anderson*, 460 U.S. at 787, n.7.

(2018). With questions of constitutional construction on such matters as "voting rights," state courts should not "assume that the United States Supreme Court is somehow an Oracle of Truth" but should "remain free . . . to adopt their own interpretations of similarly worded constitutional guarantees." Jeffery S. Sutton, Who Decides? States as Laboratories of Constitutional Experimentation 125-26 (2022).

For these reasons, the Court should not apply the federal *Anderson-Burdick* standard, but even if it does, the district court's decision should still be affirmed.

D. The district court properly denied Plaintiffs' motion for preliminary injunction.

Plaintiffs also argue that the district court erred by denying their motion for a preliminary injunction. But Plaintiffs fell far short of showing entitlement to a preliminary injunction—they did not demonstrate that their case is one of the "extreme cases where the right is very clear and it appears that irreparable injury will flow from its refusal." *City of Homedale*, 130 Idaho at 572, 944 P.2d at 707 (citations and internal quotations omitted).

Plaintiffs first contend that "[u]nder the proper standard or review (strict scrutiny), the statute plainly cannot survive (as all appear to agree), and thus Plaintiffs have shown a substantial likelihood of success on the merits." Opening Br. at 40. As an initial matter, the Secretary does *not* agree that the statutes fail under strict scrutiny. Election security and integrity is a compelling state interest, and removing a form of photo identification that lacks basic security measures and replacing it with a no-fee

alternative is narrowly tailored to achieve that interest. But again, the standard is rational basis review, not strict scrutiny, and so there is no need to reach that issue. And as Plaintiffs acknowledge, under rational basis review, Plaintiffs cannot succeed on their claims, and the laws must be upheld as constitutional.

Second, Plaintiffs did not, and do not, have an irreparable injury. Their lack of injury is discussed more in the standing section below, but in short, Plaintiffs cannot show that they have suffered an irreparable injury to their resources or mission. The record contains no evidence that the laws caused Plaintiffs to divert a dime, which is unsurprising since even the Amended Complaint merely alleges that the laws *will* cause Plaintiffs to divert resources. Plaintiffs' mission is also unaffected. The laws do not impede Plaintiffs' ability "to encourage people, specifically young people, to register to vote and vote" or to "encourage[] informed and active participation in the political processes." R. at 25 ¶ 8, R. at 27 ¶ 11. Plaintiffs will still be fulfilling their mission to encourage voters to vote and to educate voters regardless of what the law looks like. Without an irreparable injury, Plaintiffs are not entitled to a preliminary injunction even if strict scrutiny applies.

* * * * *

Plaintiffs say this case is about the right to vote. In many ways, it is—but not for the reasons Plaintiffs argue. The Idaho Constitution promises voters that their vote will count and it won't be lost to fraud. That promise only holds true if the legislature remains empowered to maintain a well-regulated election process. "It is, therefore, the

duty of the legislature to secure freedom and equality by such regulations as will exclude the unqualified and allow the qualified only to vote." *Hoffman*, 116 Ill. at 616-17, 5 N.E. at 611. That is why court after court has upheld the legislative role against constitutional challenges, just like the one Plaintiffs make here. The district court's decision was not "erroneous"; it was not "facile"; and it should be affirmed in full.

II. Plaintiffs' Charges Of Procedural Error To The District Court Are Wrong As A Matter Of Fact And, In Any Event, Make No Difference.

Plaintiffs lodge a few final complaints against the district court in hopes of reversal. *See* Opening Br. at 36. But none of the purported procedural errors warrant reversal.

First, Plaintiffs contend that the "district court defied the legal standard for evaluating motions for judgment on the pleadings" by considering "purported facts that were both directly contrary to the allegations in Plaintiffs' Complaint and entirely unsupported by the record." *Id.* Specifically, they argue that the district court improperly found that student identifications do not meet the same standards for authenticity and reliability as other forms of government identification, and that the elimination of voter identifications was not overly burdensome. *See id.* at 36-37.

But Plaintiffs fail to recognize the burden they carry on their claims. While they argue that "there is and was no evidence in the record to support such a proposition," *id.* at 36, "[t]he party asserting the unconstitutionality of a statute bears the burden of showing its invalidity and must overcome a strong presumption of validity." *Planned*

Parenthood, 171 Idaho at 439, 522 P.3d at 1197 (citation and internal quotations omitted). Plaintiffs claim that there is no evidence in the record to support the legislature's concern about the security and lack of uniformity of student identifications, but they fail to cite any evidence showing the opposite. *See* Opening Br. at 36-37. Even if the district court did consider facts outside the record, rational basis review permits a court to consider whether "there is any conceivable state of facts which will support [the statutory provision]." *Nelson v. Pocatello*, 170 Idaho 160, 170, 508 P.3d 1234, 1244 (2022). Plaintiffs are wrong that they can plead their way past rational basis review.

Plaintiffs also forget that their own Amended Complaint expressly references the Statement of Purpose of HB 340, which contains the legislature's rationale for enacting the statute, including the fact that student identifications lack "uniformity in [their] sophistication." R. 36 at ¶ 42 (citing Statement of Purpose HB 340). A court may consider documents incorporated by reference in the Complaint. *Bennett v. Bank of E. Or.*, 167 Idaho 481, 485-86, 472 P.3d 1125, 1129-30 (2020) ("[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice."); *see also* 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1371 (3d ed. 1998) (same for Rule 12(c) motions).

Plaintiffs next claim that the district court improperly relied on the bills'

statements of purpose. Opening Br. at 38. According to Plaintiffs, the disclaimer attached to the statement of purpose means courts err as a matter of law by giving it any weight. That cannot be, since this Court relied on SB 1110's statement of purpose in *Denney*, and that statement of purpose contained an identical disclaimer. *See Denney*, 169 Idaho at 435, 497 P.3d at 189; 2021 Idaho SB 1110, Statement of Purpose (available at https://tinyurl.com/2959tmcm). Moreover, the statement of purpose provides a "conceivable state of facts" that the district court was well within its rights to consider. *Nelson*, 170 Idaho at 170, 508 P.3d at 1244. And again, Plaintiffs' citation to HB 340's Statement of Purpose in their Amended Complaint opened the door for the district court to consider it.

Plaintiffs last argue that the "Secretary failed to present any argument as to Plaintiffs' right to vote claims," and the district court therefore erred in dismissing that claim. Opening Br. at 39. That is simply not true. The briefing speaks for itself and demonstrates that the Secretary argued against Plaintiffs' right to vote claim. *See* R. at 73-76. Further, the Secretary also wove its argument against that claim throughout its discussion on the Equal Protection Claim. R. at 77-80.

Even if the Secretary had failed to fully articulate its argument on the first pass, the Court could still consider it. A district court has discretion to decline to consider an argument made for the first time on reply, but it is not required to do so. *Franklin Bldg. Supply Co., Inc. v. Hymas*, 157 Idaho 632, 640, 339 P.3d 357, 365 (2014). If the nonmoving party believes that it is prejudiced by the consideration, it can move for

reconsideration and provide the additional arguments and evidence it believes that the trial court missed. *Id.* at n.6 (citing I.R.C.P. 11(a)(2)(B)). Plaintiffs did not do so here.

Further, the purpose of the waiver rule is to ensure a party has a fair opportunity to respond to arguments. *Id.* at 640. The rule is inapplicable here because Plaintiffs were on notice as to what the Secretary argued and they responded with argument and caselaw. R. at 104-06 (citing *Van Valkenburgh* and *Denney*); *see also id.* at n.4 (arguing that strict scrutiny applies to both claims). And on appeal before this Court, they have certainly had a full and fair opportunity to provide a written argument.

III. Plaintiffs' Claims Depend On Narrow, If Not Flimsy, Standing Grounds.

The district court's merits decision is sound, and the Secretary is confident that HB 124 and HB 340 stand on firm constitutional ground. But the Secretary recognizes that this Court is nevertheless "obligated" to ensure that it has subject matter jurisdiction and that Plaintiffs have standing to pursue each claim. *In re City of Shelley*, 151 Idaho 289, 294, 255 P.3d 1175, 1180 (2011). To that end, there are several standing questions on this record.

Plaintiffs are organizations and rely on purported organizational injuries only. To have organizational standing, Plaintiffs must show a "distinct palpable injury" and a "fairly traceable causal connection between the claimed injury and the challenged conduct." *Coeur d'Alene Tribe v. Denney*, 161 Idaho at 513, 387 P.3d at 766 (2015). But there are major questions on both required showings.

Distinct Palpable Injury. Both Plaintiffs rely on a diversion of resource injury

theory for standing. This Court appears not to have addressed whether diversion of resources satisfies Idaho's injury requirement. Even if it did, neither Plaintiff alleges that it has actually diverted any resources yet. For example, BABE VOTE alleges that it "will be forced to divert scarce resources" in response to HB 124 and HB 340, but it nowhere alleges that it has *already* suffered a diversionary harm. R. at 26, ¶ 9. The League of Women Voters likewise alleges that HB 124 and HB 340 "will force the League to divert resources." R. at 28, ¶ 14. But those allegations of hypothetical and conjectural yet-to-be suffered injuries fail the distinct palpable injury requirement. *See Denney*, 169 Idaho at 419, 497 P.3d at 173.

Both Plaintiffs also allege that HB 124 and HB 340 have injured them by frustrating their missions. They apparently ceased voter registration efforts, but self-inflicted injuries don't count for standing purposes. To the extent Plaintiffs claim injury related to having to learn the laws' new requirements, that "injury is one suffered alike by all citizens and taxpayers of the jurisdiction." *Denney*, 169 Idaho at 419, 497 P.3d at 173. It is also not an injury for Plaintiffs' organization but instead business as usual—Plaintiffs allege that their mission is to "educate" voters about voting requirements. R. at 26, ¶ 8; R. at 27, ¶ 12. Whatever the law is, Plaintiffs will be spending time and resources educating voters about the law's requirements.

Traceability and Redressability. There are also questions regarding traceability and redressability. Plaintiffs nowhere explain how reinstating student identifications as a valid form of voter identification will cure their claimed harms. It

is difficult to understand, for instance, how the availability of student identifications cures the alleged injury related to registering young voters. Not all young voters are students and, if Plaintiffs' allegations about the hardships around the currently acceptable forms of identification are true, then regardless of the acceptability of student identifications, many young voters will still lack an acceptable form of identification. That means Plaintiffs' purported harm in registering voters is not traceable to HB 124 and HB 340 and will not be redressed simply by reinserting student identifications into the statute.

Additionally, the business-as-usual point has a traceability and redressability component. Plaintiffs' purported harm of diverting resources to educate voters that they are required to produce voter identification at the polls is not a new harm: that's exactly what Plaintiffs would be doing anyway. *See Am. Diabetes Ass'n v. U.S. Dep't of the Army*, 938 F.3d 1147, 1155 (9th Cir. 2019). If they are going about their business as usual, then the injury results from their mission, which will continue, and is not a redressable injury.

Associational Standing. Plaintiffs do not allege—and there are no facts that would demonstrate—associational standing. They do not identify harm to any member. For this theory of standing, the "key inquiry" is whether "the association has alleged that at least one of its members face injury and could meet the requirements of standing on an individual basis." *Citizens Against Linscott/Interstate Asphalt Plant v. Bonner Cnty. Bd. of Comm'rs*, 168 Idaho 705, 713, 486 P.3d 515, 523 (2021). Plaintiffs do

not allege that HB 124 or HB 340 prevent any of their members from registering and voting. The most Plaintiffs say is that these laws will prevent BABE VOTE members from using their student identifications for registration and voting. But that is not an injury unless those members lack any other acceptable form of identification and cannot vote as a result, which is not alleged. The League makes no allegations regarding any of its members. Further, neither party identifies a member, which federal standing law requires. *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009).

The Secretary raises these questions because the Court will have to address standing regardless. Determining what, if anything, the Plaintiffs have standing to challenge regarding HB 124 and HB 340 will also keep the issues on appeal in focus. Plaintiffs cannot raise freewheeling concerns regarding a hypothetical voter who may fall in the alleged no-fee identification gap. And Plaintiffs also have no standing to challenge Idaho's voter identification as a general matter. The relief they are seeking will not remove the voter identification requirements that have existed in Idaho law since 2010.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

DATED: November 21, 2023.

STATE OF IDAHO OFFICE OF THE ATTORNEY GENERAL

By*:* */s/ Joshua N. Turner*
Joshua N. Turner
Acting Solicitor General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 21, 2023, I filed the foregoing electronically through the iCourt E-File system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notification of Service:

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