

filed separately pursuant to Local R. 7.1(b)(1), there are no material facts in dispute and Daien is entitled to judgment as a matter of law.

WHEREFORE, for all the foregoing reasons, Daien respectfully prays for an order granting summary judgment in his favor, and such further relief as the Court deems just and equitable.

Dated: September 8, 2009

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Appearing *Pro Hac Vice*
for Plaintiff Donald N. Daien

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO
SOUTHERN DIVISION**

DONALD N. DAIEN,

Plaintiff,

v.

BEN YSURSA, in his official
capacity as Secretary of State of
Idaho,

Defendant.

Civil Case No. 1:09-cv-00022-REB

**PLAINTIFF’S MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF CONTEMPORANEOUS MOTION FOR SUMMARY JUDGMENT**

COMES NOW THE PLAINTIFF, Donald N. Daien (“Daien”), by and through his attorneys, The Bernhoft Law Firm, S.C., and files this Memorandum of Points and Authorities in Support of Daien’s Motion for Summary Judgment seeking an entry of judgment in Daien’s favor. This brief is filed separately from the motion pursuant to Local R. 7.1(b)(1). The issues in this case are pure issues of law, thoroughly addressed in favor of the plaintiff by controlling Ninth Circuit precedent in *Nader & Daien v. Brewer*, 531 F.3d 1028, 1036 (9th Cir. 2008).

INTRODUCTION

Plaintiff seeks declaratory relief that two aspects of Idaho’s election laws are facially unconstitutional. First, whether Idaho’s petition circulator residency requirement violates important First Amendment political speech, expression, and associational rights; and second, whether Idaho can disparately require independent Presidential candidates to obtain approximately six times as many signatures for ballot access than other statewide independent candidates without violating those same constitutional rights.

Ninth Circuit controlling precedent conclusively resolves this case in Daien’s favor. *See Nader & Daien v. Brewer*, 531 F.3d 1028, 1036 (9th Cir. 2008). In this recent decision, a unanimous Ninth Circuit panel struck down petition circulator residency requirements as violating the fundamental First Amendment rights of petition circulators. *See id.* Equally, the Ninth Circuit struck down discriminatory treatment of independent presidential candidates compared to similarly-situated candidates, invalidating Arizona’s early deadline requirement for independent candidates since other candidates did not face the same burden. *See id.*

Moreover, the *Brewer* decision mirrored governing Supreme Court precedent in this most important ballot-access area of jurisprudence. The Supreme Court invalidated registration requirements for petition circulators on similar grounds. *See Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999) (holding that the right to circulate petitions is protected “core political speech” that cannot be limited except by the most narrowly tailored means and only when those means are necessary to a compelling state interest). The Supreme Court also invalidated discriminatory burdens on independent presidential candidates. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *see also Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979). As the Supreme Court and Ninth Circuit each held, states cannot

impose disparate ballot-access requirements for independents and their supporters. *See id.* Summary judgment is thus warranted.

STATUTORY APPENDIX AND STATEMENT OF FACTS

Pursuant to Local R. 7.1(b)(1), Daien is filing concurrently with this memorandum a statement of undisputed material facts. These facts are relied upon in their entirety in support of this motion for summary judgment. Daien is also contemporaneously submitting a separate statutory authority appendix setting forth the text of the Idaho statutes at issue in this federal civil rights suit.

LEGAL ARGUMENT

A. Standard of Review.

Summary judgment should be awarded where there is no material fact in dispute and the movant is entitled to judgment as a matter of law. *See Fed. R. Civ. P. 56(c)*. *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The question of whether a statute is facially unconstitutional is a pure question of law. *See Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 634 (1980). For that very reason, the Supreme Court has already directed that issues of the unconstitutionality of circulator restrictions and First Amendment violations should be decided on summary judgment as matters of law. *See id.* at 634-35.

Binding Supreme Court and Ninth Circuit authority require the application of strict scrutiny. *See Brewer*, 531 F.3d at 1034-35. “[T]he residency requirement nevertheless excludes from eligibility all person who support the candidate but who . . . live outside the state of Arizona. Such a restriction creates a severe burden on . . . [the candidate’s] out-of-state supporters’ speech, voting and associational rights.” *Id.* at 1036. Under strict scrutiny, the burden shifts to the Defendant Ben Ysursa (“Ysursa”) to show that the residency restriction on speech and associational rights of circulators is narrowly tailored to meet a compelling state

interest, and that it seeks to protect its interest in a manner that is the least restrictive of protected speech.

The same strict scrutiny analysis applies to the state's discriminatory signature burden on independents. In *Brewer*, the Ninth Circuit applied strict scrutiny to election-law burdens that imposed higher burdens on independents. This followed governing Supreme Court precedent. The Supreme Court applied strict scrutiny when striking down a 5% ballot-access signature requirement for a political subdivision of Illinois when the 5% requirement (in Cook County) demanded signatures in excess of the number of signatures required for general statewide ballot access. *See Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979). Independent Presidential candidates in Idaho find themselves in the same position as the non-partisan candidates in *Socialist Workers Party* found themselves. A Presidential candidate in Idaho must obtain signatures totaling a particular percentage of the votes cast in the previous election, (I.C. § 34-708A – requiring 1%), and because that amount will exceed the number of signatures required for general statewide ballot access in regular statewide elections, strict scrutiny applies to this analysis. *Compare* Decl. of Daniel J. Treuden, ¶ 3, Ex. A (requiring 6,550 signatures for a Presidential candidate), *and* I.C. § 34-708(2)(a) (requiring 1,000 signatures for a statewide candidate) (Facts, ¶¶ 6-7). *See also Socialist Workers Party*, 440 U.S. at 183-85 (discussing strict scrutiny application). Based on the foregoing, strict scrutiny applies.

B. History of States Regulating Voter Speech & Voter Choice.

State control of the ballot was foreign to America's Founders. *See* Richard Winger, *History of U.S. Ballot Access Law for New and Minor Parties*, *The Encyclopedia of Third Parties in America* (2000); *see also* A. Ludington, *American Ballot Laws, 1888-1910* (1911). The invention of the state ballot originated in the late nineteenth century. *See id.* Before that, voters and their supporters could bring their own ballot to the voting polls. *See id.* Most states adopted

the state ballot and employed a free and open ballot with few ballot access restrictions, during most of the subsequent half-century. *See id.* Even then, what restrictions did exist in a handful of states were quite modest: signature requirements around 500 or 1,000, with no deadline until 30 days prior to the general election. *See Winger, supra.* Consequently, for most of the first half-century of state ballot use, the ballot was open and free: any candidate who met the Constitutional qualifications for the office could be listed on the ballot by mere request. *See id.* Efforts to require signature totals above minimal thresholds – like 500 signatures – were summarily stricken by reformist courts as clearly and patently violating the very intent of these reform laws. *See People ex. rel. Hotchkiss v. Smith*, 99 N.E. 568 (N.Y. 1912).

It was only when third parties and candidates outside the two-party system began to seriously challenge for power or reshape the debate in ways the political incumbents found threatening that state approaches to the state ballot access began to change. *See e.g.*, Richard H. Pildes, *The Theory of Political Competition*, Va. L. Rev., Nov. 1999, 1605, 1617 (noting “the history of ballot access restrictions which get elevated just as serious new parties or independent candidates emerge as threats”); A. James Reichley, *The Future of the Two-Party System After 1996*, in *The State of the Parties* 14 (John C. Green & Daniel M. Shea, eds. 3d ed. 1999) (“The representatives of the two major parties have taken pains to enact election laws that strongly favor major party candidates”); *The Law of Democracy: Legal Structure of the Political Process* (Samuel Issacharoff, Pamela S. Karlan, and Richard H. Pildes eds., Foundation Press 2d ed. 2001) (noting “the self-interest existing power holders have in manipulating the ground rules of democracy in furtherance of their own partisan, ideological, and personal interests”); Brian P. Marron, *Doubting America’s Sacred Duopoly: Disestablishment Theory & The Two-Party System*, 6 Tex. F. on C.L. & C.R. 303 (2002); Samuel Issacharoff, *Oversight of Regulated*

Political Markets, 24 Harv. J.L. & Pub Policy 91, 96-97 (2000) (the natural side effect of politicians overseeing the terms and conditions of their competition).

Outsider options through third-party campaigns or candidacies provide the most effective method of venting for those feeling excluded from the two-party system but does so within the system: channeling dissent through democratic means and giving voice to that dissent, dissent that led to abolition, direct election of senators, the right of women and draft-eligible citizens to vote, the right to overtime, the limits on child labor, aid to farmers, the graduated income tax, and expanded participation in the public arena with more confidence in American institutions as representative. *See e.g.*, John D. Hicks, *The Third Party Tradition in American Politics*, 20 Miss. Valley. Hist. Rev. 3 (1933); A. Ranney & W. Kendall, *Democracy & the American Party System* (1956); W. Goodman, *The Two-Party System in the United States* (1960); D. Mazmanian, *Third Parties in Presidential Elections* (1974); G. Sartori, *Parties and Party Systems* (1976); Rosenstone, Behr & Lazarus, *Third Parties in America* (1984).

With the slow, steady closing of the ballot, more and more independent and outside parties disappeared from potential choices for voters, disappeared from the public discourse, and disappeared from the public consciousness. Other scholars note how badly these restrictions limit the marketplace of ideas the First Amendment was intended to promote and protect. *See* Steven Rosenstone, *Restricting the Marketplace of Ideas: Third Parties, Media Candidates & Forbes' Imprecise Standards*, 18 St. Louis U. Pub. L. Rev. 485 (1999). The Supreme Court concurred in its seminal decision in *Anderson*. *Anderson*, 460 U.S. at 791-92.

The public increasingly concurs, as they refuse partisan labels in registration, voting patterns and public opinion, while seeking more options for debate participants in Presidential debates and more options for choices on the ballot. *See The Appleseed Center for Electoral Reform and the Harvard Legislative Research Bureau, A Model Act for the Democratization of*

Ballot Access, 36 Harvard J. on Legislation 451, 454 (noting wide spread public desire for third options outside the two-party system in consistent public opinion surveys). It is for this reason that those judicial decisions closing the ballot and suppressing speech are subject to some of the fiercest criticism by legal scholars. See Bradley A. Smith, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*, 28 Harvard Journal on Legislation 167 (1991). Recent jurists agree: they routinely complain how “arcane” ballot access laws appear as “nothing more than incumbent protection devices.” See *Dotson v. NYC Board of Elections*, 2001 WL 1537689 (N.Y. Sup. 2001). As the Supreme Court noted in *Anderson*: “it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status.” *Anderson*, 460 U.S. at 793. This Court should prudently heed the Supreme Court’s skepticism in this case as well.

C. The Residency Requirement For Ballot-Access Petition Circulators For Presidential Candidates is Facially Unconstitutional.

Idaho limits the right to circulate Presidential petitions to those who are “a resident of the state of Idaho and at least eighteen (18) years of age.” I.C. § 34-1807. This limitation on the right to circulate petitions infringes on core political speech and is not a narrowly tailored means to protect any compelling state interest, and has been condemned by recent Ninth Circuit authority. See *Brewer*, 531 F.3d 1028. Conditioning “core political speech” rights on state residency cannot be tolerated. The Ninth Circuit held exactly so in *Brewer* when this Circuit struck down an Arizona statute’s residency requirement identical to Idaho’s residency requirement found in I.C. § 34-1807. The Ninth Circuit rightfully relied on Supreme Court precedent, including *Buckley*, 525 U.S. 182, where the Supreme Court found unconstitutional the registration restriction on the speech rights of potential petition circulators. See *id.*

Twelve Circuit judges from four different Circuits examined the same resident-only petition circulator issue and came to a unanimous conclusion: prohibiting all non-residents from circulating petitions violated their First Amendment rights. *See e.g., Brewer*, 531 F.3d 1028; *Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023 (10th Cir. 2008); *Nader v. Blackwell*, 545 F.3d 459 (6th Cir. 2008); *Krislov v. Rednour*, 226 F.3d 851, 858-66 (7th Cir. 2000). All of these Circuit decisions simply followed the governing logic of Supreme Court precedent: petition circulation is “core political speech” and protecting such speech reaches its “zenith” when someone is circulating a petition. *Buckley*, 525 U.S. at 186 (quoting *Meyer v. Grant*, 486 U.S. 414, 422, 425 (1988)). This requires “exacting” and “strict” scrutiny. *Meyer*, 486 U.S. at 421; *see also Buckley, supra*. This is because elections are as much a means of disseminating ideas and expressing dissent, often evolving and shifting with the sands of a campaign season, as they are means of attaining office and political objectives. *See Socialist Workers Party*, 440 U.S. at 186. In *Buckley*, the Supreme Court struck down a requirement that limited speech rights to the right to vote in the local community, by requiring petition circulators be registered voters.

Since the Supreme Court decided *Buckley*, the federal courts routinely and regularly strike down state law requirements that petition circulators could only circulate petitions to those in the same area where they could vote. *See e.g., Brewer*, 531 F.3d 1028; *Nader v. Blackwell*, 545 F.3d 459, 476 (6th Cir. 2008); *Krislov v. Rednour*, 226 F.3d 851, 858-66 (7th Cir. 2000); *Frami v. Ponto*, 255 F.Supp.2d 962 (W.D. Wis. 2003); *Morrill v. Weaver*, 224 F.Supp 882, 904 (E.D. Penn. 2002) (Permanent injunction granted holding Pennsylvania residency requirement unconstitutional under *Buckley* and *Lerman*); *Chandler v. City of Arvada, Colorado*, 292 F.3d 1236 (10th Cir. 2002); *Lerman*, 232 F.3d at 145-54 (New York requirement that witnesses to ballot access designating petitions be resident of the political subdivision in which the office or position is to be voted for held unconstitutional); *Nader 2000 Primary Committee, Inc. v.*

Hechler, 112 F.Supp.2d 575, 579 (S.D.W.V. 2000) (preliminary injunction granted where court found that “*Buckley* strongly suggests the West Virginia statute’s resident registered voter requirement for petition circulators is presumptively unconstitutional”); *Nader 2000 Primary Committee, Inc. v. Hazeltine*, 110 F.Supp.2d 1201, 1205 (D.S.D. 2000) (South Dakota requirement that petition circulator be registered voters “became a nullity with the [ACLF] decision”); *Bernbeck v. Moore*, 126 F.3d 1114, 1117 (8th Cir. 1997) (pre-ACLF decision holding unconstitutional Nebraska law requiring petition circulators to be registered voters); *Lawrence v. Jones*, 18 P.3d 1245 (Ariz. App. 2001) (ruling that cities cannot limit circulator rights to city voters); 1999 Nev. Op. Atty. Gen. No. 37 (Dec. 1, 1999) (Nevada provisions requiring initiative petition circulators to be registered voters are unenforceable); 82 Ops. Cal. Atty. Gen. 250 (Dec. 22, 1999) (circulators of initiative petitions need not declare they are residents and voters).

The Ninth Circuit’s logic in *Brewer* paralleled that of prior courts facing the identical issue and presaged the incipient trend in all the federal courts. *See Frami v. Ponto*, 255 F.Supp.3d 962 (W.D. Wis. 2003). Wisconsin, like Arizona and Idaho, imposed residency restrictions on petition circulators. Relying on *Buckley* and the Seventh Circuit case *Krislov v. Rednour*, 226 F.3d 851 (7th Cir. 2000), the district court struck down Wisconsin’s residency requirement since the requirement could not be narrowly tailored to protect a compelling state interest. Judge Crabb found that *Krislov*’s voter registration requirement was a *de facto* residency requirement, *Frami*, 255 F.Supp.2d at 967, and effectively extended *Krislov*’s holding to the broader issue: residency requirements: “When the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured.” *Krislov*, 226 F.3d at 865 (internal quotations omitted) (cited in *Frami*, 255 F.Supp.2d at 970). Moreover, the state must “show that the recited

harms are real, not merely conjectural and that the regulation will in fact materially alleviate the anticipated harm.” *Frami*, 255 F.Supp.2d at 970 (internal quotations omitted). Wisconsin’s “parade of horrors” assertion failed to show how the residency requirement was narrowly tailored to protect a compelling state interest.

So, too, all of Arizona’s arguments in *Nader* failed to show the residency requirement was narrowly tailored: “Federal courts have generally looked with favor on requiring petition circulators to agree to submit to jurisdiction for purposes of subpoena enforcement, and the courts have viewed such a system to be more narrowly tailored means than residency requirement to achieve the same result.” *Id.* (citing *Chandler*, 292 F.3d at 1242-44; *Krislov*, 226 F.3d at 866 n.7; and *Frami*, 225 F.Supp.2d at 970). Every Circuit applying strict scrutiny agrees: banning all non-residents from core political speech cannot conform to First Amendment protections. The Idaho residency requirement cannot survive the required constitutional analysis.

D. The Signature Requirements for Presidential Ballot Access Are Greater Than All Other Statewide Candidates, and Are Therefore Unconstitutional, Especially When the State Has Less of an Interest in Presidential Elections Than Idaho Statewide or Local Elections.

Independent Presidential candidates in the 2012 election cycle will have to collect approximately 6,550 signatures to be ballot qualified in Idaho, *see* I.C. § 34-708A and Treuden Decl., ¶ 3, Ex. A and Facts, ¶ 6, while statewide candidates for non-Presidential offices will only need 1,000 signatures to be ballot qualified in Idaho, *see* I.C. § 34-708(2)(a) and Facts, ¶ 7. Strict scrutiny again applies to this analysis, requiring Ysursa to set forth a compelling state interest the extra signature statute is designed to protect and that the statute is narrowly tailored to protect that interest. Ysursa simply cannot prevail in this important regard, especially when the Supreme Court has held that a “State has a less important interest in regulating Presidential

elections than statewide or local elections because the outcome of the former will be largely determined by voters beyond the State's boundaries." *Anderson*, 460 U.S. at 795.

Socialist Workers Party controls the constitutional analysis of I.C. § 34-708A. In *Socialist Workers Party*, the High Court struck down an Illinois statute requiring signatures totaling 5% of the total number of persons that voted in the previous election to obtain ballot access. In Cook County, there were over 700,000 persons that had voted in the previous election, which in turn required independent candidates to collect over 35,000 signatures in the subsequent election. *Socialist Workers Party*, 440 U.S. at 183. Another statute, however, allowed independent candidates to gain ballot access to a statewide office if they obtained 25,000 signatures. *Id.* at 186. The district court in *Socialist Workers Party* succinctly relied on an Eastern District of Arkansas decision as the basis to strike down the statute. *Id.* at 179.

On the merits of appellees' equal protection challenge, the [district] court found "[no] rational reason why a petition with identical signatures can satisfy the legitimate state interests for restricting ballot access in state elections, and yet fail to do the same in a lesser unit. *Lendall v. Jernigan*, 424 F.Supp. 951 (E.D. Ark. 1977). Any greater requirement than 25,000 signatures cannot be said to be the least drastic means of accomplishing the state's goals, and must be found to unduly impinge [on] the constitutional rights of independents, new political parties, and their adherents."

Id. (quoting *Socialist Workers Party v. Chicago Bd. of Election Comm'rs*, 433 F.Supp. 11, 20 (N.D. Ill. 1977)).¹

"The Illinois Legislature has determined that its interest in avoiding overloaded ballots in statewide elections is served by the 25,000-signature requirement. Yet appellant has advanced no reason, much less a compelling one, why the State needs a more stringent requirement for Chicago." *Socialist Workers Party*, 440 U.S. at 186.

¹ It is interesting that this quotation suggests that the higher signature requirement cannot even be supported by "any rational reason" because, while a state must comply with strict scrutiny, it will be unable to survive even the rational basis test.

Idaho finds itself with the same disparate situation here. It is of no consequence that *Socialist Workers Party* was dealing with a geographic sub-division of Illinois and this case involves the same geographic district: a statewide district. The salient fact is that there are different ballot access requirements for different offices in the same election district. Ysursa must still set forth a compelling reason, just like *Socialist Workers Party* required, for the higher signature requirement. He will have to point to some unique fact regarding Presidential elections as compared to solely Idaho intra-state elections to justify the additional burden on Presidential ballot access, but that burden is insurmountable given the fact that Idaho has a lesser interest in the Presidential election than it does in solely Idaho intra-state elections. *Anderson*, 460 U.S. at 795.

Because there is no legitimate basis to conclude that a higher signature requirement for a Presidential independent candidate is appropriate when compared to other independent statewide candidates, the higher signature requirement violates equal protection, and summary judgment is appropriately granted to Daien.

CONCLUSION

Circulating petitions for a candidate for the Presidency is the core of political speech and the apex of First Amendment rights. Limiting that right to only Idahoans when every other American has a right to exercise their core political speech in Idaho, cannot pass strict scrutiny – or any scrutiny, for that matter.

Similarly, requiring Presidential candidates to obtain approximately six times as many signatures than other statewide candidates to achieve a place on the election ballot violates the Equal Protection Clause. This requirement cannot pass a rational basis standard, much less strict

scrutiny, given the fact that Idaho has less of an interest in Presidential elections than it does in solely Idaho statewide or local elections.

For all of these reasons, summary judgment is appropriate, finding I.C. § 34-1807's petition circulator residency requirement and I.C. § 708A's requirement that a Presidential candidate submit petitions signed by persons totaling 1% of the number of votes in the prior election in excess of demands on similarly situated state-wide candidates, violate the First and Fourteenth Amendments to the United States Constitution.

Respectfully submitted this 8th day of September, 2009.

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Appearing *Pro Hac Vice*
for Plaintiff Donald N. Daien

**IN THE UNITED STATES DISTRICT COURT
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DONALD N. DAIEN,

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BEN YSURSA, in his official
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Defendant.

Civil Case No. 1:09-cv-00022-REB

PLAINTIFF’S STATEMENT OF MATERIAL FACTS

COMES NOW THE PLAINTIFF, Donald N. Daien (“Daien”), by and through his attorneys, The Bernhoft Law Firm, S.C., (Attorney Daniel J. Treuden, admitted *pro hac vice*), and respectfully files Statement of Material Facts which contains the material facts Daien contends are not in dispute. This Statement is filed pursuant to Local R. 7.1(b)(1).

Material Facts

1. Donald N. Daien (“Daien”) is a resident of and domiciled in Arizona. (Decl. of Donald N. Daien, ¶ 3) (hereinafter “Daien Decl.”).

2. Daien would like to help Presidential candidates, like Ralph Nader, or another similarly-minded candidate, gain ballot access throughout the United States, including Idaho, but will be unable to do so if it is illegal in Idaho. (Daien Decl., ¶ 5.)
3. Daien does not wish to subject himself to criminal or civil financial penalty to circulate petitions. (Daien Decl., ¶ 7.)
4. Daien believes it is his right to circulate petitions personally. (Daien Decl., ¶ 4.)
5. Daien believes he can associate with others to achieve the common goal of obtaining ballot access for Presidential candidates in all states in the United States, including Idaho. (Daien Decl., ¶ 4.)
6. In 2012, and under current law, an independent candidate for President will need approximately 6,550 signatures to obtain ballot access. (Decl. of Daniel J. Treuden, ¶ 3, Ex. A) (hereinafter “Treuden Decl.”) *See also* I.C. § 34-708A.
7. In 2012, and under current law, an independent non-Presidential statewide candidate will need 1,000 signatures to obtain ballot access. *See* I.C. § 34-708(2)(b).

Respectfully submitted on this the 8th day of September, 2009.

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Pro Hac Vice Appearance
Appearing for the Plaintiff Daien

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO
SOUTHERN DIVISION**

DONALD N. DAIEN,

Plaintiff,

v.

BEN YSURSA, in his official
capacity as Secretary of State of
Idaho,

Defendant.

Civil Case No. 1:09-cv-00022-REB

**DECLARATION OF DONALD N.
DAIEN**

I, Donald N. Daien, hereby declare that:

1. I am the Plaintiff in this matter and execute this declaration in support of my motion for summary judgment.
2. Except where explicitly noted to the contrary, I have personal knowledge of the facts set forth in this Declaration and if called upon to testify, could do so competently.
3. I am a resident of Arizona and would like to circulate petitions for ballot access on behalf of Presidential candidates in the next Presidential election cycle.

4. I will not circulate ballot-access petitions under existing Idaho law though I should have the right to do so, and want the choice to exercise that right by circulating petitions myself and by associating with others who are also circulating petitions themselves to achieve a common goal of ballot access in Idaho and other states for Presidential candidates like Ralph Nader and other similarly-minded candidates.


5. I would also like to help Presidential candidates, like Ralph Nader, or a similarly-minded candidate, to gain ballot access throughout the United States, but will not do so in Idaho if it is illegal.

6. I believe individual petition circulation is important because, with a limited number of volunteers, two individuals are able to cover twice as much ground and talk to twice as many people as one group of two individuals working together.

7. I do not wish to subject myself to criminal prosecution or any civil financial penalty to circulate petitions.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury the foregoing is true and correct to the best of my information, knowledge and belief.

Dated: September 1, 2009


Donald N. Daien

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Appearing *Pro Hac Vice*
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**IN THE UNITED STATES DISTRICT COURT
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Idaho,

Defendant.

Civil Case No. 1:09-cv-00022-REB

DECLARATION OF DANIEL J. TREUDEN

I, Daniel J. Treuden, hereby declare that:

1. I represent the Plaintiff in this matter and execute this declaration in support of his motion for summary judgment.
2. Except where explicitly noted to the contrary, I have personal knowledge of the facts set forth in this Declaration and if called upon to testify, could do so competently.

3. Attached to this declaration as Exhibit A is a true and correct copy of a document pulled from the Defendant's website setting forth the number of Presidential ballots cast in the 2008 election. According to this document, 655,032 votes were cast for President.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury the foregoing is true and correct to the best of my information, knowledge and belief.

Dated: September 8, 2009

/s/ Daniel J. Treuden
Daniel J. Treuden



Idaho Secretary of State Election Division

November 4, 2008 General Election Results

Statewide Totals

Voting Statistics

Total Number Registered Voters at Cutoff	745,627
Number Election Day Registrants	116,242
Total Number of Registered Voters	861,869
Number of Ballots Cast	667,506
% of Registered Voters that Voted	77.5%

	Total	Plurality	Percentage
United States President			
CON Chuck Baldwin	4,747		0.7%
LIB Bob Barr	3,658		0.6%
REP John McCain	403,012	166,572	61.5%
IND Ralph Nader	7,175		1.1%
DEM Barack Obama	236,440		36.1%
United States Senator			
DEM Larry LaRocco	219,903		34.1%
LIB Kent A. Marmon	9,958		1.5%
IND Pro-Life	8,662		1.3%
IND Rex Rammell	34,510		5.4%
REP Jim Risch	371,744	151,841	57.7%
US Representative - District 1			
DEM Walt Minnick	175,898	4,211	50.6%
REP Bill Sali	171,687		49.4%
US Representative - District 2			
DEM Deborah Holmes	83,878		29.0%
REP Mike Simpson	205,777	121,899	71.0%

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Comments, questions or suggestions can be emailed to: sosinfo@sos.idaho.gov

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Appearing *Pro Hac Vice*
for Plaintiff Donald N. Daien

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO
SOUTHERN DIVISION**

DONALD N. DAIEN,

Plaintiff,

v.

BEN YSURSA, in his official
capacity as Secretary of State of
Idaho,

Defendant.

Civil Case No. 1:09-cv-00022-REB

PLAINTIFF'S APPENDIX OF STATUTES

COMES NOW THE PLAINTIFF, Donald N. Daien ("Daien"), by and through his attorneys, The Bernhoft Law Firm, S.C., (Attorney Daniel J. Treuden, admitted *pro hac vice*), and respectfully files Appendix of Statutes which contains the text of several statutes at issue in this action many of which Daien contends are unconstitutional.

I.C. § 34-704. Declaration of candidacy.

Any person legally qualified to hold such office is entitled to become a candidate and file his declaration of candidacy. Each political party candidate for precinct, state, district or county office shall file his declaration of candidacy in the proper office between 8 a.m., on the twelfth

Monday preceding the primary election and 5 p.m., on the tenth Friday preceding the primary election. All political party candidates shall declare their party affiliation in their declaration of candidacy, except candidates for nonpartisan office.

Candidates who file a declaration of candidacy under a party name and are not nominated at the primary election shall not be allowed to appear on the general election ballot under any other political party name, nor as an independent candidate.

Independent candidates shall file their declaration of candidacy in the manner provided in section 34-708, Idaho Code.

I.C. § 34-708. Independent candidates.

- (1) No person may offer himself as an independent candidate at the primary election.
- (2) Any person who desires to offer himself as an independent candidate for federal, state, district, or county office may do so by complying strictly with the provisions of this section. In order to be recognized as an independent candidate, each such candidate must file with the proper officer as provided by section 34-705, Idaho Code, a declaration of candidacy as an independent candidate, during the period specified in section 34-704, Idaho Code. Such declaration must state that he is offering himself as an independent candidate, must declare that he has no political party affiliation, and must declare the office for which he seeks election. Each such declaration must be accompanied by a petition containing the following number of signatures of qualified electors:
 - (a) One thousand (1,000) for any statewide office;
 - (b) Five hundred (500) for any congressional district office;
 - (c) Fifty (50) for any legislative district office;
 - (d) Five (5) for any county office.
- (3) Signatures on the petitions required in this section shall be verified in the manner prescribed in section 34-1807, Idaho Code.
- (4) If all of the requirements of this section have been met, the proper officer shall cause the name of each independent candidate who has qualified to be placed on the general election ballot, according to instructions of the secretary of state.

I.C. § 34-708A. Independent candidates for president and vice-president.

Persons who desire to be independent candidates for the offices of president and vice-president, must file, prior to August 25 of the election year, declarations of candidacy as independent candidates. Such declarations must state that such persons are offering themselves as

independent candidates and must declare that they have no political party affiliation. The declarations shall have attached thereto a petition signed by a number of qualified electors not less than one percent (1%) of the number of votes cast in this state for presidential electors at the previous general election at which a president of the United States was elected.

The candidates for president and vice-president shall be considered as candidates for one (1) office, and only one (1) such petition need be filed for both offices.

Signatures on the petitions required in this section shall be verified in the manner prescribed in section 34-1807, Idaho Code.

I.C. § 34-711. Certification of candidates for president, vice president and presidential electors.

The state chairman of each political party shall certify the names of the presidential and vice-presidential candidates and presidential electors to the secretary of state on or before September 1, unless a five (5) day extension is granted by the secretary of state, in order for them to appear on the general election ballot. The secretary of state shall certify such candidates to the county clerks at the same time as certification of political party candidates nominated for state and federal offices by the voters in the primary election.

I.C. § 34-732. Selection of candidates for nomination in presidential primary.

Each qualified elector shall have the opportunity to vote on the official presidential preference primary ballot for one (1) person to be the candidate for nomination by a party for president of the United States. The name of any candidate for a political party nomination for president of the United States shall be printed on the ballots only:

(1) If the secretary of state shall have determined, in his sole discretion, that the person's candidacy is generally advocated or recognized in national news media throughout the United States. For the purpose of promoting the aspect of a regional primary in this regard, the secretary of state may consult with the chief election officers of neighboring states which conduct a presidential primary election on the fourth Tuesday in May. The secretary of state shall publish the names of such persons determined by him to be such candidates, together with their party affiliation, not less than sixty (60) days prior to the date of the presidential preference primary; or

(2) Any candidate who was not placed upon the ballot by the secretary of state under the provisions of subsection (1) of this section shall be placed upon the ballot after filing a declaration of candidacy accompanied by a one thousand dollar (\$1,000) filing fee. The declaration shall be filed with the secretary of state no later than the fiftieth day prior to the date of the presidential preference primary.

I.C. § 34-1807. Circulation of petitions – Verification of petition and signature sheets – Comparison of signatures with registration oaths and records – Certain petitions and signatures void.

Any person who circulates any petition for an initiative or referendum shall be a resident of the state of Idaho and at least eighteen (18) years of age. Each and every sheet of every such petition containing signatures shall be verified on the face thereof in substantially the following form, by the person who circulated said sheet of said petition, by his or her affidavit thereon, and as a part thereof:

State of Idaho,

ss.

County of

I,, being first duly sworn, say: That I am a resident of the State of Idaho and at least eighteen (18) years of age: that every person who signed this sheet of the foregoing petition signed his or her name thereto in my presence: I believe that each has stated his or her name, post-office address and residence correctly, that each signer is a qualified elector of the State of Idaho, and a resident of the county of

Signed.....

Post-office address.....

Subscribed and sworn to before me this ... day of

(Notary Seal) Notary Public.....

Residing at

In addition to said affidavit the county clerk shall carefully examine said petitions and shall attach to the signature sheets a certificate to the secretary of state substantially as follows:

State of Idaho

ss.

County of

To the honorable, Secretary of State for the State of Idaho: I,, County Clerk of County, hereby certify that signatures on this petition are those of qualified electors.

Signed

County Clerk or Deputy.

(Seal of office)

The county clerk shall deliver the petition or any part thereof to the person from whom he received it with his certificate attached thereto as above provided. The forms herein given are not mandatory and if substantially followed in any petition, it shall be sufficient, disregarding clerical and merely technical error.

Any petition upon which signatures are obtained by a person not a resident of the state of Idaho and at least eighteen (18) years of age, shall be void. The definition of resident in section 34-107, Idaho Code, shall apply to the circulators of initiative and referendum petitions. In addition to (to) being a resident, a petition circulator shall be at least eighteen (18) years of age.

I.C. § 34-1822. Penalty for violations.

Any person, either as principal or agent, violating any of the provisions of sections 34-1801 – 34-1822 shall be punished upon conviction by imprisonment in the penitentiary or in the county jail not exceeding two (2) years, or by a fine not exceeding \$5000.00, or by both, excepting that imprisonment in the penitentiary and punishment by a fine shall be the only penalty for violation of any provision of section 34-1821.

Respectfully submitted on this the 8th day of September, 2009.

THE BERNHOFT LAW FIRM, S.C.
Attorneys for the Plaintiffs

/s/ Daniel J. Treuden
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Pro Hac Vice Counsel

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of September, 2009, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the notice of electronic filing:

Name

Brian P. Kane, Attorney for Defendant
Karin D. Jones, Attorney for Defendant
Michael S. Gilmore, Attorney for Defendant

Service Address

brian.kane@ag.idaho.gov
karin.jones@ag.idaho.gov
mike.gilmore@ag.idaho.gov

Dated on September 8, 2009.

/s/ Daniel J. Treuden
Daniel J. Treuden