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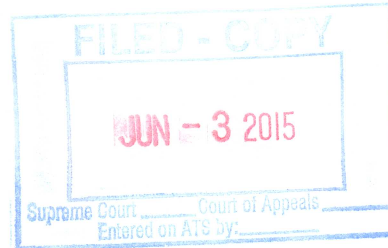

IN THE SUPREME COURT OF THE STATE OF IDAHO

COEUR D'ALENE TRIBE Petitioner, v. LAWERENCE DENNEY, Secretary of State of the State of Idaho, in his official capacity, Respondent.	No. **PETITIONER'S BRIEF IN SUPPORT OF VERIFIED PETITION FOR WRIT OF MANDAMUS**

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STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings

This case is about the Governor's invalid veto of a bill and the Secretary of State's refusal to certify it into law. The integrity of the lawmaking process is at stake. The constitutional issues in the Petition strike at the core of the checks and balances inherent in the Legislature's power to pass laws, the Governor's power to veto bills, the executive branch's duties to ensure that laws are given effect, and the people's right to have duly enacted laws enforced with clarity. Neither the Legislature nor the people can force the Secretary of State to perform his duties if he refuses; only this Court can do so.

Specifically, Senate Bill 1011 (S.B. 1011) was introduced in the Idaho Senate in the 2015 Legislative Session. In a single sentence it repealed Idaho Code § 54-2512A, a two-year-old law, which allowed wagering on "historical" horse races. Based upon Idaho Code § 54-2512A, the Idaho Racing Commission authorized slot-like machines to be installed at Idaho racetracks. S.B. 1011 quickly passed both houses by a supermajority and was presented to Governor C.L. "Butch" Otter. Under the Idaho Constitution, if the Governor desires to veto a bill before the Legislature has adjourned for the session, he must deliver the bill with his objections to the originating house within five days (excluding Sundays). The Governor attempted to veto S.B. 1011. However, because he delivered it too late, his veto was invalid.

Under the Idaho Constitution, S.B. 1011 became law on April 4, 2015, upon the expiration of the five-day veto deadline. Despite the invalid veto attempt, the Senate President treated the veto as effective and called a vote, to determine if a supermajority would override it. The vote was a nullity and had no legal effect. As S.B. 1011 is now law, the Respondent, Secretary of

State Lawerence Denney, has a non-discretionary duty under the law to certify and implement S.B. 1011, effective July 1, 2015. He refuses to do so.

Accordingly, Petitioner Coeur d'Alene Tribe brings this mandamus action to the Court under its original jurisdiction. Idaho Const., art. V § 9; Idaho Code § 1-203; Idaho Code § 7-301 et seq., and Idaho Appellate Rule 5(a).

B. Statement of Facts

1. Petitioner's Interests and the Background of S.B. 1011

Petitioner Coeur d'Alene Tribe ("the Tribe") is a federally recognized Indian Tribe. (Verified Petition for Writ of Mandamus ("Petition"), ¶ 6.) The Tribe has over 2,190 enrolled members, and maintains its governmental offices in Plummer, Idaho. *Id.* The Tribe has a concrete and discrete interest in the outcome of this case. It was a lead proponent of S.B. 1011, and it has been injured by the Secretary's refusal to certify the bill as law. *Id.*

Although the Idaho Constitution prohibits most forms of gaming within the State, *see* Idaho Const., art. III, § 20, Congress enacted the Indian Gaming Regulatory Act ("IGRA") in 1988, permitting Indian tribes to negotiate gaming compacts with the states, subject to approval by the Secretary of the Interior. 25 U.S.C. § 2701, et seq. Recognizing the historical impoverishment and lack of economic opportunities on Indian lands, one of Congress's purposes in passing the IGRA was to promote "tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702.

Under the authority of the IGRA, the Coeur d'Alene Tribe entered into a Compact with the State of Idaho, which was approved by the Secretary of the Interior. *See* February 5, 1993 Letter from Assistant Secretary of the State to Coeur d'Alene Tribal Council, http://www.bia.gov/cs/groups/xoig/documents/text/idc-038262.pdf In the ensuing years, the

Tribe negotiated with the State in an attempt to resolve disputes about the Compact, but those efforts proved futile. (Petition, ¶ 11.) As a result, in 2002 the Tribe and others invested considerable resources to place an initiative before the citizens of Idaho to authorize the use of tribal gaming machines on tribal lands, and to provide an automatic ratification process to change state-tribal gaming compacts. (Petition, ¶ 12.)

The purpose of this initiative was to address the disproportionally high unemployment, severe poverty, and a lack of basic social services, such as education and health care, on Indian reservations in Idaho. *See* Proposed 2002 Initiative, Proposition 1, filed with the Idaho Secretary of State, http://www.sos.idaho.gov/elect/inits/gaming.pdf The initiative also provided a mechanism for Indian tribes to share 5% of their net gaming income to support local educational programs and schools on or near reservations. *Id.* The ballot measure passed by a significant majority of the Idaho electorate and became law. *See* Idaho Code § 67-429 B and C. Gaming has provided tribes in Idaho with a much needed source of revenue and goes a long way toward achieving the purposes that Congress set out in the IGRA.

In 2013, however, the Legislature enacted Idaho Code § 54-2512A, a law that expanded gaming in Idaho. This law, as administered by the Idaho Racing Commission, allowed betting on "historical" or "instant" horse races at Idaho race tracks. The law's proponents originally presented it to the Legislature as a form of pari-mutuel wagering, which is one of the limited forms of gaming authorized by the Idaho Constitution, and as necessary to save the horse racing industry in Idaho. *See* Kimberlee Kruesi and Cynthia Sewell, Associated Press, "Historical Horse Racing Takes Off in Garden City, Draws Concerns," published on January 3, 2015, http://www.idahostatesman.com/2015/01/03/3571291_historical-horse-racing-takes.html?rh=1 As a result, "historical" or "instant" horse racing machines, which bear a striking resemblance to

slot machines, were installed at three race tracks in Idaho. According to the Executive Director of the Idaho Racing Commission, "[t]hey look like slot machines because they're supposed to look like slot machines." *See id.*

Concerned that the Legislature had been deceived as to the purpose of the law, proponents of a repeal, which included the Tribe, introduced Senate Bill 1011 in the Idaho Legislature in 2015. (Petition, ¶ 16.)

2. The Senate Journal is Conclusive as to the Facts

The Court must refer only to the Senate Journal for the relevant and necessary facts of the official government acts regarding the passage of S.B. 1011 into law. *Brassey v. Hanson*, 81 Idaho 403, 406, 342 P.2d 706, 707 (1959). These dispositive facts are set forth in the Journals of the Idaho Senate for the First Regular Session of the Sixty-Third Legislature, the relevant portions of which are attached as Appendix A to the Petition. Under the "journal entry rule," the Court should take judicial notice of the Senate Journal "to determine whether an act was constitutionally passed and for the purpose of ascertaining what was done by the legislature." *Brassey*, 81 Idaho at 406, 342 P.2d at 707. [1]

3. Legislative History of S.B. 1011 and the Governor's Futile Veto

In the 2015 Legislative Session, both bodies of the Legislature moved quickly to repeal the law authorizing "historical" or "instant" racing at Idaho racetracks. Senate Bill 1011 prohibited "instant racing" after July 1, 2015. Both the Senate and House passed the repeal with supermajorities, and on Monday afternoon, March 30, 2015, the bill was presented to the Governor.

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[1] For a discussion of the "journal entry rule" see 82 C.J.S. Statutes § 103. Recitals in journals "cannot be impeached by verbal statements or other parol or extrinsic evidence." *Id.*

Under the Idaho Constitution, the Governor had five days to return a veto, or until April 4. Idaho Const., art. IV, § 10.

On Thursday, April 2, the Legislature adjourned temporarily (not sine die) for the Easter holiday weekend, resuming official business on Monday, April 6. It was widely reported in the media by the Governor's office that the Governor intended to wait until Monday, April 6, to announce his decision on whether to sign S.B. 1011. *See e.g.,* Associated Press, "Otter to Delay Announcing Instant Racing Decision," http://www.ktvb.com/story/news/local/capitol-watch/2015/04/03/otter-delays-instant-horse-racing-decision/25272389/.

The Senate Journal reflects that the Governor returned the bill with a veto message to the Senate on Monday morning, April 6, 2015. (Petition, Appendix A, at 5-7.) On that date, the Governor returned the bill and his message to the office of Senate President Pro Tempore Brent Hill with a letter addressed to the President of the Senate Brad Little, who is also the Lieutenant Governor.

Shortly after the Senate was called to order on April 6, President Pro Tempore Brent Hill and two other Senate officials filed three separate official communications in the Senate Journal addressed to President Brad Little, to indicate the late and untimely return of S.B. 1011. The President Pro Tempore notified the Senate that the veto was returned past the deadline, informing the Senate that "such deadline having passed, the provision of Article IV, § 10 of the Idaho Constitution and Idaho Code § 67-504 and 505 appear to apply." (Petition, Appendix A, at 5.)

A second communication from Jennifer L. Novak, Secretary of the Senate, also served to notify the Senate that Senate Bill 1011 was not returned, as required, to the Office of the Secretary of the Senate by April 4. (Petition, Appendix A, at 5.) It is significant that Senate Secretary Novak indicated that she received other communications from the Governor's office over the

weekend, but *not* communication related to S.B. 1011: "[o]ther correspondence of legislation were slipped under my door and returned in accordance with Article IV §10 and Idaho Code §§ 67-504 & 505. Correspondence of legislation is routinely returned to me in this fashion." *Id.* The correspondence further states that no earlier return was attempted on her office, nor was she asked to receive a return at an earlier date. *Id.*

Likewise, Minority Leader Michelle Stennett officially notified the Senate with a communication to President Brad Little in the Senate Journal. (Petition, Appendix A, at 5.) She provided notice that the Governor's veto of S.B. 1011 was untimely and invalid. She further corroborated the late return of the bill to the Pro Tempore's office on Monday, April 6 and declared "[t]o the best of my knowledge no earlier return was attempted or effectuated to the Senate, nor was anyone asked to receive such a return at an earlier time. The return of S1011, being due at 4:54 pm on April 4, 2015, and such deadline having passed, S1011 is law pursuant to the provisions of Article IV, Section 10 of the Idaho Constitution and Idaho Code Sections 67-504 and 505." *Id.*

The Governor's attempted veto is contained in the Senate Journal in a letter addressed to The Honorable Brad Little, in his capacity as President of the Senate. (Petition, Appendix A, at 6-7.) Despite bearing a date of April 3, there is no indication in the record that it was delivered to President Little or any other Senate official at any time before April 6. *Id.*

President Little presided over the entire Senate session on April 6, which lasted over four and one half hours that day. Nothing in the Senate Journal indicates that S.B. 1011 and the Governor's veto message had ever been delivered to President Little by the deadline on Saturday, April 4. President Little also did not rebut or refute the President Pro Tempore who advised the Senate that the veto return was not timely under the Idaho Constitution and Idaho Code. Like-

wise, President Little also did not respond to the two other Senate officials who notified the Senate that the Governor failed to return the bill in a timely fashion. In addition, there is no indication in the Senate Journal that the Governor notified the Senate that he had, in fact, made a previous delivery by Saturday April 4, as the law requires.

Despite official notification to the Senate that the veto of S.B. 1011 was invalid and under the Idaho Constitution the bill had become law, President Little nonetheless treated the veto as if it were effective. He proceeded to call for a vote during the April 6 session to determine whether the Senate would support S.B. 1011 with a supermajority, and thereby defeat the veto. (Petition, Appendix A, at 7.) When a majority, but less than two-thirds, voted in the affirmative to override the veto, President Little declared that Senate Bill 1011 failed to become law and that "the Governor's veto [is] sustained." *Id.*

Before bringing the present action, the Tribe requested that the Secretary of State certify Senate Bill 1011 as law and deposit it with the laws in his office, as is his duty under the Constitution and Idaho Code § 67-505. He has refused. (Petition, Appendix B.) In his response, the Secretary asserted that he lacks authority to certify the bill as a law because "the requisite gubernatorial authentication under Idaho Code § 67-505 is absent." *Id.* However, there is no requirement under Idaho law that the Governor take any further action to authenticate bills that he has failed to properly return as vetoed.

The Tribe now asks this Court to exercise its original jurisdiction and order the Secretary of State to comply with his non-discretionary duties to certify this law, deposit it with the laws of the State, and assign it a chapter number in the Idaho Code.

ISSUE PRESENTED

Should this Court issue a writ of mandamus to the Secretary of State ordering him to certify that Senate Bill 1011 is law under Article IV, § 10 of the Idaho Constitution because the Governor failed to return the bill, with his objections, to the Legislature within five days after it was presented to him?

ARGUMENT

A. Mandamus is the Proper Remedy and this is the Proper Forum

The Idaho Constitution confers original jurisdiction on this Court to issue writs of mandamus. Idaho Const., art. V, § 9. In addition, the Idaho Code and the Idaho Appellate Rules confirm this Court's jurisdiction and set out procedures to review mandamus petitions. Idaho Code § 1-203; Idaho Code §§ 7-302 – 313; Idaho Appellate Rule 5.

Here, the Secretary of State has prevented a law from being given the force and effect of law. As a public officer, he has refused to certify S.B. 1011, deposit it with the other laws of the state, and assign it a chapter and section number in the Idaho Code. These are clearly mandated and non-discretionary ministerial duties. Idaho Code § 67-505 and § 67-506.

It has been long established that mandamus is the proper remedy when a petitioner is seeking to require a public officer to carry out a non-discretionary ministerial act. *Marbury v. Madison*, 5 U.S. 137 (1803) (writ of mandamus sought from Supreme Court against Secretary of State to order his delivery of judicial commissions); *Edwards v. Indus. Comm'n*, 130 Idaho 457, 459-60, 943 P.2d 47, 49-50 (1997); *Idaho Falls R'developm't Ag'ncy v. Countryman*, 118 Idaho 43, 45, 794 P.2d 632, 634 (1990).

Although this Court and the district courts both have jurisdiction over petitions for writs of mandamus, when a petition alleges sufficient facts concerning possible constitutional viola-

tions of an urgent nature, such as in this case, this is the proper forum. *See, e.g.*, *Nez Perce Tribe v. Cenarrusa*, 125 Idaho 37, 38; 867 P.2d 911, 912 (1993) (accepting jurisdiction of petition for mandamus to review tribe's challenge to amendment of Idaho Constitution); *accord Sweeney v. Otter*, 119 Idaho 135, 138, 804 P.2d 308, 311 (1990).

Further, this Court should exercise its original jurisdiction because there is not an adequate, plain, or speedy remedy in the ordinary course of law. *Sweeney*, 119 Idaho at 138, 804 P.2d at 311; Idaho Code § 7-303. The effective date of S.B. 1011 is July 1, 2015. Without a writ compelling the Secretary to act, the law will not take effect as the legislature intended. The citizens of Idaho, as well as the Petitioner as a proponent of the law, have a constitutional right to have duly enacted laws take effect. These circumstances call for an expeditious and final resolution by this Court.

B. The Governor's Veto Power is Strictly Defined by the Constitution

The Idaho Constitution and statutes set out a straightforward path for a bill to become law. Of the three branches of government, only the Idaho Legislature is vested with the lawmaking power. Idaho Const., art. III, § 1.[2] When a majority in both houses of the Legislature have voted to pass a bill, it must be presented to the Governor for his consideration. Idaho Const., art. IV, § 4.

Having been presented with a bill, the Governor is given the power by the Idaho Constitution either to reject it with a valid veto or to allow it to become law. Idaho Const. art. IV, § 4. Once presented with a bill the Governor has only three options under the Constitution: (1) if he approves the bill, he may sign it into law; (2) if he disapproves, he may veto the bill by returning

[2] Though not at issue here, the people have also reserved to themselves the power to approve or reject, or to propose laws through the initiative and referendum process. Idaho Const. art. III, § 1.

it to the house in which it originated subject to mandatory timeframes; or (3) he may allow the bill to become law without taking any further action. Idaho Const., art. IV, § 4.

There is no "pocket veto" under Idaho law through which the Governor's inaction results in a veto. *Cenarrusa v. Andrus*, 99 Idaho 404, 406, 582 P.2d 1082, 1085 (Idaho 1978) ("We full well realize that the Idaho constitutional provision, which requires an active veto to prevent a bill from becoming law… is quite different in operation from the federal 'pocket veto' provision").

The framers of the Idaho Constitution recognized that the Governor's veto power – allowing one person to thwart the will of the people acting through their elected representatives – is an immense one. To ensure that this power is not expanded or abused, the Idaho Constitution circumscribed how it must be exercised. The first limitation is a notice requirement; the Governor must return the bill with his objections to the house in which it originated. Idaho Const., art. IV, § 10. That house then has a duty to keep an official record of the veto and the Governor's objections by "enter[ing] the objections at large upon its journal." *Id.*

The second limitation is a strict deadline by which the Governor must act. In particular, "[a]ny bill which shall not be returned by the governor to the legislature within five (5) days (Sundays excepted) after it shall have been presented to him, shall become a law in like manner as if he had signed it …" Idaho Const., art. IV, § 10. In this way, the Constitution both sets a reasonable deadline for the Governor's consideration and a consequence when he fails to comply with it. Should the Governor not return the bill with his objections within five days of its delivery to him, the bill automatically becomes "a law in like manner as if he had signed it." *Id.*

When the Legislature has temporarily adjourned, Idaho Code § 67-504 provides a clear procedure so that the Governor can return any bill that he wishes to veto within the constitutionally mandated five day time frame. Idaho Code § 67-504 sets up a process that allows, rather

than prevents, the Governor to return a bill during in-session adjournments. To do so, the Governor must do two things. First, he must deliver the bill with his message to the presiding officer, clerk, or any member of such house within five days after it was presented to him. Second, on the first day the house is again in session, the Governor must "notify the house of his prior delivery, and of the time when, and the person to whom, such delivery is made." *Id.* If both of these requirements are met, his delivery will be as effective as though it were returned in open session by the Governor. *Id.*

C. The Senate Journal Contains the Legislative History of S.B. 1011

The Court must determine whether S.B. 1011 was constitutionally vetoed by a review of the relevant portions of the Senate Journal, attached to the Petition as Appendix A. The Senate Journal is the official record of the Senate. The Constitution requires that each house of the legislature keep a journal of its proceedings. Idaho Const., art. III, § 13. The Court should take judicial notice of the Senate Journal "to determine whether an act was constitutionally passed and for the purpose of ascertaining what was done by the legislature." *Worthen v. State of Idaho*, 96 Idaho 175, 176, 525 P.2d 957, 958 (1974).

Going back to our earliest territorial days, "the principle of law is settled beyond controversy that a court will not go behind the journal of a legislature to ascertain what is done by that body." *Burkhart v. Reed*, 2 Idaho 503,509, 22 P. 1 (1889), affirmed on other grounds by *Clough*

v. Curtis, 134 U.S. 361 (1890).[3] The facts contained in the Senate Journal are uncontroverted and establish that S.B. 1011 is law.[4]

D. The Governor's Attempted Veto of S.B. 1011 was Invalid

There is no dispute that the Governor was presented with Senate Bill 1011 in the late afternoon of Monday, March 30, 2015, after it was passed by a supermajority of both houses. The Legislature had not adjourned sine die (for the session), and the five-day deadline to veto the bill began to run, giving the Governor until April 4, to return the bill with his objections to the Senate. The Legislature was in session the next three days, before adjourning temporarily on Thursday, April 2, for the Easter holiday weekend, until Monday, April 6.

When the Legislature temporarily adjourned on April 2, the provisions of Idaho Code § 67-504 provided the Governor with an established and simple two-step process to veto S.B. 1011 within the constitutionally mandated five-day time period. As the five-day clock continued to run, the Governor could have delivered the bill, with his veto message, to *any* of the officers or members of the Senate listed under the statute. The Governor had the option of returning the bill to one of 37 individuals, as a return would have been effective on any of the 35 senators, or the Clerk of the Senate (the Secretary) or the Senate President. As widely reported in the media, the Governor's office informed the press he intended to wait until Monday to announce his decision on whether to sign S.B. 1011.

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[3] If non-legislative facts outside the Senate Journals are necessary to resolve the controversy, then Idaho Appellate Rule 5(d) provides that: "Issues of fact, if any, shall be determined in the manner ordered by the Court." Petitioner reserves the right to conduct discovery, develop facts, and submit a reply brief, in the event the Court were to permit Respondent to introduce facts outside the Senate Journals.

[4] The Senate sessions are also video-taped live and broadcast on Idaho Public television on "Idaho In Session" which is a collaborative effort among Idaho Public Television, the Legislative Services Office, and the Idaho Department of Administration. The April 6, 2015 session is available for viewing at: http://164.165.67.41/IIS/2015/Senate/Chambers/SenateChambers04-06-2015.map4

The Senate Journal reveals that on April 6 the Senate reconvened at 1:30 p.m. After the session opened, during the Fourth Order of Business, President Pro Tempore Brent Hill promptly notified the Senate that the Governor's veto of S.B. 1011 was untimely, informing the Senate that the Governor had returned the bill to his office that morning, well past the April 4 deadline. In a letter to Senate President Brad Little, entered in the Senate Journal, the President Pro Tempore stated:

> This communication reflects that Senate Bill 1011 was returned to my office at 8:52 am on April 6, 2015. To the best of my knowledge no earlier return was attempted to my office, nor was I asked to receive such a return at any earlier time. The return of S 1011 being due at 4:54 pm on April 4, 2015 and such deadline having passed, the provisions of Article IV, §10 of the Idaho Constitution and Idaho Code §67-504 and 505 appear to apply.

(Petition, Appendix A, at 5.)

These facts were reiterated by Minority Leader Michelle Stennett into the Senate Journal, who recognized that S.B. 1011 is now law, and stated:

> To the best of my knowledge no earlier return was attempted or effectuated to the Senate, nor was anyone asked to receive such a return at any earlier time. The return of S1011, being due at 4:54 pm on April 4, 2015, and such deadline having passed, S1011 is law pursuant to the provisions of Article IV, Section 10 of the Idaho Constitution and Idaho Code Sections 67-504 and 67-505.

(Petition, Appendix A, at 5.)

Yet a third letter was placed into the Senate Journal from the Secretary of the Senate. She officially informed the Senate that she also did not receive the bill from the Governor by the April 4 deadline. It had not been slipped under her door, which was a routine manner of communication from the Governor's office. Tellingly, she indicates that she *did* receive correspondence from the Governor regarding other bills in that fashion over the Easter holiday weekend, but not S.B. 1011. (Petition, Appendix A, at 5.)

Following the above Senate Journal entries of April 6, there are several communications from the Governor, under the Eighth Order of Business, entitled "Messages from the Governor." One is a letter from the Governor addressed to The Honorable Brad Little in his capacity as the President of the Senate. (Petition, Appendix A, at 6-7.) That letter sets out the Governor's reasons why he wishes to veto S.B. 1011. While the letter is dated April 3, nothing in the record shows that it was returned to President Little – or the Senate Secretary, any other member of the Senate – before April 6.

President Little, who presided over the Senate that day, did not state at any time that the letter was delivered to him before April 6. The Senate was in session for over four and a half hours on that date and there was ample opportunity to share this crucial information. Likewise President Little remained silent and did not refute the earlier communications from the President Pro Tempore, the Minority Leader, or the Senate Secretary, who all explicitly informed the Senate that the Governor's veto attempt was invalid as it was untimely.

If the Governor intended to veto S.B. 1011, he was required under the Idaho Constitution to deliver the bill with his objections within the five-day deadline. To accomplish this while the Legislature was temporarily adjourned, he had two duties. He needed to (1) deliver it to an authorized Senate official with five days of presentment, and (2) make a record of "such delivery, and of the time when, and the person to whom, such delivery is made." Idaho Code § 67-504. Both are necessary as separate elements, and as set forth above, no record exists of either action in the Senate Journal.

In a case with strikingly similar facts to the present case, the Minnesota Supreme Court had occasion to decide the validity of a bill that was returned and delivered back to the Senate

outside the constitutional window provided for a governor's veto. *State ex rel. Putnam v. Holm*, 215 N.W. 200 (1927).

In *Putnam*, a Senate bill had been presented to the Governor on the Wednesday before Easter, and the time for return of the legislation was three days, rather than the five days allowed in Idaho, with Sundays excepted, also as in Idaho. *Putnam*, 215 N.W. at 201. The Senate adjourned for the Easter weekend at the end of business on Thursday (for the holiday weekend, not the session), the same as the facts at hand. *Id.* The Minnesota Governor issued a veto message dated Saturday, but retained the bill and the veto message until it was delivered to the Lieutenant Governor, who was presiding over the Senate, on Monday morning. *Id.* Upon review, the court held the Governor's time to return the bill had expired on Saturday, and the bill had become law without the Governor's signature, when not returned to the Senate until Monday. *Id.* at 204.

Putnam is directly on point legally and factually. As in that case, because the Governor here did not return Senate Bill 1011 with his objections within the time allotted to him under the Constitution it became "a law in like manner as if he had signed it" immediately upon the expiration of the deadline on April 4, 2015. Idaho Const., art. IV, § 10.

E. The Senate's Vote on the Invalid Veto is a Nullity

Despite the fact that the veto was invalid, the Senate Journal reflects that President Little nevertheless called a vote, treating the purported veto as if it were effective. This action had no legal effect because the bill had already become a law. *See Wheeler v. Gallet*, 43 Idaho 175, 249 P. 1067 (1926) (holding that a governor's actions after a law came into existence were a nullity); *see also Caldwell v. Meskill*, 320 A.2d 788, 796 (1973) (following "the overwhelming weight of authority holding that a veto exercised in excess of constitutional authority is an ineffective nullity.").

In *Wheeler*, the Governor attempted to exercise his right to disapprove of a line item in an appropriations bill, but this Court held that the Governor's attempted veto was invalid. 43 Idaho at 175, 249 P. at 1067. In applying Article IV, §10 of the Constitution, the Court held that "[i]t is apparent that by the terms of this section *in the absence of a valid veto the act or bill as passed by the Legislature becomes a law.*" *Id.* at 176, 249 P. at 1068 (emphasis added). Because the veto was ineffective, the full law went into effect by operation of the Constitution within five days, and the Governor's attempt to veto the law by filing objections in the Office of the Secretary of State was a nullity. *Id.*

In another similar case, the Tennessee Supreme Court held that a legislative attempt to override an untimely and invalid veto was also a nullity. *Johnson City v. Tennessee Electric Company*, 182 S.W. 587 (Tenn. 1916). There, the General Assembly passed a bill and presented it to the Governor, who retained it for 33 days. *Id.* at 588. In the interim, the General Assembly had adjourned, not sine die, but for a large portion of the time that the Governor had the bill. *Id.* at 588 – 89. As in Idaho, the Tennessee Constitution required a return within five days, Sundays excluded, while the Assembly was still in session. *Id.* In ruling that the late veto was void, the Tennessee Supreme Court noted that had the Governor returned the bill within five days to any agent of the originating house, it would have been a valid return. *Id.* at 590. This common-sense approach foreshadows the options available to a governor in Idaho now codified in Idaho Code § 67-504. Moreover, as here, the Tennessee House took a vote despite the untimely veto. This was deemed a nullity, because the Governor's return was late, and the bill had already become law. *Id.*

In sum, the Idaho Constitution establishes a clear procedure for a bill to become a law. This does not depend upon or change if the Legislature ignores a constitutionally infirm veto and

treat such an infirm veto as valid. To allow this would expand the Legislature's powers and the Governor's beyond those established by the Constitution. The Governor had five days to return S.B.1011 to the Senate with his veto message. He failed to do so. The Governor's attempt to veto the bill was untimely and invalid, and S.B. 1011 became law automatically by operation of the Idaho Constitution on April 4, 2015. The Senate's vote on April 6 was thus a nullity with no legal effect.

F. The Secretary Has a Non-Discretionary Duty to Certify the Law

Under Article IV, § 1 of the Constitution, the Secretary of State is required to perform all duties prescribed by the Idaho Constitution and as set out by law. The Secretary of State is the compiler and keeper of Idaho's laws. Idaho Code § 67-901. To that end, one of the Secretary's ministerial and non-discretionary duties is to certify any law that has passed both houses and that has not been returned by the Governor within five days:

> Every bill which has passed both houses of the legislature, and has not been returned by the governor within five (5) days, *thereby becoming a law*, is authenticated by the governor causing the fact to be certified thereon by the secretary of state in the following form: "This bill having remained with the governor five (5) days (Sundays excepted), and the legislature being in session, it has become a law this .... day of ...., ...," which certificate must be signed by the secretary of state and deposited with the laws in his office.

Idaho Code § 67-505 (emphasis added).

Petitioner requested the Secretary of State comply with the Idaho Constitution and Idaho Code § 67-505 as to Senate Bill 1011 before bringing legal action, but he has refused. (Petition, Appendix B.) The Secretary contends he need not comply because the Governor's "authentication" is missing, meaning, apparently, that the Secretary does not believe that he has to certify a law or deposit such law with the laws in his office until the Governor further authenticates a law in some unspecified way. *Id.*

The Secretary's reading of Idaho Code § 67-505 is incorrect as a matter of law. There is no separate, additional authentication requirement. To the contrary, the very act of a bill passing both houses of the legislature coupled with the Governor's failure to return the bill within five days *is* the "authentication" by the Governor. In other words, a passed bill is self-authenticated when those events have occurred. This Court has held that nothing more is required. Just as when the Governor's act of returning a bill with his objections is the veto of the bill, nothing in the Constitution requires him to do more and further endorse the bill as "vetoed." *Cenarrusa v. Andrus*, 582 P.2d 1082, 1087, 99 Idaho 404, 409 (1978). This is the only construction that makes sense, both as a matter of language and logic.

Fundamental tenants of statutory construction are that the intent of the Legislature governs, words must be given their plain and ordinary meaning, and a statute should not be construed to lead to absurd results. *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 893, 265 P.3d 502, 506 (2011) (citations omitted). To side with the Secretary's interpretation of his duties in this case, the Court would have to insert an "and" into Idaho Code § 67-505 immediately after "law" and before "is authenticated." That is, before the Secretary believes he must certify a law under this statute, the Secretary would require (1) passage of a bill by both houses, (2) the Governor's failure to return the bill within five days, (3) thereby becoming law, *and* (4) a separate authentication by the Governor. Not only does the word "and" not appear in the statute, it would make no sense to require something more from the Governor when he has failed to act on a bill. To read this into the statute would in effect enlarge the Governor's veto powers considerably, as he could refuse to provide the authentication for the bill to become law. This would allow the Governor a pocket veto, which this Court has explicitly stated is not allowed under the Idaho Constitution. *Cenarrusa v. Andrus*, 99 Idaho at 406, 582 P.2d at 1085.

In addition to the certification requirement, the Secretary must deposit the law with the laws in his office and designate a chapter number for it in the Idaho Code. Idaho Code § 67-506. Although the Secretary has no reasonable basis in law or fact, he has not complied with these duties, and his inaction is preventing this law from taking effect on its effective date of July 1, 2015.

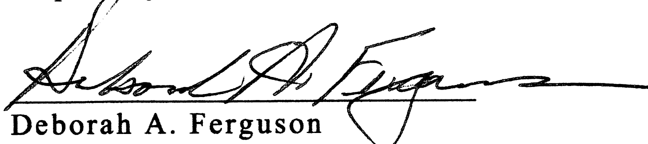
CONCLUSION

The powers defined by the Constitution are an essential part of the checks and balances of our democracy. The Governor cannot enlarge his veto power under the Constitution. Likewise the Legislature cannot overlook a failed veto attempt, and expand its own lawmaking authority. The Constitution was not created for the benefit of the Governor or the Legislature. Instead, it was created by our founders to protect the citizens of Idaho and their right to have duly enacted laws enforced. This basic right goes to the heart of our democracy. The Secretary of State has abrogated his duty to certify S.B. 1011 as a law. Only this Court has the power to promptly correct this injustice and to preserve the integrity of the lawmaking process.

For these reasons, Petitioner respectfully requests that this Court issue the writ of mandamus and compel the Secretary of State to certify 2015 Senate Bill 1011 as law.

Dated: June 3, 2015.

Respectfully submitted,



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