IN THE SUPREME COURT OF THE THE STATE OF IDAHO

In Re: VERIFIED PETITION FOR WRIT OF MANDAMUS RONALD M. NATE, et al., Petitioners, v. LAWRENCE DENNEY, Secretary of State of the State of Idaho, in his official capacity, Respondent, and GOVERNOR C.L. "BUTCH" OTTER, Intervenor-Respondent.	**Supreme Court Docket No. 45001-2017**

SECRETARY OF STATE'S RESPONSE TO AMENDED VERIFIED PETITION FOR WRIT OF MANDAMUS

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STATEMENT OF THE CASE

I. INTRODUCTION

Petitioners have disguised what should be a declaratory judgment action asking for reversal or overrule of *Cenarrusa v. Andrus*, 99 Idaho 404, 582 P.2d 1082 (1978), as a Petition for a Writ of Mandamus. Absent this Court reversing or overruling *Cenarrusa*, there exists no legal duty to cause a writ to issue. This disguised action should be rejected because until *Cenarrusa* is altered, the Secretary of State clearly acted in full compliance with his existing legal duty. Based upon the Secretary's full compliance with the Court's direction in *Cenarrusa,* this brief will make the following points urging dismissal of this Writ:

(1) Mandamus relief is not appropriate under the established standard because the petitioners have not shown, and cannot show, that the Secretary of State has failed to discharge a clear ministerial duty to assign a chapter number to the vetoed bill in view of *Cenarrusa*;

(2) There is no basis for the Court to assume original jurisdiction over the proceeding under Article V, Section 9;

(3) Petitioners underlying legal theory for issuance of the Writ is contrary to the Rule of Law and Separation of Powers;

(4) The Secretary of State takes no position on the petition's merits if the Court does assume original jurisdiction; and

(5) Any overruling of *Cenarrusa* should be wholly prospective given the Governor's justified reliance on it and the potential for uncertainty over the validity of past vetoes similarly issued under the time period sanctioned in *Cenarrusa*.

As more fully explained below, no plausible exigency has been advanced for issuance of a Writ.

II. FACTS

The facts in this case are straightforward and largely without dispute. There is no dispute that House Bill No. 67aaS, aaS (H. 67) passed both chambers of the Idaho legislature and was delivered to the Governor for his consideration. Final passage of H. 67 was completed on March

27, 2017, with the bill enrolled and signed by the Speaker of the House on March 28, 2017. *House Journal*, 10 (Mar. 27, 2017 (passage)); *House Journal*, 3 (Mar. 28, 2017 (Enrolled/ Signed)). H. 67 was then returned to the Senate, where it was enrolled and signed by the President of the Senate on March 29, 2017. *Senate Journal,* 4 (Mar. 29, 2017 (Enrolled/ Signed). The Idaho Legislature adjourned *sine die* on March 29, 2017. *Senate Journal*, 3 (March 29, 2017); *House Journal*, 2 (Mar. 29, 2017). H. 67 was presented to the Governor at 12:05 pm on March 31, 2017. The Governor returned the bill with his objections, vetoed, on April 11, 2017 to the Secretary of State. *House Journal*, 6 (Mar. 29, 2017 (Actions Recorded After *House Sine Die*)). The Secretary of State accepted this veto because it was returned to his office nine days from presentment, Sundays excepted, in accordance with the holding in *Cenarrusa* that the Governor is permitted ten days from presentment after adjournment of the Legislature within which to consider legislation. No authority within the Idaho Constitution or the Idaho statutes allows the Secretary of State to ignore a holding of the Idaho Supreme Court.

ISSUE PRESENTED BY PETITION FOR WRIT

Does the Secretary of State have a clear legal duty to ignore the precedent of the Idaho Supreme Court, substituting his interpretation of the Constitution for that of the Court's regarding the Governor's time limit for consideration of legislation following adjournment and certifying H. 67 as law?

SUMMARY OF THE ARGUMENT

In 1978, the precise scenario presented in the present petition was presented to the Idaho Supreme Court. Namely, the Governor exercised his veto authority under Article IV, § 10 after the legislature had adjourned. The question before the court was identical—Did the ten-day post adjournment deadline begin to run immediately upon adjournment, or following presentment of

the legislation to the Governor? The Court examined the issue and held: "We conclude that the governor has ten full days from the date of presentment in which to consider bills presented to him after adjournment of the Idaho Legislature." The Governor's veto is exercised by filing the bill with his objections in the Secretary of State's office. If the objections are received by the Secretary of State within the time period directed by this Court's interpretation of Article IV, § 10; the Secretary of State has no discretion and must accept the veto as valid.

Within this petition, there is no dispute as to whether the veto was exercised in accordance with *Cenarrusa*. The Secretary of State therefore clearly fulfilled his existing legal duty. Since there is no dispute as to whether the Secretary of State fulfilled his legal duty under *Cenarrusa*, there is no legal basis for a writ to issue. Any contrary conclusion effectively endorses Executive Branch nonacquiescence.

This petition should be rejected, and Petitioners directed to pursue appropriate declaratory or other relief before a district court, with eventual appeal to this Court. Given the straightforward nature of the issue, district court and any appellate review can be expedited. Indeed, had Petitioners adopted that approach initially, the controversy might now be approaching final judgment under I.R.C.P. 12(b)(6) or 56 proceedings given the obligation of a district court to adhere to *Cenarrusa*.

ARGUMENT

I. NO ARTICLE V, SECTION 9 WRIT HAS BEEN PLEADED

Article V, section 9 of the Idaho Constitution confers original jurisdiction on the Court to issue writs of mandamus. The jurisdiction of this court is fixed by the Constitution and cannot be broadened or extended by the Legislature. *Neil v. Pub. Util. Comm'n*, 32 Idaho 44, 178 P. 271, 273 (1919). The Court has repeatedly held that mandamus is not a writ of right and the

allowance or refusal to issue a writ of mandate is discretionary. *Hunke v. Foote,* 84 Idaho 391, 398, 373 P.2d 322, 325 (1962); *Kerley v. Wetherell,* 61 Idaho 31, 48, 96 P.2d 503, 511 (1939); *Reynard v. City of Caldwell,* 53 Idaho 62, 81, 21 P.2d 527, 534 (1933); *Logan v. Carter,* 49 Idaho 393, 403, 288 P. 42clc4, 427 (1930); *State v. Malcom,* 39 Idaho 185, 190, 226 P. 1083, 1085 (1924); *State v. Banks,* 37 Idaho 27, 34, 215 P. 468, 470 (1923). Furthermore, Idaho law requires that a writ may be issued only where there is not a plain, speedy, and adequate remedy in the ordinary course of law. I.C. § 7–303.

In *Utah Power & Light Co. v. Campbell*, 108 Idaho 950, 953, 703 P.2d 714, 717 (1985), the Court stated that "[m]andamus will lie if the officer against whom the writ is brought has a 'clear legal duty' to perform the desired act, and if the act sought to be compelled is ministerial or executive in nature." Additionally, "[m[andamus will lie only in those cases where there is not a plain, speedy and adequate remedy in the ordinary course of law." *Kolp v. Bd. of Trustees,* 102 Idaho 320, 323, 629 P.2d 1153, 1156 (1981); *accord Wasden ex rel. State v. Idaho State Bd. of Land Comm'rs*, 150 Idaho 547, 551-52, 249 P.3d 346, 350-51 (2010). Here, the Secretary of State has acted consistently with his *existing* legal duty. *Cenarrusa* is the law of Idaho, and the Secretary has undisputedly acted in full compliance with it. Plainly, writ of mandate may not issue under these circumstances, and Petitioners not unexpectedly cite no authority for contrary proposition. If Petitioners seek overruling of *Cenarrusa,* their remedy lies in pursuing their challenge before a district court in the form of a proceeding seeking equitable prospective relief in the form of a declaratory judgment and/or an injunction.

Cenarrusa itself is singularly instructive on this score. It was initiated as a declaratory judgment action in the district court. *Id.*, 99 Idaho at 406, 582 P.2d at 1084 ("To resolve the controversy, the Secretary of State initiated this declaratory judgment action, naming the

Governor as defendant."). Petitioners possess the same recourse, with the entire array of litigation tools within the district and appellate system available to resolve this matter in a way that recognizes the limits of this Court's original jurisdiction under Article IX, Section 9 and still obtains an expedition disposition of their claim that *Cenarrusa* warrants overruling. A plain, speedy, and adequate remedy thus exists in the ordinary course of law.

Although not directly bearing upon the inappropriateness of mandamus relief, one further point must be emphasized. They argue the existence of imminent prejudice because the effective date of the legislation is January 1, 2018. Petitioners are correct that the *tax credit* is repealed effective January 1, 2018. But the *actual tax* would not be repealed until June 1, 2018. H.B. 67, § 5 (Section 1 effective June 1 2018; Sections 2 and 3 effective Jan. 1, 2018; and Section 4 effective July 1, 2018). Absent veto, the bill's practical effect would be a five-month period in which sales tax would be collected on groceries but no credit could be claimed on the 2018 return (which would be filed in 2019). There accordingly appears no need for a decision prior to July 1, 2018. In any event, if Petitioners eventually prevail on their claim and this Court does not make *Cenarrusa*'s overruling prospective—an issue discussed below—the 2018 legislative session will provide an opportunity to address any taxpayer prejudice. Based upon the future effective dates and the Legislature's ability to respond directly to any issues that may arise, no exigency exists demanding this Court's immediate attention.

II. PETITIONERS' UNDERLYING LEGAL THEORY FOR ISSUANCE OF THIS WRIT THREATENS THE RULE OF LAW AND SEPARATION OF POWERS

Petitioners' invocation of mandamus as an appropriate avenue for relief also ignores the fundamental element of state governance under the Idaho Constitution: separation of powers. They effectively ask this Court to endorse inter-Branch nonacquiescence—*i.e.*, one Branch's intentionally not complying with the decision of another Branch. This theory has been uniformly

rejected by courts. The principle that neither the Legislature nor the Executive can regulate or alter in any way this Court's jurisdiction is basic to the doctrine of separation of powers. Idaho Const. art. II, § 1; *see also Mead v. Arnell*, 117 Idaho 660, 663, 791 P.2d 410, 413 (1990). The Court's holding in *Cenarrusa* establishes the rule of law within Idaho regarding the Governor's exercise of a post-adjournment veto. Only two methods exist to change that constitutional interpretation: (1) constitutional amendment; or (2) a subsequent holding from this Court overruling *Cenarrusa*. Undeterred, Petitioners pitch their tent on a third alternative in contending that the Secretary of State failed to discharge a clear legal duty. Stripped down to its logical core, their claims posits that the Secretary has the ministerial duty to reach his own determination about the time limits imposed on the veto power by Article IV, Section 10 and therefore must disregard the holding in *Cenarrusa* if he reaches a contrary conclusion about how those time limits should be computed.

For example, Petitioners state: "[The Secretary of State] has refused to do so, relying on this Court's decision in *Cenarrusa* . . . in which this Court in a 3-2 decision granted the Governor more than ten days to veto a bill after the legislature's adjournment even though this grant of additional time is not found anywhere in the Idaho Constitution and conflicts with the express language of the Idaho Constitution." (Am. Verified Pet. at 2-3,) What they omit is that *Cenarrusa* was the Court's interpretation of the meaning and effect of Article IV, Section 10. Interpretation of the law is the sole province of the judiciary. *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803). Once the Court has made its interpretation, that holding becomes the rule of law within Idaho. It cannot be arbitrarily ignored or changed by Executive or Legislative Branch officials.

Here, this fundamental precept flowing from Article II, Section 2 means that the Secretary of State is bound by the Court's interpretation of Article IV, Section 10 and, until *Cenarrusa* is overruled, cannot substitute his view of the Constitution for the Court's. A decision by the Court, in other words, is binding on all other state courts within Idaho, as well as executive and legislative officers, concerning the issues determined. *See Stein v. Morrison*, 9 Idaho 426, 453, 75 P. 246, 255 (1904) ("It seems to us that to keep within the spirit of our Constitution, (article 2, § 1) and form of government, which recognizes the independence and specific character of the 'three distinct departments' of government, that the judicial department could not attempt to prohibit either of the other departments from acting within the recognized scope of their respective branches of the government, but that, on the other hand, the legal effect of such action after it has been taken may be inquired into by the court."). Petitioners' argument that the Secretary of State should have ignored *Cenarrusa* and certified H. 67 as law endorses a rule that the Secretary has discretion to operate outside the law. *Id.* Thus, until the Court overrules *Cenarrusa*, the Secretary's legal duty is clear: accept the Governor's veto as valid.

III. THE SECRETARY OF STATE TAKES NO POSITION ON THE MERITS

The Secretary of State offers no argument as to the interpretation of Article IV, Section 10. It should be noted that his predecessor argued in *Cenarrusa* that the plain text of the Constitution provided for ten days following adjournment, but the Court rejected that argument. *Cenarrusa* at 406, 582 P.2d at 1084 ("The Secretary of State urges to the contrary. . . . 'After adjournment the government [*sic*] must act within ten days (Sundays excepted) Regardless [*sic*] of the number of days he has had a bill after its presentment to him.'"). With that question answered, Secretary Cenarrusa and his successors fully complied with the direction of the Court, and Secretary Denney will continue to do so. Recognizing that the veto power rests solely

within the Governor, the Secretary defers to the Governor's argument regarding the exercise of his constitutional authority. The Secretary will fulfill his constitutional and statutory obligations with regard to the filing of a veto or certification of law as directed by this Court.

IV. IF THIS COURT REVERSES *CENARRUSA*, SUCH REVERSAL SHOULD APPLY PROSPECTIVELY

This Court most recently summarized the controlling principles in *BHA Investments, Inc. v. City of Boise*, 141 Idaho 168, 173, 108 P.3d 315, 320 (2004):

> The decisions of this Court apply prospectively, to all future cases. The issue is whether and to what extent they apply retroactively to past or pending cases. The usual rule is that decisions of this Court apply retroactively to all past and pending cases. *State v. Tipton,* 99 Idaho 670, 587 P.2d 305 (1978). "For policy reasons, however, this Court has discretion to limit the retroactive application of a particular decision. We may hold that it does not apply even to the case in which the decision was announced; or that it applies only to that case and not to other past or pending cases; or that it applies to both that case and pending cases, but not to past cases. When deciding whether to limit the retroactive application of a decision, we weigh three factors: (1) the purpose of the decision; (2) the reliance upon the prior law; and (3) the effect upon the administration of justice if the decision is applied retroactively. *Thompson v. Hagan,* 96 Idaho 19, 523 P.2d 1365 (1974). We balance the first factor against the other two to determine whether to limit the retroactive application of the decision. *Jones v. Watson,* 98 Idaho 606, 570 P.2d 284 (1977).

Application of these factors leaves no legitimate doubt about the propriety of a prospective ruling if the Court overrules *Cenarrusa*.

The first factor is the purpose of this Court's decision. In *Cenarrusa*, the Court interpreted Article IV, Section 10 to provide clear direction to the Governor, Secretary of State, and the Legislature with regard to deadline for exercise of a post legislative adjournment veto. This decision established the rule under which this veto has been contemplated an exercised for the past 39 years. Overruling *Cenarrusa* will reset how these deadlines are calculated when a post adjournment veto is exercised. Based upon this *resetting* of the deadline, prospective application is judicially appropriate.

The second factor is the reliance upon the prior law. In this case, the prior law is an express holding interpreting a constitutional provision by this Court. In sum, the Governor, the Secretary of State and the Legislature are without authority to second-guess such a declaration and are constitutionally bound to follow it. The only recourse is an action asking this Court to overrule *Cenarrusa*. Again, the *Cenarrusa* holding has gone unchallenged and without question in its application for almost four decades. The Secretary of State has no choice but to follow a clear pronouncement of the Court interpreting Article IV, Section 10. Prospective application in this matter insures continued adherence to the rule of law.

The third factor is the effect on the administration of justice, "that is, the number of cases that would be reopened if the decision is applied retroactively," *V–1 Oil Co. v. Idaho Petroleum Clean Water Trust Fund,* 128 Idaho 890, 895, 920 P.2d 909, 914 (1996), or the increase in the number of cases resulting from the determination regarding the decision's retroactivity, *Jones v. Watson,* 98 Idaho 606, 609, 570 P.2d 284, 287 (1977). Here, it is unknown how many post-legislative adjournment vetoes would be affected, but presumably an overturning of *Cenarrusa* and retroactive application would open the door to, at the least, reexamination of many vetoes. Changing any one veto could create uncertainty within the law particularly if subsequent legislation also impacted a previously vetoed enactment that suddenly became operative. As discussed above, moreover, anything less than full prospective application could encourage the Executive and Legislative Branches to second-guess the decisions of Idaho's courts through nonacquiescence. Prospective application of any overruling ensures that the constitutional separation of powers and respect for coequal Branches of government remain intact.

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CONCLUSION

This writ should be denied. It is doctrinally untethered to this Court's original jurisdiction under Article V, Section 9 and flirts dangerously with undermining the separation of powers and rule of law. The Secretary of State acted squarely within the legal confines established under the *Cenarrusa* Court's interpretation of Article IV, Section 10. There is no contrary clearly established legal duty until and if *Cenarrusa* is overruled. Plain, adequate, and speedy remedies at law are available to Petitioners to pursue their claim, particularly in light of the fact that *Cenarrusa* itself was initiated as a declaratory judgment action in district court. Careful study of that case thus provides petitioners with a procedural roadmap to their desired outcome. If the Court takes up the Writ, then any application should be fully prospective to insure minimal injury to 39 years of Executive Branch practice in reliance on *Cenarrusa*.

RESPECTFULLY SUBMITTED this 16th day of May, 2017.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: 

BRIAN P. KANE
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of May, 2017, I caused to be served a true and correct copy of the foregoing by the following method to:

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