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IN THE SUPREME COURT OF THE STATE OF IDAHO

RONALD M. NATE; HEATHER SCOTT; SAGE DIXON; VITO BARBIERI; ERIC REDMAN; RON MENDIVE; MIKE KINGSLEY; THYRA STEVENSON; PRISCILLA GIDDINGS; TERRY GESTRIN; DOROTHY MOON; RYAN KERBY; JUDY BOYLE; GREG CHANEY; BRENT CRANE; LYNN LUKER; JAMES HOLTZCLAW; STEVEN HARRIS; THOMAS DAYLEY; JOHN VANDER WOUDE; CHRISTY ZITO; JEFF THOMPSON; BRYAN ZOLLINGER; AND KAREY HANKS, House Representatives; and STEVE VICK; MARY SOUZA; DAN FOREMAN; STEVEN THAYN; CLIFFORD BAYER; LORI DEN HARTOG, Senators,

Petitioners,

v.

LAWERENCE 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

REPLY TO SECRETARY OF STATE DENNEY AND GOVERNOR OTTER'S RESPONSES TO AMENDED VERIFIED PETITION FOR WRIT OF MANDAMUS

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"[T]his Court may 'exercise jurisdiction to review a petition for extraordinary relief where the petition alleges sufficient facts concerning a possible constitutional violation of an urgent nature.'" *Coeur D'Alene Tribe v. Denney*, 161 Idaho 508, ---, 387 P.3d 761, 766 (2015) (quoting *Idaho Watersheds Project v. State Bd. of Land Comm'rs,* 133 Idaho 55, 57 (1999)). This Court has shown a "willingness to relax ordinary standing requirements in other cases where: (1) the matter concerns a significant and distinct constitutional violation, and (2) no party could otherwise have standing to bring a claim." *Id.*, 161 Idaho at ---, 387 P.3d at 767.

"It is this Court's responsibility to ensure that the Idaho Constitution's mandate that '[a]ll political power is inherent in the people [and] Government is instituted for their equal protection and benefit' is zealously protected." *Id.*, 161 Idaho at ---, 387 P.3d at 775 (quoting *Washington State Legislature v. Lowry,* 931 P.2d 885, 891–92 (1997)). "[T]his Court has insisted upon strict adherence to the procedures outlined in our Constitution for enacting laws and in exercising the veto power." *Id.*, 161 Idaho at ---, 387 P.3d at 767. "[T]he provisions are mandatory and ... it is the imperative duty of the ... executive ... to obey them." *Id.* "[T]he duty of supporting the constitutional provisions 'is imposed upon all public officers by the solemn obligations of the official oath, which obligations cannot be discharged by disobeying, ignoring, and setting at naught the plain provisions of the constitution, but only by obedience thereto.'"

Id., 161 Idaho at ---, 387 P.3d at 773 (quoting *Cohn v. Kingsley*, 5 Idaho 416, 421-22 (1897)). "Where the mandatory provisions of the constitution require certain things to be done in exercising the veto power and enacting laws, this Court must guard against violations of those constitutional provisions." *Id.*, 161 Idaho at ---, 387 P.3d at 767.

"The public has a significant interest in the integrity of Idaho's democratic government, and a writ of mandamus is a remedy by which public officials may be held accountable to the citizens for their constitutional duties." *Id.* In *Coeur D'Alene Tribe*, this Court asked and answered the following question:

> If the Tribe does not have standing to bring this writ, the question would then become, who does? Neither the members of the Senate, the Governor, nor the Secretary of State appear ready or willing to challenge the constitutionality of the Governor's purported veto or of the Senate's actions in this case. Thus, if the Tribe could not bring this writ, there would be no one to enforce the important constitutional provisions involved in this case or to ensure that the integrity of the law-making process is upheld. The legal question before the court involves a fundamental constitutional provision regarding governmental structure and is a matter over which this Court has original jurisdiction pursuant to article V, section 9 of the Idaho Constitution. Such an interest is sufficient to compel an elected official to comply with a non-discretionary constitutional duty through a writ of mandamus, and this Court may therefore entertain the Tribe's plea.

Id., 161 Idaho at ---, 387 P.3d at 767-768.

Here, like the facts in *Coeur D'Alene Tribe*, this case concerns a significant and distinct constitutional violation of the veto power found in article IV, § 10 of the Idaho Constitution. Only this Court is positioned to redress this significant and distinct constitutional violation because (1) any district court will be bound by *stare decisis* to follow *Cenarrusa*; (2) the legislature cannot pass legislation "overriding" *Cenarrusa* because *Cenarrusa* involves an "interpretation" of the Idaho Constitution by a majority of this Court; and (3) only this Court can

reverse *Cenarrusa* to restore the clear, plain, and unambiguous language of article IV, § 10 of the Idaho Constitution to post adjournment vetoes. These narrow circumstances strike at the heart of this Court's constitutional and statutory powers and duties under article V, § 9 of the Idaho Constitution, and Idaho Code § 1-203 conferring to this Court "original jurisdiction to issue writs of mandamus . . . ***and all writs necessary or proper to the complete exercise of its appellate jurisdiction***." (Emphasis added).

Moreover, if Petitioners do not have standing as members of the house and senate who voted in favor of H.B. 67 and whose votes Governor Otter has thwarted by filing a veto outside the time requirements of article IV, § 10, the question then becomes, who does? This is especially true here where both Governor Otter and Secretary Denney not only do not stand ready or willing to challenge the constitutionality of the governor's purported veto, but both Governor Otter and Secretary Denney have filed briefing in opposition to Petitioners' request for relief before this Court. Conceivably, either Governor Otter or Secretary Denney could file a declaratory judgment action like the secretary of state did in *Cenarrusa* or seek a writ before this Court to have this Court address the significant issues in this case. However, this is not likely to happen given that both Governor Otter and Secretary Denney are parties to this case and asking this Court not to reverse *Cenarrusa*.

Finally, Governor Otter argues that there are a "number of parties" who could revisit before a district court the *Cenarrusa* decision. Yet, Governor Otter fails to identify even one of these parties. Instead, Governor Otter summarily concludes that Petitioners do not have standing because they are "similarly situated with all individuals who buy groceries", and

"[s]imply stating an interest in legislation or even advocating for a bill that fails to become law does not create an injury in fact sufficient for standing."[1] Governor Otter's argument answers the question, "If not Petitioners, then nobody"--or at least nobody Governor Otter can identify.

B. Petitioners Have Standing.

This Court has recently set forth the traditional test for standing pursuant to United States Supreme Court jurisprudence:

> [T]o establish standing a plaintiff must show (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a like[lihood] that the injury will be redressed by a favorable decision. An injury sufficient to satisfy the requirement of an injury in fact must be concrete and particularized and actual or imminent, not conjectural or hypothetical.

State v. Philip Morris, Inc., 158 Idaho 874, 881 (2015) (citations omitted) (internal quotation marks omitted).

This Court has further explained that "[a]s a general rule, a citizen or taxpayer, by reason of that status alone, does not have standing to challenge governmental action" and that a "citizen or taxpayer may not challenge a governmental enactment where the injury is one suffered alike by all citizens and taxpayers of the jurisdiction." *Koch v. Canyon Cty.*, 145 Idaho 158, 160 (2008) (citations omitted). However, Idaho has adopted the United State Supreme Court's analysis of associational standing and carved out a narrow exception to the general rule concerning taxpayer standing allowing taxpayers to have standing if nobody else could bring the claim. *Id.* at 161.

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[1] See Brief of Respondent-Intervenor Governor Otter, p.8.

While the exception in *Koch* dealt with article VIII, § 3 of the Idaho Constitution, the exception should apply here. If petitioners as both taxpayers and legislators do not have standing to bring this claim seeking to uphold the plain meaning of the Idaho Constitution, then who could bring this action? As in *Koch*, if this Court were to find that neither taxpayers, legislators, nor anyone else has standing to challenge the constitutionality of Governor Otter's veto, then this Court should apply the taxpayer standing exception found in *Koch*.

Additionally, the United States Supreme Court has held that a group of state legislators had standing to bring a mandamus action claiming an institutional injury. The United States Supreme Court explained:

> [W]e find no departure from principle in recognizing in the instant case that at least the twenty senators whose votes, if their contention were sustained, would have been sufficient to defeat the resolution ratifying the proposed constitutional amendment, have an interest in the controversy which, treated by the state court as a basis for entertaining and deciding the federal questions, is sufficient to give the Court jurisdiction to review that decision.

Coleman v. Miller, 307 U.S. 433, 446, 59 S. Ct. 972, 979, 83 L. Ed. 1385 (1939).

Petitioners in this case as taxpayers have shown an injury in fact because if Governor Otter's veto stands, house member Petitioners collectively will suffer an injury in fact. Their collective votes caused H.B. 67 to pass in the house. The house has 70 members. This means that 36 house members are needed to pass a bill. Here, 51 house members voted in favor of H.B. 67.[2] The "aye" votes from the 24 house member Petitioners caused H.B. 67 to pass. Thus, house member Petitioners have standing because (1) their injury in fact is the

[2] H. Journal of the Idaho Leg., 64th Leg., 1st Session, at 10 (March 27, 2017).

disenfranchisement of their votes; (2) caused by Governor Otter's vetoing H.B. 67 outside the time requirements of article IV, § 10; and (3) that this Court's reversal of *Cenarrusa* will redress.

II. MANDAMUS IS THE PROPER REMEDY, AND THIS IS THE PROPER FORUM.

Secretary Denney and Governor Otter correctly argue that a writ of mandamus will lie if an officer against whom the writ is brought has a "clear legal duty" to perform an act that is ministerial or executive in nature. Secretary Denney and Governor Otter further argue that the precedent governing this case is found in *Cenarrusa v. Andrus*, 99 Idaho 404 (1978), and not in article IV, § 10 of the Idaho Constitution. And Secretary Denney and Governor Otter finally argue that under *Cenarrusa, existing as it does today*, Secretary Denney has a "clear legal duty" to certify Governor Otter's veto of H.B. 67, thus making a writ of mandamus improper.

Traditionally, "courts do not pronounce new law, but only discover the true law." *Thompson v. Hagan*, 96 Idaho 19, 25 (1974). This concept derives from the mid-eighteenth century where Sir William Blackstone wrote that judicial power is "not delegated to pronounce a new law, but . . . maintain and expound the old one." 1 W. Blackstone, Commentaries *69 (1765). Nowadays, "[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each." *Marbury v. Madison,* 5 U.S. 137, 177, 1 Cranch 137, 177, 2 L.Ed. 60 (1803). As former Idaho Supreme Court Justice McDevitt has explained, "[w]hile we must adhere to our previous decisions, *stare decisis* does require us to reexamine our prior precedents to determine whether they are still valid." *State v. Card*, 121 Idaho 425, 444 (1991). And this

means that "when the Court changes its mind, the law changes with it." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 550, 111 S.Ct. 2439, 2451 (1991) (O'Connor, J., dissenting).

Here, this Court is called upon to determine whether the 10-day after adjournment requirement found in article IV, § 10 of the Idaho Constitution applies, or whether the 10-day after presentment after adjournment rule in *Cenarrusa* applies to govern the veto in this case. Because these are indeed two "laws" that conflict with each other, this Court must decide on the operation of each. After this Court discovers the "true law," then Secretary Denney's "clear legal duty" will be known, and Secretary Denney will know whether to certify H.B. pursuant to Idaho Code § 67-505. In this process, if this Court were to overrule *Cenarrusa* and hold that Governor Otter's veto did not comply with the time requirements found article IV, § 10 of the Idaho Constitution, this would provide a "clear legal duty" for Secretary Denney to follow. In such circumstance, a writ of mandamus would be proper because Secretary Denney has filed Governor Otter's veto outside the time requirements found in article IV, § 10 of the Idaho Constitution. But until this Court "expounds" on *Cenarrusa*, article IV, § 10 of the Idaho Constitution, and "discovers the true law," this Court should reserve ruling on Secretary Denney's "clear legal duty" because it is only after this Court "expounds" on *Cenarrusa*, article IV, § 10 of the Idaho Constitution, and "discovers the true law" that this Court can make this determination.

The facts of this case also satisfy the requirement that a writ may be issued only where there is not a plain, speedy, and adequate remedy in the ordinary course of the law. *Kolp v. Bd.*

of Trustees of Butte Cty. Joint Sch. Dist. No. 111, 102 Idaho 320, 323 (1981). H.B. 67 contemplates the elimination of sales tax on "food" together with a corresponding elimination of the grocery tax credit. Implementing elimination of sales tax on "food" is presumably an involved logistical and administrative undertaking. For example, the state tax commission will likely need to write guidelines specifying exactly what qualifies as "food" for taxation purposes. In addition, stores selling "food" will need time to write and implement computer programing to accommodate the new guidelines. Given that this is an involved undertaking, the legislature has staggered implementation of the new legislation to start January 1, 2018, to be completed by July 1, 2018, rather than have all parts of H.B. 67 become effective July 1, 2017.

If the People of the State of Idaho are to obtain the tax relief passed by supermajorities in both the house and the senate by July 1, 2018, then "time is of the essence." Specifically, contrary to Secretary Denney's claim that "[t]here accordingly appears no need for a decision prior to July 1, 2018," waiting until July 1, 2018 or thereafter for a decision in this case would undoubtedly delay implementation of H.B. 67 for at least another year. If the People are to obtain the benefits of H.B. 67 as a supermajority of their elected representatives in both the house and the senate contemplated, they need this issue resolved now because resolution before the district court and then on appeal will delay the effects of H.B. 67 for one year.

Contrary to Govern Otter and Secretary Denney's contention that Petitioners can avail themselves of filing this matter before a district court, a district court would provide no "adequate" remedy because the district court would be bound by *stare decisis* to follow

Cenarrusa that Petitioners are seeking to reverse. Only this Court can reverse *Cenarrusa* making the action before the district court a dress rehearsal to get before this Court.

In this regard, Secretary Denney would have 21 days to respond to an action filed with a district court. Governor Otter would again seek to intervene. Assuming no basic discovery, the soonest Petitioners could get a hearing on summary judgment would likely be 60-90 days in Ada County. The district court would likely take another 30 days to issue a decision. Any motion for reconsideration could easily extend the matter for another 30 days. Given the law of *stare decisis*, the district court is bound to follow *Cenarrusa* and rule against Petitioners who would then file an appeal and end up back before this Court likely in late fall 2017. On appeal, there would be at least 30 days to get the record settled and another 30 days to file an opening brief. Assuming no briefing extensions, the matter would be fully briefed by next February or March. The matter might be set for oral argument in June or July 2018 with a court decision within 30 days. By this time, if Petitioners are successful on appeal, H.B. 67 could become law effective retroactive to January and July 2018 without any time for implementation. Also, because a district court will be bound by *stare decisis* to follow *Cenarrusa*, Petitioners have no "adequate" remedy before any district court.

Secretary Denney further argues that "the 2018 legislative session will provide an opportunity to address any taxpayer prejudice."[3] Again, even if the legislature were to address "taxpayer prejudice," it is impossible to fully erase "taxpayer prejudice" caused by delayed implementation of H.B. 67 because implementation of H.B. 67 will take one year to achieve.

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[3] See Secretary of State Denney's Response to Amended Verified Petition for Writ of Mandamus, p. 5.

implementation delayed is tax relief denied. Nobody can expect the state tax commission to begin preparing tax guidelines pending the uncertain judicial fate of H.B. 67. And saying that the legislature will have an "opportunity" to act really means nothing at all, and saying the legislature would act is speculative at best.

Most importantly, even though the district court and the legislature are theoretically proper forums to resolve a dispute involving the validity of a governor's veto under article IV, § 10 of the Idaho Constitution, this Court has found that a petitioner for a writ of mandamus satisfies the lack of an adequate, plain or speedy remedy when (1) "the facts [of the] case demonstrate a clear constitutional violation," and (2) "the resolution of the case involves an important constitutional question." *Coeur D'Alene Tribe v. Denney*, 161 Idaho 508, ---, 387 P.3d 761, 776 (2015). Here, Petitioners have demonstrated a clear constitutional violation for the reasons set forth in this brief. Speaking of Governor Otter's failed veto in *Coeur D'Alene Tribe*, this Court said, "This Court has a significant interest" in taking a case and issuing a writ of mandamus "to correct the constitutional violation that has occurred." *Id.*

For all these reasons, Petitioners have no plain, speedy, and adequate remedy in the ordinary course of law, this Court is the proper forum, and a writ of mandamus compelling Secretary Denney to certify H.B. 67 as law is an appropriate remedy in this case.

Governor Otter raises the issue that this Court should deny a writ even if it satisfies this Court's previous tests because "[i]ssuing this writ would harm the executive branch and future governors by effectively reducing the ten days under the Constitution the chief executive has to

consider bills passed *sine die*."[4] Governor Otter's argument is that issuing the writ would disrupt the balance between the legislative and executive branches of government when dealing with vetoes after adjournment. But Governor Otter's quarrel is not actually with issuance of a writ but with the plain, clear, and unambiguous language of article IV, § 10 of the Idaho Constitution that creates the time requirements Governor Otter objects to. Governor Otter's remedy is not found in obstructing the path to constitutional compliance. His remedy is to take his argument to the People and follow the specific amendment process clearly delineated in the Idaho Constitution itself. IDAHO CONST., art. XX, § 1; I.C. § 67-507.

III. PETITIONERS' UNDERLYING LEGAL THEORY FOR ISSUANCE OF A WRIT UPHOLDS THE RULE OF LAW AND RECOGNIZES SEPARATION OF POWERS.

Secretary Denney misunderstands the nature of Petitioners' legal theory for issuance of a writ. Petitioners do not advocate that Secretary Denney (a member of the executive branch) can reach his own determination about the time limits imposed on the veto power found in article IV, § 10 of the Idaho Constitution or ignore the judicial branch's holding in *Cenarrusa*. Instead, Petitioners agree with the Court in *Marbury v. Madison,* 5 U.S. 137, 177, 1 Cranch 137, 177, 2 L.Ed. 60 (1803), that "[i]t is emphatically the province and duty of the judicial department to say what the law is." And it is especially true that when "two laws conflict with each other, the courts must decide on the operation of each." *Id.*

Here, the 10-day after adjournment requirement in article IV, § 10 of the Idaho Constitution conflicts with the 10-day after presentment after adjournment rule in *Cenarrusa*. Moreover, *Cenarrusa* is a decision where a majority of this Court in a narrow 3-2 decision

[4] See Brief of Respondent-Intervenor Governor Otter, p. 12.

unfortunately ignored the plain reading of article IV, § 10 of the Idaho Constitution, instead preferring to rely on hypothetical facts unrelated to the case to reach its decision. In so doing, the majority in *Cenarrusa* amended rather than interpreted article IV, § 10 of the Idaho Constitution, thus accomplishing by judicial fiat what can be accomplished only by following the specific amendment process clearly delineated in the Idaho Constitution itself. IDAHO CONST., art. XX, § 1; I.C. § 67-507. It is on this basis that Petitioners request the judiciary, and specifically this Court, to exercise its original jurisdiction, reexamine *Cenarrusa* consistent with the rule of *stare decisis* to determine whether *Cenarrusa* is still valid, and to discover and apply the "true law" found article IV, § 10 of the Idaho Constitution, which gives rise to a "clear legal duty" for Secretary Denney to follow.

IV. *STARE DECISIS* IS NOT A BAR TO REVERSING *CENARRUSA* THAT IS MANIFESTLY WRONG AND WARRANTS REVERSAL TO VINDICATE PLAIN AND OBVIOUS PRINCIPLES OF LAW FOUND IN ARTICLE IV, SECTION 10 OF THE IDAHO CONSTITUTION.

This Court has recently stated, "[s]tare decisis requires that this Court follow 'controlling precedent unless that precedent is manifestly wrong, has proven over time to be unjust or unwise, or overruling that precedent is necessary to vindicate plain, obvious principles of law and remedy continued injustice.'" *Hoffer v. Shappard*, 160 Idaho 868, 883 (2016) (*quoting State v. Owens*, 158 Idaho 1, 4–5 (2015)). "This Court has recognized that 'where a statute or constitutional provision is plain, clear, and unambiguous, it 'speaks for itself and must be given the interpretation the language clearly implies.'" *Coeur D'Alene Tribe v. Denney*, 161 Idaho 508, ---, 387 P.3d 761, 771 (2015) (quoting *Verska v. St. Alphonsus Reg'l. Med. Ctr.*, 151 Idaho 889, 895 (2011) (quoting *Moon v. Inv. Bd.*, 97 Idaho 595, 596 (1976))). "This Court reviews the

provision's language as a whole, considering the meaning of each word, so as not to render any word superfluous or redundant. Thus, the starting point in this Court's interpretation of the relevant constitutional and statutory provisions is the plain language." *Id.* (citation omitted).

Governor Otter's attempted veto of H.B. 67 was untimely based on the plain language of the relevant constitutional provisions together with the undisputed and unambiguous facts. Idaho Constitution, article IV, § 10 addresses the Governor's veto power. It provides:

> Every bill passed by the legislature shall, before it becomes a law, be presented to the governor. If he approve, he shall sign it, and thereupon it shall become a law; but if he do not approve, he shall return it with his objections to the house in which it originated, which house shall enter the objections at large upon its journals and proceed to reconsider the bill. If then two-thirds of the members present agree to pass the same, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered; and if approved by two-thirds of the members present in that house, it shall become a law, notwithstanding the objections of the governor. In all such cases the vote of each house shall be determined by yeas and nays, to be entered on the journal. *Any bill which shall not be returned by the governor to the legislature within five days (Sundays excepted) after it shall have been presented to him, shall become a law in like manner as if he had signed it, unless the legislature shall, by adjournment, prevent its return, in which case it shall be filed, with his objections, in the office of the Secretary of State within ten days after such adjournment (Sundays excepted) or become a law.*

Idaho Const. art. IV, § 10 (emphasis added).

The plain language of article IV, § 10 of the Idaho Constitution requires a governor to file a veto, with his objections, with the secretary of state within 10 days after adjournment of the legislature *sine die* (Sundays excepted). The governor's duty under article IV, § 10 is plain, clear, and unambiguous; therefore, it "'speaks for itself and must be given the interpretation the language clearly implies.'" *Coeur D'Alene Tribe v. Denney*, 161 Idaho 508, ---, 387 P.3d 761, 771 (2015) (quoting *Verska v. St. Alphonsus Reg'l. Med. Ctr.*, 151 Idaho 889, 895 (2011) (quoting *Moon v. Inv. Bd.*, 97 Idaho 595, 596 (1976))).

Given that this Court can reach no conclusion other than that article IV, § 10 of the Idaho Constitution requires a governor to file a veto within 10 days after *adjournment*, not 10 days after *presentment*, this Court can assuredly say that the precedent in *Cenarrusa* is "manifestly wrong" and overruling *Cenarrusa* is "necessary to vindicate plain, obvious principles of law" set forth in article IV, § 10 of the Idaho Constitution. Accordingly, this Court should overrule *Cenarrusa*.

A. Relying On Hypothetical Facts Unrelated To The Facts Of The Case In *Cenarrusa*, A Majority Of The Court Wrongly Inserted A "Presentment" Requirement Where None Exists.

The Framers of article IV, § 10 of the Idaho Constitution used the word *presentment* when addressing a governor's vetoing a bill while the legislature is in session. Use of this word shows their intent that the governor's time to veto a bill while the legislature is in session runs from the date of *presentment* during the legislative session. These same Framers did not use the word *presentment* when addressing a governor's vetoing a bill after adjournment *sine die*. Given that the Framers used the word *presentment* in the very same sentence addressing vetoing a bill while the legislature is in session but did not use the word *presentment* in the very same sentence addressing vetoing a bill after *adjournment*, the framers obviously intended that the governor's time to veto while the legislature is not in session begins to run upon *adjournment*, not *presentment*.

Undeterred by the plain, clear and unambiguous language of article IV, § 10 and the clear intent of the Framers, a 3-2 majority in *Cenarrusa* concluded that the governor has 10 days after *presentment* in the case of adjournment to file his veto with the secretary of state.

"Unfortunately, a majority of the *Cenarrusa* Court chose to disregard the plain meaning of the Idaho Constitution in order to uphold the veto under a hypothetical set of facts that were unrelated to the facts of the case." *Coeur D'Alene Tribe v. Denney*, 161 Idaho 508, ---, 387 P.3d 761, 785 (2015) (Justices Eismann and W. Jones specially concurring). Specifically, the majority in *Cenarrusa* speculated that a mischievous legislature could delay presentment beyond the time a governor could act to veto a bill. Therefore, the majority concluded that in the case of adjournment, the governor's 10 day time limit begins to run upon presentment, not adjournment.

The majority in *Cenarrusa* bases its argument on hypothetical facts stacked on hypothetical facts. Joint Rules 4 and 5 of the Idaho Legislature require that a bill be enrolled not later than 48 hours after the time of passage and that all bills be delivered to the governor for his consideration within 72 hours after enrollment.[5] Thus, for the majority's reasoning in *Cenarrusa* to be sound, one must assume that (1) the legislature would engage in mischief by delaying delivery of a bill after adjournment beyond the 10-day veto time period of article IV, § 10 (something that has not happened since Idaho became a state); and (2) the legislature would also have to violate its own Joint Rules 4 and 5 (something that has not happened ever). The problem with this reasoning is that "'public officers are bound to perform their duties with diligence and fidelity. That they may act otherwise cannot be assumed as a justification for denying them the right to act at all.'" *Cenarrusa v. Andrus*, 99 Idaho 404, 415 (1978) (Justices Donaldson and D. Shepard dissenting in part and concurring in part) (quoting Opinions of the

[5] See Joint Rules 4 and 5, Idaho Leg. https://legislature.idaho.gov/statutesrules/jointrules/.

Attorney General of the State of Oregon, #5204, p. 189, April 19, 1961 (quoting *Hartness v. Black*, 114 A. 44, 50 (Vt. 1921))).

Importantly, as in *Cenarrusa*, no facts exist in this case to even remotely suggest that the legislature delayed presentment to Governor Otter. In this case, the legislature adjourned *sine die* on March 29, 2017, and delivered H.B. 67 to Governor Otter on March 31, 2017—just two days after adjournment and giving Governor Otter until April 10, 2017 to file his veto. As Justice Donaldson presumed, the legislature "'perform[ed] their duties with diligence and fidelity.'" *Id.* Thus, the reasoning behind the majority's decision in *Cenarrusa* does not apply here.

B. The Majority In *Cenarrusa* Amended The Idaho Constitution Rather Than Interpret It.

Petitioners submit that the majority in *Cenarrusa* did more than simply "interpret" article IV, § 10 of the Idaho Constitution. The majority in *Cenarrusa* amended article IV, § 10 of the Idaho Constitution because the majority added the word *presentment* where clearly it does not exist, and the Framers intended that it not be. However, the Idaho Constitution can be amended only through the specific provisions detailed in the Idaho Constitution itself. This requires supermajorities in both the house and the senate together with a majority of the state electorate. IDAHO CONST., art. XX, § 1; I.C. § 67-507. A majority of this Court does not possess this power.

C. Governor Otter Should Take His Arguments To Amend The Constitution To The People, Not This Court.

Governor Otter argues extensively that a majority of this Court got it right in *Cenarrusa* balancing the legislative and executive authorities. Governor Otter predictably recites the

arguments and reasoning a majority of this Court relied on as the basis for its decision in *Cenarrusa*. Petitioners will not respond to these arguments except to say that Governor Otter makes the same mistake a majority of this Court made in *Cenarrusa* because the arguments (1) ignore the clear, plain and unambiguous language of article IV, § 10 of the Idaho Constitution; (2) call on this Court to amend article IV, § 10 of the Idaho Constitution through judicial power rather than by the power reserved to the legislature and the People; and (3) are based on a hypothetical set of facts unrelated to the facts of the case. In other words, Governor Otter's arguments on the merits of amending article IV, § 10 of the Idaho Constitution to include the word *presentment* after adjournment are proper for a political campaign directed at the legislature and the People rather than a legal argument directed at this Court that lacks the power to amend the Idaho Constitution.

V. THIS COURT SHOULD AT A MINIMUM APPLY A REVERSAL OF *CENARRUSA* IN A MODIFIED PROSPECTIVE FASHION IN WHICH THE NEW DECISION APPLIES PROSPECTIVELY AND TO THE PARTIES BRINGING THIS ACTION.

Secretary Denney asks that this Court apply any reversal of *Cenarrusa* prospectively only. "This Court's usual rule is that our decisions apply retroactively to all past and pending cases." *Sanders v. Board of Trustees of Mountain Home School District No. 193*, 156 Idaho 269, 273 (2014). This Court has "discretion to limit the retroactive application of a particular decision for policy reasons." *Id.* This Court has stated:

> 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).

BHA Investments, Inc. v. City of Boise, 141 Idaho 168, 173 (2004). With regard to the third factor, this Court considers "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 (1996), or the increase in the number of cases resulting from the determination regarding the decisions retroactivity, *Jones v. Watson*, 98 Idaho 606, 609 (1977)." *Id.*

Importantly, this Court does not just "evaluate" the relevant factors, but balances the first factor against the other two to determine whether to limit the retroactive application of the decision. *BHA Investments, Inc.*, 141 Idaho at 173. Another consideration this Court has identified is that "'the person who successful[ly] challenges existing legal doctrine can be . . . regarded as having thereby set himself apart.'" *Dawson v. Olson*, 94 Idaho 636, 640 (1972) (quoting Chief Justice Schaefer in *The Control of 'Sunbursts': Techniques of Prospective Overruling*, 24th Annual Benjamin N. Cardozo Lecture, 1967, reprinted in 42 N.Y.U.L.Rev. 631, 638 (1967)). Therefore, "special consideration . . . may extend to a plaintiff who pioneers a successful reform in the law." *Dawson*, 94 Idaho at 640. This explains "[t]he practice of overruling prospectively except as to the litigants then at bar" even when the court protects a substantial reliance interest by applying a decision prospectively. *Id.* The obvious rationale for this practice is that without it plaintiffs will have virtually no incentive to challenge bad law that will perpetually languish and thereby afflict society with bad public policy.

Here, application of these factors should cause this Court to apply a reversal of *Cenarrusa* at least in a modified prospective fashion in which the new decision applies

prospectively and to the parties bringing the action resulting in the new decision. Petitioners begin this analysis by balancing the factors set out in *BHA Investments*.

Under the first factor, the purpose of this Court's decision overruling *Cenarrusa* would be to uphold the clear and unambiguous language of article IV, § 10 of the Idaho Constitution requiring that the Governor file his objections to H.B. 67 with the Secretary of State within ten days after adjournment of the Legislature. The Preamble to the Idaho Constitution states the purpose of the Idaho Constitution: "We, the people of the state of Idaho, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare do establish this Constitution." It is hard to imagine a loftier or weightier purpose than to secure the blessings of freedom and promote our common welfare. It is therefore little wonder that this Court has recognized that the Idaho Constitution and its provisions, including article IV, § 10, is "the supreme law of the land." *State v. Village of Garden City*, 74 Idaho 513, 524 (1953). The importance of upholding the Idaho Constitution is further found in Idaho Code § 59-401, which requires that any elected or appointed officer must take and subscribe an "official oath" swearing or affirming that he or she will support the Constitution of the state of Idaho before filling any office or entering upon the duties of his or her office.

Upholding the clear and unambiguous language of the Idaho Constitution must be balanced against the reliance upon the prior law and the effect upon the administration of justice. As for the second factor and its effect upon the administration of justice, a negligible or slight effect of "the number of cases that would be reopened" or "the increase in the number of cases" resulting from retroactive application weighs against ***only*** a prospective application of

a reversal of prior law. *Rogers v. Yellowstone Park Co.*, 97 Idaho 14, 26 (1974); *BHA Investments, Inc. v. City of Boise*, 141 Idaho 168, 173 (2004).

Here, applying a reversal of *Cenarrusa* retroactively would have a negligible or slight effect on increased litigation. Petitioners have attached to this brief a spreadsheet showing a summary of all the bills Governor Otter has vetoed after adjournment since 2007 when Governor Otter took office. Since 2007, Governor Otter has exercised the veto power a total of 16 times after adjournment. Of these 16 vetoes, only three were more than 10 days after adjournment excluding Sundays. Specifically, Governor Otter vetoed House Bill 298, 11 days after adjournment in 2011; he vetoed a line item in Senate Bill 1430, 13 days after adjournment in 2014; and he vetoed H.B. 67 at issue in this case 11 days after adjournment in 2017.[6]

This Court has indicated that a constitutional claim can be subject to a statute of limitations. *Wadsworth v. Department of Transportation*, 128 Idaho 439, 442 (1996); *C & G, Inc. v. Canyon Highway Dist. No. 4*, 139 Idaho 140 (2003); *see also City of Tupelo v. Paterson*, 208 So.3d 557, 568 (Miss. 2017) (applying statutes of limitations to constitutional claims "will act as a safeguard to force parties to pursue their claims with reasonable diligence"). Accordingly, a claim for violation of a provision of the Idaho Constitution is likely subject to the four-year statute of limitations found in Idaho Code § 5-224. The effect of a statute of limitations barring

[6] Petitioners have reviewed the *Sine Die Reports* to identify vetoes and information in the *Bill Center* to obtain bill histories from 2007 (when Governor Otter took office) through 2017 to identify all of Governor Otter's vetoes after adjournment during that time. This information is public record and found at the legislature's official website at legislature.idaho.gov. Petitioners ask the Court to take judicial notice of these facts. Petitioners have attached a summary of this information as Appendix 1 to this brief for the Court's review.

claims resulting from reversal of prior case law is a factor for this Court to consider when evaluating the effect of the administration of justice. *BHA Investments, Inc. v. City of Boise*, 141 Idaho 168, 173 (2004).

Given that H.B. 67 and a line item from Senate Bill 1430 are the only vetoes Governor Otter has exercised outside the 10-day requirement within the last four years, a reversal of *Cenarrusa* would have negligible or slight effect on the administration of justice. Even Governor Otter agrees that applying *Cenarrusa* retroactively will have at most a negligible or slight effect on the administration of justice. Governor Otter states, "There are no previous vetoes issued by Governor Otter that could be challenged if the Court decides to overturn *Cenarrusa*," and "[r]eversing *Cenarrusa* will likely not result in another case challenging a veto by Governor Otter."[7]

As for the third factor, Governor Otter will likely claim he relied on *Cenarrusa* with regard to the timing of his veto. However, since taking office in 2007, Governor Otter has vetoed 16 bills after adjournment. And only three of these bills are outside the 10-day requirement. Thus, to the extent Governor Otter has developed a "general practice," he generally does not rely on the time frame established in *Cenarrusa*, but has acted in accordance with the time frame established in article IV, § 10 of the Idaho Constitution.

Moreover, when reliance has been a significant factor, this Court generally has applied the reversal of case law in a modified prospective fashion to the parties before the court and prospectively, rather than prospectively only. *V-1 Oil Co. v. Idaho Petroleum Clean Water Trust*

[7] See Brief of Respondent-Intervenor Governor Otter pp. 25 and 27.

Fund, 128 Idaho 890, 895 (1996); *Potlatch Corp v. Idaho State Tax Com'n*, 120 Idaho 1, 2 (1991); *Rogers v. Yellowstone Park Co.*, 97 Idaho 14, 26 (1974); *Thompson v. Hagan*, 96 Idaho 19, 25 (1974); and *Smith v. State*, 93 Idaho 795, 808 (1970).

On balance, the People's right to have article IV, § 10 of the Idaho Constitution enforced as the supreme law of the land outweighs the Governor Otter's claim to rely on erroneous case law. Given that the effect on the administration of justice is negligible or slight, and given that Governor Otter most often has followed the time frame for a veto after adjournment found in article IV, § 10 rather than rely on the time frame set out in *Cenarrusa*, a strong argument exists for retroactive application of a decision reversing *Cenarrusa*. However, even if this Court finds that reliance is a compelling factor, this Court should apply a decision reversing *Cenarrusa* in a modified prospective fashion applying its decision to this case and prospectively, rather than prospectively only.

Secretary Denney's request for prospective application only results in a "heads you lose, tails I win" result for the People. In *Cenarrusa*, this Court reversed the district court's grant of summary judgment in favor of the Secretary of State resulting in upholding the Governor's veto of a bill outside the time requirements of article IV, § 10 of the Idaho Constitution. This Court essentially "overruled" the clear and unambiguous language of article IV, § 10 of the Idaho Constitution requiring that the Governor file a veto with the Secretary of State within 10 days after adjournment. This Court did not limit its holding in *Cenarrusa* prospectively only. The Court could have said, "The Legislature, the Governor, the Secretary of State, and the People of Idaho have relied on this constitutional provision for 88 years since the United State Congress

approved the ratified constitution on July 3, 1890. Accordingly, given this strong reliance, we will apply *Cenarrusa* prospectively only." Now, Secretary Denney is asking this Court to apply any reversal of *Cenarrusa* prospectively only. If this Court were to do that, then the People will have been deprived of the clear application of article IV, § 10 of the Idaho Constitution twice—once with *Cenarrusa* and again with this case. The People should not lose twice on the very same issue, especially if the Court overrules *Cenarrusa* holding that article IV, § 10 is clear, unambiguous, and required Governor Otter to file his veto of H.B. 67 within 10 days of adjournment. Otherwise, the Idaho Constitution becomes something less than "the supreme law of the land."

Secretary Denney misapplies the balancing test found in *BHA Investments*. The first factor requires this Court to consider the purpose of ***this Court's decision reversing existing law***. *See Thompson v. Hagan*, 96 Idaho 19, 25 (1974) (stating "the purpose of the ***new*** decision must be analyzed in connection with the question of retroactivity) (emphasis added). Instead, Secretary Denney improperly focuses on the purpose of the ***prior*** law being reversed. Moreover, Secretary Denney places too much reliance on the fact that *Cenarrusa* has been law for 39 years because article IV, § 10 had been the law 88 years at the time of *Cenarrusa* and has been the supreme law of the land for 127 years. Because Secretary Denney focuses on the wrong "decision," precluding a proper weighing of the first factor against the two other factors, the rest of his argument is flawed.

As for the second factor, Secretary Denney says that he relied on the prior law in accepting Governor Otter's veto. However, at issue is ***Governor Otter's*** reliance on *Cenarrusa*

to alter the clear time restrains of his ability to veto under article IV, § 10. Secretary Denney does not argue Governor Otter's reliance on *Cenarrusa*. And Secretary Denney's own reliance on *Cenarrusa* for filing the veto is irrelevant on the issue before the Court. Although Governor Otter may claim he relied on *Cenarrusa*, since taking office Governor Otter has vetoed 16 bills after adjournment. Only three of these bills were more than 10 days after adjournment. (Appendix 1.) Governor Otter has followed the time constraints of article IV, § 10 four times more than he has followed the time constraints of *Cenarrusa*.

As for the third factor, Secretary Denney admits that "it is unknown how many post legislative adjournment vetoes would be effected," but speculates that it would "open the door" to "many."[8] Secretary Denney further speculates that "changing any one veto ***could*** create uncertainty within the law particularly ***if*** subsequent legislation also impacted a previously vetoed enactment that suddenly became operative."[9] (Emphasis added). Unfortunately, it is precisely this kind of speculation that lead a majority of this Court to its decision in *Cenarrusa* in the first place. This Court need not speculate because Petitioners have submitted Appendix 1 that summarizes Governor Otter's vetoes since 2007.

Finally, Secretary Denney makes no attempt to balance the first factor against the second and third factors. Instead, Secretary Denney discusses each factor independently and summarily calls for a prospective application if this Court overrules *Cenarrusa*. However, as explained above, at a minimum, if this Court overrules *Cenarrusa* it should do so in a modified prospective fashion in which the new decision applies prospectively and to the parties bringing

[8] See Secretary of State's Response to Amended Verified Petition for Writ of Mandamus, p., 9.
[9] See Secretary of State's Response to Amended Verified Petition for Writ of Mandamus, p., 9.

the action. Such a result would strike the appropriate balance of upholding the Idaho Constitution to the facts of this case and allaying fears of the uncertainty with opening litigation floodgates while also encouraging future litigants to pioneer reforms in the law.

VI. CONCLUSION.

For all the reasons set forth above, in the Petitioner's Amended Verified Petition for Writ of Mandamus, and in Petitioners' Amended Brief in Support of Verified Petition for Writ of Mandamus, Petitioners respectfully request that this Court overrule *Cenarrusa v. Andrus*, 99 Idaho 404 (1978), apply the time requirements for veto after adjournment found in article IV, § 10 of the Idaho Constitution, and issue the writ of mandamus compelling the Secretary of State to certify H.B. 67 as law.

RESPECTFULLY SUBMITTED this 24th day of May, 2017.

SMITH, DRISCOLL & ASSOCIATES, PLLC

By: _____
Bryan D. Smith
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of May, 2017, I caused a true and correct copy of the foregoing **REPLY TO SECRETARY OF STATE'S RESPONSE TO AMENDED VERIFIED PETITION FOR WRIT OF MANDAMUS** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

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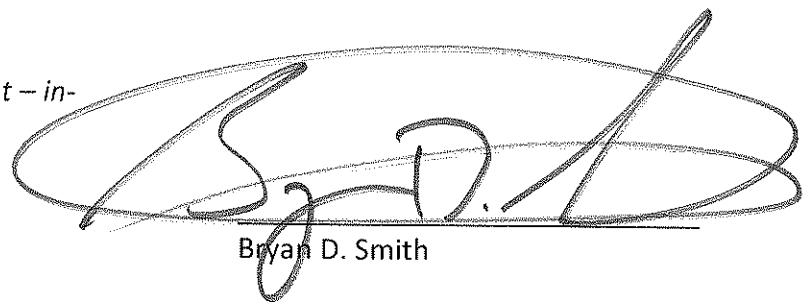

Bryan D. Smith

APPENDIX 1

AFFIDAVIT

STATE OF IDAHO)
) ss.
County of Ada)

COMES NOW Fred Birnbaum and states as follows:

1. I am over the age of majority and have personal knowledge of the information contained herein.

2. I am the Vice President and Chief Operating Officer at the Idaho Freedom Foundation.

3. I have reviewed the Sine Die Reports to identify vetoes and information in the Bill Center to obtain bill histories from 2007 (when Governor Otter took office) through 2017 to identify all of Governor Otter's vetoes after adjournment during that time. This information is public record and found at the legislature's official website at legislature.idaho.gov.

4. I have prepared a summary of this information attached hereto and as Appendix 1 to Petitioners' Reply to Secretary of State's Response to amended Verified Petition for Writ of Mandamus. I am familiar with the content therein and to the best of my knowledge, believe it to be a true and correct summary of Governor Otter's vetoes from 2007 through 2017 after adjournment.

Further, your affiant sayeth naught.

Fred Birnbaum

Subscribed and sworn to me this 25th day of May, 2017.

Notary Public for Idaho
Residing at: Bellevue
My commission expires: 2-14-23

Legislation vetoed by Governor Otter after adjournment

Year	Adjournment date	Bill Number	Transmittal Date	Veto Date	Days after adjournment	Sundays	Days after Adjournment (Excluding Sunday)	Days from adjournment to Transmittal
2017	Wed, 03/29/2017	H67	Fri, 03/31/2017	Tue, 04/11/2017	**13**	2	11	2
	Wed, 03/29/2017	H139	Tue, 03/28/2017	Thu, 04/06/2017	**8**	1	7	-1
	Wed, 03/29/2017	H202	Tue, 03/28/2017	Thu, 04/06/2017	**8**	1	7	-1
	Wed, 03/29/2017	H274	Fri, 03/31/2017	Thu, 04/06/2017	**8**	1	7	2
	Wed, 03/29/2017	H318	Fri, 03/31/2017	Thu, 04/06/2017	**8**	1	7	2
2016	Fri, 03/25/2016	H650	Mon, 03/28/2016	Tue, 04/05/2016	**11**	2	9	3
	Fri, 03/25/2016	S1342	Thu, 03/24/2016	Tue, 04/05/2016	**11**	2	9	-1
2015	Sat, 04/11/2015	H152	Wed, 04/08/2015	Tue, 04/21/2015	**10**	2	8	-3
	Sat, 04/11/2015	S1146	Thu, 04/09/2015	Thu, 04/16/2015	**5**	1	4	-2
	Sat, 04/11/2015	S1192 line item veto	Mon, 04/13/2015	Thu, 04/16/2015	**5**	1	4	2
2014	Thu, 03/20/2014	S1430 - line item*	Mon, 03/24/2014	Fri, 04/04/2014	15	2	13	4
2013	Thu, 04/04/2013	H278	Mon, 04/01/2013	Thu, 04/11/2013	**7**	1	6	-3
	Thu, 04/04/2013	S1080	Fri, 03/29/2013	Thu, 04/11/2013	**7**	1	6	-6
2012	NA							
2011	Thu, 04/07/2011	H298	Fri, 04/08/2011	Wed, 04/20/2011	**13**	2	11	1
2010	NA							
2009	NA							
2008	Wed, 04/02/2008	H0664	Wed, 04/02/2008	Mon, 04/14/2008	**12**	2	10	0
2007	Fri, 03/30/2007	S1153	Mon, 03/26/2007	Fri, 03/30/2007	**0**		0	-4

Years with NA reflect either no vetoes or none after adjournment