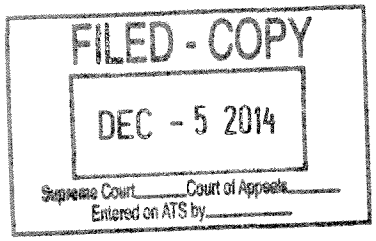
12-5-2014

Hansen v. Denney Respondent's Brief Dckt. 42285

IN THE SUPREME COURT OF THE STATE OF IDAHO

CALEB HANSEN, Appearing Pro Se, Plaintiff-Appellant, vs. BEN YSURSA, Idaho Secretary of State, Defendant-Respondent.	)	Supreme Court No. 42285-2014 Fourth Judicial District Case No. CV OC 1407627



BRIEF OF RESPONDENT

Appeal from the District Court of the
Fourth Judicial District for Ada County

Honorable Steven Hippler, Judge presiding

Caleb Hansen
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Boise, ID 83702

Plaintiff-Appellant

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STATEMENT OF THE CASE

Nature of the Case. This appeal addresses (1) the procedure a would-be candidate for the Legislature must follow in District Court to overturn the Secretary of State's denial of his request to appear on the ballot, and (2) if mootness and/or procedural issues are not dispositive, the substantive grounds upon which a would-be candidate can be denied a place on the ballot.

Statement of Facts. On March 12, 2014, Plaintiff-Appellant Caleb Hansen submitted a Declaration of Independent Candidacy for State Representative, Seat B, Legislative District 19, for the general election of November 4, 2014, to the Office of Respondent-Defendant Secretary of State Ben Ysursa.[1] R., pp. 3, 55. Later that same day, Chief Deputy Secretary of State Timothy A. Hurst sent Mr. Hansen a letter informing Mr. Hansen that (1) he would not be on the ballot because he had not been a qualified elector in District 19 for a year preceding the general election, and (2) he had a right under Idaho Code § 34-215 to appeal the decision to deny him a place on the ballot. The body of that letter said:

> Article III, section 6 of the Idaho Constitution lays out the qualifications of an individual to serve as a member of the Idaho legislature. It says:
>
> > "No person shall be a senator or representative who, at the time of his election, is not a citizen of the United States, and an elector of this state, nor anyone who has not been for one year next preceding his election an elector of the county or district whence he may be chosen."
>
> The Constitution, in Article VI Section 2, also defines an elector. Again, it says:
>
> "Every male or female citizen of the United States, eight-

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[1] Mr. Ysursa did not run for re-election in 2014. Lawerence Denney was elected Secretary of State in the general election of 2014 and is scheduled to take office on January 5, 2015. Pursuant to Idaho Appellate Rule 7, Mr. Denney will be substituted as a party for Mr. Ysursa once he takes office.

> een years old, who has resided in this state, and the county are [where] he or she offers to vote for the period of time provided by law, if registered as provided by law, is a qualified elector."
>
> According to the voter registration records of the State, you would not meet the qualifications to be an Idaho Legislator this year. Your name will, therefore, not appear on the primary election[2] ballot. Enclosed is a letter from the Attorney General issued in 1998 addressing this issue. Your petitions are being returned as of this date.
>
> ***If you disagree with this decision Idaho Code section 34-215 provides that you may appeal to the District Court for remedy.***

R., pp. 10, 18, 49 (emphasis added). The 1998 letter from the Attorney General's Office that was enclosed with the letter quoted above contained a legal analysis concluding that candidates for the Legislature must have been qualified electors (*i.e.*, registered voters) in their district for a year before the general election. R., pp 11-13, 19-21, 50-52.

Mr. Hansen was not registered to vote in District 19 for one year before the general election of 2014. Indeed, Mr. Hansen registered to vote in District 19 on March 11, 2014, the day before he presented his candidacy papers to the Secretary of State. R., pp. 56-57 (Verified Answer, ¶ 5), 61-64 (voter registration records).

Although the Chief Deputy Secretary of State's letter informed Mr. Hansen of his right of appeal under Idaho Code § 34-215, Mr. Hansen did not promptly file an appeal. Instead, he wrote a letter dated March 18, 2014, to the Attorney General, which contended that the analyses of the Offices of the Secretary of State and of the Attorney General were in error. R., pp. 22-24. By a letter dated March 19, 2014, Constituent Information Specialist Kriss Bivens Cloyd of the

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[2] The letter's reference to the "primary election" ballot was in error. As an independent candidate, Mr. Hansen was seeking a place on the general election ballot. See Idaho Code § 34-708, in particular subsection (4) (qualified independent candidates shall be placed on the general election ballot).

Attorney General's Office told Mr. Hansen that the Attorney General could not provide the legal guidance that Mr. Hansen was seeking. R., p. 25.

Mr. Hansen's Appellant's Brief states that he "worked diligently to identify and exhaust any informal, administrative, and otherwise non-judicial means to resolve the issue," including "a discussion on April 1st 2014 with Kriss Bivens Cloyd." App.Br., p. 5. His Affidavit does not state when that discussion took place, R., p. 16, and he does not explain in his Brief or Affidavit why he had further discussion with Ms. Bivens Cloyd thirteen days after her letter to him.

Course of the Proceedings. On April 18, 2014, thirty-seven days after the Chief Deputy Secretary of State's letter informing Mr. Hansen that he would not be on the ballot and that he had a right of appeal under Idaho Code § 34-215, Mr. Hansen filed an Application for a Writ of Mandamus in District Court. R., pp. 3-14. The Application stated that Mr. Hansen was entitled to a Writ of Mandamus because he had no plain, speedy and adequate remedy at law. R., p. 3. The Application asked the District Court to "speedily issue a Writ of Mandate compelling the Secretary of State to certify the Applicant's candidacy and include the name 'Caleb Hansen' on the November 4th 2014 general election ballot as an unaffiliated candidate for State Representative District 19 Seat B." R., p. 8.

The Secretary of State moved to dismiss the Application, arguing that no Writ should issue when Mr. Hansen had, but did not pursue, a right of appeal under Idaho Code § 34-215. R., pp. 30-34. Alternatively, if the Application for a Writ were treated as an appeal to the District Court under § 34-215, the Secretary of State argued that the appeal should be dismissed as untimely because it was not taken within Idaho Rule of Civil Procedure 84(b)'s twenty-eight-day deadline for appeal following the decision to be appealed. R., pp. 35-36.

The Secretary of State noticed a hearing for his Motion to Dismiss to be argued on May 14, 2014. R., pp. 38-39. Mr. Hansen then noticed a hearing for his Application for a Writ of

Mandamus to be argued the same day. R., p. 41. In response to Mr. Hansen's notice, the Secretary of State filed a Verified Answer, an Affidavit, and a Memorandum in Opposition to the Application that preserved his arguments for the Motion to Dismiss; he also made fallback legal arguments and presented additional facts for the District Court to consider if the Motion to Dismiss were denied and the Application for a Writ were taken up at hearing. R., pp. 54-82.

The District Court heard argument on May 14, 2014, and granted the Motion to Dismiss from the bench. Tr., pp. 30-39. The District Court's Order and Judgment granting the Motion to Dismiss was filed with the Clerk of the District Court on May 28, 2014. It provided:

> IT IS THE ORDER AND JUDGMENT of this Court that:
>
> The Application for a Writ of Mandamus is DENIED; and
>
> Treating the Application for a Writ of Mandamus as an appeal pursuant to Idaho Code § 34-215, the Appeal is DISMISSED for lack of jurisdiction as untimely filed.
>
> This is a FINAL JUDGMENT on all issues in this case from which an appeal may taken as provided by the Idaho Appellate Rules.

R., pp. 83-84.[3] Mr. Hansen timely appealed on July 8, 2014, forty-one days after Judgment was filed with the Clerk. R., pp. 85-87.

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[3] The District Court's Order and Judgment preceded the adoption of the current version of Idaho Rule of Civil Procedure 54(a), which became effective July 1, 2014. Rule 54(a) now requires judgments to begin with the words: "JUDGMENT IS ENTERED AS FOLLOWS: ... ."

The words used by the District Court in the first paragraph of the judgment above are similar in concept to the current requirement of Rule 54(a), but are not identical.

ISSUES PRESENTED ON APPEAL

This appeal presents the following issues:

(1) Mootness. (a) Is the appeal from the District Court moot and subject to dismissal because no relief can now be provided regarding the general election of November 4, 2014?, or

(b) should the appeal be decided under one or more exceptions to the mootness rule, *i.e.*:

(i) the appeal presents issues capable of repetition but evading review, and/or

(ii) the appeal presents issues of substantial public importance?

(2) Procedure — Appeal and Mandamus. If the appeal is not dismissed as moot,

(a) did Mr. Hansen timely appeal the Secretary of State's denial of a place on the ballot?,

(b) was he exhausting administrative remedies and entitled to additional time for appeal when he contacted the Office of the Attorney General?, and/or

(c) may he seek a writ of mandamus to compel the Secretary of State to place him on the ballot if he did not timely appeal from the Secretary of State's decision?

(3) Qualifications for the Ballot. If the preceding issues are not dispositive, must a would-be candidate for State Legislature be a registered voter for at least one year before the general election in the district in which he seeks office in order to qualify for the ballot?

ATTORNEYS' FEES ON APPEAL

The Secretary of State does ***not*** seek attorneys' fees on appeal.

ARGUMENT

I. The Issues on Appeal Are Moot, But Are Capable of Repetition and Evading Review and/or Are of Substantial Public Importance, So the Appeal Should Not Be Dismissed as Moot

The Appellant's Brief does not discuss mootness. The general election of November 4, 2014, is over; thus, Mr. Hansen's claim of a right to appear on that ballot for that election is moot. The general rule is that the Court dismisses moot issues:

> This Court may dismiss an appeal when ... the case involves only a moot question. A case becomes moot when the issues presented are no longer live .... A case is moot if it presents no justiciable controversy and a judicial determination will have no practical effect upon the outcome.

Stephen v. Sallaz & Gatewood, Chtd., 150 Idaho 521, 528, 248 P.3d 1256, 1263 (2011) (citations omitted). However, moot issues need not be dismissed

> (1) when there is the possibility of collateral legal consequences imposed on the person raising the issue; (2) when the challenged conduct is likely to evade judicial review and thus is capable of repetition; and (3) when an otherwise moot issue raises concerns of substantial public interest.

Stephen, 150 Idaho at 528, 248 P.3d at 1263 (citation and internal punctuation omitted). As explained in Parts I.A and I.B of this argument, pp. 6-10, the second and third of Idaho's three exceptions to the general rule for dismissal of moot appeals apply here. Thus, the Court may rule on the moot issues presented by this appeal.

A. Ballot Disqualification Is Capable of Repetition But Evading Review

There are two parts to the second exception to the mootness doctrine: (1) The issue is capable of repetition, and (2) the issue evades review. Both are present here.

First, the issue of disqualification of would-be Legislative candidates for failure to be a qualified elector (registered voter) in the candidate's Legislative District for a year before the

general election is recurring. Affidavit of Secretary of State Ysursa (twelve candidates have been similarly disqualified in the 2006-2014 election cycles). R., p. 67. Likewise, issues of the proper procedure to challenge the Secretary of State's disqualification of a candidate from the ballot are recurring. *E.g.*, *Yost v. Ysursa*, Supreme Court Docket No. 35234 (2008) (application for original writ in Supreme Court to be placed on the ballot denied) (no published decision).

Second, recurring election issues evade appellate review. Would-be candidates cannot be disqualified before filing their candidacy papers with the Secretary of State; ballot qualification issues become moot upon creation of the ballot. As explained below, the period from filing to creation of the general election ballot is at most about 6½ months and in this case was 179 days.

Primary elections are held on the third Tuesday of May in even numbered years. Idaho Code § 34-601(1). Candidates for State Senator and State Representative must file Declarations of Candidacy during a two-business-week period beginning the twelfth Monday before the primary election and ending the tenth Friday before the election. Idaho Code § 34-704 (timelines for party candidates to file for primary election), § 34-708 (independent candidates have same timelines). Under these statutes, May 15 is the earliest date on which a primary election can be held; February 26 (or February 27 in leap years) is the earliest date for filing Declarations of Candidacy in such a year. May 21 is the latest date on which a primary election can be held; March 15 is the latest date for filing in such a year. Thus, a Declaration of Candidacy could be filed as early as February 26 or as late as March 15.

General elections for State Senator and State Representative are held on the first Tuesday after the first Monday in November in even numbered years. Idaho Code § 34-601(2) (date of general election); § 34-614 (State Senators and State Representatives run in general election). The Secretary of State must prepare sample ballots for the county clerks by September 7. Idaho Code § 34-903 (Secretary of State to prepare sample ballots), § 34-909 (deadline for preparation

of sample ballots). Sample ballots are prepared long in advance of the general election because ballots must be available for absentee military voting 45 days before the election. Idaho Code § 34-1002; 42 U.S.C. § 20302(a)(8) (formerly § 1973ff-2) (military absentee ballots must be mailed at least 45 days before election if requested more than 45 days before election).

It is 193 days from February 26 (the earliest possible day to file a Declaration of Candidacy for Legislative office) to September 7 (the deadline for preparing sample ballots). It is 176 days from March 15 (the latest possible day to file) to September 7.[4] Thus, whether the issues in this appeal are (1) the proper procedure to challenge the Secretary of State's denial of a place on the ballot, or (2) the grounds upon which a would-be candidate for the Legislature may be denied a place on the ballot, the Court may rely on its own experience to conclude that 176 to 193 days is insufficient time for first the District Court, then the Supreme Court, to review the Secretary of State's decision and that these issues are capable of repetition but evading appellate review. Thus, this exception to the mootness rule applies.[5]

B. Election Issues Are of Substantial Public Importance

Several sections of the Idaho Constitution address qualifications for office,[6] and Article

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[4] In 2014 the primary election was held on Tuesday, May 20, 2014. The first date for candidate filing was Monday, March 3, 2014; the last date was Friday, March 14, 2014. It was 179 days from the Chief Deputy Secretary of State's March 12, 2014 letter to Mr. Hansen until September 7, 2014

[5] If a would-be candidate is denied a place on the primary election ballot, the time line would of course be much more compressed because the primary election is held in May.

[6] Article III, § 6, provides the following qualifications for Senators and Representatives:

> **§ 6. Qualifications of members.** — No person shall be a senator or representative who ... is not a citizen of the United States, and an elector of this state, nor anyone who has not been for one year next preceding his election an elector of the county or district whence he may be chosen.

Article IV, § 3, includes many qualifications for constitutional executive offices:

> **§ 3. Qualifications of officers.** — No person shall be eligible to the office of governor or lieutenant governor unless he shall have attained the age of thirty years at the time of his election; nor to the office of secretary of state, state controller, or state treasurer, unless he shall have attained the age of twenty-five years; nor to the office of attorney general

VI of the Idaho Constitution is devoted exclusively to elections and suffrage. The prominence of these issues in the Constitution shows their substantial public importance. Further, case law has long noted the importance of election-related issues. *E.g.*, *Weldon v. Bonner County Tax Coalition*, 124 Idaho 31, 37, 855 P.2d 868, 874 (1993), *rev'd on other grounds*, *City of Boise City v. Keep the Commandments Coalition*, 143 Idaho 254, 141 P.3d 1123 (2006) (critical issue of scope of referendum and initiative power taken up because it presented important undecided issue of law); *Keenan v. Price*, 68 Idaho 423, 429, 195 P.2d 662, 664 (1948) (would-be candidate's claim of right to appear on the ballot taken up because it was important issue). These authorities show the public importance of issues regarding qualifications for office and of elections in general. The public importance exception to mootness also applies.

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unless he shall have attained the age of thirty years, and have been admitted to practice in the Supreme Court ... of Idaho, and be in good standing at the time of his election. In addition ... each of the officers named shall be a citizen of the United States and shall have resided within the state ... two years next preceding his election.

Article V, § 18, provides the following qualifications for Prosecuting Attorneys:

§ 18. Prosecuting attorneys — Term of office — Qualifications. — A prosecuting attorney ... shall be a practicing attorney at law, and a resident and elector of the county for which he is elected. ...

Article V, § 23, provides the following qualifications for district judges:

§ 23. Qualifications of district judges. — No person shall be eligible to the office of district judge unless he be learned in the law, thirty years of age, and a citizen of the United States, and shall have resided in the state ... at least two years next preceding his election, nor unless he shall have been at the time of his election, an elector in the judicial district for which he is elected.

Mr. Hansen laments that with Idaho's same-day voter registration "[He], and likely the majority of Idaho's qualified electors, never heard or imagined that there are rights that could be forfeited due to technicalities regarding voter registration even if the right and ability to vote was never impeded." App. Br., p. 9. The sections excerpted above show that what Mr. Hansen calls "technicalities" for holding office were important to the Delegates to the Idaho Constitutional Convention; they required more civic engagement with one's own community to run for office than they did to vote.

II. Idaho Code § 34-215 Provided a Plain, Speedy and Adequate Remedy at Law From Ballot Disqualification; Mandamus Was Not Available When No Timely Appeal Was Filed

This section of the brief first examines in turn the law of appeals to the District Court, of exhaustion of administrative remedies, and of mandamus.

A. Appeals from the Secretary of State to the District Court Must Be Timely Filed; the District Court Properly Dismissed the Appeal as Untimely

Idaho Code § 34-215 provides a right of appeal to District Court from the Secretary of State's disqualification of a would-be candidate from the ballot:

> **34-215. Appeals by aggrieved persons.** — (1) Any person adversely affected by any act or failure to act by the secretary of state ... under any election law, or by any order ... directive or instruction made under the authority of the secretary of state ... under any election law, may appeal therefrom to the district court ... .
>
> ...
>
> (4) The remedy provided in this section is cumulative and does not exclude any other remedy provided by law against any act or failure to act by the secretary of state ... under any election law or against any order ... directive or instruction made under the authority of the secretary of state ... under any election law.

No section in Title 34 provides a deadline for appeal under § 34-215. There are two "default" provisions of law with deadlines for appeal from executive action when the appeal statute is silent: (1) Idaho Code § 67-5273,[7] the section of the Administrative Procedure Act

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[7] Idaho Code § 67-5273 provides:

> **§ 67-5273. Time for filing petition for review.** — (1) A petition for judicial review of a temporary or final rule may be filed at any time ... .
>
> (2) A petition for judicial review of a final order ... must be filed within twenty-eight (28) days of the service date of the final order ... , or, if reconsideration is sought, within twenty-eight (28) days after the service date of the decision thereon. ...
>
> (3) A petition for judicial review of a final agency action other than a rule or order

(APA) with deadlines for judicial review of agency actions under the APA, and (2) Idaho Rule of Civil Procedure 84(b),[8] which applies when no statute prescribes a different appeal period. The Court need not decide which of these catch-all provisions governs here because they both provide the same answer: The twenty-eight-day time for appeal began to run on March 12, 2014, when the Chief Deputy Secretary of State notified Mr. Hansen in writing that he would not be on the ballot and could appeal under § 34-215; the appeal time expired four weeks later on April 9, 2014. Mr. Hansen did not file in District Court until nine days later, on April 18, 2014. R., p. 1. Thus, the District Court's dismissal of the appeal as untimely should be affirmed.

B. Contacts with the Office of the Attorney General Did Not Exhaust Administrative Remedies and Did Not Delay the Time for Appeal

Mr. Hansen argues that § 67-5273(3) applies to his appeal and that it extended the time for appeal while he was pursuing administrative remedies. App.Br., pp. 5-6, 15. He contends that his discussions with the Attorney General's Office were an attempt to exhaust administrative

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must be filed within twenty-eight (28) days of the agency action, except as provided by other provision of law. The time for filing a petition for review shall be extended during the pendency of the petitioner's timely attempts to exhaust administrative remedies, if the attempts are clearly not frivolous or repetitious. ...

[8] Idaho Rule of Civil Procedure 84(b) provides:

84(b). Filing Petition for Judicial Review.

(1) Unless a different time or procedure is prescribed by statute, a petition for judicial review from an agency to district court must be filed with the appropriate district court within twenty-eight (28) days after the agency action is ripe for judicial review under the statute authorizing judicial review, but the time for filing a petition for judicial review is extended as provided in the next sentence. When the decision to be reviewed is issued by an agency with authority to reconsider its decision, the running of the time for petition for judicial review is suspended by a timely motion for reconsideration ... . Judicial review is commenced by filing a petition for judicial review with the district court... . ...

Mr. Hansen says without any citation of authority that "the Secretary of State has authority to reconsider the decisions of his office," ¶ 4, App.Br., p. 19, so Mr. Hansen was entitled to Rule 84(b)'s provisions regarding reconsideration and tolling. App.Br., p. 19. However, Mr. Hansen did not file any formal motion for reconsideration with the Secretary of State, so there was no tolling under Rule 84(b)'s reconsideration provision.

remedies. App. Br., pp. 5-6, 10-11, 15-20. They were not.

Mr. Hansen's argument fails because it was the Secretary of State's decision that he appealed, not the Attorney General's. No statute gives the Attorney General remedial authority over the Secretary of State's decisions. Section 67-5273(3) is not explicit that the administrative remedies that must be exhausted are remedies before the officer or agency whose decision will be reviewed by the District Court, but that proposition is implicit. The purpose of exhaustion is to allow the agency or officer that made the decision to review (and if necessary correct) its decision as provided by statute, not to persuade a second officer or agency to overrule the first, and the case law refers to remedies before the agency that made the decision, not remedies before other agencies or officers:

> Before a court will hear an appeal from an agency adjudication, a litigant must normally exhaust the administrative remedies ***that agency*** makes available. If an administrative remedy is ***provided by statute***, relief must first be sought by exhausting such remedies before the courts will act. ... The purpose of this rule is simple; it provides the administrative body with the opportunity to mitigate or cure personnel grievances without judicial intervention.

Nation v. State, Department of Correction, 144 Idaho 177, 193, 158 P.3d 953, 969 (2007) (emphasis added) (citations and internal punctuation omitted). The Secretary of State knows of no cases permitting exhaustion of administrative remedies before an officer or agency other than the one making the decision when the second officer or agency has no right to overturn the first.

Petersen v. Franklin County, 130 Idaho 176, 938 P.2d 214 (1997), cited App.Br., pp. 15-16, does not apply here. In that case the Petersens attempted to exhaust administrative remedies before the county commissioners (the decision makers); the commissioners did not indicate that they had made a final decision and that the Petersens had exhausted their administrative remedies until well after the decision at issue was made. This Court held that the time for petitioning for judicial review did not being to run until the Petersons were informed that they had exhausted

their administrative remedies. 130 Idaho at 185, 938 P.2d at 1223. In this case, however, the Chief Deputy Secretary of State informed Mr. Hansen of his right of appeal from the start, and statute did not provide any administrative remedies for Mr. Hansen to exhaust.

Moreover, even if Mr. Hansen's attempt to persuade the Attorney General to overrule the Secretary of State were to be considered an exhaustion of administrative remedies (even though there was no such statutory remedy), the Office of the Attorney General declined to enter the fray in a letter dated March 19, 2014. Mr. Hansen filed more than twenty-eight days after that, on April 18, 2014. He was untimely no matter how one counts.

Mr. Hansen also contends that he should not be "punished for first attempting to resolve the issue through administrative, informal, and non-judicial means as statute requires," App.Br., p. 19, citing Idaho Code § 67-5241(1)(c), a subsection of the APA which states that "(1) Unless prohibited by other provisions of law: ...[¶] (c) informal disposition may be made of any contested case by negotiation, stipulation, agreed settlement, or consent order. Informal settlement of matters is to be encouraged." Section 67-5241(1)(c) does not apply here; it is part of the contested case hearing sections of the APA, but statute does not provide for a contested case hearing for ballot eligibility. Instead, statute provides for appeal to District Court.

Under Article V, § 20, of the Idaho Constitution, the District Court's appellate jurisdiction is purely statutory. "**§ 20. Jurisdiction of the district court.** — The district court shall have original jurisdiction in all cases, both at law and in equity, and ***such appellate jurisdiction as may be conferred by law.***" Emphasis added. Filing a timely appeal is therefore jurisdictional. *Chavez v. Canyon County*, 152 Idaho 297, 303, 271 P.3d 695, 701 (2012) (district court had no jurisdiction to hear untimely appeal); *Cobbley v. City of Challis*, 143 Idaho 130, 133, 139 P.3d 732, 735 (2006) (same). Mr. Hansen filed his application for a writ on April 18, 2014, nine days after the time to appeal expired. Accordingly, the District Court had no jurisdiction to hear an

appeal from Mr. Hansen if his Application for a writ is considered an appeal. See also Idaho Rule of Civil Procedure 84(n) (failure to file an appeal "within the time limits prescribed by statute and these rules shall be jurisdictional and shall cause automatic dismissal ... upon motion of any party, or upon initiative of the district court"). The District Court's dismissal of Mr. Hansen's application as an untimely appeal, if it were an appeal, should be affirmed.

C. Mandamus Is Not Available Following a Missed Appellate Deadline

The statutes governing mandamus provide that it is available when there is no plain, speedy and adequate remedy at law:

> **§ 7-302. When and by what courts issued.** — It [a writ of mandamus] may be issued by ... any district court to any inferior tribunal, ... board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office ... ; or to compel the admission of a party to the use and the enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded ... .
>
> **§ 7-303. Absence of adequate remedy.** — The writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. ...

These statutes have been interpreted from the earliest days of Statehood forward to preclude issuance of a writ of mandamus (or its counterpart the writ of prohibition, see Idaho Code § 7-401) when a right of appeal is available. *Wilterding v. Green*, 4 Idaho 773, 786-777, 45 P. 134, 138 (1896) (mandamus is not available when statute provides a complete remedy); *Ackerman v. Bonneville County*, 140 Idaho 307, 311, 92 P.3d 557, 561 (Ct.App. 2004) (when there was "a plain, speedy and adequate remedy in the normal course of law, because the denial of the motions ... could be appealed directly ... we affirm the district court's decision not to issue a writ of prohibition on this basis"). The District Court's denial of the writ should be affirmed.

III. If the Court Reaches the Merits, It Should Affirm the Secretary of State's Construction of "Elector" in Article III, § 6, to Mean a Qualified Elector, *i.e.*, a Registered Voter

Summary. The issue on the merits is whether an "elector" must be a registered voter. Mr. Hansen in effect argues that "elector" and "anyone who could legally register to vote but has not" mean the same thing; thus, if he were at least eighteen years old, a citizen, and a resident of Legislative District 19 for one year before the general election of 2014, he would be entitled to run for the Legislature.[9] But this argument would re-write the Idaho Constitution in two places.

First, it would effectively change the word "elector" in Article III, § 6 to "resident," even though the Framers decided by motion and vote to substitute the term "elector" for "inhabitant" in that section. Second, it would render the phrase, "if registered as provided by law," in Article VI, § 2, a nullity. Neither of these provisions should be amended, diminished, rendered superfluous, or nullified. Mr. Hansen's argument on the merits should be denied because the Framers of the Idaho Constitution crafted a practical balance between qualifications for the Legislature and elections officers' ability to verify the qualifications, namely requiring candidates to be registered voters for a year before the election. Accordingly, the Secretary of State asks this Court deny Mr. Hansen's appeal on the merits if it reaches the merits.

A. Article III, § 6 Requires State Legislators to Have Been An Elector of Their District or County for One Year Preceding the Election

The Appellant's Brief would have Mr. Hansen placed on the ballot without regard to the constitutional qualifications for a Legislator so long as he meets the statutory qualifications of Idaho Code § 34-614(2). App. Br., pp. 7, 22 ("no statute ... disqualified the Applicant"). The correct analysis begins with the Idaho Constitution.

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[9] Mr. Hansen did not allege in the Application for a Writ, R., pp. 3-8, or in his Affidavit, pp. 15-16, that he had been and continued to be a resident of Legislative District 19 for at least one year before the general election of 2014. This failure of proof is another reason for ruling against him on the merits.

The "Court applies the rules of statutory construction to construe constitutional provisions." *Wasden v. State Bd. of Land Com'rs*, 153 Idaho 190, 196, 280 P.3d 693, 699 (2012). "Where a statute or constitutional provision is clear, the Court must follow the law as written and, thus, when the language is unambiguous, there is no occasion for application for rules of construction." *Hayes v. Kingston*, 140 Idaho 551, 553, 96 P.3d 652, 654 (2004).

Two sections of the Idaho Constitution provide qualifications for the Legislature. Article III, § 6, requires citizenship and a year as an elector in the district to qualify for the Legislature:

> **§ 6. Qualifications of members.** — No person shall be a senator or representative who, at the time of his election, is not a citizen of the United States, and an elector of this state, nor anyone who has not been for one year next preceding his election, an elector of the county or district whence he may be chosen.

Citizenship is a necessary condition to be in the Idaho Legislature, but it is not sufficient. Any person wishing to serve must also meet a second condition of local civic engagement: being an elector of his district for a year before the election. Perhaps Mr. Hansen is of the opinion that "Voter registration ... serves no purpose as a requirement to run for office, while causing harm to the state by creating a barrier for qualified legislative candidates," App.Br., p. 24, but the Framers of the Idaho Constitution thought otherwise. It is their thoughts that count.

In turn, Article VI, § 2 defines electors — indeed, its title is "Qualifications of electors":

> **§ 2. Qualifications of electors.** — Every male or female citizen of the United States, eighteen years old, who has resided in this state and in the county where he or she offers to vote for the period of time provided by law, if registered as provided by law, is a qualified elector.

This section has two requirements for a "qualified elector" in addition to age and citizenship: (1) residing in the county where he or she will vote for the time provided by law, and (2) not only residing in the county, but also being "registered as provided by law."

These two sections can be simply and easily read together. They require candidates for the Legislature to be citizens, to be at least eighteen years old, to be an elector of the county and the legislative district for one year before the general election, and to have been a registered elector during that time. These two provisions should be read together:

> [C]onstitutional provisions cannot be read in isolation, but must be interpreted in the context of the entire document. [They] must be read to give effect to every word, clause and sentence ... [w]e will not construe [them] in a way which makes mere surplusage of the provisions included therein ...; [i]n construing the Constitution, ... provisions apparently in conflict must be reconciled if at all possible ... [t]hree sections of the Idaho Constitution, inasmuch as they relate to the same matter or subject, ... must be construed in *pari materia*.

Westerberg v. Andrus, 114 Idaho 401, 403-404, 757 P.2d 664, 666-667 (1988) (citations and internal punctuation omitted). Thus, this Court should construe the phrase "if registered as provided by law" so as not to render it meaningless or surplusage.

To be an elector, one must meet the qualifications of Article VI, § 2. A person who does not meet all them does not have the "qualifications of [an] elector." Giving effect to the words and clauses in Article VI, § 2, there are four requirements to be an elector under Article III, § 6: being (a) a citizen of the United States, (b) eighteen years old, (c) a resident of the county for the time period prescribed by law, and (d) registered to vote as provided by law for a year before the general election. Mr. Hansen was not an elector in District 18 for a year before the 2014 general election because he was not "registered as provided by law" for that time. Mr. Hansen could qualify as a candidate for the Legislature only if this Court renders the fourth requirement for electors — to be "registered as provided by law" — as surplusage.

Registration regulates the right of suffrage; it likewise can regulate the right to run for office. Qualified electors must be registered to vote as provided by law, so the requirement that

members of the Legislature be electors "for one year next preceding his election" means they do not become electors until they have registered to vote as required by law.

B. The Term "Elector" Replaced "Inhabitant" When Article III, § 6 Was Framed

The debates of the Constitutional Convention support the plain meaning of the language: Article III, § 6 was intended to require more than residence as to qualify for the Legislature. During the convention, a draft of Article III, § 6 was debated and amended. Delegate Heyburn moved to amend Article III, § 6, to substitute the word "elector" for "inhabitant" just before the phrase "of the county or district." *Proceedings and Debates of the Constitutional Convention of Idaho 1889*, Vol. I, p. 506 (1912). Mr. Heyburn explained:

> The object of that is, that a man might not live in the county at all, he only needs to be an elector of this state and inhabitant of the county; inhabitant is not the term we should use, but a man who is going to be a candidate for the legislature should be an elector of the county and district he seeks to represent.

Id. The motion carried, and "elector" replaced "inhabitant." *Id.* The Constitutional Convention clearly intended more than residency through this change in the wording in what would become Article III, § 6. This change prevented "carpetbagging" by requiring legislators to have an official connection to their districts for at least a year before the election, as opposed to a mere residence or inhabitance. Based upon this change in wording, "elector" in Article III, § 6, does not have the same meaning as "resident" or its synonym "inhabitant".[10] *Cf. Wright v. Willer*, 111 Idaho 474, 476, 725 P.2d 179, 181 (1986) (recognizing a distinction between statutory terms — "moving" or "making" a motion and "filing" a motion). Similarly, the terms "resident" and "elector" do not have the same meaning, but instead must be recognized as terms involving

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[10] "Inhabitant" and "resident" have similar meanings. Webster's Ninth New Collegiate Dictionary (1989) defines "inhabitant" as "one that occupies a particular place regularly, routinely, or for a period of time", p. 622, and "resident" as "**1:** one who resides in a place ...," p. 1003. The corresponding definition of "reside" is "**1 ... b:** to dwell permanently or continuously : occupy a place as one's legal domicile." *Id.*

discrete circumstances, particularly as residence is a qualification to be an elector. In other words, one must be a resident before one can be an elector, which makes the meaning of "resident" broader than the meaning of "elector."

Being an elector requires a level of civic engagement and community involvement that exceeds merely residing in a district; the terms "elector" and "resident" are far from synonymous. Choosing the term "elector" over the term "resident" or "inhabitant" at the Constitutional Convention shows the Framers' intent that candidates for the Legislature must have a degree of civic engagement via voter registration for at least one year before an election.

C. The Constitution Provides Different Qualifications for Different Offices

The Idaho Constitution's other sections for qualifications for office show that "elector" and "resident" have different meanings. The Framers used the terms "elector" and "resident" for specific purposes. For example, Article IV, § 3 requires that the Governor, Lieutenant Governor, Secretary of State, Controller, Treasurer, and Attorney General "shall be a citizen of the United States and shall have resided within the state or territory two years next preceding his election." In contrast, Article V, § 18 sets forth that the Prosecuting Attorney "shall be a practicing attorney at law, and ***a resident and elector*** of the county for which he is elected." (Emphasis added). Article V, § 23 requires that a District Judge "shall have ***resided*** in the state or territory at least two years next preceding his election, nor unless he shall have been at the time of his election, an ***elector*** in the judicial district for which he is elected." (Emphasis added).

The Framers could have provided that Legislators merely reside in the district they represent, as they did for Executive officers. Compare Art. III, § 6, with Art. IV, § 3. They did not. They chose, instead, to require a Legislator be an elector within the district for a year before his election, which is more than mere residency. The Framers also required Prosecuting Attorneys and District Judges to be residents in their counties or districts and to be electors, see Article V,

§ 18 and § 23, which shows that being an elector is more than being a resident.

This Court should reject Mr. Hansen's implicit invitation to revise the Idaho Constitution. A straightforward comparison of the constitutional sections outlining the qualifications for office shows that the Framers intended that a Legislator be qualified beyond mere residency. Mr. Hansen cannot show that he has met the constitutional qualifications to be an elector for the time required by law, based upon a plain reading of the Constitution.

D. Idaho Code § 34-614 Cannot Limit Article III, § 6

Mr. Hansen says: "No statute in Idaho Code disqualified the Applicant from holding the office of State Representative, or from being placed on the ballot for election to that office." App.Br., ¶ 7, p. 22. He quotes Idaho Code § 34-614(2), which has a residency requirement, but no requirement to be an elector:

> (2) No person shall be elected to the office of representative or senator unless he shall have attained the age of twenty-one (21) years at the time of the general election, is a citizen of the United States and shall have resided within the legislative district one (1) year next preceding the general election at which he offers his candidacy.

Be that as it may, the Legislature cannot amend or repeal any part of the Constitution by legislative act. *State v. Village of Garden City*, 74 Idaho 513, 522, 265 P.2d 328, 331-332 (1953). Therefore, the requirements of Idaho Code § 34-614 can add to, but cannot relax, those of Article III, § 6. The residency requirement of § 34-614(2) cannot reduce or eliminate the constitutional requirement that a Legislator be an elector for a year prior to the election.

E. "Elector" And "Qualified Elector" Mean the Same Thing in the Idaho Constitution

Article VI, § 2 has been amended three times, but the phrase: "if registered as provided by law, is a qualified elector" has not changed since its adoption in 1890.[11] The original 1890

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[11] See 1895 Idaho Session Laws (I.S.L.), S.J.R. No. 2 (extending franchise to women); 1961 I.S.L.,

Idaho Constitution referred to voters as both electors and as qualified electors many times.[12] Just ten years after the Constitution's adoption, this Court said, "after a most careful examination of the several provisions of the constitution in which the terms 'elector' and 'qualified elector' are used, we conclude that said terms are used interchangeably and that an elector is a qualified elector." *Wilson v. Bartlett*, 7 Idaho 271, 276, 62 P. 416, 417 (1900).

Wilson construed the term "elector" with respect to eligibility to sign a petition for removal of a county seat. *Wilson* noted that voters were then required to reregister every two years, and that county clerks were required to keep the registration lists for only one year. *Id.* at 277-278, 62 P. at 418. How as a clerk to determine who was an elector during the one year gap when there were no voter registration records? *Wilson* explained that under those circumstances, "We do not think that registration is intended as one of the substantive qualifications of an elector. Registration was intended only as a regulation of the exercise of the right of suffrage, and not a qualification for such right." *Id. Wilson* held that registration was not "intended as one of the substantive qualifications of an elector" to avoid the following paradox: "If registration is

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S.J.R. No. 6 (providing limited franchise to recent residents to vote for President); 1982 I.S.L., H.J.R. No.14 (extending franchise to eighteen-year-olds, repealing obsolete rules for women who held office under Territorial laws, and moving durational residency requirements from Constitution to statute).

[12] The following sections refer to voters as "electors": Idaho Const. Art. III, § 2 (legislators are chosen by "electors"); Art. V, § 6 (Supreme Court justices are chosen by "electors of the state at large"); Art. XII, § 1 ("electors" may organize a city or town); Art. XX, §§ 1, 2 & 3 (submission of constitutional amendments to "electors"); Art. XXI, § 6 (submission of original Constitution to "electors").

The following sections refer to voters as "qualified electors": Idaho Const. Art. IV, § 2 (executive constitutional officers chosen by "qualified electors"); Art. V, § 11 (District Judges chosen by "qualified electors"); Art. V, § 18 (Prosecuting Attorneys chosen by "qualified electors"); Art. VI, § 2 (registered voters are "qualified electors"); Art. XVIII, § 2 ("qualified electors" may remove county seat); Art. XVIII, § 3 ("qualified electors" may divide county); Art. XXI, § 9 ("qualified electors" shall vote for State and district offices following Idaho's admission into Union).

If "electors" and "qualified electors" do not have the same meaning, then Legislators and Supreme Court Justices would be chosen by one body of voters ("electors") while Executive Officers, District Judges, and Prosecuting Attorneys would be chosen by a different body of voters ("qualified electors"). That seems unlikely to have been the Framers' intent.

one of the qualifications of an elector, the registrar is prohibited from registering any person who has not theretofore been registered." *Id.* at 276, 62 P. at 417.

Wilson held that for purposes of signing a petition to move a county seat, registration was not required, and the terms "elector" and "qualified elector" were interchangeable. *Wilson* did not hold that one could vote or hold office as an elector without registering, simply that the signing of a petition to exercise one's constitutional right to petition for a change in county seat did not require registration at a time when clerks were under no obligation to have preserved voter registration records.

F. Under Current Law Registration Is a Qualification to Become an Elector

Kerley v. Wetherell, 61 Idaho 31, 96 P.2d 503 (1939), held: "[T]he constitutional definition of a 'qualified elector' includes registration as an element thereof, where the municipal or statutory law requires registration." *Id.* at 41, 96 P.2d at 508. After this observation, *Kerley* limited the holding of *Wilson*, noting that *Wilson* "is based upon an interpretation of the intention of the law there under consideration." *Id.* at 42, 96 P. at 508. *Kerley* held that signers of a referendum petition under a Boise City ordinance must be registered voters. "The legislature clearly has the power to make registration an essential element." *Id. Kerley* limited *Wilson* to its circumstances; it held that the Constitution required registration to be a qualified elector under Article VI, § 2, whenever registration was required by law.

> If we are correct in our conclusion that the words "qualified elector" as used in said section was intended to mean electors of Boise City who are registered as required by law, then it follows that only such a qualified elector can verify such a petition, and the names of signers on a referendum petition, not so verified, cannot be counted.

Id. at 42, 96 P. at 508. In this case, registration is required to vote for Legislative candidates, so it follows under *Kerley* that "electors" who run for the Legislature must be registered voters.

Dredge Mining Control - Yes!, Inc. v. Cenarrusa, 92 Idaho 480, 445 P.2d 655 (1968), explained the Court's holding in *Kerley*: "[I]n considering ... whether signers of an initiative petition ... were required to be registered electors in the city, [*Kerley*] held that registration was required." *Id.* at 482-83, 445 P.2d at 657-58. *Dredge Mining* held that to be qualified to sign an initiative petition, a person must be eligible to vote on the measure and thus must be registered. *Id.* at 482, 445 P.2d at 657. The Court further noted that if a person were not registered to vote, it would be impossible for a clerk to verify that the person met the qualifications to vote. *Id.* A similar analysis applies in this case. Absent registration, it would be impractical to determine how long legislative candidates have lived in the district as "electors".

G. If the Law Is Ambiguous, the Secretary of State's Pragmatic Interpretation of the Constitution Provides an Easily Verifiable Test of Ballot Eligibility

The Secretary of State "is the chief election officer of this state, and it is his responsibility to obtain and maintain uniformity in the application, operation and interpretation of the election law." Idaho Code § 34-201(1). If the Constitution is ambiguous regarding being an elector for a year before the general election, the Court may defer to or adopt his constitutional interpretation for the same reasons that it would defer to his interpretation of a statute or a rule:

> Where an agency interprets a statute or rule, this Court applies a four-pronged test to determine the appropriate level of deference to the agency interpretation. This Court must determine whether: (1) the agency is responsible for administration of the rule in issue; (2) the agency's construction is reasonable; (3) the language of the rule does not expressly treat the matter at issue; and (4) any of the rationales underlying the rule of agency deference are present. There are five rationales underlying the rule of deference: (1) that a practical interpretation of the rule exists; (2) the presumption of legislative acquiescence; (3) reliance on the agency's expertise in interpretation of the rule; (4) the rationale of repose; and (5) the requirement of contemporaneous agency interpretation.

Duncan v. State Bd. of Accountancy, 149 Idaho 1, 3, 232 P.3d 322, 324 (2010).

The Secretary of State is not an "agency" as described by *Duncan*; he is a constitutional officer. That is all the more reason that the Court may wish to give him deference. When he is carrying out duties assigned to him by statute as the State's chief election officer, including his "responsibility to obtain and maintain uniformity in the application, operation and interpretation of the election law," § 34-201(1), the following paragraph explains that the *Duncan* reasons for deference to his interpretation of Idaho constitutional and statutory election law make sense.

First, the Secretary of State is charged by law with being the State's chief election officer. Second, his construction of Article III, § 6's requirement to be an elector of the county or district for one year preceding the election is reasonable. Third, if there is an ambiguity in the law (and this portion of the Argument only applies if there is an ambiguity), the Secretary of State must resolve it to determine who is eligible for the ballot. Fourth, three of the five rationales for deference are present: The Secretary of State's interpretation provides an easily administered solution to the practical problem of resolving whether a candidate for the Legislature has been an elector in the district for a year before the general election; potential and actual candidates have relied on the Secretary of State to administer access to the ballot fairly and transparently; and the Secretary of State has taken a uniform position for at least forty years. Ysursa Aff., ¶ 3. Neither the third nor fifth rationales are present here because no one can now know if there was acquiescence by the Framers to this interpretation or what the Framers' practices were.

To elaborate on the practical aspects of the Secretary of State's position, Article III, § 6's requirement that a legislative candidate be an elector of the district for one year prior to his or her election is easily checked if being an elector means being a registered voter. But what if being an elector merely requires residence? This is how the Idaho Code defines voting residence:

> **34-107. "Residence" defined.** — (1) "Residence," for voting purposes, shall be the principal or primary home or place of abode of a person. Principal or primary home or place of abode is

> that home or place in which his habitation is fixed and to which a person, whenever he is absent, has the present intention of returning after a departure or absence therefrom, regardless of the duration of absence.
>
> (2) In determining what is a principal or primary place of abode of a person the following circumstances relating to such person may be taken into account: business pursuits, employment, income sources, residence for income or other tax pursuits, residence of parents, spouse, and children, if any, leaseholds, situs of personal and real property, situs of residence for [the homestead property tax exemption], and motor vehicle registration.
>
> (3) A qualified elector who has left his home and gone into another state or territory or county of this state for a temporary purpose only shall not be considered to have lost his residence.
>
> (4) A qualified elector shall not be considered to have gained a residence in any county or city of this state into which he comes for temporary purposes only, without the intention of making it his home but with the intention of leaving it when he has accomplished the purpose that brought him there.
>
> (5) If a qualified elector moves to another state, or to any of the other territories, with the intention of making it his permanent home, he shall be considered to have lost his residence in this state.

Section 34-107's definition of voting "residence" shows the difficulty that the Secretary of State would have in determining the residence of Legislative candidates if voter registration records did not dispose of the issue of being an elector. If there were a challenge to a would-be candidate's residence in the district for a year before the election, the Secretary of State might have to examine his or her business pursuits, employment, income sources, residence for income or other tax pursuits, residence of other family members, if any, leaseholds, situs of personal and real property, homestead exemption, and motor vehicle registration to determine residency. How unworkable that would be! Instead, voter registration records provide a bright-line rule of law

that is easily administered. If the Court determines that Constitution and statutes regarding being an elector for a year before the election are ambiguous, it may defer to or adopt the Secretary of State's practical administration of the issue.

H. There Was No Record in the District Court Upon Which to Bring an Equal Protection Challenge

Mr. Hansen states that the Secretary of State "has not claimed to have disqualified a single incumbent legislator from running for or holding office by the same legal theory ... which strongly suggests that the law may not have been applied equally to incumbent candidates and non-incumbent candidates alike." App.Br., p. 8. He adds: "There is a systematic barrier to new candidates running for legislature that is not applied to incumbents. This barrier is created ... by the inconsistent manner in which the Secretary of State is enforcing the law." *Id.*, p. 26.

Mr. Hansen's unsubstantiated implications, nay accusations, that the Secretary of State has applied one standard to challengers and another to incumbents are beyond the pale. There is nothing in the record to support them. Mr. Hansen has challenged the Secretary of State's integrity with not a shred of evidence to support his challenge. That ends this discussion. Saying more would dignify scurrility.

CONCLUSION

The Secretary of State asks this Court:

(1) Not to dismiss the appeal as moot, but to consider it under the following exceptions to the mootness doctrine: (a) the appeal presents issues capable of repetition but evading review, and/or (b) the appeal presents issues of substantial public importance.

(2) To affirm the District Court's dismissal of the case below and to hold (a) there was no timely appeal from the Secretary of State's decision, (b) the time for appeal from the Secretary of State's decision was not extended by attempts to seek administrative remedies before the

Attorney General, and (c) mandamus was not available against the Secretary of State following the failure to file a timely appeal from the Secretary of State's decision.

(3) If the Court reaches the merits, to affirm the Secretary of State's construction of the Idaho Constitution and to hold that the Secretary of State properly construed Article III, § 6, and Article VI, § 2, of the Idaho Constitution by determining that every person who would serve as a member of the Idaho Legislature must have been a registered voter in his or her county or his or her district for one year preceding the general election.

RESPECTFULLY SUBMITTED, this 5th day of December, 2014.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

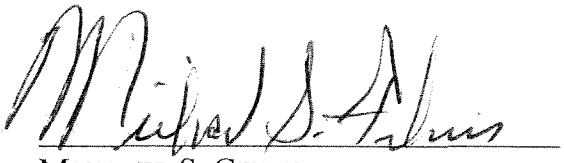
By: _____
MICHAEL S. GILMORE
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of December, 2014, I caused to be served a true and correct copy of the foregoing by the following method to:

Caleb Hansen
280 North 8th St., Apt. #306
Boise, ID 83702

- [x] U.S. Mail
- [ ] Hand Delivery
- [ ] Certified Mail, Return Receipt Requested
- [ ] Overnight Mail
- [ ] Facsimile:
- [ ] Email: caleb@apsboise.com



MICHAEL S. GILMORE
Deputy Attorney General