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IN THE SUPREME COURT OF THE STATE OF IDAHO

KIKI LESLIE A. TIDWELL, an individual; and THE MADISON JEAN TIDWELL QUALIFIED SUBCHAPTER S TRUST, a legal entity organized under the laws of the State of Idaho,

Respondents/Cross-Appellants,

v.

BLAINE COUNTY, a political subdivision of the State of Idaho; ARCH COMMUNITY HOUSING TRUST, INC., an Idaho corporation; BLAINE COUNTY HOUSING AUTHORITY, a public agency of the State of Idaho; and John Does 1-5,

Appellants/Cross-Respondents.

Supreme Court Docket No. 48799-2021
Ada County Case No. CV07-18-00551

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

Respondents/Cross-Appellants, Kiki Leslie A. Tidwell and The Madison Jean Tidwell Qualified Subchapter S Trust (collectively, "Tidwell"), by and through their attorneys of record, Givens Pursley LLP, hereby submit this Memorandum in Support of Petition for Rehearing.

I. INTRODUCTION

Tidwell respectfully requests the Court grant a rehearing in this case. The Court's decision vacates the district court's judgment, eliminating a necessary check on the County's unlawful conduct. The Court's decision surrenders Parcel C[1]—an undersized lot fronting on a canal that is bound for a substandard sewer drainage system—to the whims of the County. And the Court's decision imposes on Tidwell a standing threshold even higher than what she would have to clear if she were in federal court.

The Court should grant a rehearing for at least two reasons. First, while it was raised throughout the litigation, a key issue was omitted from the discussion of Tidwell's standing on appeal. The issue is that, by the County's own standards, the sewer drainage system planned for Parcel C is woefully inadequate to support the proposed duplex. That substandard and overburdened sewer system will be located along the Hiawatha Canal, which delivers water downstream to Tidwell's property. Tidwell had standing to pursue this action against the County because building a duplex on an undersized lot with a substandard sewer system impacts the quality of water that makes its way to Tidwell's property downstream.

Second, the majority's decision and Justice Stegner's dissent both discussed whether the Court's standing jurisprudence was consistent with the text of the Idaho Constitution. Tidwell joins Justice Stegner, Justice Trout, and the various other voices both inside and outside the state in calling on the Court to reevaluate its "lockstep" approach to the standing doctrine. Tidwell requests a rehearing on this issue so that it can be more fully argued. If the Court's standing doctrine were

[1] For ease of reference, the capitalized terms used herein have the same meaning ascribed to them in the Response Brief of Respondents/Cross-Appellants.

in line with the more lenient language of the Idaho Constitution, there would be no doubt that Tidwell had standing to pursue this case.

II. LEGAL STANDARD

A petition for rehearing is governed by Idaho Appellate Rule 42. The rule itself does not set forth any specific grounds for granting or denying a petition for rehearing, and our research has not identified any such grounds. However, the Idaho Appellate Handbook suggests that good grounds for rehearing include:

> (1) a perceived error in or omission from the facts relied upon by the Court, (2) misapplication of a particular authority to the facts, (3) the omission of discussion of a particular issue on appeal that the petitioner deems crucial to further proceedings, or (4) the discussion by the Court of an issue not necessarily raised or briefed by the parties.

Idaho Appellate Handbook, Ch. XI, section A.2 (6th ed. October 2019). Tidwell asserts the Court omitted key facts in its decision on standing and also discussed issues not briefed by the parties, as set forth below in Parts B and C, respectively.

III. ARGUMENT

A. The Court's ruling abandons a constitutional check on government overreach.

The Idaho Constitution "guarantees that 'courts of justice shall be open to *every person*, and a speedy remedy afforded for *every injury of person, property or character*, . . .'" *Reclaim Idaho v. Denney*, 169 Idaho 406, 441, 497 P.3d 160, 195 (2021) (J. Stegner dissenting) (emphases original) (quoting Idaho Const. art. I, § 18). This provision suggests "that Idaho's Constitution was meant to be more protective of an individual citizen's right to bring suit to redress government action." *Zeyen v. Pocatello/Chubbuck Sch. Dist. No. 25*, 165 Idaho 690, 707, 451 P.3d 25, 42

(2019) (J. Stegner dissenting). And redressing government action—the overreach of a local government—is what this case was all about.

Tidwell initially brought this case when it became evident that the County would, in defiance of its own rules and regulations as well as "[t]he express language of all of the decision documents" related to Parcel C's proper use, proceed to build residential housing on Parcel C. (R. at 960.) The County initially challenged Tidwell's standing to bring her case at the preliminary injunction hearing. (*See* R. at 124.) At this early stage, the district court found that Tidwell did, in fact, have standing, relying in part on the esthetic value that would be lost if construction moved forward on Parcel C. *See Tidwell v. Blaine Cnty.*, No. 48799, 2023 WL 6450936 at *6 (Idaho Oct. 4, 2023). On this ruling, and in reliance on the constitutional guarantees afforded to Idaho's citizens, Tidwell moved her case forward. Tidwell invested hundreds of thousands of dollars in this litigation to stave off other challenges to her case, including another challenge at summary judgment to her standing. Tidwell ultimately achieved a complete victory on the merits of her claims. Thanks in no small part to judicial intervention and a persistent plaintiff-citizen, the County's overreaching had been redressed. Now, on appeal, Tidwell is faced with the painful irony that the Court would prefer to maintain a "self-imposed constraint" on its jurisdiction than uphold the guarantee from the Idaho Constitution that courthouse doors should be open to citizens, like her, who seek to check government misconduct.

The Idaho Constitution, by virtue of the absence of a "case or controversy" provision like the kind found in its federal counterpart, "envisions a lower bar to access Idaho's courts." *Tidwell*, 2023 WL 6450936 at *16 (J. Stegner, dissenting). Ironically, however, the Court has made the bar ***higher*** for Tidwell than it would be if she were in federal court. The majority acknowledges that

"the U.S. Supreme Court has found esthetic interests are enough to support standing under a federal standard[.]" *Tidwell*, 2023 WL 6450936 at *10. And yet, while the Court "has historically looked to the United States Supreme Court for guidance on issues of standing," it refuses to do so here. *Reclaim Idaho*, 169 Idaho at 418, 497 P.3d at 172. As a result, a *federal* court with *limited* jurisdiction and a *more* stringent constitution would find that Tidwell's esthetic interests support standing, but an *Idaho* court of *general* jurisdiction and a *less* stringent constitution would not. Such a state of affairs should give the Court pause, and plenty of reason to reevaluate its decision.

B. Tidwell has standing because Parcel C's substandard sewer system will create health and environmental injuries for the neighborhood and Tidwell's property in particular.

Setting aside, for the moment, the constitutional issues with the Court's approach to standing, Tidwell suffered an injury sufficient to confer standing. The County's proposed construction on Parcel C will impact Tidwell's property[2] from both a health and environmental standpoint. Tidwell's property at 300 Let 'Er Buck Road is downstream from Parcel C, where the County intends to permit the installation of a substandard drain-field sewage system that is likely to be overwhelmed by the introduction of waste from two homes on an undersized lot. The likely result is both groundwater and surface water pollution. The substantial likelihood that this sewage system will impact Tidwell's property constitutes a "particularized harm" caused by the County's proposed development of Parcel C. It is, therefore, sufficient to confer standing on Tidwell.

Parcel C is 0.6 of an acre. (R. at 500.) It is situated in an unincorporated area of the County, which means there is no city sewer or other main line that it can stub into. A septic-tank drain-

[2] Consistent with the Court's published opinion, and for purposes of convenience, Tidwell refers in the present tense to her ownership of her former properties, which she owned throughout the pendency of the case before the district court.

field sewage system, *i.e.* the disposal of Parcel C's sewage in a subterranean septic tank and drain field located on the property, is the only option available for managing the property's sewage waste. According to the County's own ordinances, one acre is the minimum size of any lot with a septic-tank drain-field sewage system. (R. at 523.) Thus, "Parcel C is too small [for such a sewage system]." (R. at 954.) This is important. Septic tanks rely on natural biological processes in the soil to safely process the wastewater from a home.[3] If the system sits on too little acreage, the wastewater will overwhelm the natural processes and allow contamination to enter the groundwater and surface water.[4]

In spite of Parcel C's size and the County's 1-acre minimum, the County has issued a building permit for the property, which construction will necessarily include a septic-tank drain-field sewage system. Not only will Parcel C be too small to support such a sewage system, per the County's own rules, but the sewage system on this undersized lot will be supporting *two* residential units—a duplex. In sum, instead of two units with two acres to support a septic system, there will be two units on 0.6 acres, less than two-thirds of the land required for a single unit.

To make matters worse, Parcel C sits alongside the Hiawatha Canal, which runs south-southeast past the property. (R. at 543, 654, 819, 681.) Tidwell has harbored concerns regarding Parcel C's substandard septic situation, in part because of how it would affect groundwater in the

[3] *See* "A Homeowner's Guide to Septic Systems", United States Environmental Protection Agency (December 2002) at 1.
[4] *Id*. at 9 ("If the amount of wastewater entering the system is more than the system can handle, the wastewater backs up into the house or yard and creates a health hazard.").

area, but also because her property at 300 Let ‘Er Buck Road draws water from the same Hiawatha Canal downstream from Parcel C. (R. at 141, 158.)[5]

[5] The pages in the record cited here contain maps of the general area, one of which is depicted above. As shown in the Record at 543, 654, 819, and 681, the Hiawatha Canal runs alongside Parcel C. The canal then continues south-southeast, passing Tidwell’s property at 300 Let ‘Er Buck Road. In the maps (R. at 141 and 158), the canal can be seen as a line of trees running south-southeast, on the east side of Buttercup Road, and, for the most part, parallel to the road. While the canal itself does not pass through or along Tidwell’s property, there is a headgate and diversion point about 1000 feet north of Tidwell’s property where water from the canal is diverted under Buttercup Road and to the property, providing water for the stream, pond, and other water features on the property.

Thus, Tidwell's property is hydrologically connected to Parcel C and its proposed substandard septic system by virtue of the Hiawatha Canal that flows past Parcel C and toward Tidwell's property. The two nearby properties are also logically connected by groundwater. Thus, the threat that Parcel C will be disposing of two residential units' worth of sewage over 0.6 of an acre, an area that the County itself recognizes as insufficient for disposal of even a *single* residential unit's sewage, will likely result in health and environmental injuries to Tidwell and her property, not to mention the surrounding community. *See Schneider v. Howe*, 142 Idaho 767, 772, 133 P.3d 1232, 1237 (2006) (holding that "standing may be predicated upon a threatened harm" and finding that plaintiff had demonstrated a "specific future injury" sufficient to confer standing). This is the danger created when the County tries to shoehorn Parcel C into a use for which it was never intended.[6] The potential for environmental harm is a distinct and palpable injury that is sufficient to support Tidwell's standing.

While Tidwell focused on esthetic and recreational uses in her appellate briefing, among other things, the potential for environmental harm has been stressed throughout the case. Since the outset of the litigation, Tidwell has noted the concerns with developing Parcel C because of the lack of a suitable septic system to serve residential units on the property. (R. at 24, 39.) This issue of the substandard lot's septic system was also raised in Tidwell's pre-trial and post-trial briefing. (R. at 833, 844, 941.) And the district court made special note of it in its findings of fact. (R. at 954.)

[6] No provision was ever made for Parcel C's sewer system because residential construction on the lot was never intended. (R. at 954.)

The construction of a duplex and an overburdened and substandard septic system along the Hiawatha Canal presents a threatened injury that is sufficiently distinct and palpable to confer standing on Tidwell. There is a fairly traceable causal connection between the County's plans for Parcel C and the injury that Tidwell's property will suffer—just follow the water. Given this particularized harm caused by the county's proposed conduct, the Court should reconsider its decision and find that Tidwell did, in fact, have standing.

C. The Court's "lockstep" approach to its standing jurisprudence departs from the text of the Idaho Constitution and closes courthouse doors that are meant to be open.

Tidwell agrees with Justice Stegner's dissent (joined by Justice Trout) and the growing chorus of voices arguing that "the time has come for the Idaho Supreme Court to formally decouple its own standing doctrines from those of federal courts." *State Courts-State Standing Doctrine-Idaho Supreme Court Retains Federal Framework for Assessing Standing to Sue in State Court-Reclaim Idaho v. Denney*, 497 P.3d 160 (Idaho 2021), 135 Harv. L. Rev. 1945, 1954 (2022); *see also* Michael S. Gilmore, *Standing Law in Idaho: A Constitutional Wrong Turn*, 31 Idaho L. Rev. 509 (1995) (arguing Idaho's adoption of federal standing principles in certain actions "should be abandoned"). The Court's adoption of federal standing jurisprudence is inconsistent with the language of the Idaho Constitution and the Court should hold that Tidwell has standing by applying rules and factors that are based on the provisions of the Idaho Constitution, which governs her case.

As the Court has held previously, "the origin of Idaho's standing is a self-imposed constraint adopted from federal practice, as there is no 'case or controversy' clause or an analogous provision in the Idaho Constitution as there is in the United States Constitution." *Coeur D'Alene*

Tribe v. Denney, 161 Idaho 508, 513, 387 P.3d 761, 766 (2015). But this re-telling of the origin of Idaho's standing doctrine is not complete. The Idaho Supreme Court addressed questions regarding its citizens' standing to sue in state courts at the very beginning of statehood. *See e.g. Orr v. State Bd. of Equalization*, 2 Idaho 923, 28 P. 416, 417-18 (1891). It was not until nearly a century later that the Court first introduced federal standing principles into its own state-based analysis. Gilmore, 31 Idaho L. Rev. at 558; *see Bear Lake Educ. Ass'n, By & through Belnap v. Bd. of Trustees of Bear Lake Sch. Dist. No. 33*, 116 Idaho 443, 448, 776 P.2d 452, 457 (1989). But the *Bear Lake* court merely dipped its toe in the water, noting that the analysis by federal courts was "instructive" and being careful to point out that "some elements of standing in the federal system are colored by the constitutional requirements of a 'case' or 'controversy,'" unique to the federal Constitution. 106 Idaho at 87, 675 P.2d at 347. Subsequent decisions by the Court abandoned this measured approach, without reason or justification, and began treating federal standing jurisprudence as its own. Gilmore, 31 Idaho L. Rev. at 564 (citing *Miles v. Idaho Power Co.*, 116 Idaho 635, 778 P.2d 757 (1989)). Now, recognizing that the state's standing doctrine has walked out on a limb, the Court simply refers to its adoption of federal standing jurisprudence as a "self-imposed constraint." In doing so, however, the Court continues on a path where it acts without authority from the Idaho Constitution or Idaho law.

The phenomenon described above is what some sources call "lockstepping." That is, "the tendency of some state courts to diminish their constitutions by interpreting them in reflexive imitation of the federal courts' interpretation of the Federal Constitution." 135 Harv. L. Rev. at 1950. There are many reasons why lockstepping is problematic, especially in the context of the federal standing doctrine. The following paragraphs address a few.

First, lockstepping can lead to mismatched and ungrounded jurisprudence, as is happening in Idaho, when state and federal courts offer competing justifications for the very same doctrines. 135 Harv. L. Rev. at 1950. For example, this Court justifies the standing factors it has adopted from *Lujan* (injury in fact, causation, and redressability), *State v. Philip Morris, Inc.*, 158 Idaho 874, 881, 354 P.3d 187, 194 (2015), on prudential grounds. Those prudential grounds include "identify[ing] appropriate or suitable occasions for adjudication by a court," *Id*., as well as "avoid[ing] advisory opinions[.]" *Planned Parenthood Great Northwest v. State*, 171 Idaho 374, __, 522 P.3d 1132, 1159 (2023). This Court's justifications for the *Lujan* factors, however, are incompatible with the U.S. Supreme Court's justifications, which treat the *Lujan* factors as defining the Court's jurisdiction based on the federal "case or controversy" requirement. *See e.g. Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 n.3 (2014). As a result of this mismatch, federal courts are crafting inflexible constitutional doctrines, ignoring whether they strike the right practical balance in regulating the exercise of judicial power, while Idaho courts are presumptively bound to apply those same doctrines specifically for purposes of regulating the exercise of judicial power. 135 Harv. L. Rev. at 1951.

Second, as Justice Stegner stressed in his dissent, lockstepping overlooks the constitutionally based distinctions between federal courts and state courts; the former being courts of limited jurisdiction and the latter courts of general jurisdiction. Idaho Const. art. 5, § 20; 135 Harv. L. Rev. at 1951-52. Failure to account for these distinctions "limit[s] a citizen's ability to seek and obtain redress in Idaho courts." *Tidwell*, 2023 WL 6450936 at *17 (J. Stegner, dissenting). Moreover, failing to treat Idaho courts like the courts of general jurisdiction that they are requires the Court to, on the fly, craft exceptions to the federal standing framework whenever it becomes

evident that constitutionally significant cases will be barred from *all* courthouses; state and federal. *See Reclaim Idaho*, 169 Idaho at 422, 497 P.3d at 176. One such case was *Reclaim Idaho*, where the Court explained how it has "relaxed traditional standing requirements in order to hear cases involving alleged constitutional violations that would otherwise go unaddressed because no one could satisfy traditional standing requirements." *Id*. But by "*traditional* standing requirements," the Court really meant *federal* standing requirements. And the Court's "relaxed standing" approach to some cases ultimately only treats the symptoms of its misguided standing jurisprudence, it does not cure the disease. Relying on federal standing and imperfect, ad hoc exceptions to that doctrine means plaintiffs like Tidwell slip through the cracks and are shut out from Idaho courthouses.

Idaho's lockstep approach to the federal standing doctrine lands it among a minority of states. "Most states distinguish between the structure of the state and federal courts, and avoid adopting federal doctrine without regard to their own precedent or circumstances." Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 Ky. J. Equine Agric. & Nat. Res. L. 349, 398 (2016). And Idaho is one of just fourteen states that have adopted some part of the federal standing framework without distinguishing it from any state doctrine. *Id*. at 353-54 nn. 17-19.

Moreover, a "self-imposed constraint" on the jurisdiction of Idaho courts is unnecessary in cases like Tidwell's where the Legislature has already crafted constraints of its own. As a plaintiff bringing a claim under the Declaratory Judgment Act, Tidwell must meet the standard set forth in that statute. Idaho Code § 10-1201 (limiting claims to "person[s] interested under a deed, will, written contract[, etc.] . . . or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, . . ."). The same is true for claimants under the Local

Land Use and Planning Act,[7] the Idaho Administrative Procedure Act,[8] the Constitutionally Based Educational Claims Act,[9] the Community Infrastructure District Act,[10] the Idaho Protection of Public Employees Act,[11] as well as actions to quiet title,[12] and actions for the partition of real property,[13] to name a few. Even the majority made note in its opinion of another case wherein "a statute granted standing" to particular claimants. *Tidwell*, 2023 WL 6450936 at *9 (discussing *In re Jerome Cnty. Bd. of Comm'rs*, 153 Idaho 298, 308, 281 P.3d 1076, 1086 (2012)).

At best, the Court's self-imposed standing doctrine serves merely a redundant gatekeeping function in cases, like Tidwell's, that involve this kind of legislative direction. *But see Ciszek v. Kootenai Cnty. Bd. of Comm'rs*, 151 Idaho 123, 128, 254 P.3d 24, 29 (2011) (requiring a claimant under the Declaratory Judgment Act to both meet the requirements of the Act and show standing). Further, the Idaho Constitution seems to be at odds with arbitrary limitations on court access, Idaho Const. art. I, § 18 ("Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property or character . . . ."); *see also Hawley v. Green*, 117 Idaho 498, 501, 788 P.2d 1321, 1323-24 (1990) (explaining that this provision "admonishes" Idaho courts to secure the rights and remedies afforded by the Legislature), and provides that the Legislature has the sole authority to prescribe the jurisdiction of Idaho's inferior courts. Idaho Const. art. V, § 2 ("The jurisdiction of such inferior courts shall be as prescribed by the legislature."); *see also Acker*

[7] Idaho Code § 67-6535 (limiting appeals to applicants denied an application or "aggrieved by a final decision").
[8] Idaho Code § 67-5270 (limiting claims to "person[s] aggrieved").
[9] Idaho Code § 6-2205 (limiting standing to present and future schoolchildren and their parents and guardians); *see Zeyen*, 165 Idaho at 707, 451 P.3d at 42 (J. Stegner dissenting).
[10] Idaho Code § 50-3119 (limiting appeals to "person[s] in interest who feel[ ] aggrieved).
[11] Idaho Code § 6-2105 (limiting claims to "employee[s] who allege[ ] a violation of this chapter . . . .").
[12] Idaho Code § 6-401 (limiting actions to quiet title to "any person against another who claims an estate or interest in real or personal property adverse to him, ...").
[13] Idaho Code § 6-501 (limiting actions to "cotenants").

v. Mader, 94 Idaho 94, 96, 481 P.2d at 607 (1971) (explaining that this provision "intended the legislature to be the sole authority").

The Court has embraced federal standing principles for decades and has applied them to cases as recently as a few weeks before the opinion was issued here. *Tidwell*, 2023 WL 6450936, at *8. But this Court's precedent should always be closely scrutinized when it interprets the State's Constitution. The U.S. Supreme Court does the same:

> We have long recognized, . . . that stare decisis is "not an inexorable command," and it "is at its weakest when we interpret the Constitution." It has been said that it is sometimes more important that an issue "be settled than that it be settled right." But when it comes to the interpretation of the Constitution—the "great charter of our liberties," which was meant "to endure through a long lapse of ages,"—we place a high value on having the matter "settled right."

Dobbs v. Jackson Women's Health Org., 597 U.S. __, 142 S. Ct. 2228, 2262 (2022) (internal citations omitted). Tidwell encourages the Court to reconsider its opinion, abandon judicially created standing requirements entirely or adopt a set of rules or factors for standing in Idaho that is consistent with the State's Constitution, and find that Tidwell had standing sufficient to pursue her case against the County.

D. The Court's decision, as it stands, results in a losing situation for all.

For several reasons, Tidwell's case should motivate the Court to both schedule a rehearing and reevaluate its standing jurisprudence. By failing to reach the merits of Tidwell's case, the Court leaves meaningful issues unresolved. First, on the merits of the case, the district court found unequivocally that the County had wrongfully appropriated Parcel C for a use for which it did not have the property rights. In the district court's words, "[t]he ***express language*** of ***all*** of the decision documents . . . demonstrate that the parties ***consistently*** intended to limit Parcel C to open space

or recreational use and ***never wavered from that intent***." (R. at 960 (emphases added).) In other words, the County did not own the rights that would allow the construction of housing on Parcel C. By deciding the issue on procedural grounds, this larceny goes unaddressed. In addition, it means all nearby residents, including Tidwell, lose out on the open space and recreational parcel along the canal and bike path that had been dedicated for their benefit.

Second, building a duplex on Parcel C means that water quality in the area is threatened by an undersized lot with a massively deficient septic system. The inability of Parcel C to support an adequate septic system for residential construction was never evaluated when it was deeded to the County because residential construction was never intended there. (R. at 954.) But thanks to the Court's decision, the construction moves forward.

Third, while the County may feel as though it has come away with a win, a cloud remains over Parcel C. A judgment has been entered, after a full trial, finding that Parcel C was never meant for residential construction. If another plaintiff with standing exists, nothing stops her from stepping up and enforcing the fact that residential development rights for Parcel C were never conveyed to the County. The district court's factual findings loom large over Parcel C.

The Court's decision on standing leaves all in a lose-lose-lose situation. Tidwell urges the Court to reevaluate its decision and schedule a rehearing where the issues discussed above can be addressed.

IV. CONCLUSION

Tidwell respectfully requests that the Court grant a rehearing and reconsider its decision in this appeal.

DATED this 8th day of November, 2023.

/s/ Gary G. Allen
Gary G. Allen – Of the Firm
Attorneys for Respondents/Cross-Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on this 8th day of November, 2023, I caused a true and correct copy of the foregoing to be served electronically through the iCourt system, which caused the following parties or counsel to be served by electronic means, as more fully reflected below:

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