No. 24522

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF SAGUACHE, STATE OF COLORADO, Plaintiff in Error, v. KEITH H. EDWARDS, GEORGE W. MCCLURE, AND HAROLD G. NEWMYER, for themselves and on behalf of all residents of Saguache County, Colorado, Defendants in Error.	Error to the District Court of the County of Saguache State of Colorado HONORABLE RICHARD E. CONOUR JUDGE

BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE

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THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF SAGUACHE, STATE OF COLORADO,

Plaintiff in Error,

v.

KEITH H. EDWARDS, GEORGE W. MCCLURE, AND HAROLD G. NEWMYER, for themselves and on behalf of all residents of Saguache County, Colorado,

Defendants in Error.

BRIEF OF THE COLORADO MUNICIPAL LEAGUE

AS AMICUS CURIAE

STATEMENT OF THE CASE

The Colorado Municipal League files this Brief on behalf of its association of two hundred nineteen (219) Colorado cities and towns, and in support of Defendants in Error. This case directly involves an appeal from a decision of the district court ordering reapportionment of county commissioner districts in Saguache County and Amicus Curiae herein adopts Defendants in Error statement of the case.

The public importance of this Court's decision is far greater, however, than the litigation which directly involves only a single county. The problem of unequal apportionment of county commissioner districts appears to still prevail in many Colorado counties -- often, if not invariably, to the detriment of the urban or municipal resident. Plaintiff in Error in seeking advancement of the hearing in this matter acknowledged that the issues involved affect all counties except the City and County of Denver. Because of the broad public importance, Amicus Curiae asks this Court to resolve without further doubt the issue of the right and remedy of each county resident to apportionment of commissioner districts into districts "as nearly equal in population as possible."

SUMMARY OF THE ARGUMENT

I. C.R.S. 1963, 35-3-6, IMPOSES A CLEAR AND JUDICIALLY ENFORCEABLE DUTY UPON COUNTY COMMISSIONERS TO REAPPORTION COMMISSIONER DISTRICTS WHICH ARE UNEQUAL IN POPULATION.

II. FAILURE TO REQUIRE REAPPORTIONMENT OF MALAPPORTIONED DISTRICTS WOULD CONSTITUTE A DENIAL OF THE RIGHT TO EQUAL PROTECTION.

ARGUMENT

I. C.R.S. 1963, 35-3-6, IMPOSES A CLEAR AND JUDICIALLY ENFORCEABLE DUTY UPON COUNTY COMMISSIONERS TO REAPPORTION COMMISSIONER DISTRICTS WHICH ARE UNEQUAL IN POPULATION.

C.R.S. 1963, 35-3-6, unquestionably delegates the authority and imposes the duty on the board of county commissioners to apportion

commissioner districts into compact districts "as nearly equal in population as possible."

> 35-3-6. Commissioners' districts -- vacancies. Each county shall be divided into as many compact districts by the county commissioners as there are county commissioners in the county; such districts to be as nearly equal in population as possible. They shall be numbered consecutively and shall not be subject to alteration oftener than once in two years. One commissioner shall be elected from each of such districts by the voters of the whole county. If any commissioner, during his term of office, shall remove without the district in which he resided when elected, his office shall thereupon become vacant. All proceedings by the county commissioners in formation of such districts not inconsistent herewith are hereby confirmed and validated. (emphasis supplied)

The statute imposes an unequivocable duty upon the county commissioners. To attribute to the term "shall" the meaning "may" or any meaning other than a mandatory duty would do discredit to the english language. In Colorado the presumption certainly exists that the word "shall" when used in a statute is mandatory. Swift v. Smith, 119 Colo. 126, 201 P.2d 609 (1948).

There is no reason here to rebut or circumvent the ordinary meaning of "shall." In fact, the legislative history of C.R.S. 1963, 35-3-6, supports the plain language of the statute. Prior to 1963 this statute was silent as to who was to divide the county into districts. In fact, the earlier district court case in Saguache County to which Plaintiff in Error refers and cites as res judicata was based on the pre-1963 statute. In 1963 the General Assembly enacted House Bill 90 amending C.R.S. 1963 (1953), 35-3-6, and that section alone:

> 35-3-6.--Commissioners' districts -- vacancies. Each county shall be divided into as many compact districts BY THE COUNTY COMMISSIONERS as there are county commissioners in the county; such districts to be as nearly equal in population as possible. They shall be numbered consecutively and shall not be subject to alteration oftener than once in two years. One commissioner shall be elected from each of such districts by the voters of the whole county. If any commissioner, during his term of office, shall remove without the district in which he resided when elected, his office shall thereupon become vacant. ALL PROCEEDINGS BY THE COUNTY COMMISSIONERS IN FORMATION OF SUCH DISTRICTS NOT INCONSISTENT HEREWITH ARE HEREBY CONFIRMED AND VALIDATED. Chapter 262, Session Laws of 1963.

By adding "BY THE COUNTY COMMISSIONERS" House Bill 90 simply granted the power and imposed the duty on county commissioners to carry out the equal apportionment provisions of the statute. Unlike much legislation which is enacted after substantial amendments have obscurred legislative intent, H.B. 90 was enacted as introduced without amendment. 1963 Senate and House Journals. Another construction of "shall" would unjustly mean that the citizens of Colorado have the right but not a remedy for arbitrary and discriminatory county commissioner districting or failure to redistrict.

Parenthetically, Plaintiff's in Error reference to the 1955 district court decision of Judge Nolan denying a mandamus suit seeking reapportionment as being res judicata is answered, if for no other reason, by the significant 1963 amendment. Indeed the Nolan decision or other similar interpretations may imply a specific intent to clarify or change the prior law by delineating responsibility for redistricting. Uzzell v. Lunney, 46 Colo. 403, 104 P.945 (1909), and People v. City and County of Denver, 84 Colo. 576, 272 P.629 (1928).

Thus, whether the Court interprets the statute in light of legislative history, or merely by looking at its plain, unambiguous wording, we submit that the statute compels commissioners to divide their counties into districts of nearly equal population.

II. FAILURE TO REQUIRE REAPPORTIONMENT OF MALAPPORTIONED DISTRICTS WOULD CONSTITUTE A DENIAL OF THE RIGHT TO EQUAL PROTECTION.

The clear wording of C.R.S. 1963, 35-3-6, together with a legislative history consistent with that wording makes a lengthy discussion of constitutional guarantees of equal protection unnecessary. It is axiomatic that statutes are to be construed, if possible, to avoid serious constitutional questions. Amicus Curiae submits that a serious question of violation of equal protection would be present if C.R.S. 1963, 35-3-6, were interpreted to provide no enforceable right to equal apportionment of commissioner districts.

The line of cases starting with Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962), and running through Reynolds v. Sims, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed.2d 506 (1964) and Avery v. Midland County, 390 U.S. 474, 88 S. Ct. 1114, 20 L. Ed. 2d 45 (1968) suggest a violation of the Equal Protection Clause of the Fourteenth Amendment to the U. S. Constitution unless the districts in Saguache County are reapportioned.

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society...To the extent that a citizen's vote is debased, he is that much less a citizen. Reynolds v. Sims, 84 S. Ct. 1362 at 1384.

In Avery, supra, the Supreme Court applied the reapportionment cases to counties. It is true that in Avery commissioners were elected from districts rather than by an at large vote. However, discrimination is also readily apparent from a system, such as Colorado's, which requires commissioners to be residents of particular districts (if the districts are not substantially equal in population) even though elections are by an at large vote. By forcing one or more commissioners to be selected from a substantially smaller district, in terms of population, this provides proportionally greater representation

to the residents of that district. As a resident of a particular district and as commissioner for that district, there is an undeniable inclination or disposition on the part of that commissioner to prefer or "look out" for its interest. The fact that all county electors vote for all commissioner offices cannot overcome the invidious discrimination inherent in substantially unequal districts. Whether it is in terms of locating a county dump or other public works, building or improving roads, or sharing revenue and expenses or otherwise cooperating with municipalities within the county, residents of an underpopulated district are unjustly favored.

In Saguache County, according to the 1960 Federal Census, each voter has a total of only 157 persons from whom to chose candidates and elect a commissioner from District No. 1. In District No. 2, on the contrary, the choice would be from a total of 2,906 persons. Conversely, the 157 persons residing in District 1 have a proportionately greater say in the affairs of the county. In substance, such discrimination is no different, except for degree, from denying the vote entirely. Nor is the situation any different simply because there is more than one possible candidate. Apportionment of districts containing 3½%, 65% and 31½% of the county population constitutes an invidous discrimination against the residents of the more densely populated districts in terms of their voice in county affairs and, therefore, is unconstitutional.

In 1969 the United States Supreme Court decided two landmark cases imposing a new and more rigid standard for measuring compliance with requirements of equal protection where the right to vote is involved. Kramer v. Union Free School District, 89 S. Ct. 1886 (1969), and Cipriano v. City of Houma, 89 S. Ct. 1897 (1969). Both cases involved state statutes limiting the franchise to select classes of people. In holding both statutes unconstitutional, the Court enunciated the new rule that statutes granting the franchise to some and denying it to others violate the Equal Protection Clause of the Fourteenth Amendment unless the state can show a compelling state interest furthered by the discrimination.

In Kramer, supra, at pages 1889-92 the Court emphasized the problem of representation and voice in affairs of government and set forth the protection afforded by the Equal Protection Clause.

> 'In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances of the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.'... And, in this case, we must give the statute a close and exacting examination. '(S)ince the right to exercise ...

the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.'...This careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.

Thus, state apportionment statutes, which may dilute the effectiveness of some citizens' votes, receive close scrutiny from this Court....

And, for these reasons, the deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials. Those decisions must be carefully scrutinized by the Court to determine whether each resident citizen has, as far as is possible, an equal voice in the selections. Accordingly, when we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinctions made are not applicable....The presumption of constitutionality and the approval given 'rational' classifications in other types of enactments are based on as assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality. And, the assumption is no less under attack because the legislature which decides who may participate at the various levels of political choice is fairly elected. Legislation which delegates decision making to bodies elected by only a portion of those eligible to vote for the legislature can cause unfair representation. Such legislation can exclude a minority of voters from any voice in the decisions just as effectively as if the decisions were made by legislators the minority had no voice in selecting.

The need for exacting judicial scrutiny of statutes distributing the franchise is undiminished simply because, under a different statutory scheme, the offices subject to election might have been filled through appointment....

Nor is the need for close judicial examination affected because the district meetings and the school board do not have 'general' legislative powers. Our exacting examination is necessitated not by the subject of the election; rather, it is required because some resident citizens are permitted to participate and some are not....

Whether classifications allegedly limiting the franchise to those resident citizens 'primarily interested' deny those excluded equal protection of the law depends, inter alia, on whether all those excluded are in fact substantially less interested or affected than those the statute includes. In other words, the classifications must be tailored so that the exclusion of appellant and members of his class is necessary to achieve the articulated state goal....

Amicus Curiae submits that there is no compelling state interest in discrimination in population of commissioner districts. On the contrary, C.R.S. 1963, 35-3-6, evidences a state interest in equality. Thus, any construction of C.R.S. 1963, 35-3-6, which did not compel equal apportionment of commissioner districts, it is submitted, would be a denial of equal protection as enunciated by the reapportionment cases and as extended by Kramer and Cipriano, supra. C.R.S. 1963, 35-3-6, should be construed so as to avoid conflict with the Fourteenth Amendment.

CONCLUSION

The clear meaning of C.R.S. 1963, 35-3-6, legislative history showing an intent consistent with the statutory wording and the serious constitutional issues raised by any contrary interpretation dictate that the district court decision be affirmed.

The arguments offered by Plaintiff in Error are unworthy of serious consideration. Plaintiffs in Error do not stress that no wrong has been committed -- they argue instead that the Colorado Courts are powerless to right a wrong and correct an injustice. Plaintiff's in Error failure to reapportion suggests an indifference for law which this Court should not tolerate. A grave injustice to Defendants in Error and others similarily situated (recent population estimates indicate that about 80% of the citizens of Colorado and of the counties therein reside within municipalities) if this Court were to rule that the right to equal representation was without a judicial remedy. We respectfully ask this Court for an unequivocable decision which will force other malapportioned counties to be reapportioned without separate and prolonged litigation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing Brief have been served upon all parties of record by mail, postage prepaid, to J. Fritz Schneider, Schneider, Shoemaker, Wham and Cooke, 1421 Court Place, Denver, Colorado 80202; and Robert W. Ogburn, 729 First Avenue, Monte Vista, Colorado 81144, this 10th day of February, 1970.