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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, **Plaintiff-Appellant,** **v.** **GERALD ROSS PIZZUTO, JR.,** **Defendant-Respondent.**	**DOCKET NO. 49489-2022** **Idaho County District Court No. CR-1985-22075** **CAPITAL CASE**
GERALD ROSS PIZZUTO, JR., **Petitioner-Respondent,** **v.** **STATE OF IDAHO,** **Respondent-Appellant.**	**DOCKET NO. 49531-2022** **Idaho County District Court No. CV25-22-0004** **CAPITAL CASE**

DEFENDANT-RESPONDENT'S/PETITIONER-RESPONDENT'S RESPONSE TO GOVERNOR BRAD LITTLE'S *AMICUS CURIAE* BRIEF

Appeal from the District Court of the Second Judicial District for Idaho County,
Honorable Jay P. Gaskill, District Judge Presiding

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The Governor's amicus curiae brief, filed May 4, 2022 ("Gov. Br."), advances an irrelevant plain-language, inverts constitutional avoidance into its opposite, and whitewashes his own hasty decision to ignore the vote for mercy rendered by the Commissioners.[1]

I. The Governor's plain-language argument is incorrect.

Misperceiving the nature of the case, the Governor directs his plain-language section at establishing a series of points that no one disputes: (1) that "as provided by statute" in the 1986 amendment to Section 7 "necessarily requires the use of legislative power for enactment," *id.* at 3–4; (2) that the word "only" in the amendment is "mandatory and prohibitive," *id.* at 4; (3) that the 1986 amendment unambiguously "limit[s] the Commission's unfettered discretion," *id.* at 3; and (4) that the words "as provided by statute" are "prescriptive and mandatory," *id.* at 6.[2] Everyone else agrees, and it gets the analysis nowhere. The 1986 amendment undeniably calls for legislation concerning commutations and in so doing reduces the Commission's discretion in a mandatory fashion. But the critical question is *what type* of legislation is envisioned by the amendment. Is it a statute completely stripping the Commission of the commutation power granted to it by Section 7, as the State contends? Or is it a statute regulating the way in which the Commission exercises its commutation power, as Mr. Pizzuto would have it? The Governor never engages with that debate, and his plain-language presentation is largely beside the point.

[1] Mr. Pizzuto uses here the same shorthand employed in his Answering Brief, filed Apr. 27, 2022 (hereinafter "Answering Brief" or "Ans. Br.").

[2] Unless otherwise noted, all internal quotation marks and citations are omitted, and all emphasis is added.

Having disposed of the Governor's principal conclusions, there remains in his brief only a handful of scattered assertions, and they are no more persuasive. First, the Governor summarily states that "as provided by statute" must have the significance he ascribes to the phrase because otherwise the 1986 amendment would have been "mere surplusage." *Id.* 4. Mr. Pizzuto described at some length in his Answering Brief how the 1986 amendment worked a meaningful change to Section 7 by giving the legislature the authority to adopt *standards* for commutations, as many statutes around the county have done. *See* Ans. Br. at 10–11, 21–22. The Governor does not even attempt to respond.

Most of the Governor's plain-language discussion deals with a random litany of cases in which the phrase "as provided by statute," or something in the same vein, appears. *See* Gov. Br. at 4–6. Nearly every one of the cases is easily distinguishable, as they do not involve comparable language. In almost all of them, the language at issue plainly conditions a single subject on legislation. *See Fischer v. Croston*, 413 P.3d 731, 741 (Idaho 2018) (construing I.R.C.P. 54(e)(1) to authorize attorney fees "only as provided by statute"); *State ex rel. Discover Fin. Servs., Inc. v. Nibert*, 744 S.E.2d 625, 643 (W. Va. 2013) (analyzing a constitutional clause declaring that the attorney general "shall perform such duties as may be prescribed by law"); *Holzendorf v. Bell*, 606 So. 2d 645, 648 (Fla. Dist. Ct. App. 1992) (revolving around a constitutional clause providing that "[s]pecial elections and referenda shall be held as provided

by law"); *Schumacher v. Great N. Ry. Co.*, 136 N.W. 85, 87 (N.D. 1912) (considering a statute establishing that marriage "shall be entered into . . . only as provided by law").[3]

In such cases, no question arises as to the scope of "as provided by statute" because the phrase manifestly covers the entire field. For instance, when a marriage can only be entered into as provided by law, *see Schumacher*, 136 N.W. at 87, there is only one thing to ask about a marriage under the statute: does it comply with the pertinent legislation? By contrast, there are two things the 1986 amendment could apply to: *who* grants commutations or *how* they do so. That is, Section 7 has two layers: it first grants the commutation authority to the Commission and then it qualifies that authority with reference to statute. There is no parallel in these cases of the Governor's, and they are consequently of little value in the instant appeal.

The only authority of the Governor's that merits more rebuttal is *Neb. PSC v. Neb. Pub. Power Dist.*, 590 N.W.2d 840 (Neb. 1999). In that case, the court probed the organic statute for a state agency in the telecommunication field. The statute directed the agency to "regulate and exercise general control as provided by law over all common carriers." *Id.* at 847. In a challenge to the agency's jurisdiction, the Nebraska Supreme Court read "as provided by law" to signify that the "statutory authority over any particular common or contract carrier must be

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[3] *Clarabal v. Dep't of Educ.*, 446 P.3d 986 (Haw. 2019), is even less germane than the cases listed above, as it did not turn on "as provided by statute" or any similar phrase. Rather, the court there mentioned the *omission* of such a phrase from the constitutional provision at issue. *See id.* at 1000. And contrary to the Governor's insinuation, *see* Gov. Br. at 5, *Clarabal* did not hold that "as provided by law" always means "solely defined by legislative enactments." *Clarabal* merely concluded that the provision under review *did not* make a program "solely defined by legislative enactments" when it included *no* qualifications. *See* 446 P.3d at 1000–01.

derived from some statute other than" the one just quoted. *Id.* "To hold otherwise," the Nebraska Supreme Court said, would "render the phrase 'provided by law' superfluous." *Id.*

The Nebraska case is distinct from Mr. Pizzuto's because it relates to a statutory grant of authority, as opposed to a constitutional authorization. A regulatory agency like the one in the Nebraska appeal is by definition a creature of statute, and it will always be subject to the legislature's will in all respects. *See, e.g.*, *Ky. Waterways All. v. Johnson*, 540 F.3d 466, 488 (6th Cir. 2008) (remarking that "[r]egulatory agencies are creatures of statute"). Contrastingly, the Commission is recognized in the Idaho Constitution as the organ that "shall have power to . . . grant commutations." It therefore makes sense that the Nebraska agency would have no power other than what the legislature saw fit to give it. But it does not make sense of the Commission, which has a more privileged status under the Idaho Constitution. For the same reasons, the Nebraska Supreme Court's characterization of "as provided by law" as being rendered superfluous by a contrary reading has no force here. As noted, the purpose of the 1986 amendment was to empower the legislature to regulate the process by which the Commission considers commutation petitions. Importantly, that is precisely what was communicated in the public notice to the voters, a group whose perspective is studiously ignored by the Governor. The public was told that the 1986 amendment would give the legislature "the authority to set policies and procedures for commutations." Applt. Opening Br., filed Apr. 8, 2022, App. H.[4] Such a purpose would not fit with the Nebraska statute, because regulatory agencies are always

[4] Newspaper articles from the era likewise overwhelmingly support Mr. Pizzuto's gloss on the voters' intent, as almost none of them suggest the commutation power was being transferred.

inherently subject to legislative oversight, and no statute need say so. That is why the "as provided" language in Nebraska must have been signaling something broader than oversight, i.e., the agency's power as a whole. The same logic does not apply to Section 7. Lastly, the Nebraska Supreme Court did not take on an argument like Mr. Pizzuto's, so its stance on "as provided" sheds little light on the present case in any event.

Seeking to account for why he has a role in commutations despite his absence from the Constitution's description of the process, the Governor protests that he was in fact incorporated into Section 7. *See* Gov. Br. at 6. His strained explanation is that "as provided by statute" refers to legislation, and the "*usual* course for enacting statutes requires presentment to the Governor." *Id.* (emphasis altered). So what? The question here is not about who is involved in passing the statutes contemplated by the 1986 amendment. It is about who exercises the commutation power. There is nothing in Section 7, either before or after the 1986 amendment, to indicate that anyone other than the Commission enjoys the commutation power. To repeat the dispositive plain language, which the Governor never even recognizes in his plain-language argument, the Commission "shall have power . . . to grant commutations." A plain-language argument that glosses over the plain language of the controlling clause is scarcely worthy of the name.

II. The Governor's constitutional-avoidance argument is incorrect.

Misunderstanding the doctrine, the Governor appeals to the canon of constitutional avoidance. *See id.* at 8. The Governor's mistake is to use the doctrine as a reason for the Court

to *uphold* the constitutionality of Idaho Code § 20-1016.[5] That is the opposite of what constitutional avoidance does. As the Governor's own authority puts it, the canon's purpose is to "allow appellate courts to *skip* the constitutional inquiry." *Miller v. ISP*, 252 P.3d 1274, 1283 (Idaho 2011). Taking that approach, courts decline to "pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed of." *Pearson v. Callahan*, 555 U.S. 223, 241 (2009) (cited approvingly by *Miller*, 252 P.3d at 1283). The Governor doesn't ask this Court to "skip the constitutional inquiry." *Miller*, 252 P.3d at 1283. Nor has he identified "some other ground upon which the case may be disposed of," *Pearson*, 555 U.S. at 241, such as, for example, a question regarding the vehicles through which Mr. Pizzuto brought his claim. Instead, the Governor encourages the Court to reach the merits of the constitutional question and sustain § 20-1016. Notwithstanding the Governor's unexplained view to the contrary, "avoidance" does not mean "address the merits and rule in my favor."

It is true, as another of the Governor's cases reiterates, that the doctrine of constitutional avoidance does sometimes lead courts to comment on the meaning of constitutional provisions to some extent. For example, the doctrine can be triggered by a challenge that is based on a *statute*, when one interpretation generates constitutional concerns by implication and another does not. To clarify such concerns, a court might refer in passing to the meaning of the Constitution,

[5] The Court would also be entitled to disregard the Governor's theory concerning constitutional avoidance on the basis that it was not asserted by the State either below or in its Opening Brief, and raising it in the reply would be too late. *See* Ans. Br. at 6 n.6. As the State itself has explained, "this Court will not consider arguments from an amici that were not raised by the parties or passed on by the lower courts." State's Resp. to 1986 Voters' Mot. to File Amicus Br., filed May 2, 2022, at 3.

usually when it is obvious and not at issue in the dispute between the parties. *See Hill-Vu Mobile Home Park v. City of Pocatello*, 402 P.3d 1041, 1047 (Idaho 2017). In a case like that, the court interprets a statute in such a way that it need not delve into the Constitution. Here, though, Mr. Pizzuto's attack on § 20-1016 is premised entirely on the Constitution, and both parties—as well as the Governor himself—want the Court to construe Section 7. To Mr. Pizzuto's knowledge, no court in the country has ever embraced the Governor's counterintuitive belief that the Constitution can be avoided in a case where the entire question is what the Constitution means.

Finally, to the unclear extent that the Governor intends to rely on the rule that statutes are presumed constitutional, and merely gives the doctrine the wrong name, he would still be off base. The State did not call on that canon in its Opening Brief and thereby forfeited any chance to have it considered in the case, *see* Ans. Br. at 41 n.16, and as an amicus the Governor cannot inject it into the appeal by himself, *see Schweitzer Basin Water Co. v. Schweitzer Fire Dist.*, 408 P.3d 1258, 1262 (Idaho Ct. App. 2017). Plus, Mr. Pizzuto outlined in his Answering Brief how the presumption is exempted from criminal cases, *see* Ans. Br. at 41 n.16, which the Governor does not even acknowledge—let alone refute. In sum, even if the Court charitably places a more appropriate label on the constitutional-avoidance argument than the one wrongly chosen by the Governor, it would not change the analysis.

III. The Governor's policy argument is incorrect.

In a cursory section devoid of authority, the Governor resorts to policy. *See* Gov. Br. at 9. Partly, his reasoning seems to be that governors have in the past exercised the commutation power so it must be a prudent arrangement. Just because a system is in place does not mean that

it's a good one. The Governor elsewhere insists without evidence that he engaged in a "thorough review of the case for many months." *Id.* at 1. In fact, the Governor spent less than a day "weighing" the judgment for mercy reached by the Commissioners, never even referenced their well-supported reasons in his own decision—even though the Commissioners are the very people the Governor and his predecessors appointed for their judgment and expertise in the field—and pointed to the facts of the crime alone as the only germane consideration while overlooking every other potential basis for mercy. *See* Ans. Br. at 44. That kind of heedless, deference-free mindset in a matter of life and death hardly reflects a sound policy. If an appellate court reversed the judgment of a trial judge a day after receiving her decision in a case with no emergency and in an order that contained no discussion of her reasoning, few in the legal system would find themselves inspired by the reliability of the judiciary. So, too, for the Governor.

The Governor also suggests that he must have the commutation power because § 20-1016 was enacted, avoided a veto, and has not been struck down yet. *See* Gov. Br. at 7, 9. His logic is flawed. The fact that the question is unsettled means only that it must be answered now, not that it has to be resolved in a certain way. All legal issues are adjudicated in the course of real disputes. Some are raised sooner and some later, for a multitude of reasons, none of which go to the merits. That is the nature of a common-law system. Courts routinely invalidate old statutes under constitutional theories they are encountering for the first time years after their enactment. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (rejecting a similar criticism about the historical acceptance of firearms regulations under the Second Amendment because, "[f]or most of our history the question did not present itself," and providing other examples).

Rather than taking the Governor's perspective on the history, one might just as easily say that the first judge to ever take up the question—in the district court below—definitively answered it in Mr. Pizzuto's favor, which certainly does not imply that § 20-1016 is unassailable.

It is equally erroneous for the Governor to posit that "legislative silence after the 1986 Amendment took effect would have ended any issuance at all of commutations." Gov. Br. at 7. When the 1986 amendment was passed, a pre-existing statute expressly directed the Commission to consider commutation petitions. *See* 49489 R., pp. 650–51 (containing Idaho Code § 20-213 (1986)); *see also State v. Storey*, 712 P.2d 694, 697 n.2 (Idaho Ct. App. 1985) (referencing the statutory authorization for the Commission "to commute fixed sentences"). And after the amendment, the Commission issued regulations reflecting its continued authority to commute sentences, *see* Ex. 1, which contradicts the Governor's (and State's) intimation that the agency lost the commutation power as soon as the "as provided" language was added to Section 7. The rules confirm that the Commission kept the constitutional power after the 1986 amendment. And it was thus unconstitutional for a statute to then take the power away from the Commission.

IV. Conclusion

The Governor's policy preference to wield the commutation power does not change the law, and affirmance remains appropriate.

Respectfully submitted this 13th day of May 2022.

/*s*/ Jonah J. Horwitz
Jonah J. Horwitz
Attorney for Defendant-
Respondent/Petitioner-Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of May 2022, I caused to be served two true and correct copies of the foregoing document by the method indicated below, postage pre-paid where applicable, addressed to:

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/s/ Jonah J. Horwitz
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Respondent/Petitioner-Respondent

State of Idaho v. Gerald Ross Pizzuto, Jr.
Supreme Court Docket Nos. 49489-2022, 49531-2022
Filed in Support of Response to Governor Brad Little's *Amicus Curiae* Brief

Exhibit 1

(Policies and Procedures Manual of the Idaho Commission for Pardons and Parole, Rules 50.08 and 50.10 (1987))

STATE OF IDAHO

BOARD OF CORRECTION

Commission for Pardons and Parole

1075 Park Boulevard
Statehouse Mail
Boise, Idaho 83720

88-07

January 4, 1988

Laura Pershing
State Law Library
Supreme Court Building
451 West State
Boise, ID 83720

Dear Ms. Pershing:

Enclosed is the Policies and Procedures Manual of the Idaho Commission for Pardons and Parole. The manual is the first manual for the Commission adopted through the Administrative Procedures Act.

A public hearing was held on May 6, 1987, and the rules were officially adopted on October 28, 1987 by the Commission, becoming effective that date.

Yours sincerely,

Olivia Craven

Olivia Craven
Executive Director

OC/ecs
0352V

Enclosure

50.07 Victims

1. Victims of felony crimes for which a criminal complaint was filed on or after October 1, 1985, and for which an inmate was committed to the institution as a result of the crime, will receive notification of parole hearings or other hearings and parole release dates prior to expiration of the sentence and will be afforded the opportunity to address the Commission.

   a. Notice of parole hearings or other hearings conducted by the Commission, or tentative parole release dates prior to the expiration of sentence on the particular inmate, will be sent by the Commission staff to the victim(s), advising of the date of scheduled hearing or tentative release.

      i. If victim requests to testify at the hearing, request must be made to Executive Director five (5) days in advance of the first day of scheduled hearings.

      ii. A victim may submit written information or statements to Executive Director to be reviewed at scheduled hearings. These must be submitted seven (7) days in advance of the first day of scheduled hearings.

   b. Notice of tentative parole release date granted before expiration of the sentence will be sent to victim.

      i. Commission will not be responsible for notification of any Court-ordered release or escape.

      ii. Commission will not be responsible for notification of release upon completion of sentence.

   c. Commission staff will send notices to victim to the last address given by Court. It shall be the responsibility of the victim to notify Commission staff of any address change.

2. Other victims not included in I.C. 19-5306 may be afforded the opportunity to present written or verbal testimony.

   a. Requests for personal testimony must be made to Executive Director five (5) days in advance of the first day of scheduled hearings and Executive Director will make determination of appearance.

   b. Written information or statements may be submitted to the Executive Director to be reviewed at scheduled hearings. These must be submitted seven (7) days in advance of the first day of scheduled hearings.

Statutory Reference: I.C. 19-5306

50.08 Commutation

1. Commutation is a process whereby clemency may be granted to modify a sentence imposed by the sentencing jurisdiction, and the process requires both the submission of a Petition for Commutation and a hearing.

   a. Inmate must submit a Petition for Commutation when seeking clemency.

      i. Prior to submitting a Petition, the inmate must have been in an institution of the Department of Corrections, or as a transfer in another jurisdiction on the current sentence, twelve (12) months before submitting Petition.

      ii. An inmate may submit a Petition once every twelve- (12) month period.

      iii. Petition should include the reasons why the petitioner is requesting commutation of the sentence.

      iv. Petition may include letters from concerned individuals.

      v. Inmate generally submits the petition, and it is advised that the petition be reviewed by his/her socialworker or counselor.

      vi. Legal counsel and law clerks may assist in the preparation of the petition, which must include the signature of the requesting inmate.

      vii. Petitions are reviewed at quarterly sessions and petition must be received at Commission office no later than the first day of the month of a quarterly session. Petitions received after the first day of the month will be held for review until the next quarterly session.

      viii. Petition will be reviewed without petitioner present.

      ix. Commission may continue consideration of the petition to the next quarterly session to obtain additional information or further consideration.

      x. Commission staff will notify petitioner of decision of Commission to deny or grant Commutation Hearing and, if granted, the month the hearing will be held.

   b. If hearing has been granted, the hearing will be scheduled for a quarterly session.

      i. Notice shall be published in some newspaper of general circulation at Boise, Idaho, at least once a week for four (4) consecutive weeks, immediately prior to the hearing.

ii. A copy of such notice shall be mailed to each Prosecuting Attorney of the county from which any such person was committed; additionally, notice shall be forwarded to the sentencing Court and County Sheriff of the sentencing jurisdiction.

iii. All policy and procedure governing the conduct of a parole hearing will apply to a Commutation Hearing.

iv. Quorum vote is required for decision.

(a) Votes are public record and dissenting votes of Commissioners voting are submitted to the office of the Secretary of State.

(b) All written material considered in the decision process of a Commutation granted will be submitted to the office of the Secretary of State.

2. A Fixed Term sentence will not be commuted absent acquiescence or stated lack of objection by the sentencing judge or court; Commission staff will request input from the sentencing jurisdiction.

3. Only rarely will circumstances be extraordinary enough to approve a petition for a Commutation. Habilitative progress alone will not generally be regarded as sufficient, and the granting of a hearing should not be interpreted as intent to commute a sentence.

4. The Commission may make exception of above-described policies and procedures in the case of a person under sentence of death.

Statutory Reference: I.C. 20-213

Section 7, Article 4, Idaho State Constitution

50.09 Self-Initiated Progress Report.

1. In the case where circumstances have substantially changed to the inmate's benefit after parole has been denied and either no action in his/her case is contemplated or the next parole consideration has been continued for a period in excess of six (6) months, an inmate may request the Commission to schedule a special parole hearing at an earlier date.

a. The process is initiated by the inmate completing and submitting a Self-Initiated Petition form, stating reasons for reconsideration.

i. Petition may be submitted no sooner than six (6) months after the last hearing.

ii. Only one (1) special hearing will be permitted in any twelve-(12) month period.

iii. Petitions are reviewed at quarterly sessions, without the presence of petitioner, and must be submitted no later than the first day of the month of a quarterly session. Petitions received after the first day of the month will be held for review until the next quarterly session.

iv. One Commissioner will review a petition and make decision to grant or deny a hearing.

(a) Reviewing Commissioner may submit to other commissioners for deliberation.

(b) Reviewing Commissioner may continue consideration of the Petition to the next quarterly session to obtain additional information.

v. Petitioner will be advised of Commission decision by Commission staff within three (3) weeks after consideration.

vi. If granted a special Hearing, the hearing may be scheduled for any month.

b. If a special hearing is scheduled, the previous decision of the Commission will be considered null and void.

50.10 Pardon

1. A Pardon may be considered for a person having been convicted of any crime.

   a. Generally, application for Pardon will not be considered until a period of time has elapsed since discharge from custody, as defined below.

      i. Applications for pardon for nonviolent or property crimes may be submitted for consideration three (3) years after discharge from parole or probation, penal institution, or jail.

      ii. Applications for pardon for violent or sex crimes (crimes against a person) may be submitted five (5) years after discharge from probation or parole, a penal institution, or jail.

   b. An application can be obtained from Commission office.

   c. Completed application should be submitted to Commission staff and shall include the reasons why the Pardon is being requested. Letters of recommendation from responsible community members may be included.

   d. After receipt of the completed application, Commission staff will request an investigation be completed by Correctional Field Personnel in the area in which applicant resides, to include:

      i. Criminal record check.

      ii. Employment history since release from custody.

      iii. Positive or negative status as a citizen.

      iv. Interview with applicant.

      v. Additional information deemed necessary or appropriate.

   e. Pursuant to completion of the invesitgation, a hearing will be scheduled for the next quarterly session of the Commission, allowing sufficient time for advertising required by Statute.

      i. Advertising will be published in a newspaper of general circulation at Boise, Idaho at least once a week for four (4) consecutive weeks, immediately prior to hearing.

      ii. Applicant's appearance at the hearing is not mandatory, but is encouraged.

      (a) Notice of hearing date and time will be sent to applicant.

      (b) If applicant cannot appear at scheduled time and requests to be present, the hearing may be continued to the next quarterly session without re-advertising.

      (c) If applicant does not appear and has not advised Commission staff of his/her desire to appear, the Commission may make a decision based on the available information.

      (d) In some cases, when applicant does not appear, Commission may specifically request applicant's appearance and the hearing will be continued to the next quarterly session without re-advertising.

      (e) The hearing will be conducted in the same manner as a parole hearing with all Policies and Procedures and Rules of Conduct of a parole hearing to apply.

   f. A quorum vote is required for a decison.

      i. Votes are a matter of public record and dissenting votes are submitted to the office of the Secretary of State.

      ii. All written material considered in the decision process of a Pardon granted will be submitted to the office of the Secretary of State.

      iii. Applicant will be notifed of the decision at the time of the hearing or, if not present at hearing, written notification will be sent.

Statutory Reference: I.C. 20-213

Section 7, Article 4, Idaho State Constitution