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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, **Plaintiff-Appellant,** **vs.** **GERALD ROSS PIZZUTO, JR.,** **Defendant-Respondent.**	**Supreme Court Docket: 49489-2022** **Idaho County District Court Dockets: CR-1985-22075 & CV25-22-0004**
GERALD ROSS PIZZUTO, JR., **Petitioner-Respondent,** **vs.** **STATE OF IDAHO,** **Respondent-Appellant.**	

BRIEF OF *AMICUS CURIAE* GOVERNOR BRAD LITTLE IN SUPPORT OF THE STATE OF IDAHO

APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

HONORABLE JAY P. GASKILL
District Judge

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COMES NOW Brad Little, Governor of the State of Idaho, by and through his above-referenced attorneys, having been granted by this Court in its order dated April 20, 2022, permission to appear as *Amicus Curiae* pursuant to Rule 8, Idaho Appellate Rules (IAR), hereby respectfully submits the following *Amicus Curiae* brief in support of the State of Idaho ("State").

INTRODUCTION

Governor Brad Little's rejection of the Idaho Commission of Pardons and Parole's ("Commission") recommendation to commute Gerald Pizzuto's lawful death sentences to life in prison without the possibility of parole was wholly consistent with Idaho law and done in furtherance of his legal obligation to faithfully execute the laws of this state. Idaho Const. Art. IV, § 5. The Governor's rejection was in direct response to the Commission's *request* to review their recommendation which was presented to the Governor consistent with Idaho Code ("I.C.") § 20-1016. The Commission conducted their hearing, deliberated, and wrote their opinion with a majority of four commissioners in favor of recommending commutation and a minority of three opposed to such a recommendation. 49489, Record on Appeal ("R."), pp. 563-64. The Commission's Executive Director transmitted their written recommendation to the Governor with a memorandum acknowledging that the Commission's action was a recommendation for his consideration according to law.[1] 49531, R., p. 40. After a thorough review of the case for many months in anticipation of a possible commutation recommendation by the Commission requiring his consideration, the Governor concluded that Mr. Pizzuto's heinous killing spree of four innocent souls in the months after his release from prison in Michigan for rape strongly warranted against commutation. 49489, R., p. 566. Consequently, the Governor rejected the Commission's divided recommendation. *Id*.

[1] The Executive Director is the "official representative" of the Commission. *See* I.C. § 20-1002(9).

Contrary to Mr. Pizzuto's telling, there was no unconstitutional arrogation of authority, no improper "interven[tion]" or "interference" by Governor Little, nor any claim to "the ultimate commutation power." *See* Pizzuto's *Answering Brief* ("AB") p. 3. In fact, there never was a commutation even issued by the Commission, as expressed by the very text of the documents the Commission adopted and the Executive Director transmitted to the Governor. 49531, R., p. 40; 49489, R., pp. 563-64. Rather, when the Commission presented its recommendation to him, the Governor sought to give full force and effect to I.C. § 20-1016 which is expressly authorized and contemplated by Article IV, Section 7, and which Governor Little was dutybound to faithfully execute. It was pursuant to this constitutionally authorized statute the Governor considered and rejected the Commission's recommendation.

The process the Commission and the Governor followed should come as a surprise to no one. This is the exact process the Governor's predecessors in office and previous members and executive directors of the Commission have employed since 1988 when the Legislature enacted a statute to carry out the constitutional amendment adopted by Idaho voters in 1986. *See* State's *Opening Brief* ("OB") pp. 17-18 (quoting *State v. Winkler*, 167 Idaho 527, 530 (2020)). Furthermore, it is a process the Legislature and the Commission studiously revisited only two years ago with H.B. 427, a bill which passed unanimously and was signed into law by Governor Little which recategorized those serious criminal offenses that required a governor's approval for pardon or commutation. 2020 Idaho Sess. Laws, Ch. 62, § 2. Since 1988, Idaho's governors have accepted some Commission recommendations and rejected others, whether by express denial or inaction

within the thirty-day period. For example, Governor Little granted two pardon recommendations and denied three others in 2019, and granted one pardon recommendation in 2020.[2]

To defend his lawful rejection of the Commission's recommendation and to aid the Court in resolving this case, Governor Little wishes to articulate three points in support of the State. First, the phrase "only as provided by statute" in Article IV, Section 7 is remarkably unambiguous and that contorting the restriction on the Commission to none at all is not only untethered from the plain constitutional text, but against the great weight of other uses and interpretations of similar restrictive language. Second, even if the Court identifies a reasonable alternative reading of Section 7, the Court must employ its longstanding constitutional avoidance doctrine because the State articulates a reasonable reading that avoids declaring I.C. § 20-1016 unconstitutional. Third, the balance stuck by the Legislature and the voters of Idaho in amending the Constitution to introduce a check on the Commission for the most serious crimes has served the state well for 34 years.

ARGUMENT

1. The phrase "only as provided by statute" in Section 7 is unambiguous.

Governor Little entirely concurs with the State's position that the phrase "only as provided by statute" is unambiguous and that the voters introduced this restriction to limit the Commission's unfettered discretion. OB pp. 6-13. The Idaho Constitution's limitation on the Commission contains two important details that make its meaning even more clear than other similar limitations considered by courts in other jurisdictions: (1) the requirement for a particular type of law—a

[2] The Commission's recommendation for commutation at issue in this case is the only recommendation Governor Little has received for commutation, but the process for obtaining either a pardon or commutation for certain offenses is identical. However, while the Commission does restrict who can apply for a pardon, it does not place any similar limitation on who can request a commutation. *See* IDAPA 50.01.01.550.01.

statute—which necessarily requires the use of legislative power for enactment, and (2) the use of the mandatory and prohibitive phrase "only."

Many jurisdictions have interpreted "as provided by law" to mean "prescribed or provided by statute." *See, e.g., Nebraska Pub. Serv. Comm'n v. Nebraska Pub. Power Dist.*, 590 N.W.2d 840, 847 (1999) (*citing Peile v. Skelgas, Inc.*, 610 N.E.2d 813, 816 (Ill. App. Ct. 1993), *rev'd, on other grounds* 645 N.E.2d 184 (1994)); *Holzendorf v. Bell*, 606 So.2d 645 (Fla. App. 1992).[3] From the adoption of the 1946 Amendment to Section 7 until the 1986 Amendment took effect, the Commission enjoyed a general and unreviewable grant of power for pardon and commutation decisions. The addition of "only as provided by statute" by Idaho voters in 1986 ended any such general and unreviewable grant of power. Otherwise, if the Commission retains such power after the 1986 Amendment, the limiting language adopted by the voters would be "superfluous." *Id*. at 847. This Court's abiding standard is to not read texts "in a way which makes mere surplusage of provisions included therein." *Bradbury v. Idaho Jud. Council*, 149 Idaho 107, 116, 233 P.3d 38, 47 (2009) (*quoting Sweitzer v. Dean*, 118 Idaho 568, 572 (1990)).

Any reasonable reading of Section 7 must consider the full preclusive effect of the word "only." The North Dakota Supreme Court has persuasively grappled with the language "only as provided by law." It held "[t]he words…are perfectly clear and susceptible of but one meaning

[3] The Nebraska Supreme Court also cited *Manchin v. Browning*, 296 S.E.2d 909 (W. Va. 1982), which also supports the State's position, before it was overruled in *State ex rel. Discover Fin. Servs., Inc. v. Nibert*, 744 S.E.2d 625 (W. Va. 2013). Nevertheless, *Nibert* continues to support the State's position. These two cases consider whether the limiting phrase in the West Virginia Constitution abrogates an attorney general's common law authority. In the case before this Court there is no parallel common law power for a board created in Idaho's Constitution designed to review pardons and commutations as there is for the West Virginia Attorney General's authorities. And even if there were a parallel common law power, Idaho has exercised the constitutionally authorized limitation with the statute codified at I.C. § 20-1016. West Virginia overruled the interpretation in *Manchin* only in so far as (1) common law authority exists, and (2) the lack of legislative enactment expressly authorized by the limiting phrase in the Constitution. *Nibert* at 645.

which is to effect a radical change in the prior [text]." *Schumacher v. Great N. Ry. Co.*, 136 N.W. 85 (1912). The court continued that "[a]ny other construction would be absurd, as it would ignore, not only the plain words of the statute, but also the evident legislative intent to effect a change…" *Id*. The words are "clearly mandatory and prohibitive." *Id*. Here, the court held that the language "only as provided by law" unmistakably abrogated the prospective recognition of common law marriage. *Id*. at 87.

The provision in Article X, Section 4 of the Hawaii Constitution, added less than a decade before Idaho's 1986 Amendment, requiring the state to "provide for a Hawaiian education program consisting of language, culture and history in the public schools," lacks restrictive language like "only as provided by law" or "only as provided by statute." The Hawaii Supreme Court reasoned the absence of such provisions leaves a "constitutionally adequate Hawaiian education program to be defined by this court's interpretation, for it is the courts, not the legislature, who are the ultimate interpreters of the Constitution." *Clarabal v. Dep't of Educ.*, 446 P.3d 986, 1000 (2019) (quoting *In re Application of Maui Elec. Co.*, 408 P.3d 1, 20 n.33 (2017) (internal formatting omitted). In contrast, where such restrictive provisions exist in Hawaii's constitution they allow "legislative enactments to alter or qualify the central requirement" or even be "solely defined by legislative enactments." *Clarabal* at 1000. (*Citing* Haw. Const. Art. XV, § 4 ("English and Hawaiian shall be the official languages of Hawaii, except that Hawaiian shall be required for public acts and transactions only as provided by law."); Haw. Const. Art. XI, § 9 ("Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality…").

The Idaho Judiciary itself has used "only as provided by statute" and "only as provided by law" to express strict limitation. Concerning attorney's fees under IRCP 54(e)(1) for trespass actions, the Court regularly restates the "only as provided by statue" limitation. *See e.g., Fischer*

v. Croston, 163 Idaho 331, 341 (2018); *Akers v. Mortensen*, 156 Idaho 27, 36 (2014); *Akers v. D.L. White Const., Inc.*, 156 Idaho 37, 53–54 (2014); *Bumgarner v. Bumgarner*, 124 Idaho 629, 644–45 (Ct. App. 1993). Further, this Court has used "only as provided by law" to restrict the use of appropriations to the conditions the Legislature attaches, *State v. State Bd. of Educ.*, 33 Idaho 415 (1921), and to describe the legal obligations on a county treasurer on spending money. *Ada Cty. v. Clark*, 43 Idaho 489 (1927). Every use is consistent. No use is nebulous, unclear, or shrouded in doubt about what the Court meant. The Idaho Judiciary's own use of these phrases simply does not cabin an interpretation not giving full power and exclusivity of the word "only" to end the old clemency regime and establish a new one by statute. Indeed, counsel for the Governor are at a loss to find a court anywhere which has ever found such a plain and straightforward limitation to be either ambiguous or anything other than prescriptive and mandatory.

The Governor makes no claim to constitutional authority here. His authority to approve or reject commutations and pardons is derived solely from I.C. § 20-1016. But it is simply not accurate to read the Governor completely out of the first paragraph of Article IV, Section 7, as Mr. Pizzuto suggests. AB p. 7. The usual course for enacting statutes *requires* presentment to the Governor. *Nate v. Denney*, 166 Idaho 801, 808 (2017) (All "bills must be presented to the governor…"). As might be expected, the limiting language highly favors the Legislature. Afterall, the Legislature drafted the text of the joint resolution presented to the voters. Idaho Const. Art. XX, § 1; 1986 Idaho Sess. Laws, S.J.R. No. 107.

Further, it is an exercise of exclusive legislative power to vote on the text that becomes statutes or to take no vote at all.[4] Consequently, because of the limiting language, legislative silence after the 1986 Amendment took effect would have ended any issuance at all of commutations or pardons pursuant to Section 7. Likewise, assuming *arguendo* Governor Cecil Andrus vetoed the bill presented to him in 1988 to carry out the purposes of Section 7 and the veto was not overridden, here, too, no commutations or pardons could issue pursuant to Section 7. 1988 Idaho Sess. Laws, Ch. 323, § 1. These scenarios, though purely hypothetical, are not simply the realm of imagination. In fact, it is not unlike what occurred between 1912 and 1933 with ballot initiatives and referenda in this state. *Reclaim Idaho v. Denney*, 169 Idaho 406, 497 P.3d 160, 168 (2021) ("deliberate inaction" by the Legislature to pass enabling legislation for 18 years following Governor Moses Alexander's 1915 veto of legislation he thought "fatal" to the initiative and referendum process). However, in one critical respect they differ. The initiative and referendum powers reserved in the Idaho Constitution are fundamental rights subject to strict scrutiny. *Id*. at 181–85. In contrast, clemency has never been found to involve a fundamental right. *Leavitt v. Craven*, 154 Idaho 661, 666–67 (2012). Others can only speculate whether the collective inaction of the political branches was an improper impediment of an Idaho elector's fundamental rights in that era because no one apparently tried to vindicate them in court, but the very difference in that

[4] It is an exclusive use of legislative power whether completed in the usual way through the legislative branch or by the people with a successful ballot initiative, which could have filled hypothetical legislative branch silence after the 1986 Amendment took effect or could rewrite (or even repeal) I.C. § 20-1016 altogether now. Statutes enacted by initiative are "on an equal footing" with those enacted by the Legislature. *Reclaim Idaho v. Denney*, 497 P.3d 160, 193 (2021) (quoting *Luker v. Curtis*, 64 Idaho 703, 706 (1943)). In turn "the Idaho Legislature has no constitutional or statutory limitation on amending or repealing an initiated statute." Bart M. Davis, *Idaho's Messy History with Term Limits: A Modest Response*, 52 Idaho L. Rev. 463, 469 (2016).

speculative possibility serves to emphasize the preclusive effect of the restrictive language in Section 7.

2. The Court must employ its longstanding constitutional avoidance doctrine because the State articulates a reasonable reading that avoids declaring I.C. § 20-1016 unconstitutional.

The Court's long-employed constitutional avoidance doctrine applies here. "Whenever an act of the Legislature can be so construed and applied as to avoid conflict with the Constitution and give it the force of law, such construction will be adopted by the courts." *Hill-Vu Mobile Home Park v. City of Pocatello*, 162 Idaho 588, 594 (2017) (quoting *Grice v. Clearwater Timber Co.*, 20 Idaho 70, 77 (1911). This Court's more recent admonition is likewise instructive, that constitutional questions should not be "decided lightly" by taking up "unnecessary constitutional questions" when more than one possible construction exists. *Miller v. Idaho State Patrol*, 150 Idaho 856, 864 (2011). Thus, the Legislature deserves the "assum[ption] that it did not overlook the provisions of the Constitution[] and designed the act to take effect." *Grice* at 77.

Even if there is a reasonable alternative interpretation contrary to the precedential one-way street leading to the State's unambiguous interpretation of the language limiting the Commission, this Court should not depart from its constitutional avoidance doctrine. It is no secret that this case involves the most litigated capital case in Idaho's history. The State recites the multitude of times these convictions and sentences have been upheld. OB pp. 1-2. This case does not present an invitation to turn the constitutional avoidance doctrine on its head. To depart from this bedrock principle does injustice to the people of Idaho who (1) ratified the 1986 Amendment to limit the Commission's power, and (2) whose political branches implemented the 1986 Amendment they ratified by giving considered meaning to it, which they were expressly invited by the very text of the amendment to do.

3. The policy for commutation and pardons adopted by the voters and the Legislature for the most serious crimes is balanced and has served the State well.

As stated earlier, on two occasions the Governor has denied recommendations for pardons and on three others he has granted them. *See supra* p. 2. Also, the Governor is aware of a recommended pardon for a Lewd and Lascivious Conduct conviction that Governor Dirk Kempthorne took no action on, allowing the thirty-day period to elapse resulting in a denial, and a recommended commutation for a First-Degree Murder conviction of an inmate serving a life sentence without the possibility of parole which Governor Butch Otter rejected in 2018. This case does not exist in a vacuum. This is a studied and well-developed policy that is supported by Section 7. To find otherwise is to say that Idaho voters failed in their objective to limit the Commission's power and that this 36-year-old latent flaw embedded by the voters in the constitution was discovered only when Governor Little acted in this case. No, the pardon and commutation regime that Idaho settled on nearly a century after statehood is constitutional and deserves to continue.

CONCLUSION

Governor Little respectfully requests that this Court reverse the decisions of the district court and remand the case back to the district court for the issuance of a new death warrant as provided by law.

DATED this 4th day of May, 2022.

/s/ Brady Hall
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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of May, 2022, I caused to be served a true and correct copy of the foregoing document by way of electronic court filing on the following:

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