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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	**Supreme Court Docket**
	)	**Nos. 49489-2022 & 49531-2022**
Plaintiff-Appellant,	)	
	)	**Idaho County District Court**
v.	)	**Nos. CR-1985-22075 & CV25-22-0004**
	)	
GERALD ROSS PIZZUTO, JR.,	)	**CAPITAL CASE**
	)	
Defendant-Appellee.	)	**APPELLEE'S BRIEF IN SUPPORT OF PETITION FOR REHEARING**
	)	
	)	

The Court sends a man to his death in this case by staking its public reputation on a fraud perpetrated against the Idaho people. *See State v. Pizzuto*, --- P.3d ----, 2022 WL 3591723 (Idaho 2022).[1] Until now, the Court had vigilantly policed against "unconstitutional attempts by the Legislature to limit the people's ability to" discharge their lawmaking responsibilities. *Reclaim Idaho v. Denney*, 497 P.3d 160, 195 (Idaho 2021) (Stegner, J., concurring).[2] Yet here

[1] Hereinafter, Pizzuto refers to the majority's decision in the appeal as "Opinion." He will cite it as "*Pizzuto Op.*" and will use the star pages in Westlaw.

[2] In this brief, unless otherwise noted, all internal quotation marks, citations, and alterations are omitted, and all emphasis is added.

the Court gives the Governor the sole commutation power after the people of Idaho declared *three times* their opposition to that policy. Worse, the Opinion disregards the information the people received about an amendment they themselves enacted and upholds a statute passed after the public was deliberately deceived by the legislature—a reality the Court does not even acknowledge, let alone explain. In the process, the Opinion adopts a supposedly textualist approach that ignores most of the text at issue; deems a provision unambiguous when two of the Court's own Justices construe it differently; consults legislative history and policy when convenient and while still inexplicably purporting to endorse a plain-language analysis; and reverses a thorough district judge's opinion based on key arguments never raised by the State.

These errors will not just affect Pizzuto—who will be put to death because of them. They will also create confusion in Idaho law by destabilizing the Court's settled precedent on how the judiciary executes its most basic duty of analyzing statutory and constitutional law. Consequently, the Opinion should be withdrawn and a new one granting relief should be issued. At a minimum, it is necessary for the Opinion to be amended, to engage with the serious questions glossed over by the Court and to avoid injecting uncertainty into the law. In another successive capital post-conviction case, *see Dunlap v. State*, 516 P.3d 987 (Idaho 2022), the Court issued an amended opinion on rehearing to clarify various matters and to address the petition, *see id.* at 1015. The same careful approach is warranted here.

When the majority Opinion is revisited, it is appropriate for the concurrence to be as well. The concurrence agrees with the undersigned that the Governor acted unconstitutionally and that Pizzuto was given a commutation by the only entity lawfully authorized to do so: the Commission. *See Pizzuto Op.* at *13–14 (Horton, J., concurring). Nonetheless, the concurrence concludes that Pizzuto's execution can go forward on the basis of the novel theory that there is

no redress for the constitutional violation. *See id.* at *14–17. The concurrence's approach gives rise to a right without a remedy, generates due process concerns, rewards the legislature for acting unconstitutionally, and eliminates commutations for death-row inmates altogether—a perverse result that no one has advocated for. The simpler solution is the right one: since the Idaho Constitution gives the commutation power to the Commission alone, and since the Commission voted to grant Pizzuto a commutation, his death sentences were reduced to life without parole as a matter of state law. In the absence of such an opinion, the Court ought to at least order the State to respond to the petition and/or hold a new oral argument so that the grave issues raised here are adequately resolved before they are mooted by Pizzuto's death, and so that the public's faith in the integrity of the judicial system is protected.

I. Argument

Pizzuto will take in turn each point in support of rehearing. Collectively, these issues raise enough doubt about the Opinion to call for additional briefing, a new oral argument, and/or an amended opinion that fully engages with the questions articulated here. Pizzuto believes that all of the arguments below were sufficiently preserved in the district court. Some are being developed further now because they are responsive to the content of the Court's own Opinion. To the extent the Court regards any issue here as having been inadequately addressed earlier in the appeal, Pizzuto notes that he was—at the State's request and over his objection—given only twenty-one days to file his answering brief in this difficult capital case, with no extensions allowed, which prevented counsel from making the most comprehensive arguments that he otherwise would have before the issuance of the Opinion. *See* Order, entered Mar. 14, 2022.

A. The Opinion's "textualism" overlooks most of the text.

While claiming to rely entirely on the plain language of Section 7, *see Pizzuto Op.* at *7, the Opinion leaves most of the text of the provision out of its analysis—and it strongly supports Pizzuto's interpretation.

As the Opinion itself reiterates, the Court is obligated in a plain-language analysis to "give effect to *all the words*" in the relevant provision. *Id.* at *10. That admonition is oft-repeated by the Court. *See, e.g.*, *Wasden v. State Bd. of Land Comm'rs*, 280 P.3d 693, 699 (Idaho 2012) ("The Court will give effect to the plain language of an unambiguous statutory or constitutional provision" and in so doing will assess "the provision's language *as a whole*, considering the meaning of *each word*, so as not to render any word superfluous or redundant."); *Robison v. Bateman-Hall, Inc.*, 76 P.3d 951, 954 (Idaho 2003) ("To determine the meaning of a statute, the Court applies the plain and ordinary meaning of the terms and, where possible, *every word, clause and sentence* should be given effect."). Despite acknowledging the Court's duty to weigh each word, the Opinion does not do so.

Quite to the contrary, the Opinion incorrectly acts as though there is only one sentence in Section 7 dealing with commutations.[3] That is the second sentence of the provision, which states that the Commission "shall have power to remit fines and forfeitures, and, only as provided by statute, to grant commutations and pardons after conviction and judgment, either absolutely or upon such conditions as they may impose in all cases of offenses against the state except treason or conviction on impeachment." The quotation above is only forty-seven words. Section 7 as a

[3] As discussed below, the Opinion also mistakenly relies on the first sentence of Section 7, even though it has nothing to do with commutations. *See infra* at Part I.F.

whole is 339 words. A plain-language analysis that closes its eyes to eighty-seven percent of the plain language is incomplete.

Several of the neglected passages in Section 7 are noteworthy, notwithstanding the Opinion's silence on them. The most consequential of the passages is the first sentence of the second paragraph of Section 7, which expressly gives the Governor a *different* clemency power from that of commutation: the authority to grant respites or reprieves, i.e., to postpone executions. When the Governor postpones an execution, it is then the Commission that determines—under the plain language of Section 7—whether to "commute . . . the offense." Pizzuto stressed in his answering brief that the way to harmonize the first and second paragraphs of Section 7 is to hold that they collectively "adopt the simple, clean method of giving commutations to the Commission and reprieves to the Governor." Answering Brief, filed Apr. 27, 2022 ("Answering Brief" or "Ans. Br."), at 8.[4] The concurrence shares the same view. As the concurrence puts it, "the only power granted the governor by Article IV, section 7 is the power to delay execution of sentences (grant respites or reprieves) in order to give the Commission or legislature (in cases of treason) the opportunity to determine whether a pardon or commutation is to be granted." *Pizzuto Op.* at *13. The reprieve power is a major aspect of Section 7, and a major element of the dispute between the parties. If the Opinion is to hold up to public scrutiny, it should have an answer to the role of the reprieve power. Indeed, since the concurrence invokes the reprieve power, it is difficult to see its absence from the Opinion as anything other than a concession that it has no answer.

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[4] The point was also fully preserved below. *See* 49489 R., p. 556.

There is another sentence in Section 7 that militates in favor of Pizzuto's view, and it is likewise missing in action from the Opinion's analysis. It is the sentence right after the one highlighted by the Opinion, and it clarifies that "no commutation" may be "granted, except by the decision" of the Commission. The sentence places every commutation determination in the hands of the Commission, in language that admits of no apparent exceptions. Moreover, the words "grant" and "decision" unequivocally reference the final authority to determine whether a commutation will be awarded or not. *See Decision*, Black's Law Dictionary (11th ed. 2019) (a "decision" is a "determination after consideration of the facts and the law[ ]"); *Determination,* Black's Law Dictionary (11th ed. 2019) (a "determination" is a "final decision by a[n] . . . administrative agency"). The language does not evoke the power to make a mere recommendation, as the Opinion reduces them to. This sentence speaks directly to what constitutional power the Commission exercises in the commutation arena. It is undeniably pertinent to the case.

Essentially, the Opinion appears to treat the case as though it turns exclusively on the meaning of the 1986 amendment to Section 7. But it does not. The question of who enjoys the commutation power is resolved by Section 7 as a whole, and the whole provision must be accounted for. In Pizzuto's view, these overlooked parts of Section 7—in combination with his other arguments—refute the correctness of the Opinion's conclusion. Short of a reversal, though, the referenced language at least demands some sort of response in an amended opinion if the Court wishes for its decision in this capital case to be seen as persuasive.

Another worrisome aspect of the Opinion's ostensible plain-language analysis is its unexplained declaration that it is "[i]mportant[]" that "the Commission acts as an executive branch agency under the auspices of the governor" and that the "*intra-branch* allocation of

authority granted in section 20-1016 does not raise the same separation of powers concerns as if an *inter-branch* allocation of authority occurred." *Pizzuto Op.* at *9 (emphasis in original). For starters, as with many of the Opinion's holdings, it is untethered from the parties' arguments. The State has never suggested that the separation of powers weakens Pizzuto's claim, either below or on appeal. That is a reason for the Court to examine the matter in more detail now on rehearing. *See* Idaho Appellate Handbook, Ch. XI, § A.2 (6th ed. 2019) (listing, as a "good ground[]" for rehearing in Idaho appeals "the discussion by the Court of an issue not necessarily raised or briefed by the parties"). Incidentally, Pizzuto respectfully suggests that it would be generally helpful for the Idaho bar if the Court were to articulate what factors it considers in determining whether to grant rehearing, as there does not appear to be any public guidance on this subject, unlike in other jurisdictions. *See, e.g.*, Fed. R. App. P. 35(a) (setting forth the bases for federal appellate courts to grant rehearing); Mont. R. App. P. 20(1) (listing the criteria by which the Montana appellate courts consider petitions for rehearing).

The Opinion's sua sponte invocation of the argument is also in tension with its prevailing norms. Historically, the Court has "follow[ed] the principle of party presentation" and "presumed that parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument entitling them to relief." *Safaris Unlimited, LLC v. Jones*, 501 P.3d 334, 343 (Idaho 2021). "In other words, a court's role is to sit as a neutral arbiter, not to act as an additional advocate sifting through each party's evidence to determine the most persuasive arguments that might have been made." *Id.* at 343–44. "[T]he principle of party presentation" is "so basic to our system of adjudication." *Deon v. H&J, Inc.*, 339 P.3d 550, 554 (Idaho 2014). Granted, the Court has the discretion to overlook the party-presentation doctrine. Even so, it would be appropriate to at least acknowledge the argument's

status in an amended opinion and explain why the usual rule is not being enforced—especially since the office responsible for the omission is seeking to carry out "the most severe punishment" known to the law, *Roper v. Simmons*, 543 U.S. 551, 568 (2005), i.e., the taking of a human life, and therefore can reasonably be held to a high bar.

There is also a legitimate concern about the appearance of impartiality. The Opinion chides Pizzuto for raising the rule of lenity on appeal for the first time, referencing its "longstanding doctrine" of preservation. *Pizzuto Op.* at *11. One might imagine the doctrine to be even more compelling when it comes to theories that the State never argued either at the district court or on appeal. That is both because such theories were never presented at either level of the court system, reinforcing their forfeited status, and because the State—unlike Pizzuto—cannot benefit from the well-established proposition that the Court is entitled to affirm on any basis supported by the record. *See Hoffer v. City of Boise*, 257 P.3d 1226, 1229 (Idaho 2011) ("Where the lower court reaches the correct result by an erroneous theory, this Court will affirm the order on the correct theory."). If there is sufficient cause to note Pizzuto's omissions, there is sufficient cause to note the State's, and to account for why they are being excused.

More substantively, Pizzuto cannot gather from the Opinion why it believes the separation of powers is important here. At the risk of stating the obvious, the Governor and the Commission are two separate entities. They are notably both referred to in Section 7, and given separate responsibilities: as relevant here, commutations for the Commission and respites for the Governor. *See Pizzuto Op.* at *14 (Horton, J., concurring) ("I do not find it important that this misallocation of powers occurs within the executive branch."). And again at the risk of stating the obvious, the two actors did not agree about the proper disposition of Pizzuto's clemency petition here: the Commission voted to grant it and the Governor chose to deny it. The Opinion

cites no authority for the proposition that a constitutional division of labor can be transgressed at will by a chief executive so long as he is violating the prerogative of an entity in his own branch. Such a rule would be startling, as it would render any constitutional boundaries within the executive branch meaningless. It is not uncommon for disputes to arise regarding constitutional lines within the executive branch. The courts resolve those disputes in the ordinary course of business as they would any other. *See, e.g.*, *Evans v. Andrus*, 855 P.2d 467, 470–72 (Idaho 1993) (per curiam) (ruling in favor of the State Superintendent of Public Instruction in a lawsuit against the governor regarding a statute's validity under a state constitutional clause relating to education); *State v. State Bd. of Corrs.*, 52 P. 1090, 1091–92 (Utah 1898) (striking down a statute purporting to give parole power to the board of corrections because the state constitution gave the authority to a separate board of pardons instead). If a new principle is now in effect in Idaho, it warrants careful analysis, lest the Opinion's casual aside cause confusion in other cases.

B. The Opinion's finding of unambiguousness is at odds with caselaw.

The Opinion's determination that Section 7 is unambiguous, *Pizzuto Op.* at *7, flies in the face of two reasonable jurists interpreting the provision differently in this very appeal.

Consistent with precedent, the Opinion recognizes that "[a] constitutional provision is only ambiguous if reasonable minds might differ or be uncertain as to its meaning." *Id.* at *4. That definition of ambiguousness is well-settled. *See, e.g.*, *State v. Winkler*, 473 P.3d 796, 800 (Idaho 2020); *Gordon v. Hedrick*, 364 P.3d 951, 956 (Idaho 2015); *State v. Doe*, 92 P.3d 521, 524 (Idaho 2004). The Court's own decision here satisfies the test by definition. Two Justices expressly disagree with the Opinion's plain-language assessment of Section 7. They feel, instead, that "[t]he plain language of Article IV, section 7 grants commutation and pardon powers only to the Commission." *Pizzuto Op.* at *13. And the concurring Justices further opine

that the statute under attack "is unconstitutional because it purports to transfer the power to grant pardons and commutations to the governor rather than the Commission." *Id.* at *14. Surely the two concurring Justices are "reasonable minds."

The Court has previously announced the common-sense idea that judicial disagreement reflects ambiguity. *See Gonzalez v. Thacker*, 231 P.3d 524, 526 (Idaho 2009) (regarding a statute as ambiguous because its meaning had "spawned litigation and several appeals that have divided both the Court of Appeals as well as this Court"). Other courts take the same perspective. *See Deutsche Bank Nat'l Tr. Co. v. Fid. Nat'l Title Grp.* No. 2:20-cv-1606, 2020 WL 7360680, at *3 (D. Nev. Dec. 14, 2020) ("Reasonable jurists have interpreted this statute differently, and the fact that district courts are in disarray on the question confirms that the statute's language is ambiguous."). As before, it is at least necessary for the Court to clarify in an amended opinion how it can adhere to a determination of unambiguousness that would seemingly classify two of its own Justices as unreasonable minds.

The problems with the Opinion's unambiguousness finding are reflected not just by the concurrence, but more broadly by the fact that the interpretation adopted by the three-Justice majority in this case is not shared by *anyone* involved in the litigation. As discussed elsewhere, the Opinion reads Section 7 as continuing to vest the constitutional commutation power in the Commission, even after the 1986 amendment, but understands the Commission to still be exercising that power when it makes a mere recommendation to the Governor. *See infra* at Part I.G. That was not the position advocated for by the State, which was that the 1986 amendment divested the Commission of all of its constitutional commutation power and moved that power to the legislature, which then transferred it to the Governor. *See* Opening Brief, filed Apr. 8, 2022 (hereinafter "Opening Brief" or "Opening Br."), at 12; *accord* Reply Brief, filed May 11, 2022,

at 3 (construing the 1986 amendment to "divest[]" the authority "to grant commutations" away "from the Commission" so that the legislature could give it to whatever entity it chose). It was not the position adopted by the Governor, who endorsed the State's view. *See* Governor's Amicus Brief, filed May 4, 2022, at 3. And it was not the position taken by the district court, which was unable to find a single unambiguous meaning of any kind. *See* 49489 R., p. 743. An unambiguous provision is one that "would have only one reasonable interpretation." *State v. Neal*, 362 P.3d 514, 519 (Idaho 2015). The Opinion would have it that the majority alone has reached the "one reasonable interpretation" when everyone else in the case all read Section 7 differently. Only an unusual definition of "reasonable" assumes the faculty of reason to be missing from all of the other participants in a legal case.

It is also problematic for similar reasons that the Opinion contains language appearing to suggest that the Court deems Section 7 unambiguous in part because Pizzuto himself asserted his own plain-language interpretation. For instance, the Court writes: "*Importantly*, despite the district court's determination that the constitutional language was ambiguous, both the State and Pizzuto argue on appeal that the constitutional provision is unambiguous, and its plain language supports their respective interpretations of the commutation powers." *Pizzuto Op.* at *5. Elsewhere, the Opinion avers that "[a]lthough the district court held otherwise," it "*agree[s]* with the parties that Article IV, section 7 is unambiguous." *Id.* at *7. Finally, the Opinion characterizes Pizzuto's appeal to the rule of lenity as "appear[ing] to contradict Pizzuto's earlier assertion that the constitutional and statutory language at issue is unambiguous." *Id.* at *11 n.4.

These various statements are naturally understood to signal that when a litigant in Idaho offers his own plain-language construction of a provision, he somehow makes it more feasible for a court to adopt the *opposite* construction urged by his adversary, rather than for the court to

find the provision ambiguous. If the Court here did not intend to convey as much, it is hard to see why it is "important" that the State and Pizzuto had competing plain-language theories, or why it would make sense in any meaningful way for the Court to say that it was "agreeing" with the parties in embracing a reading of Section 7 that is 180 degrees opposed to Pizzuto's.

The Court's message in that regard will, if it remains in the Opinion, have negative consequences for the judicial system in Idaho. Pizzuto carefully framed his ambiguousness arguments in the alternative to his plain-language theory. That is, Pizzuto made clear in his brief that he was first proposing a plain-language reading to justify affirmance and then, in the event the Court disagreed, offering a series of contentions premised on the assumption that Section 7 was instead found ambiguous. *See* Ans. Br. at 15 (prefacing the second half of the brief with the explanation that "[*i*]*f* the Court disagrees with the above and deems Section 7 ambiguous, the analysis even more strongly favors" affirmance after consideration of the additional factors that would then become relevant). Attorneys around the country routinely approach cases in the same way that Pizzuto did, making a plain-language argument first and then an ambiguity argument in the alternative. *See, e.g.*, *Local 791, United Food & Commercial Workers Union v. Shaw's Supermarkets, Inc.*, 507 F.3d 43, 47 (1st Cir. 2007); *State v. Stay*, 935 N.W.2d 428, 432 n.4 (Minn. 2019); *In re Kunz*, 99 P.3d 793, 794 (Utah 2004).

And it is helpful to the judiciary and the public as a whole for lawyers to follow this strategy. If a provision is potentially unambiguous, a party's plain-language theory will help the court resolve the matter in the easiest, simplest way. But if the provision is also potentially ambiguous, then the right result might require a consideration of legislative history, policy, and so forth—and it assists the courts to have briefing on all such matters. Thus, briefing on both sides of the coin facilitates the best outcome in the most efficient way. The Opinion here

discourages such alternative briefing by appearing to punish a party for undertaking a plain-language argument. In fact, the Opinion seems to go out of its way to add a footnote admonishing Pizzuto for supposedly contradicting himself by including in his brief a section on the rule of lenity. *See Pizzuto Op.* at *11 n.4. But the rule of lenity appeared in a section of the brief that was explicitly making an alternative argument. *See* Ans. Br. at 15 ("If Section 7 is ambiguous, affirmance is still appropriate."). The attorneys and judges who study the Court's opinions might well assume that alternative theories along these lines are now disfavored. Applied to other cases, such remarks will lead to less effective briefing, and less reliable results.

Apart from its unfortunate pragmatic consequences, the Opinion's comments about ambiguity and alternative arguments are doctrinally unsound. The Opinion intimates that the presence of two conflicting plain-language theories by the two parties supports the conclusion that one of them must be correct. But the opposite is true—a difference between reasonable minds is the very essence of ambiguity. *See Pizzuto Op.* at *4. Justice Moeller aptly captured the dynamic at oral argument in this appeal, where he asked how much import should be placed upon "the fact that both sides in this case are arguing the statute is unambiguous? We have two very reasonable attorneys here, making two very reasonable arguments that the statute means exactly opposite things. Doesn't that by definition imply we're dealing with something that's ambiguous?" Oral Arg. at 39:55–40:10. That is spot on. The Opinion's contrary implication will inject confusion into the Court's ambiguousness test, and is in need of clarification.

In more case-specific terms, the Opinion's determination of Section 7's single, supposedly unambiguous meaning cannot be squared with the controlling language itself. The Opinion takes the stance that by conditioning the power to grant commutations on the phrase "only as provided by statute," the legislature unequivocally authorized itself to reduce the

Commission to a merely advisory body with respect to capital commutations. *See Pizzuto Op.* at *7. Even setting aside the other constitutional language neglected by the Opinion, and even setting aside the fact of two Justices adopting a different interpretation, this conclusion is untenable. The Opinion does not cite a single judicial decision, from any jurisdiction in the country, finding that a similar phrase had such a meaning. This is a notable gap, for many states have comparable provisions that vest clemency decisions in a particular actor but allow the legislature to play a role in regulating the process. *See generally Jamison v. Flanner*, 228 P. 82, 88–99 (Kan. 1924). And yet none of those courts have, like this one, determined that such language effectively supplants the power to make a final clemency decision altogether. Admittedly, there is to Pizzuto's knowledge no other state with identical language in a constitutional clemency provision. However, that does not change the fact that the Opinion would appear to make Idaho the only state in the country where the constitution refers to one actor (the Commission) as making a particular type of clemency decision (commutations) and yet where another actor (the Governor) has the final say-so in those clemency proceedings. Such an anomalous result suggests that it is not the only reasonable construction.

It is also important to remember that Pizzuto identified in his briefing a well-reasoned decision from another state high court construing similar language precisely how he construes Section 7 here. *See* Ans. Br. at 14 (discussing *United Pub. Workers v. Yogi*, 62 P.3d 189, 190–93, 96 (Haw. 2002)). In *Yogi*, a statute limiting unions was challenged under a state constitutional clause providing that "[p]ersons in public employment shall have the right to organize for the purpose of collective bargaining *as provided by law*." 62 P.3d at 190 n.5. The Hawaii Supreme Court concluded that to uphold the statute would give "lawmakers absolute discretion to define the scope of collective bargaining," which would "produce the absurd result

of nullifying the" very entitlement "to organize for the purposes of collective bargaining" recognized by the constitutional provision. *Id.* at 196. In its Opinion, the Court here codifies the same "absurd result"—Section 7 recognizes the Commission's power to grant commutations "as provided by statute" and the legislature has nullified the power by giving it to the Governor.

Obviously, *Yogi* is not binding on the Court. Be that as it may, the fact is that the only on-point case identified by either party or the Opinion is irreconcilable with this Court's holding. The Court's view of Section 7 cannot be dubbed the "only . . . reasonable interpretation," *Neal*, 362 P.3d at 519, when it is the only case in the country that has reached the conclusion, and when at least one well-reasoned decision has reached the opposite conclusion. If the Court is to justify its determination in a fashion that merits the confidence of the public and the bar, it must at least grapple with the counterarguments and authorities on the other side of the scale.

C. The Opinion's framework is inconsistent with precedent.

Destabilizing a cornerstone of Idaho appellate law, the Opinion designates Section 7 unambiguous and yet proceeds to rely on history and policy, even though those factors are off-limits when the language is plain under venerable caselaw.

For many years, it has been black-letter law in Idaho that when the plain-language controls, it is the only consideration for the Court. *See Pentico v. Idaho Comm. for Reapportionment*, 504 P.3d 376, 379–80 (Idaho 2022) ("Where a statute or constitutional provision is clear we must follow the law as written. Where the language is unambiguous, there is no occasion for the application of rules of construction."). In particular, legislative history and policy cannot play any part in dictating the significance of an unambiguous provision. *See Gonzalez*, 231 P.3d at 526 ("*When a statute is ambiguous*, the Court should consider not only the literal words of the statute, but also the reasonableness of proposed constructions, the public

policy behind the statute, and its legislative history in order to discern and implement the intent of the legislature."); *State v. Mercer*, 138 P.3d 308, 309 (Idaho 2006) (reminding that legislative history cannot be consulted when statutory language is unambiguous); *see also Arel v. T&L Enter.*, 189 P.3d 1149, 1153 (Idaho 2008) (same for public policy).

The Opinion pays lip service to the well-established notion that it is only when "the reviewing court finds the provision to be ambiguous" that it can "utilize the rules of statutory construction." *Id.* at *4. At the outset of its substantive analysis, the Opinion informs the reader that Section 7's unambiguous meaning settles the controversy. *See Pizzuto Op.* at *7. Confusingly, though, the Opinion then goes on to run through the very factors that it had just disclaimed: history and policy. Specifically, the Opinion tells us that the statute under attack was enacted as part of a clear historical trend in the same direction. *See id.* at *9 ("[A]s occurred with the adoption of the 1946 and 1986 Amendments to Article IV, section 7, and the passage of the enabling legislation that followed, the legislature has redefined the operation of the clemency process within the executive branch . . . ."). In defending its historical analysis, the Opinion places great emphasis on its conception of what the law was between 1946 and 1986, and how it changed afterwards. *See id.* at *10. At the same time, the Opinion also cites materials from legislative meetings regarding the statutory implementation of the 1986 amendment. *See id.* And last, but far from least, the Opinion expresses deference to the legislature's "*policy* preference for promoting greater accountability and governance over the clemency process." *Id.* at *9. In short, the Opinion's reasoning is pervaded by history and policy.

There is no explanation in the Opinion as to why the Court is resorting in great detail to sources that are plainly forbidden by its own caselaw in a plain-language analysis, while at the same time insisting that Section 7 is unambiguous. In the absence of such an explanation, the

Opinion's methodology here will cause uncertainty among lower courts and attorneys regarding how the judiciary carries out its most basic duty: the interpretation of codified laws. *See Reclaim Idaho*, 497 P.3d at 179 (noting that the "[p]assing on the constitutionality of statutory enactments, even enactments with political overtones, is a fundamental responsibility of the judiciary, and has been so since *Marbury v. Madison*"). Imagine that an observer were looking to the Opinion here as a guide for how Idaho courts interpret a provision, when they consider extra-textual clues, what role history and policy play in their analyses, and so forth. Such an observer would have no idea what the answers were to any of those questions, since the Court's statements of the law in general are irreconcilable with what it actually does in its reasoning. In order to prevent misunderstandings, revisions at a minimum are necessary.

On top of the problems that the Opinion will cause for Idaho law as a whole, the Court's internal contradictions are problematic in Pizzuto's case in particular given the issues he raised above regarding the plain-language analysis. Earlier, Pizzuto explained how the Court's plain-language interpretation failed to take stock of all the plain language in Section 7, including—most significantly—text outside of the 1986 amendment. *See supra* at Part I.A. The Court's historical analysis compounds the mistake, because it is focused entirely on situating the same 1986 amendment in one contestable narrative. *See Pizzuto Op.* at *10. In other words, the Court is having it both ways: it is using only the constitutional language helpful for its result, instead of all of it, and then also bolstering its conclusion with history and policy. If the Court committed to its plain-language approach, it would have to deal with the language that cuts in Pizzuto's favor, and it also could not go to history or policy. The Court's precedents do not permit it to have its cake and eat it too. And, as Pizzuto will show in the next section of this brief, if the Court is to continue to rely on history and policy here, it should at least factor in the Idaho

people's perspective rather than deferring entirely to the view of the legislators who deliberately misled the public in 1986 about the purpose of the amendment, as the Opinion does now.

D. The Opinion's approach is anti-democratic.

By far the most troubling quality of the Opinion is its lack of interest in the standpoint of the Idaho public on the meaning of a constitutional amendment that the citizens themselves enacted by popular vote. The Opinion avoids any analysis of the people's repeated and explicit policy choice to take the commutation power *away* from the Governor's sole control. To make matters worse, the Opinion relies on the intent of the legislature when it was legislators who deliberately decided *not* to inform the people of how they planned to move the commutation power. And to top things off, the Opinion cursorily rejects an interpretation of the amendment that is—verbatim—what the people were told it meant. It is bad enough that the Opinion, if it stands, will send a man to death on the basis of such an anti-democratic opinion. The long-term consequences are worse, as the Opinion provides a roadmap to future legislatures who wish to manipulate and mislead the voters into changing the state's foundational legal document.

Beginning with first principles, the Idaho Constitution declares that "[a]ll political power is inherent in *the people*." Idaho Const., art. I, § 2. One way in which the people's ultimate power is protected is through their role in amending the Constitution. No constitutional amendment may pass unless "a majority of *the electors* shall ratify the same." Idaho Const., art. XX, § 1. Given the people's privileged place in the process, this Court has traditionally paid deference to their intent in construing constitutional amendments. *See Keenan v. Price*, 195 P.2d 662, 667 (Idaho 1948) (cautioning courts that "the will of the people expressed at the proper time and in the proper manner in ratifying [a constitutional] amendment ought not to be lightly disregarded"); *Idaho Mut. Ben. Ass'n v. Robison*, 154 P.2d 156, 159 (Idaho 1944) (focusing on

the intent of the public in construing a constitutional amendment because "[t]he people, not the legislature, amend the constitution" and because "the amendment becomes effective when ratified by the people and not otherwise"); *Straughan v. City of Coeur d'Alene*, 24 P.2d 321, 323 (Idaho 1932) ("The fundamental power [to amend the Constitution] still remains in the people controllingly expressed by them in the Constitution . . . ."); *see also* Cathy R. Silak, *The People Act, The Courts React: A Proposed Model for Interpreting Initiatives in Idaho*, 33 Idaho L. Rev. 1, 37–38, 59 (1996) (concluding that "the case law indicates [that] where th[is] court is interpreting the Idaho Constitution . . . the intent of the voters is paramount").

The Court's customary fidelity to the people's intent in deciphering constitutional amendments has evaporated in the case at hand. There is not a single reference in the analysis section of the Opinion to what the people were told about the 1986 amendment. *See Pizzuto Op.* at *4–12. In skipping the people's side, the Opinion omits a substantial amount of material that directly supports Pizzuto's rendering of the amendment. Most critically, the Idaho public has spoken definitively and repeatedly on the precise question presented by the case: should the Governor exclusively possess the commutation power? And they have said no three times. In the original constitution, the commutation power was exercised by a board comprised of the Attorney General, the Secretary of State, and the Governor. In 1942 and 1944, the people were asked by the legislature to modify the three-person board and give the Governor alone the

commutation power. *See* S.J.R. 7 (1941); H.J.R. 4 (1943).[5] Both times, the people rejected the measures. *See* Idaho Secretary of State, Election Division, Idaho Constitutional Amendment History, available at https://sos.idaho.gov/elect/inits/hst40_50.htm. In 1946, the people went a step further and took the Governor—and his two fellow board members—out of the commutation process altogether, to be replaced by a new specialized entity. *See* S.J.R. 3 (1945); Idaho Secretary of State, Election Division, Idaho Constitutional Amendment History, available at https://sos.idaho.gov/elect/inits/hst40_50.htm. To summarize this chapter of the history, the people of Idaho twice refused to vest the commutation power in the Governor alone, and then took away even his 1/3 vote. This sequence of events sheds light directly on what path the Idaho people have taken on the question presented in the case, i.e., a path as far from the Governor as possible. And yet the Court acknowledges the history only in the background section of its Opinion, *see Pizzuto Op.* at *2–3, and only to ignore it in the analysis, *see id.* at *4–12.

Still, that is more than the Opinion does for the decisive fact that the legislators behind the 1986 amendment willfully chose *not* to tell the people that the commutation power would be moved back to the Governor in a stark reversal of what the public voted to do thirty years earlier. The Court does not even grace that fact with a citation—in the background or anywhere else. In his Answering Brief, Pizzuto described how the Interim Criminal Sentencing Committee—which eventually recommended the 1986 amendment to the full legislature—took up two separate

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[5] Pizzuto acknowledges that the Court denied his motion to augment the briefing to address the 1942 and 1944 votes, as well as to comment on the statement by former Attorney General Jones that is referenced below. *See* Order, entered June 23, 2022. However, the Opinion itself recognizes these votes, *see Pizzuto Op.* at *2, albeit without appearing to address them in its analysis. Therefore, Pizzuto assumes it is permissible to discuss them now. He likewise submits that it would be inappropriate for the Court to disregard the votes since it does, as explained elsewhere, consider legislative history in its decision.

proposals that would have explicitly given the Governor the commutation power based upon a recommendation from the Commission. *See* Ans. Br. at 34. The committee deliberated on the proposals and elected *not* to pass them to the legislature. *See id.* Instead, they picked the "as provided by statute" formulation, which says nothing on its face about who will exercise the commutation power—or about the Governor doing anything. Yet two years later the legislature did exactly what it had decided not to tell the people: made the Governor the only decision-maker on serious commutation cases. *See* Idaho Code § 20-1016.

It is unsurprising that the amendment's promoters kept the people in the dark, since the public had spoken out against their plans every time they had been consulted. Then-Attorney General Jim Jones subsequently admitted the obvious: "It was my intent to give the governor the final say-so on a commutation or pardon, on a serious offense," but "there was some reluctance to present it exactly like that to the people." Betsy Z. Russell, *Execution or reprieve: Who decides? Justices weigh arguments in Idaho murderer's case*, Idaho Press, June 13, 2022, available at https://www.idahopress.com/news/local/execution-or-reprieve-who-decides/article_9721977b-62e2-52ef-b9d0-3bf721fcebb3.html. Contemporaneous records reflect the same narrative. A senator on the Interim Committee suggested that staff tweak Section 7's clemency powers, but "*without saying it will be in the hands of the governor*." Ans. Br., Ex. 2 at 2. It is difficult to imagine a scenario with clearer evidence of an orchestrated scheme to misinform the public about the consequences of their vote.

True to their word, the amendment's proponents made sure that the people had no inkling of the legislators' objective to reallocate the commutation power from the Commission to the Governor. Two official documents were transmitted to the people in connection with the 1986 amendment: the public notice and the ballot itself. Neither breathed a word about an intent to

have anyone other than the Commission make decisions about whose sentence would be commuted. *See* Opening Br., App. H; 49489 R., p. 646. To the contrary, both characterized the Commission as continuing to make commutation decisions after the passage of the amendment. *See* Opening Br., App. H; 49489 R., p. 646. Like the other material addressed above, the documents given to the voters appear nowhere in the majority Opinion here.

The Opinion's evasion of the voter documents is especially helpful to its result, because it allows the Court to casually dismiss an interpretation of the 1986 amendment that is, word for word, what the people were told it meant. Specifically, the Opinion describes Pizzuto as "read[ing] the legislature's authority as one to 'set policies and procedures for commutations'" under the amendment. *Pizzuto Op.* at *9. The Opinion rebuffs the interpretation on the ground that it could not "ignore that the Constitution itself was amended in 1986, and there would have been no reason to amend it just to provide the legislature with regulatory power it already had." *Id.* There are several defects in that reasoning, which are taken up elsewhere, but for present purposes Pizzuto would only stress that it is not his counsel who came up with the "policies and procedures" understanding of the amendment. It was *the legislature*. As Pizzuto made plain in his briefing, *see* Ans. Br. at 25 & n.12, the legislative council[6] advised the people of Idaho that, if they were to pass the 1986 amendment, lawmakers would then "have the authority to set policies and procedures for commutations," Opening Br., App. H; 49489 R., p. 646. It is remarkable that the Opinion would discount an interpretation of the amendment that was officially broadcast to the voters by the legislature itself without even acknowledging the source of the language.

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[6] The legislative council is made up wholly of state lawmakers. *See* Idaho Code § 67-427.

On a more fundamental level, it is not evident from the Opinion what basis it has for disregarding the people's vantage point. After all, the Opinion does make use of history and policy. The Opinion even calls upon *legislative* history to back up its conclusion. *See Pizzuto Op.* at *10 (citing two meetings in the legislature during the process by which the 1986 amendment was approved by lawmakers before being presented to the voters). If the legislature's perception warrants consideration, surely the voters' does as well, especially since "[t]he people, not the legislature, amend the constitution." *Robison*, 154 P.2d at 159. Nor does the Opinion make explicit what is implicit, i.e., that it is choosing not to pay heed to the voters' point of view. Rather, the Opinion portrays itself as *honoring* the public's position in the constitutional scheme. To that end, the Opinion asserts that "the word 'only'" in the 1986 amendment "showcases the people's intent to oversee the use of the commutation power through statutory governance." *Pizzuto Op.* at *7. Though Pizzuto takes issue with the Court's reading of the word "only," the bigger question is why "the people's intent" suddenly matters in an Opinion that otherwise cares only about the legislature's. The Opinion leaves the impression that the people's intent will be given legal value only when it matches the Court's desired outcome.

A similar comment is warranted with respect to policy. The Opinion discerns in Section 7 "a policy preference for promoting greater accountability and governance over the clemency process." *Pizzuto Op.* at *9. No doubt, those were the policy goals of at least some of the *legislators* who pushed for the 1986 amendment. But what of the policy preferences of the public that thrice voted *against* giving the Governor the sole commutation power? Surely those voters had a policy preference not only to remove the Governor from the commutation process, as they did in 1946, but also more generally to ensure that such a grave responsibility never

rested in the hands of a single individual. As the concurrence rightly states, "[t]he Constitution has always required that the power to extend mercy be exercised with the collective wisdom and moral judgment of a board, not by a lone executive who is directly subject to political pressures." *Pizzuto Op.* at *14. The district court below similarly thought it significant that "[t]he Idaho Constitution has never directed that one individual has the power to decide matters of commutation in any criminal matter, let alone a case with the ultimate penalty of death." 49489 R., pp. 751–52. And the change the 1946 voters worked in Section 7 remains there. That is, the Governor expressly had one third of the commutation power in the original version of Section 7, as reflected by the first sentence. In 1946, the voters took him out of that sentence. To this day, he is not in the first sentence, and Section 7 gives him no express commutation power. The policy choice made by the people in 1946 continues to be embodied in the language of Section 7.

Apart from the question of one decision-maker as opposed to several, there is also the matter of specialists versus generalists. The 1946 voters expressed the judgment that difficult clemency cases call for the expertise of people who see large numbers of petitions and develop the aptitude to evaluate the risks to the public, offenders' rehabilitation, and so on. Consider Governor Little's own statements announcing his appointments to the Commission, who he has praised for their "temperament and expertise," as well as their experience in corrections and other related fields. *See, e.g.*, Governor Little appoints two to Idaho Commission of Pardons and Parole, Aug. 26, 2019, available at https://gov.idaho.gov/pressrelease/governor-little-appoints-two-to-idaho-commission-of-pardons-and-parole/.

The simple question begged by the Opinion is why the "policy preferences" of the legislature now resonate with a majority of this Court, but not those of the voters whose decision in 1946 remains just as much a part of the constitutional text as does the 1986 amendment.

In the same vein, it is worth inspecting the policy goals of the legislators more closely, for it underscores the way in which the people's own goals are obfuscated by the Opinion. The Opinion refers generically to desires for "a more politically accountable body," for "statutory governance," and so forth. *Pizzuto Op.* at *3, *7. To some extent, the Opinion connects those aims to the 1986 amendment. *See id.* at *3. Fatally for its persuasiveness, though, the Opinion never links these supposed policy objectives to the heart of the case, i.e., the replacement of the Commission with the Governor as the ultimate decision-maker on capital commutations in § 20-1016(2). The elision lets the Opinion steer clear of the real story here, which is that the political leaders pushing for the 1986 amendment had a far more concrete goal than "accountability." Their goal, which is proven as a matter of historical record by the sources cited above, was to put the Governor in charge of commutation decisions, full stop. The essential question, then, is why the legislature did not communicate that goal to the people. And the answer is no secret: they tried before, and the people said no. The Court now blesses this end-run around the people by championing a vague policy and evading the true policy choice underlying the dispute here. Nor is it even clear why the Opinion regards its result as more consistent with the values of "accountability and governance" than the district court's. The Governor appoints the Commissioners. *See* Idaho Code § 20-1002. If he is dissatisfied by their decisions, or if his constituents are, he can presumably install new ones. The lack of accountability or governance are not obvious, and in any event the people were certainly not advised that the Governor's insertion into the process was the solution—or was even being considered.

In a similar tactic, the Opinion seeks to spin a narrative in which the 1946 amendment is the flip-side of the 1986 amendment. The former "removed the governor . . . completely . . . from clemency decisions," but the latter let him be put back in. *Pizzuto Op.* at *10. This false

equivalence allows the Opinion to criticize Pizzuto for "subordinat[ing] the 1986 Amendment to the 1946 Amendment." *Id.* If one considers these amendments through the eyes of the voters, though—which the Opinion never does—they are not at all on equal footing. The 1946 amendment *told* the people explicitly, through the language of the change itself, that they were "removing the governor from clemency decisions." *Id.* In 1986, having failed to convince the people through clear and explicit language, the legislature chose instead to put before the people a measure that left in place the text giving the Commission the commutation power and that made no reference to anyone else exercising the power. This manipulation then enabled the legislature to find the clear and explicit language only two years later, when they no longer needed the people's assent, and could make the policy change they intended all along. Pizzuto is not subordinating the 1986 amendment. The legislature chose to subordinate the people in 1986 by misleading them, and the Opinion now rewards the deceit.

At oral argument, the Court expressed concern about how as a practical matter it would be possible to divine the intent of the voters. *See* Oral Arg. at 42:08–36. Preliminarily, the question of whether the people's intent is significant has already been answered by binding precedent, in the cases cited at the outset of the section. If the Court is going to disavow that caselaw, it should say so. More to the point, although the unpacking of voter intent could raise complications in other cases, the case at bar is an easy one. The Court would be well within its rights to limit its consideration to the two official voter documents highlighted above. *See Hull v. Rossi*, 17 Cal. Rptr. 2d 457, 460 (Ct. App. 1993) ("Since this pamphlet accompanies the ballot, it appears to give an imprimatur of official approval to its contents and is likely to carry greater weight in the minds of the voters than normal campaign literature."). There is nothing more difficult about analyzing those documents than there is about analyzing legislative intent—which

the Court routinely does and in fact did in this very case. *See Edwards v. Aguillard*, 482 U.S. 578, 636–38 (1987) (Scalia, J., dissenting) (discussing how it is "almost always an impossible task" to "discern[] the subjective motivation of those enacting [a] statute" because of how many different potential explanations there are, because "what motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it," and because "[l]egislative histories can be contrived and sanitized").

Another option that would make the Opinion's task easier would be the tools of statutory construction. The Opinion repeats the convention that it is only when a provision is ambiguous that the rules of statutory construction can be brought to bear. *See Pizzuto Op.* at *4. As before, though, the Opinion's use of history and policy cast doubt on whether it really is following a plain-language analysis. And if it is not, the canons come into play. Here, the most salient canons are that the abrogation of settled law (i.e., the Commission exercising the commutation power) must be "clearly indicate[d]," *Callies v. O'Neal*, 216 P.3d 130, 136 (Idaho 2009), and that the legislature's rejection of language achieving a certain result suggests the same result is not embodied by the text it chose, *see Wood v. Farmers Ins. Co. of Idaho*, 454 P.3d 1126, 1128–29 (Idaho 2019). Both canons powerfully favor Pizzuto's side. And if history and policy are permissible, the canons are at issue too. In all events, the critical thing is for the Court to simply explain why it is acceptable to shunt to the side these important, fully preserved arguments of Pizzuto's. *See* Ans. Br. at 17–18, 34–35. Without such an explanation, the most tempting inference is that the voters are being jettisoned as an inconvenience.

That inference is harder to avoid in light of the circumstances surrounding the Court's handling of the case. As noted elsewhere, the Court expedited the case over the objection of Pizzuto and at the request of an Attorney General's Office that acted with essentially no urgency

in the case over the last four decades of litigation until it sensed a possible death warrant. The Court then allowed the Governor to submit an amicus brief, even though the State here is represented by the very officer—the Attorney General—who routinely speaks for the Governor's interest in numerous matters. *See* Order, entered Apr. 20, 2022. It did so despite no effort by the Governor's counsel to demonstrate that his amicus brief would add anything new to the case. *See* Application to Appear as Amicus, filed Apr. 15, 2022. Then, the Court denied a motion to participate as amicus by a group of 1986 voters. *See* Order, entered May 10, 2022. The Opinion makes reference to the Court's granting of the Governor's amicus motion, *see Pizzuto Op.* at *1, and says nothing about the voters'. Taken in tandem with the facts above, the Court's processing of the case again implies that it does not want to hear from the public, and that it prioritizes only the concerns of elected officials wielding political influence. When it comes to the reputation of the courts, "[b]oth the *appearance* and the reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself." *Williams v. Pennsylvania*, 579 U.S. 1, 16 (2016). To give short shrift to the Idaho voters in so many different ways is to gravely threaten the appearance of impartial justice.

The other message sent by the Opinion is a blueprint to legislators looking to deceive voters for their own policy agendas. What happened here, to recapitulate, was that legislators tried to move the commutation power to the Governor, were rejected by the people in their attempt, and then accomplished the same goal by intentionally choosing language that disguised their motives from the voters. The Court now places its stamp of approval on the fraud committed against the citizens of Idaho. Doubtlessly, the reality will not be lost on the state's political actors. It was only just over a year ago that the Court underlined its responsibility "to protect against encroachments on the people's constitutionally enshrined power" by a legislature

that has displayed at best a transactional commitment to pure popular democracy. *Reclaim Idaho*, 497 P.3d at 180. The people are entitled to the same protection in all cases, even when the beneficiary is a death-row inmate and even in the teeth of political pressure. At a bare minimum, the people are entitled to an account of how their status is being factored into the case—or not—rather than being written out of the picture.

Below, the State's rejoinder to Pizzuto's appeal to the intent of the public was to insist that "[v]oters have nothing to say whatsoever in this." 49489 Tr., p. 19, ll. 19–20. Although the Opinion does not endorse that approach, its reasoning likewise creates a situation in which the voters have not been given a meaningful say in an important area of public policy where they have voted three times. Pizzuto is confident that the Court does not intend to send such a message to the public, and the rehearing process is the ideal vehicle to clarify as much.

E. The Opinion ignores the best explanation for the amendment.

Despite purporting to take on Pizzuto's explanation for the purpose of the 1986 amendment, the Opinion overlooks his main argument, leaving a gaping hole in its reasoning.

The Opinion attributes to Pizzuto the idea that the 1986 amendment was designed to give the legislature the power "to set policies and procedures for commutations." *Pizzuto Op.* at *9. It is true that those words appear in Pizzuto's brief, but they are quotations from official materials provided to the 1986 voters—a fact unacknowledged in the Opinion. *See* Ans. Br. at 12, 25, 37. To be clear, Pizzuto continues to disagree with the Opinion's treatment of the "policies and procedures" angle. For present purposes, however, the more important point is that the Opinion devotes no analysis whatsoever to the explanation that was always Pizzuto's principal one. Namely, Pizzuto has consistently argued that the purpose of the 1986 amendment was to enable the legislature to pass "statutes that prescribe *the standards* that inmates are

required to meet in order to obtain a favorable clemency decision." Ans. Br. at 10; *accord* 49489 R., p. 690 (making the same argument below).

As Pizzuto showed in his briefing, there are many examples of statutes in this vein. *See* Ans. Br. at 10–11. A legislature could enact a statute with criteria that a petitioner must satisfy to earn a commutation. *See, e.g.*, *Woodring v. Whyte*, 242 S.E.2d 238, 242 (W. Va. 1978) (discussing a statute providing that commutations are available "for good conduct, industry and obedience"). Or a legislature might direct a clemency board to only consider commutation issues that have "not been reviewed in the judicial process." Utah Code Ann. § 77-27-5.5(5). Or it might require commutation where a sentence is "clearly excessive given the nature of the offense and the record of the offender." Ariz. Rev. Stat. Ann. § 31-402(C)(2).

These are all statutes that exist in the real world, and it is difficult to see how any such provision could have been passed under Section 7 as it read prior to the 1986 amendment. The Opinion's basis for rejecting the "policies and procedures" argument is the fact that Section 7 already allowed the legislature, before 1986, to "prescribe the sessions of [the Commission] and the manner in which application shall be made, and regulated proceedings thereon." *Pizzuto Op.* at *9. But statutes listing out eligibility criteria, like those listed above, do not prescribe the sessions of the Commission or regulate its proceedings. Rather, they dictate substantive rules about who can and cannot have their sentences commuted. Significantly, that is precisely what the Idaho voters were told the 1986 amendment would do. *See* Opening Br., App. H (notifying the public that the amendment would "[g]iv[e] the Legislature the authority *to set standards for commutations and pardons*"). This was always a central part of Pizzuto's theory, and the Opinion's avoidance of the issue does not make it go away.

F. The Opinion's reliance on the first sentence of Section 7 is misplaced.

Sustaining an argument made by no one, the Opinion contends that because the legislature has the power to create the Commission, it must have the power to strip it of its commutation authority. The Opinion's reasoning rewrites the plain text of Section 7, strays from binding precedent, and is inconsistent with the majority's own view of the constitutional history.

It is of great importance to the Opinion that the first sentence of Article 7 "gives the legislature the power to 'create' the board itself." *Pizzuto Op.* at *7. "If the Constitution authorizes the legislature to 'create' a board," the Opinion infers, "logic dictates the legislature i[s][7] also authorized to 'recreate' the board by modifying its structure and operations." *Id.* Later, the Opinion returns to the point, submitting that "because the legislature is constitutionally mandated to 'create' a board, it cannot seriously be argued that the legislature has somehow usurped that board by redefining its structure and operation." *Id.* at *9.

There are multiple reasons why this tack of the Opinion calls for reassessment. First, it was never articulated by the State, and implicates the same concerns about the party-presentation rule, partiality, and reconsideration of matters raised for the first time in an appellate decision. *See supra* at Part I.A. Furthermore, the Opinion offers essentially no justification for the notion that the first sentence of Section 7 allows the legislature to do anything with respect to stripping the Commission of commutation powers. The sentence states: "Such board as may hereafter be created or provided by legislative enactment shall constitute a board to be known as the board of pardons." There is nothing in those words about who exercises the commutation power. That

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[7] The Opinion states that "logic dictates the legislature *it* also authorized to 'recreate' the board." *Pizzuto Op.* at *7. Pizzuto assumes that "it" should be "is" and that the typo can be corrected in an amended opinion.

question is addressed by the second, third, and fifth sentences, all of which refer exclusively to the *Commission* as granting commutations. The Opinion does not provide a citation for the counterintuitive proposition that a general grant of authority somehow alters a specific commitment made explicitly and repeatedly elsewhere in the text. To the contrary, it used to be that "the specific controls over the general." *Shay v. Cesler*, 977 P.2d 199, 202 (Idaho 1999).

More broadly, the Opinion's unexplored assumption is that the power to create implies the power to do everything else, and that is not necessarily so. There are situations in which greater powers do not include lesser powers. *See, e.g.*, *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002) ("[T]he greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance."); *In re Kennedy*, 27 A.3d 844, 112 (N.H. 2011) ("[A] public employer's 'greater' power to create or eliminate a position or program does not necessarily include the 'lesser' power to unilaterally determine wages and hours for the position or program."). And one such situation is when the Constitution explicitly addresses the supposedly lesser power, in which case its text must be honored. *See Trump v. Mazars USA, LLP*, 940 F.3d 710, 780 (D.C. Cir. 2019) (Rao., J., dissenting) ("The district court suggests that the greater power of impeachment and removal must include the lesser legislative power to investigate illegal actions by the President. Yet the Constitution is not designed this way. The greater power does not include the lesser in a Constitution that explicitly vests Congress with limited and enumerated legislative powers and then provides for a wholly separate impeachment power with different objects, processes, and limits."), *vacated*, 140 S. Ct. 2019 (2020). To rely on the first sentence of Section 7 is essentially to avoid engagement with the text that everyone in the case agrees is dispositive.

A variation of the same theory is the Opinion's syllogism that "if the legislature can deprive the Commission of its clemency powers, as Pizzuto argued, surely it can modify the process of commutation through an additional procedural step of gubernatorial review." *Pizzuto Op.* at *10. There are many situations in which a legislature does not have to act in a given field, but—if it does—constitutional rights attach. *See, e.g.*, *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) ("[T]he Constitution does not require States to grant appeals as of right to criminal defendants" but, if they do, "the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution."). Commutations in Idaho are no different. Regardless of whether the legislature could have chosen not to create the Commission, or whether it could abolish the Commission, or whether it could eliminate some or all clemency tools, the fact is that it has done none of those things. What it has done is to "create[]" the Commission under Section 7. And once created under Section 7, the Commission "*shall*" have the commutation power. *See Rife v. Long*, 908 P.2d 143, 150 (Idaho 1995) (reiterating that the word "shall" is "imperative or mandatory"). There is no need to live in the world of hypotheticals. In the real world, the legislature has created all of the conditions necessary to trigger Section 7's placement of the commutation power with the Commission.

The same lack of engagement with the constitutional text is also facilitated by the Opinion's fluctuating description of exactly what it is that Section 7 allows the legislature to do in the commutation field. A wide variety of phrases appear in the Opinion under that umbrella, from "the parameters of how commutations are granted," to "the scope of [the Commission's] operations," to modifications to "its structure," to its "composition." *See Pizzuto Op.* at *7, *10, *11. The problem for the Opinion is that none of these phrases describe the issue in the case, which is the legislature's taking of a specific power (to grant commutations) and making another

actor responsible for its exercise (the Governor). As it happens, Pizzuto's own account of the 1986 amendment would permit the legislature to do all of these other actions enumerated by the Opinion. *See, e.g.*, Ans. Br. at 11 ("The legislature here does have the authority to *regulate* the Commission's commutation power" and "[i]t could give the Commission parameters on when to exercise the power, as numerous other statutes elsewhere do."). The Opinion's catalogue of examples of things that the legislature can by all accounts do is likewise more distracting than it is helpful. No one doubts that the legislature can "set the number of Commission members, place power in the governor to appoint the commissioners and executive director, and establish the term length each commissioner serves." *Pizzuto Op.* at *7. That is because Section 7 doesn't commit any of those items to the Commission. It does, however, do so with respect to the power to grant commutations—the only act that matters here. The Opinion cannot convincingly justify its own position by drifting away from the narrow question of power that is actually presented, and a tightening of language is needed if nothing else.

Additionally, the Opinion's treatment of the first sentence of Section 7 only works if the language is given a construction different from the one the Court has previously placed upon it. The Opinion depicts Section 7 as "authoriz[ing]" the legislature to create the Commission. *Pizzuto Op.* at *7. Though the Opinion offers little in the way of elaboration, the implication is that the legislature would also have the discretion not to create the Commission at all. It would then follow, by the Opinion's lights, that if the legislature need not establish the Commission to begin with, it need not guarantee that the agency has any particular powers. The very first step in this chain is the weakest, for the Court has already read the pertinent language as imposing a "*requirement* that the legislature create a" Commission "responsible for exercising the" constitutional authorities laid out in Section 7. *Winkler*, 473 P.3d at 798. In the appeal at bar,

the Opinion recites this language from *Winkler* approvingly, *see Pizzuto Op.* at *5, and echoes its terminology, *see id.* at *9 (describing the legislature as "constitutionally *mandated* to 'create' a board"). But if *Winkler* is good law in this respect, it destroys the Opinion's reasoning. A constitutional *imperative* to create the Commission does not imply any kind of power over the body's powers. The opposite implication is the more natural one. If the legislature is compelled by Section 7 to create the Commission, then it is Section 7 that is the driving force, and it is Section 7 that can delineate the Commission's powers and not the legislature.

Finally, the Opinion's perspective on the first sentence of Section 7 is sharply at odds with its handling of the meaning of the 1986 amendment, and results in a confusing analysis. In rejecting Pizzuto's reading of the 1986 revision, the Opinion posits that "there would have been no reason to amend" Section 7 "just to provide the legislature with regulatory power it already had." *Pizzuto Op.* at *9. Yet under the Opinion's own interpretation of the first sentence of Section 7, that is precisely what the 1986 amendment did. According to the Opinion, it is the legislature's supposed authorization to create the Commission that empowered it to pass § 20-1016(2). *See Pizzuto Op.* at *7. At the same time, the Opinion stresses that it "must read the 1986 amendment as giving the legislature authority that it did not have before." *Id.* at *9. How can both of these things be true? The first sentence of Section 7 was not disturbed in 1986. Under the Opinion's reading of that sentence, the legislature seemingly had the necessary power prior to 1986. That would suggest the 1986 amendment did nothing—just what the Opinion wrongly accuses Pizzuto of arguing. In summary, these two strands of the Opinion cannot be harmonized with one another. If they are both to remain, additional explanation is in order.

G. The Opinion creates due process problems.

In seeking a happy medium between the two parties' positions, the Opinion finds itself in no-man's land, where the Commission does in some sense still have the commutation power and yet where it is somehow still permissible for the legislature to allow an entirely different actor the sole power to make the final decision on whether a death sentence is reduced to life or not. The Opinion's unsuccessful search for a compromise results in a puzzling analysis that generates serious due process problems and, if uncorrected, will generate needless litigation.

In agreement with Pizzuto, and in disagreement with the State, the Opinion concedes that the commutation power is constitutionally "vested in the Commission." *Pizzuto Op.* at *8. Yet to uphold the Governor's action, the Opinion then proceeds to define the word "power" into nonexistence. *See id.* at *9. According to the Opinion, the Commission is still exercising the commutation power in a world in which its only impact on the final result—the only thing that matters in a commutation proceeding—is a non-binding recommendation to someone else who then unilaterally decides what to do. *See id.* at *9. This is so, the Opinion reasons, because the Governor "cannot initiate clemency proceedings, conduct those proceedings, or independently exercise either the pardon or commutation power. Nor can the governor alter the Commission's recommendation." *Id.* at *9. Instead, the Governor only "provides an internal check-and-balance" and his "power is limited to either approving or disapproving the recommendation." *Id.* at *9. This method of analysis, which jumps over the actual commutation decision in order to build up everything else, is a bit like saying that a totalitarian dictator of a nuclear power doesn't possess the power to drop an atom bomb because his role is "limited to either approving or disapproving the recommendation" of his generals.

Delving more specifically into the Opinion's reasons, it is true—firstly—that the Governor "cannot initiate clemency proceedings." *Id.* at *9. But neither can the Commission. It is the *prisoner* who initiates clemency proceedings. *See* 1984 Idaho Op. Atty. Gen. 75, 1984 WL 162407, at *6 (determining that a commutation "may be granted only upon application" and not sua sponte); *accord* IDAPA 50.01.01.450.01; IDAPA 50.01.01.450.03.c. This factor does not reflect any power possessed by the Commission. As for the fact that the Governor cannot "conduct" commutation "proceedings," *Pizzuto Op.* at *9, it is hard to call this a power. In the present case, for instance, the Commission considered a voluminous amount of documentary evidence and held a lengthy hearing. *See* Ans. Br. at 43. And yet its recommendation was unilaterally rejected by the Governor the same day it was made in a decision that refused to even try to engage with the Commission's rationale for its judgment. *See id.* at 44. The ability to hold a hearing in order to make a recommendation with no weight is hardly a power.

The Opinion is also reassured by the fact that the Governor cannot "independently exercise" the "commutation power." *Pizzuto Op.* at *9. Pizzuto is not sure what the Opinion means. If it means that the Governor can't rule on a commutation request until the Commission has made a recommendation, that is so. But how does that indicate that the Commission is exercising an independent power? It is often the case that something must happen before a unilateral power is exercised. A lawyer has to object before a judge exercises his power to overrule the objection. That does not mean that the lawyer is somehow the one exercising a power in connection with the objection, rather than the judge who rules on it.

Along the same lines, the Opinion's reference to the Governor's approval process also raises more questions than it answers. It is not clear what the Opinion has in mind when it declares that "even under Idaho Code section 20-1016 the governor's power is limited to either

approving or disapproving the recommendation." *Pizzuto Op.* at *9. In particular, the Opinion does not appear to explicitly take a position on the question of whether the Governor has the power to grant a commutation in the absence of a favorable recommendation from the Commission. If the Opinion's answer is yes, there is no obvious hook in the statute for its interpretation, which instead categorically states that in capital cases "the commission's determination shall only constitute a recommendation subject to approval or disapproval by the governor." Idaho Code § 20-1016(2). On its face, that language would indicate that if the Commission voted against a petition, the Governor could disapprove, and grant the commutation. And if the Opinion's answer is no, it is presumably relying on Section 7 rather than § 20-1016. But what in Section 7 supports that view? The constitutional text refers to the Commission "grant[ing] commutations." As noted, the granting of a commutation is by no means the making of a recommendation. Whatever the Court's answer, it is a significant one that lies at the heart of the case, and it should be set forth and explained in an amended opinion.

Finally, the Opinion takes comfort in how the Governor cannot "alter the Commission's recommendation" because his "power is limited to either approving or disapproving the recommendation." *Id.* at *9. The underlying premise is that the making of a recommendation is in itself a power. Pizzuto is aware of no authority holding that a constitutional power in a certain area can be relegated to a toothless advisory status and still be regarded as a power. The power addressed by Section 7 is the "power . . . *to grant commutations*." There is no advisory power of any kind in the constitutional text. It makes little sense, then, for the Opinion to suggest that the Commission is somehow exercising the Section 7 power when the Court is forbidding it from doing the one thing with the power that is described by Section 7: granting commutations.

Idaho Code § 20-1016 is itself consistent with Pizzuto's understanding, and inconsistent with the Court's. The provision describes the Commission's "full and final *authority*" to grant commutations for less serious offenses. § 20-1016(3). With respect to capital cases, the Commission's "determination shall only constitute a recommendation subject to approval or disapproval by the governor." § 20-1016(2). "Authority" is synonymous with "power." *See, e.g.*, *Power*, Black's Law Dictionary (11th ed. 2019) (defining "congressional power" as "[t]he authority vested . . . to enact laws"). The contrast here is between a power, on the one hand, and a recommendation on the other. Plainly, the legislature understood itself to be taking away the Commission's power in § 20-1016, and the parties, district court, and Governor likewise shared that understanding. There is no basis for the Opinion to adopt a different understanding by stretching the word "power" beyond its breaking point.

The Opinion's discourse on how the Commission "does not grant the governor power to *directly* commute or pardon anyone," *Pizzuto Op.* at *9, misses the mark. Whatever "directly" might mean here, it remains the case that the *Commission* plainly does not have the commutation power in a scheme where it is by any measure not able to commute a death sentence. That is the only thing that matters under Section 7, according to the Opinion's own reasoning.

In the final analysis, there are complex issues in the case, but this isn't one of them. A non-binding vote on a commutation petition by an advisory body to an actor who then exercises unilateral decision-making authority is in no plausible sense a "power[] to . . . commute sentences." *Pizzuto Op.* at *8. The Opinion's nod to the voters' "preserv[ation of] the constitutional *power* of the Commission to grant a commutation," *id.* (emphasis in original), does not jibe with its decision to uphold a death sentence after a majority of the same Commission voted to reduce it to life. In this case, the Governor proceeded on the assumption that he—and

he alone—could either grant or deny Pizzuto a commutation. The Opinion approves of his assumption. It thereby gives him the commutation power, no matter what label it chooses to affix. If the Court continues to allocate power in this way, an amended opinion should at least make it clear what is happening.

The current Opinion's refusal to acknowledge the reality raises due process concerns, because it recognizes a constitutional right to have commutation decisions rendered by the Commission and in the same breath deprives the Commission of that very power.

A due process claim is evaluated "in two steps: the first asks whether there exists a liberty[, life,] or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Ky. Dep't of Corrs. v. Thompson*, 490 U.S. 454, 460 (1989).

The first step is satisfied as a matter of constitutional law. Five Supreme Court Justices have opined that the Due Process Clause of the Fourteenth Amendment applies to clemency proceedings. *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 288 (1998) (O'Connor, J., concurring); *id.* at 290–91 (Stevens, J., concurring). As a consequence, that conclusion is precedential here as a matter of federal constitutional law. *See Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000) (adopting the same reading of *Woodard*). Thus, the only question is whether Pizzuto has received the quantity of process to which he is due. The minimal due process required in the clemency context is that "a death row prisoner . . . receive the clemency procedures explicitly set forth by state law." *Duvall v. Keating*, 162 F.3d 1058, 1061 (10th Cir. 1998); *accord Baze v. Thompson*, 302 S.W.3d 57, 60 (Ky. 2010). That is precisely what the Opinion deprives Pizzuto of. On the one hand, the Opinion recognizes that the Idaho Constitution vests the commutation power in the Commission, removing any doubt about what

state law requires. On the other hand, the Opinion upholds a decision by an actor entirely distinct from the Commission to deny a commutation in the face of a favorable determination by the Commissioners. The Opinion enshrines a particular expectation in the state constitution—that the Commission render commutation decisions—and then refuses to effectuate it in Pizzuto's case. As a result, the Opinion births a due process violation. For due process purposes, it is essential that Pizzuto is not alleging that some state actor was required to grant him a commutation and failed to do so. He is alleging that the Court's own Opinion makes the Commission the relevant state actor and that it *did* grant him a commutation. In rejecting a due process challenge in another case arising in the same area of law, the U.S. Supreme Court wrote that a "commutation statute" that had "no definitions, no criteria, and no mandated 'shalls,' create[d] no . . . duty or constitutional entitlement." *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 466 (1981). Section 7 does have a "shall." The Commission "*shall* have power to remit fines and forfeitures, and, only as provided by statute, to grant commutations."

Justice O'Connor's concurrence in *Woodard*, which represents the binding rule of law in the field, provides as an example of a due process violation a situation where "the State arbitrarily denied a prisoner any access to its clemency process." 523 U.S. at 289. That is effectively what occurred here. The clemency process contemplated by Section 7, as construed by the Opinion, is one in which the commutation power is vested in the Commission. That process was complete when the Commission voted for life. The Opinion has no basis for adding an extra step beyond what the Constitution envisions. It is arbitrary for the Opinion to admit that the Commission is the constitutionally empowered commutation actor and to then strip Pizzuto of the benefit of a decision rendered by that very body. *See Cty. of Sacramento v. Lewis*, 523

U.S. 833, 845 (1998) ("We have emphasized time and again that the touchstone of due process is protection of the individual against arbitrary action of government.").

The due process complications engendered by the Opinion are exacerbated by the nature of the state procedural vehicles through which Pizzuto brought his claim—and upon which the district court granted relief. Criminal Rule 35(a) authorizes district courts to "correct a sentence that is illegal from the face of the record at any time." Idaho's post-conviction statute likewise allows a challenge to a sentence that is unconstitutional or "exceeds the maximum authorized by law." Idaho Code § 19-4901(a)(1), (3). Like clemency, these collateral avenues—once created by the state—must be regulated with the "fundamental fairness mandated by the Due Process Clause." *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987). It is fundamentally unfair for Section 7 to confer the commutation power on the Commission—as recognized by the Opinion—and yet for the Commission's decision to be rendered meaningless by the Governor's intervention. That is particularly so in the capital context, where the courts are "particularly sensitive to insure that every safeguard is observed," *Gregg v. Georgia*, 428 U.S. 153, 187 (1976), and even more so when it comes to clemency, which "is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted," *Herrera v. Collins*, 506 U.S. 390, 411–12 (1993).

H. The concurrence errs and creates due process problems.

Because there are so many deficiencies in the majority Opinion, it is necessary for the Court to revisit its decision as a whole, including the concurrence. Plus, the concurrence raises an even more serious due process problem than the majority Opinion, which means that all five sitting Justices have signed on to a decision that creates a constitutional violation, and all five

Justices should reevaluate the matter. Here, Pizzuto will first explain how the concurrence is wrong as a matter of state law, and then why it gives rise to due process concerns.

The concurring opinion agrees with Pizzuto that the Governor acted unconstitutionally by intervening in the commutation proceedings and that the decision is left in the hands of the Commission alone by Section 7, but then oddly invites the State to execute him anyway. *See Pizzuto Op.* at *14. Explaining this result, the concurrence suggests that even though the legislature violated the Constitution by passing § 20-1016(2) and giving the commutation power to the Governor, lawmakers' refusal to authorize the Commission's exercise of the authority somehow obliterated the commutation power altogether. Put differently, the concurrence faults the legislature for unconstitutionally taking the commutation power away from the Commission and addresses the violation by taking the commutation power away from *everyone*. This curious analysis, in which a man can be executed even though the constitutionally relevant body voted to convert his death sentence to life, is on shaky ground in multiple respects.

The analysis, firstly, relies on an incorrect legal maneuver. It is the premise of the concurrence that the 1986 amendment's insertion of the words "only as provided by statute" means that "there must be enabling legislation authorizing the Commission to grant pardons or commutations." *Pizzuto Op.* at *15. To the concurrence's mind, there is no such enabling authorization because § 20-1016(2) instead reflects a legislative desire to reduce the Commission to an advisory role in commutations. *Id.* at *15. Initially, the concurrence's insistence upon a need for an implementing statute is not easy to square with the Court's own caselaw. In *Reclaim Idaho*, the Court addressed a constitutional provision stating that the people's referendum power was to be exercised "under such conditions and in such manner as may be provided by acts of the legislature." 497 P.3d at 167. The Court disclaimed an interpretation of this language whereby

the referendum right ceases to exist absent legislative action, as the legislature's failure to act does not "signal that the drafters of the [constitutional] amendment intended to give . . . an impotent and illusory power." *See id.* at 182–83. It is unclear why the same would not be true of the commutation power—if Section 7 was intended to give that authority to the Commission, as the concurrence correctly believes it was, then it becomes just as much "an impotent and illusory power" when it is dependent on legislative action. In the event *Reclaim Idaho* is distinguishable, it is incumbent on the concurrence to articulate the distinction.

The concurrence's search for an enabling statute is also the product of a self-contradictory reading of the 1986 amendment. In labeling § 20-1016(2) unconstitutional, the concurrence understands the amendment—properly—as only permitting "the legislature to place limits on the exercise of the commutation power that the Constitution grants *to the Commission*" and as authorizing "the legislature to *cabin* that authority." *Pizzuto Op.* at *13, *14 (first emphasis in original). When the concurrence gets to the remedy question, the meaning of the amendment has shifted: suddenly, "[t]he effect of the 1986 amendment was to *eliminate* . . . [the] self-executing grant of constitutional power to commute sentences." *Id.* at *15. These are two very different things. If the 1986 amendment *allowed* the legislature to place limits on the Commission's exercise of its constitutional commutation power, then why was the legislature *required* to do anything in the way of an enabling statute? Presumably, an amendment that permits limitations on a constitutional power doesn't erase the constitutional power. And conversely, if the 1986 amendment did in fact eliminate the self-executing grant of constitutional power, then it did far more than allow the legislature to cabin the authority—it completely displaced the authority and moved it to the legislature itself. Needless to say, Pizzuto endorses the analysis in the first half of the concurrence. At any rate, the two halves should match.

Setting those threshold difficulties aside, the concurrence is mistaken even on its own terms. To the extent that implementing statutes are required, two exist.

The first is Idaho Code § 20-1002(1), which provides that the Commission "shall succeed to and have all rights, powers and authority" of the "board of pardons as are granted and provided by the provisions of the constitution of the state of Idaho." Under the concurrence's own logic, that statute does the work required to give the Commission legislative authorization to carry out commutations. To repeat, the concurrence finds that "[t]he plain language of Article IV, section 7 grants commutation and pardon powers only to the Commission," but that "there must be enabling legislation authorizing the Commission to grant pardons or commutations." *Pizzuto Op.* at *13, *15. Section 20-1002(1) expressly states that the Commission shall have all the powers granted to the body by Section 7, and the concurrence understands those powers to include commutations. The provision therefore is an enabling one just as the concurrence describes it. And the statute does not appear to be considered by the concurrence, which should at least explain why it doesn't fit the bill if that is the case.[8]

The other enabling statute that meets the concurrence's description to a "t" is Idaho Code § 20-1004(1). Similar to the provision above, § 20-1004(1) provides that the Commission "shall

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[8] Pizzuto does not detect in the concurrence any reason why the supposedly missing enabling statute would have had to exist at any particular prior moment in time. But if it did, § 20-1002(1) has been in effect for all potentially pertinent time periods. The original version of the provision was enacted in 1969 and although it has been amended and renumbered multiple times, the relevant language has always remained. *See* 1969 Idaho Sess. Laws ch. 97, § 5; 1974 Idaho Sess. Laws ch. 6, § 2; 1980 Idaho Sess. Laws ch. 247, § 6; 1991 Idaho Sess. Laws ch. 166, § 1; 1994 Idaho Sess. Laws ch. 171, § 1; 1998 Idaho Sess. Laws ch. 355, § 1; 1999 Idaho Sess. Laws ch. 311, § 1; 2007 Idaho Sess. Laws ch. 102, § 1; 2017 Idaho Sess. Laws ch. 182, § 1; 2021 Idaho Sess. Laws ch. 196, § 3. And insofar as it matters, the 1986 amendment did not inspire the legislature to alter the statutory language at issue here, which it easily could have in the last forty-six years.

. . . [h]ave the powers relating to commutation, pardon and remission of fines and forfeitures as set forth in section 7, article IV, of the Idaho constitution." The statute both specifically identifies the constitutional provision being implemented ("section 7, article IV, of the Idaho constitution[ ]") and identifies the constitutional nature of the "powers relating to commutation[]" referenced in that section; these powers, the legislature said, were ones that the Commission "shall [h]ave[.]" Section 20-1004(1), again, fills the hole that the concurrence laments: it provides an express legislative imprimatur on the Commission's constitutional commutation power—a power the concurrence recognizes is granted by Section 7 "only to the Commission." *Pizzuto Op.* at *13.[9] And § 20-1004(1) is, like § 20-1002(1), conspicuously absent from the concurrence's discussion, and equally deserving of attention and analysis.

To be sure, § 20-1016(2), the statute at issue in Pizzuto's case, purported to limit the Commission's powers. But it did so in a way the concurring Justices rightly felt was unconstitutional. *See Pizzuto Op.* at *14–15. The upshot is that the sole statute the concurrence rests its ultimate recommended disposition on—reversal of the district court—is the sole statute it deems unlawful. As a basis for this unique approach, the concurrence essentially posits that the Governor's desired result must stand despite his unconstitutional action because the Commission could not do what it did either. But this conclusion does not follow.

The concurrence forgets the axiomatic principle that, "when a statute is unconstitutional it is void and is to be treated as though it never existed." *State v. Quinn*, 623 N.W.2d 36, 38

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[9] Although § 20-1004(1) was only enacted in 2014, it has been redesignated and amended subsequently and the legislature chose to retain the language at issue, further confirming its continued validity. *See* 2021 Idaho Sess. Laws ch. 196, § 5 (redesignating as Idaho Code § 20-1004).

(S.D. 2001). Idaho law on severance is to the same effect: the first question the Court asks when a provision is unconstitutional is whether "the invalid portion may be stricken without affecting the remainder of the statute." *State v. Nielsen*, 960 P.2d 177, 180 (Idaho 1998). Under the concurrence's constitutional analysis, § 20-1016(2) must be taken out of the picture entirely. What remains in its place are the two statutes outlined earlier, §§ 20-1002 and 20-1004, which unequivocally grant authority to the Commission to exercise the full panoply of powers given to it by the Constitution. *Cf. Reclaim Idaho*, 497 P.3d at 191–92 (unconstitutionality of substitute statute means that former statute remains in full effect).[10] Under those statutes, the Commission's favorable commutation decision would be final.

Raising another confusing wrinkle, the concurring opinion delves into the legislative history of Section 20-1016(2), *see Pizzuto Op.* at *16–17, implying either that the statute is ambiguous, *see Winkler*, 473 P.3d at 800, or that the legislature's intent in enacting this subsection can shed light on the remainder of the Idaho Code with respect to the Commission, *see, e.g.*, *Pizzuto Op.* at *15. But there is no need to parse what limits the legislature intended to

[10] The direct ancestor of Section 20-1016(2) is Idaho Code § 20-240. *See* 1969 Idaho Sess. Laws ch. 419, § 8. In 1988, two years after Section 7's amendment, § 20-240 was likewise amended to provide that the Commission had full and final authority to grant commutations except in cases of murder and certain other offenses; in those instances, the Commission's determination would only "constitute a recommendation" to the Governor. 1988 Idaho Sess. Laws ch. 323, § 1. This "recommendation" language was removed from Section 20-240 and recodified as Section 20-240A two years ago, 2020 Idaho Sess. Laws ch. 62, §2; Section 20-240A was in turn redesignated as Section 20-1016 last year, 2021 Idaho Sess. Laws ch. 196, § 18. Section 20-240A's "recommendation" language, however, suffers from the same constitutional flaw as does the current Section 20-1016(2). The Commission's constitutional power is to grant commutations, not issue non-binding recommendations. This shared unconstitutionality means that if § 20-1016 is void, its predecessors §§ 20-240 and 20-240A must be as well. All that remains are the two statutes, §§ 20-1002 and 20-1004, which reaffirm the Commission's constitutional power to grant commutations.

impose on the Commission in an unconstitutional statute: that statute is void, so what the legislature intended to do with it is irrelevant. It can and should be disregarded, and the focus placed instead on what the Commission is given the power to do elsewhere in Idaho's Constitution and Code.

What is more, even if the legislature's intentions are considered, the concurrence's conclusion does not hold up. The concurring Justices say that Pizzuto's death sentence must be carried out because there is no showing of legislative intent to properly grant anyone "the powers of commutation or pardon for murder." *See Pizzuto Op.* at *17; *see also id.* at *14, *16. But to the extent the concurrence is purporting to defer to the intent of the legislature, it is not doing so in a rational fashion. The consequence of the concurrence's reasoning would be that *no one* has the power to commute a death sentence in Idaho. It cannot be done by the Commission alone, because there is no implementing statute. And it cannot be done by the Governor, because Section 7 forbids it. There is no plausible foundation to suggest that the legislature intended to abolish commutations for murder sentences. The legislature's intent in § 20-1016(2) is not obscure—it intended not to eliminate the commutation power but to give it to someone else. And that, to repeat, is the intent rightly regarded by the concurrence as unconstitutional. The result lobbied for by the concurrence was no one's intent. Nor does any relevant actor now share the concurrence's view of the law. Everyone—the legislature, the Commission, the Governor, the Attorney General, Pizzuto—agrees that commutations exist, while disagreeing over how they are to be awarded. The legislature signaled its view by purporting to set up a process for commutations, § 20-1016(2), and the others did the same by engaging in a lengthy commutation proceeding for Pizzuto.

In sum, the concurrence correctly concludes that the Governor violated the Constitution, but incorrectly urges the Court to effectuate the Governor's unconstitutional action (denying a commutation) and to nullify the Commission's constitutional action (granting a commutation). The concurrence's search for an enabling statute is inconsistent with caselaw; its conclusion that there is no enabling statute ignores two key provisions in Idaho code; its reliance on an admittedly unconstitutional statute transgresses basic judicial norms; and its chosen result (the abolition of commutations) accords with no one's intent.

In addition to these manifold problems, the concurrence gives rise to a blatant due process violation. Above, Pizzuto explained why the majority Opinion rings due process alarms—to wit, because it acknowledges that the Commission exercises the constitutional commutation power and still upholds a statute that diminishes the power beyond recognition. The concurrence is infected by the same due process error, only more so. For the concurrence not only believes that the Commission enjoys the commutation power—it embraces Pizzuto's theory that the Governor has no part of that power. *See Pizzuto Op.* at *13 (determining that § 20-1016(2)'s "purported grant of power to the governor to make the final decision whether to commute or pardon a person convicted of a crime punishable by life imprisonment or death is unconstitutional"). And still, as set forth above, the concurrence declines to take the next logical step, and instead turns around and finds that the legislature's unconstitutional action has inadvertently opened up a black hole, in which no murder convict can receive a commutation from anyone. For all the reasons arrayed above, a fortiori, the concurrence's reasoning violates due process.

On top of those reasons, one can add that Section 7 plainly envisions some kind of commutation and pardon process. It is entitled "[t]he pardoning power" and it describes an

administrative agency that "*shall* have" the commutation power. The clause thereby underlies a reasonable expectation on the part of murder convicts, like all other prisoners, that they will be able to appeal to the authorities for a commutation. Not so, responds the concurrence—such an inmate has no one to ask for a commutation from because no one has the constitutional authority to bestow one. That kind of chimerical commutation process is patently unconstitutional under the Fourteenth Amendment. For related reasons, the concurrence's approach violates due process because it creates a right (to seek a commutation) with no remedy (because no one can grant it). *See State v. Douglas*, 522 A.2d 302, 309 (Conn. App. 1987) ("Such a right without a remedy is at odds with emerging standards of due process, both state and federal."). The U.S. Supreme Court has stressed the importance of crafting remedies that are "wholly commensurate with the nature and extent of the constitutional violation." *Hills v. Gautreaux*, 425 U.S. 284, 300 (1976). Under the concurrence's approach, the remedy for Pizzuto's violation is non-existent, and the consequence is his death.

II. Conclusion

In light of the above, Pizzuto respectfully asks the Court to withdraw its Opinion and issue a new decision granting him the relief he requested in his Answering Brief, or at least call for a response from the State and hear a new oral argument to consider the important issues raised here.

Dated this 25th day of October 2022.

/s/ Jonah J. Horwitz
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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of October 2022, I caused to be served a true and correct copy of the foregoing document by the method indicated below:

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