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Nye v. Katsilometes Appellant's Brief Dckt. 45917

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Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

IN THE IDAHO SUPREME COURT

W. MARCUS W. NYE, an individual Plaintiff/Respondent vs. TOM KATSILOMETES, an individual Defendant/Appellant	)	Bannock Co. Case No. CV 17 1622-OC SUPREME COURT No. 45917 **APPELLANT'S BRIEF**

APPELLANT'S BRIEF

Appeal from District Court of the Sixth Judicial District for Bannock County
Honorable District Judge Robert C. Naftz presiding

ATTORNEY FOR APPELLANT

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STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an appeal from the District Court's grant of summary judgment to the Plaintiff, Mr. Nye, in a declaratory judgment action. The District Court concluded that the Idaho Senate had the inherent discretion under Article III Section 9 of the Idaho Constitution to award attorney's fees to a winner in an election contest that Defendant, Mr. Katsilometes, had brought before the Senate.

The Senate lacked the legal authority to award attorney's fees and the District Court erred in finding the Senate had such authority. In reaching its conclusion, the District Court ignored the plain language of the statutory provisions which govern election contests, I.C. 34-2120, which until a recent amendment, allowed a prevailing party only costs but not attorney's fees. The District Court further failed to cite, let alone address, a case out of this Court that is right on point, *Noble v. Ada County Elections Bd.*, 135 Idaho 495, 20 P.3d 679 (2000).

The issues presented in this case are straightforward and yet intriguing from a constitutional perspective. Can the Idaho Senate ignore Idaho's laws and its own rules? Is the Idaho Senate's award of attorney's fees in a Contest of Election capable of being converted into a judgment by a District Court, despite the express language of Idaho's laws and decisions of this Court interpreting those laws? Appellant contends the answer is "no" to both questions. Should the District Court's decision be affirmed, and the judgment be upheld, it would confer unbridled powers upon the legislature, disregard the bicameral structure of the legislative process, allow the judiciary to retroactively amend statutes, and threaten to upend the balance of power of what are supposed to be three coequal branches of government. This Court should reverse and remand to the District Court with instructions to declare Mr. Katsilometes the prevailing party.

B. COURSE OF PROCEEDINGS

Mr. Katsilometes, the Republican candidate for a Senate seat in the Pocatello area, timely filed his Notice of Election Contest with the Secretary of the Idaho Senate, served said Notice on the opposing candidate, Mr. Nye, and Idaho Senate President *Pro Tempore* Brent Hill. R. Vol. 2 pp. 20-21. Thereafter, an email sent by Jennifer Novak, Secretary of the Senate, to Defendant stated, "The Senate's election contest procedures follow the guidelines provided in Idaho Statute 34 Chapter 21." R. Vol. 2 p. 1017. A Procedural Order was entered and Signed by Senator *Pro Tempore*, Brent Hill. R. Vol. 2 pp. 33-35. The Order referred the Contest of Election to a Standing Committee (State Affairs), laid out the procedure for conducting discovery and filing briefs, and stated "[I]n all other respects the Committee shall be governed by the rules of the Senate." Id. It is undisputed the Rules of the Senate in place at the time of the Contest did not provide for the award of attorney's fees in a Contest of Election or otherwise.

Discovery began once the procedural order was entered. However, once Mr. Nye's violations of campaign finance laws such as I.C. § 67-6610A were uncovered, and his receipt of incriminating emails about some illegal bank transfers (R. Vol 2 pp. 875-881) was confirmed, Mr. Nye refused to answer deposition questions regarding his violation of the Sunshine Law. R. Vol 2 pp. 958-959 and *see* IRCP 30(d)(3) and (g)(1) (regarding the consequences for a deponent's refusal to answer questions at a deposition). The parties then simultaneously filed and exchanged their pre-hearing briefing. R. Vol 2 pp. 655-668 and 682-710.

A hearing was held on January 16, 2017 before the Senate State Affairs Committee on the merits of the Election Contest. R-Audio CD (File 29A). Plaintiff's counsel specifically acknowledged under a "technical" reading of the statute there could be some "hay" made about the campaign finance violations Mr. Katsilometes raised as grounds for his Contest. R- Exhibit 29A January 16, 2017 audio at 2:14. At the hearing, in responses to Senator Bart Davis'

questions, Mr. Ruchti stated I.C. §§ 12-121 and 12-117 were inapplicable to these proceedings and did not provide a basis for the Senate to make an award of attorney's fees. R- Exhibit 29A January 16, 2017 audio at 1:56- 2:00:30. Mr. Ruchti stated he did not know if IRCP 11 applied but simply cited the alleged constitutional authority given to the Senate under Article III Section 9 as the power for the Senate to make an award of attorney's fees in a Contest of Election. Id. The Committee voted to uphold the results of the election and directed the parties to prepare and submit a memorandum of fees and costs.

On January 23, 2017 a hearing was held before the Senate State Affairs Committee on the issue of an award of attorney's fees and costs. Following the hearing, the Committee unanimously approved a recommendation to make an award of the entirety of Mr. Nye's attorney's fees ($18,060) and costs ($1,711.84). R. Vol 2 p. 744 and R- Exhibit 29B January 23, 2017 audio. On January 24, 2017 the findings of the State Affairs Committee were presented to the full Senate. R. Vol 2. p. 993 and Audio CD Exhibit 29C. On January 25, 2017 the Senate voted to adopt the recommendations of the State Affairs committee 1) upholding the results of the election and 2) making an award of the entirety of Mr. Nye's attorney's attorney fees and costs. R. Vol 2. p. 996-997 and Audio CD Exhibit 29D. Mr. Nye was present, voted on both measures, and did not declare a conflict of interest. Id. Mr. Nye's vote violated Senate Rule 39 (h) which stated in relevant part:

> Right to Vote. — (H) …A Senator with a conflict of interest under applicable law shall, on the day of and before casting a vote on the Senate floor, disclose the conflict verbally or in writing to all members of the Senate present. The presiding officer shall ensure that such disclosure is entered upon the Journal…Upon disclosure of any such conflict, the Senator may vote upon any question or issue to which the conflict relates, unless the Senator requests to be excused.

Thereafter, contrary to the requirements of the pre-2017 version of I.C. § 34-2120(b), the findings of the Senate were never sent to the House for a vote by both houses of the legislature.

Thus, even the Senate's award of Mr. Nye's costs failed to meet the requirements of the pre-2017 version of I.C. § 34-2120(b). Similarly, the findings were never sent to the Governor for his signature or other executive action. Id.

Shortly after the award of Mr. Nye's attorney's fees and costs by the Senate, his counsel began demanding payment from Mr. Katsilometes. R- Vol 1 pp. 217-218. Mr. Katsilometes followed the explicit language of the pre-2017 version of I.C. § 34-2120. He instructed Mr. Nye to collect the bond he had posted at the outset of the Contest, pursuant to I.C. § 34-2120(a), and paid Mr. Nye the remaining $1,211.84 balance of the costs awarded by the Senate (but not the House). R- Vol 1 pp. 10, 11, 209, and 214. Mr. Katsilometes declined to pay the award of attorney's fees made by the Senate due to the holding of *Noble* and the express language of the pre-2017 version of I.C. § 34-2120. Id.

On April 26, 2017 Plaintiff filed his *Action for Declaratory Judgment* in Bannock County. R- Vol 1 pp. 8-13. Following a scheduling conference, Defendant filed his *Answer to Action for Declaratory Judgment* which asserted general denials of the Senate's authority to make an award of attorney's fees and 15 Affirmative Defenses primarily addressing the Senate's violation of numerous provisions of Idaho's Constitution in making its award as well as the plain language of the pre-2017 version of I.C. § 34-2120. R- Vol 1 pp. 32-39.

The parties agreed to jointly submit a record and to forego discovery. R. Vol 2 p. 6-1036. Thereafter, the parties simultaneously filed dispositive motions and then response briefs. R. Vol 1 pp. 83, 85-136 and R. Vol 1 pp. 141-164. A hearing on both motions was held before the District Court. Tr. 8-70. The District Court issued a written decision in favor of Plaintiff. R. Vol 1 pp. 168-179. Thereafter a Judgment in the amount of $18,060 (the amount of the fee award made by the Senate) was issued in favor of Plaintiff. R. Vol 1 p. 181. Plaintiff then submitted a fee petition seeking the attorney's fees and costs he incurred pursuing the case

before the District Court pursuant to I.C. § 12-120(1). R. Vol 1 pp. 183- 193. The District Court issued a written decision awarding Plaintiff his attorney's fees and costs incurred in the District Court phase of the litigation as well as pre-judgment interest since January 25, 2017, the date the Senate made its award. R. Vol. 1 pp. 307-321. An amended judgment was issued for a total amount of $35,372.38. Defendant timely appealed. R. Vol. 1 pp. 221-222.

C. STATEMENT OF FACTS

The facts underlying Mr. Nye's violation of the Sunshine Laws are almost entirely irrelevant to these proceedings. The issues on appeal are purely legal, i.e. did Article III Section 9 provide the Senate legal authority to make an award of attorney's fees in a Contest of Election, despite case law and statutory language to the contrary? Can a district court disregard a statute and a Supreme Court decision in order to engage in an *ex post facto* statutory amendment? There is no dispute the Senate had the authority under Article III Section 9 to decide Mr. Nye had won the election, even had they acknowledged his technical violations of campaign finance laws. This appeal simply focuses on whether or not the Senate had the authority to make an award attorney's fees in a Contest of Election and whether the District Court had the authority to convert that award into a judgment.

Should the Court desire to understand Mr. Nye's underlying Sunshine Law violations, Appellant incorporates by reference the "Legal Grounds for Underlying Contest of Election" and the "Factual Background for Contest of Election" contained in the *Brief in Support of Defendant's Dispositive Motion*. R-Vol. 1 pp. 115- 121. Suffice to say, technical violations of campaign finance laws undeniably occurred, were documented through bank records, emails, and reports Mr. Nye filed with the Idaho Secretary of State. Yet, for reasons known only to the Senate, the Senate decided against formally acknowledging them.

To provide a purported basis for its award of attorney's fees, the Senate found the Contest

of Election was "brought and pursued frivolously, unreasonably, and without factual or legal foundation." R. Vol 2 p. 993. The Senate made no legal or factual findings to support this conclusory determination. As this Court is aware, in a judicial setting, in order "[t]o appropriately grant attorney's fees, a specific finding must be made and supported by the record that the case was pursued unreasonably and without foundation." *Sun Valley Shopping Ctr. v. Idaho Power,* 803 P.2d 993, 998, 119 Idaho 87 (1991). The stated reasons of the Senate State Affairs Committee, or at least some members thereof, for making the finding of frivolous conduct, seemed to be a concern that many other members of the legislature may have committed similar technical Sunshine Law violations. Members of the State Affairs Committee also expressed concern that having done so could expose them to a similar election contest. R Exhibit 29A Senate State Affairs January 16, 2017 Hearing Audio at 2:32:20 – 2:32:51. Despite this admission of a clear conflict of interest, no members of the Senate recused themselves from participating in this election contest.

Similarly, there was no explanation given by either house of the Legislature as to why it felt the immediate need to amend I.C. § 34-2101 (grounds for election contests) to remove subsection 4 (i.e. the commission of "any violation as set out in chapter 23, title 18, Idaho Code" - the precise ground Mr. Katsilometes used as the basis for his election contest). Since Idaho caselaw has held time and time again, amended statutes mean something different than the prior version of that statute, it appears the Senate amended I.C. § 34-2101 (now I.C. § 34-2104) immediately following this election contest because Mr. Katsilometes had asserted a valid legal basis for his election contest. Specifically, the amended grounds for election contests, now found at I.C. § 34-2104(6), removed the violation of the "catchall" provision for election crimes, I.C. § 18-2315 (which was also amended in 2017), as a ground for an election contest. There is simply no explanation given by the Senate as to how on one hand Mr. Katsilometes could have

engaged in frivolous conduct and yet the Senate immediately amended the very same statutes he had relied upon. If the statutes were so clear as to support a basis for frivolous conduct, then there should have been no need to eviscerate the precise statutes Mr. Katsilometes relied upon.

The highly politicized nature of the legislative branch is the precise reason we have three separate branches of government. The independent judiciary and cannons of judicial ethics help ensure an impartial decisionmaker will decide disputes amongst Idaho's citizens. The Senate's finding of frivolousness, unreasonableness, and lack of foundation, which provided is alleged basis for its subsequent award of attorney's fees, should be viewed with a high degree of skepticism.

II. ADDITIONAL ISSUES ON APPEAL

A. THE AWARD OF ATTORNEY'S FEES AND PRE-JUDGMENT INTEREST MADE BY THE DISTRICT COURT AGAINST RESPONDENT SHOULD ALSO BE VACATED.

Appellant requests this court remand this case to the District Court with instructions to vacate the original Judgment as well as the Amended Judgment, which added in Mr. Nye's award of his attorney's fees incurred in the District Court phase of this dispute as well as pre-judgment interest. *See H2O Environmental, Inc. v. Farm Supply Distributors, Inc.*, 2018 Idaho Supreme Court Case No. 45116. Appellant also asks this court to issue an award of his attorney's fees and costs incurred on appeal pursuant to I.C. 12-120(1) and IAR 40 and 41, since the original amount in dispute was under $35,000. *See Action for Declaratory Judgment* at R. Vol. 1 p. 10. Finally, Appellant requests this Court instruct the District Court on remand to make an award of Appellant's attorney's fees incurred in the District Court phase of this dispute pursuant to I.C. 12-120(1), since the original amount in dispute was under $35,000. Id.

III. ARGUMENT

A. STANDARD OF REVIEW

The parties simultaneously submitted dispositive motions citing IRCP 56. In addition,

Defendant cited 12(b)(6) alleging Plaintiff failed to state a claim that entitled him to relief. Ultimately, due to the extensive record developed before the Senate which was jointly submitted by the parties, the Court's ruling denying Defendant's Motion and granting Plaintiff's Motion was based on IRCP 56. R. Vol 1 p. 171. No factual findings were made by the District Court.

In Idaho, "[t]he standard of review applicable to questions of law is one of deference to factual findings, but we freely examine whether statutory and constitutional requirements have been met in light of the facts as found." *Hall v. Farmers Alliance Mut. Ins. Co.*, 145 Idaho 313, 320, 179 P.3d 276, 283 (2008). "Because constitutional questions are purely questions of law, they are reviewed *de novo.*" *Bradbury v. Idaho Judicial Council*, 136 Idaho 63, 67 (2001). This Court exercises free review over questions of law. *See, e.g., Mut. of Enumclaw v. Box,* 127 Idaho 851, 852, 908 P.2d 153, 154 (1995). The interpretation of a statute is a question of law over which this Court exercises free review. *State v. Hart,* 135 Idaho 827, 829, 25 P.3d 850, 852 (2001).

B. Neither Idaho's Constitution nor The Election Contest Statutory Scheme Permitted the Senate to Make an Award of Attorney's Fees.

i. Idaho's Statutory Scheme in Place at the Time This Contest of Election was Held is Clear, the Legislature Could only Make an Award of Costs Against the Unsuccessful Party.

Plaintiff's declaratory judgment claim is based on a January 25, 2017 Senate Journal entry where Plaintiff, along with other Senators, voted to award himself $18,060 in attorney's fees following an unsuccessful contest of election Defendant initiated. R Vol. 2 p. 996-997. *See also* R Vol. 2 p. 993. The statutory scheme governing contests of election which was in place at the time this Election Contest was conducted provided in relevant part:

> (a) The contestant shall file with the secretary of state a bond in the amount of five hundred dollars ($500) conditioned to pay the contestee's **costs** in case the election be confirmed by the legislature.

> (b) The contestants are liable for witness fees and the costs of discovery made by them respectively. If the election is upheld by the legislature, **the legislature**[1] may assess **costs** against the contestant. If the election is annulled by the legislature, the legislature may assess costs against the contestee.
> Pre-2017 version of I.C. § 34-2120 Security for costs--Assessment of costs (Emphasis added)

The District Court's conversion of the unenforceable attorney's fee award into a judgment violates the holding of *Noble v. Ada County Elections Bd.*, 135 Idaho 495, 20 P.3d 679 (2000). *Noble* addressed a contest of a primary election which involved identical cost shifting language as is at issue in this case. The election contest statutory scheme placed jurisdiction for primary election contests in the District Court, as compared to the legislature for election contests for the general election. Presumably this jurisdictional distinction is due to the requirements found in Article III Section 9 of Idaho's Constitution. This Court in *Noble* reviewed the plain language of I.C. § 34-2130, as it existed prior to the 2017 amendment[2], and held:

> The general rule is that costs do not include attorney fees unless attorney fees are expressly included in the definition of the term costs. *See* 20 AM.JUR.2D *Costs* § 1 (1995); 20 C.J.S. *Costs* § 125 (1990). The legislature's awareness of this rule is demonstrated by its authorization of awards of costs and attorney fees. *See, e.g.,* I.C. §§ 5-321, 6-101(3)(*o*), 7-610, 9-342, 12-120(5), 16-1620A (all referring to costs and attorney fees). When the legislature has intended that the term costs cover attorney fees, it has so provided. *See, e.g.,* I.C. §§ 18-3302(6), 18-6713(9), 18-7805(a), 25-3405(7), 26-3106(1)(c), 30-3-48(3), 30-3-54(4), 37-1014, 59-1320(4), 67-6626. Therefore, we hold that attorney fees are not appropriately awarded under I.C. § 34-2130.
>
> *Noble v. Ada County Elections Bd.*, 135 Idaho 495, 20 P.3d 679 (2000).

Unfortunately, the District Court did not even cite *Noble*, in its decision converting the award of attorney's fees made by the Idaho Senate into a judgment. Similarly, the District Court did not find I.C. § 34-2120 to be unconstitutional. Instead the District Court relied on discretionary powers the Senate allegedly possesses under Article III Section 9 of the Idaho Constitution in

[1] The use of the otherwise undefined word "legislature" is important because its plain meaning envisions action by both houses. Here, only the Senate made the fee award against Mr. Katsilometes.
[2] The legislature amended many of the laws governing contests of election following the 2017 Election Contest

reaching its decision converting the Senate's award of attorney's fees into a judgment. However, as will be explained below, this section of Idaho's Constitution simply permits the Senate to establish procedural rules and pick the winning candidate in a disputed election.

ii. A Survey of the History of the Speech and Debate Clause and Election Contest Statutory Schemes from Other States Indicates the Senate's Actions were Unprecedented.

Appellant is not asking the Court to compel the Senate or the legislature to do anything. He is not asking this Court to seat him as a Senator. Similarly, the Idaho legislature, the Senate, and for that matter, the State of Idaho did not seek relief from the District Court – independently or alongside Mr. Nye, to compel Mr. Katsilometes to pay the Senate's award of attorney's fees. Appellant simply asks that the monetary Judgment be vacated and the case remanded so that he can be declared the prevailing party in the District Court aspect of this case.

Article I, § 5, of the Constitution of the United States, relating to the powers of Congress, provides in pertinent part, "each house shall be the judge of the elections, returns, and qualifications of its own members." Consequently, once a certificate of election is issued by a state, neither states nor courts have jurisdiction to hear a challenge to an election or membership in either the U.S. House of Representatives or the Senate. *Barry v. United States*, 279 U.S. 597, 73 L. ed. 867, 49 S. Ct. 452 (1929). *State ex rel. Fleming v. Crawford*, (1891) 28 Fla. 441, 10 So. 118, 14 L.R.A. 253; *Sutherland v. Miller*, (1917) 79 W. Va. 796, 91 S.E. 993, L.R.A.1917D, 1040; *Burchell v. State Bd. of Election Comrs.*, (1934) 252 Ky. 823, 68 S.W. 2d 427; *People ex rel. Fitzgerald v. Voorhis*, (1918) 222 N.Y. 494, 119 N.E. 106; *State ex rel. Twenty-five Voters v. Selvig*, (1927) 170 Minn. 406, 212 N.W. 604. The States followed suit and have similar constitutional provisions.

The constitutions of most if not all, of the states contain provisions similar to Art.

Defendant initiated which gave rise to this case. These amendments are significant to Appellant's arguments and are discussed in greater detail later in this briefing.

> 1, § 5, of the Federal Constitution, to the effect that each house of the state legislature shall be the judge of the election and qualifications of its own members. And it is well settled that such a provision vests the legislature with sole and exclusive power in this regard, and deprives the courts of jurisdiction of those matters.
> *Jurisdiction of courts to determine election or qualifications of member of legislative body, and conclusiveness of its decision, as affected by constitutional or statutory provision making legislative body the judge of election and qualification of its own members*, 107 A.L.R. 205.

Article III Section 9 of Idaho's Constitution contains similar language in this respect:

> Each house when assembled shall choose its own officers; **judge of the election**, qualifications and returns of its own members, **determine its own rules of proceeding**, and sit upon its own adjournments; but neither house shall, without the concurrence of the other, adjourn for more than three (3) days, nor to any other place than that in which it may be sitting. (emphasis added).

Like the U.S Constitution and that of most states, this provision only allows each house to serve as the "judge of the election." It does not provide any mechanism for conducting these quasi-judicial proceedings. It simply lets an individual house of the legislature determine who won "the election" in the event a contest is initiated. Like Idaho, most states have a separate statutory scheme governing contests of election. These state statutes tend to vary widely. However, there does not appear to be a single instance of a legislature making an award of attorney's fees or Court upholding a legislative award of attorney's fees between two private parties to an election contest - absent an express statutory provision authorizing such an award. *See Rowland v. Saxena*, Not Reported in S.W.3d, 2011 WL 345827 (2011) (Tennessee case affirming dismissal of a suit to collect attorney's fees incurred defending an election contest on the grounds the statutory scheme placed jurisdiction to make such an award with the legislature).

Article III Section 9 of Idaho's Constitution goes on to state each house of the legislature can "determine its own rules of proceeding." However, Article III Section 9 does not state a single house of the legislature can affect the property rights of parties to a contest of election, make an award money in favor of a prevailing party, or impose criminal penalties on the

unsuccessful party. The statutory scheme in place at the time this election contest was initiated and decided defined the substantive rights of the parties which could be impacted by an adverse decision by one house of the legislature. Only an award of costs could be made and confirmation of that award by both houses was necessary. The District Court erred in extending I.C. § 34-2120 beyond its plain language.

iii. The District Court's Holding Extended the Discretionary Authority the Senate Possessed Under Article III Section 9 of the Idaho Constitution in Violation of the Separation of Powers Doctrine.

Appellant agrees the question at hand involves some aspect of a Separation of Powers analysis. However, the District Court misapplied the doctrine by ignoring the duties constitutionally assigned to the Judiciary and the Executive branch by the enactment of I.C. § 34-2120. *See* Article V Section 20 and Article IV Section 5. The separation of powers doctrine is embraced in Art. II, § 1 of the Idaho Constitution.

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

This Court has held, "[o]ur precedent instructs that the separation of powers doctrine is triggered when (1) a "textually demonstrable constitutional commitment" assigns the matter to a particular branch of government; or (2) the matter implicates another branch's discretionary authority." *Tucker v. State*, 162 Idaho 11, 29 (2017) *quoting Miles v. Idaho Power Co.*, 116 Idaho 635, 639-40, 778 P.2d 757, 761-62 (1989).

At the outset, it is important to note the Separation of Powers Doctrine in Idaho's Constitution envisions the application of strict constructionism by use of the phrase "expressly directed or permitted." Providing for an award of attorney's fees in contravention of existing statutes and caselaw would not fall within the powers granted under the express language of

Article III Section 9. That section only permits each house when assembled to be the "judge of the election" and to "determine its own rules of proceeding."

Just as the Legislature's powers were Constitutionally limited to picking the winning candidates and statutorily limited to making an award of costs, the District Court was not permitted to engage in an *ex post facto* case specific amendment of I.C. § 34-2120 to permit an award of attorney's fees. Legislative amendments are "textually demonstrable commit[ted]" by the Idaho Constitution to the legislative branch. See Article III Section 1. Legislative amendments must be made by the vote of both houses of the Legislature (Article III Section 15) and can not be enacted *ex post facto* (Article I Section 16 and Article XI Section 12) to change the outcome of a case.

The District Court erred in several respects in its application of the *Miles* test. First, the "textually demonstrable constitutional commitment," when viewed through the narrow lens of strict constructionism mandated by Article II, § 1, only commits the power to be the "judge of the election" to each house of the legislature. A single house, in this case the Senate, is expressly prohibited from amending a statute and is expressly prohibited from enacting an *ex post facto* law. *See* Article III Section 15 and Article I Section 16.

There is a "textually demonstrable constitutional commitment" to faithfully execute I.C. § 34-2120 given to the Executive Branch in Article IV Section 5.

> The supreme executive power of the state is vested in the governor, who shall see that the laws are faithfully executed.

Neither the Executive Branch nor the State of Idaho have sought to participate in this litigation to collect on the Senate's award of Mr. Nye's attorney's fees. Likewise, the award of attorney's fees was never presented to the Governor for his signature or approval. *See* Article IV Section 10. Therefore, this case must be viewed as a monetary dispute between two citizens and not as though the State or the legislature was seeking to collect on a fee award.

There is also a "textually demonstrable constitutional commitment," of original jurisdiction to determine the substantive rights of Idaho's citizens in a case or controversy, given to the Judicial Branch. Article V Section 20.

> JURISDICTION OF DISTRICT COURT. The district court shall have original jurisdiction in all cases, both at law and in equity, and such appellate jurisdiction as may be conferred by law.

A Court is to faithfully apply the law as written. "In interpreting a statute, it is this Court's duty to ascertain and give effect to legislative intent by reading the entire act, including amendments." *George W. Watkins Family v. Messenger,* 118 Idaho 537, 539–40, 797 P.2d 1385, 1387–88 (1990). "If the language of the statute is clear, the Court should apply the plain meaning of the statute." *Jen–Rath Co., Inc. v. Kit Mfg. Co.,* 137 Idaho 330, 335, 48 P.3d 659, 664 (2002); *Payette River Prop. Owners Ass'n v. Bd. Of Comm'rs of Valley County,* 132 Idaho 551, 557, 976 P.2d 477, 483 (1999). This Court "must follow the law as written ..., [and][i]f it is socially or economically unsound, the power to correct it is legislative, not judicial." *Gonzalez v. Thacker*, 148 Idaho 879, 883 (2009) quoting *John Hancock Mut. Life Ins. Co. v. Neill,* 79 Idaho 385, 405, 319 P.2d 195, 206, (1957). "[E]ach court, at every level, must 'decide according to existing laws.'" *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 226-227 (1995) quoting *United States v. Schooner Peggy,* 1 Cranch 103, 109, 2 L.Ed. 49 (1801). The Judiciary has no power to enact or amend legislation. *See* Idaho Constitution Article III Section 1. Here the District Court disregarded the plain language of I.C. § 34-2120 as well as the holding of this Court in *Noble*. However, the Court did not declare I.C. § 34-2120 unconstitutional.

> Passing 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,* 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1813). *See, e.g., Heller v. Cenarrusa,* 106 Idaho 586, 682 P.2d 539 (1984) (equal protection); and *Bint v. Creative Forest Products,* 108 Idaho 116, 697 P.2d 818, *appeal denied,* 474 U.S. 803, 106 S.Ct. 35, 88 L.Ed.2d 28 (1985) (due process). Furthermore, we are not precluded from reviewing the constitutionality of a proposed course of action merely because both the executive and legislative branches happen to

> concur in supporting it. Constitutional rights, as well as this Court's duty to faithfully interpret our constitution and the federal constitution, do not wane before united efforts of the legislature and the governor.
>
> *Miles v. Idaho Power Co*., 116 Idaho 635 (1989). *See also In re SRBA Case No. 39576*, 128 Idaho 246, 254 (1995) and *J.R. Simplot Co., Inc. v. Idaho State Tax Com'n*, 120 Idaho 849, 854 (1991).

The primary issue on appeal is a District Court decision which ignored statutory and controlling case law in order to compel one private citizen to pay another private citizen. Yet, in ignoring existing law, the decision of the District Court makes no mention of controlling case law nor the constitutionality of the applicable statutory scheme governing the award of attorney's fees in Election Contest at issue.

Turning to the second prong of the *Miles* test to determine when the Separation of Powers doctrine is triggered, Idaho's Supreme Court has interpreted Article II Section 1 as a prohibition on judicial review of discretionary acts of the legislature. *In re SRBA Case No. 39576*, 128 Idaho 246 (1995). Here, the District Court, in its application of the two-part *Miles* test, looked to two provisions of Article III Section 9 when if held the award of Plaintiff's attorney's fees was within the Senate's discretionary authority. The District court relied on the Senate's power to 1) "judge of the election, qualification and returns of its own members," and 2) to "determine its own rules of proceeding." R. Vol 1 p. 176.

First, with respect to the phrase "determine its own rules of proceeding," Idaho caselaw is clear, making an award of attorney's fees would be substantive law-making and not a mere discretionary procedural rule.

> The Idaho Constitution vests the power to enact substantive laws in the Legislature. Idaho Const. art. III, § 1; *see also Mead v. Arnell,* 117 Idaho 660, 664, 791 P.2d 410, 414 (1990) ("[O]f Idaho's three branches of government, only the legislature has the power to make 'law.' "). This power is not restricted by the Court's authority to enact rules of procedure to be followed in the district courts. *State v. Beam,* 121 Idaho 862, 863, 828 P.2d 891, 892 (1992) ("[T]his Court's rule making power goes to *procedural,* as opposed to *substantive,* rules."). This Court has adopted the standard for delineating substantive laws from procedural rules

> promulgated by the Washington Supreme Court in *State v. Smith,* 84 Wash.2d 498, 527 P.2d 674 (1974). In *Smith,* the Washington Supreme Court observed that substantive law "creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated." *Id.* at 501, 527 P.2d at 677, *quoted in Beam,* 121 Idaho at 863–64, 828 P.2d at 892–93.
>
> *In re SRBA Case No. 39576*, 128 Idaho 246, 255 (1995).

Appellant does not disagree the Senate is afforded some latitude and discretion in instituting procedural rules or even compelling the attendance of witnesses in an election contest. *See Barry v. United States*, 279 U.S. 597, (1929) ("The Senate, having sole authority under the Constitution to judge of the elections, returns and qualifications of its members, may exercise in its own right the incidental power of compelling the attendance of witnesses without the aid of a statute.").

The legislative branch is vested with the constitutional authority to enact laws which "create, define and regulate primary rights." *See In re SRBA supra*. Here the legislature did so with the enactment of the pre-2017 version of I.C. § 34-2120(b) – a statute that did not grant legislature the right to make an award of attorney's fees but instead limited its jurisdiction to making an award of costs. Providing for judicially enforceable awards of attorney's fees require substantive laws, not procedural rules.

> I.C. § 42–1423, (1994) which expressly prohibits an award of costs or attorney fees against the state in a general water adjudication, is a legitimate exercise of the Legislature's substantive authority. This Court has consistently held that the power to award attorney fees is governed by statute. *E.g., Hellar v. Cenarrusa,* 106 Idaho 571, 578, 682 P.2d 524, 531 (1984) ("We continue to adhere to the so-called 'American rule' to the effect that attorney fees are to be awarded **only where they are authorized by statute** or contract.").
>
> *In re SRBA Case No. 39576*, 128 Idaho 246, 256 (1995) (Emphasis added).

There was no statute authorizing a single house of the legislature, in this case the Senate, to make an award of attorney's fees against a party to an election contest until after the subject contest of election was concluded. As will be discussed below, the post-election contest

amendment of I.C. § 34-2120(b) was not retroactive. Thus, at the time this Contest was initiated and decided, making an award of attorney's fees in a contest of election did not fall within the power granted to the legislature to "determine its own rules of proceeding" in Article III Section 9.

With respect to the phrase "judge of the election, qualification and returns of its own members," as an alleged basis for conferring discretionary authority upon the Senate to impose an award of attorney's fees, this Court clarified that the phrase should be given its plain meaning.

> We are mindful of the provisions of art. 3, § 9, of our constitution…
> This provision makes each house of the legislature the sole judge of the election and qualification of its members. The candidates concerned in this proceeding being contestants for the office of state senator, the ultimate decision as to which shall be declared elected and seated, remains to be made by the state senate when assembled. Our decision herein is not binding upon that body. It may be considered, along with other pertinent data, for what weight or effect the senate may see fit to give it, in the final determination of the election of the senator for Power county, should a proceeding for that purpose be initiated in or by the state senate, 81 C.J.S. States § 34; 49 Am.Jur. States, § 34.
>
> *Burge v. Tibor*, 88 Idaho 149, 154 (1964).

The United States Supreme Court has made a similar limitation on quasi-judicial authority granted to the United States Congress in Article I Section 5 of the United States Constitution.

> *First.* Generally, the Senate is a legislative body, exercising in connection with the House only the power to make laws. But it has had conferred upon it by the Constitution certain powers which are not legislative but judicial in character. Among these is the power to judge of the elections, returns and qualifications of its own members. Art. I, § 5, cl. 1. "That power carries with it authority to take such steps as may be appropriate and necessary to secure information upon which to decide concerning elections." *Reed* v. *County Commissioners,* 277 U.S. 376, 388. Exercise of the power necessarily involves the ascertainment of facts, the attendance of witnesses, the examination of such witnesses, with the power to compel them to answer pertinent questions, to determine the facts and apply the appropriate rules of law, and, finally, to render a judgment which is beyond the authority of any other tribunal to review.
> *Barry v. United States*, 279 U.S. 597, 613-14, 73 L. ed. 867, 49 S. Ct. 452 (1929).

The phrase "judge of the election" in Article III Section 9 of Idaho's Constitution simply means each house (the Senate in this case) gets to decide who shall be declared elected and seated in

that particular house of the Idaho Legislature once an election contest is initiated. The provision should continue to be given its plain meaning as is directed by the Separation of Powers Doctrine found at Article II, § 1 of the Idaho Constitution. It is undisputed each house of the legislature has the discretion as to how it conducts the evaluation as to who will be the successful candidate. That discretion only extends to procedural determinations of matters such as setting hearing dates, assignments to committees, the duration and scope of discovery, the manner of taking testimony, and so on. However, permitting the imposition of a monetary award of attorney's fees against an unsuccessful party extends that discretion into an area statutorily and constitutionally assigned to other branches of government.

I.C. § 34-2120(b) was a specific legislative enactment which permitted the legislature to award cost but not attorney's fees. The judicial branch has original jurisdiction in all cases of law and equity, which includes the right to declare the rights and obligations of two private citizens. Neither the Idaho Legislature, nor one house thereof, can act to deprive the Judicial branch of its constitutional authority in this regard. Similarly, the award of attorney's fees against Mr. Katsilometes did not follow the Constitutionally mandated legislative process.

The Idaho Supreme Court has already recognized this distinction in the separation of powers in a converse situation where the Legislature asked the Judiciary to impose a tax to fund education if certain criteria were met. In *Idaho Schools for Equal Educational Opportunity v. State*, 140 Idaho 586, 597 (2004), the Supreme Court held:

> "Just as Article II of the Idaho Constitution prohibits the Legislature from usurping powers properly belonging to the judicial department, so does that provision prohibit the judiciary from improperly invading the province of the Legislature." *In re SRBA Case No. 39576,* 128 Idaho 246, 255, 912 P.2d 614, 623 (1995). "The power to tax, or to exempt from taxation, remains with the Legislature." *Williams v. Baldridge,* 48 Idaho 618, 630, 284 P. 203, 207 (1930).

This Court went on to declare the current education funding mechanisms unconstitutional and ordered the Legislature to bring them into compliance. Id. However, the Plaintiffs in the Idaho

School Funding line of cases ultimately discovered the Judiciary can declare a victor and order a remedy yet provide no mechanism for enforcing that remedy against the legislature. The legislature never fixed the school funding issue and arguably went on to make further cuts to funding education in Idaho.

Mr. Nye now finds itself on the flipside of this constitutional conundrum. Here, the Senate may have been free to make a symbolic award of attorney's fees for one of its members. However, under the statutes existing at the time of the subject election contest, there was no constitutionally permissible mechanism for a court or the Executive Branch to enforce such an obligation between two private citizens. Similarly, and ultimately fatal to Mr. Nye's claims, the Judiciary is absolutely prohibited from ignoring and retroactively amending a statute to provide relief to one litigant to the detriment of another.

C. The 2017 Amendment to I.C. § 34-2120 and the Senate Rules Confirm the Senate Lacked Authority to Make an Award of Attorney's Fees Against Defendant.

Following this Contest of Election, the legislature amended I.C. § 34-2120 (now I.C. § 34-2118) as well as the Senate and House Rules to permit the award of attorney's fees in future contests of election. R-Vol 2 pp. 1031-1035. The District Court did not rule the award of fees by the Senate complied with the Constitutionally mandated procedure specified in Article III Section 15 (requiring bicameral votes) of passing legislation. To put it simply, the Senate's award of Mr. Nye's fees does not carry the full force and effect of a law. Rather, under the rules of statutory construction, the passage of the 2017 amendments to I.C. § 34-2120 (now I.C. § 34-2118, which now permits a single house of the legislature to make an award of attorney's fees in a contest of election) further confirm Appellant's position. Namely, the Senate did not possess the unicameral power to make an award of attorney's fees prior to the 2017 amendments. The new section of Idaho Code governing cost and fee shifting in legislative election contests now provides in relevant part:

> 34-2118. SECURITY FOR COSTS — ASSESSMENT OF COSTS AND FEES — ASSESSMENT OF ATTORNEY'S FEES. (1) The contestor must file with the secretary of state a bond in the amount of one thousand dollars ($1,000) conditioned to pay the contestee's costs if the election be confirmed by the legislature.
>
> (2) The parties are liable for witness fees and the costs of discovery made by them respectively. If the election is upheld by the legislature, the legislature may assess costs and fees, other than attorney's fees, against the contestor. If the election is annulled by the legislature, the legislature may assess costs and fees, other than attorney's fees, against the contestee.
>
> **(3) Attorney's fees.**
>
> **(a) Attorney's fees may be awarded against the contestor if <u>the legislature</u> determines the contest of election is frivolous and has no foundation in law or fact.**
>
> (b) Attorney's fees may be awarded against the contestee if the election is annulled by the legislature due to misconduct, fraud or corruption on the part of the contestee.

Additionally, the term "legislature", which had previously been undefined and thus given its commonly understood bicameral meaning, was newly defined in the 2017 amendments to the Election Contest Act as:

> (7) "Legislature" means the Idaho **senate or** the Idaho house of representatives **or both**.
>
> I.C. § 34-2102(7) (Emphasis added).

The new legislation is not retroactive, and it does not permit Mr. Nye to recover in this case. Indeed, Respondent never sought relief based on a claim that the new statute was retroactive or that it had any applicability to this case. *See* R. Vol 1 pp 8-13. Even were the amended statutes retroactive, which they are not, Article XI Section 12 and Article I Section 16 of the Idaho Constitution would prohibit the Court from enforcing such a law against Mr. Katsilometes. This is due to the fact the Senate had already issued its decision and made its award prior to the passage of the new Election Contest statutes.

The 2017 amendments do bolster Appellant's, case however. This Court recently addressed statutory interpretation and the process of discerning legislative intent in the context of a legislative amendment to a statute. This Court held statutory amendments are an

acknowledgement by the legislature that a prior version of a statute had a completely different meaning than the amended version.

> This Court has held that when the Legislature amends a statute, it must be presumed that the Legislature intended the statute to have a different meaning from the pre-amendment version. *Intermountain Health Care, Inc. v. Bd. of Cnty. Comm'rs of Madison Cty.*, 109 Idaho 685, 687, 710 P.2d 595, 597 (1985). Moreover, the inclusion of a retroactive effective date indicates that the Legislature intended the 2011 Amendment to take effect from that date forward. This Court has held that statutory amendments are not retroactive unless expressly so declared. *A & B Irr. Dist. v. Idaho Dep't of Water Res.,* 153 Idaho 500, 508, 284 P.3d 225, 233 (2012). It stands to reason that a statute with a retroactive effective date cannot be applied to events prior thereto.
>
> *Chandler's-Boise LLC v. Idaho State Tax Commission*, 162 Idaho 447, 398 P.3d 180, 188 (2017).

This is a very clear pronouncement that changes to a statute, such as those made to I.C. § 34-2120 (now I.C. § 34-2118) in 2017 (amending "costs" to "costs and attorney's fees") indicate the prior version of the statute's reference to "costs" meant an award of attorney's fees was not permissible. Similarly, the amendment to I.C. § 34-2102(7), defining the previously undefined term "legislature" to now mean the House or the Senate or both, means the pre-2017 version of I.C. § 34-2120 required a vote of both houses to make an award of costs in a legislative contest of election. That did not occur for Mr. Nye's award of attorney's fees which was only voted on by the Senate.

The Senate Rules and the new version of I.C. § 34-2120, now I.C. § 34-2118, enacted in 2017, following the Contest of Election at issue herein, now provide statutory authority for an award of attorney's fees to the successful party in a contest of election. R-Vol 2 pp. 1031-1035. When it proposed these amendments, the Senate (specifically Senator Bart Davis) acknowledged the "provisions included in this legislation (and not found in the current statutory framework) include…..awarding of costs and attorney's fees." R-Vol 2 pp. 1031 ¶2. Words in statues and rules matter. It was disingenuous for the Senate to both make an award of fees against Appellant

while nearly simultaneously acknowledging they lacked the power to do so.

Pursuant to the holding in *Chandler's-Boise LLC*, the new version of I.C. § 34-2120 (I.C. § 34-2118) as well as 34-2102(7) have a "different meaning" than the prior version(s). Likewise, there are no retroactive effective dates in the new I.C. § 34-2118 or 34-2102(7). Thus, the amendments are inapplicable to the award of fees made in the contest of election at issue herein. *See Chandler's-Boise LLC, supra* and Idaho Code and § 73-113 (1) (The language of a statute should be given its plain, usual and ordinary meaning). The District Court was bound to follow the law as it existed at the time the Senate's "award of fees" was made. Instead, the District Court made no mention of these amendments, much less the holding of *Noble v. Ada County Elections Bd.*, 135 Idaho 495, 20 P.3d 679 (2000).

IV. CONCLUSION

The District Court's decision sets a dangerous precedent. If it is allowed to stand, Idaho's citizens will have little confidence they can rely on statutes and existing case law when going about their daily business. More importantly, holding that the legislature has unbridled authority to "determine its own rules of proceeding" under Article III § 9 sends a chilling message to anyone who might wish to petition their lawmakers or comment on proposed legislation. If an award of attorney's fees is merely a procedural rule, then it would stand to reason the legislature (or one house thereof) would be free to make an award against a party's attorney. *See* I.C. § 12-123. Similarly, it would stand to reason the Legislature could also make an award of the attorney's fees the legislature incurred in researching or defending its actions. One can only wonder where this pandoras' box of inventing unbridled "rules of procedure" on the fly would lead to.

Citizens of Idaho must have confidence in the laws that have been enacted by their legislature. Similarly, due process requires the legislature put Idaho's citizens on notice of its

own rules of proceeding before taking action which could deprive a citizen of their property or liberty. The District Court's decision sends a chilling message that members of the Idaho Legislature are free to disregard laws passed by the Legislature. If the decision of the District Court is upheld, the Legislature could take further liberties by couching its actions as "discretionary authority" or a "rule of procedure." Where the legislature has already ignored citizen's initiatives (term limits) and decisions of this Court (school funding) we are well down the slippery slope which ends with an erosion of the public's confidence in its elected officials and the institutions of our democracy. The decision of the District Court must be reversed and remanded with instructions to declare Mr. Katsilometes the prevailing party.

DATED this 9th day of November 2018.

By: _____s/ J. Kahle Becker_____
J. KAHLE BECKER
Attorney for Appellant/Defendant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 9th day of November 2018, a true and correct copy of the foregoing **APPELLANT'S BRIEF** was served upon opposing counsel as follows:

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_____ US Mail
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___X__ Facsimile/Email/I-Court

By: _____s/ J. Kahle Becker_____
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