Attachment 5
1/23/17

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IN THE SENATE OF THE STATE OF IDAHO

IN THE MATTER OF: THE CONTEST OF THE ELECTION OF MARCUS W. NYE (a/k/a "MARK" NYE) TO THE OFFICE OF STATE SENATOR, IN AND FOR LEGISLATIVE DISTRICT NO. TWENTY-NINE	**INCUMBENT'S RESPONSE TO CONTESTANT'S MEMO OF COSTS**

COMES NOW Incumbent, Senator Marcus ("Mark") W. Nye, by and through the undersigned counsel, and hereby files Incumbent's Response to Contestant's Memo of Costs. Incumbent (hereinafter "Senator Nye") hereby respectfully requests the Idaho Senate to reject Contestant's argument that the prevailing party in a Contest of Election is limited to recovering for its costs the $500.00 bond amount required by Idaho Code § 34-2120.

Contestant (hereinafter "Mr. Katsilometes") acknowledges he was not the prevailing party and, therefore, is not entitled to seek his costs.[1]

[1]Mr. Katsilometes does not address in his Memo of Costs the prevailing party's right to claim attorney fees; however, at the hearing in this matter, he took the position that the prevailing party was not entitled to attorney fees. The Senate should reject this position based on the reasons stated by Senator

I. ANALYSIS

At hearing, and now in his Memo of Costs, Mr. Katsilometes takes the position that the prevailing party's costs are limited to the $500.00 bond amount required by Idaho Code § 34-2120. This is simply not true.

First, this position represents a misreading of the statute itself, which states:

> 34-2120. SECURITY FOR COSTS — ASSESSMENT OF COSTS. (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 may assess costs against the contestant. If the election is annulled by the legislature, the legislature may assess costs against the contestee.
> (c) If the election is set aside or annulled on the grounds of fraud or error by the election officials in conducting the election or in canvassing the returns, the contest costs shall be a charge against the county in which the fraud or error occurred.
> (d) If a special election is called by the legislature pursuant to section 34-2121, Idaho Code, the costs associated with the special election shall be allocated in equal amounts to the state of Idaho and the county or counties where the special election is held.

Notice that subparagraph (a) deals with the bond requirement of $500.00, which is to be applied to the **contestee's costs in the event the election is confirmed**. Nothing in subparagraph (a) limits contestee's recovery of his costs to the $500.00 amount (or allows the contestant to recover his costs from the bond in the event he is the prevailing party). It simply ensures there is a minimum amount available **to contestee** to apply to his costs.

Mr. Katsilometes' misreading of the statute is made even more clear in subparagraph (b), which states the Legislature may assess costs against the party who

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Nye at hearing, in his Verified Memorandum of Costs and Attorney Fees, and in this brief.

does not prevail in the contest of election. If the Legislature intended for the prevailing party's costs to be awarded in an amount no greater than $500.00, the Legislature would have made that clear in subparagraph (b). In addition, the Legislature would have created in the statute a bond or other similar requirement in the amount of $500.00 for the contestee, just as it did in subparagraph (a) for the contestant. The fact that the Legislature did not do so demonstrates it did not consider awards of costs to be limited to $500.00. It just wanted to make sure there would be a minimum amount available to apply towards contestee's costs in a given case.

Second, limiting the Senate's ability to award costs, as well as attorney fees, would be an unwarranted limitation on the Senate's Constitutional authority. Idaho Constitution Article III, § 9, entitled "Powers of each house" states:

> 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 days, nor to any other place than that in which it may be sitting.

(Emphasis added.)

This Section of the Idaho Constitution makes absolutely clear that the Idaho Senate is the master of its own destiny when it comes to the elections and qualifications of its members **and** in deciding the rules to be used when making such determinations. This includes decisions about awarding costs and attorney fees upon the conclusion of a contest of election.

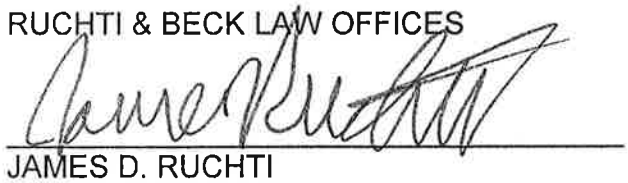
CONCLUSION

Senator Nye respectfully requests that the Senate reject Mr. Katsilometes' position that Idaho Code § 34-2120 limits an award of costs to the prevailing party to the $500.00

bond amount found in subparagraph (a). The plain language of the statute does not support such a reading. In addition, the Idaho Constitution does not support such a limitation. The Senate has the inherent power to require Mr. Katsilometes to pay Senator Nye's costs in the amount of $1,711.84 and his attorney fees in the amount of $18,060.00 for a **total award of $19,771.84.**

DATED this 20th day of January, 2017.

RUCHTI & BECK LAW OFFICES



JAMES D. RUCHTI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of January, 2017, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

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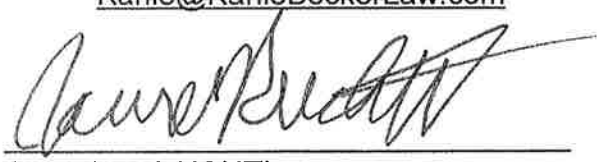

JAMES D. RUCHTI