

THE OFFICE OF THE GOVERNOR

**EXECUTIVE DEPARTMENT
STATE OF IDAHO
BOISE**

EXECUTIVE ORDER NO. 2021-13

BANNING VACCINE PASSPORTS AND MANDATORY TESTING

WHEREAS, Idaho law does not require Idahoans receive a COVID-19 vaccine, and it is a matter of personal choice; and

WHEREAS, some Idahoans are unable to receive a vaccine due to age, medical condition, religious objection, or philosophical objection; and

WHEREAS, some states are exploring and implementing various “vaccine passport” systems and mandates; and

WHEREAS, California has mandated that children receive a COVID-19 vaccine in order to access either public or private schools; and

WHEREAS, implementing “vaccine passport” requirements violates Idahoans' medical privacy, impedes our economic recovery, encourages prejudice and discrimination, and causes division among our populace; and

WHEREAS, some entities within Idaho are ignoring these problems and still attempting to implement “vaccine passport” systems in violation of Executive Order No. 2021-04; and

WHEREAS, it is contrary to my core values as an Idahoan that any Idahoan should be forced, coerced, or threatened into receiving a vaccine; and

WHEREAS, I believe it is contrary to the principles of a free society for anyone to face prejudice or discrimination for their personal medical decisions; and

WHEREAS, pursuant to Article N, Section 5 of the Idaho constitution, the supreme executive power of the state is vested in the Governor of Idaho, who shall see that the laws are faithfully executed; and

WHEREAS, pursuant to Idaho Code 67-802, the Governor is authorized and empowered to implement and exercise his constitutional duties by issuing executive orders which shall have the force and effect of law when issued.

NOW, THEREFORE, I, Janice McGeachin, Acting Governor of the State of Idaho, by virtue of the authority vested in me by the Constitution of the United States, the Constitution of the State of Idaho, and the laws of the State of Idaho, do hereby proclaim and declare as follows:

- 1. No department, agency, board, commission, or other executive branch entity or official of the State of Idaho, including but not limited to the Idaho State Department of Education and all public schools, colleges, and universities shall:
 - a. Require as a condition of accessing state services or facilities that an individual produce proof he or she has received a COVID-19 vaccine, produce proof he or she has tested negative for COVID-19, or reveal his or her COVID-19 vaccination status; or*
 - b. Require as a condition of continued or new employment that an individual produce proof he or she has received a COVID-19 vaccine, produce proof he or she has tested negative for COVID-19, or reveal his or her COVID-19 vaccination status; or*
 - c. Produce and issue a COVID-19 vaccine passport for the purpose of certifying that an individual has received a COVID-19 vaccine; or**

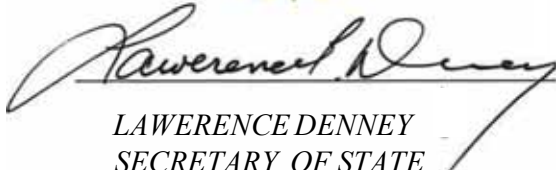
- d. Provide information of an individual's COVID-19 vaccine status to any person, company, or governmental entity for inclusion in a COVID-19 vaccine passport program.
2. All departments, agencies, boards, commissions, and other executive branch entities of the State of Idaho are directed to immediately take steps to rescind, alter, or suspend any administrative rules in conflict with this Executive Order.
3. This Executive Order does not, and shall not be construed to, prohibit, restrict, or otherwise limit:
 - a. The right of an individual to access his or her own personal health information under state or federal law; or
 - b. The normal operation of Idaho's existing Immunization Reminder Information System (IRIS).
4. This Executive Order is effective beginning at 2:00 pm on October 5, 2021.



IN WITNESS WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the State of Idaho in Boise on this 5th day of October in the year of our Lord two thousand twenty-one.



JANICE MCGEACHIN
GOVERNOR



LAWRENCE DENNEY
SECRETARY OF STATE



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

October 7, 2021

TRANSMITTED VIA EMAIL

Mr. Brady Hall
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Office of the Governor
Idaho State Capitol
Boise, ID 83720
Brady.Hall@gov.idaho.gov

Re: Meaning of "Absence from the State" in Article IV, Section 12 – Our File No. 21-74751

Dear Mr. Hall:

You have requested an analysis of whether the interpretation of article IV, section 12 of the Idaho Constitution expressed in a letter sent by Governor Little to Lieutenant Governor McGeachin on July 29, 2021 is correct. The Governor's letter is based on his understanding that the phrase "absence from the state" in article IV, section 12 means physical absence combined with an inability to perform the duties of governor, which I refer to here as "effective absence." The question is whether "absence from the state" means: (1) pure physical absence from the state of any distance or duration, or (2) effective absence.

As discussed further below, although this is a close question, the Governor's interpretation is reasonable. A reviewing court could conclude that "absence from the state" as used in article IV, section 12 means effective absence based on the language of article IV, section 12 and language in other provisions of article IV; the law that was in effect at the time article IV, section 12 was adopted; the historical context; and the need to avoid absurd results. That said, this is a close question, as demonstrated by the fact that the states that have addressed similar language appear to be split as to whether "absence from the state" means effective or physical absence.

BACKGROUND

In the letter in question, Governor Little informed Lieutenant Governor McGeachin that he would be temporarily out of the state of Idaho on July 29, 2021 related to travel to attend an event. Governor Little wrote that his time outside of Idaho would be "brief and will not at all hinder my ability to perform any official duties as Idaho's elected Governor." The Governor

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wrote, “I am not aware of any official business that will require your services in an acting Governor capacity. Thus, you are not authorized to act as Governor during my brief time out of state.” Governor Little continued, “[i]n the event my absence renders me unable to carry out the duties of the office, my staff will notify you immediately.”

Article IV, section 12 sets out the circumstances under which the powers, duties, and obligations of the governor devolve to the lieutenant governor. It provides in full:

In case of the failure to qualify, the impeachment, or conviction of treason, felony, or other infamous crime of the governor, or his death, removal from office, resignation, absence from the state, or inability to discharge the powers and duties of his office, the powers, duties and emoluments of the office for the residue of the term, or until the disability shall cease, shall devolve upon the lieutenant governor.

Idaho Const. art. IV, § 12. The Governor’s July 29, 2021 letter therefore interprets “absence from the state” in article IV, section 12 to mean effective absence.

ANALYSIS

A reviewing court could agree with the Governor’s interpretation and interpret “absence from the state” to mean effective absence. A court could reach this conclusion by first recognizing that the plain language of article IV, section 12 is ambiguous because: (1) related provisions in article IV do not provide complete clarity as to the intended meaning of “absence from the state;” (2) the dictionary definitions of the key terms “absence” and “disability” could support physical or effective absence interpretations; (3) the principles of statutory interpretation applied to the plain language of article IV, section 12 could support physical or effective absence interpretations; and (4) the relevant law that was in effect at the time article IV, section 12 was adopted demonstrates ambiguity as to the Framers’ intent. After finding the plain language ambiguous, a court could look to the comments made at the Constitutional Convention, the historical context of the provision, and the need to avoid absurd results to conclude that “absence from the state” means effective absence. As noted above, this is a close question, and courts in other states that have addressed similar language are split on effective absence versus physical absence interpretations.

A. It is possible, but unlikely, that the plain language of article IV, section 12 could be found to clearly express the intent that “absence from the state” means effective absence based on language in article IV.

“When interpreting constitutional provisions, the fundamental object is to ascertain the intent of the drafters by reading the words as written, employing their natural and ordinary meaning, and construing them to fulfill the intent of the drafters.” State v. Winkler, 167 Idaho 527, 531, 473 P.3d 796, 800 (2020) (quotation marks and citation omitted). “Where the constitutional provision is clear and unambiguous, the expressed intent of the drafters must be given effect.” Id. (quotation marks and citation omitted). “A constitutional provision is ambiguous where

reasonable minds might differ or be uncertain as to its meaning.” Id. (quotation marks and citation omitted).

The term “absence from the state” in article IV, section 12 of Idaho’s Constitution is not defined nor does it have an immediately apparent meaning in that section, as discussed further below. However, a reviewing court could look to related provisions in article IV to conclude that “absence from the state” has a clear meaning. See Winkler, 167 Idaho at 531, 473 P.3d at 800 (looking for any other language within the pertinent article that made the term “pardon” in the Idaho Constitution immediately clear to determine whether the term was ambiguous).

Article IV, section 14 could be read as providing the necessary clarification as to the meaning of “absence from the state.” Article IV, section 14 establishes both when president pro tempore becomes acting governor and when the speaker of the house assumes the position. It provides, in full:

In case of the failure to qualify in his office, death, resignation, absence from the state, impeachment, conviction of treason, felony or other infamous crime, or disqualification from any cause, of both governor and lieutenant governor, the duties of the governor shall devolve upon the president of the senate pro tempore, until such disqualification of either the governor or lieutenant governor be removed, or the vacancy filled; and if the president of the senate, for any of the above named causes, **shall become incapable of performing the duties of governor**, the same shall devolve upon the speaker of the house.

Idaho Const. art. IV, § 14 (emphasis added). The disqualifications stated in this provision are substantially the same as those stated in section 12, including the phrase “absence from the state.” Yet, section 14 provides additional information as to the phrase’s meaning with its conclusion as to when the duties devolve from the president of the senate to the speaker of the house. Under section 14, this devolution comes when the president of the senate “for any of the above named causes, shall become incapable of performing the duties of governor[.]” See id. In other words, section 14 arguably provides insight into the Framers’ intent with the enumerated causes in section 12: that they would be events that would render the governor incapable of performing the duties of governor. Given that the phrase “absence from the state” is a disqualifier in sections 12 and 14, it should be read consistently across the sections. Ratzlaf v. United States, 510 U.S. 135, 143, 114 S. Ct. 655, 660, 126 L. Ed. 2d 615 (1994). Thus, a court could conclude that the gloss provided in section 14 should be read to apply to section 12 to establish that “absence from the state” means effective absence.¹

¹ A term appearing in several places in a statutory text is generally read the same way each time it appears. See Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 479, 112 S. Ct. 2589, 2596, 120 L. Ed. 2d 379 (1992). It is essential to construe a single formulation here because otherwise Idaho could have one set of circumstances under which a lieutenant governor could assume the office of governor and a second set of slightly different circumstances under which the president pro tem or speaker assumes the role of governor if the lieutenant governor is unable to govern.

That said, the following contrary arguments could be made based on the language of section 14: (1) the Framers should be presumed to have intentionally not included this language in section 12 because it is not present in section 12, so section 12 should not be read in light of section 14; (2) the Framers could have intended to treat devolution to the speaker of the house differently from devolution to the lieutenant governor or the president of the senate pro tempore because the speaker of the house holds a different position; and (3) the Framers could have intended physical absence from the state to be a legal disqualification from performing the duties of governor. If a court were to agree with these arguments, it could conclude that section 14 does not clarify the plain language of section 12.²

Separately, a court could conclude that article IV, section 13 sheds necessary light on the meaning of the phrase “absence from the state” because section 13 treats “absence” as something different from the disqualifications stated in section 12. Article IV, section 13, which establishes the circumstances in which the president pro tempore becomes acting governor, states “[i]n case of the absence or disqualification of the lieutenant governor from any cause which applies to the governor, or when he shall hold the office of governor, then the president pro tempore of the senate shall perform the duties of the lieutenant governor until the vacancy is filled or the disability removed.” Because “absence” in this provision is treated as something different than the disqualifications stated in article IV, section 12, this could be read as suggesting that pure physical absence is something that is different from “absence from the state” under article IV, section 12.

However, again, there are flaws with this argument. The phrase in section 13 is “absence,” rather than “absence from the state.” A court could find this difference significant enough to trigger the canon of interpretation that the drafters are presumed to have intended different meanings when they used different words.

On the whole, any potential clarity provided by sections 13 and 14 for a plain language reading of “absence from the state” in section 12 could fail based on the contrary arguments identified above.

Separately, a court could conclude that article IV, section 5 provides the necessary clarity as to the meaning of “absence from the state” because it provides that “[t]he supreme executive power of the state is vested in the governor, who shall see that the laws are faithfully executed.” A court could conclude that interpreting “absence from the state” to mean that supreme executive power transfers to the lieutenant governor to potentially effect a different policy vision every time the governor momentarily leaves the state is inconsistent with plain meaning of article IV, section 5. In other words, a court could conclude that a physical absence interpretation defeats the governor’s supreme executive power and the lieutenant governor’s constitutional

² But as observed above, such a conclusion would be contrary to the generally accepted rules of statutory construction. If individuated interpretation were necessary, there would need to be a congruent compelling argument for such interpretation. In the preparation of this analysis, no such compelling reasoning could be identified.

subordination to the governor, particularly in light of the governor's express direction that the lieutenant governor was not authorized to act in his absence.

That said, a court could find any potential clarity outweighed by the ambiguity inherent in the dictionary definitions of the relevant terms, in the overall construction of section 12, and in the law that was in effect at the time section 12 was drafted, as discussed below.

B. A reviewing court could find the plain language of article IV, section 12 ambiguous as to the meaning of “absence from the state.”

A court would likely look to the dictionary definitions of key terms, to principles of statutory interpretation, and to the law that was in effect at the time article IV, section 12 was adopted in order to understand what the Framers meant by “absence from the state.” A court could conclude that all three sources demonstrate that the plain language is ambiguous as to whether the Framers meant effective or physical absence.

1. The dictionary definitions of “absence” and “disability” could be found ambiguous.

In reviewing the plain language, the “Court begins with the dictionary definitions of disputed words or phrases contained in the [provision].” State v. Clark, 168 Idaho 503, 484 P.3d 187, 192 (2021). These words are given their plain, usual, and ordinary meaning, while construing the statute as a whole. State v. Hart, 135 Idaho 827, 829, 25 P.3d 850, 852 (2001). Pertinent to your question, article IV, section 12 provides that “the powers, duties and emoluments of the office [of governor] . . . devolve upon the lieutenant governor” “in case of the” governor’s “absence from the state” “for the residue of the term, or until the disability shall cease[.]” Thus, there are two key terms to be defined: “absence” and “disability.”

This is because the term “disability” arguably has some modifying effect on the meaning of the term “absence” as it is key to understanding when the devolution to the lieutenant governor on the grounds of “absence” ends (assuming the governor is not absent from the state for the remainder of his term). The lieutenant governor assumes the role of governor either (1) for the residue of the term or (2) until the disability shall cease. It seems fairly straightforward that the absence of the governor from the state would not result in the lieutenant governor assuming the office of governor for the “residue of the term,” thus “absence from the state” must pair with “until the disability shall cease.” In simplest terms, interpreting “absence from the state,” must necessarily include an interpretation of “until the **disability** shall cease.”

Looking at the definition of “absence” as it was understood at the time article IV, section 12 was adopted, the version of Webster’s Complete Dictionary of the English Language published in 1886 defined “absence” as (1) “[a] state of being absent or withdrawn from a place or from companionship”; (2) “[w]ant; destitution”; and (3) “inattention to things present; heedlessness.” *Absence*, WEBSTER’S COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1886) (available at <https://archive.org/details/websterscomplete00webs/page/n9/mode/2up>).

The definition of “absence” has not changed much over time. Currently, Merriam-Webster offers three substantially similar definitions for “absence”: (1) “a state or condition in which something is expected, wanted, or looked for is not present or does not exist: a state or condition in which something is absent”; (2) “a failure to be present at a usual or expected place: the state of being absent” or “the period of time that one is absent”; or (3) “inattention to present surroundings or occurrences—usually used in the phrase absence of mind.” *Absence*, MERRIAM-WEBSTER.COM DICTIONARY, <https://www.merriam-webster.com/dictionary/absence> (last visited August 5, 2021).

Of all of these definitions, only one definition from each dictionary clearly applies to physical place. The other definitions of absence apply to something other than physical presence or non-presence, such as when absence refers to the non-presence of a less tangible concept, such as in the phrase “in the absence of reform [=without reform], progress will be slow,” which is offered by Merriam-Webster to explain its first definition. *Id.*

Here, the word “absence” in article IV, section 12 applies to “from the state.” But, having established that absence can have a meaning that encompasses more than the lack of physical presence, what does it mean for the governor to be absent from the state? Does absence mean solely a lack of physical presence in the state? Or does it mean that the governor is absent from the state when the state or condition of having a governor does not exist for the State, *i.e.*, that he is physically absent and unable to discharge his duties because of his absence?

Turning to the definition of “disability,” it does not resolve this ambiguity. The relevant edition of Webster’s Complete Dictionary of the English Language defined “disability” as (1) “[s]tate of being disabled; deprivation of ability; want of competent physical or intellectual power, means, opportunity, and the like; incapacity; incompetency” or (2) “[w]ant of legal qualification; legal incapacity or incompetency.” *Disability*, WEBSTER’S COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1886) (available at <https://archive.org/details/websterscomplete00webs/page/n9/mode/2up>).

Currently, Merriam-Webster provides three potentially relevant definitions for “disability”: (1) “a physical, mental, cognitive, or developmental condition that impairs, interferes with, or limits a person’s ability to engage in certain tasks or actions or participate in typical daily activities and interactions”; (2) “a disqualification, restriction or disadvantage”; and (3) “lack of legal qualification to do something.” *Disability*, MERRIAM-WEBSTER.COM DICTIONARY, <https://www.merriam-webster.com/dictionary/disability> (last visited August 5, 2021).

Again, there is ambiguity. Does disability mean inability to govern, meaning that the position of governor devolves to the lieutenant governor until the condition or restriction that has impaired the governor’s ability to perform his tasks as governor has ceased? In that case, it would suggest that “absence from the state” turns on both the governor’s physical absence and his inability to perform his duties as governor. Or does disability mean solely the cessation of the lack of legal qualification to act as governor, which could apply to physical or effective absence?

Looking outside of the confines of section 12, other provisions of article IV suggest that disability may have been intended to mean temporary disqualification, as opposed to a permanent disqualification for the remainder of the governor's term. See Idaho Const. art. IV, § 13 ("In case of the absence or **disqualification** of the lieutenant governor from any cause which applies to the governor, or when he shall hold the office of governor, then the president pro tempore of the senate shall perform the duties of the lieutenant governor until the vacancy is filled or the disability removed." (Emphasis added.)); Idaho Const. art. IV, § 14 ("In case of . . . absence from the state, . . . or disqualification from any cause, of both governor and lieutenant governor, the duties of the governor shall devolve upon the president of the senate pro tempore, until **such disqualification** of either the governor or the lieutenant governor be removed, or the vacancy filled (Emphasis added.)). However, even understanding disability to mean temporary disqualification does not clear up the ambiguity as to the meaning of "absence from the state." This interpretation of "disability" could be applicable to both physical absence and effective absence.

2. Principles of statutory interpretation could be found ambiguous as to whether the Framers meant effective or physical absence.

The command of plain language reading that one must give meaning to all the words in a provision could be understood to raise further ambiguity. Clark, 168 Idaho 503, 484 P.3d at 192 (plain language reading "includes giving effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant." (Quotation marks omitted.)). Article IV, section 12 uses a disjunctive to add the final clause "inability to discharge the powers and duties of his office" to the list of enumerated events that trigger devolution to the lieutenant governor, suggesting that the final clause may have been intended to set out a different cause for devolution.

Applying the principle of interpretation that every word and phrase must be given independent meaning, "inability to discharge the powers and duties of his office" could be read to have a different meaning than the preceding "failure to qualify," "impeachment," "conviction for treason, felony, or other infamous crime," "death," "removal from office, resignation," and "absence from the state." An effective absence interpretation could arguably violate this principle because "absence from the state" would not have independent meaning: events that trigger this exclusion would also fall within the exclusion "inability to discharge the powers and duties of office." Thus, there would be no need to have the "absence from the state" exclusion at all. The principle of giving effect to all the words and provisions in a statute could therefore support interpreting "absence from the state" to mean physical absence.

That said, there is a flaw in the application of this principle to section 12 because it also applies to the other enumerated causes of devolution in section 12, such as death and removal from office. Yet, death and removal from office clearly would also render the governor unable to discharge the powers and duties of his office. But death is still enumerated separately from "inability to discharge the powers and duties of his office" in section 12.

Ultimately, although the enumerated causes of devolution have independent meaning, the Idaho Supreme Court requires that provisions be construed as a whole. Hart, 135 Idaho at 829, 25 P.3d at 852; Hoskins v. Howard, 132 Idaho 311, 315, 971 P.2d 1135, 1139 (1998). Another principle could be found better suited to understand what the Framers meant by “absence from the state.”³ The legal maxim of *nositur a sociis* could be applied to understand “absence from the state” and the other enumerated disqualifications by reading them in context together and with the phrase “or inability to discharge the powers and duties of his office”. “The legal maxim *nositur a sociis* . . . means ‘a word is known by the company it keeps.’” Chandler’s-Boise LLC, 162 Idaho at 453, 398 P.3d at 186 (citation omitted). Applying this principle here, the phrase “inability to discharge the powers and duties of his office” and the other enumerated causes, such as death and removal from office, wherein the governor is implicitly or explicitly unable to discharge his duties, provide necessary context to understand “absence from the state.” Based on the context of the other causes, “absence from the state” could be read as an absence that renders the governor unable to perform the duties of governor. Thus, based on the legal maxim *nositur a sociis*, “absence from the state” could be understood to mean a circumstance where the governor is unable to discharge his duties as governor. This reading would support an effective absence interpretation.

3. The law that was in effect when the Constitution was drafted is unlikely to provide clarity as to whether the Framers meant effective or physical absence.

“[T]he law that was in effect when the Constitution was drafted” is another source one can apply to understand of the meaning of article IV, section 12. Nate v. Denney, 166 Idaho 801, 804, 464 P.3d 287, 290 (2017). In Nate, the Idaho Supreme Court compared the relevant provisions of the Organic Act of the Territory of Idaho against the relevant provision of the Idaho Constitution to understand its meaning. Id. at 804-08, 398 P.3d at 290-94. Relevant to article IV, section 12, section 3 of the Organic Act provided in pertinent part:

³ In Clark, the Idaho Supreme Court repeated its prior precedent in describing this command as (1) a principle of statutory interpretation to be applied in determining whether the language of a provision is unambiguous and (2) as something different from the rules or canons of statutory construction, which may be applied only if the language is ambiguous. 168 Idaho at ___, 484 P.3d at 192. However, there appears to be confusion as to whether other principles of statutory interpretation, such as the maxim *nositur a sociis*, are canons of construction that are only applied to ambiguous text or whether they are principles of statutory interpretation that are applied to determine whether the text is ambiguous. For example, in State v. Schulz, which was quoted in Clark in support of the relevant discussion, the Court applied the maxim *nositur a sociis* to a phrase that the Court described as “ambiguous” to conclude that the statute was unambiguous. 151 Idaho 863, 867, 264 P.3d 970, 974 (2011); *see also* Chandler’s-Boise LLC v. Idaho State Tax Comm’n, 162 Idaho 447, 452-53, 398 P.3d 180, 185-65 (2017) (looking to the maxim *nositur a sociis* to support a plain language reading of a statute). In contrast, in ABK, LLC v. Mid-Century Ins. Co., the Idaho Supreme Court refused to apply the doctrine of *nositur a sociis* to a question of contract interpretation because it was a canon of construction “to be used to assist in contract interpretation only where an ambiguity exists.” 166 Idaho 92, 100, 454 P.3d 1175, 1184 (2019). For the purposes of this letter, I will assume that the Court will look to principles of statutory interpretation such as *nositur a sociis* to understand the plain language of article IV, section 12 prior to concluding the provision is ambiguous based on its use of the doctrine in statutory interpretation cases.

§ 3. Secretary of territory--Term of office--Powers and duties.-- . . . [I]n case of the death, removal, resignation, or absence of the governor from the territory, the secretary shall be, and he is hereby, authorized and required to execute and perform all the powers and duties of the governor during such vacancy or absence, or until another governor shall be duly appointed and qualified to fill such vacancy.

Pub. L. 37-96, 12 Stat. 808, 809 (1863).

Comparing section 3 of the Organic Act against Idaho's Constitution, there is a notable difference in the causes of devolution to the secretary under the Organic Act versus devolution to the lieutenant governor under article IV, section 12. Under the Organic Act, only "death, removal, resignation or absence of the governor from the territory" triggered devolution to the secretary. Pub. L. 37-96, 12 Stat. 808, 809 (1863). Article IV, section 12 added additional causes for devolution: failure to qualify, impeachment, conviction of treason, felony, or other infamous crime, or inability to discharge the duties of office. The addition of the final phrase in section 12 could suggest that section 12 was only intended to articulate causes that render the governor unable to perform the duties of his office under the principle of *maxim noscitur a sociis*, as discussed above. This argument is supported by the contrast with the articulated causes of devolution in the Organic Act. This would support an effective absence interpretation. However, a physical absence interpretation could also be supported by the addition of inability to discharge the duties of office in section 12: the Framers could have understood absence in the Organic Act and in section 12 to mean something other than inability to discharge the duties of office and therefore added "inability to discharge the powers and duties of office" to section 12.

It must also be noted that the triggers to terminate the devolution of the governor's powers and duties are different in the Organic Act versus article IV, section 12. Under section 3 of the Organic Act, three of the causes would permanently cause devolution as they would cause a "vacancy" that would need to be filled. *Id.* However, upon the governor's "absence" there would only be a temporary devolution, and the secretary would only be acting governor "during such . . . absence." *Id.* But the Framers used different language to terminate a temporary devolution under section 12 on the grounds of absence. Under section 12, devolution on the grounds of "absence from the state" terminates when "the disability shall cease." Idaho Const. art. IV, § 12.

It is notable that the Framers used different language to terminate devolution in the event of an absence under the Idaho Constitution from what was used in the Organic Act. The Framers could have continued to use "during such vacancy or absence" and added other language to address the cessation of an inability to govern; instead, they chose to use "until the disability shall cease." This change in the language could be understood to mean that the Framers intended "absence from the state" in section 12 to have a different meaning from the absence contained in the Organic Act, one that encompassed the inability to govern. This reading would support an effective absence interpretation. In the alternative, as discussed above, the Framers could have

understood “disability” as used in section 12 to mean legal disqualification and intended it to cover all of the temporary causes of devolution in section 12. This interpretation could support an effective or physical absence reading.

In light of the above, a court could conclude that ambiguity exists in the dictionary definitions of the terms, the possible plain language readings of section 12 using principles of statutory interpretation, and in light of the law at the time section 12 was adopted. Based on these linguistic uncertainties, it seems likely that a reviewing court would find the phrase “absence from the state” ambiguous.

C. If article IV, section 12 is found ambiguous, statutory construction is required and could cause a court to conclude that “absence from the state” means effective absence.

If a court found article IV, section 12 ambiguous as to the meaning of “absence from the state,” the court would look to the principles of statutory construction to ascertain the meaning of the disqualification. “[T]he ordinary rules of statutory construction” apply to interpreting constitutional provisions. *Moon v. Inv. Bd.*, 97 Idaho 595, 596, 548 P.2d 861, 862 (1976). “Where the language of a constitutional provision is ambiguous, the debates from the constitutional convention may be resorted to for the purpose of interpretation.” *Winkler*, 167 Idaho at 531, 473 P.3d at 800 (citation omitted). One should also look to the “context of the time in which” the provision was adopted. *Id.* (citation omitted).

1. While at times contradictory, the debates from the constitutional convention and other provisions of the original constitution could be read to suggest that “absence from the state” was intended to mean effective absence.

Article IV, section 12 of the Idaho Constitution was adopted at the 1889 constitutional convention. The only amendments offered were to insert the word “treason” and the word “other” between “or” and “infamous.” 1 Proceedings & Debates of the Const. Convention of Idaho 421 (I.W. Hart ed., 1912). These discussions are unenlightening for the purposes of this question. However, in the discussion of article IV, section 1, as to the number of executive officers proposed, Mr. Gray offered the following debate:

Mr. GRAY. I hardly see the force of the objection to the number of officers we have here. We considered that they are necessary. The lieutenant governor has been mentioned by the chairman of the committee. We have this benefit, that we would not have in the event we did not have that office: The likelihood is, if the governor holds his position, that all the duties he will have to perform is that of president of the senate; and that is the only pay he gets—is for that service, but in the event of the governor’s death, or **absence from his post**, then there is some sort of positive person to take his position; and we think it is a very important clause in it, when it costs the state nothing in the event that does not happen, to have the succession of the office provided for. We can easily see of how much

benefit it might be, supposing that we might suddenly lose the governor **or for some reason he should be disqualified to perform his duties.**

Id. at 414 (emphasis added).

Similarly, in the debate over an amendment to article IV, section 19 regarding compensation for the lieutenant governor while acting governor, Mr. Poe stated: “Now, this amendment is to the effect that if at any time the governor should be absent from the state **and** unable to perform the duties of governor, then by virtue of his office [the lieutenant governor] would act as governor.”⁴ 2 Proceedings & Debates of the Const. Convention of Idaho, 1324 (I.W. Hart ed., 1912) (emphasis added).

Thus, both Mr. Poe and Mr. Gray appear to have understood “absence from the state” to mean effective absence. In contrast, Mr. Heyburn indicated the opposite understanding, speaking of a salary for the lieutenant governor “if the governor is absent **or** unable to act and conduct his duties.” Id. at 1329 (emphasis added).

It must also be noted that the 1889 constitutional convention also adopted former article IV, section 19, which repeal was ratified at the general election on November 3, 1998. In pertinent part, the originally adopted provision stated: “Provided, however, the legislature may provide for the payment of actual and necessary expenses to the governor, lieutenant-governor, secretary of state, attorney general, and superintendent of public instruction, while **traveling within the state** in the performance of official duty.” Idaho Const. art. IV, § 19 (repealed). This provision could be read as indicating that the constitutional convention viewed the governor as only conducting official business while within the state, which would support a physical absence construction.⁵

That said, the same convention also adopted article V, section 27, which, as originally adopted, provided “the legislature may provide for the payment of actual and necessary expenses of the governor, secretary of state, attorney general, and superintendent of public instruction incurred while in the performance of official duty.” This provision, which does not include the “within the state” caveat of article IV, section 19, suggests that the convention did foresee the named officials leaving the state in the exercise of their official duties.

On the whole, while there is evidence in the constitutional convention debates that would support both the physical and the effective absence interpretations, a court could conclude that the majority of the delegates who issued comments bearing on this question understood that the lieutenant governor would only become acting governor upon the governor’s effective absence, which would support the effective absence interpretation.

⁴ The committee later rejected this amendment based on the provision in article IV, section 12 stating that the emoluments of the governor pass to the lieutenant governor when he is acting governor. 2 Proceedings & Debates at 1324-29.

⁵ In 1994, the people ratified an amendment to this provision that removed the phrase “within the state”; thus, from 1994 until its repeal in 1998, article IV, section 19 stated, “the legislature may provide for the payment of actual and necessary expenses to these officers while traveling in the performance of official duty.” **IAC Archive 2021**

2. *A court could conclude that the historical context suggests that “absence from the state” was intended to mean effective absence.*

The historical context in which article IV, section 12 was drafted must also be considered.⁶ Prior to the adoption of Idaho’s Constitution, Idaho was governed by territorial governors, who were resented and viewed as carpetbaggers. DONALD CROWLEY AND FLORENCE HEFFRON, *THE IDAHO STATE CONSTITUTION: A REFERENCE GUIDE* 4 (1994). At least one territorial governor never set foot in the territory. *Id.*

In addition, at the time of the constitutional convention, Idaho’s territorial railroads were the only method for significant travel, despite Idaho’s diverse and difficult geography. DENNIS C. COLSON, *IDAHO’S CONSTITUTION: THE TIE THAT BINDS* 130-32 (1991). The convention delegates recognized the difficulty of traveling. 2 Proceedings & Debates at 1552 (discussing the possibility of having to travel by rail, on the back of a mule, or on snowshoes to get to court). Related to the difficulty of traveling in 1889, one can also assume that travel required more time and was associated with lengthier and more complete absences from the state than in the modern world. Contrary to the numerous methods of remote communication available today, telegram and physical mail was the order of the day.⁷ 2 Proceedings & Debates at 1693, 1811, 1929.

In light of this historical background, it could reasonably be inferred that the convention delegates understood that a governor’s “absence from the state” would necessarily prevent him from fulfilling his duties. Given the realities of travel and communication technologies in 1889, when the governor was absent from the state in 1889, the convention delegates could reasonably have understood that the governor was simply unable to fulfill his duties in the same way as when he was present in the state. *But see State ex rel. Warmoth v. Graham*, 26 La. Ann. 568, 569 (La. 1874) (“The mere absence, at Pass Christian, within a few hours’ run of the Capital, could not, by any possibility, affect the public interest.”). They therefore could have understood the governor’s absence from the state to mean effective absence.

3. *Interpreting “absence from the state” as meaning effective absence could be found necessary to avoid absurdity.*

⁶ The Idaho Supreme Court has not viewed the past interpretations or practice of officials under a constitutional provision as controlling its interpretation of that provision. *See Nate*, 166 Idaho at 810-11, 464 P.3d at 296-97 (an over 50-year history of legislators routinely presenting bills to governors after adjournment, with no apparent objection from those governors, and an almost 39-year history of governors untimely vetoing laws without objection from legislators cannot change the constitutional requirements that bills be presented to the governor prior to adjournment *sine die*). Thus, it is unlikely that the court would give weight to a past practice of lieutenant governors acting as governor when the governor was temporarily out of the state nor is it likely that the court would give weight to Idaho Code section 67-805A(2), which provides that the lieutenant governor performs the duties of acting governor in the case of the governor’s “temporary absence from the state” “until the governor returns to the state.” This statute appears to suffer from the assumption that the governor is physically unable to perform his job duties while out of state.

⁷ It wasn’t until 1915 that the first coast-to-coast telephone call was completed.

Ultimately, a court could resolve any ambiguity as to the meaning of “absence from the state” by the need to construe the constitutional provision to avoid absurdity. Any construction of a constitutional provision that would render it absurd and defeat the intent of the drafters is to be avoided. See State ex rel. Idaho State Park Bd. v. City of Boise, 95 Idaho 380, 383, 509 P.2d 1301, 1304 (1973) (rejecting alternative constructions of the constitutional language as they “would be patently absurd and would defeat the constitutional intent as delineated by the proceedings and debates of the constitutional convention”); State v. McKie, 163 Idaho 675, 678, 417 P.3d 1001, 1004 (Ct. App. 2018), *review denied* (May 23, 2018) (“Constructions of an ambiguous statute that would lead to an absurd result are disfavored.”).

It would be absurd for the mere physical absence of the governor from the state to trigger the devolution of his duties to the lieutenant governor. Given the technologies available in this day and age, there is no impediment to the governor performing his duties remotely. Such a rule would require that the “movements of the [g]overnor should be watched, with the view that the [l]ieutenant [g]overnor or [p]resident pro tempore should slip into his seat, the moment he stepped across the borders of the State.” Warmoth, 26 La. Ann. at 570.

It would also mean that the governor could not act as governor outside of the state. But the Constitution vests “[t]he supreme executive power of the state” in the governor. Idaho Const. art. IV, § 5. Thus, under Idaho Code section 67-802(4), the governor “is the sole official organ of communication between the government of this state and the government of any other state or territory, or of the United States.” If the governor were unable to act as governor outside the state, he would be unable to carry out this function via in-person meetings and conferences with other governments. This would be an absurd result.

Further, an interpretation of “absence from the state” as meaning physical absence only would subject the state to whiplash policy changes when the lieutenant governor becomes acting governor. It is not unusual in Idaho politics for the voters to elect a governor from one political party and a lieutenant governor from the other party. CROWLEY, at 108. Thus, during a brief absence, the lieutenant governor could issue executive orders with different policy objectives. The people of Idaho could not be guaranteed the execution of the policy choices of the individual they elected solely because the quirks of Idaho’s geography, population centers, and airport locations, which cause the governor to have to temporarily travel out-of-state to execute his duties as Idaho’s governor.

These concerns led the Nevada Supreme Court to adopt the effective absence rule. Quoting a 1872 decision, the court wrote “to accept ‘strict’ absence forced one to ‘reflect upon the possible consequences of such a construction of the Constitution, upon the disgraceful tricks, strifes, and exhibitions, which might be entailed upon the people of the State[.]’” Sawyer v. First Jud. Dist. Ct. in and for Ormsby County, 410 P.2d 748, 750 (Nev. 1966) (quoting People ex rel. Tennant v. Parker, 3 Neb. 409 (1872)). The court gave great weight to “the citizens’ . . . right to realize the *unintruded* policies of the individual they placed in that office.” Id. (emphasis added); see also State ex rel. Meyers v. Reeves, 78 P.2d 590, 512-13 (Wash. 1938) (Geraghty, J., concurring) (“Under present-day conditions, no good reason exists for a rule that would confine the

[g]overnor to the limits of the state or permit him to cross the state line only at the risk of a disruption of his policies.”)

On a related note, if “absence from the state” were interpreted to mean pure physical absence, the governor’s staff would never quite know who their boss was when the governor was out of the office. Staffers would have to constantly monitor the governor’s location to know whether they should follow instructions given to them by the lieutenant governor or the governor. A staffer could never be quite certain whether to follow the governor’s telephoned⁸ or emailed instructions or the lieutenant governor’s contrary contemporaneous instruction when the governor was traveling. The lieutenant governor could even fire the governor’s staff when the governor was temporarily out of the state, even if he was just out of state for 30 minutes. Such outcomes would be inconsistent with the lieutenant governor’s constitutional role as the governor’s subordinate. See art. IV, § 5 (“The supreme executive power of the state is vested in the governor, who shall see that the laws are faithfully executed.”).

Finally, a physical absence rule could lead to absurdity in terms of the compensation afforded to the lieutenant governor while acting as governor. Article IV, section 12 states that the lieutenant governor is entitled to the “emoluments” of the governor while acting as governor and Idaho Code section 67-809(2) provides that the lieutenant governor will receive the difference between the daily salaries of lieutenant governor and the governor in addition to the salary of the lieutenant governor when acting as governor. If the lieutenant governor were acting governor every time the governor was physically absent from the state, such as when the governor stopped over in Spokane for a half hour in the process of traveling to a location in Idaho, there would be absurdity in the lieutenant’s governor’s compensation.

Considering the debates at the constitutional convention, the historical context of when article IV, section 12 was drafted, and the need to interpret “absence from the state” to avoid absurdity, a court could conclude that the canons of construction compel the conclusion that “absence from the state” means effective absence.

D. States with similar constitutional provisions are split as to whether “absence from the state” means effective absence or pure physical absence.

It appears the states to have interpreted similar constitutional provisions that contain the phrase “absence from the state” are split as to whether “absence from the state” means effective absence or mere physical absence.⁹ Half of the states identified as having addressed this question

⁸ Or even video-conferenced instructions whereby the staffer and the governor could physically see one another on a screen within a single room. Facetime, Zoom, WebEx, and others have made face-to-face access from virtually anywhere a reality.

⁹ See, e.g., Ark. Const., amend. 6, § 4 (“In case of the impeachment of the Governor, or his removal from office, death, inability to discharge the powers and duties of the said office, resignation or absence from the State, the powers and duties of the office, shall devolve upon the Lieutenant Governor for the residue of the term, or until the disability shall cease. But when the Governor shall, with the consent of the Legislature, be out of the State, in time of war, at the head of a military force thereof, he shall continue commander-in-chief of all the military forces of the State.”) IAC Archive 2021

directly have concluded that “absence from the state” means effective absence. State ex rel. Ashcroft v. Blunt, 813 S.W.2d 849, 852-53 (Mo. 1991) (*en banc*) (reaffirming adoption of the rule that “the power of [g]overnor devolves upon the [l]ieutenant [g]overnor in the [g]overnor’s absence only when such absence effectively debilitates or prevents the [g]overnor from executing the duties of his office”); Sawyer, 410 P.2d at 749 (following the “overwhelming majority of states” that have concluded that absence means effective absence “i.e., an absence which is measured by the state’s *need* at a given moment for a particular act by the official then physically not present”); In re An Act Concerning Alcoholic Beverages, 31 A.2d 837, 840-41 (N.J. 1943) (holding that absence from the state means “an absence such as will injuriously affect the public interest and does not include a mere temporary absence” (quotation marks omitted)); Johnson v. Johnson, 3 N.W.2d 414, 415 (Neb. 1942) (“[M]ere temporary absence from the state for the performance of official duty or for recreation or for business of a personal nature not interfering with the interests of the public does not vacate the office of governor and instate the lieutenant governor therein with all the powers, duties and emoluments thereof.”); Warmoth, 26 La. Ann. at 569 (interpreting “absence from the state” to mean when the governor’s absence is “such as would affect injuriously the public interest”).

The other half of the states identified as having addressed this question directly have concluded that “absence from the state” means pure physical absence from the state, of any duration or distance. *See* Bratsenis v. Rice, 438 A.2d 789, 791 (Conn. 1981) (“We decline to conclude that absence implies anything other than physical absence.”)¹⁰; In re Governorship, 603 P.2d 1357, 1362 (Cal. 1979) (in bank) (concluding that “constitutional and legislative history, contemporaneous interpretation and historical practice, and considerations of public policy, namely the need for certainty in effectuating executive decisions, support the” interpretation that “absence from the state” “must be given its literal, common meaning of physical nonpresence”);

State.”) (effective Sept. 14, 1914); Cal. Const., art. V, § 10 (“The Lieutenant Governor shall act as Governor during the impeachment, absence from the State, or other temporary disability of the Governor”); Conn. Const. art. IV, § 18 (“In the case of the inability of the governor to exercise the powers and perform the duties of his office, or in the case of his impeachment or of his absence from the state, the lieutenant governor shall exercise the powers and authority and perform the duties appertaining to the office of the governor until the disability is removed or, if the governor is impeached, he is acquitted, or if absent, he is removed.”) (eff. December 30, 1965); La. Const. art. 53 (“In case of impeachment of the Governor, his removal from office, death, refusal or inability to qualify or to discharge the powers and duties of his office, resignation, or absence from the State, the powers and duties of the office shall devolve upon the Lieutenant Governor, for the residue of the term, or until the Governor, absent or impeached, shall return or be acquitted, or the disability be removed”) (eff. April 1868); Mo. Const. art. IV, § 11(a) (“On the death, conviction or impeachment, or resignation of the governor, the lieutenant governor shall become governor for the remainder of the term. . . . On the failure to qualify, absence from the state or other disability of the governor, the powers, duties, and emoluments of the governor shall devolve upon the lieutenant governor for the remainder of the term or until the disability is removed. . . .”); Neb. Const. art. IV, § 16 (“In case of the death, impeachment and notice thereof to the accused, failure to qualify, resignation, absence from the state, or other disability of the Governor, the powers, duties and emoluments of the office for the residue of the term or until the disability shall be removed shall devolve upon the Lieutenant Governor.”) (eff. October 12, 1975); Okla. Const. art. 6, § 16 (“In case of impeachment of the Governor, or of his death, failure to qualify, resignation, removal from the State, or inability to discharge the powers and duties of the office, the said office, with its compensation, shall devolve upon the Lieutenant Governor for the residue of the term or until the disability shall be removed.”).

¹⁰ As demonstrated in footnote 8, Connecticut’s relevant constitutional provision had notably different language than Idaho’s, and had a far more apparent physical absence meaning.

Walls v. Hall, 154 S.W.2d 573, 577 (Ark. 1941) (“It is our view that ‘absence from the state’ ... means out of the state for any period of time.”); Montgomery v. Cleveland, 98 So. 111, 114 (Miss. 1923) (“[W]henver the [g]overnor is beyond the confines of the state he is absent from the state, and he cannot perform the duties of his office during such absence, and the functions of the office are vested in the [l]ieutenant [g]overnor.”); Ex parte Crump, 135 P. 428, 436 (Okla. Crim. App. 1913) (“[T]he plain intention of the framers of the Constitution and the people in adopting it was to provide that in [the governor’s] absence from the state for any purpose or for any period of time, however short, his constitutional functions shall devolve upon the [l]ieutenant [g]overnor as acting [g]overnor.”).

Finally, one prominent legal treatise has concluded that absence means effective absence. See 38 Am. Jur. 2d, Governor § 12 (“Generally, the term ‘absence’ means effective absence from the state and that is an absence which is measured by the state’s need at any given moment for a particular act by the official then physically not present.”).

CONCLUSION

In short, while this is a close legal question, as demonstrated by the split between the states that have addressed this question, a reviewing court could conclude that Governor Little’s interpretation of “absence from the state” in article IV, section 12 of Idaho’s Constitution as expressed in his July 29, 2021 letter is correct and that “absence from the state” means effective absence, not physical absence.

I hope you find this analysis helpful.

Sincerely,



BRIAN KANE
Chief Deputy