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

BRENT REGAN, a qualified elector of the State of Idaho,

Petitioner,

vs.

LAWERENCE DENNEY, Secretary of State of the State of Idaho, in his official capacity,

Respondent,

DELEENA FOSTER, an individual, PAMELA BLESSINGER, an individual, BRUCE BELZER, MD, an individual, and IDAHO MEDICAL ASSOCIATION, INC., an Idaho non-profit corporation,

Intervenors-Respondents.

Supreme Court Docket No. 46545-2018

RESPONDENT'S BRIEF

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I. STATEMENT OF THE CASE

Idaho Code § 56-267 met the requirements for an initiative and was placed for consideration by the Idaho electorate on the November 2018 ballot as Proposition 2. There were 365,107 Idahoans who voted to make Idaho Code § 56-267 law, while 237,567 voted against it. A majority of the voters, 60.6%, voted in favor of the initiative. In fulfillment of the requirements under Article III, § 1, of the Idaho Constitution, and Chapter 18, Title 34, of the Idaho Code, the Acting Governor issued a proclamation on November 20, 2018.[1] As a result, Idaho Code § 56-267 is a law of the State of Idaho.

Petitioner, Brent Regan, seeks an order from this Court declaring that Idaho Code § 56-267 is unconstitutional because it impermissibly delegates discretionary authority to the federal government and the Idaho Department of Health and Welfare. Petitioner's Brief at 16. But section 56-267 does not unlawfully delegate any authority, because it provides specific terms for expansion of Medicaid coverage in Idaho and authorizes the Department of Health and Welfare to take the actions necessary to implement that expansion. It provides:

> 56-267. MEDICAID ELIGIBILITY EXPANSION. (1) Notwithstanding any provision of law or federal waiver to the contrary, the state shall amend its state plan to expand Medicaid eligibility to include those persons under sixty-five (65) years of age whose modified adjusted gross income is one hundred thirty-three percent (133%) of the federal poverty level or below and who are not otherwise eligible for any other coverage under the state plan, in accordance with sections 1902(a)(10)(A)(i)(VIII) and 1902(e)(14) of the Social Security Act.
>
> (2) No later than 90 days after approval of this act, the department shall submit any necessary state plan amendments to the United States Department of Health and Human Services, Centers for Medicare and Medicaid Services to implement the provisions of this section. The department is required and authorized to take all actions necessary to implement the provisions of this section as soon as practicable.

[1] A copy of the proclamation is attached as Appendix 1.

Section 56-267 allows for expansion of Medicaid only if three conditions are met. The newly eligible must be under 65 years old, have an adjusted gross income under 133% of the federal poverty level, and not be otherwise eligible for coverage under specific statutory provisions. Medicaid is a federal-state cooperative program under which costs for medical services are shared by the federal and state sovereigns. The discretion granted under Idaho Code § 56-267 permits the responsible state authorities to cooperate and implement the law as intended.

Petitioner did not challenge Proposition 2 during the initiative process. He waited until November 21, 2018, to bring his challenge to section 56-267, after it became law. Petitioner did not file an action in district court challenging the law. Instead, he filed an original action in this Court, relying solely on Idaho Code § 34-1809(4). Petition for Review at 3, ¶ 1.[2]

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

A. Should the Court dismiss the petition because the Court lacks original jurisdiction to consider it?

B. Should the Court dismiss the petition because Petitioner lacks standing?

C. Even if the Court had original jurisdiction to consider a challenge to section 56-267, should it dismiss the petition as non-justiciable because it raises purely hypothetical concerns?

D. Even if the Court considered the petition on its merits, should the Court deny the petition because section 56-267 prescribes the specific terms under which the State and

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[2] Petitioner has titled his action a "Petition for Review," but it does not seek review of any "inferior tribunal, board or officer exercising judicial functions" as provided in Idaho Code § 7-202. And Petitioner has argued that Idaho Appellate Rule 5(d) should not apply to his case, Petitioner's Brief at 6, so it cannot be considered as a request for an extraordinary writ governed by Rule 5(d). Thus, Idaho Code § 34-1809(4) is the sole basis on which Petitioner relies to establish original jurisdiction in this Court.

Department of Health and Welfare may expand Medicaid eligibility, and it delegates no authority to the federal government?

E. Should the Court award Respondent his reasonable attorneys' fees because Petitioner brought this action "frivolously, unreasonably or without foundation" within the meaning of Idaho Code § 12-121?

III. ARGUMENT

A. The Court Lacks Original Jurisdiction to Consider the Petition.

Petitioner contends Idaho Code § 34-1809(4) confers original jurisdiction in this Court. There are two problems with this argument. First, the Constitution, not the legislature, defines the Court's jurisdiction. Article V, § 9; *Neil v. Public Utilities Comm'n,* 32 Idaho 44, 178 P. 271, 273 (1919). So the legislature had no authority to expand the Court's original jurisdiction in section 34-1809(4). Second, by its terms, section 34-1809(4) applies only to "initiative[s]." The law Petitioner challenges, Idaho Code § 56-267, is no longer an initiative; it is a law.

1. The Court has determined that Idaho Code § 34-1809(4) does not and cannot create original jurisdiction in the Supreme Court.

The separation of powers doctrine mandates that neither the legislature nor the executive can regulate the Supreme Court's original jurisdiction. *Mead v. Arnell*, 117 Idaho 660, 663, 791 P.2d 410, 413 (1990). Based on this principle, this Court determined that Idaho Code § 34-1809(4) is an impermissible attempt to expand the Court's original jurisdiction. *In re Petition to Determine Constitutionality of Idaho Code Sections 67-429B and 67-429C, Enacted in the Indian Gaming Initiative, Proposition One*, No. 29226 (Idaho S. Ct. June 2, 2003) (order dismissing petition), *reh'g denied* (Oct. 16, 2003).[3] In that case, as in this, the petitioners sought to bring an original

[3] For the Court's convenience, copies of its orders from the Indian Gaming Initiative case are attached to this brief as Appendices 2 and 3.

proceeding in this Court to raise a post-election challenge to an initiative that had become law. In its order dismissing the petition for lack of jurisdiction, the Court held that section 34-1809(4) did not and could not create original jurisdiction in the Supreme Court because "[t]he legislature has no power to extend this Court's original jurisdiction. *Neil v. Public Utilities Comm'n,* 32 Idaho 44, 178 P. 271 (1919)." In the *Indian Gaming* case, the petitioners argued that Article III, §1, which guarantees the right of initiative to the people, includes the legislative ability to assign original jurisdiction to the Court to review initiatives. But the Court rejected that notion: "There is absolutely nothing in the wording of this provision that could be reasonably so construed." Order at 2.[4]

In this case, Petitioner has not provided any argument as to how Idaho Code § 34-1809(4) is a constitutionally permissible expansion of this Court's original jurisdiction. In *Neil*, the Court expressly stated, "The jurisdiction of this court is fixed by the Constitution and cannot be broadened or extended by the Legislature." 32 Idaho at 52, 178 P. at 273. And the Court's order in the Indian Gaming Initiative case considers and rejects any conceivable argument Petitioner might offer. This Court should dismiss the petition for lack of original jurisdiction.[5]

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[4] In *Noh v. Cenarrusa*, 137 Idaho 798, 53 P.3d 1217 (2002), at least one member of the Court would have held that Idaho Code § 34-1809(4) was unconstitutional:

> The Legislature's instruction to this Court to hear controversies that would not otherwise be justiciable constitutes an exercise of a power properly belonging to this Court that the legislature is not constitutionally permitted to exercise. The majority acknowledges that the legislature cannot create a justiciable controversy where none exists. I believe we should take the next step and find unconstitutional the relevant clause of I.C. § 34-1809.

Id. at 804, 53 P.3d at 1223 (2002) (Kidwell, J., concurring).

[5] Petitioner may point to the Court's review of ballot titles as conferring original jurisdiction on this Court. *See* Idaho Code § 34-1809(3). But a challenge to ballot titles is an appeal from the Attorney General, who is acting in a quasi-judicial capacity by assigning impartial titles to the measure. In this regard, the Attorney General is not acting as either an adversary or

2. Even if Idaho Code § 34-1809(4) could expand the Court's original jurisdiction to allow for consideration of a challenge to an initiative, it could not provide jurisdiction for this challenge, because Idaho Code § 56-267 is no longer an initiative; it already has become a law.

Idaho Code § 34-1809(4) purports to allow for review of an initiative at any time following the Attorney General's issuance of the certificate of review; however, this provision does not by its terms permit review of a law. An initiative is the power of the people to propose legislation, and enact or reject the same at the polls independent of the legislature. *Luker v. Curtis*, 64 Idaho 703, 136 P.2d 978 (1943). This means that an initiative is only an initiative until such time as it is rejected or approved. Once a majority of voters approves an initiative, the Governor issues a proclamation under Idaho Code § 34-1813 declaring that the measure has the "full force and effect as the law of the state of Idaho from the date of [the] proclamation." At that point, the measure is no longer an initiative because it has become law, and is on "equal footing" with all other laws in the State of Idaho. *Luker,* 64 Idaho at 706, 136 P.2d at 979.

As of November 20, 2018, Proposition 2 ceased being an initiative and became Idaho Code § 56-267, a law. Because he waited until November 21, 2018 to challenge that law, Petitioner should have filed his claims in district court under Title 10, Chapter 12, the Uniform Declaratory Judgment Act.

B. Petitioner Does Not Have Standing.

Recognizing that Idaho Code § 34-1809(4) attempts to unconstitutionally create original jurisdiction, it also attempts to bestow standing on "[a]ny qualified elector . . . ." But if that statute

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advocate of the measure. So a ballot title petition to the Court is one of certiorari or review, not an assignment of original jurisdiction. *In Re Petition of the Idaho State Federation of Labor*, 75 Idaho 367, 374, 272 P.2d 707, 710-711 (1954). *See also Noh v. Cenarrusa,* 137 Idaho 798, 802, 53 P.3d 1217, 1221 (2002) (noting the distinction between a challenge to ballot titles versus a challenge to constitutionality). In this case, the Attorney General has determined that he cannot defend Idaho Code § 34-1809(4) because it is contrary to well-settled Idaho Supreme Court precedent, as described by the Court in its *Indian Gaming* order.

is overturned by this Court, then Petitioner cannot independently demonstrate standing. As a general rule, a citizen or taxpayer, by reason of that status alone, does not have standing to challenge governmental action. "An interest, as a concerned citizen, in seeing that the government abides by the law does not confer standing." *Troutner v. Kempthorne*, 142 Idaho 389, 391, 128 P.3d 926, 928 (2006). "A citizen or taxpayer may not challenge a governmental enactment where the injury is one suffered alike by all citizens and taxpayers of the jurisdiction." *Ameritel Inns, Inc. v. Greater Boise Auditorium Dist.*, 141 Idaho 849, 852, 119 P.3d 624, 627 (2005). "The general rule holds even if the citizen or taxpayer alleges some indirect harm from the governmental action." *Koch v. Canyon County,* 145 Idaho 158, 160, 177 P.3d 372, 374 (2008).

As the Court explained in *Koch*, there is a narrow exception to this rule that permits taxpayer standing when the case involves an "'illegal expenditure of public money,'" *id.* at 161, 177 P.3d at 375 (quoting *Greer v. Lewiston Golf & Country Club, Inc.*, 81 Idaho 393, 397, 342 P.2d 719, 722 (1959)), that would violate Article VIII, § 3, of the Idaho Constitution. *Koch*, 145 Idaho at 162, 177 P.3d at 376. This narrow exception does not apply in this case. Petitioner does not contend that Idaho Code § 56-267 violates Article VIII, § 3, of the Idaho Constitution.

In the instant case there is no illegal expenditure of money coupled with an increased tax burden because the Idaho legislature has the discretion and authority to appropriate the necessary funds to implement section 56-267. Petitioner has not alleged any harm to himself. Instead, Petitioner has raised a generalized policy-based grievance against the State's implementation of Medicaid expansion, which is not actionable. Petitioner cannot satisfy the requirements for standing.

C. The Petition Raises Non-Justiciable, Purely Hypothetical Concerns.

Even if the legislature had the power to expand the Court's original jurisdiction through Idaho Code § 34-1809(4), Petitioner's claims should be dismissed because they are not justiciable. They raise merely "hypothetical" concerns. *See Haight v. Dep't of Trans.*, 163 Idaho 383, 391, 414 P.3d 205, 213 (2018) (citing *State v. Rhoades*, 121 Idaho 63, 69, 822 P.2d 960, 966 (1991)). State participation in Medicaid and its expansion is optional, and depends on the legislature's willingness to appropriate the necessary funds. Even if the legislature chooses to appropriate the funds necessary to implement section 56-267, the possible future concerns Petitioner raises are merely conjectural, and may never come to pass.

1. Medicaid is an entirely optional cooperative state-federal program.

The Medicaid program was created in 1965, when Congress added Title XIX to the Social Security Act, 79 Stat. 343, as amended, 42 U.S.C. § 1396 *et seq.* (1976 ed. and Supp. II), for the purpose of providing federal financial assistance to states that choose to reimburse certain costs of medical treatment for needy persons. Although participation in the original Medicaid program is entirely optional, once a state elects to participate, it must comply with the requirements of Title XIX. *Harris v. McRae*, 448 U.S. 297, 301 (1980). Medicaid is a jointly financed federal-state cooperative program to assist states in the provision of medical care to their needy citizens. *Moore ex rel Moore v. Reese*, 637 F.3d 1220, 1232 (11th Cir. 2011).

In 2010, 42 U.S.C. §1396a was amended[6] to expand what states were required to offer through their respective Medicaid programs. *National Federation of Independent Business ("NFIB") v. Sebelius*, 567 U.S. 519, 542 (2012). Most relevant for this case, the Act required state

[6] These amendments were part of the larger Patient Protection and Affordable Care Act of 2010.

programs to provide Medicaid coverage to adults with incomes up to 133 % of the federal poverty level. 42 U.S.C. §1396(a)(10)(A)(i)(VIII). When Congress passed this amendment, it made the expansion of Medicaid eligibility a mandatory requirement for ongoing Medicaid participation. In other words, if a state did not expand its Medicaid offerings in compliance with the Act, the federal government could withhold 100% of a state's Medicaid funding.

Twenty-six states, including Idaho, sued to challenge this mandatory expansion provision alleging that Medicaid was an optional cooperative agreement between states and the federal government, and that by conditioning ongoing funding on state expansion of Medicaid, the amendment violated the Spending Clause. The United States Supreme Court agreed, finding that the financial inducement offered by Congress to states to expand Medicaid was akin to a "gun to the head." *NFIB v. Sebelius,* 567 U.S. at 581. Requiring states to expand Medicaid or risk the loss of all Medicaid funding was an "economic dragooning" leaving states with no real option but to accept the expansion. The Court resolved this infirmity by prohibiting application of § 1396c in a way that resulted in states placing the entirety of their Medicaid funding in jeopardy. *Id.* at 585-86. In sum, Medicaid remains a fully-optional state and federal cooperative program.[7]

2. <u>The Medicaid plan amendment process is state driven, not delegated to the federal government.</u>

Idaho Code § 56-267 instructs the Department of Health and Welfare to expand the State's offering of Medicaid services to enumerated beneficiaries. This instruction is consistent with the Director and the Department's already existent authority under Idaho Code §§ 56-202(a) (Director

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[7] Idaho is not a party to the recent district court decision in Texas addressing the constitutionality of healthcare reform in total. *Texas v. United States*, No. 4:18-cv-00167-O, 2018 WL 6589412 (N.D. Tex. Dec. 14, 2018). It is important to note that that decision does not impose a nationwide injunction or impact Idaho's Medicaid expansion efforts in any way.

to administer public assistance and social services to eligible people)[8] & 56-203(1-7, 9). Additionally, Idaho Code § 56-267 is not self-executing. Two additional steps must be taken. First, the State must amend its plan, and second, the Idaho legislature must appropriate the "state match" for the expanded scope of Medicaid.

Medicaid is a federal-state cooperative plan. Under this cooperative endeavor, each state submits to the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services ("CMS") a comprehensive written statement called a "state plan" that describes the nature and scope of its Medicaid program. 42 CFR § 430.10. A state specifies in its state plan many operational and policy decisions including eligible groups, types and range of services covered, how payments to providers are determined, and other administrative and operating procedures. 42 USC § 1396a; 42 CFR § 430.0. Each state plan is subject to amendment at any time when the state has a material change in policy, state law, or organization and operation of the program, or there is a change in federal laws or by court decision. 42 CFR § 430.12. The state plan will also give assurances that a state will follow federal rules in order to provide the basis for federal financial participation in the state program. 42 CFR § 431.10. The format for a state plan is organized into seven sections according to the federal template that includes basic content as well as state-specific content that reflects the characteristics of the state's program. 42 CFR § 430.12. CMS may either approve or disapprove a state plan or plan amendment. A state plan is considered approved within 90 days unless CMS disapproves or requests further information from the state in order to make a final determination, which would begin another 90-day timeframe for CMS to consider the submission. 42 CFR § 430.16. Procedures and timeframes for a state that

[8] Idaho Code § 56-202(d) requires annual reporting to the legislature and governor of activities and expenditures along with compliance with federal reporting requirements. This adds yet another layer of oversight for the legislature.

appeals or challenges a CMS action regarding a state plan are found in the Code of Federal Regulations at 42 CFR § 430.18 and more specifically at Subpart D of 42 CFR Part 430.

Idaho Code § 56-267 requires Idaho Medicaid to submit a proposed state plan amendment to CMS within 90 days. No expansion of Medicaid eligibility will occur without completion of this process. Therefore, there is no impermissible delegation.

3. Idaho Code § 56-267's Medicaid eligibility expansion will not occur unless the legislature appropriates necessary funds.

Medicaid is an optional program designed to encourage states to accept federal funds to cover medical services for blind, disabled, elderly, and needy families with dependent children. States have the ability to opt in or out of Medicaid at any time, but opting in requires states to provide a match of federal funds. As Petitioner has noted, Idaho is required to provide a "match" of 10% funding, while the federal government provides 90% of the funding.

The expansion of Medicaid eligibility permitted by section 56-267 requires an appropriation to fulfill the state match portion of Medicaid. Under Article VII, § 13, of the Idaho Constitution, money can be drawn from the Idaho treasury only through an appropriation made by law. Thus, no expansion of Medicaid eligibility will occur in Idaho unless the legislature appropriates the necessary additional funds.

If the legislature does appropriate the funds necessary to implement section 56-267, its oversight and involvement will not end there. Each year, Idaho's continued participation in Medicaid, including any expansion, requires an annual appropriation. Each year, the State's Medicaid Division within the Department of Health and Welfare receives an appropriation to continue offering Medicaid services and programs within Idaho. *See* H. 695, Appropriations –

Health and Welfare – Medicaid (2018); S. 1174, Appropriations – Health and Welfare – Medicaid (2017); S. 1391, Appropriations – Health and Welfare – Medicaid (2016).[9]

4. Petitioner's claims are not justiciable because they are purely hypothetical.

Petitioner's claims rest upon a series of "what ifs." In order for a case to be justiciable, it must rest on a definite or concrete premise that touches on legal relations of the parties as opposed to advising on what the law would be based on a hypothetical set of facts. *See Haight*, 163 Idaho at 391, 414 P.3d at 213 (citing *State v. Rhoades*, 121 Idaho 63, 69, 822 P.2d 960, 966 (1991)). Much of Petitioner's brief is dedicated to two hypothetical scenarios: (1) What if the federal government increases the eligibility requirements from 133% of the poverty level to 153%? (Petitioner's Brief at 11); and (2) What if the federal match changes from 90% to 71%? (Petitioner's Brief at 12). Both of these hypotheticals are purely conjectural.

Both overlook two significant points as well. First, Petitioner's hypothetical changes to Medicaid in the wake of *NFIB v. Sebelius* would be considered optional for states to adopt because they could be interpreted as an impermissible post-acceptance or retroactive condition. *See* 567 U.S. at 584. Second, if Medicaid were altered as provided for in the hypotheticals, the Secretary of Health and Human Services would be prohibited from withdrawing existing Medicaid funds for failure to comply with the requirements set out in such changes. *Id*. at 585. Any injury Idaho might suffer under Petitioner's hypotheticals is illusory at best.

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[9] Appropriations although not codified are law. They meet all constitutional requirements for laws because they contain an enacting clause (Article III, § 1) having been passed by both chambers (Article III, 15), and presented to the governor for signature (Article IV, § 10, § 11). In this regard the Legislature never delegates its vested authority because the appropriation is an annual new law with regard to Medicaid.

Additionally, the Idaho legislature would be given the opportunity to review any amendments through the annual appropriation process. Nothing within section 56-267 is beyond review by the Idaho legislature.

The circumstances advanced by Petitioner are purely hypothetical and based on future events that may or may not happen. Additionally, through the appropriation process, the legislature will be able to review the implementation of Idaho Code § 56-267. The hypothetical harm Petitioner alleges will occur only if Congress acts and the Idaho legislature fails to act. No evidence demonstrates the likelihood of either happening.[10]

D. Section 56-267 is constitutional because it delegates no authority to the federal government and prescribes specific terms under which the State may expand Medicaid eligibility.

Even if the Court had original jurisdiction and determined that Petitioner has standing and that his petition presents a real justiciable controversy, the petition has no merit. Petitioner relies on the "non-delegation" doctrine, *see* Petition for Review at 2-3, but that doctrine is not implicated by Idaho Code § 56-267.

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[10] Petitioner makes much of the Attorney General's Certificate of Review indicating the cooperative nature of the potential give and take between the State and federal government with regard to the amended Medicaid Plan. Although there could be a dispute between the State and federal government with regard to a plan amendment, the discretion with regard to continuation in the Medicaid program ultimately resides with the State. If the federal government alters the criteria for the provision of Medicaid services, the State, as instructed by *NFIB v. Sebelius*, has the option to alter its offerings in accordance with the federal alterations. Although opting out may result in the State forgoing some funding, the federal government cannot require compliance subject to removal of all funding. The possible scenarios outlined in the Certificate of Review are hypothetical, intensely fact dependent, and beyond the scope of the expansion outlined in Idaho Code § 56-267. Any joint federal-state program entails a risk of disagreement between the two if the federal government alters the program. Petitioner's argument would prevent the State from participating in any federal program. Such an extreme position is completely impractical and contrary to the very concept of federalism and dual sovereigns.

Petitioner contends that through the adoption of Idaho Code § 56-267, the people, standing in the place of the Idaho legislature, have delegated legislative authority to the federal government and Director of the Department of Health and Welfare. The prohibition against the delegation of legislative power is rooted in the vesting clause of Article III, § 1: "The legislative power of the state shall be vested in a senate and house of representatives." This power is then extended to the people through the initiative clause, "the people reserve to themselves the power to propose laws. . . ." *Id.* This vesting of legislative power is reinforced through the application of Article II, § 1:

> DEPARTMENTS OF GOVERNMENT. 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.
>
> In Idaho, to avoid a violation of the non-delegation doctrine:
>
> [t]he legislature must itself fix the condition or event on which the statute is to operate, but it may confide to some suitable agency the fact-finding function as to whether the condition exists, or the power to determine, or the discretion to create, the stated event. The nature of the condition is broadly immaterial.[11]

State v. Kellogg, 98 Idaho 541, 543, 568 P.2d 514, 516 (1977). Recognizing the practical reality of government, the Court observed, "[i]n deciding whether a delegation is proper the court's evaluation must be 'tempered by due consideration for the practical context of the problem sought to be remedied, or the policy sought to be effected.'" *Id.*

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[11] In this regard, Idaho closely tracks with the federal "intelligible principle" standard. Federally, courts have limited federal delegations to "lay down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform." *Whitman v. American Trucking Associations, Inc,* 531 U.S. 457 (2001) *quoting J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

In *Kellogg*, the Court rejected a claim that the legislature unconstitutionally delegated authority to the Board of Pharmacy and the federal government to determine which drugs should require a prescription. The statute in question merely defined the goal of regulating drugs "'in the interest of public health and safety.'" *Id.* at 544, 568 P.2d at 517. It left it up to the Board of Pharmacy and the Commissioner of the Federal Food and Drug Administration to decide which drugs to regulate. The Court acknowledged that the legislature wisely left implementation of the act to those with the expertise necessary to understand a complex topic and best achieve the act's purpose. *See id.* It also recognized that it would be "'unreasonable and impractical'" for the legislature to specify all the details of agency action in such a situation. *Id.* (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946)). The Constitution is satisfied so long as the statute "'delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'" *Id.* Idaho Code § 56-267 easily exceeds this standard.[12]

The statute does not delegate any authority to the federal government. Idaho Code § 56-267 allows for the expansion of Medicaid eligibility only under three specific conditions:

1. Individuals must be under 65;
2. Have a modified adjusted gross income less than 133% of federal poverty level; and
3. Not be otherwise eligible for coverage under Idaho's current state plan.

Contrary to Petitioner's suggestion, section 56-267 does not say that these conditions will automatically change if Congress alters federal law. Section 56-267 does refer to "sections 1902(a)(10)(A)(i)(VIII) and 1902(e)(14) of the Social Security Act," but that reference merely

[12] Often non-delegation challenges are directed at legislative grants of rulemaking authority. Idaho's system of legislative review of administrative rules, coupled with the constitutional authority contained in Article III, § 29, likely operate to preclude a legal challenge under the non-delegation doctrine because in Idaho, administrative rulemaking is never placed beyond the review and reach of the Idaho legislature.

acknowledges that the three statutory conditions are consistent with current federal law. If federal law were to change one of the three criteria, Idaho law would not change with it unless the legislature amended section 56-267.[13] In sum, section 56-267 delegates no authority to the federal government to make any future changes that would be binding on Idaho.[14]

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[13] The legislature might choose instead to opt out of the amended federal criteria. Although that choice might require Idaho to forgo future Medicaid participation and funding, it would not affect the federal government's obligation to provide its share of funding for pre-amendment services under Idaho Code § 56-267. *See NFIB v. Sebelius* 567 U.S. at 585 (Secretary cannot withdraw existing Medicaid funds for failure to comply with expansion).

[14]Petitioner relies heavily on *Idaho Savings & Loan Ass'n v. Roden*, 82 Idaho 128, 350 P.2d 225 (1960). *Roden* has no application to this case. In *Roden*, the primary issue was whether statutory provisions the trial court had found unconstitutional for delegating authority to the federal government were severable from the rest of the statute. The Court held that they were not severable, and thus reversed the trial court on that issue. The Court's analysis did agree with the trial court's conclusion that the legislature unconstitutionally delegated authority to the federal government because the Idaho statute at issue required Idaho savings and loan associations to comply with future federal statutes and regulations enacted or adopted after the Idaho statute's effective date. *See Roden*, 82 Idaho at 134, 350 P.2d at 228.

This case is entirely different than *Roden* because section 56-267 does not incorporate future changes to federal Medicaid eligibility law. It merely prescribes criteria that are consistent with current federal law. Nothing in Idaho's Constitution prohibits the legislature from adopting concepts from current federal law when it legislates. Moreover, to the extent *Roden* held that it was an unconstitutional delegation for a statute to incorporate federal law, that holding is inconsistent with this Court's more recent decisions. *See, e.g., State v. Kellogg*, 98 Idaho 541, 568 P.2d 514 (1977) (rejecting claim that it was an unconstitutional delegation for statute to incorporate federal Food and Drug Administration's determinations about which drugs should require a prescription).

In fact, numerous Idaho statutes incorporate federal law, including future changes to that law. *E.g.,* Idaho Code §§ 33-2202 (authorizing State Board of Education to act as the "state board for career technical education for the purpose of carrying into effect the provisions of the federal act known as the Smith-Hughes act, amendments thereto, and any subsequent acts now or in the future enacted by the congress affecting vocational education"); 33-2901, -2902, and-2905 (acts permitting the University of Idaho to benefit from federal programs and assenting to comply with not only current federal law but also future "acts amendatory thereof and supplementary thereto"); 74-104(1) (incorporating federal law and regulations to determine which records are exempt from disclosure under the Public Records Act). And Idaho's existing Medicaid program law incorporates federal laws to determine eligibility. *See* Idaho Code § 56-254. If the Court were to accept Petitioner's argument, all these laws and many more would be unconstitutional.

Looking at the second paragraph of Idaho Code § 56-267, there is similarly no delegation of legislative authority:

> (2) No later than 90 days after approval of this act, the department shall submit any necessary state plan amendments to the United States Department of Health and Human Services, Centers for Medicare and Medicaid Services to implement the provisions of this section. The department is required and authorized to take all actions necessary to implement the provisions of this section as soon as practicable.

The second paragraph allows for implementation of the three specific criteria defined in the first. It directs the Department to submit "any necessary state plan amendments" to expand Medicaid as prescribed in the first paragraph of the statute. It does not create additional discretion, but instead directs the Department to work through the existing process for the provision of Medicaid within the state of Idaho.

No language in Idaho Code § 56-267 authorizes or even purports to authorize the Director to act beyond the scope of the legal authority granted by Idaho Code § 56-267. This provision authorizes the Director to take the necessary steps to implement the expansion of Idaho's Medicaid program to only the specific individuals defined by the statute.[15]

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[15] Petitioner also frets over the language "all actions necessary to implement," by somehow inserting "the power to ignore any provision of law or federal waiver to the contrary." Petition for Review at 3. Petitioner arrives at this conclusion through his unexplained interpretation of the introductory phrase, "Notwithstanding any provision of law or federal waiver to the contrary . . . ." Petitioner unjustifiably inflates the meaning of "notwithstanding." Notwithstanding is a catchall provision whose supposed referent is unclear and possibly even nonexistent. In the instant case, it is clear that "notwithstanding" is intended to override any obstacles in existence at the time of adoption of Idaho Code § 56-267. In sum, it reflects the drafters' ignorance of the comprehensive law and seeks to account for it. It does not create any broader authority. As a statute, Idaho Code § 56-267 is on equal footing with all other statutes and may be subject to a subsequent "notwithstanding" clause, a later in time statute enacted that repeals it in whole or part, or any other legislative limitation. This clause merely permits the Department to move forward with Medicaid expansion if any contrary law was on the books at the time of enactment, or a waiver was in place that needs to be removed based on the updated plan amendment.

To the extent that any discretion or authority is granted, such grant is checked by the annual appropriation process. Medicaid receives its own annual appropriation from the Idaho legislature; thus to the extent the state match is changed or altered, the legislature will be called upon to review and determine whether to fund such altered criteria. There is no violation of the non-delegation doctrine because no portion of Idaho Code § 56-267 is ever beyond the oversight and review of the Idaho legislature.

Even absent this annual legislative oversight section 56-267 would be constitutional. The justification this Court approved in upholding the deference in *Kellogg* applies with equal force here. Medicaid is a complicated program, and the Department has special expertise developed through its administration of the current Medicaid program. It makes great sense to task the Department with implementing the steps necessary to accomplish Medicaid expansion in Idaho. And section 56-267 delegates far less discretion than that in *Kellogg*. It does not leave eligibility criteria to the Department's discretion, but instead specifically prescribes those criteria. The law merely directs the Department to take the necessary steps to implement those criteria, *i.e.*, amend the state plan to expand Medicaid eligibility as provided for in Idaho Code § 56-267(1), and then submit the amended plan to CMS for approval. If the Department proposes administrative rules to implement Medicaid expansion, it must present those rules to the legislature for its approval. *See* Idaho Code § 67-5291.

It should be noted that Idaho Code § 56-267 is a consistent extension of the powers and duties already granted to the Director of Health and Welfare to design and implement changes to Idaho's current Medicaid programs under Idaho Code §§ 56-202 and 56-253. If the Court were to accept Petitioner's impermissible delegation argument here, it would be tantamount to declaring Idaho's entire Medicaid program unconstitutional.

In *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015), the United States Supreme Court upheld the State's discretion to not raise Medicaid reimbursement rates under 42 U.S.C. § 1396a(a)(30)(A). Private Medicaid providers sued in an effort to force Idaho to adopt higher rates established by federal law. *Id.* at 1382. The State defended against the suit, because as a federal-state cooperative program, the State retained the discretion whether to raise the rates. The Court dismissed the suit. It noted that Spending Clause legislation such as the Medicaid Act is a contract between the states and the federal government. *Id.* at 1387. Under those circumstances, states retain discretion and may choose to comply or not comply with the changes made by the federal government. The Secretary of Health and Human Services may notify the state it is out of compliance and subject to penalties under the Act, *id.* at 1386-87, but no one can force a state to comply with changes in the federal program. Contrary to Petitioner's claim, the State of Idaho has established its ability to retain discretion over its participation in Medicaid without unnecessarily ceding authority to the federal government. Petitioner cannot demonstrate any set of circumstances under which the state of Idaho will not continue to fully exercise its sovereign discretion within the federal-state cooperative Medicaid program.

As the United States Supreme Court observed in addressing Medicaid expansion, some states may decline to participate, some may voluntarily sign up, but the question is one for each individual state to determine. *NFIB v. Sebelius*, 567 U.S. 519, 587 (2012). As an optional program, the Idaho legislature never cedes either its authority or discretion to the federal government or any agency with regard to Idaho's participation in Medicaid. Contrary to Petitioner's assertion, the Idaho legislature weighs the State's ongoing participation in the federal Medicaid program each and every year, and it will continue to do so in the future.

E. The Court Should Award Respondent Reasonable Attorneys' Fees Because Petitioner Brought This Action "Frivolously, Unreasonably or Without Foundation" Within the Meaning of Idaho Code § 12-121.

Idaho Code § 12-121 authorizes the Court to award "reasonable attorney's fees to the prevailing party" if it determines "that the case was brought . . . frivolously, unreasonably or without foundation." In determining whether to award fees under section 12-121, this Court examines "the 'entire course of the litigation . . . and if there is at least one legitimate issue presented, attorney fees may not be awarded even though the losing party has asserted other factual or legal claims that are frivolous, unreasonable, or without foundation.'" *Steuerer v. Richards*, 155 Idaho 280, 287, 311 P.3d 292, 299 (2013) (quoting *Michalk v. Michalk*, 148 Idaho 224, 235, 220 P.3d 580, 591 (2009)).

Petitioner's action meets this standard because it is frivolous, unreasonable, and without foundation on several levels. It is well-settled law that the legislature cannot expand the Court's original jurisdiction, and this Court has already determined that Idaho Code § 34-1809(4) violates this principle. Thus, there was no valid basis for Petitioner to use section 34-1809(4) to invoke the Court's original jurisdiction. And Petitioner has suffered no particularized injury, so he lacks standing apart from the flawed section 34-1809(4), and his petition raises only speculative, non-justiciable concerns. Even absent all these jurisdictional defects, the petition is meritless. Idaho Code § 56-267 does not delegate any authority to the federal government as Petitioner contends. Nor does it unlawfully delegate legislative authority to the Department of Health and Welfare. Any delegation to the Department is well within established law and consistent with the existing Medicaid program. Thus, the petition raises no legitimate issues.

IV. CONCLUSION

The Court should dismiss the petition because it lacks original jurisdiction and Petitioner lacks standing. Even absent those fatal flaws, the Court should reject the petition. It raises only non-justiciable hypothetical concerns, and it fails to establish that Idaho Code § 56-267 impermissibly delegates legislative authority. The Idaho legislature will continue to retain all authority to fund and direct the administration of the Medicaid program; the mere acceptance of additional monies to expand the number of Idahoans eligible to receive Medicaid does not and will not strip the legislature of that authority.

DATED: December 21, 2018.

Respectfully submitted,

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/s/ W. Scott Zanzig
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Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of December, 2018, a true and correct copy of the foregoing document was filed with the Clerk of the Court using the iCourt E-File system which sent a Notice of Electronic Filing to the following person(s):

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/s/ W. Scott Zanzig
W. SCOTT ZANZIG
Deputy Attorney General

APPENDIX 1

Executive Department
State of Idaho

The Office of the Governor
Proclamation

State Capital
Boise

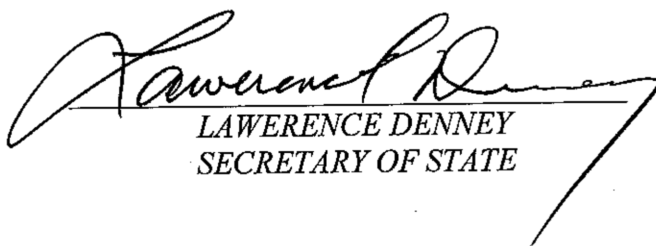
WHEREAS, the Secretary of State and the State Board of Canvassers have canvassed the votes cast on November 6, 2018 concerning Proposition Two (An initiative to provide that the State shall amend its state plan to expand Medicaid eligibility to certain persons); and,

WHEREAS, the results show that said proposition has received 365,107 "Yes" votes, 237,567 "No" votes,

NOW, THEREFORE, I, BRAD LITTLE, Acting Governor of the State of Idaho, pursuant to Section 34-1813, Idaho Code, do hereby proclaim that Proposition Two has been passed by the people of the State of Idaho.

IN WITNESS WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the State of Idaho at the Capitol in Boise on this 20th day of November, in the year of our Lord two thousand and eighteen and of the Independence of the United States of America the two hundred forty-third and of the Statehood of Idaho the one hundred twenty-ninth.

BRAD LITTLE
ACTING GOVERNOR



LAWERENCE DENNEY
SECRETARY OF STATE

APPENDIX 2

In the Supreme Court of the State of Idaho

IN THE MATTER OF THE PETITION/ ACTION TO DETERMINE THE CONSTITUTIONALITY OF IDAHO CODE SECTIONS 67-429B AND 67-429C, ENACTED IN THE INDIAN GAMING INITIATIVE, PROPOSITION ONE.	
MAXINE T. BELL; LAIRD NOH; PAUL CHRISTENSEN; and BRYAN FISCHER,	ORDER
Petitioners,	NO. 29226 Ref. No. 02S-385
v.	
PETE T. CENARRUSA, in his capacity as Idaho Secretary of State, DIRK KEMPTHORNE, in his capacity as Idaho Governor, ERNEST L. STENSGAR, and THE COALITION FOR INDIAN SELF RELIANCE, real parties in interest,	
Respondents.	

The Petitioners have filed a petition/action asking this Court to exercise original jurisdiction or inherent jurisdiction to determine the constitutionality of Idaho Code §§ 67-429B and 67-429C. The Petitioners assert several grounds upon which they contend that this Court has original jurisdiction to hear their petition.

First, they contend that this Court has original jurisdiction based upon that portion of Idaho Code § 34-1809 that provides: "Any qualified elector of the state of Idaho may, at any time after the attorney general has issued a certificate of review, bring an action in the Supreme Court to determine the constitutionality of any initiative." This Court's original jurisdiction is set forth in the Constitution. The legislature has no power to extend this Court's original jurisdiction. *Neil v. Public Utilities Comm'n*, 32 Idaho 44, 178 P. 271 (1919). The Petitioners contend, however, that pursuant to Article III, § 1, of the Idaho Constitution, the legislature has the power to grant this Court original jurisdiction to determine the constitutionality of initiatives.

The portion of Article III, § 1, upon which the Petitioners rely states that "legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, initiate any desired legislation and cause the same to be submitted to the vote of the people at a general election for their approval or rejection." They contend that this provision authorizes the legislature to grant original jurisdiction to this court in matters regarding initiatives. There is absolutely nothing in the wording of this provision that could reasonably be so construed. It merely authorizes the legislature to determine the conditions and manner in which the voters may exercise the power to propose laws by the initiative process.

The Petitioners next contend that this Court has original jurisdiction to hear their petition pursuant to that portion of Article V, § 9, of the Idaho Constitution, which provides: "The Supreme Court shall also have original jurisdiction to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all writs necessary or proper to the complete exercise of its appellate jurisdiction." They argue that by their petition they are requesting a writ of prohibition.

A writ of prohibition "arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person." IDAHO CODE § 7-401 (1998). The Petitioners seek a declaration that Idaho Code §§ 67-429B and 67-429C are unconstitutional. They are not seeking to arrest the proceedings of any tribunal, corporation, board or person.

The Petitioners next contend that this Court has original jurisdiction under the Uniform Declaratory Judgment Act. This Court has jurisdiction to grant a summary judgment only in connection with the proper exercise of its original jurisdiction as granted by the Constitution. *See Mead v. Arnell*, 117 Idaho 660, 791 P.2d 410 (1990). We do not have original jurisdiction to hear actions seeking a declaratory judgment that are unconnected with our jurisdiction under Article V, § 9, "to issue writs of mandamus, certiorari, prohibition, and habeas corpus."

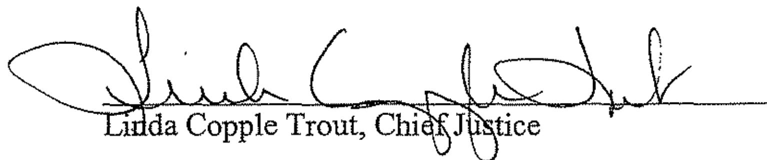
Finally, Petitioners contend that this Court has original jurisdiction to hear this declaratory judgment action pursuant to Article V, § 2, of the Idaho Constitution, which provides: "The judicial power of the state shall be vested in a court for the trial of impeachments, a Supreme Court, district courts, and such other courts inferior to the Supreme Court as established by the legislature." It is §§ 9 and 10 of Article V, however, which define

this Court's original jurisdiction. *Dewey v. Schreiber Implement Co.*, 12 Idaho 280, 85 P. 921 (1906). Indeed, if § 2 were construed to provide that this Court has original jurisdiction in all cases, then §§ 9 and 10 would be superfluous. Under neither section do we have original jurisdiction to hear the Petitioners' petition/action. Therefore, after due consideration,

IT IS HEREBY ORDERED that the petition/action to determine the constitutionality of Idaho Code §§ 67-429B and 67-429C, enacted in the Indian Gaming Initiative, Proposition One, be, and hereby is, DISMISSED without prejudice because this Court does not have original jurisdiction to decide the matter.

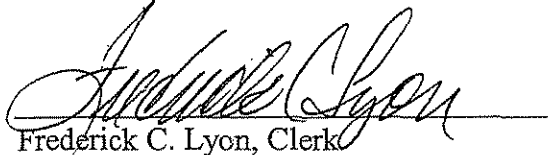
DATED this 2nd day of June 2003.

By Order of the Supreme Court



Linda Copple Trout, Chief Justice

ATTEST:



Frederick C. Lyon, Clerk

cc: Counsel of Record

I, Stephen W. Kenyon, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above is a true and correct copy of the Order entered in the above entitled cause and now on record in my office.
WITNESS my hand and the Seal of this Court 4/11/08

STEPHEN W. KENYON Clerk

By: [signature] Deputy

APPENDIX 3

In the Supreme Court of the State of Idaho

IN THE MATTER OF THE PETITION/ACTION TO DETERMINE THE CONSTITUTIONALITY OF IDAHO CODE SECTIONS 67-429B AND 67-429C, ENACTED IN THE INDIAN GAMING INITIATIVE, PROPOSITION ONE.

MAXINE T. BELL; et al.,

Petitioners,

v.

PETE T. CENARRUSA, in his capacity as Idaho Secretary of State, et al.,

Respondents,

and

BRUCE NEWCOMB and ROBERT L. GEDDES,

Intervenors.

ORDER DENYING PETITION FOR REHEARING

NO. 29226

Ref. No. 03RH-25

I, Stephen W. Kenyon, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above is a true and correct copy of the Order entered in the above entitled cause and now on record in my office.
WITNESS my hand and the Seal of this Court 4/11/08

STEPHEN W. KENYON Clerk

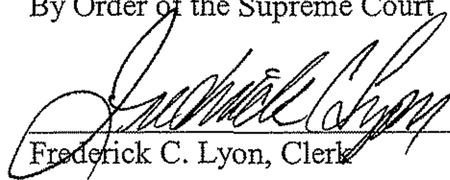
By: Kimber Grove Deputy

On June 2, 2003 the Court issued an ORDER dismissing the PETITION/ACTION TO DETERMINE THE CONSTITUTIONALITY OF IDAHO CODE SECTIONS 67-429B AND 67-429C, ENACTED IN THE INDIAN GAMING INITIATIVE, PROPOSITION ONE without prejudice because this Court does not have original jurisdiction to decide the matter. The Petitioners filed a PETITION FOR REHEARING and supporting BRIEF on June 19, 2003 and the Intervenors filed a BRIEF IN SUPPORT OF PETITION FOR REHEARING August 15, 2003. The Court is fully advised; therefore, after due consideration,

IT IS HEREBY ORDERED that Petitioner's PETITION FOR REHEARING be, and hereby is, DENIED.

DATED this 16th day of October 2003.

By Order of the Supreme Court



Frederick C. Lyon, Clerk

cc: Counsel of Record

Entered on ATS
By: ____