

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

**Supreme Court Docket No. 46545-2018**

**\* \* \* \* \***

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

**v.**

**LAWRENCE DENNEY, Secretary of State of the State of Idaho, in his official capacity,  
Respondent.**

**\* \* \* \* \***

**PETITIONER'S BRIEF**

**\* \* \* \* \***

**Bryan D. Smith, Esq., residing at Idaho Falls, Idaho, for Petitioner, Brent Regan.**

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## STATEMENT OF THE CASE

### A. Nature of the Case and Course of Proceedings.

This case concerns the balance and separation of powers within our constitutional form of government and addresses the outer limits by which state lawmaking authority can be delegated to another government entity. Specifically, this case concerns whether Proposition #2, recently passed by the voters and also known as “Medicaid Expansion,” is unconstitutional because it delegates Idaho’s lawmaking authority under Article III, Section 1 of the Idaho Constitution to an agency or lawmaking authority of the United States government.

### B. Statement of Facts.

On October 18, 2017, an initiative petition was filed in the office of the Idaho Secretary of State.<sup>1</sup> The initiative petition proposed to add a new statute requiring that Idaho expand Medicaid eligibility. This initiative petition submitted to the Secretary of State contained four substantive sections. Pursuant to Idaho Code Section 34-1809, the Idaho Office of the Attorney General reviewed the initiative petition and prepared advisory comments dated November 7, 2017.<sup>2</sup>

The Office of the Attorney General did not consider whether the initiative petition was unconstitutional under the Idaho State Constitution for impermissibly delegating lawmaking authority to the United States government. Section one of the initiative petition represented the substantive portion of the initiative petition. This section required the state Medicaid

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<sup>1</sup> See Petition, Appendix C.

<sup>2</sup> See Petition, Appendix C.

program to expand its eligibility criteria to include certain individuals who are not otherwise eligible for Medicaid coverage.<sup>3</sup>

Section two proposed to amend the Idaho Code to specify that existing definitions would apply to the new statute. And Section three contained an emergency clause that was inappropriate given the different statutory framework surrounding the initiative process from the legislative process.<sup>4</sup> Section four of the initiative contained a type of “sunset clause” tied to a contingent condition. If the level of federal financial contribution for the expansion population was reduced below ninety percent (90%), the provision would be null and void. The Office of the Attorney General identified his concerns that this “sunset clause” may not be operative if triggered until and if the United States government allowed Idaho to terminate its involvement in expanding Medicaid eligibility.

By the time the initiative petition sponsors completed the signature gathering and the Secretary of State placed Proposition #2 on the November 6, 2018 ballot, Proposition #2 no longer contained sections three and four in the original initiative petition. Proposition #2 passed by majority vote. On November 20, 2018, Lieutenant Governor Brad Little issued a proclamation declaring Proposition #2 the “law.” Secretary of State Lawrence Denney has amended Idaho Code Section 56-267 to include the new law that reads in pertinent part as follows:

**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

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<sup>3</sup> See Petition, Appendix C.

<sup>4</sup> See Petition, Appendix C.

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.

The effect of Section 56-267 is that it expands the state Medicaid eligibility in accordance with the provisions of sections 1902(a)(10)(A)(i)(VIII) and 1902(e)(14) of the Social Security Act 42 U.S.C 1396a to include (1) persons who are under age 65; (2) whose income is at or below 133% of the federal poverty level; and (3) who do not otherwise qualify for standard Medicaid.

On November 21, 2018, Petitioner, Brent Regan, filed this Petition before this Court that has issued an Order requiring Petitioner to “provide briefing in support of the alleged unconstitutionality of Proposition 2, as well as the alleged legal effect of the implementation by the Department of Health and Welfare of the ‘planned amendments.’”

#### **ISSUES PRESENTED**

1. Does Idaho Code Section 56-267 unconstitutionally delegate lawmaking authority in violation of Article 3, Section 1 of the Idaho Constitution where Section 56-267 requires that the State of Idaho be bound by sections 1902(a)(10)(A)(i)(VIII) and 1902(e)(14) of the Social Security Act?

2. What is the legal effect of the implementation by the Department of Health and Welfare of the “planned amendments”?

## ARGUMENT

### A. This Court Is The Proper Forum For Review.

Under Idaho Code Section 34-1809(4), “Any 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 code section confers on an elector of the state a substantive right for this Court to determine the constitutionality of any initiative.

This Court issued its Order dated November 21, 2018 and referenced Idaho Appellate Rule 5(d) as the basis for the Order. That Rule states that “The Supreme Court acting through three (3) or more members, or by two (2) or more members when the Court is in recess, may issue a writ . . . to appear or respond at the time fixed in the writ to show cause why the relief requested in the petition should not be granted.” Idaho Appellate Rule 5(d) appears to be a rule of “procedure” (affecting mechanical operations of the court) whereas the right to bring an action in this Court to determine the constitutionality of an initiative appears to be a “substantive” rule (defining right) created by the legislature.

Accordingly, Petitioner requests that the Court follow Section 34-1809(4) and have the entire Court determine the constitutionality of Idaho Code Section 56-267 rather than follow the procedure in Idaho Appellate Rule 5(d). *See In re SRBA Case No. 39576*, 128 Idaho 246, 255 (1995) (this Court’s rule making goes to procedural as opposed to substantive rules given that this Court is bound to respect the legislature’s reasonable exercise of powers expressly delegated to it by the constitution of this state).

B. An Initiative Is Treated The Same As A Statute Passed By The Legislature And Signed Into Law By The Governor When Analyzing Its Constitutionality.

Article III, Section 1 of the Idaho Constitution identifies where “legislative power” resides in the state. Pursuant to Section 1, legislative power resides (1) in the senate and the house; (2) in The People reserved to themselves and known as the “referendum power”; and (3) in The People and reserved to themselves known as the “initiative power.” This Court has explained this as follows:

The People adopted a constitution which divides the powers of state government into three distinct branches (Const. art. II, sec. 1), the first and foremost of which is the legislative power (Const., art. III, sec. 1) “vested in a senate and house of representatives.” Then, as an afterthought and by way of amendment (in 1912), they reclaimed certain specified powers, one of which was “the power to propose laws, and enact the same at the polls independent of the legislature.” This created an alternative method for passage of a law and, *by the very terms of the reservation, the alternative method can only be exercised “under such conditions and in such manner as may be provided by acts of the legislature.”*

*Luker v. Curtis*, 64 Idaho 703, 706 (1943)

This Court has clearly stated that the initiative process is one way the “people” can exercise constitutionally vested “legislative power”:

Our prior cases make it clear that the initiative process is just one of three ways that the “legislative power of the state” is to be exercised under Article III, Section 1, of the Idaho Constitution, as amended in 1912 (the legislature and the referendum are the other two). Initiative legislation is on an equal footing with legislation enacted by the state and must comply with the same constitutional requirements as legislation enacted by the Idaho legislature.

*Westerberg v. Andrus*, 114 Idaho 401, 405 (1988).

Accordingly, the initiative process of lawmaking does “not give any more force or effect to initiative legislation than to legislative acts but [places] them on an equal footing. The power to thus legislate is derived from the same source” as that given to the legislature under the



Idaho Constitution. *Luker, supra*, 64 Idaho at 706. “Initiative legislation is of the same force and effect as that enacted by both houses of the legislature and approved by the governor, and must not violate *any* constitutional provision of the United States or of the State of Idaho.” *State v. Finch*, 79 Idaho 275, 280 (1957) (emphasis added). This means that The People of this state are bound by the same constitutional limits that have been placed on our elected representatives. *State v. Village of Garden City*, 72 Idaho 513, 524 (1953).

C. Idaho Code Section 56-267 Unconstitutionally Delegates Future Lawmaking Power To The United States Government And Agencies Thereof.

Article II, Section 1 of the Idaho Constitution establishes three distinct departments of government: The legislative, judicial, and executive branches. This constitutional provision prohibits an entity within one branch from exercising the powers vested within another entity of a different branch. It is therefore a constitutional mandate that there be a “separation of powers among the three branches of Idaho’s government.” *Mead v. Arnell*, 117 Idaho 660, 664 (1990). Therefore, each branch of government must exercise its constitutional powers and none other.

This Court has stated clearly that the legislative power resides exclusively in the legislature and by logical extension to any constitutional “lawmaking body”:

The Constitution of the State of Idaho and this Court, through its interpretation in the cases cited herein, have clearly established that the legislative power was vested exclusively in the legislature; that a statute or law should be enacted only by a bill, passed by both houses of the legislature and signed by the governor, or rejected by the governor, passed over the veto by the legislature, or having become law without the governor’s signature as provided in the Constitution.

*Mead, supra*, 117 Idaho at 664.

A corollary to this rule is that the legislature (and by logical extension any constitutionally equivalent “lawmaking body”) may not “delegate its authority to another government or agency.” *Idaho Sav. & Loan Ass’n v. Roden*, 82 Idaho 128, 134 (1960); *see also* Idaho Const. Art. II, Section 1, Art. III, Sections 1 & 15. This Court has explained that “[o]ne of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority.” *State v. Purcell*, 39 Idaho 642, 649 (1924).

In *Idaho Sav. & Loan Ass’n v. Roden*, 82 Idaho 128 (1960), this Court held that a statute was unconstitutional and in violation of the rule that a lawmaking body cannot delegate its lawmaking power to the federal government or an agency thereof. In that case, a statute required that Idaho savings and loan associations insure their accounts with the Federal Savings and Loan Insurance Corporation. *Id.* As a pre-requisite to insuring with the Federal corporation, a savings and loan association had to “abide by and conform with rules and regulations of the Federal Home Loan Bank Board adopted after the date of the Idaho legislation.” *Id.* The associations also had to “abide and conform with *any* amendment to Title 4 of the Housing Act . . . which may become effective after the date of the Idaho act.” *Id.* (emphasis added).

In *Roden*, this Court held that this was an unconstitutional delegation of Idaho legislative authority to the federal government and an agency thereof. *Id.* The adoption of the federal statutory scheme would allow the federal government to make amendments without the Idaho legislature exercising its legislative power. “The legal axiom that all legislative power is vested in the Legislature of the State of Idaho has been set forth in *State v. Nelson*, 36 Idaho 713, 213

P. 358. The legislature cannot delegate its authority to another government or agency in violation of our Constitution.” *Id.* at 228-229.

The defendant in *Roden* argued that the Court should not consider the modifications of the rules and regulations that the Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation enacted after the statute was passed because they did not affect the plaintiff. This Court stated, “This argument is not persuasive, inasmuch as the question to be resolved is whether or not the Legislature of the State of Idaho, contrary to the Idaho Constitution, Article 3, section 1, unlawfully delegated its authority to the federal government and an agency thereof.” *Id.* at 228. Thus, the statute was unconstitutional because the Idaho Legislature had unconstitutionally delegated future lawmaking power to the federal government in violation of Article III, Section 1 of the Idaho Constitution. *Id.*

Idaho Code Section 56-267 reads, in pertinent part:

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.

The effect of Section 56-267 is that it expands the state Medicaid eligibility in accordance with the provisions of sections 1902(a)(10)(A)(i)(VIII) and 1902(e)(14) of the Social Security Act to include persons (1) who are under age 65; (2) whose income is at or below 133% of the federal poverty level; and (3) who do not otherwise qualify for standard Medicaid. Section 1902(a)(10)(A)(i)(VIII) reads as follows:

[B]eginning January 1, 2014, [persons] who are under 65 years of age, not pregnant, not entitled to, or enrolled for, benefits under part A of subchapter XVIII of

this chapter, or enrolled for benefits under part B of subchapter XVIII of this chapter, and are not described in a previous subclause of this clause, and whose income (as determined under subsection (e)(14)) does not exceed 133 percent of the poverty line (as defined in section 1397jj(c)(5) of this title) applicable to a family of the size involved, subject to subsection (k);

42 U.S.C. 1396a.

Section 56-267 expressly states that the statute expands Medicaid eligibility in accordance with Section 1902(a)(10)(A)(i)(VIII). Importantly, in the future the federal government can exercise its lawmaking power and change the provisions of this section and related parts. Specifically, the federal government may decide that 133% of the poverty line needs to be 153% of the poverty line. This would increase the number of people eligible for Medicaid expansion and to whom Idaho would be required to provide Medicaid benefits. Section 56-267 and Section 1902(a)(10)(A)(i)(VIII) both use the “federal poverty level/line” as the baseline for the 133% amount. The federal poverty line is a number determined by federal census data collected from all 48 contiguous states, not just Idaho.<sup>5</sup> The federal government uses its lawmaking and rule delegation authority to arrive at the federal poverty line annually. 42 U.S.C. 9902. As the federal poverty line increases, so does the number of eligible persons under Section 56-267.

Section 56-267 expressly states that the statute expands Medicaid eligibility in accordance with Section 1902(e)(14) of the Social Security Act. This section addresses “income eligibility for medical assistance under the State plan” and serves as the standards to determine “income eligibility” under Section 56-267. Like the standards in Section 1902(a)(10)(A)(i)(VIII), the standards in Section 1902(e)(14) are subject to the federal government’s exercising its

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<sup>5</sup> See <https://www.census.gov/topics/income-poverty/poverty/guidance/poverty-measures.html>.

lawmaking power and changing the provisions of this section and related parts. In the future, the federal government may determine that a person can have twice the amount of assets or income that he can today and still be eligible for benefits under Section 56-267.

Because Section 56-267 delegates future lawmaking to the federal government and its agencies, Section 56-267 violates Article III, Section 1 of Idaho's Constitution. And just as this Court explained in *Roden*, the issue is not the effect that the federal government's future lawmaking may or may not have on Section 56-267 because "the question to be resolved is whether or not the Legislature of the State of Idaho [here, The People's initiative lawmaking power], contrary to the Idaho Constitution, Article 3, Section 1, unlawfully delegated its authority to the federal government and agency thereof." *Roden, supra*, 82 Idaho at 228.

Section 56-267 also unconstitutionally delegates Idaho's cost to the future lawmaking of the federal government. Under 42 U.S.C.A. 1396d(y), the federal government contributes to the costs that Section 56-267 will add to the state Medicaid program. The statute has a sliding scale and caps out at 90% in the year 2020 and thereafter. In the future, the federal government can exercise its lawmaking power and change the provisions of this section. Specifically, the federal government may decide that a 90% payment for an able-bodied adult is not fair given that the federal government pays only about 71% for disabled adults. The federal government can exercise its lawmaking power and change this 90% to 71% without Idaho ever exercising any of its lawmaking power found in Article III of the Idaho Constitution.

Even the proponents of Proposition #2 recognized that the federal government could in the future change this 90% figure to something less. This is likely why the initiative petition filed with the Secretary of State and reviewed by the Office of the Attorney General contained a

version of a sunset clause tied to a contingent condition.<sup>6</sup> This proposed clause, removed prior to passage, declared that the expansion provision shall become null and void if the level of federal financial contribution for the expansion population is reduced below 90%.

The Office of the Attorney General concluded that the sunset clause set forth in section four of the proposed initiative presented a “unique issue.” If the sunset clause were triggered, Idaho would be required to provide services for Medicaid expansion until the program could get an amendment approved by Centers for Medicare and Medicaid (“CMS”) to terminate the program. The Office of the Attorney General stated, “[T]here is a possibility that the amendment to remove this service could be delayed or *even denied*, either of which could limit the application of the Section 4 sunset clause.”<sup>7</sup> (Emphasis added).

Moreover, according to the Office of the Attorney General, “[I]f CMS outright denies the proposed amendment to return to the current eligibility criteria, the Medicaid program would have the opportunity to challenge that both administratively and if necessary through the courts; however the program would be required to continue providing those services with a higher percentage of state funds until a final decision could be obtained. The time that the state would have to continue providing services could be anywhere from a few months to several years.”<sup>8</sup>

Petitioner submits that the Office of the Attorney General views the language of Proposition #2 that became Section 56-267 as delegating lawmaking authority to the federal government who can decide in the future to change Idaho’s share of costs. In fact, according to

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<sup>6</sup> See Petition, Appendix B.

<sup>7</sup> See Petition, Appendix C.

<sup>8</sup> See Petition, Appendix C.

the Office of the Attorney General, Idaho might not ever get “permission” from the federal government or CMS to get a waiver for Section 56-267. Although proponents of Section 56-267 may claim that the State of Idaho could simply choose to terminate its Medicaid program altogether to avoid the effects of future federal lawmaking if the federal government reduced the 90% payment amount, this Court did not tell the plaintiff in *Roden* that he could choose to terminate his business altogether to avoid the effects of future federal lawmaking. Instead, this Court stated, “the question to be resolved is whether or not the Legislature of the State of Idaho, contrary to the Idaho Constitution, Article 3, section 1, unlawfully delegated its authority to the federal government and agency thereof.” 82 Idaho at 228.<sup>9</sup>

D. Section 56-267 Could Have Contained Limiting Language But Failed To Include It.

In 1995, President Clinton signed into law the Self-Employed Health Insurance Act.<sup>10</sup> An issue arose whether it applied retroactively to the benefit of Idaho taxpayers on their Idaho income taxes for 1994. Then Idaho Attorney General, Alan G. Lance, issued ATTORNEY GENERAL OPINION NO. 95-02 in which he stated that the provisions of the federal law did not apply retroactively to Idaho income taxes. Attorney General Lance also addressed the issue of possible constitutional implications of Idaho statutes relating to the new tax law. Attorney General Lance concluded that the Idaho statutes did not effect an adoption of federal law and then said this:

It is appropriate to note, however, that part of the reason for annually updating Idaho Code Section 63-3004 is to avoid any possibility of an apparent adoption of

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<sup>9</sup> The situation the Office of the Attorney General describes reminds Petitioner of a line from a famous song by The Eagles called “Hotel California.” That line reads, “You can check out any time you like, But you can never leave!”

<sup>10</sup> See Idaho Attorney General Opinion No., 95-02.

federal law changes that significantly affect state tax policy without legislative approval.<sup>11</sup>

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For this reason, the Idaho Legislature may adopt existing provisions of the Internal Revenue Code as a part of the Idaho Income Tax Act, but it cannot adopt, as Idaho law, unknown and unknowable future federal provisions.<sup>12</sup>

Here, Section 56-267 could have said, "in accordance with sections 1902(a)(10)(A)(i)(VIII) and 1902(e)(14) of the Social Security Act *as currently codified.*" Then, the Legislature could adopt the provisions annually to update Title 56, et seq. Instead, Section 56-267 allows the federal government to change the standards in Section 56-267 with unknown and unknowable future federal provisions. Having the Legislature revisit Section 56-267 and adopt the provisions annually would preserve the legislative making authority found in Article III of the Idaho Constitution and force the Legislature to exercise its lawmaking power.

E. The Delegation To The Federal Government Of Future Lawmaking Authority Can Change The Will Of The People From What They Agreed To Without Their Consent.

The People of the State of Idaho passed Proposition #2 understanding the current state of the law. For example, The People passed Proposition #2 understanding that the federal government would pay no less than 90% of the increased costs associated with Proposition #2. Another way to look at the unconstitutional delegation issue is to view what happens if the federal government changes the 90% amount to something less like 71%. The People may have never passed Proposition #2 if they had known that the federal government could increase the costs to taxpayers by 300%. Yet, as Section 56-267 is currently written, the federal government could do just that thereby thwarting the will of The People, putting into law a provision they did

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<sup>11</sup> The Idaho Legislature continues to this day annually adopting federal government tax code to prevent an unconstitutional delegation of lawmaking power to the federal government.

<sup>12</sup> See Idaho Attorney General Opinion No., 95-02.



not agree to, and taking away from The People the provision they voted for when they approved Proposition #2.

F. The Legal Effect of the Implementation By The Department Of Health And Welfare Of The "Planned Amendments."

The legal effect of allowing the current Section 56-267 is that Idaho will be delegating its lawmaking power to the federal government to make unknown and unknowable federal law the law of Idaho without Idaho exercising any lawmaking authority under Article III of the Idaho Constitution. This could mean the federal government could change the federal poverty level, the percentage of the poverty level to qualify for benefits under Section 56-267, the income and/or assets to qualify for benefits under Section 56-267, and even the share Idaho pays for Medicaid under Section 56-267. Moreover, in the future the federal government can change what The People voted for on Proposition #2 (including thwarting their will) without Idaho ever exercising any lawmaking authority under Article III of the Idaho Constitution.

**CONCLUSION**

For all the reasons set forth above, Petitioner requests that the Idaho Supreme Court declare Idaho Code Section 56-267 unconstitutional.

DATED this 20th day of November, 2018.

RESPECTFULLY SUBMITTED,

SMITH, DRISCOLL & ASSOCIATES, PLLC

By: 

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