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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, v. 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**

PETITIONER'S REPLY BRIEF

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I. THE COURT CAN ACCEPT JURISDICTION OVER THIS MATTER.

Respondent argues that Idaho Code Section 34-1809(4) cannot legislatively confer original jurisdiction upon this Court because only the Idaho Constitution can confer original jurisdiction upon this Court.[1] Respondent relies on this Court's Order entered June 3, 2003 in *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) (hereinafter referred to as "The Order.") However, this Court can assert original jurisdiction notwithstanding The Order or the reasoning it contains.

A. The Order Does Not Address The Rule That This Court Will Exercise Original Jurisdiction Where A Petition Alleges Sufficient Facts Concerning Possible Constitutional Violations.

Petitioners in the case in which this Court issued The Order raised four grounds upon which they argued this Court had original jurisdiction. Importantly, The Order does not address the rule that Petitioner raises here that this Court "will accept jurisdiction to review a petition for extraordinary relief where the petition alleges sufficient facts concerning possible constitutional violations." *Nez Perce Tribe v. Cenarrusa*, 125 Idaho 37, 38-39 (1993) (the Court exercised original jurisdiction because the amended petition alleged sufficient facts concerning possible constitutional violations); *see also Evans v. Andrus*, 124 Idaho 6, 11 (1993) (this Court exercised original jurisdiction, found a statute unconstitutional, and permanently prohibited the executive branch from enforcing its provisions); and *Mead v. Arnell*, 117 Idaho 660 (1990) (this

[1] Respondent and Intervenors have both filed briefs raising many of the same issues and arguments. Accordingly, Petitioner will mainly address Respondent's arguments responding where necessary or appropriate to Intervenors' arguments.

Court accepted jurisdiction limited to a simple declaration of the constitutionality of a particular statute or the lack thereof).

"[I]n certain circumstances this Court will exercise its original jurisdiction to rule on the constitutionality of a statute." *Nez Perce Tribe*, 125 Idaho at 38. This is particularly true when the issue presented is of an "urgent nature." *See Idaho Watersheds Project v. State Bd. Of Land Comm'rs*, 133 Idaho 55, 57 (1999) (recognizing that this Court may "exercise jurisdiction to review a petition for extraordinary relief where the petition alleges sufficient facts concerning a possible constitutional violation of an urgent nature"); *Sweeney v. Otter*, 119 Idaho 135, 138 (1990) ("Because the petition alleges sufficient facts concerning a possible constitutional violation of an *urgent nature*, we accept jurisdiction in this case to review the petition for extraordinary relief" (emphasis added)); and *Keenan v. Price*, 68 Idaho 423, 429 (1948) (accepting jurisdiction because of the "importance of the question presented" and the "urgent necessity for immediate determination").

Here, Petitioner claims that Idaho Code Section 56-267 is unconstitutional because it delegates state lawmaking authority to the federal government. Petitioner has presented sufficient facts concerning a possible constitutional violation. By its express terms, Section 56-267 is on a "fast track" because it requires the Department of Health and Welfare ("the Department) to submit a plan within 90 days from its passage and to effect its terms as soon as "practicable." Medicaid expansion has received considerable media and public attention with many groups and individuals pushing to implement the effects of Section 56-267 as soon as possible. The legislature needs to know during the 2019 legislative session whether Section 56-267 is a viable statute for funding purposes. The legislature will convene in January 2019 and

usually adjourns about 90 days later. This Court has abbreviated the briefing schedule and set a date for oral argument. All these facts tend to show that the issue of the constitutionality of Section 56-267 is of an "urgent nature." Thus, this Court should accept original jurisdiction in this matter.

B. This Court's Reasoning In The Order Does Not Apply Here Where Petitioner Seeks An Extraordinary Writ.

Article V, section 9, of the Idaho Constitution 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." When this Court issued The Order, this Court stated that Petitioners contended that this Court had original jurisdiction to hear their petition pursuant to one of the categories contained in Article V, section 9. But petitioners sought only a declaration from this Court, not any kind of writ found in Article V, section 9, of the Idaho Constitution.

Here, Idaho has created a "Code Commission" whose purpose is to keep Idaho Code up to date. I.C. § 73-201. The Code Commission is created in the Office of the Secretary of State, who also serves as its permanent secretary. I.C. § 73-203. The powers and duties of the Code Commission include bringing Idaho Code up to date as soon as practicable and removing statutes this Court rules to be unconstitutional. I.C. § 73-205. The Secretary of State also has the express duty to designate each act of the legislature which has become a law by its appropriate chapter number. I.C. § 67-903. Pursuant to his duties, the Secretary of State has

already added online Section 56-267 to the Idaho Statutes on the official website of the Idaho legislature.[2]

The Petition has a separate heading entitled "CLAIM FOR RELIEF" in which Petitioner requests that (1) this Court declare Section 56-267 unconstitutional; and (2) issue an order requiring the Secretary of State to remove Section 56-267 from Idaho law if the Secretary of State has already revised Title 56 to include it. Given that the Secretary of State has already exercised his authority and added Section 56-267 online to the Idaho Statutes, Petitioner, unlike petitioners in the case where this Court issued The Order, seeks an order requiring the Secretary of State to remove Section 56-267 from the laws of the State of Idaho. This order would most appropriately be called a writ of mandamus because it would be an order commanding action. *See Henry v. Ysursa*, 148 Idaho 913, 917 (2008) (stating that a writ of prohibition "arrests" while a writ of mandamus "commands" action). Accordingly, this Court can exercise original jurisdiction in this matter.

C. Respondent's Argument That Petitioner Cannot Constitutionally Challenge Section 56-267 Under Section 34-1809(4) Puts Petitioner In An Inequitable Lose-Lose Situation Contrary To The Legislature's Intent.

Respondent argues that Section 34-1809(4) allows this Court to review only an initiative, not a law. According to Respondent, given that Proposition 2 has passed and become law, Section 34-1809(4) does not allow this Court to review Proposition 2 (now codified as section

[2] https://legislature.idaho.gov/statutesrules/idstat/Title56/T56CH2/SECT56-267/.

56-267). But Respondent's argument runs up against a ripeness issue that creates a lose-lose situation for any qualified elector pursing a constitutional challenge under Section 34-1809(4).

In *Noh v. Cenarrusa*, 137 Idaho 798 (2002), this Court was presented with deciding the constitutionality of a proposed initiative. This Court concluded that the constitutional issue was not ripe: "There is not a real controversy at this point because Proposition One is simply a proposal. ***It has not become a law.***" *Id.* at 801 (emphasis added). Under the ripeness doctrine as articulated by this Court, until an initiative becomes a law, its constitutionality does not present a justiciable controversy any more than a bill passed by the House and Senate is ripe for adjudication before the governor signs it into law. An initiative does not become law until the governor issues a proclamation declaring the initiative approved by a majority of the electorate who voted. I.C. § 34-1813.[3] Based on this Court's holding in *Noh*, the constitutionality of Proposition 2 (now Section 56-267) was not ripe for adjudication until about 4:30 p.m. on November 20, 2018 when Lieutenant Governor Brad Little signed the proclamation.[4]

Given this Court's clear directive regarding ripeness in reviewing a constitutional challenge to an initiative before it has become law, and losing the ability to challenge an

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[3] Respondent further argues that "no expansion of Medicaid eligibility will occur unless the legislature appropriates the necessary additional funds." Respondent's Brief, p. 10. Given that the Department of Health and Welfare is even now at state expense amending the state plan to effect Medicaid expansion before any "legislative appropriation," this assertion is debatable; however, assuming for argument's sake only that this assertion is true, the eligibility standards set forth in section 56-267 in fact became the law in Idaho as soon as the proclamation was issued irrespective of any "legislative appropriation." Idaho Code § 34-1813.

[4] See Appendix 1 attached to Respondent's Brief. In addition, the "legislative process" for the initiative was not complete until the law took effect. As explained above, the legislative process was not complete until the proclamation was issued. In a concurring opinion, Justice Shepard has stated, "In my view it is exceedingly dangerous for this Court, or any court, to interfere with the legislative process. Within the duties of this Court is the determination of the constitutionality of actions of other branches of government but only when the time and circumstances are appropriate. I suggest that neither the time nor the circumstances are appropriate during the legislative process." *Associated Taxpayers of Idaho, Inc. v. Cenarrusa*, 111 Idaho 502, 503 (1986).

initiative after it has become law as Respondent argues, Petitioner finds himself right between the hammer and the anvil: In an effort to follow this Court's clear directive, Petitioner could not knowingly file a Petition that was not ripe for adjudication, but, in so doing, Proposition 2 converted into a law and became not justiciable under Section 34-1809(4), according to Respondent. Respondent argues Petitioner had to file the Petition before it became law. But under *Noh*, the constitutionality of Proposition 2 was not ripe before the proclamation was issued because "[i]t has not become law." 137 Idaho at 801.

This Court should effect the intent of the legislature when it passed Section 34-1809(4), which states that "[a]ny 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." The operative language is very broad stating that "any qualified elector" may "at any time after the attorney general has issued a certificate of review" bring an action before this Court. This broad language shows clear legislative intent in favor of providing a qualified elector an avenue to bring initiative constitutional challenges directly to this Court and stands in stark contrast to Respondent's argument, which if accepted, prevents a qualified elector from following *Noh* and file a Petition before an initiative becomes law. Accordingly, this Court should allow Petitioner to proceed and focus on the substance of the language of Proposition 2 that has become Section 56-267 rather than focus on whether that language is now called an "initiative" or a "law."

II. PETITIONER HAS STANDING TO CHALLENGE IDAHO CODE SECTION 56-267.

A. The Legislature Has Conferred Standing Under Idaho Code Section 34-1809(4).

When considering whether the legislature has conferred standing upon an individual to bring an action, this Court has said, "this Court gives effect to legislative intent and the purpose of the statute." *Thomson v. City of Lewiston*, 137 Idaho 473, 478 (2002). "'The legislature's intent in enacting a statute may be implied from the language used or inferred on grounds of policy or reasonableness.'" *Id. (quoting Allen v. Blaine County*, 131 Idaho 138, 141 (1998)). This Court has further stated, "[w]e presume that the legislature did not intend to change the common law unless the language of a statute clearly indicates the legislature's intent to do so." *Id.*

In *Thomson*, 137 Idaho at 478, this Court relied on these principles to hold that the legislature's use of the phrase "any person in interest" rather than "any person" shows legislative intent to limit the number of possible plaintiffs and require common law standing principles. At issue in *Thomson* was a statute that gave "any person in interest" standing to challenge a city ordinance creating an urban renewal plan. The plaintiff admitted that he lacked standing under traditional grounds. But a statute gave "any person in interest" standing to challenge the ordinance. This Court held that the legislature's use of the phrase "any person in interest" did not manifest an intent to change the common law standing requirements. "By using the term 'any person in interest' rather than 'any person,' we hold that the legislature intended to limit the number of possible plaintiffs, and incorporate common law standing principles." *Id.*

Here, Section 34-1809(4) confers standing on "[a]ny qualified elector," not "any person in interest." Nothing under traditional common law principles confers standing on "any qualified elector." Thus, the phrase "[a]ny qualified elector" demonstrates a legislative intent to change the common law and confer standing on anyone who qualifies as an elector under the laws of Idaho. A "qualified elector" is defined in Idaho Code Section 34–402:

> Every male or female citizen of the United States, eighteen (18) years old, who has resided in this state and in the county for thirty (30) days where he or she offers to vote prior to the day of election, if registered within the time period provided by law, is a qualified elector.

This Court has stated that Section 34-1809(4) specifically allows a qualified elector to file an action to challenge the constitutionality of an initiative. "While the petitioners do not meet the traditional requirements of standing and ripeness, Idaho Code § 34-1809 specifically allows them to file the present action." *Noh v. Cenarrusa*, 137 Idaho at 801.

Here, Respondent does not challenge that Petitioner is a "qualified elector." Petitioner has verified in the Petition that he is a qualified elector in the State of Idaho. Petitioner is registered in Kootenai County to vote and in fact voted in the general election held on November 6, 2018. Because Section 34-1809(4) specifically confers standing on Petitioner, he need not satisfy traditional standing requirements.

Respondent says that if this Court overturns Section 34-1809(4), "then Petitioner cannot independently demonstrate standing."[5] Respondent fails to support this issue with argument and authority why this Court should overturn the standing requirement or the entirety of Section 34-1809(4). This Court has stated recently and repeatedly that a party waives an issue

[5] Respondent's Brief, pp. 5-6

on appeal by failing to support the issue with argument and authority. *Bergeman v. Select Portfolio Servicing*, --P.3d—2018 WL 6694587 (December 20, 2018). Accordingly, Respondent has waived the issue of this Court's "overturning" the standing provision in, or the whole of, Section 34-1809(4), even if the jurisdictional component were unconstitutional.

The standing provision of Section 34-1809(4) would remain in effect even if this Court were to rule the jurisdictional component unconstitutional. "When determining whether the remaining provisions in a statute can be severed from an unconstitutional provisions, this Court will, when possible, recognize and give effect to the intent of the Legislature as expressed through a severability clause in the statute." *In re SRBA Case No. 39576*, 128 Idaho 246, 264 (1995).

Idaho Code Section 34-1823 contains a severability clause. Accordingly, even if this Court were to determine that the jurisdictional provision of Section 34-1809(4) was unconstitutional, the severability clause would save the balance of the provision including the standing provision because the jurisdictional component does not prevent the remaining provisions of the legislation from functioning as the legislature intended.

B. Intervenors' Standing Arguments Are Without Merit.

Intervenors claim this Court "held" in *Noh* that "***Idaho Code § 34-1809 cannot compel the Court to decide a case that lacks a judicial [sic] controversy.***"[6] Similarly, Intervenors claim

[6] Intervenors' Brief, p. 12. (Emphasis in original.)

"this Court previously held in *Noh*, Idaho Code § 34-1809(4) cannot create standing or a justiciable controversy where none otherwise exists."[7]

However, the "holding" of *Noh* was that the Court was not presented with a "justiciable controversy" because the voters had not yet voted on the proposed initiative, and the constitutional concept of separation of power prevented the Court from interfering with the lawmaking process. Waiting until the voters passed the initiative allowed the lawmaking process to proceed without unconstitutional judicial interference, while at the same time honoring the legislature's intent to allow a qualified elector to challenge the constitutionality of the initiative, but only after its passage.

Here, Petitioner has waited until the initiative lawmaking process is 100% complete. Section 56-267 has now become law. Accordingly, there is no concern that this Court will interfere with the initiative lawmaking process if this Court were to rule on the constitutionality of Section 56-267.

Intervenors further argue that "a statute that purports to convey standing in controversies that are not justiciable is unconstitutional."[8] Intervenors cite federal case law that Congress cannot erase Article III's standing requirement by statutorily granting the right to sue to a plaintiff who would not otherwise have standing. But "Idaho's standing requirement 'is a self-imposed constraint adopted from federal practice, as there is no 'case or controversy' clause or analogous provision in the Idaho Constitution as there is in the United States

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[7] Intervenors' Brief, p. 13. Intervenors' statement is contradicted by the express wording in *Noh*: "While the petitioners do not meet the traditional requirements of standing and ripeness, Idaho Code § 34-1809 specifically allows them to file the present action." *Noh v. Cenarrusa*, 137 Idaho at 801.
[8] Intervenors' Brief, p. 13.

Constitution.'" *Employers Resource Management Company v. Ronk*, 162 Idaho 774, 777 (2017) (*quoting Coeur d'Alene Tribe v. Denney*, 161 Idaho 508, 513 (2015)). The standing requirement "ensures that a court has the ability to order the relief sought, which must create a substantial likelihood of remedying the harms alleged." *Employers Resource Management Company v. Ronk*, 162 Idaho 774, 777 (2017).

Here, this Court clearly has the ability to declare Section 56-267 unconstitutional and enter an order directing the Secretary of State to remove Section 56-267 from Idaho Code. Because standing is a court-imposed requirement, not a constitutionally-mandated requirement, the legislature as a separate and equal branch of government can create standing statutorily through its lawmaking power subject only to constitutional limitations as was the case in *Noh*. Accordingly, Petitioner can rely on Section 34-1809(4) to satisfy the standing requirements because the legislature has statutorily created standing that does not run afoul of separation of powers concerns given that Petitioner has waited until Section 56-267 has become law.

III. RESPONDENT MAKES NUMEROUS ADMISSIONS ESTABLISHING THAT IDAHO CODE SECTION 56-267 IN FACT DELEGATES LAWMAKING AUTHORITY TO THE FEDERAL GOVERNMENT.

Respondent argues that "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."[9] Respondent further argues that

[9] Respondent's Brief, p. 11.

because Petitioner raises a series of "what ifs," Petitioner presents a claim that is nonjusticiable.

Respondent misunderstands the nature of Petitioner's argument that Section 56-267 is unconstitutional because it delegates Idaho lawmaking authority to the federal government. *See Idaho Sav. & Loan Ass'n v. Roden*, 82 Idaho 128 (1960) (holding that the legislature unlawfully delegated its lawmaking authority to the United States government because the defendant was required to abide and conform with federal rules and regulations after enactment of the Idaho legislation). Petitioner does not present the hypotheticals to show injury in fact that might result if the federal government changes the law. Instead, Petitioner presents them merely to illustrate that the federal government can in fact change the law in the future after passage of Section 56-267. This, in turn, establishes that Idaho has unlawfully delegated its lawmaking authority to the federal government.

Respondent does not dispute Petitioner's claims that the federal government does possess unilateral power to change federal law that will flow into the provisions of Section 56-267. Specifically, Respondent admits that the hypotheticals "may or may not happen"[10] and "may never come to pass."[11] If there were no delegation of lawmaking power at all, Respondent would say that the hypotheticals that affect Idaho "cannot happen" and "could never come to pass." The fact that they ***can*** happen and ***could*** come to pass establishes the federal government has unilateral power to change federal law that affects Idaho and Section 56-267 in particular.

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[10] Respondent's Brief, p. 12.
[11] Respondent's Brief, p. 7.

Reduced to its essence, Respondent's argument is that the federal government can make changes to Section 56-267, but that these changes are not an improper delegation because the Idaho Legislature can later accept or reject any such changes. Respondent says things like "[e]ach state plan is subject to amendment at any time when . . . there is a change in federal laws. . . ."[12] and that "[i]f the federal government alters the criteria for the provision of Medicaid services, the State . . . has the option to alter its offerings in accordance with the federal alterations."[13]

Respondent further argues that the legislature's appropriation authority provides an additional layer of oversight to accept or reject any prospective federal government changes to Section 56-267: "If the legislature does not appropriate the funds necessary to implement § 56-267, its oversight and involvement will not end there. Each year, Idaho's continued participation in Medicaid, including expansion, requires an annual appropriation."[14] Similarly, "through the appropriation process, the legislature will be able to review the implementation of Idaho Code § 56-267."[15] And "the Idaho legislature would be given the opportunity to review any amendments through the annual appropriation process. Nothing within § 56-267 is beyond review by the Idaho legislature."[16]

But one of Respondent's statements in particular sums up Respondent's position unequivocally: ***"The hypothetical harm Petitioner alleges will occur only if Congress acts and***

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[12] Respondent's Brief, p. 9.
[13] Respondent's Brief, p. 12.
[14] Respondent's Brief, p. 10.
[15] Respondent's Brief, p. 12.
[16] Respondent's Brief, p. 12.

the Idaho Legislature fails to act."[17] By this statement, Respondent admits that the federal government can prospectively change Medicaid expansion eligibility requirements that would then flow into Section 56-267 and become Idaho law without any action on the part of the Idaho legislature.

Respondent's unequivocal position underscores the difference between how Respondent envisions lawmaking authority under article III, section 1 of the Idaho Constitution and how this Court in *Roden* envisioned lawmaking under article III, section 1 of the Idaho Constitution. Specifically, Respondent admits that Section 56-267 delegates lawmaking authority to the federal government who can act and change Section 56-267; and this delegation is permissible because the Idaho legislature can later reject the federal government's changes to Section 56-267 if the legislature wishes.

This Court rejected a similar argument in *Idaho Savings & Loan Association v. Roden*, 82 Idaho 128 (1960). Specifically, in *Roden* the federal government enacted several changes to certain rules and regulations after the enactment of the Idaho statute the plaintiff was contesting. Defendants argued that these future rules and regulations should not be considered "as they do not affect the plaintiff," *id.* at 134—much the same way Respondent argues here that Petitioner's hypotheticals demonstrate no "injury in fact." This Court rejected the argument that the future rules changes had any relevance stating, "This argument is not persuasive, inasmuch as the question to be resolved is whether or not the Legislature of the

[17] Respondent's Brief, p. 12. (Emphasis added.)

State of Idaho, contrary to the Idaho Constitution, Article 3, § 1, unlawfully delegated its authority to the federal government and an agency thereof." *Id.*

In other words, what transpired after enactment of the Idaho statute was irrelevant because the issue was whether the statute delegated lawmaking authority in violation of article III, section 1 of the Idaho Constitution in the first place. This Court viewed the issue through the lense of a "constitutional continuum." On one end of the continuum lies the proper lawmaking power of an authority found in article III, section 1. On the other end lies the delegation of lawmaking power to an unauthorized body not found in article III, section 1. Immediately upon entry into that part of the continuum that represents the unconstitutional delegation of lawmaking power, the statute is unconstitutional. Whatever happens thereafter is irrelevant because the statute is unconstitutional and not to be saved by fixing the constitutional infirmity with subsequent lawmaking actions.

Stated differently, in *Roden* this Court started on the end of the continuum where proper lawmaking power lay under the Idaho Constitution. Once this Court concluded that the statute entered that part of the continuum where an unconstitutional delegation of lawmaking power lay, this Court ended the analysis. It did not matter whether the prospective rules of the federal government were good, bad, or actually caused the plaintiff "injury in fact." This Court certainly did not state that the legislature's otherwise unconstitutional delegation of lawmaking authority could be salvaged by the legislature's subsequently providing oversight, reviewing future changes to federal law, and rejecting those it found repugnant. Yet, this is the very argument Respondent makes in this case without citing any legal authority that supports this

extraordinary position for lawmaking—particularly, lawmaking under article III, section 1, of the Idaho Constitution.

This Court has very good reason to reject Respondent's argument. Legislators are elected to represent the people of Idaho. Their job is to legislate. They are supposed to review existing laws using their collective wisdom to keep those that are good and repeal those that are bad. They are also supposed to enact new laws that are good for Idaho. In this process, they are supposed to engage in policy debate and ***proactively*** exercise their lawmaking power. Under Respondent's approach, the federal government can make changes to federal law that flow into Section 56-267 and become Idaho law by default. If legislators fail to ***react*** to federal changes, then the people of Idaho get new law by default without their legislators' ever exercising lawmaking authority under article 3, section 1, of the Idaho Constitution. Idaho will have new laws without the Idaho legislature doing anything.

IV. RESPONDENT'S RELIANCE ON *STATE V. KELLOGG* IS MISPLACED.

In *State v. Kellogg*, 98 Idaho 541 (1977), this Court addressed whether the legislature had improperly delegated its authority to the Board of Pharmacy and the federal government to define which drugs required a prescription. Ultimately, this Court said, "[w]e cannot say that this is an improper delegation of legislative authority." *Id.* at 545.

The circumstances of *Kellogg* are not only distinguishable from those here but also call for limiting *Kellogg's* application. *Kellogg* dealt with drug regulation. This Court saw the issue of drug regulation as being in a class of its own: "Regulation of drugs demands particular regard for practical considerations" and requires a "free delegation" of authority. *Id.* at 543. This Court noted, "[i]n the area of drug regulation, delegations have been generally sustained

despite broad standards of discretion." *Id.* Given the unique nature of drugs, this Court applied a very broad, essentially "free delegation" standard not normally applied in delegation cases.

Other courts have followed suit and cited *Kellogg* noting that the area of drug regulation presents a unique situation requiring "flexibility." *See People v. Turmon*, 340 N.W.2d 620, 648 (Mich. 1983) (referencing *Kellogg* in support of its discussion that the area of drug regulation presents a unique situation requiring "flexibility"); *Lucas v. Maine Com'n of Pharmacy*, 472 A.2d 904, 912 (Me. 1984) (referencing *Kellogg* in its discussion about the "inherent difficulties of strict legislative control of pharmacology").

Because of the unique nature of drugs, many states, including Idaho as demonstrated in *Kellogg* itself, even allow administrative agencies to designate chemicals as "controlled substances" that become the basis for state criminal laws. *See State v. Tiplick*, 43 N.E.3d 1259, 1268 fn. 11 (Ind. 2015) (identifying 20 states to have analyzed statutes authorizing administrative agencies to designate chemicals as controlled substances subject to state criminal laws). The United States Supreme Court has even allowed the Attorney General to schedule substances as "controlled" for a limited time as "necessary to avoid an imminent hazard to public safety." *Touby v. United States*, 500 U.S. 160, 163, 111 S.Ct. 1752, 114 L.E.d.2d 219 (1991).

For these unique reasons, this Court in *Kellogg* appears to have applied a "free delegation" standard and allowed the Board of Pharmacy and the Commissioner of the United States Food and Drug Administration to define which drugs required a prescription.[18] Less than

[18] At the time of *Kellogg*, the only method by which a drug could become a prescription drug in Idaho was by the operation of federal law. And only the Commissioner of the United States Food and Drug Administration decided

one year after *Kellogg*, this Court appears to have limited *Kellogg* to situations where the legislature can empower rule-making to an agency or to "an official." In *Kermer v. Johnson*, 99 Idaho 433, 451 (1978), this Court cited *Kellogg* for the rule that "[a]lthough it is well established that the legislature cannot delegate any of its power to make laws to any ***other body*** or ***authority***, the legislature can empower ***an agency*** or ***an official*** to ascertain the existence of facts or conditions upon which the law becomes operative." (Emphasis added.) This statement suggests that while under some circumstances the legislature can delegate broad rule-making authority to administrative agencies and even government "officials," the rule applied in *Roden* remained well-established: The legislature cannot delegate any of its power to make laws in the future to any other body or authority, including the federal government.

Here, Respondent unsuccessfully argues that Medicaid eligibility standards are on par with the highly complicated, technical, and ever-changing world of drugs, including "controlled substances," stating, "Medicaid is a complicated program, and the Department has specialized expertise developed through its administration of the current Medicaid program."[19] However, the issue is not whether the Medicaid program is "complicated." The precise and only issue Section 56-267 addresses is the standards for expanding Medicaid benefits to a defined group of Idahoans. Unlike the area of drug regulation, expanding Medicaid eligibility standards does not require particular "expertise," "practical considerations," or "flexibility." Medicaid eligibility provides no standards for imposing criminal liability, unlike designating chemicals as "controlled

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for the federal government which drugs were to be regulated as prescription drugs. *State v. Kellogg*, 98 Idaho 541, 543 (1977).

[19] Respondent's Brief, p. 17.

substances" for both administrative and criminal law purposes. Simply put, Respondent fails to make the case that Medicaid expansion standards justify a "free delegation" of authority like that necessary to address the inherent difficulties of drug regulation requiring strict control.

Also, unlike the situation in *Kellogg* where the statute delegated regulatory authority to the "Board of Pharmacy and the Commissioner of the United States Food and Drug Administration to decide which drugs to regulate,"[20] Section 56-267 impermissibly delegates actual lawmaking authority to another "body" or "authority": The United States Congress. Specifically, Section 56-267 references both sections 1902(a)(10)(A)(i)(VIII) and 1902(e)(14) of the Social Security Act found at 42 U.S.C. 1396a and requires the Department to act in accordance with these sections. This is not a permissible delegation to "an official" to define facts or conditions upon which the law becomes operative like an FDA Commissioner that this Court said was permissible in *Kermer v. Johnson*, 99 Idaho 433, 451 (1978).

Interestingly, Justice Bakes' dissent in *Kellogg* over 40 years ago adopts the same reasoning that Petitioner asks this Court to follow here. Justice Bakes dissented in *Kellogg* first stating that the delegation simply went too far, particularly in the criminal context, even for the area of drug regulation. Justice Bakes then offered a solution that Petitioner asks this Court to follow: "The legislature is free to adopt by reference the drug laws of the United States at the time that I.C. § 37-2210 was enacted, but it may not delegate its legislative authority to the government of the United States in the future." *State v. Kellogg*, 98 Idaho 541, 547 n.2 (1977). Justice Bakes also provided the very same example Petitioner provided in its initial Brief:

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[20] Respondent's Brief, p. 14.

> The constitutional prohibition against adopting federal law in futuro has been recognized by the Idaho legislature in other contexts. Thus, I.C. § 63-3024 imposes a tax upon the "taxable income" of every resident individual, trust or estate. "Taxable income" is defined in I.C. § 63-3022 the same as it is in Section 63 of the "Internal Revenue Code." Internal Revenue Code is defined in I.C. § 63-3004 as "the Internal Revenue Code of 1954 of the United States, as amended, and in effect on the 1st day of January, 1977." 1977 I.S.L., ch. 1. The legislative history to I.C. § 63-3004 shows that each year the legislature amends that section to change the reference to the Internal Revenue Code to January 1, of the current year which seems to me a recognition by the legislature that it could not constitutionally pass a statute which would adopt by reference federal law in futuro.

State v. Kellogg, 98 Idaho 541, 547 n.2 (1977).

Petitioner similarly has argued that Section 56-267 needed to have said, "in accordance with sections 1902(a)(10)(A)(i)(VIII) and 1902(e)(14) of the Social Security Act ***as currently codified***" or similar words such as, "in effect on November 6, 2018" (the date the initiative was passed). Otherwise, Section 56-267 unconstitutionally delegates lawmaking power to the federal government. The addition of such limiting language protects and preservers the future lawmaking authority within the proper scope of article III, section 1 of the Idaho Constitution.[21] And with the addition of such limiting language, the legislature would be required to review the provisions annually and update Title 56, if necessary, after consideration of any changes to federal law. The people of this state deserve nothing less than engaged and vigilant legislators who stand as protectors to guard against default federal encroachment in violation of Article 10 of the United States Constitution: "The powers not delegated to the United States by the

[21] This limiting language also would allow Idaho to participate in all federal program contrary to Respondent's assertion that "Petitioner's argument would prevent the State from participating in any federal program." Respondent's Brief, p. 12. The fact is that following Petitioner's approach of including limiting language allows the State of Idaho to participate in any federal program while also preserving Idaho's lawmaking authority and urging the legislature to engage more fully in the legislative process.

Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

As written, Section 56-267 instead allows the federal government to change the standards in Section 56-267 with unknown and unknowable future federal provisions. Under Respondent's approach, these changes become Idaho law unless the legislature reacts. This approach not only violates the proactive lawmaking duty in article III, section 1 of the Idaho Constitution, but also stands as a retreat from Idaho's duty to jealously protect its own sovereignty recognized in Article 10 of the United States Constitution. Requiring the legislature to revisit Section 56-267 and adopt changes, if necessary, preserves Idaho lawmaking power. Moreover, it requires the legislature to exercise its lawmaking power proactively and deliberately, rather than reactively, and prevents turning our lawmakers into "zombie legislators" whose failure to act results in new Idaho law.

Respondent cites *Armstrong v. Exceptional Child Center, Inc.*, 135 S.Ct. 1378 (2015), and *NFIB v. Sebelius*, 567 U.S. 519, 587 (2012), for authority that states may voluntarily choose to comply or not comply with changes made by the federal government. Respondent correctly points out that Medicaid is a voluntary program where states choose to participate. Petitioner does not dispute this proposition. However, Respondent's proposition misses the issue.

The issue is not whether states may voluntarily choose to comply or not comply with changes made by the federal government in Medicaid law. The issue is whether Idaho gets to voluntarily choose before or after the federal law already has become Idaho law. If Idaho gets to voluntarily choose before, then Idaho exercises its lawmaking power on the "constitutional continuum" within the scope Article III, Section 1, of the Idaho Constitution. But if Idaho only

voluntarily chooses afterwards, then Idaho exercises its lawmaking power on the "constitutional continuum" outside the scope of Article III, Section 1, of the Idaho Constitution. In the end, Petitioner's approach to relying on federal law with the adoption of limiting language countenances a course that complies with Article III, Section 1, of the Idaho Constitution whereas Respondent's course does not.

V. IDAHO CODE SECTION 56-267 DOES IN FACT DELEGATE FUTURE LAWMAKING AUTHORITY TO THE FEDERAL GOVERNMENT.

Respondent claims that "section 56-267 delegates no authority to the federal government to make any future changes that would be binding on Idaho."[22] Respondent's argument is that "Idaho Code Section 56-267 allows for the expansion of Medicaid eligibility only under three specific conditions: 1. Individuals must be under 65; 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."[23] Further, "section 56-267 does not say that these conditions will automatically change if Congress alters federal law."[24] Instead, "[i]f federal law were to change one of the three criteria, Idaho law would not change with it unless the legislature amended section 56-267."[25]

The three specific conditions Respondent refers to are found in section 1902(a)(10)(A)(i)(VIII) of the Social Security Act. 42 U.S.C. 1396a. These three specific conditions are all requirements for Medicaid expansion eligibility and are expressly stated in

[22] Respondent's Brief, p. 15.
[23] Respondent's Brief, p. 14.
[24] Respondent's Brief, p. 14.
[25] Respondent's Brief, p. 15.

Section 56-267. But Medicaid expansion eligibility also has income standards found in section 1902(e)(14) of the Social Security Act. 42 U.S.C. 1396a. Medicaid expansion is aimed at people without means to purchase healthcare. The idea is that we do not want a $1 million lottery winner to qualify for Medicaid expansion. But no Medicaid expansion eligibility income standards are expressly stated as conditions in Section 56-267. Instead, Section 56-267 incorporates these standards by reference to Section 1902(e)(14) of the Social Security Act. If Congress changes these income standards, such changes would trigger an automatic change in Section 56-267 without any Idaho legislative action.

Respondent dismisses Section 56-267's reference to sections 1902(a)(10)(A)(i)(VIII) and 1902(e)(14) of the Social Security Act, saying that the reference "merely acknowledges that the three statutory conditions are consistent with current federal law."[26] Although they are consistent, they are also incomplete. None of the income standards found in Section 1902(e)(14) are set forth in Section 56-267. Moreover, under Section 1902(a)(10)(A)(i)(VIII), a person must also not be pregnant to qualify for Medicaid expansion.[27] As such, Section 56-267 omits "nonpregnancy" that is really an additional eligibility standard. The evidence is undisputed that Section 56-267 does not contain all Medicaid eligibility standards and expressly references specific federal law to include these standards.

According to Respondent, "[t]he second paragraph [of Section 56-267] allows for implementation of the three specific criteria defined in the first [paragraph of Section 56-267]"

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[26] Respondent's Brief, p. 15.

[27] Pregnancy is already a qualifying condition for traditional Medicaid.

and therefore delegates no legislative authority.[28] Respondent says the second paragraph of Section 56-267 "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" and "to take the necessary steps to implement the expansion of Idaho's Medicaid program to only the specific individuals defined by the statute."[29]

But the Department cannot implement a plan based only on the "three specific criteria" because the "three specific criteria" omit the income standards in Section 1902(e)(14) and the pregnancy standard in Section 1902(a)(10)(A)(i)(VIII) necessary for Medicaid expansion. The Department can implement Medicaid expansion beyond the specific three criteria because Section 56-267 expressly authorizes the Department to act in "accordance with" Sections 1902(e)(14) and 1902(a)(10)(A)(i)(VIII). In fact, Section 56-267 authorizes and requires that the Department implement Medicaid expansion in accordance with this federal law: "The department is required and authorized to take all actions necessary to implement" Medicaid expansion.

If Respondent were correct and Section 56-267 did not give power to the Department to act "in accordance with" the standards found in Sections 1902(e)(14) and 1902(a)(10)(A)(i)(VIII), then the only way for the Department to submit a federally-qualifying Medicaid expansion plan would be for the Department to exercise lawmaking authority and ***create***, not ***implement***, standards necessary for Medicaid expansion. Importantly, the authority to make law lies exclusively within the province of the legislature and not within the province of an

[28] Respondent's Brief, p. 15.
[29] Respondent's Brief, p. 16.

administrative agency whose province it is to implement law. *Mead v. Arnell*, 117 Idaho 660, 664 (1990).

VI. INTERVENORS' ARGUMENT THAT IDAHO CODE SECTION 56-267 DOES NOT DELEGATE LAWMAKING AUTHORITY IS SIMILARLY WITHOUT MERIT.

Intervenors argue that Section 56-267 does not "expressly" incorporate sections 1902(e)(14) and 1902(a)(10)(A)(i)(VIII) of the Social Security Act and requires only that the state amend its plan within 90 days at which time the purpose of Section 56-267 is completed. And Section 56-267 does not authorize or contemplate any future amendments to the state plan. Therefore, once the state amends its plan to expand Medicaid, the state cannot amend its plan again, even if the federal government changes the standards, without first obtaining legislative approval.

Intervenors' argument ignores the reality that Section 56-267 expressly authorizes the Department to amend its state plan to expand Medicaid eligibility "in accordance with sections 1902(e)(14) and 1902(a)(10)(A)(i)(VIII) of the Social Security Act." Intervenors acknowledge that the state plan must give assurance that it will be administered in conformity with federal law.[30] The whole Medicaid framework rests upon Idaho's compliance with federal law. To this purpose, Section 56-267 expressly authorizes the Department to act "in accordance with sections 1902(e)(14) and 1902(a)(10)(A)(i)(VIII) of the Social Security Act." Section 56-267 expressly authorizes the Department to act "in accordance with" these federal law standards even if Section 56-267 does not expressly adopt federal law. If these federal law standards were to change, Section 56-267 would continue to provide the Department authorization to act

[30] Intervenors' Brief, p. 7.

"in accordance with" the changed expanded Medicaid eligibility standards. Nothing in Section 56-267 requires the Department first to obtain approval from an Idaho lawmaking body before maintaining compliance because Section 56-267 already expressly authorizes the Department to act "in accordance with" federal law. Section 56-267 states, "The department is required and authorized to take all actions necessary to implement the provisions of this section."

Intervenors no doubt recognize this reality and therefore argue that "the use of the words 'in accordance with' is a description of an objectively ascertainable condition, not a delegation of legislative authority."[31] This is a distinction without a difference. The "objectively ascertainable condition" is federal law. If federal law changes, then the conditions change under which Idaho would participate in Medicaid expansion. However, the express authorization for the Department to act "in accordance with" then existing Federal law without first obtaining lawmaking authority would not change. Therefore, the federal government would be making Idaho law, and the Department would be implementing federal law, without first obtaining the authorization from any Idaho lawmaking power found in Article III, Section 1, of the Idaho Constitution.

The solution to this unconstitutional delegation of authority to the federal government is for Section 56-267 to have included a provision for the Department to act in accordance with Sections 1902(e)(14) and 1902(a)(10)(A)(i)(VIII) of the Social Security Act "in effect on November 6, 2018." In the event of a federal law change, this limiting language would divest the Department of any authority to change Medicaid eligibility standards without first obtaining

[31] Respondent's Brief, p. 15.

authority from an Idaho lawmaking body. Section 56-267's requirement that the Department amend the state plan and submit it to CMS within 90 days does not provide any protection because Section 56-267 expressly authorizes the Department to act "in accordance with" federal law without any limitations.

Finally, Intervenors argue that "unlike *Roden*, Idaho Code § 56-267 does not delegate any power to Congress or a federal agency 'to make future laws and regulations governing' Idahoans."[32] The fact that Section 56-267 expressly authorizes the Department to act "in accordance with" federal law that is subject to future changes is precisely the constitutional infirmity this Court found in *Roden*. Specifically, the federal government can change the Medicaid eligibility standards that the Department is expressly authorized and required to act upon. Petitioner submits that federal changes to Idaho state law affect Idahoans. Accordingly, the facts of this case fall squarely within the rule in *Roden*.

VII. RESPONDENT'S CLAIM THAT PETITIONER HAS NOT RAISED EVEN ONE VALID ARGUMENT IS ITSELF FRIVOLOUS, UNREASONABLE AND WITHOUT FOUNDATION.

Parties cannot waive subject matter jurisdiction that does not depend on the parties in the case or the manner in which they have stated their claims. *State v. Garcia*, 159 Idaho 6, 10 (2015). Here, Petitioner cited Section 34-1809(4) as the basis for subject matter jurisdiction. But this Court has accepted jurisdiction in the past to rule on the constitutionality of a statute. And this Court has original jurisdiction to issue a writ of mandamus that Petitioner seeks here to compel the Secretary of State to remove Section 56-267 from Idaho Code.[33] Idaho Const. art. V,

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[32] Intervenors' Brief, p. 17.

[33] In this Regard, this Court entered an order dated November 21, 2018 citing Idaho Appellate Rule 5(d) as the basis for ordering Petitioner to file its initial brief. Rule 5(d) governs the procedure of issuance of writs for which

§ 9. The Order Respondent relies on to say this Court has no jurisdiction under Section 34-1809(4) is not contained in any published opinion. Therefore, although it is "law of the case" in ***its*** case, it cannot be the law in ***this*** case until this Court follows it in a published decision.

Section 34-1809(4) expressly gives Petitioner standing to challenge the constitutionality of Section 56-267. Even if this Court has no subject matter jurisdiction under Section 34-1809(4), the standing provision of this section is severable and confers standing on Petitioner. Respondent has provided no argument or legal authority to the contrary thereby waiving the issue. Petitioner does not raise speculative and nonjusticiable concerns because Respondent concedes that Section 56-267, in fact, confers lawmaking authority on the federal government to change Idaho law unless the Idaho legislature fails to act.

Finally, Section 56-267 does in fact delegate authority to the federal government to make future changes to Section 56-267.[34] In this regard, Petitioner finds irony in Respondent's position that "section 56-267 delegates no authority to the federal government to make any future changes that would be binding on Idaho"[35] while at the same time maintaining that "[t]he hypothetical harm Petitioner alleges will occur only if Congress acts and the Idaho legislature fails to act."[36]

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this Court has original jurisdiction. The Court's subsequent order dated December 12, 2018 setting a briefing and oral argument schedule further appears to be done pursuant to Rule 5(d)'s procedures for issuance of a writ. Thus, it appears this Court is proceeding jurisdictionally under its original jurisdiction regarding the procedure to issue special and extraordinary writs.

[34] Petitioner submits that former Justice Bakes and former Attorney General G. Alan Lance would agree with Petitioner's analysis. *See* Justice Bakes' dissent in *State v. Kellogg*, 98 Idaho 541 (1977) (stating that statutes that delegate lawmaking authority to the federal government are unconstitutional unless they contain a limiting language reference, for example, such as, "in effect on the 6th day of November, 2018."); and ATTORNEY GENERAL OPINION NO. 95-02 (stating that the legislature cannot adopt, as Idaho law, unknown and unknowable future federal provisions).

[35] Respondent's Brief, p. 15.

[36] Respondent's Brief, p. 12.

CONCLUSION

For all the reasons set forth in the Petition for Review, in Petitioner's Brief in Support of Review, and in the Petitioner's Reply Brief, Petitioner respectfully requests that this Court declare Idaho Code § 56-267 unconstitutional and issue a writ of mandamus directing the Secretary of State to remove it from the official Idaho Code.

DATED this 9 day of January, 2019.

RESPECTFULLY SUBMITTED,

SMITH, DRISCOLL & ASSOCIATES, PLLC

By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9 day of January, 2019, 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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