IDAHO ATTORNEY GENERAL'S ANNUAL REPORT

OPINIONS

CERTIFICATES OF REVIEW

AND

SELECTED ADVISORY LETTERS

FOR THE YEAR

2023

Raúl R. Labrador
Attorney General

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2023 Idaho Att'y Gen. Ann. Rpt.

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2023 Idaho Att'y Gen. Ann. Rpt. 5

Similarly, the Certificate of Review of May 31, 2023 is found at:

2023 Idaho Att'y Gen. Ann. Rpt. 49

The Advisory Letter of February 20, 2023 is found at:

2023 Idaho Att'y Gen. Ann. Rpt. 73

CONTENTS

ATTORNEYS GENERALS OF IDAHO

GEORGE H. ROBERTS 1891-1892
GEORGE M. PARSONS..... 1893-1896
ROBERT McFARLAND 1897-1898
S. H. HAYS..... 1899-1900
FRANK MARTIN..... 1901-1902
JOHN A. BAGLEY 1903-1904
JOHN GUHEEN..... 1905-1908
D. C. McDOUGALL..... 1909-1912
JOSEPH H. PETERSON 1913-1916
T. A. WALTERS..... 1917-1918
ROY L. BLACK 1919-1922
A. H. CONNER 1923-1926
FRANK L. STEPHAN..... 1927-1928
W. D. GILLIS 1929-1930
FRED J. BABCOCK..... 1931-1932
BERT H. MILLER..... 1933-1936
J. W. TAYLOR 1937-1940
BERT H. MILLER..... 1941-1944
FRANK LANGLEY 1945-1946
ROBERT AILSHIE (Deceased November 16)..... 1947
ROBERT E. SMYLIE (Appointed November 24)..... 1947-1954
GRAYDON W. SMITH 1955-1958
FRANK L. BENSON 1959-1962
ALLAN B. SHEPARD..... 1963-1968
ROBERT M. ROBSON 1969-1970
W. ANTHONY PARK 1971-1974
WAYNE L. KIDWELL..... 1975-1978
DAVID H. LEROY 1979-1982
JIM JONES..... 1983-1990
LARRY ECHOHAWK..... 1991-1994
ALAN G. LANCE..... 1995-2002
LAWRENCE G. WASDEN 2003-2022
RAÚL R. LABRADOR..... 2023-

Raúl R. Labrador
Attorney General

INTRODUCTION

Dear Fellow Idahoans:

As your Attorney General, it is a great honor to present my administration's first volume of the Idaho Attorney General's Annual Report, Opinions, Certificates of Review, and Selected Advisory Letters. I believe it is the Attorney General's duty to be a strong advocate for the people of Idaho by guarding their liberties, defending the laws duly enacted by our representatives, and protecting our state's sovereignty. I am very proud of the great legal representation our office has provided to the people of Idaho.

The work published in this volume represents just a small portion of the many hours of research, writing, and service by my dedicated staff. Below are some highlights of the work accomplished by the attorneys and staff in the Office of Attorney General in 2023.

On the first few days of my administration, I learned that the Internet Crimes Against Children Unit (ICAC) – part of my Criminal Law Division – had a backlog of over 1500 cyber tips. This was extremely troubling because it meant that there were potentially many cases of child abuse and exploitation that were not being investigated. I immediately revamped the Criminal Law Division and restructured the ICAC Unit by increasing our resources (almost doubling its size) and improving our partnerships with local law enforcement and federal agencies to effectively fight the growing problem. In 2023, ICAC received 2,400 cyber tips. I am proud to report that even with the increasing number of cyber tips, ICAC was able to significantly reduce their backlog by the end of 2023. And currently, ICAC no longer has a backlog, and is triaging cyber tips within one week of receiving them.

In 2023, I re-established the Office of the Solicitor General to proactively fight against federal overreach and defend our state's laws. In one of our first legal battles, the Office of Solicitor General, working with the Energy & Natural Resources Division, won a major victory against the Biden Administration's regulatory overreach after they attempted to redefine which "waters of the United States" or WOTUS are federally regulated under the Clean Water Act. These two divisions

have been at the forefront in the battles against the federal government's attempts, through regulatory action, to control Idaho's waters and lands. As part of their great work, they submitted multiple comments challenging the Lava Ridge project in the Magic Valley. These challenges and many others are still ongoing, but I am fervently committed to fight the federal government's blatant overreach.

In 2023, Attorneys assigned to the Department of Health and Welfare recouped over $15 million in Medicaid estate recoveries. In addition, the Consumer Protection Division obtained over $2.4 million in consumer restitution, civil penalties, and costs and fees, and received more than $23 million from tobacco companies. As a result of work done by my office, Idaho received $2,442,281 from opioid settlements and completed new settlements involving two opioid manufacturers and three national pharmacies, requiring changes and oversight that will prevent future similar crises. These five companies will pay almost $90 million to the state, counties, cities, and local health districts over the next several years.

I invite you to visit my website at http://ag.idaho.gov if you would like to learn more about my office, the consumer protection resources available, and legal matters affecting Idaho. If you want to receive updates about the work we are doing for the citizens of Idaho, feel free to sign up to our weekly newsletter that can be found at https://www.ag.idaho.gov/newsroom/category/newsletter/.

Sincerely,

RAÚL R. LABRADOR
Attorney General

OFFICE OF THE ATTORNEY GENERAL
RAÚL R. LABRADOR
ATTORNEY GENERAL
2023
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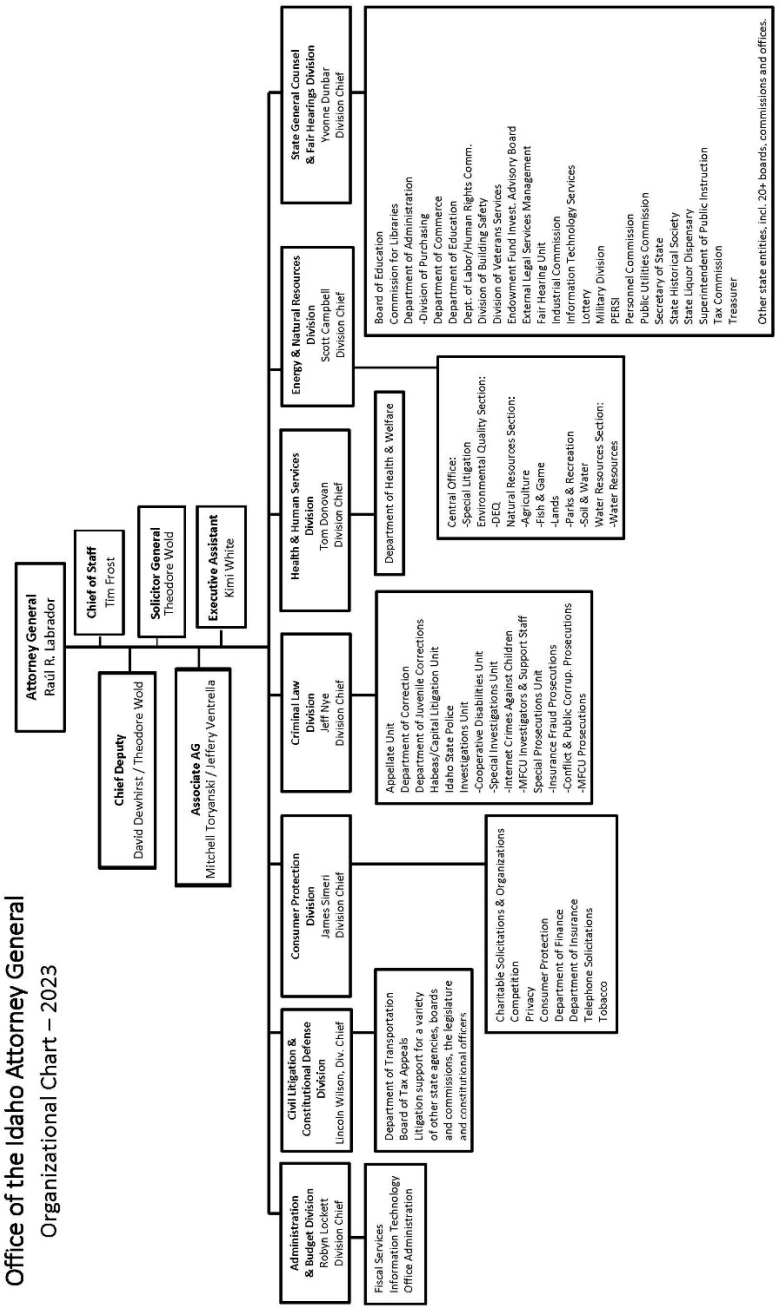
Office of the Idaho Attorney General
Organizational Chart – 2023
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Tim Frost
Chief Deputy
David Dewhirst / Theodore Wold
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Theodore Wold
Associate AG
Mitchell Toryanski / Jeffery Ventrella
Executive Assistant
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Administration & Budget Division
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Habeas/Capital Litigation Unit
Idaho State Police
Investigations Unit
-Cooperative Disabilities Unit
-Special Investigations Unit
-Internet Crimes Against Children
-MFCU Investigators & Support Staff
Special Prosecutions Unit
-Insurance Fraud Prosecutions
-Conflict & Public Corrup. Prosecutions
-MFCU Prosecutions
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-Special Litigation
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-Agriculture
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-Lands
-Parks & Recreation
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Water Resources Section:
-Water Resources
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External Legal Services Management
Fair Hearing Unit
Industrial Commission
Information Technology Services
Lottery
Military Division
PERSI
Personnel Commission
Public Utilities Commission
Secretary of State
State Historical Society
State Liquor Dispensary
Superintendent of Public Instruction
Tax Commission
Treasurer
Other state entities, incl. 20+ boards, commissions and offices.

OFFICIAL OPINIONS
OF
THE ATTORNEY GENERAL
FOR THE YEAR 2023

RAÚL R. LABRADOR

ATTORNEY GENERAL
STATE OF IDAHO

ATTORNEY GENERAL OPINION NO. 23-1

TO: The Honorable Bruce Skaug
Idaho House of Representatives
P.O. Box 83720
Boise, Idaho 83720-0038

Per Request for Attorney General's Opinion

You have requested an opinion from the Attorney General on the Attorney General's authority to prosecute violations of Idaho Code section 18-622. Your request raises important questions of Idaho law in the public interest and therefore this opinion is published as an official opinion of the Idaho Office of the Attorney General.

QUESTION PRESENTED

What authority does the Idaho Attorney General have to bring prosecutions for criminal abortion under Idaho Code section 18-622?

CONCLUSION

The Idaho Attorney General's criminal prosecutorial authority exists only where specifically conferred by statute or upon referral or request by county prosecutors. The Legislature has not granted the Attorney General any authority to prosecute violations of Idaho Code section 18-622. Thus, the Idaho Attorney General may bring or assist in a prosecution under Idaho Code section 18-622 only if specifically requested by a county prosecutor pursuant to an appointment made by a district court under Idaho Code section 31-2603.

ANALYSIS

The Attorney General is Idaho's "chief legal officer," but not its chief law enforcement officer. Newman v. Lance, 129 Idaho 98, 102, 922 P.2d 395, 399 (1996). Rather, Idaho Code dictates that it is "the policy of the state of Idaho that the primary duty of enforcing all the penal provisions of any and all statutes of this state, in any court, is

vested in the sheriff and prosecuting attorney of each of the several counties." Idaho Code § 31-2227. Those elected county prosecutors have plenary criminal enforcement authority to prosecute crimes that occur in their respective jurisdictions and do not answer to the Attorney General. Idaho Code § 31-2604. In fact, while Idaho law previously allowed the Attorney General "[to]exercise supervisory powers over prosecuting attorneys in all matters pertaining to [their] duties …," Newman, 129 Idaho at 102, 922 P.2d at 399, the Legislature struck that provision in 1998, limiting the Attorney General's criminal enforcement authority to the ability to "assist the prosecuting attorney … " in each respective county. State v. Summer, 139 Idaho 219, 224, 76 P.3d 963, 968 (2003). Even the Governor's authority in the matter is limited to "requir[ing] the attorney general to aid any prosecuting attorney in the discharge of his duties." Idaho Code § 67-802(7). The Governor may not require the Attorney General to assume those duties himself.

The Attorney General's ability to prosecute criminal cases as referrals from county prosecutors comes in two forms. First, when a county prosecutor cannot perform his or her duties, the county prosecutor may refer a case to the Attorney General and move for a court order appointing him as special prosecutor to assume "all the powers of the prosecuting attorney ….." Idaho Code § 31-2603(a). Second, a county prosecutor who wants to utilize the resources of the Attorney General's Office may seek the appointment of a special assistant Attorney General to prosecute or assist in prosecuting a criminal case. Idaho Code § 31-2603(b). Thus, under Idaho law, the Attorney General has prosecutorial authority only if specifically conferred by the Legislature or if requested by county prosecutors and approved by a state district judge.

I. The Legislature Has Not Given the Attorney General Independent Authority to Prosecute Violations of Idaho Code § 18-622.

The Legislature has conferred prosecutorial authority on the Attorney General to prosecute specific crimes in specific circumstances. For example, the Legislature has granted the Attorney General authority to prosecute violations of criminal law by county elected officials acting in their official capacity. Idaho Code § 31-2002. In addition, the Legislature recently enacted a new law to take effect

May 5, 2023 that would give the Attorney General discretion to prosecute violations of Idaho Code section 18-623, but only "if the prosecuting attorney … refuses to prosecute violations …." H.B. 242, § 18-623(4). The Legislature has not granted the Attorney General any such authority to prosecute violations of Idaho Code section 18-622.[1] Thus, the Attorney General has no power to bring independent prosecutions under that statute.

II. The Attorney General May Prosecute Violations of Idaho Code § 18-622 Only Upon Request by a County Prosecutor.

In the absence of a specific grant of prosecutorial authority, the Attorney General has that power only where his assistance is requested by a county prosecutor. That power is set forth in Idaho statutory law, which gives the Attorney General the "duty," "[w]hen required by the public service, to repair to any county in the state and assist the prosecuting attorney thereof in the discharge of duties." Idaho Code § 67-1401(7). As construed by the Idaho Supreme Court, the Attorney General's authority under this statute is entirely derivative: it exists only if the county prosecutor specifically requests the assistance of the Attorney General via an appointment by the district court under Idaho Code section 31-2603(b).

The Idaho Supreme Court construed these principles in Newman, where it rejected the Attorney General's attempt "to appear in a criminal case and assume control and direction of the case on behalf of the state[.]" 129 Idaho at 99, 922 P.2d at 396. At the time the Newman case was decided, Idaho statutory law still gave the Attorney General supervisory authority over county prosecutors. Id. Nevertheless, the Idaho Supreme Court relied on the fact that "[t]he legislature has made it the primary obligation of the Prosecutor to enforce the state penal laws … " by making it "the policy of the state of Idaho that the primary duty of enforcing all the penal provisions of any and all statutes of this state, in any court, is vested in the sheriff and prosecuting attorney of each of the several counties." Id. at 103, 922 P.2d at 400. Thus, the Idaho Supreme Court granted a writ "prohibiting the Attorney General from asserting dominion and control over the cases …." absent a request by the county prosecutor. Id. at 104, 922 P.2d at 401.

The Idaho Supreme Court further explained these principles in Summer. There, the Court observed that "in 1998 the Legislature deleted the provision allowing the Attorney General to exercise supervisory powers over prosecuting attorneys," which it said "apparently reduc[ed] the authority of the Attorney General in relation to county prosecuting attorneys." Id. at 224, 76 P.3d at 968. And, in any event, "[e]ven prior to the 1998 amendment …, Newman made it clear that the prosecuting attorney has primary responsibility for the enforcement of state penal laws." Id. The Idaho Supreme Court thus reaffirmed that, absent a specific statutory grant of prosecutorial authority, the Attorney General has independent authority to prosecute only upon petition by the county prosecuting attorney under Idaho Code section 31-2603.[2]

Finally, the foregoing limitations on the Attorney General's authority also mean he has no separate referral power. While county prosecutors have statutory power to refer a matter to the Attorney General for prosecution by requesting his assistance and appointment by the district court, see Idaho Code §§ 67-1401(7) and Idaho Code § 31-2603, Idaho law does not grant a reciprocal right to the Attorney General to refer a matter to county prosecutors. In those circumstances, the Attorney General stands in the same shoes as any citizen: he has the right to apprise a county prosecutor of facts that they believe constitute a prosecutable crime that the prosecutor may or may not decide to pursue. So, whether it is the Attorney General or any other private citizen who apprises the prosecutor of those matters, it remains within the county prosecutor's discretion to bring charges absent an express referral to the Attorney General and an appointment by the district court. Idaho Code § 31-2603.

CONCLUSION

For the reasons above, I conclude that the Idaho Attorney General may not bring or assist in a prosecution under Idaho Code section 18-622 unless a county prosecutor specifically so requests and an appointment is made by the district court under Idaho Code section 31-2603.

AUTHORITIES CONSIDERED

1. Idaho Code:

§ 18-622.
§ 18-623.
§ 31-2002.
§ 31-2227.
§ 31-2603.
§ 31-2604.
§ 67-802.
§ 67-1401.

2. Idaho Session Laws:

2023 Idaho Sess. Laws 947.

3. Idaho Cases:

Newman v. Lance, 129 Idaho 98, 922 P.2d 395 (1996).
Planned Parenthood of Idaho, Inc. v. Wasden, 376 F.3d 908 (9th Cir. 2004).
State v. Summer, 139 Idaho 219, 76 P.3d 963 (2003).

Dated this 27th day of April, 2023.

RAÚL R. LABRADOR
Attorney General

Analysis by:

JEFF NYE
Deputy Attorney General

[1] The original version of this bill would have given the Attorney General discretion to prosecute violations of Idaho Code section 18-622 as well. See H.B. 242, original bill text Feb. 28, 2023. However, those references were removed in subsequent amendments to the bill, which were ultimately passed by the Legislature and signed by the Governor.

[2] The Ninth Circuit's decision in Planned Parenthood of Idaho, Inc. v. Wasden, 376 F.3d 908 (9th Cir. 2004), is immaterial to this analysis, since a federal court's ruling on sovereign immunity under *Ex parte Young*, correct or not, cannot create state-law powers that do not exist under operative state law.

ATTORNEY GENERAL OPINION NO. 23-2

TO: The Honorable Mike Moyle
Idaho House of Representatives
P.O. Box 83720
Boise, Idaho 83720-0038

The Honorable Jason Monks
Idaho House of Representatives
P.O. Box 83720
Boise, Idaho 83720-0038

Per Request for Attorney General's Opinion.

You have requested an opinion from the Attorney General on the effects of Idaho Code section 33-804, Idaho Code section 63-809, and Property Tax Administrative Rule 801.

QUESTIONS PRESENTED

1. Does Idaho law allow a school district to seek voter approval of an additional plant facilities levy before the expiration of an existing ten-year plant facilities levy pursuant to Idaho Code section 33-804 and Property Tax Administrative Rule 801?

   Short Answer: Neither statute nor rule permits school districts to seek voter approval of an additional plant facilities levy before the expiration of an existing plant facilities levy.

2. Would an additional plant facilities levy be considered a levy that is "not authorized by law" pursuant to Idaho Code section 63-809(2)?

   Short Answer: Because a concurrent plant facilities levy transgresses an explicit statutory provision, that

concurrent levy should be set aside as illegal since it attempts to fix a levy not authorized by law.

TENETS OF STATUTORY CONSTRUCTION

In matters of statutory interpretation, the Idaho Supreme Court has long held that while "[s]tatutory interpretation begins with the literal language of the statute[,] [p]rovisions should not be read in isolation, but must be interpreted in the context of the entire document." Estate of Stahl v. Idaho State Tax Comm'n, 162 Idaho 558, 562, 401 P.3d 136, 140 (2017) (quoting State v. Schulz, 151 Idaho 863, 866, 264 P.3d 970, 973 (2011)); see also Idaho Code § 73-113. When construing a statute, it must be given "an interpretation that will not render it a nullity, and effect must be given to all the words of the statute if possible, so that none will be void, superfluous, or redundant." Bonner County v. Cunningham, 156 Idaho 291, 295, 323 P.3d 1252, 1256 (Ct. App. 2014) (quoting State v. Mercer, 143 Idaho 108, 109, 138 P.3d 308, 309 (2006)). Where ambiguity exists in a statute or a conflict exists between provisions of law, statutory interpretation is necessary. "The object of statutory interpretation is to give effect to legislative intent." State v. Doe, 147 Idaho 326, 328, 208 P.3d 730, 732 (2009) (citation omitted). When interpreting statutes, "[c]onstructions that would lead to absurd or unreasonably harsh results are disfavored." Saint Alphonsus Reg'l Med. Ctr. v. Gooding County, 159 Idaho 84, 89, 356 P.3d 377, 382 (2015) (quoting Spencer v. Kootenai County, 145 Idaho 448, 455, 180 P.3d 487, 494 (2008)). These same tenets of statutory construction apply when interpreting administrative rules. Grace at Twin Falls, LLC v. Jeppesen, 171 Idaho 287, 519 P.3d 1227, 1232 (2022). This Office employed these tenets of statutory construction in reviewing Idaho Code section 33-804, Idaho Code section 63-809, and Property Tax Administrative Rule 801.

ANALYSIS

A. Idaho law does not permit school districts to seek voter approval of an additional plant facilities levy before the expiration of an existing plant facilities levy.

Generally speaking, Idaho Code section 33-804 permits school districts, with voter approval, to collect revenue through a plant facilities

levy. The plain language of the statute indicates that a school district may not propose a new plant facilities levy before the expiration of an already existing levy of the same kind. Idaho Code section 33-804 states in relevant part:

> 33-804. SCHOOL PLANT FACILITIES RESERVE FUND LEVY. In any school district in which a school plant facilities reserve fund has been created . . . to provide funds therefor the board of trustees shall submit to the qualified school electors of the district the question of a levy not to exceed four-tenths of one percent (.4%) of market value for assessment purposes in each year, as such valuation existed on December 31 of the previous year, for a period not to exceed ten (10) years.
>
> The question of a levy to be submitted to the electors of the district and the notice of such election shall state the dollar amount proposed to be collected each year during the period of years in each of which the collection is proposed to be made, the percentage of votes in favor of the proposal which are needed to approve the proposed dollar amount to be collected, and the purposes for which such funds shall be used. Said notice shall be given, the election shall be held subject to the provisions of section 34-106, Idaho Code, and conducted and the returns canvassed as provided in title 34, Idaho Code; . . . .
>
> . . .
>
> If the question be approved, the board of trustees may make a levy, not to exceed four-tenths of one percent (.4%) of market value for assessment purposes as such valuation existed on December 31 of the previous year, in each year for which the collection was approved, sufficient to collect the dollar amount approved and **may again submit the question at the expiration of the period of such levy**, for the dollar amount to be collected during each year, and the number of years which the board may at that time determine. Or, during the period approved at any such election, if such period be less than ten (10) years or the

> levy be less than four-tenths of one percent (.4%) of market value for assessment purposes as such valuation existed on December 31 of the previous year, the board of trustees may submit to the qualified school electors in the same manner as before, the question whether the number of years, or the levy, or both, be increased, but not to exceed the maximum herein authorized. If such increase or increases be approved by the electors, the terms of such levy shall be in lieu of those approved in the first instance, but disapproval shall not affect any terms theretofore in effect.
> . . . .

Idaho Code § 33-804 (emphasis added). To summarize, this statute authorizes school districts which have a plant facilities reserve fund to levy a tax and collect revenue for this fund. The statute specifies two conditions: (1) a plant facilities levy may not exceed 10 years; and (2) it may not exceed "four-tenths of one percent (.4%) of market value for assessment purposes." Id. The statute also specifies requirements for what must be disclosed by a school district when submitting "[t]he question of a levy . . . to the electors of the district." Id. Additionally, the statute specifies a process for "again submit[ting]" the question of a levy to voters and for amending an existing plant facilities levy. Id.

The language of Idaho Code section 33-804 proscribes a school district from presenting to voters an additional plant facilities levy prior to the expiration of an already existing levy. The plain language of this statute specifically addresses when a school district may "again submit the question" of a plant facilities levy to voters. Id. The statute permits the question to be submitted to voters "at the expiration of the period of such levy," referring to the already existing plant facilities levy. Id. There is no provision in the statute that authorizes school districts to submit the question of a new levy before the expiration of this period.

The statute does provide one alternative: an existing plant facilities levy whose term is less than the maximum limit (ten years) or the levy limit (four-tenths of one percent of market value) may be amended to increase either limit, but "not to exceed the maximum" authorized in the statute. Id. If a plant facilities levy is amended, "the terms of such [amended] levy shall be in lieu of those approved in the

first instance." Id. In short, while the statute does allow for an existing plant facilities levy to be amended under certain limited conditions, it contains no language permitting a school district to submit the question of a new plant facilities levy to voters before the "expiration of the period" of an existing levy. Id.

Aspects of the statute would be nullified if school districts could levy concurrent plant facilities levies. Most immediately, multiple levies could render the time limit and levy limit in the statute effectively meaningless. Moreover, even if an additional plant facilities levy did not violate the time or levy rate limits, presenting a question of a new levy to voters without following the amendment procedure in the statute would nullify those provisions of the statute. It is inconsistent with the statute to read it as permitting concurrent plant facilities levies.

In interpreting this statute, the Commission appears to have reached this same conclusion about Idaho Code section 33-804. Property Tax Administrative Rule 801 states:

> Any school or library district with an existing plant facilities fund is not allowed to levy for an additional plant facilities fund in any tax year until the period of the existing plant facilities fund has expired. This limitation will not apply to any state-authorized plant facilities levy, established under Section 33-909, Idaho Code or the cooperative service agency school plant facilities levy established under Section 33-317A, Idaho Code.[1]

IDAPA 35.01.03.801(02). In this rule, the Commission appears to have interpreted Idaho Code section 33-804 as prohibiting school districts from having concurrent plant facilities levies. However, the Commission's intent is not fully clear as the rule uses the word "fund" throughout. The use of the word "fund" introduces possible ambiguity to the rule which makes it possible to read the Commission's rule in two ways. First, that the rule interprets Idaho Code section 63-804 as prohibiting a school district from having multiple plant facilities levies. Second, that the rule interprets the statute as prohibiting a school district from having multiple plant facilities funds. Neither of these readings is inconsistent or contradictory of Idaho Code section 33-804 and neither reading implies that a school district may have concurrent

plant facilities levies. As the language in Idaho Code section 33-804 is sufficiently clear, the possible ambiguity in this rule is immaterial to interpreting the statute.

Finally, interpreting Idaho Code section 33-804 as not permitting school districts to ask voters for concurrent plant facilities levies is consistent with general principles of municipal law.

> [M]unicipalities do not enjoy unfettered power to act in the absence of an express statutory limitation. Instead, "[m]unicipal corporations in Idaho may exercise *only* those powers granted to them by the state Constitution or the legislature." Alpert v. Boise Water Corp., 118 Idaho 136, 795 P.2d 298, 304 (Idaho 1990) (emphasis added) (citations omitted); Alliance for Property Rights and Fiscal Responsibility v. City of Idaho Falls, 742 F.3d 1100, 1102 (9th Cir.2013) (" 'Idaho has long recognized the proposition that a municipal corporation, as a creature of the state, possesses and exercises only those powers either expressly or impliedly granted to it.' ") (quoting Caesar v. State, 101 Idaho 158, 610 P.2d 517, 519 (Idaho 1980)).

In re Old Cutters, Inc., No. 1:13-CV-00057-EJL, 2014 WL 1319854, at *10 (D. Idaho Mar. 31, 2014), dismissed (Nov. 26, 2014).

> This position, also known as "Dillon's Rule," has been generally recognized as the prevailing view in Idaho. Moore, "Powers and Authorities of Idaho Cities: Home Rule or Legislative Control?", 14 Idaho L.Rev. 143, 147, n. 18 (1977) (for cases supporting this view). Thus, under Dillon's Rule, a municipal corporation may exercise only those powers granted to it by either the state constitution or the legislature and the legislature has absolute power to change, modify or destroy those powers at its discretion. State v. Steunenberg, 5 Idaho 1, 4, 45 P. 462, 463 (1896).

Caesar v. State, 101 Idaho 158, 160, 610 P.2d 517, 519 (1980). Municipalities are not presumed to have any inherent power. They may

only exercise such power as has been expressly granted to them by either the Constitution or by statute.

Neither the Constitution nor any statute grants school districts the authority to ask voters to approve concurrent plant facilities levies. Idaho's Constitution generally permits the Legislature to provide a system of revenue for counties and municipalities. See Idaho Const. art. VII, § 6.; art. VII, § 15; art. VIII, § 3; and art. XVIII, § 5. None of the constitutional provisions describing municipal finance grant any specific right to school districts related to plant facilities levies.

Additionally, no specific statutory authority warrants school districts to ask voters for what would be a concurrent plant facilities levy. After voters in a school district have approved a plant facilities levy, the statute presents two paths forward for a school district. It may either wait until the expiration of the existing levy to again present the question of a levy to taxpayers "[o]r" they may propose an amendment to the existing plant facilities levy. Idaho Code § 33-804. There is no third option. The statute does not authorize a school district to request a second levy prior to the expiration of a current plant facilities levy. Consistent with Dillon's Rule, the school district may only exercise such power as has been expressly granted to it. As that statute does not grant school districts the power to request a second levy during the term of an existing levy, such authority should not be inferred.

Taken altogether, the plain language of the statute does not permit a school district to propose a new plant facilities levy until an already existing levy of the same kind expires.

B. A Concurrent plant facilities levy, by failing to comply with Idaho Code § 63-809(2), should be considered "not authorized by law"

Idaho Code section 63-809 requires that the Idaho State Tax Commission ("Commission") report unauthorized and excess levies to either the Office of Attorney General or to specific county officials. The code section states that the Commission "shall carefully examine the statements furnished to it" by the counties related to their levy of property taxes. Idaho Code § 63-809; see also Idaho Code § 63-808. Under subsection (2) of this statute, if the Commission discovers:

> that the governing authorities of any . . . school district . . . have fixed a levy for any purpose or purposes not authorized by law or in excess of the maximum provided by law for any purpose or purposes, [then] the commission shall thereupon notify the attorney general . . . [and] notify the board of county commissioners, county treasurer and county attorney of the county in which it appears that such unauthorized or excess levy has or levies have been fixed.

Idaho Code § 63-809(2). Upon notification from the Commission, the attorney general or the county attorney "shall immediately bring suit in a court of proper jurisdiction against the . . . governing authorities of any . . . school district . . . levying such unauthorized or excess levy to set aside such levy as being illegal." Idaho Code § 63-809(3).[2]

In fulfilling its duty, the Commission reviews all property tax levies claimed by counties and municipalities. Idaho Code § 63-809(1). By rule, the Commission presumes that the reports made to it by the counties and municipalities are consistent with "pertinent statutory provisions." IDAPA 35.01.03.803(01)(a). If the Commission receives a complaint about a levy, the Commission will determine whether the levy is appropriate. IDAPA 35.01.03.120(05). "The Tax Commission's investigatory authority is limited to determining whether a levy rate or property tax budget increase exceeds any statutory maximum, or whether a levy is unauthorized." Id. The Commission will report a levy as being unauthorized or excessive if there is "clear and convincing documentary evidence" to establish that it is "an unauthorized levy." Id. Whether the Commission will determine any specific levy to be unauthorized depends upon its review of specific facts on a case-by-case basis. This Office does not have authority to direct the Commission's administrative decision-making process or its interpretation of law related to any particular case.

The language of Idaho Code section 63-809 is broad, categorical, and capacious, targeting actions which have "fixed a levy for any purpose or purposes *not authorized by law . . .*" (italics added). This phrase has never been interpreted by a court and the Commission has not issued any substantive rules, decisions, or guidance

interpreting this phrase. Nevertheless, the operative broad statutory language is sufficient to address this scenario.

In the scenario analyzed here, that is, where a school district asks its voters for a concurrent plant facilities levy, that is, one lacking statutory warrant, and which transgresses the explicit terms of Idaho Code section 33-804, it is reasonable to expect that a court would set aside a concurrent plant facilities levy as illegal since it lacks explicit statutory warrant.[3]

CONCLUSION

Idaho Code section 33-804 does not authorize school districts to levy concurrent plant facilities levies. The statute only permits a school district to amend its current plant facilities levy or wait to seek voter approval for a new plant facilities levy following the expiration of its current levy. If a school district does fix a concurrent plant facilities levy, the additional plant facilities levy should be considered a levy that is "not authorized by law" pursuant to Idaho Code section 63-809(2).

AUTHORITIES CONSIDERED

1. Idaho Constitution:

Article VII, § 6.
Article VII, § 15.
Article VIII, § 3.
Article XVIII, § 5.

2. Idaho Code:

§ 33-804.
§ 63-808.
§ 63-809.
§ 63-810.
§ 73-113.

3. Idaho Administrative Rules:

IDAPA 35.01.03.120.

IDAPA 35.01.03.801.
IDAPA 35.01.03.803.

4. Idaho Cases:

Bonner County v. Cunningham, 156 Idaho 291, 295, 323 P.3d 1252, 1256 (Ct. App. 2014).
Caesar v. State, 101 Idaho 158, 160, 610 P.2d 517, 519 (1980).
Estate of Stahl v. Idaho State Tax Commission, 162 Idaho 558, 562, 401 P.3d 136, 140 (2017).
Grace at Twin Falls, LLC v. Jeppesen, 171 Idaho 287, 519 P.3d 1227, 1232 (2022).
Saint Alphonsus Regional Medical Center v. Gooding County, 159 Idaho 84, 89, 356 P.3d 377, 382 (2015).
Spencer v. Kootenai County, 145 Idaho 448, 455, 180 P.3d 487, 494 (2008).
State v. Doe, 147 Idaho 326, 328, 208 P.3d 730, 732 (2009).
State v. Mercer, 143 Idaho 108, 109, 138 P.3d 308, 309 (2006).
State v. Schulz, 151 Idaho 863, 866, 264 P.3d 970, 973 (2011).

5. Federal Cases:

In re Old Cutters, Inc., No. 1:13-CV-00057-EJL, 2014 WL 1319854, at *10 (D. Idaho Mar. 31, 2014), dismissed (Nov. 26, 2014).

6. Attorney General Opinions:

1991 Idaho Att'y Gen. Ann. Rpt. 98.
1995 Idaho Att'y Gen. Ann. Rpt. 16.

Dated this 2nd day of August, 2023.

RAÚL R. LABRADOR
Attorney General

Analysis by:

JEFFERY J. VENTRELLA
Associate Attorney General

[1] While similarly named, these levies are separate levies that are not related to the procedure set forth in Idaho Code section 33-804.

[2] This summary of this provision is consistent with this Office's previous statements about this provision from Opinion No. 91-9 issued in 1991 and Opinion No. 95-3 issued in 1995. 1991 Idaho Att'y Gen. Ann. Rpt. 98 and 1995 Idaho Att'y Gen. Ann. Rpt. 16.

[3] If an otherwise approved levy for an authorized purpose contains mathematical or clerical errors, the legislature permits those errors to be corrected under Idaho Code section 63-810 without voiding the levy.

ATTORNEY GENERAL OPINION NO. 23-3

TO: The Honorable Phil McGrane
Idaho Secretary of State
700 W. Jefferson Street, E205
Boise, Idaho 83702

Per Request for Attorney General's Opinion.

You requested an opinion from the Attorney General on whether Idaho law allows caucuses to be held in public facilities. This opinion addresses the question you have presented.

QUESTIONS PRESENTED

1. Whether public facilities (i.e., state meeting rooms, city halls, schools, etc.) can be used by the political parties to conduct caucuses for the nomination of presidential candidates?

ANALYSIS

The Public Integrity in Elections Act generally disallows public funds, resources, or property to be used to advocate for candidates or ballot measures. However, there is an exemption that seems to allow political parties to run caucuses at public facilities so long as all political parties are given "equal and fair access" to the public facility. The applicable language of this Act is referenced below:

> (5) "Property or resources" means goods, services, equipment, computer software and hardware, college extra credit, other items of intangible property, or facilities provided to or for the benefit of a candidate, a candidate's personal campaign committee, a political issues committee for political purposes, or advocacy for or against a ballot measure or candidate. *Public property or resources that are available to the general public, at such times and in such manner as they are available to*

> *the general public, are exempt from this exclusion and may be used by a political party as defined in section 34-109, Idaho Code, provided that all political parties are given equal and fair access.*

Idaho Code § 74-603(5) (emphasis added).

The clear language of the stature indicates that political parties can use "[p]ublic property or resources that are available to the public." The only limiting language in the Act clarifies that the public property and resources must be used "at such time and in such manner as they are available to the general public". Id.

The statute does not define the phrase, "at such time and in such manner as they are available to the general public." Fortunately, the legislative meeting minutes pertaining to HB 566, which was eventually codified as Idaho Code sections 74-601 to 74-606, shed additional light on this language. For example:

> **Rep. Monks** presented **H 566** which would allow equitable use of public areas for all recognized political parties wanting to have an event *that is in accordance with the function of the location.* These events have taken place on occasion as it was assumed they were allowed to do so but it would be prudent to get permissions in writing.

House State Affairs Committee meeting minutes, February 11, 2022, p.3 (emphasis added).

> **Senator Stennett** asked if the bill would distinguish between general public areas and private properties with meeting rooms. **Representative Monks** responded that the bill applied only to publicly owned properties. He said the *bill would only apply to areas where one had to request authorization for the use, such as a meeting room.* He clarified that a space would not have to be always open to be considered generally available to the public, as long as it was open fairly to all parties.

Senate State Affairs Committee meeting minutes, February 11, 2022, p.3 (emphasis added).

Based on the comments captured in these legislative minutes, it appears that the Legislature intended to allow access to political parties to utilize public facilities at a time when such facilities were open to the general public and in accordance with the function of the location.

While schools are open to enrolled students and educators during school hours, they are not generally open to the public at large. Thus, a school would not be available for political party use during regular school hours. If the school facility is open to the general public after hours and/or the weekend, however, political parties should be granted permission to use the facility. The school would also have to allow equal and fair access to any other political party wanting to use its facilities.

CONCLUSION

The clear language of the Public Integrity in Elections Act generally disallows the use of public funds, resources, or property for the advocacy of candidates or ballot measures. However, it allows political parties to hold caucuses at public facilities so long as all political parties are given "equal and fair access" to the public facility.

AUTHORITIES CONSIDERED

1. Idaho Code:

§ 34-109.
§ 74-601, et seq.
§ 74-603(5).

2. Other Authorities:

Minutes of House State Affairs Committee, February 11, 2022.
Minutes of Senate State Affairs Committee, February 11, 2022.

Dated this 15th day of September, 2023.

RAÚL R. LABRADOR
Attorney General

Analysis By:

YVONNE DUNBAR
Division Chief, Deputy Attorney General

JEFFERY J. VENTRELLA
Associate Attorney General

ATTORNEY GENERAL OPINION NO. 23-4

TO: The Honorable Judy Boyle
Idaho House of Representatives
P.O. Box 83720
Boise, ID 83720-0038

Per Request for Attorney General's Opinion.

You have requested an opinion from the Attorney General on how the prohibitions on promoting or counseling in favor of abortion in the No Public Funds for Abortion Act, chapter 87, title 18, Idaho Code, apply to professors and other educators employed by Idaho's public universities and community colleges. Your request raises an important question on the application of Idaho law, and therefore this opinion is published as an official opinion of the Idaho Office of the Attorney General.

QUESTION PRESENTED

> Does the language in the No Public Funds for Abortion Act prohibiting the use of public funds to "promote" or "counsel in favor" of abortion prohibit employees of public institutions of higher education from speaking on abortion within the context of academic teaching and scholarship if their speech could be viewed as supporting abortion?

CONCLUSION

No. The No Public Funds for Abortion Act comprehensively prohibits the use of public funds to, among other things, "provide, perform, or induce an abortion; assist in the provision or performance of an abortion; promote abortion; counsel in favor of abortion; refer for abortion; or provide facilities for an abortion or for training to provide or perform an abortion." However, under a plain language interpretation of the Act applying appropriate canons of statutory construction, the Act does not prohibit university employees from speaking on abortion in

their academic teaching or scholarship, even if that teaching or scholarship could be viewed as supporting abortion or abortion rights in general.

ANALYSIS

In 2021, the State of Idaho enacted the "No Public Funds for Abortion Act." See Idaho Code § 18-8701. Among other things, the Act prohibits the use of public funds "in any way to provide, perform, or induce an abortion; assist in the provision or performance of an abortion; promote abortion; counsel in favor of abortion; refer for abortion; or provide facilities for an abortion or for training to provide or perform an abortion." Idaho Code § 18-8705(1). It also prohibits the use of any "part of any tuition or fees paid to a public institution of higher education … to pay for an abortion, provide or perform an abortion, provide counseling in favor of abortion, make a referral for abortion, or provide facilities for an abortion or for training to provide or perform abortion." Idaho Code § 18-8706. An intentional violation of the act by a public officer or public employee "shall be considered a misuse of public moneys punishable under section 18-5702, Idaho Code." Idaho Code § 18-8709.

This opinion is intended to clarify the scope of the Act as it relates to academic teaching and scholarship conducted by the employees of Idaho's public institutions of higher education. These important questions concerning academic freedom and the free speech rights of public university professors are frequently litigated from all sides of the political spectrum.[1]

I. First Amendment Interpretation Framework.

A. The Presumption of Constitutionality.

Interpretation of the Act is guided by well-established canons of statutory interpretation relating to the constitutionality of a statute. First, "[i]t is generally presumed that legislative acts are constitutional, that the state legislature has acted within its constitutional powers, and any doubt concerning interpretation of a statute is to be resolved in favor of that which will render the statute constitutional." Olsen v. J.A. Freeman Co., 117 Idaho 706, 709, 791 P.2d 1285, 1288 (1990) (citations

omitted). "Whenever possible, a statute should be construed so as to avoid a conflict with the state or federal constitution." State v. Gomez-Alas, 167 Idaho 857, 866, 477 P.3d 911, 920 (2020) (brackets and citation omitted). Thus, "[w]hen possible, the Court is obligated to seek an interpretation of a statute that upholds its constitutionality." Planned Parenthood Great Nw. v. State, 171 Idaho 374, 397, 522 P.3d 1132, 1155 (2022) (cleaned up). "[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, court is obligated to construe the statute to avoid such problems." INS v. St. Cyr, 533 U.S. 289, 299–300 (2001) (cleaned up). In interpreting statutes, one "must construe statutes under the assumption that the legislature knew of all legal precedent and other statutes in existence at the time the statute was passed." Twin Lakes Canal Co. v. Choules, 151 Idaho 214, 218, 254 P.3d 1210, 1214 (2011) (cleaned up). Finally, a statute should be given "an interpretation that will not render it a nullity." Id. (citations omitted).

B. Binding Precedent Allows Government to Limit Funding of Promotion of Abortion.

The U.S. Supreme Court has specifically addressed the question of whether the government may, under the First Amendment, prohibit the use of government funds to "engag[e] in activities that encourage, promote or advocate abortion as a method of family planning." Rust v. Sullivan, 500 U.S. 173, 180 (1991) (cleaned up). The Court held that "[t]here is no question but that the … prohibition … is constitutional." Id. at 192. This is because "the government may make a value judgment favoring childbirth over abortion and implement that judgment by the allocation of public funds." Id. at 192–93 (internal quotations, ellipses, and citation omitted). These restrictions can also be imposed upon employees who are voluntarily employed, since the "employees remain free … to pursue abortion-related activities" when they are not using the government funds and the prohibitions in question "do not in any way restrict the activities of those persons acting as private individuals." Id. at 198–99.

Rust's holding is even more notable because it was decided when the U.S. Supreme Court's precedent erroneously recognized a federal constitutional right to abortion. Now that the Supreme Court

has correctly held that the U.S. Constitution does not provide a right to abortion, see Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228, 2242 (2022), and Idaho has criminalized abortion in most circumstances, see Idaho Code § 18-622, this reasoning is even stronger. And there is no question that the State of Idaho may constitutionally prohibit the use of public funds to perform a criminal act, or to incite, solicit, or agree to assist a criminal act. See Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (incitement); Brown v. Hartlage, 456 U.S. 45, 55 (1982).

C. Binding Precedent Protects Speech by University Employees on Matters of Public Concern in Teaching or Scholarship.

At the same time that the First Amendment permits the government to limit the use of public funds in support of abortion, there is also a long line of cases from the U.S. Supreme Court and the U.S. Courts of Appeals interpreting the First Amendment protection of speech uttered by public employees. One of the earliest is Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty., Ill., 391 U.S. 563 (1968). In that case, the Court stated that even though public employees cannot be "compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest" as a condition of working for a government employer. Id. at 568. However, "it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." Id. Thus, in analyzing the free speech claims of public employees, the "problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Id.

More recently, the U.S. Supreme Court, in Garcetti v. Ceballos, 547 U.S. 410 (2006), addressed the question of "whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties." Id. at 413. The Court answered this question in the negative and held that "when public employees make statements pursuant to their official duties, the

employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." Id. at 421.

However, Garcetti also noted that "[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence." Id. at 425. Indeed, the U.S. Supreme Court has stated that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." Keyishian v. Bd. of Regents of Univ. of N.Y., 385 U.S. 589, 603 (1967). "That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." Id. Thus, the majority in Garcetti determined that "[w]e need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching." Garcetti, 547 U.S. at 425. Similarly, the Court in Rust observed that "the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment." Rust, 500 U.S. at 200.

While the U.S. Supreme Court has not yet decided whether the Garcetti analysis "would apply in the same manner to a case involving speech related to scholarship or teaching," Garcetti, 547 U.S. at 425, the issue has been addressed by several courts of appeals, including the Ninth Circuit. In Demers v. Austin, 746 F.3d 402 (9th Cir. 2014), the court held that "*Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed pursuant to the official duties of a teacher and professor." Id. at 412 (internal quotations omitted).

Similarly, courts in the Fourth, Fifth, and Sixth circuits, in addition to the Ninth Circuit, have held that Garcetti does not apply to professors at public universities while engaging in teaching and scholarship. Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021)at 512 (compiling cases to support its holding that public universities "cannot force

professors to avoid controversial viewpoints altogether in deference to a state-mandated orthodoxy" and concluding that the university violated a professor's free-speech rights when it disciplined him for refusing to use a student's preferred pronouns). Helping students think critically is a core value of public universities, and the "need for the free exchange of ideas in the college classroom is unlike that in other public workplace settings." Id. at 507. "The Nation's future depends upon leaders trained through wide exposure to [the] robust exchange of ideas…." Keyishian, 385 U.S. at 603. "Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." Id. (quoting Sweezy v. State of New Hampshire, 354 U.S. 234, 250 (1957)).

Thus, "academic employee speech not covered by Garcetti is protected under the First Amendment, using the analysis established in Pickering." Demers, 746 F.3d at 412. Under the two-part Pickering balancing test, the employee must first "show that his or her speech addressed matters of public concern." Id. (internal quotations omitted). "Second, the employee's interest in commenting upon matters of public concern must outweigh the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Id. (internal quotations omitted).

In applying this two-part Pickering balancing test to the question presented, there can be no doubt that speech related to abortion does address matters of public concern. In balancing that against the State's interest in promoting the efficiency of the public services it performs through its employees, it is important to note that this issue deals with a relatively small subset of public employees—only those employees of public institutions of higher education engaging in academic scholarship and teaching. The interest of this small subset of employees, however, has what the U.S. Supreme Court has declared to be a "special concern of the First Amendment." Keyishian, 385 U.S. at 603. This interest is of such vital importance that "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection." Id. (internal quotations and parentheses omitted).

On the other hand, the State also has a vitally important interest in that it is entitled to make certain value judgments and to implement that value judgment through the allocation of public funds. See Rust, 500 U.S. at 192–93. Further, the State, as set forth in Idaho's statutes, has a "'profound interest' in preserving the life of preborn children," and has declared it to be the policy of the State that "all state statutes, rules and constitutional provisions shall be interpreted to prefer, by all legal means, live childbirth over abortion." Idaho Code § 18-601; see also Dobbs, 142 S.Ct. at 2284 (2022) (describing a state's interest in prohibiting abortion as including, among other things, a "respect for and preservation of prenatal life at all stages of development," "the protection of maternal health and safety," and "the mitigation of fetal pain").

In the same way that a public university cannot discipline a professor for failing to comply with the university's preferred pronoun policy in the professor's classroom, see Meriwether, 992 F.3d at 511, the balancing test would likely make it unconstitutional for a state to prohibit professors from discussing abortion in the classroom or engaging in academic scholarship relating to abortion, even if some of that teaching and scholarship could be viewed as supporting abortion. If the Act were construed to prohibit that speech, the prohibition would likely be unconstitutional. Nevertheless, as discussed below, that issue is not reached because the plain language of the Act does not prohibit speech related to abortion in the context of academic teaching and scholarship. Thus, it is unnecessary to reach any final resolution of the *Pickering* balancing test in this context.

II. The Act Does Not Prohibit Public University Employees from Engaging in Speech in Academic Teaching or Scholarship Which Could Be Viewed as Supporting Abortion in General.

When engaging in statutory interpretation, the objective "is to derive the intent of the legislative body that adopted the act." Estate of Stahl v. Idaho State Tax Comm'n, 162 Idaho 558, 562, 401 P.3d 136, 140 (2017). As the Idaho Supreme Court has explained,

> [s]tatutory interpretation … begins with the literal language of the statute. Provisions should not be read

> in isolation, but must be interpreted in the context of the entire document. The statute should be considered as a whole, and words should be given their plain, usual, and ordinary meanings. It should be noted that the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant. When the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and the Court need not consider rules of statutory construction.

Id. (quoting State v. Schulz, 151 Idaho 863, 866, 264 P.3d, 970, 973 (2011)). In addition, it must be presumed that the legislature was aware of all applicable legal precedent existing at the time the statute was passed, including the legal precedent relating to academic speech discussed above. Twin Lakes Canal Co., 151 Idaho at 218, 254 P.3d at 1214.

The plain text of the Act does not prohibit public university employees from engaging in speech relating to academic teaching and scholarship that could be viewed as supporting abortion. The Act prohibits the use of public funds to "promote abortion" and to "counsel in favor of abortion." The plain meaning of these terms do not prohibit professors from speaking on abortion in their teaching and scholarship, even if that teaching or scholarship could be viewed as supporting abortion.

1. Interpreting "counsel in favor of."

"Counsel" is defined, in part, as "advice, esp. that given formally." *Counsel*, The New Oxford American Dictionary (2001). In the context of the Act, which is designed to prohibit the use of public funds for abortion, the plain meaning of the term "counsel" must refer to the counsel or advice one person gives to another person asking for advice or help with a specific situation. Academic teaching about abortion, discussing the arguments some have advanced in favor of abortion within the academic environment, and conducting academic scholarship relating to abortion would not be impacted by the term "counsel in favor of abortion," since those activities do not relate to counseling a specific person in a specific circumstance in favor of

abortion. Thus, a professor might violate the Act by advising a specific student during office hours to obtain an abortion, but would not violate the Act by discussing abortion in a favorable manner in class or in scholarship.

2. Interpreting "promote."

The term "promote" sometimes has a more generalized meaning than "counsel," being defined as "further the progress of (something, esp. a cause, venture, or aim); support or actively encourage." *Promote*, The New Oxford American Dictionary 1364 (2001). However, within statutory law, "promote" has also been interpreted with a meaning similar to the meaning of "counsel" discussed above. In U.S. v. Williams, 553 U.S. 285, 300 (2008), the U.S. Supreme Court held that the term "promotes," in a statute criminalizing the pandering of child pornography, "does not refer to abstract advocacy, such as the statement 'I believe that child pornography should be legal' or even 'I encourage you to obtain child pornography.'" Rather, the term "refers to the recommendation of a particular piece of purported child pornography with the intent of initiating a transfer." Id. The court held that the statute which, among other things, prohibited the promotion of child pornography, "falls well within constitutional bounds." Id. at 299.

The use of "promote" in the Act should be interpreted in the same manner as the U.S. Supreme Court did in Williams. Just as the term "promote," as used in the federal statute prohibiting the pandering of child pornography does not "refer to abstract advocacy," the term "promote" in the Act also does not refer to the abstract teaching and scholarship of abortion conducted by university professors. Rather, teaching and scholarship are critical to fulfill the ideals set forth in the above cited cases. These ideals—helping to train our Nation's future leaders, encouraging the robust exchange of ideas, helping students to learn how to think critically—are not inhibited by the Act. Rather, what is prohibited is contribution, on State time and money, to efforts to facilitate abortions. The most reasonable construction of the Act according to its plain language and the presumption of constitutionality is that it does not penalize the critical discussion of, or even favorable coverage of, abortion within the context of academic teaching and scholarship.

3. Application of the Act.

Based on this plain language interpretation, the Act does not prohibit any academic discussion in favor of abortion. While it is impossible to list every possible act that may be permissible, or that may run afoul of the Act, as examples only, a literature professor could assign students to read in class essays or literature discussing, or even advocating for, abortion without fear of violating the Act. An ethics professor could discuss abortion, and assign students to research topics of abortion, within a medical ethics course without fear of violating the act. A law school professor could teach about Roe v. Wade, Dobbs, and how states have regulated, or not regulated, abortion in the aftermath of Dobbs, and could even advocate that Roe was right and Dobbs is wrong, and that the State of Idaho's laws regarding abortion should be changed, without fear of violating the Act.[2] Professors can conduct academic scholarship, including research and writing, about abortion, even if that research or writing supports abortion, without fear of violating the Act.

The plain meaning of the phrases "promote abortion" and "counsel in favor of abortion" do not prohibit speech about abortion in the context of academic teaching and scholarship conducted by the employees of public institutions of higher education engaged in academic teaching and scholarship, even if that teaching or scholarship could be viewed as supporting abortion. However, official activities by public university employees which do not constitute academic teaching or scholarship would be prohibited by the Act. As an example only, a professor or other university employee could not, during office hours, counsel a specific student to abort her baby, or refer that student to an abortionist in order to abort her baby. And a professor could not, as part of her academic research or teaching responsibilities, use public funds to participate in or assist with an abortion in another state.

Nor do university professors have *carte blanche* authority to do whatever they want relating to abortion in the context of their teaching and scholarship. For example, Idaho Code section 39-9306(3) prohibits the use of "an unborn infant or the bodily remains or embryonic stem cells of an aborted infant in animal or human research, experimentation or study, or for transplantation." That statutory prohibition is unrelated to the speech or expressive conduct of university employees and is thus

unaffected by this interpretation of the Act. And the other prohibitions in the Act not addressed above forbid the use public funds to provide abortions, induce abortions, provide facilities for abortions or training to provide or perform an abortion, counsel a specific person to obtain an abortion, or to refer a specific person for abortion.

Finally, this opinion addresses only how the Act affects the academic speech of employees of public institutions of higher education relating to teaching or scholarship. It does not relate to speech by employees of public higher education institutions that is not related to teaching or scholarship, or to teaching or scholarship that is not speech or expressive conduct. Nor does this opinion apply to teachers at public primary and secondary schools since the same academic freedom analysis may not apply to primary and secondary school teachers. See, e.g., Demers, 746 F.3d at 413 ("[T]he degree of freedom an instructor should have in choosing what and how to teach will vary depending on whether the instructor is a high school teacher or a university professor."); Evans-Marshall v. Bd. of Educ. of the Tipp City Exempted Vill. Sch. Dist., 624 F.3d 332, 334 (6th Cir. 2010) (holding that the "right to free speech protected by the First Amendment does not extend to the in-class curricular speech of teachers in primary and secondary schools made 'pursuant to' their official duties.").

CONCLUSION

For the reasons above, I conclude that the plain meaning of the No Public Funds for Abortion Act does not prohibit employees of institutions of higher education from engaging in abortion related speech as part of their academic teaching or scholarship, even if that teaching or scholarship could be viewed as supporting abortion. Although the prosecutorial authority of this office is limited and triggered only upon referral by a county prosecutor, *see* Formal Opinion 23-1, this office would not bring any referred prosecution under the Act inconsistent with the interpretation set forth herein.

AUTHORITIES CONSIDERED

1. Idaho Code:

§ 18-8701.
§ 18-8705.
§ 18-8706.
§ 18-8709.
§ 18-622.
§ 18-601.
§ 39-9306(3).

2. Idaho Cases:

Estate of Stahl v. Idaho State Tax Comm'n, 162 Idaho 558, 401 P.3d 136 (2017).
Olsen v. J.A. Freeman Co., 117 Idaho 706, 791 P.2d 1285 (1990).
Planned Parenthood Great Nw. v. Idaho, 171 Idaho 374, 522 P.3d 1132 (2022).
State v. Gomez-Alas, 167 Idaho 857, 477 P.3d 911 (2020).
State v. Schulz, 151 Idaho 863, 264 P.3d, 970 (2011).
Twin Lakes Canal Co. v. Choules, 151 Idaho 214, 254 P.3d 1210 (2011).

3. Other Authorities:

Brandenburg v. Ohio, 395 U.S. 444 (1969).
Brown v. Hartlage, 456 U.S. 45 (1982).
Demers v. Austin, 746 F.3d 402 (9th Cir. 2014).
De Piero v. Penn. St. Univ., No. 2:23-cv-02281 (E.D. Pa. 2023).
Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228 (2022).
Evans-Marshall v. Bd. of Educ. of the Tipp City Exempted Vill. Sch. Dist., 624 F.3d 332 (6th Cir. 2010).
Garcetti v. Ceballos, 547 U.S. 410 (2006).
INS v. St. Cyr, 533 U.S. 289 (2001).
Jackson v. Wright, No. 4:21-CV-00033, 2022 WL 179277 (E.D. Texas 2022).

Keyishian v. Bd. of Regents of Univ. of N.Y., 385 U.S. 589 (1967).
Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021).
NCF Freedom, Inc. v. Diaz, No. 4:23-cv-00360-MW-MAF (N.D. Fla. 2023).
New Oxford American Dictionary (2001).
Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty., Ill., 391 U.S. 563 (1968).
Reges v. Cauce, No. 2:22-cv-0964 (W.D. Wash 2023).
Rust v. Sullivan, 500 U.S. 173 (1991).
Sweezy v. State of New Hampshire, 354 U.S. 234 (1957).
U.S. v. Williams, 553 U.S. 285 (2008).

Dated this 15th day of September, 2023.

RAÚL R. LABRADOR
Attorney General

Analysis By:

LINCOLN DAVIS WILSON
Division Chief, Civil Litigation and Constitutional Defense[1]

[1] See, e.g., Meriwether v. Hartop, 992 F.3d 492, 512 (6th Cir. 2021) (holding that the university violated a professor's free-speech rights when it disciplined him for refusing to use a student's preferred pronouns); *NCF* Freedom, Inc. v. Diaz, No. 4:23-cv-00360-MW-MAF (N.D. Fla. 2023) (complaint alleging that Florida's SB 266, which, according to the complaint, "outlaws college courses thought to advance 'political or social activism' and other disfavored concepts and prohibits the expenditure of funds associated with any program promoting 'diversity, inclusion and equity,'" violates academic freedom); Jackson v. Wright, No. 4:21-CV-00033, 2022 WL 179277 (E.D. Texas 2022) (ruling on a motion to dismiss in which a university professor alleged that he was disciplined, in violation of the First Amendment, for his academic writings and scholarship relating to a racially charged dispute about certain musical theorists); De Piero v. Penn. St. Univ., No. 2:23-cv-02281 (E.D. Pa. 2023) (complaint alleging constructive termination in violation of university professor's First Amendment rights based on the university professor's disagreement with "antiracist" training); Reges v. Cauce, 2:22-cv-0964 (W.D.

Wash 2023) (complaint alleging First Amendment violation due to disciplinary action against professor for refusing to include university land acknowledgement on class syllabus and including his own views on the subject on the syllabus).

[2] While it should go without saying, just as a professor could talk about his or her position on abortion as part of a relevant class discussion, students in the class would be equally free under the First Amendment to express their opinions on abortion, even if their opinions are opposed to the professor's opinions, without facing adverse consequences from the professor (such as a lower grade).

Topic Index

and

Tables of Citation

OFFICIAL OPINIONS
2023

UNITED STATES CONSTITUTION CITATIONS

IDAHO CONSTITUTION CITATIONS

UNITED STATES CODE CITATIONS

IDAHO CODE CITATIONS

ATTORNEY GENERAL'S CERTIFICATES OF REVIEW FOR THE YEAR 2023

RAÚL R. LABRADOR

ATTORNEY GENERAL
STATE OF IDAHO

May 31, 2023

The Honorable Phil McGrane
Idaho Secretary of State
Statehouse
VIA HAND DELIVERY

Re: Certificate of Review
Proposed Initiative Amending Title 34, Idaho Code, to change Idaho's elections for U.S. House and Senate, State Offices, Legislative Offices, and County Offices.

Dear Secretary of State McGrane:

An initiative petition was filed on May 2, 2023, proposing to amend title 34 of the Idaho Code. Pursuant to Idaho Code section 34-1809, this office has reviewed the petition and prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each legal or constitutional issue that may present problems. This letter therefore addresses only those matters of substance that are "deemed necessary and appropriate" to address at this time and does not address or catalogue all problems of substance or of form that the proposed initiative may pose under federal or Idaho law. Idaho Code § 34-1809(1)(a). Further, under the review statute, the Attorney General's recommendations are "advisory only," and the petitioners are free to "accept or reject them in whole or in part." Idaho Code § 34-1809(1)(b). This office offers no opinion with regard to the policy issues raised by the proposed initiative or the potential revenue impact to the state budget from likely litigation over the initiative's validity.

SUMMARY OF PROPOSED INITIATIVE

The proposed initiative broadly addresses two distinct subjects in Idaho law: (I) the replacement of Idaho's current party primary system for most offices with what the proposed initiative calls an "open primary"; and (II) the institution of an "instant run-off," otherwise known as "ranked choice voting," for the general election. The initiative

contains a severability clause in the event that any of its provisions are declared unconstitutional and, if passed, would take effect January 1, 2026. Pet. §§ 41–42.

I. "Open Primary"

The proposed initiative would replace Idaho's system of party primary elections with what it calls an "open primary." Id. § 5. The new primary system would apply to elections for United States Senator, Member of the United States House of Representatives, and elective state, district and county offices. Id. § 14. The new system would consist of a single primary for all voters regardless of affiliation. See id. §§ 9–10.

Idaho's current primary system allows each political party to nominate general election candidates by conducting a primary election in which the political party may limit participation to only those voters with particular party affiliations. Idaho Code § 34-404. The proposed initiative, by contrast, would create a single primary election where all voters, regardless of affiliation, narrow the field of eligible candidates for the general election. See Pet. §§ 10, 25. All candidates for a given office would appear on the same ballot and would be allowed to select any party affiliation, or nonpartisan or undeclared. Pet. § 16, Idaho Code § 34-704A(1). Each voter would be allowed to vote for a single candidate for each office whom they desire to advance to the general election. Pet. § 14.

Under the proposed initiative, the four top vote-earners for each office would advance to the general election ballot. Id. §§ 14, 26. The general election ballot would include each candidate's stated party affiliation along with a disclaimer stating that a candidate's indicated party affiliation does not represent an endorsement or nomination by that party. Id. § 26. Write-in candidates from the open primary could advance to the general election ballot only by meeting certain vote totals and filing a declaration of intent. Id. § 12–13.

The proposed initiative would abolish the process of parties nominating candidates for office. Under Idaho's current election system, a primary candidate may declare an affiliation with any party, but on the general election ballot, a candidate may express that

affiliation only if they have been nominated by that party in the primary. Idaho Code § 34-1214(1). The proposed initiative, in contrast, would permit candidates to express any party affiliation they wished, both in the "open primary" and, if they advanced, on the general election ballot. See Pet. §§ 5, 24. The general election ballot would state that the candidate's listed affiliation was not an endorsement of that candidate by the party. Id. § 24.

The proposed initiative then makes a series of other changes to Idaho statutory law intended to implement the provisions described above. Id. §§ 12, 15–23. This includes other changes to repeal aspects of Idaho election law where political parties have a role in the process, such as the ability to replace candidates for office on the primary and general election ballots. Id. §§ 22–23.

II. Instant Run-off General Election

The proposed initiative would also repeal Idaho statutes that prohibit instant runoff or ranked-choice voting. Idaho Code § 34-903B (effective 7/1/23). The proposed initiative would institute an "instant run-off" process for each covered elective office, Pet. § 6, provided that three or more candidates have advanced to the general election. Id. § 35, Idaho Code § 34-1218(2). While current Idaho law allows voters to vote for no more than one candidate for each office in the general election, the instant run-off system would require voters to rank all general election candidates in order of preference. Pet. § 6. The votes in this system would then be tabulated in rounds as follows:

- In each round, each ballot counts as a vote for its highest-ranked candidate still remaining in that round. Pet. § 35, Idaho Code § 34-1218(3).
- If in any round of voting, an active candidate has a majority of votes, that candidate is elected. Id., Idaho Code § 34-1218(3)(a).
- In the first round, if no candidate has a majority and there are write-in candidates who have filed a declaration of intent but received fewer than 100 votes or fewer than any non-write-in candidate, then the votes for that candidate are transferred to the next-highest ranked active candidate on each ballot. Id., Idaho Code § 34-1218(3)(b); see also Pet. § 12.

- In subsequent rounds, if no candidate has a majority, then the active candidate with the fewest votes is eliminated and the votes for that candidate are transferred to the next-highest ranked active candidate on each ballot. Pet. § 35, Idaho Code § 34-1218(3)(b).
- A ballot is inactive if it does not contain rankings for an active candidate or it contains an overvote—that is, two candidates with the same ranking—for its highest-ranked candidate. Id., Idaho Code § 34-1218(4).
- Tie votes, both for candidate elimination and wins, are broken by lot. Id., Idaho Code § 34-1218(5); Pet. § 34.

The proposed initiative also makes changes to determination of party vote share under article III, section 2, of the Idaho Constitution, which allows the two largest political parties to nominate members for the legislative redistricting commission. Under current law, party vote share is determined by the votes for party nominees in the general election. In contrast, under the proposed initiative, party vote share is determined by total votes in the first round for candidates who have indicated an affiliation for that party, regardless of whether they have been nominated or supported by that party. Pet. § 35, Idaho Code § 34-1218(6). The proposed initiative makes related changes to the statute setting forth the methods for creating a political party. Pet. § 11. The proposed initiative then makes a series of other changes to Idaho statutory law intended to implement the provisions above. See Pet. §§ 28–32, 36–40.

MATTERS OF STYLE AND FORM

This office has identified the following matters of style and form that may affect the validity of the proposed initiative.

I. Misleading Use of "Open Primary"

The use of the term "open primary" in the proposed initiative is misleading. "Open primary" is a term that refers to primaries that do not require voters to declare party affiliation to vote in a party's primary contest to nominate a candidate for the general election. See State Primary Election Types, Nat'l Conf. of State Legislatures, https://tinyurl.com/nhz8n5jm (Updated Jan. 5, 2021). Under current

law, Idaho is best characterized as having a "partially closed" primary because it allows parties to "let in unaffiliated voters, while still excluding members of opposing parties," thus giving parties "more flexibility from year-to-year about which voters to include." Id. The proposed initiative would not create an open primary system; it abolishes the system of party primaries for most offices. To avoid misleading voters, the proposed initiative should select terminology other than "open primary." For example, courts have referred to similar systems as a "blanket primary," which "is distinct from an 'open primary.'" Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 445 n.1 (2008).

II. Inconsistent Treatment of Party Nomination/Endorsement

The proposed initiative contains inconsistent and potentially misleading language regarding whether candidates are nominees of a party. For example, the initiative requires the Secretary of State to issue "certificates of nomination" to candidates who advance from the "open primary" to the general election. Pet. § 33. This is problematic because the initiative states elsewhere that advancing to the general election does not reflect that a candidate has been nominated by the party that the candidate claims. Id. § 26. The proposed initiative also provides conditions for write-in candidates of political parties to appear on the general election ballot, id. § 12, yet at the same time it otherwise prohibits candidates for "open primary" offices from being the nominees of a political party. And the proposed initiative makes parties' rights under Idaho law contingent on the general election performance of candidates who express an affiliation with them, yet at the same time it abolishes the parties' ability to nominate candidates for any office.

III. Miscellaneous Matters

Sections 1 and 2 of the proposed initiative contain, respectively, the law's title and its findings and purposes, but as this office understands these sections, they will not be codified in the Idaho Code. Only sections 3 through 38 are in proper legislative format for showing new statutory provisions.

Sections 6 and 7 of the proposed initiative are identical and thus redundant of one another.

Sections 14, 15, and 19 of the initiative appear to prohibit independent candidates from appearing on any primary election ballot. Section 14 retains current law that independent candidates shall not be voted on at primary elections, which is problematic if party primaries no longer exist. And while section 15 requires independent candidates to file their declaration of candidacy pursuant to Idaho Code section 34-708, section 19 then repeals Idaho Code section 34-708. As a result, the initiative would prohibit independent candidates from running for United States Senate, United States House of Representatives, any state office, and any county office by having them declare their candidacy in the manner provided by a statute that does not exist, prohibiting them from participation in the blanket primary, and prohibiting them from appearing on the general election ballot.

Section 16 requires candidates for the blanket primary to file a declaration of candidacy no later than the tenth Friday preceding the primary election, per Idaho Code section 34-704. However, section 13 of the initiative allows write-in candidates to file their declaration of candidacy no later than the eighth Friday before the election, per Idaho Code section 34-702A. As a result, write-in candidates for the blanket primary are instructed that they may timely file a declaration of candidacy for two additional weeks, but if they file within that period of time they cannot be recognized as a candidate in the blanket primary. This conflict should be addressed.

Section 17 of the proposed initiative provides for political party candidates for county offices to file with the county clerk. This appears to conflict with section 26, which only allows candidates who advanced from the blanket primary to be included on the general election ballot. Section 24 of the initiative provides for the printing of primary election ballots for party nominations for federal or statewide offices and provides that unopposed party candidates for party nomination advance to the general election ballot. This conflicts with section 26, which prohibits such candidates from being included on the general election ballot.

Section 25 states that electors who have designated a party affiliation may only vote in the primary election of their party but also contains a new provision that allows all electors to vote in the blanket primary. These clauses appear to be in conflict with each other.

Section 26 purports to limit the inclusion of party candidates on the general election ballot to party candidates for precinct committeeman. This could be construed to prohibit the inclusion of party candidates for President from appearing on the general election ballot in Idaho. It also would move precinct committeeman elections to the general election instead of the primary election where they currently occur. This would conflict with Idaho Code section 34-502 which requires that the new officers of county central committees be elected at a meeting held within 10 days after the primary election, and Idaho Code section 34-503, which requires the same of the legislative district committees within 11 days after the primary election. This portion of the initiative should be clarified.

Section 40 of the initiative is a general repeal of "[a]ll statutes inconsistent with the provisions of this act." The general nature of this prevents voters from having fair notice of what the initiative might be repealing and would be difficult to make effective because different people may have a different understanding of whether something is inconsistent. In addition, this section purports to accomplish this reconciliation by requiring the codifiers correction bill to include a repeal of any such statute, but an initiative cannot require the Legislature to write or pass any particular bill.

MATTERS OF SUBSTANTIVE IMPORT

These problems of style and form give way to more serious legal defects. Broadly considered, the initiative conflicts with: (I) statutory requirements for a ballot initiative; (II) state and federal constitutional dictates about elections for specific offices; (III) party rights of expression and association; and (IV) voter rights of expression and association.

I. The Proposed Initiative Violates Statutory Requirements.

Idaho statutory law imposes specific requirements for the submission of ballot initiatives. The proposed initiative fails to meet these in two critical respects.

A. The Proposed Initiative Violates the Single-Subject Rule.

The single-subject rule, adopted by the Legislature in 2020, provides that "[a]n initiative petition shall embrace only one (1) subject and matters properly connected with it." Idaho Code § 34-1801A. This standard codifies for initiatives Idaho's single-subject rule for constitutional amendments, Idaho Constitution article XX, section 2, and legislative acts, id. article III, section 16. That rule considers whether a proposed change can "be divided into subjects distinct and independent, … any one of which be adopted without in any way being controlled, modified or qualified by the other[.]" Idaho Watersheds Project v. State Bd. Of Land Comm'rs, 133 Idaho 55, 60, 982 P.2d 358, 363 (1999). This rule is intended to prevent initiatives from addressing multiple subjects at the same time and "forcing the voter to approve or reject such amendment as a whole." Id. (citation omitted). Voters cannot be "required to either support both proposals or to reject both." Id. Thus, the rule stops "the pernicious practice of 'logrolling' in the submission of a constitutional amendment." Id. (citation omitted).

The proposed initiative plainly violates Idaho Code section 34-1801A. It addresses two distinct subjects: (1) the so-called "open primary" that eliminates party primaries; and (2) the institution of ranked choice voting for the general election. These two matters are separate subjects and neither one depends on the other. The presence of these two distinct subjects is also apparent from the "Findings and Intent" section of the initiative, which separately describes two different purposes for each of these two voting measures. Pet. § 2.

Idaho voters cannot be required to either adopt the "open primary" system and the ranked choice voting method of general election voting or to reject both of them. That is the very type of "logrolling" the Idaho Supreme Court has held violates the single subject requirement. Idaho Watersheds Project, 133 Idaho at 60.

B. The Proposed Initiative Cannot Provide Its Own Ballot Title.

To the extent the proposed initiative attempts to provide its own ballot title, it violates Idaho statutory law. Idaho law makes it the duty of the Attorney General to provide a ballot title that gives a "true and impartial statement of the purpose of the measure and in such language that the ballot title shall not be intentionally an argument or likely to

create prejudice either for or against the measure." Idaho Code § 34-1809(2)(e). That consists of a "[d]istinctive short title not exceeding twenty (20) words by which the measure is commonly referred to or spoken of" and "[a] general title expressing in not more than two hundred (200) words the purpose of the measure." Idaho Code § 34-1809(2)(d)(i)–(ii). Here, however, the proposed initiative provides both its own short and general titles, describing itself as "The Idaho Open Primaries Act" and making detailed descriptions of the purported "findings and intent" for the law. Pet. §§ 1–2. As noted above, these sections would not be enacted in Idaho Code as part of the law itself. And rather than being written as "true and impartial" descriptions of what the law accomplishes, the descriptions contain misleading phrases such as "open primary" that, for the reasons noted above, are likely to confuse voters about what the proposed initiative would do. Unlike a statutory enactment approved by the legislature, a proposed ballot initiative is not the product of legislative give-and-take, inclusive of amendments, nor is it tested against expert testimony. As such, it's inappropriate for the proposed initiative to assert "findings and intent" for the law.

II. Both Constitutions Impose Election Requirements for Certain Offices.

A. State Constitution Sets Vote Thresholds for State Executives.

The proposed initiative's application of ranked choice voting for state executive office violates the Idaho Constitution. The Idaho Constitution provides that for the statewide executive branch offices, the candidate "having the highest number of votes for the office voted for shall be elected." Idaho Const. art. IV, § 2. This means that a majority of the votes cast is not necessary; instead, whoever gets the most votes wins. In contrast, the proposed initiative sets the threshold to win election to any office at a majority of the remaining vote through a sequential tabulation process. The proposed initiative states that if no candidate receives a majority of the votes upon the count of the vote in the election, the election goes to a series of what it calls "instant runoff elections," but which are really subsequent rounds tabulating lower-ranked votes cast on general election ballots. The candidate with

the fewest votes is eliminated in each round until one candidate has received a majority of ranked votes.

Other state supreme courts have addressed whether procedures like this run afoul of similar state constitutional provisions setting vote thresholds at less than a majority. The Supreme Court of Maine unanimously held that this method of voting violated a state constitutional provision stating that candidates for governor or the legislature win election if they receive more votes than their opponents for the race. Opinion of the Justices, 162 A.3d 188 (Me. 2017). "[W]hen a statute—including one enacted by citizen initiative—conflicts with a constitutional provision, the Constitution prevails." Id. at 198. Ranked choice voting "prevents the recognition of the winning candidate when the first plurality is identified," but the state constitution required "a candidate who receives a plurality of the votes would be declared the winner in that election." Id. at 211. Because the instant runoff method "would not declare the plurality candidate the winner of the election but would require continued tabulation until a majority is achieved or all votes are exhausted," it was "in direct conflict with the Constitution." Id.

In contrast, the Alaska Supreme Court upheld the state's ranked-choice election system as consistent with a similar provision of the Alaska Constitution. Kohlhaas v. State, 518 P.3d 1095 (Alaska 2022). It concluded that the system was in fact a single election in which the vote count was complete only when all rounds of counting and elimination of candidates had concluded. Id. at 1120. It rejected the reasoning of the Maine Supreme Court that "each round of vote *tabulation* is a separate round of *voting*" and thus "that the system is akin to a series of runoff elections." Id. at 1121.

This office believes that the opinion of the Maine Supreme Court better accords with principles of interpretation as they relate to the Idaho Constitution and the proposed initiative. The proposed initiative's clear emphasis is on obtaining majority support to elect a candidate, even though the Idaho Constitution nowhere states that a majority is required. See Pet. §§ 2, 35. As the Maine Supreme Court explained, the constitution requires that a candidate who wins a plurality be elected, yet the system set out in the proposed initiative demands further rounds of vote counting and sets a threshold far exceeding a plurality.

This office disagrees with the Alaska Supreme Court's explanation that ranked choice voting constitutes a single round of voting that "is not complete until the final round of tabulation." Kohlhaas, 518 P.3d at 1121. Under the system proposed here, lower-ranked candidate choices on ballots will never be considered, much less tabulated, if a candidate attains a majority in an earlier round. And the final round of tabulation is deemed "final" only because a candidate has attained a majority of ranked votes cast: a different standard than that required by the Idaho Constitution.

A related problem arises for the method for breaking ties in the proposed initiative. Unlike both Maine and Alaska, article IV, section 2 of the Idaho Constitution provides that in the event of a tie in the election for statewide executive branch officials, the election result is determined by vote of the Legislature. The instant runoff election system violates this provision by stating that ties will be broken by proceeding to another round of eliminating the candidate with the least votes and counting the lower choices of those whose candidate is eliminated.[1] Thus, this aspect of the instant runoff election system also violates the Idaho Constitution as applied to statewide executive branch officials.

B. U.S. Constitution Commits Congressional Elections to Legislature.

The proposed initiative likely violates the Federal Constitution with respect to the election of United States Senators and Representatives. The United States Constitution states that "[t]he times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof." U.S. Const. art. I, § 4 (the "Elections Clause"). Because the U.S. Constitution commits the manner for electing Senators and Representatives to state legislators, there are substantial questions surrounding whether it can lawfully be changed via the initiative process. The U.S. Supreme Court in Arizona State Legislature v. Arizona Independent Redistricting Commission, 576 U.S. 787 (2015), upheld a redistricting commission that operated independent of the legislature, while four dissenting justices held that this was contrary to the history and plain language of the constitution. Id. at 824 (Roberts, C.J., dissenting). More recently, however, the Supreme Court granted

certiorari and has heard oral argument in Moore v. Harper, 142 S. Ct. 2901 (2022), which may revisit aspects of Arizona State Legislature. Moore concerns whether the Elections Clause prohibits a state supreme court from construing the state constitution contrary to the will of the legislature with respect to congressional elections. Thus, if the U.S. Supreme Court revisits its holding in Arizona State Legislature, it may prevent the proposed initiative from changing the legislature's prescribed manner for electing Senators and Representatives.

III. The Proposed Initiative May Violate the Rights of Parties.

By abolishing the party primary system for most offices, the proposed initiative may violate state and federal constitutional provisions that protect the expression, association, and political rights of political parties. The party primary system, adopted in Idaho and most other U.S. jurisdictions, was instituted to make political parties accountable to their members. Under the prior system, party bosses made the decision about which candidates would run in the general election. See Political Primaries: How Are Candidates Nominated?, Library of Congress, https://tinyurl.com/mrxbehyc (last visited May 30, 2023). Primaries were adopted so that members of recognized parties could vote on the candidates that they wished to represent their interests in the general election. Id. By going through that process, a party creates a formal association with a candidate that the party presents as its nominee for a given office. See Cal. Democratic Party v. Jones, 530 U.S. 567, 573 (2000).

The ability of a political party to nominate a candidate for public office is a powerful right of speech and association in the democratic process. The U.S. Supreme Court has "continually stressed that when States regulate parties' internal processes they must act within limits imposed by the Constitution." Id. "Representative democracy" in our country requires that citizens be able "to band together in promoting among the electorate candidates who espouse their political views," which is a right "that the First Amendment protects." Id. at 574. That "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only," that is, the right not to associate just as much as the right to associate. Id. (citation omitted). "'Freedom of association would prove an empty guarantee if associations could not limit control over their

decisions to those who share the interests and persuasions that underlie the association's being.'" Id. at 574–75 (citation omitted).

There is "no area" of a political party's association right to exclude that is "more important than … the process of selecting its nominee." Id. at 575. Thus, the U.S. Supreme Court has "vigorously affirm[ed] the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party selects a standard bearer who best represents the party's ideologies and preferences." Id. (citation omitted). In doing so, it has overturned a California law that created a single primary in which voters could vote for non-party members to select party nominees, see id., but it upheld against a facial challenge a Washington law that created a single primary but did not make any candidate the nominee of the party. Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008).

The proposed initiative alters the rights of political parties granted by the Idaho Constitution. Significantly, the Idaho State Constitution accords political parties rights that do not exist in every state constitution. For example, Idaho has made the expressive rights of parties fundamental to its constitution by according the two largest parties rights to select members of the redistricting commission. Specifically, "[t]he leaders of the two largest political parties of each house of the legislature" are each entitled to designate one member of the redistricting commission, as are "the state chairmen of the two largest political parties, determined by the vote cast for governor in the last gubernatorial election." Idaho Const. art. III, § 2.

By removing the ability of the parties to nominate a candidate through the primary process, the constitutionally granted right of parties to designate members of the redistricting commission is impaired, if not entirely voided. Pet. §§ 2(1), 5. No analogous constitutional provision was addressed in Washington State Grange. Unlike in Washington State Grange, the issue with the proposed initiative is not simply the removal of the party primary nomination process. Instead, the proposed initiative also circumscribes the right of political parties to participate in redistricting in the form and manner laid out in the Idaho State Constitution. If this change does not significantly impair the right, it will certainly dilute it.

IV. The Proposed Initiative Violates Rights of Voters.

The proposed initiative also violates voters' rights of suffrage under the Idaho Constitution, which states that "[n]o power, civil or military, shall at any time interfere with or prevent the free and lawful exercise of the right of suffrage." Idaho Const. art. 1, § 19. In an ordinary election, a voter may vote for one of the candidates on the ballot, a write-in candidate, or no candidate at all. But the proposed initiative interferes with suffrage by requiring voters to vote for all candidates on the ballot. It does so through its instruction prohibiting the voter from, among other things, skipping a ranking of candidates, Pet. § 26, and its requirement that the voter "shall" mark his ballot to indicate the specific ranking order the voter wishes to assign to each candidate. Id. § 27. Taken separately or together, these provisions require voters to rank every candidate in the election and thus to cast ballots in favor of candidates they may not support. And these "shall" provisions are not without teeth: the potential consequence of failing to rank a candidate is to have one's ballot not considered in successive rounds of the tabulation procedure. Pet. § 35, Idaho Code § 34-1218(4).

Idaho caselaw suggests this constitutes direct interference with the right to vote only for candidates the voter supports. In Van Valkenburgh v. Citizens for Term Limits, 135 Idaho 121, 127–28, 15 P.3d 1129, 1135–36 (2000), the Idaho Supreme Court struck down a statute that provided for the inclusion of a statement regarding the candidates making of a term limits pledge as interfering with the right to vote. The court reasoned that including this information on the ballot was equivalent to having a state official in the voting booth telling the voter what was important to consider in voting. If that indication on the ballot interfered with the right to vote, then instructing the voter to cast ranked votes for every candidate on their ballot represents a much greater interference with the right to vote.

These requirements of ranked choice voting not only violate the prohibition of interfering with suffrage, but also likely violate constitutional protections for free speech by compelling citizens to confess by act their faith in candidates they do not support. See Janus, 138 S. Ct. at 2463. "As Justice Jackson memorably put it: 'If there is any fixed star in our constitutional constellation, it is that no official, high

or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.'" Id. (citing W. Va. Bd. of Ed. v. Barnette, 319 U.S. 624, 642 (1943)). The proposed initiative thus unlawfully compels speech from voters in connection with casting their ballots.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via copy of this Certificate of Review, deposited in the U.S. Mail to Ashley Prince, 1424 S. Loveland Street, Boise, ID 83705.

Sincerely,

RAÚL R. LABRADOR
Attorney General

Analysis by:

Lincoln Davis Wilson
Chief, Civil Litigation and
Constitutional Defense

James E. "Jim" Rice
Deputy Attorney General

[1] The proposed initiative also states that, if there is still a tie after all rounds are completed, then the tie is broken by a coin toss by the Secretary of State, which is the same method provided for breaking ties in Idaho statutory law. See Pet. § 34, Idaho Code § 34-1216. For the reasons above, this office believes that this coin toss provision—both in the proposed initiative and in current law—is plainly unconstitutional for state executive officers under article IV, section 2 of the Idaho Constitution.

Topic Index

and

Tables of Citation

CERTIFICATES OF REVIEW
2023

UNITED STATES CONSTITUTION CITATIONS

IDAHO CONSTITUTION CITATIONS

UNITED STATES CODE CITATIONS

IDAHO CODE CITATIONS

ATTORNEY GENERAL'S SELECTED ADVISORY LETTERS FOR THE YEAR 2023

RAÚL R. LABRADOR

ATTORNEY GENERAL
STATE OF IDAHO

February 20, 2023

The Honorable Chuck Winder
President Pro Tempore
Idaho State Senate
P.O. Box 83720
Boise, Idaho 83720-0081
VIA HAND DELIVERY

Re: Briefing of Legislative Committee Members and the Open Meetings Law

Dear Pro Tem Winder:

Yesterday you asked if a gathering of legislative committee members who receive a briefing from an outside party constitutes a meeting subject to Idaho's Open Meeting Law ("OML").

Idaho Code section 74-207 states that:

> [a]ll meetings of any standing, special or select committee of either house of the legislature of the state of Idaho shall be open to the public at all times, except in extraordinary circumstances as provided specifically in the rules of procedure in either house, and any person may attend any meeting of a standing, special or select committee, but may participate in the committee only with the approval of the committee itself.

The OML defines "meeting" as "…the convening of a governing body of a public agency to make a decision or to deliberate toward a decision on any matter." Idaho Code § 74-202(6) (emphasis added).

"Decision means any determination, action, vote or final disposition upon a motion, proposal, resolution, order, ordinance or measure on which a vote of a governing body is required…" Idaho Code § 74-202(1).

"Deliberation means the receipt or exchange of information or opinion relating to a decision, but shall not include informal or impromptu discussions of a general nature that do not specifically relate to the matter then pending before the public agency for decision." Idaho Code § 74-202(2).

If a quorum (majority as per Senate Rule 20(B)) of legislative members are present and no vote is taken at the briefing, the question of whether a meeting for purposes of the OML has occurred, hinges on whether committee members deliberate before, during, or after the briefing. If legislative members receive or discuss information relating to a decision pending before them, then a meeting has taken place. If information received or discussed does not relate to a pending decision, there is no meeting and the OML does not apply.

While this conclusion hinges upon a reading of the law, the court of public opinion may conclude otherwise. This response is provided to assist you. It is an informal and unofficial expression of the views of this office based upon the research of the author. Please contact me if you would like to discuss this matter further.

Sincerely,

MITCHELL E. TORYANSKI
Associate Attorney General

February 24, 2023

The Honorable Judy Boyle
Idaho House of Representatives
700 W. Jefferson Street
P.O. Box 83720
Boise, Idaho 83720-0038

Re: Request for Legislation Review of House Bill 24

Dear Representative Boyle:

You have requested an Attorney General's Opinion concerning House Bill 24. This opinion addresses the question you have presented.

QUESTION PRESENTED

House Bill 24 ("HB24") delegates authority to determine policies and award grants to the workforce development council. Does HB24's delegation exceed the authority of the Legislature or violate the separation of powers in the Idaho Constitution?

CONCLUSION

The Idaho Legislature has the authority to create the grant program to fund post-secondary career training as proposed in HB24. However, the grant program might not comply with the separation of powers. Idaho law on separation of powers follows federal law, which is currently in flux. Under more permissive separation of powers precedents from the early twentieth century, the combination of definitions and conditions contained in HB24 may make the law constitutional. But the original meaning of separation of powers, which a majority of the Supreme Court of the United States has stated an intent to adopt, would impose more strict limits on legislative delegation. Should the Idaho Supreme Court adopt the original meaning understanding, HB24 might not meet those standards and may not be constitutional.

ANALYSIS

I. Legislative Power.

If enacted, HB24 will create a grant program to aid students in paying for post-secondary career training including academic and certificate programs of study. The Idaho Legislature has plenary powers in all matters except as prohibited or limited by the constitution, meaning that the Idaho Legislature can enact grant programs like that in HB24 unless the Idaho Constitution or U.S. Constitution say otherwise. See Greater Boise Auditorium Dist. v. Royal Inn of Boise, 106 Idaho 884, 885 (1984). The Idaho Constitution does not contain a prohibition or limitation on the Legislature's creation of grant programs to fund post-secondary career training. As a result, the Legislature has the authority to create a grant program to fund post-secondary career training.

II. Separation of Powers.

The separation of powers is set forth in article II, section 1 of the Idaho Constitution, which divides state government into the legislative, judicial, and executive branches of government. It states that "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." Idaho Const. art. II, § 1. How such provisions are interpreted is currently changing.

In general, Idaho has looked to federal precedents interpreting the U.S. Constitution to shape its own separation of powers doctrine. Thus, Idaho has followed early twentieth century federal precedent from around the time of the New Deal that set forth a more permissive standard for when the Legislature can delegate power to an Executive agency. See State v. Kellogg, 98 Idaho 541, 544 (1977) (quoting American Power & Light Co. v. Securities & Exchange Comm'n, 329 U.S. 90, 105 (1946)). However, a majority of the current members of the Supreme Court of the United States has stated a desire to return to the original meaning of the federal constitution on separation of powers, which would impose stricter limits on delegation of legislative power to executive agencies.[1] It is unclear at this time how the Idaho Supreme

Court might respond to a change in federal law on this question. Thus, this opinion evaluates HB24 under both the early twentieth century precedents and under the original meaning understanding.

A. Early Twentieth Century Separation of Powers Principles.

HB24 may be constitutional under the early twentieth century understanding of separation of powers. Those precedents came during the dramatic expansion of the administrative state under the New Deal. At first, the Supreme Court struck down certain New Deal programs as improper delegations of legislative power to executive agencies. See A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 521–22 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388, 415, 418, 430 (1935). But then the tide turned, and the Supreme Court began to approve New Deal programs under more permissive standards for the separation of powers.

Those newer precedents give the legislative branch relatively "broad" discretion to delegate authority to agencies due to "the necessities of modern legislation dealing with complex economic and social problems." American Power & Light Co., 329 U.S. at 105. The Idaho Supreme Court has followed those federal precedents in interpreting our own constitution, reasoning that the "legislative process would frequently bog down" if the Legislature had "to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation." See Kellogg, 98 Idaho at 544 (quoting American Power & Light Co., 329 U.S. at 105). Idaho courts have thus upheld legislative delegation so long as the Legislature "clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." Id.; see also Emps. Res. Mgmt. Co. v. Kealey, 166 Idaho 449, 455-456 (2020) (quoting Kerner v. Johnson, 99 Idaho 433, 450–51 (1978)). Under these standards, the Idaho Supreme Court has held that "a statute is an unconstitutional delegation of legislative power" if it "lacks standards, guidelines, restrictions or qualifications of any sort placed in the delegating legislation.'" Kealey, 166 Idaho at 454 (citing Royal Inn of Boise, 106 Idaho at 886, 684 P.2d at 288).

HB24 may satisfy these precedents. With regard to policy, the bill provides guidelines for the Workforce Development Council, which is established in the executive office of the governor and has its members appointed by the governor. Idaho Code § 72-1201(1). It prioritizes grants, first, to students pursuing training for careers that are in-demand in Idaho, and second, based on student financial need. The bill restricts grants to eligible students, who are defined as Idaho residents, who will graduate high school or its equivalent beginning with the spring 2024 graduating class, and who have enrolled in or applied to an eligible institution in the fall semester following graduation. The bill also defines the eligible institutions where the student must be enrolled. The bill further provides limitations and conditions on the time within which the student must complete the education and training, and the funds are expressly made subject to appropriation by the Legislature.

On the other hand, the bill also provides the Council with considerable discretion. The bill provides broad latitude to establish a grant application process; to award grants to eligible students on conditions specified in the bill; and to take other such actions as are necessary to implement and enforce the provisions of the bill. HB24 also provides the Council with discretion to grant an extension on the time to begin classes at an eligible institution. Nevertheless, the definitions and conditions above may well provide sufficient standards for HB24 to satisfy separation of powers law under early twentieth century precedents.

B. Original Meaning of Separation of Powers.

Because the Idaho Supreme Court has historically followed federal law with regard to separation of powers, the Legislature should be aware of and consider new developments in federal law that may return to the original meaning of separation of powers. This is particularly true given that the Idaho Constitution was ratified when this original meaning standard was operative, and a compelling argument could be made that it represents a better understanding of the limits on legislative power imposed by the People of the State. Thus, it is appropriate to evaluate HB24 under the original meaning understanding of separation of powers.

HB24 may not comply with separation of powers under an original meaning understanding of those principles. "Constitutional analysis must begin with 'the language of the instrument,' ... which offers a 'fixed standard' for ascertaining what our founding document means." Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2244–45 (2022). And the original meaning of separation of powers under the federal Constitution was much more strict than the early twentieth century precedents.

Under the federal Constitution, power belongs to the People, who give it to the government subject to certain conditions. That means that the power given by the People cannot be delegated by one branch of the government to another in violation of those conditions. Gundy, 139 S. Ct. at 2133 (Gorsuch, J., dissenting). Thus, because the People had "vested the power to prescribe rules limiting their liberties in [the legislature] alone," then "[n]o one, not even [the legislature], had the right to alter that arrangement." Id. "As Chief Justice Marshall explained, [the legislature] may not delegate ... powers which are strictly and exclusively legislative." Id. (quotation omitted).

The framers insisted on this arrangement because "[t]hey believed the new federal government's most dangerous power was the power to enact laws restricting the people's liberty," and that an "excess of law-making" was one of "the diseases to which our governments are most liable." Id. at 2134 (citation omitted). So "the framers went to great lengths to make lawmaking difficult." Id. If the legislative branch "could pass off its legislative power to the executive branch," then "the entire structure of the Constitution … would make no sense." Id. at 2134–35 (internal quotation marks omitted). "As Madison explained, there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates." Id. at 2135 (internal quotation marks omitted).

This original understanding imposes much stricter limits on when the legislative branch can delegate power to an executive agency. A legislative delegation complies with these standards if it "set[s] forth standards "sufficiently definite and precise to enable [the legislature], the courts, and the public to ascertain" whether [the legislature's] guidance has been followed." Id. at 2136 (citation omitted). To be sure, these standards allow the legislative branch to

"make the application of that rule depend on executive fact-finding" and to provide the executive with additional discretion "over matters already within the scope of executive power." Id. at 2136–37. But the legislative branch may not "delegate to the agency the authority both to decide [a] major policy question and to regulate and enforce." Paul, 140 S. Ct. 342 (statement of Kavanaugh, J.).

HB24's broad delegation of appropriations authority to the Workforce Development Council to make policy decisions might not meet these standards. On the one hand, HB24 prescribes several requirements for eligibility for the grant program, which a court could find are sufficiently detailed to determine that the grant program satisfies legislative demands. But on the other hand, HB24 involves a delegation of power—specifically, the appropriations power—that is inherently legislative and not within the scope of executive power. And so a court could find that HB24 unlawfully delegates policy-making power to the executive to determine which type of educational and training programs to fund. That authority is sufficiently broad that it might include the Council supporting programs that are in fact antithetical to the Legislature's aims.

As proposed legislation, HB24 is not entitled to a presumption of constitutionality. And for the reasons above, it might not comply with the separation of powers under an original meaning understanding of the Constitution.

* * * *

Please feel free to contact me if you have any questions or need additional analysis.

Sincerely,

RAÚL R. LABRADOR
Attorney General

[1] See Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting, with Roberts, C.J., and Thomas, J.) (criticizing the Supreme Court's nondelegation jurisprudence as "an understanding of the Constitution at war with its text and history"); *id.* at 2030 (Alito, J., concurring) (expressing support "to reconsider the approach we have taken for the past 84 years" regarding nondelegation); Paul v. United States, 140 S. Ct. 342 (2019)

(statement of Kavanaugh, J.) (citing the need for "further consideration" of Justice Gorsuch's "scholarly analysis of the Constitution's nondelegation doctrine" in Gundy).

February 24, 2023

The Honorable Brad Little
Governor, State of Idaho
700 W. Jefferson Street
P.O. Box 83720
Boise, Idaho 83720

The Honorable John Vander Woude
Idaho House of Representatives
700 W. Jefferson Street
P.O. Box 83720
Boise, Idaho 83720-0038

Re: Request for Attorney General Analysis of Idaho Broadband Advisory Board

Dear Governor Little and Representative Vander Woude:

You have requested an Attorney General's Opinion concerning the Idaho Broadband Advisory Board. This opinion addresses the question you have presented.

QUESTION PRESENTED

Does Idaho Code section 67-4761 and the authorities entrusted to the Board composed of six active legislators and three gubernatorial appointees violate the separation of powers doctrine inherent in Idaho's Constitution including, but not limited to, article II, section 1?

CONCLUSION

The Legislature has the authority to designate the membership of the Board and to provide for the manner of their appointment. The authority and duties delegated to the Idaho Broadband Advisory Board have appropriate guidelines and limitations provided by the Legislature. In addition, the Board's authority appears likely to satisfy separation of powers, both under early twentieth century precedents and under an

original meaning interpretation. Consequently, Idaho Code section 67-4761 is probably constitutional.

BACKGROUND

The Board was created by the passage of House Bill 127, which was signed by the Governor on March 23, 2021, and went into effect on that date. The bill created two new sections of Idaho Code, Idaho Code sections 67-4760 and 67-4761. Section 67-4760 created the Idaho broadband fund, and section 67-4761 created the Board, set its membership and the method of appointment, and defined its powers and responsibilities. The Board is created within the Department of Commerce, an executive branch department. However, the Board does not report or make recommendations to the Department of Commerce.

The Board consists of nine members: three (3) members of the house of representatives appointed by the speaker of the house of representatives, three (3) members of the senate appointed by the president pro tempore of the senate, and three (3) members of the public appointed by the governor. Idaho Code § 67-4761(1).

The Board has two primary areas of responsibility. Those responsibilities are, first, the creation of a statewide broadband plan that "will determine the manner of structuring, prioritizing, and dispersing grants from the Idaho broadband fund to areas of the state that are most in need," and second, to "determine which broadband projects are undertaken pursuant to this section." Idaho Code § 67-4761(2). The Board is further charged with administering the implementation of the plan and maintaining and revising it as necessary. Idaho Code § 67-4761(4). Executive branch agencies of the state of Idaho are required to "cooperate with the advisory board by providing requested research, information, and studies pertaining in any manner to the statewide broadband plan." Idaho Code § 67-4761(2).

The Board must create a statewide broadband plan and determine what projects will be funded using funds appropriated by the Legislature for that purpose. Idaho Code § 67-4760. The statewide broadband plan is required to include "the manner of structuring,

prioritizing, and dispersing grants." Idaho Code § 67-4761(2). The standard to be used in making the plan is to see that the grants are dispersed "to areas of the state that are most in need." Id.

ANALYSIS

Evaluation of a statute is made considering the "strong presumption of the validity of an ordinance, and an appellate court is obligated to seek an interpretation of a statute that upholds its constitutionality." State v. Hellickson, 135 Idaho 742, 744, 24 P.3d 59, 61 (2001) (citation omitted). For the reasons below, the Board and its operations appear to be constitutional.

I. Appointment Power and Board Makeup.

The Idaho Constitution provides a different scheme than the federal Constitution does for the creation of offices and the appointment of state officers. While the federal Constitution limits who may appoint federal officers, under article IV, section 6 of the Idaho Constitution, "the Legislature has the power to create an office and provide for the filling of the same whenever such office is not established by the Constitution, and to provide for the appointment of such officer either by the chief executive or in any other manner that in the wisdom of the Legislature it may deem proper." Smylie v. Williams, 81 Idaho 335, 339–40 (1959) (quoting Ingard v. Barker, 27 Idaho 124 (1915)). The Idaho Supreme Court has also stated that the Idaho Legislature has the power to "modify, control, or abolish" such offices. Id. Thus, it is likely that the method of appointment provided for members of the Board does not violate article II, section 1.

II. Separation of Powers.

Idaho law on the constitutional separation of powers follows federal law, which is currently in flux. On the one hand, early twentieth century federal precedents, adopted by the Idaho Supreme Court, provide a more permissive standard for when the legislative branch may delegate power to executive agencies. See State v. Kellogg, 98 Idaho 541, 544 (1977) (quoting American Power & Light Co. v. Securities & Exchange Comm'n, 329 U.S. 90, 105 (1946)). But on the other hand, a majority of the Supreme Court of the United States has

expressed a desire to return to the original meaning interpretation of separation of powers, which sets more strict limits on legislative delegation.[1]

Although it is unclear whether the Idaho Supreme Court will adopt this original meaning standard, that question is immaterial to this opinion, since the Board appears to meet both standards for separation of powers. The Idaho Broadband Advisory Board is directed to the narrow purpose of approving broadband projects, limited to the funds in the Idaho broadband fund, after finding that such projects will be carried out in the communities that have the most need. Because the Legislature has decided the policy question and directed it to be implemented based on agency fact-finding, it is probably constitutional under any standard.

A. Early Twentieth Century Separation of Powers Principles.

The Board's function appears to be constitutional under Idaho Supreme Court precedents applying the early twentieth century standard of separation of powers. The Idaho Supreme Court addressed a similar delegation of power in Kerner v. Johnson, 99 Idaho 433 (1978), which involved a constitutional challenge to a law delegating authority to construct or replace dams to irrigation district boards. The boards were allowed to construct or replace dams upon a finding that the construction or replacement was in the interest of the district and the public interest or necessity. Idaho Code § 43-2203. The Idaho Supreme Court concluded that:

> [t]he board is not given unbridled authority to replace dams but is only authorized to do so when it finds that those conditions are present. We conclude, therefore, that § 43-2203 does not constitute an unlawful delegation of legislative authority; rather, the board is authorized to act only for a limited purpose in a limited manner after finding that certain conditions exist.

Kerner, 99 Idaho at 451, 583 P.2d at 378. The Idaho Supreme Court recently applied the rule set forth in Kerner to evaluate and uphold a delegation of legislative authority to the Department of Commerce

which was tasked with awarding tax incentives. Emps. Res. Mgmt. Co. v. Kealey, 166 Idaho 449, 454 (2020). The Board's duty to issue grants based on similar fact-finding is likely constitutional under these precedents.

B. Original Meaning of Separation of Powers.

The Board's function also appears to be constitutional under an original meaning interpretation of separation of powers. Under that interpretation, a legislative enactment may "decide the major policy question itself and delegate to the agency the authority to regulate and enforce," Paul v. United States, 140 S. Ct. 342 (2019) (statement of Kavanaugh, J.), and may also "authorize executive branch officials to fill in even a large number of details, [or] to find facts that trigger the generally applicable rule of conduct specified in a statute." Gundy v. United States, 139 S. Ct. 2116, 2145 (2019) (Gorsuch, J., dissenting). Here, the Legislature has decided the major policy question—access to broadband for areas of the State that are most in need—and it has left the Board to fill out the details and make funding decisions-based factfinding about need. Thus, it is probably constitutional under an original meaning interpretation of separation of powers.

* * * *

Please feel free to contact me if you have any questions or need additional analysis.

Sincerely,

RAÚL R. LABRADOR
Attorney General

[1] See Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting, with Roberts, C.J., and Thomas, J.) (criticizing the Supreme Court's nondelegation jurisprudence as "an understanding of the Constitution at war with its text and history"); id. at 2130 (Alito, J., concurring) (expressing support "to reconsider the approach we have taken for the past 84 years" regarding nondelegation); Paul v. United States, 140 S. Ct. 342 (2019) (statement of Kavanaugh, J.) (citing the need for "further consideration" of

Justice Gorsuch's "scholarly analysis of the Constitution's nondelegation doctrine" in Gundy).

March 13, 2023

The Honorable Chuck Winder
President Pro Tempore
Idaho State Senate
700 W. Jefferson Street
Boise, Idaho 83702

The Honorable Melissa Wintrow
Minority Leader
Idaho State Senate
700 W. Jefferson Street
Boise, Idaho 83702

Re: Request for Legal Review of House Bill 25

Dear Pro Tem Winder and Senator Wintrow:

You have requested an Attorney General's Opinion concerning House Bill 25 (HB25). This opinion addresses the questions you have presented.

QUESTIONS PRESENTED

Question 1: What conflict, if any, exists between HB25 and the prohibition against local and special laws provided in article III, section 19 of the Idaho Constitution? What is the likelihood that the State would prevail in potential litigation challenging HB25 on these grounds?

Question 2: Would HB25's statement that "[a]ctions of the director [of the Department of Administration] under this section shall be discretionary and not subject to the provisions of chapter 52, title 67, Idaho Code [,][Idaho Administrative Procedure Act (APA)]" leave individuals with no appeal right for decisions made pursuant to the authority granted in HB25? If so, does the lack of any appeal right for these decisions violate the guarantee of due process pursuant to the Fourteenth Amendment to the Constitution of the United States? If not, what process can individuals use to protest or appeal decisions made pursuant to the authority granted in HB25?

CONCLUSION

Question 1: HB25 does not violate article III, section 19 of the Idaho Constitution because it is not a "local or special law" within the meaning of that provision.

Question 2: While decisions of the Director under HB25 may not be subject to appeal, not all agency actions are subject to judicial review, and removing an agency decision from review doesn't violate the Fourteenth Amendment's Due Process Clause. That does not mean, however, that the Director's actions could never be challenged in court. Individuals who have standing to sue can obtain judicial review of the Director's action through any Idaho statute that authorizes that review.

ANALYSIS

I. HB 25 Is Not Unconstitutional Special Legislation.

The Idaho constitution gives the Legislature "plenary power over all subjects of legislation not prohibited by the federal or state constitution…." Wilson v. Perrault, 6 Idaho 178, 617 (1898). Article III, section 19 of the Idaho Constitution prohibits the Legislature from passing "local or special laws" in certain "enumerated cases," including laws that "authoriz[e] the laying out, opening, altering, maintaining, working on, or vacating roads, highways, streets, alleys, town plats, parks, cemeteries, or any public grounds not owned by the state." Idaho Const. art. III, § 19. In this regard, Idaho's constitution is like many other state constitutions adopted in the late 19th century that prohibit "local or special" legislation. See Jones v. State Bd. of Medicine, 97 Idaho 859, 876 (1976). The original purpose of these constitutional provisions was "to prevent legislation bestowing favors on preferred groups or localities." Id. (citation omitted).

The Idaho Supreme Court has developed a three-part test for determining if a law is unconstitutionally "local or special" under article III, section 19. First, a special law is one that "applies only to an individual or number of individuals out of a single class similarly situated and affected or to a special locality." Jones v. Lynn, 169 Idaho 545, 562 (2021) (citation omitted). Second, "when the Legislature pursues

a legitimate interest in protecting citizens of the state in enacting a law, then it is not special." Id. Third, "courts must determine whether the statute's classification is arbitrary, capricious, or unreasonable...." Id. (cleaned up). In other words, a law is only unconstitutional special legislation if it "disproportionately affect[s] one member of a *similarly situated class*." Planned Parenthood Great Nw. v. State, 522 P.3d 1132, 1212–13 (Idaho Jan. 5, 2023) (citation omitted). In contrast, "[g]eneral laws are those laws that 'apply to all persons and subject matters in a like situation,' and they are constitutional for purposes of Article III, § 19." Citizens Against Range Expansion v. Idaho Fish and Game Dep't, 153 Idaho 630, 636 (2012).

Applying the Idaho Supreme Court's three-part test suggests that HB25 is not an unconstitutional special or local law.

First, HB25 treats all similarly situated properties in the same manner. HB25 applies to a unique, small class of properties: the roads and a park adjoining the State Capitol. The State Capitol houses two out of the three branches of Idaho's Government. There is no location like it in Idaho. It follows that there is no other property in Idaho like the property surrounding the Capitol. So HB25 treats all similarly situated properties in the same way. Next, the Legislature has an obvious, legitimate State interest in ensuring that the property immediately around the State Capitol is safe, secure, and orderly. See Citizens Against Range Expansion, 153 Idaho at 638; Idaho Code § 67-1602. Third, for similar reasons, HB25's classification isn't arbitrary or unreasonable. It advances the Legislature's legitimate interest in creating an orderly and predictable environment around the Capitol, where the Legislature exercises its plenary lawmaking power, see Idaho Const. art. I; Wilson, 6 Idaho 178, *pincite, and the Executive ensures "that the laws are faithfully executed." Idaho Const. art. IV, § 5.

It does not matter that HB25 applies to a very small class of properties. In Citizens Against Range Expansion, the Idaho Supreme Court rejected the notion that a law is necessarily an unconstitutional special law because it applies to a class of one. See Citizens Against Range Expansion, 153 Idaho at 638. In fact, the court used the State Capitol as an example of why this "class of one" argument was wrong:

> even if [the challenged law] was meant to apply just to this one facility, *that would not make it a special law*. To follow [plaintiff's] line of reasoning, the Legislature would never be able to set safety standards for a one-of-a-kind State facility without running afoul of art. III, § 19. *That would perhaps bode ill for limiting the level of noise in the State Capitol*.

Id. (emphasis added).

Indeed, the Legislature has passed laws that apply only to the "one-of-a-kind" Capitol building, and no court has found these laws unconstitutional. See, e.g., Idaho Code § 67-1602 (providing requirements for the "space within the interior of the capitol building"). The property adjoining the Capitol is similarly "one-of-a-kind." Because HB25 applies "to all persons and subject matters in a like situation," it is very likely "constitutional for the purposes of Article III, § 19 of the Idaho Constitution." Citizens Against Range Expansion, 153 Idaho at 636.

II. HB25 Does Not Violate Due Process.

A. HB25 Would Not Necessarily Provide a Way to Appeal the Director's Exercise of Discretionary Authority.

The Idaho Constitution allows the Legislature to define the appellate jurisdiction of Idaho district courts. Idaho Const. art. V, § 20. This means that "actions of state agencies or officers ... are not subject to judicial review unless expressly authorized by statute." In re City of Shelley, 151 Idaho 289, 292 (2011) (citing I.R.C.P. 84(a)(1)). Where no statute authorizes judicial review of an agency's action, district courts lack subject matter jurisdiction to review that action. Laughy v. Idaho Dep't of Transp., 149 Idaho 867, 870 (2010) (dismissing a petition for review of an agency's decision because no statute authorized an appeal); In re Williams, 149 Idaho 675, 678–79 (2010) (same).

The Idaho APA governs judicial review of many agency actions. Laughy, 149 Idaho at 870. But many other agency actions are unreviewable under the APA. Id. (dismissing a petition for APA review

of an agency's decision because no statute authorized an appeal); In re Williams, 149 Idaho at 678–79 (same). Indeed, the APA itself limits judicial review to "final agency action *other than an order in a contested case*..." Idaho Code § 67-5270(2) (emphasis added).

As you note, HB25 exempts "[a]ctions of the director" from APA review. HB25 § 1. This does not, however, mean that the Director's actions could never be challenged in court. Individuals who have standing to sue can seek judicial review of the Director's action through any Idaho statute that authorizes that review. Laughy, 149 Idaho at 870. The appropriate statutory vehicle for such a challenge would depend on the nature of the plaintiff's claim, the injuries he alleges, and the relief he seeks. See, e.g., Idaho Code §§ 10-1201–1217 (Declaratory Judgments Act).

B. Due Process Does Not Require Administrative Appeal Rights.

HB25 does not violate the Fourteenth Amendment's due process guarantee even though it exempts the Director's decisions from APA review. Courts have recognized two broad applications of the Due Process Clause: "substantive" due process; and procedural due process. See, e.g., Bradbury v. Idaho Judicial Council, 136 Idaho 63, 68–71 (2001). Your question focuses on *procedural* due process, which "is the aspect of due process relating to the minimal requirements of notice and a hearing if the deprivation of a significant life, liberty, or property interest may occur." Id. at 72. To determine if a law violates an individual's procedural due process rights, the law must threaten an individual's "liberty or property interest." Id. at 73. That applies "only to the deprivations of [an] interest encompassed by the Fourteenth Amendment's protection of liberty and property." Board of Regents v. Roth, 408 U.S. 564, 569 (1972). Thus, "[o]nly after a court finds a liberty or property interest will it reach the next step of analysis in which it determines what process is due" that individual. Bradbury, 136 Idaho 73. "The existence of a liberty or property interest depends on the "construction of the relevant statutes," and the "nature of the interest at stake." Id.

Individuals do not have a "liberty or property" interest under the Fourteenth Amendment to appeal every agency decision. To the contrary, "actions of state agencies or officers ... are *not* subject to judicial review unless expressly authorized by statute." City of Shelley, 151 Idaho at 292, 255 P.3d at 1178 (emphasis added). So HB25's exemption of the Director's actions from APA review does not implicate a liberty or property interest. The procedural due process analysis ends there. Bradbury, 136 Idaho at 73, 28 P.3d at 1014.

C. Challenges to the Director's Decisions Under HB25 May Be Available.

For the reasons stated above, the Fourteenth Amendment does not require HB25 to provide for judicial review of the Director's decisions, but various pathways of review may nevertheless be available. For example, while "actions of state agencies or officers ... are not subject to judicial review unless expressly authorized by statute," City of Shelley, 151 Idaho at 292, a statute may permit such review in a variety of different contexts, all of which would be dependent upon their specific facts. Individuals who have standing to sue can seek judicial review of the Director's action through any Idaho statute that authorizes that review. See, e.g., Idaho Code §§ 10-1201–1217 (Declaratory Judgments Act, authorizing courts to "declare rights, status, and other legal relations, whether or not further relief is or could be claimed").

Please feel free to contact me if you have any questions.

Sincerely,

RAÚL R. LABRADOR
Attorney General

March 17, 2023

The Honorable Lance Clow
Idaho House of Representatives
Idaho State Capitol
P.O. Box 83720
Boise, Idaho 83720-0038

Re: Request for Legislation Review of HB 273

Dear Representative Clow:

This letter responds to your request posing two questions related to draft bill House Bill 273 ("HB 273"). This letter addresses your questions by first providing a brief answer and offering further analysis.

QUESTIONS

1. Is the addition of two sentences added in HB 273 a lawful way to achieve the bill's goal which is to allow county and city residents to reduce their property tax base budget by initiative or referendum?

Short Answer: As written, this bill does not appear to directly conflict with Idaho law. However, the language in the bill may not achieve the bill's goal. It provides no procedure for cities or counties to calculate future budget capacity using the initiative-amended budget amount. It also provides no procedure for residents to recover property tax revenue already levied by counties or cities. Additionally, it does not provide a procedure protecting a city's or county's budget from being insufficiently funded. As such, it is likely that an amended-budget initiative would be voided by a court if it caused a city or county to incur debt or default on obligations contrary to constitutional limits on county and municipal indebtedness.

2. Can one initiative/referendum be used to lower the base property tax for both a county and a city within it?

Short Answer: Because of the procedural requirements of referenda and initiatives, an attempt to amend a city budget would likely need to be separate from an attempt to amend a county budget. Idaho Code specifies two distinct procedures for bringing such actions to a vote, one for city initiatives and one for county initiatives. These two procedures require unique procedural steps that do not overlap. Additionally, the statutes describing the referenda and initiative process specify that such an action should only pertain to a single subject. It is arguable that a referendum or initiative seeking to amend two budgets violates this single-subject clause. To avoid procedural challenges, a referendum or initiative amending a city budget should be separate from one amending a county budget.

ANALYSIS

1. House Bill 273 Does Not Directly Conflict with Statute, However, it May Not Achieve the Drafter's Goals of Allowing County or City Residents to Reduce their Property Tax Base Budget.

House Bill 273 does not appear to directly conflict with other Idaho law. The Idaho Legislature has broad authority to determine the organization of cities and counties. See Idaho Const. art. XII, § 1; art. XVIII, §§ 5 and 12. The Legislature also has specific authority to determine the system of finance used in Idaho's cities and counties. Idaho Const. art. VII, §§ 6 and 15. The proposed amendments in House Bill 273 appear to be consistent with the Legislature's constitutional authority under these sections. Additionally, the language of the amendments makes it clear that the right to amend a budget by referendum or initiative is to apply "notwithstanding" any other provision of Idaho Code. Taken together, there is no apparent direct conflict between House Bill 273 and other Idaho law.

While the Idaho Supreme Court has held in Weldon v. Bonner County Tax Coalition, 124 Idaho 31 (1993) that city and county budget processes are not subject to voter referenda or initiatives, that holding is likely not applicable to this amendment. The decision in Weldon was based on the Court's interpretation of Idaho Constitution art. III, sec. 1. It determined that a referendum or initiative could not be used to overturn a process, such as a county's process to determine a budget. Weldon at 38-39. It held that referenda and initiatives were intended

for overturning or creating laws, and not for determining the result of a process. Id. While the facts in Weldon bear some similarities to a referendum or initiative that would arise under the proposed amendments in the house bill, there are enough factual differences to make it unlikely that Weldon would control.

Critically, in Weldon, the Legislature had not provided a specific authorization to residents of cities and counties allowing them to amend a budget by referendum or initiative. In contrast, a referendum or initiative brought pursuant to the amendments in the house bill would be brought under specific Legislative authorization. This distinction is important as it gives the residents seeking a referendum under the amended language of the house bill a separate constitutional basis to support their referendum or initiative. The referendum or initiative could be construed as proceeding as a constitutional referendum or initiative under Idaho Constitution art. III, sec. 1. It could also be construed as being a Legislatively created method for determining a city or county budget under Idaho Constitution article VII, sections 6 and 15. Under these latter constitutional provisions, this amendment could be seen as just prescribed procedure for amending a city or county budget using the same procedure as a referendum or initiative. In summary, expressly providing in statute for residents of city or county to bring a referendum or initiative to modify a budget makes it less likely that the referendum or initiative will be found unconstitutional.

While the proposed amendment does not seem to directly conflict with other Idaho law, it is not well integrated with other Idaho law and likely does not achieve the drafters' goal. The goal appears to allow a resident of a city or county to reduce the property-tax, base budget through the referendum and initiative process. The bill does not provide specific procedures for how to accomplish its aim and is likely un-administrable by cities and counties.

As an example, the bill does not address how cities and counties are to incorporate an initiative-amended budget into their budget capacity calculations for a later year. Under Idaho Code section 63-802, cities and counties calculate their budget capacity using "the highest dollar amount of property taxes certified for its annual budget for any one (1) of the three (3) tax years preceding the current tax year." An initiative reducing the property-tax, base budget would at best have

a limited effect on the ongoing budget capacity of a taxing district. Without specific statutory language requiring a city or county to use the initiative-amended budget for subsequent years, an initiative-amended budget would only have a temporary effect on the city or county budget and not produce a permanent reduction in the property tax base budget.

The bill also does not address the timing and deadlines differences between the referendum and initiative process and the property-tax budgeting process. The referendum and initiative process takes longer than a year to complete, with just the time for signature collection being eighteen months.[1] As such, any completed referendum or initiative will likely relate to a prior year's budget and not the current year's budget. Idaho Code § 34-1802(1). Idaho Code has no provision for how to amend a prior year's budget based on this referendum and initiative process. Specifically, there is no provision in Idaho Code for how to recover money spent pursuant to the budget prior to amendment and no provision for how to refund levied taxes back to taxpayers. In short, without further amendments to Idaho law, House Bill 273 will likely not be administrable by cities or counties.

Additionally, the goal of the legislation will likely be frustrated if the referendum and initiative process results in underfunded cities or counties. The Idaho Constitution requires cities and counties to make provisions for paying their debts. Except when permitted by a vote of two-thirds of voters, a county or city may not "incur any indebtedness, or liability . . . exceeding in that year, the income and revenue provided for it for such year." Idaho Const. art. VIII, § 3. When voters do allow for such indebtedness, the municipality must also provide "for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within thirty years from the time of…." incurring the debt. Id. The Constitution states that "[a]ny indebtedness or liability incurred contrary to this provision shall be void."[2] Id.

As an example, an initiative that reduces the budget of a city or county could trigger a violation of any one of the elements of Idaho Constitution article VIII, section 3. As an example, a budget reduction could make an expense that otherwise would have been within the yearly income and revenue of the city or county become a liability requiring a two-thirds majority vote before being incurred. It also could

disrupt the requirement that the city or county lays an "annual tax sufficient to pay the interest" on a debt or interferes with a city or county's ability to pay off a debt within thirty years. Id. In short, as the bill does not include specific provisions preventing a city or county from being underfunded, it may produce referenda or initiatives that fail upon judicial review.

In summary, the house bill does not directly conflict with Idaho law. However, it likely does not achieve its policy goal as it lacks necessary provisions to integrate the policy into Idaho's property tax law and is likely un-administrable. Additionally, its policy goals may be frustrated if the referendum or initiative process underfunds a city or county and is set aside by a court pursuant to constitutional debt limitations.

2. A Referendum or Initiative to Amend a City Budget Likely Needs to Be Separate from a Referendum or Initiative to Amend a County Budget.

By statute, the city and county initiative process require different procedural steps that do not overlap with one another. As an example, a city's initiative process requires that the city attorney and city clerk review and certify the initiative. The county's initiative process puts those duties into the hands of the county prosecuting attorney and county clerk. Additionally, the city initiative process gives the city council the right to adopt the ordinance proposed by the initiative before the election. The county initiative process gives the county commissioners this right. The two processes also calculate the signature gathering requirement differently, with the city's being based on eligible voters voting in the last general city election and the county's being based on eligible county voters. In short, because the two processes require procedural steps that are different from one another, an initiative to amend a city budget should be brought separately from an initiative to amend a county budget.

Additionally, Idaho Code section 34-1801A contains a single-subject clause that states that "[a]n initiative petition shall embrace only one (1) subject and matters properly connected with it." It is arguable that an initiative seeking to amend a city and county budget at the same time would embrace more than one subject. Bringing an initiative to

amend a city budget separately from an initiative to amend a county budget would eliminate potential procedural challenges to a budget initiative.

Sincerely,

NATHAN NIELSON
Deputy Attorney General

[1] This deadline can vary. The statute provides for the shorter of "eighteen (18) months . . . or April 30 of the year of the next general election." Idaho Code § 34-1802. In either instance, and taken with the other deadlines specified in Idaho Code title 34, chapter 18, a budget initiative will most likely be related to a prior year's budget.

[2] These requirements do not apply to "ordinary and necessary expenses authorized by the general laws of the state." Idaho Const. art. VIII, § 3.

March 17, 2023

The Honorable Ilana Rubel
Minority Leader
Idaho House of Representatives
700 W. Jefferson Street
Boise, Idaho 83702

Re: Request for Attorney General Analysis

Dear Representative Rubel:

You have requested a legal opinion on House Bill 265. House Bill 265 ("HB265") establishes a new civil action regarding sexual exhibitions and establishes new prohibitions on the use of public facilities and public assets for the sexual exhibitions defined by the new civil action.

QUESTIONS PRESENTED

1. Does HB265 violate the First Amendment to the U.S. Constitution?

2. Does HB265 violate due process under the Fourteenth Amendment to the U.S. Constitution with regard to vagueness or overbreadth?

CONCLUSIONS

1. HB265 does not violate the First Amendment. The exhibitions of sexual conduct proscribed by HB265 would not be protected under either an original understanding of the First Amendment or under the Supreme Court's modern jurisprudence on obscenity.

2. HB265 does not violate Fourteenth Amendment due process protections of vagueness and overbreadth. HB265 provides fair notice of the conduct it proscribes and requires parties to take reasonable steps to prevent minors from exposure to

exhibitions of "sexual conduct," for which it provides a clear and detailed statutory definition.

BACKGROUND

House Bill 265, if enacted, would add Idaho Code section 6-3601, which creates a civil action regarding sexual exhibitions. It specifies that a person or institution that knowingly promotes, conducts, performs, or participates in a show, exhibition, or performance by a live person before an audience must take reasonable steps to restrict the access of minors (17 years old or younger) to exhibitions that meet three criteria:

1) The person or institution must have reason to believe that minors are likely to be present.

2) The show, exhibition, or performance involves live persons engaged in statutorily defined "sexual conduct."

3) The show, exhibition, or performance is patently offensive to an average person applying contemporary community standards in the adult community as a whole with respect to what is suitable for minors.

House Bill 265 specifically defines "sexual conduct" to mean:

(i) Acts, whether actual or simulated, of masturbation, sexual intercourse, or physical contact with a person's unclothed genitals or pubic area;

(ii) Sexually explicit descriptions of acts described in subparagraph (i) of this paragraph; or

(iii) Sexually provocative dances or gestures performed with accessories that exaggerate male or female primary or secondary sexual characteristics.

If a person or institution violates this section and a minor is exposed to "sexual conduct," the minor has a cause of action against the person or institution that failed to take reasonable steps to restrict

the access of minors. The civil action must be commenced within 4 years "after the act has occurred." HB265 permits the minor (or a parent or legal guardian of such minor) to recover statutory damages of $10,000 for each violation, as well as damages for "all psychological, emotional, economic, and physical harm suffered." A prevailing minor, parent, or guardian is entitled to reasonable attorney fees and costs.

HB265 establishes an affirmative defense for the person or institution if it "had reasonable cause to believe that the minor involved" was 18 years or older based on a proffer of documents purporting to show that the minor was 18 years old or older. But HB265 says that it is *not* a defense that the minor was accompanied by the minor's parent or legal guardian. HB265 also includes a severability clause, in case any portion of Idaho Code section 6-3601 was declared invalid.

HB265 also would create another new section, Idaho Code section 67-2359. That section would prohibit public institutions, public facilities, public equipment, or other public assets from being "used for the purposes of shows, exhibitions, or performances that involve live persons engaged in sexual conduct, as defined in" Idaho Code section 6-3601. HB265 would also prohibit public institutions or facilities from leasing, selling, or permitting the subleasing of its facilities or property, "for the purpose of shows, exhibitions, or performances that involve live persons engaged in sexual conduct, as defined within the law.

ANALYSIS

I. The First Amendment.

A. Obscenity Under the First Amendment.

Although "the First Amendment bars the government from dictating what we see or read or speak or hear," this freedom "has its limits; it does not embrace certain categories of speech, including … obscenity." Ashcroft v. Free Speech Coal., 535 U.S. 234, 245-46 (2002). How obscenity is defined is then the critical question. There are two possible approaches: (1) the original meaning of the First Amendment; and (2) the Supreme Court's modern jurisprudence on obscenity.

First, original meaning. In recent decisions, the Supreme Court has emphasized the need to interpret constitutional provisions in accordance with their original meaning. "Constitutional analysis must begin with 'the language of the instrument,' ... which offers a 'fixed standard' for ascertaining what our founding document means." Dobbs v. Jackson Women's Health Org., 142 S Ct. 2228, 2244-45 (2022). Interpretation of the Constitution must be "rooted in the … text, as informed by history." N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2127 (2022). The Supreme Court has also applied these principles in the context of the First Amendment's religion clauses. See Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2426 (2022). Thus, the Supreme Court may be poised to apply these principles to First Amendment free speech jurisprudence as well. Should the Court do so, that analysis might require considering whether at the time of ratification, the First Amendment would have been understood as covering the type of sexual expression at issue.

Second, the question may be evaluated under the Supreme Court's modern precedents on obscenity. Prior to its recent reaffirmation of original meaning jurisprudence, the Supreme Court developed constitutional common law regarding the meaning of obscenity, which it says refers to "sexual conduct." Brown v. Entertainment Merchants Ass'n, 564 U.S. 786, 793 (2011). The prevention and punishment of obscenity "has never been thought to raise any Constitutional problem." Id. The Supreme Court has held that whether material constitutes obscenity requires consideration of three elements:

1) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;

2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; *and*

3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 24 (1973).

Within this framework, the Supreme Court has held that the First Amendment permits appropriately targeted restrictions on speech that may harm minors. Although minors "are entitled to a significant measure of First Amendment protection," the State has a "legitimate power to protect children from harm" and may limit their access to speech in "relatively narrow and well-defined circumstances.'" Brown, 564 U.S. at 794 (citation omitted). And while the State does not have "a free-floating power to restrict the ideas to which children may be exposed," it may do so with respect to speech that is obscene. Id.

Thus, under the modern obscenity framework, material that is obscene to minors, even if not obscene to adults, may be regulated as to minors. Id. at 795. Indeed, so long as the Legislature's judgment that materials proscribed as obscene are harmful to children is "not irrational," a statute prohibiting them will be sustained by the U.S. Supreme Court. Id. Thus, in Ginsberg v. New York, 390 U.S. 629 (1968), the Supreme Court upheld a prohibition of the sale to minors of sexual material that would be obscene from the perspective of the child. As the Court summarized in a later decision, the law upheld in Ginsberg "restricted the sale of certain depictions of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse that were harmful to minors," which was defined as:

> (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and
>
> (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and
>
> (iii) is utterly without redeeming social importance for minors.

Brown, 564 U.S. at 793 n.2 (holding that obscenity test for minors did not apply to law concerning violence in video games).[1]

The Supreme Court has invalidated certain statutes purporting to protect minors where they have gone beyond these standards. For example, in Reno v. American Civil Liberties Union, 521 U.S. 844 (1997), the Supreme Court held that provisions of the Communications

Decency Act intended to protect minors from harmful material on the internet were invalid under the First Amendment. This was so for several reasons. First, the law there pertained to speech on the internet, a worldwide, open forum of expression. See id. at 852-53. Second, the law lacked the "critical requirement" that the "proscribed material be 'specifically defined by the applicable … law,'" and it covered more than just obscenity—it extended to "excretory activities" and "'organs' of both a sexual and excretory nature," rather than just "sexual conduct." Id. at 873. Third, because of the absence of meaningful ways to limit access by minors on the internet, the law chilled protected speech by adults. Id. at 874. Fourth, the law imposed criminal sanctions for violating its provisions, which "may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." Id. at 872. And fifth, the law did not address Miller's prongs "that, taken as a whole, the material appeal to the prurient interest, and … that it lack serious literary, artistic, political, or scientific value." Id. at 873–74.

B. HB265 Likely Satisfies First Amendment Standards.

HB265 complies with the First Amendment under an original meaning standard. There is no serious contention that, at the time the First Amendment was ratified, freedom of speech would have been understood to protect exhibitions of sexual conduct, as defined by HB265, much less the participation of minors in same. An original conception of obscenity would very likely support the protections for minors in HB265.

HB265 also complies with the Supreme Court's existing First Amendment precedent for obscenity. As in Ginsberg, the bill provides a thorough and detailed definition of "sexual conduct" that specifically describes the actual or simulated sexual acts that are subject to the law. Also as in Ginsburg, the bill specifically incorporates the requirement that the exhibition be "patently offensive to an average person applying contemporary community standards in the adult community as a whole with respect to what is suitable for minors."

HB265 also avoids several of the pitfalls that have led to the invalidation of other laws. Unlike the act at issue in Reno, HB265 is not directed to speech in a public forum like the internet, but to exhibitions

of sexual conduct. Unlike Reno, the law has a clearly specified definition of "sexual conduct" and it does not sweep in other speech, such as speech concerning execratory functions. Unlike Reno, there is little risk that the law chills protected speech by adults, since it is a common practice for exhibitions involving sexual conduct to check IDs of minors for entry, as HB265 specifically contemplates with its affirmative defense involving fake IDs. And unlike Reno, HB265 does not impose criminal penalties, but is rather limited to a civil action by affected minors and a prohibition of public funding of the speech at issue.[2]

HB265 might be subject to challenge under the modern obscenity framework, because, unlike the law approved in Ginsberg, it does not contain express elements that the exhibition concern "prurient interest" or have no "social value to minors." See Reno, 521 U.S. at 873–74. The Ninth Circuit has invalidated a state statute that attempted to prohibit the display of obscene books to minors but lacked these requirements. Powell's Books, Inc. v. Kroger, 622 F.3d 1202 (9th Cir. 2010).

But it is now in doubt whether those precedents remain good law following the Supreme Court's reaffirmation of original meaning standards. And even under that historical framework, HB265 effectively embraces a prurient interest requirement, since any exhibition that satisfies its clear and specific definition of "sexual conduct" (including a reference to "sexually provocative" conduct) and its "patently offensive" requirement would almost certainly meet that standard." In addition, a court might find that HB265 is valid under this framework because it satisfies all of the other concerns the Supreme Court addressed in Reno, as noted above. For example, in the context of HB265, unlike the book displays in Powell's Books, it is readily feasible for anyone hosting an exhibition of "sexual conduct" to check IDs and thus take reasonable steps to exclude minors. Even without those elements, there are strong grounds to believe that HB265 is constitutional.

II. The Fourteenth Amendment.

One of the implications of the due process clause of the Fourteenth Amendment is that laws must give people of ordinary

intelligence fair notice of what conduct they prohibit. Brown, 564 U.S. at 807 (Alito, J., concurring) (citation omitted). In the First Amendment context this means that laws that fail to give such notice may be unconstitutionally vague or overbroad if they would chill protected speech. Id. (citation omitted). The Supreme Court has explained that "[v]ague laws force potential speakers to steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked." Id. This does not require perfect clarity and precise guidance in statutory language, but to be upheld, it must be narrow and specific. Id.

"These principles apply to laws that regulate expression for the purpose of protecting children." Id (citation omitted). Thus, in the Ginsberg case referenced above, the Supreme Court considered a due process challenge to the definition of "harmful to minors" as being unconstitutionally vague. The statute defined harmful to minors as follows:

> (f) 'Harmful to minors' means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it:
>
> (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and
>
> (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and
>
> (iii) is utterly without redeeming social importance for minors.

The Supreme Court quickly disposed of that challenge, ruling that the definition gave persons adequate notice of what was prohibited and did not offend due process. Ginsberg, 390 U.S. 643. As noted above, the statute at issue gave a detailed and specific definition of sexual conduct. Id. at 793 n.2. Likewise, in Miller, the Supreme Court explained that a statute specifying "hard core" sexual conduct specifically defined by the state law (whether as written or construed by

a court) "will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution." Miller, 413 U.S. at 27.

Thus, for the same reasons that HB265 satisfies the First Amendment, it also satisfies the Fourteenth Amendment and is not overbroad or vague. One of the elements of proof under HB265 is that the show, exhibit, or performance involve live persons engaged in "sexual conduct," which, as in Ginsberg, is a clearly specified definition. It involves actual or simulated sexual acts, descriptions of same, or exaggerations of primary or secondary sexual characteristics in a sexually provocative manner. In addition, also as in Ginsberg, the show, exhibition, or performance, must be "patently offensive to an average person applying contemporary community standards in the adult community as a whole with respect to what is suitable for minors." The detailed description of "sexual conduct" and the examination of the show as a whole under contemporary community standards are in line with what has been upheld in Ginsberg and Miller. And for the same reasons noted above, the absence of express "prurient interest" and "no social value" elements is likely not fatal to HB265's validity. The bill may be construed as making the prurient interest requirement implicit, and any overbreadth concerns about restricting protected speech by adults can be avoided simply by checking IDs. Thus, HB265 satisfies Fourteenth Amendment due process concerns of vagueness and overbreadth.

Please feel free to contact me if you have any questions.

Sincerely,

RAÚL R. LABRADOR
Attorney General

[1] The Miller opinion, released a few years after Ginsberg, rejected the "utterly without redeeming social value" test from its Memoirs v. Massachusetts case, instead applying the lack of social value test set forth above. In the Erznozik opinion released in 1975, after Miller, the Supreme Court noted that it "had not had occasion to decide what effect Miller will have on the Ginsberg formulation." 422 U.S. 205, 213 n.10. But the Ninth Circuit noted a decade ago that although the Supreme Court had not expressly

utilized the social value test, a number of U.S. Courts of Appeals have. See Powell's Books, Inc. v. Kroger, 622 F.3d 1202 (9th Cir. 2010) (citation).

[2] If HB265 can constitutionally proscribe certain sexual exhibitions as obscene, then it is necessarily permissible for it to refuse to use public funds to support that expression, as HB265 purports to do.

April 4, 2023

The Honorable C. Scott Grow
Idaho State Senate
700 W. Jefferson Street
Boise, Idaho 83702
sgrow@senate.idaho.gov

The Honorable Wendy Horman
Idaho House of Representatives
700 W. Jefferson Street
Boise, Idaho 83702
wendyhorman@house.idaho.gov

Re: House Bill (HB) 350, Section 16

Dear Senator Grow and Representative Horman:

This letter responds to your inquiry about language within section 16 of HB350, an appropriation bill for the Department of Health and Welfare (DHW) for substance abuse treatment and prevention, mental health services, and psychiatric hospitalization.

QUESTIONS PRESENTED

1) Does the appropriation language allow the sub-granting of funds from the Division of Substance Abuse and Prevention to other divisions within the DHW?

2) May first responders sub-distribute naloxone and needles to other groups such as crisis centers, hotels, or schools?

3) If a first responder group refuses to participate in the distribution process, could emergency medical service (EMS) staff at DHW distribute funds for naloxone and needles?

BACKGROUND

The general rule of statutory interpretation in Idaho is that the literal words of the statute must be given their plain and ordinary meaning, construing the statute as a whole. Verska v. Saint Alphonsus Regional Medical Center, 151 Idaho 889, 893, 265 P.3d 502, 506 (2011). There is no need for a court to construe the statue if it is unambiguous, the court simply follows the law as it is written. Id.

House Bill 350 section 16 provides in its entirety:

> SECTION 16. DIRECTING THE USE OF THE STATE OPIOID RESPONSE GRANT. Of the funds appropriated in Section 1 of this act for the State Opioid Response Grant, funds available for naloxone and needles shall be available only to first responders in the State of Idaho.

RESPONSE TO QUESTION 1

No. The State Opioid Response Grant is specifically appropriated in the Division of Substance Abuse Treatment and Prevention. There is no appropriations language that allows a transfer of state opioid response grant funds to any other division and there is no language within HB350 that would support the proposition that any other division is authorized to direct State Opioid Response Grant funds for naloxone and needles to any entity other than first responders.

RESPONSE TO QUESTION 2

Yes. While HB350, Section 16 requires that State Opioid Response Grant funds for naloxone and needles be available only to first responders, first responders may distribute product to other persons or entities eligible under the grant.

In the past, DHW itself has distributed naloxone kits to: First responders, substance use disorder treatment providers, recovery and crisis centers, emergency departments, shelters, public health districts, safer syringe programs and other entities. HB350 requires DHW to direct these funds solely to first responders. This adds increased accountability on product use and increases the likelihood that information and training will accompany its distribution.

Absent legislative language that restricts product distribution, first responders may use grant funds to purchase naloxone and needles and distribute these products to other individuals and entities to accomplish program goals. First responders may not, however, transfer grant funds to other persons and organizations and DHW may only award these grant funds to first responders.

RESPONSE TO QUESTION 3

No. While general policy of the state favors widespread use of naloxone and needle exchanges, the language of HB350 is clear and limited. The funds for naloxone and needles are intended to be available only for first responders. It would be inconsistent with the plain language of HB350 for staff of the DHW to distribute grant funds to third parties.

Sincerely,

RAÚL R. LABRADOR
Attorney General

July 6, 2023

The Honorable Sage Dixon
Idaho House of Representatives
P.O. Box 83720
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sdixon@house.idaho.gov

Re: Request for AG Analysis

Dear Representative Dixon:

Below are answers to your questions. I agree with the analysis Mitchell Toryanski emailed you on February 10, 2023, but add some additional detail.

1. **Does Idaho Code Section 36-1201 compel those persons who are not fishermen, hunters or trappers to stop at Idaho fish and game check stations?**

In certain circumstances, Idaho law requires that all persons must stop at Idaho Department of Fish and Game (IDFG) check stations. Idaho Code section 36-1201(b) provides:

> No fisherman, hunter or trapper shall refuse or fail to: . . Stop and report at a wildlife check station encountered on his route of travel when directed to do so by personnel on duty. Such direction may be accomplished by signs prominently displayed along the route of travel indicating those persons required to stop.

While Idaho Code section 36-1201 only refers to fishermen, hunters, or trappers, other sections of Idaho Code may apply to direction of all traffic for a check station. For example, Idaho Code section 49-1419 provides:

> OBEDIENCE TO TRAFFIC DIRECTION. No person shall willfully fail or refuse to comply with any lawful order or direction of any peace officer, fireman or uniformed

> adult school crossing guard invested by law with authority to direct, control or regulate traffic.

IDFG conservation officers are peace officers, in these cases directing traffic to stop with signage. Idaho Code § 36-1301. Additionally, other sections of Idaho Code require drivers to follow traffic control devices and officer direction. See e.g., Idaho Code § 49-801 (Signs, Signals and Markings); Idaho Code § 18-705 (Resisting and obstructing officers).

Idaho appellate courts have upheld the constitutionality of such check stations as advancing the State's interest in wildlife management, providing:

> Hunting is a highly regulated activity, which in turn, correspondingly reduces hunters' reasonable expectations of privacy. The wild game within our state belongs to the people as a whole in their collective, sovereign capacity and is treated as a common trust. We hold that it is constitutionally reasonable to briefly detain the traveling public, in or near designated hunting areas during hunting season, to question hunters, check their licenses, inquire about game taken, inspect game in hunters' possession, and collect biological data. In this capacity, fish and game officers not only act as law enforcers, but also as public trustees protecting, conserving, and promoting the replenishment of Idaho's wildlife.

State v. Thurman, 134 Idaho 90, 97 (Ct. App. 1999); see also State v. Medley, 127 Idaho 182, 186-7 (1995) ([*r]outine* fish and game check stations are an effective method for advancing the state's compelling interest in wildlife management and conservation). Id. Federal courts have also upheld such check stations in a recent case appealed all the way to the United States Supreme Court. Tanner v. Schriever, No. 2:18-CV-00456-DCN, 2020 WL 5414564 (D. Idaho Sept. 9, 2020), *aff'd sub nom.* Tanner v. Idaho Dep't of Fish & Game, No. 20-35886, 2022 WL 1223998 (9th Cir. Apr. 26, 2022), *cert. denied* Tanner v. Idaho Dep't of Fish & Game, 143 S. Ct. 405 (2022).

Such check stations, however, have limited prescribed uses, as they must be "narrowly focused to advance the public's interest in wildlife preservation, protection, perpetuation and management . . . ." Id. at 95. "[T]here is no statutory authorization for a 'dragnet' checkpoint, . . . where all passersby are stopped and screened for any conceivable violation." Medley, 127 Idaho at 187.

Regarding stopping people who are not fisherman, hunters, or trappers, such stops should be momentary and minimally invasive, with few questions asked. As described in a recent case:

> At these check stations, IDFG officers stop all vehicles passing through and inquire if the driver and/or passengers have been hunting, fishing, or trapping. If the answer is no, the officers ask no further questions and the vehicle proceeds on its way. These stops rarely last longer than a few seconds. If the answer is yes, the officers spend a few minutes collecting data, receiving public input, and, if necessary, enforcing state laws that pertain to the management and conservation of wildlife resources.

Tanner, 2020 WL 5414564, at *1. As a practical matter under IDFG policy, major IDFG check stations set up along larger public highways only direct fishermen, hunters, or trappers to exit the highway to the check station, with no requirement for others to stop. The subset of IDFG check stations that stop all traffic are a smaller category used in limited circumstances, locations, and times on smaller rural roads where most of the people stopped are fishermen, hunters, or trappers.

2. Does Idaho Code Section 36-1201 authorize the Idaho Department of Fish and Game to establish game check stations that stop all traffic (roadblocks) for game check station purposes?

Courts have repeatedly held Idaho Code section 36-1201 authorizes the IDFG to establish game check stations that stop all traffic in narrow circumstances. This question was addressed squarely by Idaho State courts in Medley and Thurman. State v. Medley, 127 Idaho 182, 187, 898 P.2d 1093, 1098 (1995) ("[T] the legislature has provided

statutory authority supporting the use of routine Department check stations."); State v. Thurman, 134 Idaho 90, 94 (Ct. App. 1999) "The Idaho legislature has provided statutory authority to the Idaho Department of Fish and Game to conduct routine check stations. Idaho Code § 36–103(b); Idaho Code § 36–1201(b)." Id. The Thurman case found an all-stop check station set up on a rural gravel road in Owyhee County to be a valid exercise of statutory authority. Thurman, 134 Idaho at 92. Federal courts have also agreed with Idaho courts' analysis, similarly, speaking to this exact issue. Tanner, 2020 WL 5414564, at *3 ("[W]ildlife checkpoints, whether "roadblocks" or otherwise, maintained by IDFG are authorized by § 36-1201 for the purpose of checking fish and game licenses and lawful possession of wildlife.").

I hope you find this analysis helpful. Please feel free to contact me if you have any additional questions or concerns.

Sincerely,

OWEN MORONEY
Deputy Attorney General

September 11, 2023

The Honorable Scott Herndon
P.O. Box 83720
Boise, Idaho 83720-0081
SHerndon@senate.idaho.gov

Re: Special Session Subject

Dear Senator Herndon:

You requested an opinion regarding whether the legislature would exceed its constitutional authority by confining a self-initiated special session to a single bill as specified in the constituting petition. As explained in further detail below, RS30783 could be a proper "subject" for a petition because it is specific, thereby providing notice to legislators and the public in compliance with the Idaho Constitution. However, utilizing a bill as a petition subject could unnecessarily limit the legislature during special session. An alternative subject, which both complies with the Idaho Constitution and provides flexibility for the legislature to potentially consider other bills or resolutions, is "presidential candidate nominations."

A. Relevant Constitutional Provisions

Article III, section 8, of the Idaho Constitution provides two mechanisms for special sessions of the legislature - one initiated by the governor and the other self-initiated by the legislature through a petition process. The provision authorizing the legislature to convene a special session states:

> The legislature, while remaining a part-time, citizen legislature, must also be convened in special session by the president pro tempore of the senate and the speaker of the house of representatives upon receipt of a joint written petition of at least sixty percent of the membership of each house, *specifying the subjects to be considered*. Such special session must commence no later than fifteen days after the petition is received by

> the president pro tempore of the senate and the speaker of the house of representatives. At a special session convened pursuant to this section, *the legislature shall have no power to consider or pass any bills or resolutions on any subjects other than those specified in the petition and those necessary to provide for the expenses of the session.*

Idaho Const. art. III, § 8(2) (emphasis added).

Article III, section 16, of the Idaho Constitution provides, in pertinent part: "Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title…."

B. Analysis

1. Interpretation of "Subjects"

Your question focuses on the meaning and application of the term "subjects" in subsection 2, quoted above. Subsection 2 of article III, section 8 was added in 2022 when voters adopted S.L. 2021, Senate Joint Resolution 102. Because of its recentness, there exists no caselaw interpreting or construing the amended language. Thus, the rules of statutory interpretation must be utilized to parse out the meaning of the term "subjects". In statutory interpretation, the meaning of a statute begins with the literal language.[1] If the statutory language is unambiguous, the statute's plain meaning should be applied; and if the statutory language is ambiguous, the proffered interpretations and context should be considered.[2] A statute will only be regarded as ambiguous when reasonable minds might differ as to its interpretation.[3] Statutory interpretation also requires one to review other related provisions so terms are applied consistently throughout.[4]

"Subject" is commonly defined as "material or essential substance."[5] This definition is not likely considered ambiguous as this is the meaning attributed to the term "subjects" in the context of the provision at hand and reasonable minds would not likely differ as to its interpretation.

The term "subject" is also contained in article III, section 16, which sets forth the requirement for unity of subject and title in an act. Idaho courts have repeatedly explained the purpose of the unity requirement is to "prevent fraud and deception in the enactment of laws and to provide reasonable notice to the legislators and the public of the general intent and subject matter of the act."[6] Given the court's application of the term "subject" in article III, section 16, it is reasonable to anticipate that the court will require the subject(s) for an article III, section 8 special session petition to also be specific enough to put the legislature and public on notice of the general intent and subject matter to be addressed during the special session. As such, the legislature should consider utilizing more specific verbiage for its "subjects", rather than an overarching or general topics.[7]

2. Senator Winder's Special Session Petition

Your question is in reference to Senator Winder's special session petition with the specific "subject" "[t]o consider only the passage and enactment of the language that is RS30783." Such a petition appears to cohere with the Constitutional intent of article III, section 8, as it appears to put the legislature and public on notice of the subject to be addressed during special session. Similarly, RS30783 appears to comply with the unity requirement in article III, section 16 since it is focused on presidential candidate nominations.

However, Senator Winder's special session petition could have an unanticipated limiting effect. The plain meaning of article III, section 8 suggests that more than one bill or resolution can be considered or passed by the legislature in the special session so long as each bill or resolution address the subject(s) identified in the constituting petition. By limiting the special session to a specific bill, the legislature would not be able to consider other bills or resolutions, even if they address the same subject as identified in RS30783. An argument could also be made that the legislature could not even consider amendments to RS30783 since the specific session "subject" is RS30783 as written and presented at the time of the petition.

To avoid such a scenario, another "subject" for the petition is "presidential candidate nominations." This subject is specific enough to provide meaningful notice, but also broad enough to provide more

flexibility to the legislature to consider other bills or resolutions related to the nomination of presidential candidates.

Sincerely,

JEFFERY J. VENTRELLA
Associate Attorney General

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[1] Callies v. O'Neal, 147 Idaho 841, 847, 216 P.3d 130, 136 (2009).

[2] Id.

[3] Id.

[4] 3G AG LLC v. Idaho Dep't of Water Res., 170 Idaho 251, 261, 509 P.3d 1180, 1190 (2022) ("Provisions should not be read in isolation, but must be interpreted in the context of the entire document").

[5] https://www.merriam-webster.com/dictionary/subject.

[6] See e.g. Cox v. City of Sandpoint, 140 Idaho 127, 130, 90 P.3d 352, 355 (Ct. App. 2003)

[7] For instance, compare the term "elections", which is so general that it does not appear to provide meaningful notice to the legislature or public, with the subject "presidential candidate nominations", which is specific enough to provide meaningful notice.

September 13, 2023

The Honorable Scott Herndon
Idaho State Senate
P.O. Box 83720
Boise, Idaho 83720-0081
SHerndon@senate.idaho.gov

Re: Request for AG Analysis

Dear Senator Herndon:

You requested advise regarding the role of the Secretary of State in overseeing the political party nomination process, specifically as outlined in RS30783. The analysis regarding this question is explained in further detail below.

A. Relevant Provisions of RS30783[1]

RS30873 seeks to amend Idaho Code section 34-606 to address pathways for political parties to nominate candidates for the presidential election. The bill includes an addition of Idaho Code section 34-606(4), which reads as follows:

> (4) In years in which a president of the United States is to be nominated and elected, a primary election may be held for the purpose of enabling voters to choose their political party's nominee for candidate for president in conjunction with the primary election on the third Tuesday in May.
>
> (a) Participation in a primary election for president of the United States by a political party shall be optional. Any political party recognized pursuant to section 34-501, Idaho Code, that intends to nominate its candidate for president by means of a party caucus instead of a presidential primary election shall notify the secretary of state's office of its intent no later than the first day of October prior to the primary election. By no later than

> January 1 in the presidential election year, such political party shall also provide the secretary of state's office with a list of its caucus locations and shall certify that the party has sufficient funds to hold its nomination by caucus.
>
> (b) If a party notifies the secretary of state that it does not intend to nominate its candidate for president by caucus or if the conditions set forth in paragraph (a) of this subsection are not met, the primary election for president shall be held in conjunction with the primary election on the third Tuesday in May.

B. Analysis

In the case California Democratic Party v. Jones, a proposition sought to convert the State of California's primary election from a closed primary to blanket primary.[2] The Court held that this violated political parties' First Amendment right of association because it interfered with a party's right to select a candidate.

One could argue that RS307823 is likewise unconstitutional under the California Democratic Party decision. However, such argument would likely fail for a host of reasons. First, unlike the blanket primary proposition in California Democratic Party which disallowed party candidate selection, RS307823 allows parties to nominate a candidate through a party caucus. The parties simply need to meet two conditions before doing so. Second, the two conditions imposed by RS307823 are not so burdensome as to be considered intrusive. To qualify, the parties must 1) notify the Secretary of State of the party's intent to hold a caucus before October first prior to the year of the primary election, and 2) by January first, provide the Secretary of State a list of caucus locations and certifying the party has sufficient funds to hold a caucus. Third, the Secretary of State's role in RS307823 is strictly ministerial. The conditions posed in RS307823 are simply "checkbox" conditions. The Secretary of State has no discretion in considering whether a party has met the conditions. His role is solely to determine whether the parties have submitted the requisite notice and certification on time or not. Fourth, the Secretary of State is the chief election officer of the state and is responsible for obtaining and

maintaining uniformity in the application, operation, and interpretation of the election laws.[3] As chief election officer, the Secretary of State has a vested interest in maintaining transparent and organized elections. This interest is bolstered by the Court in the California Democratic Party decision, who acknowledge that "[s]tates play a major role in structuring and monitoring the . . . election process..."[4] The stipulations outlined in RS30783 are simply a means for the Secretary of State to structure and monitor the State of Idaho's election process. For these reasons, RS30783 likely passes constitutional muster.

I hope this analysis is helpful.

Sincerely,

JEFFERY J. VENTRELLA
Associate Attorney General

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[1] The applicable section of RS 30783 consists of p. 2, lines 38-40 and p.3, lines 1-13.

[2] California Democratic Party v. Jones, 530 U.S. 567, 572-73, 120 S. Ct. 2402, 2406, 147 L. Ed. 2d 502 (2000).

[3] Idaho Code § 34-201.

[4] California Democratic Party v. Jones, 530 U.S. 567, 567, 120 S. Ct. 2402, 2404, 147 L. Ed. 2d 502 (2000).

September 15, 2023

The Honorable Judy Boyle
Idaho House of Representatives
P.O. Box 83720
Boise, Idaho 83720-0038
jboyle@house.idaho.gov

Re: Caucuses in churches and schools

Dear Representative Boyle:

You requested an opinion from the Attorney General on whether Idaho law allows caucuses to be held in churches and schools. The below analysis reviews the question as it applies to each of these facilities.

Caucus at Church:

There is nothing in Idaho law that prevents a caucus from being held in a non-public facility so long as the political party organizing the caucus has permission to use that facility for political purposes. As churches are non-public facilities, a political party would not be legally withheld from holding a caucus at a church so long as the church was willing to allow the caucus to be held on its property.

Caucus at School:

The Public Integrity in Elections Act generally disallows public funds, resources, or property to be used to advocate for candidates or ballot measures. However, there is an exemption that seems to allow political parties to run caucuses at public facilities so long as all political parties are given “equal and fair access” to the public facility. The applicable language of this Act is referenced below:

> (5) "Property or resources" means goods, services, equipment, computer software and hardware, college extra credit, other items of intangible property, or facilities provided to or for the benefit of a candidate, a

> candidate's personal campaign committee, a political issues committee for political purposes, or advocacy for or against a ballot measure or candidate. *Public property or resources that are available to the general public, at such times and in such manner as they are available to the general public, are exempt from this exclusion and may be used by a political party as defined in section 34-109, Idaho Code, provided that all political parties are given equal and fair access.*

Idaho Code § 74-603(5) (emphasis added).

The clear language of the statute indicates that political parties can use "[p]ublic property or resources that are available to the public." The only limiting language in the Act clarifies that the public property and resources must be used "at such time and in such manner as they are available to the general public".

The statute does not define the phrase, "at such time and in such manner as they are available to the general public." Fortunately, the legislative meeting minutes pertaining to HB 566, which was eventually codified as Idaho Code sections 74-601 to 74-606, shed additional light on this language. For example:

> **Rep. Monks** presented **H 566** which would allow equitable use of public areas for all recognized political parties wanting to have an event *that is in accordance with the function of the location.* These events have taken place on occasion as it was assumed they were allowed to do so but it would be prudent to get permissions in writing.

House State Affairs Committee meeting minutes, February 11, 2022, p.3 (emphasis added).

> **Senator Stennett** asked if the bill would distinguish between general public areas and private properties with meeting rooms. **Representative Monks** responded that the bill applied only to publicly owned properties. He said the *bill would only apply to areas where one had to*

> *request authorization for the use, such as a meeting room.* He clarified that a space would not have to be always open to be considered generally available to the public, as long as it was open fairly to all parties.

Senate State Affairs Committee meeting minutes, March 7, 2022, p.3 (emphasis added).

Based on the comments captured in these legislative minutes, it appears that the legislature intended to allow access to political parties to utilize public facilities at a time when such facilities were open to the general public and in accordance with the function of the location.

While schools are open to enrolled students and educators during school hours, they are not generally open to the public at large. Thus, a school would not be available for political party use during regular school hours. If the school facility is open to the general public after hours and/or the weekend, however, political parties should be granted permission to use the facility. The school would also have to allow equal and fair access to any other political party wanting to use its facilities.

The clear language of the Public Integrity in Elections Act generally disallows the use of public funds, resources, or property for the advocacy of candidates or ballot measures. However, it allows political parties to hold caucuses at public facilities so long as all political parties are given “equal and fair access” to the public facility.

Sincerely,

JEFFERY J. VENTRELLA
Associate Attorney General

September 22, 2023

The Honorable Chuck Winder
President Pro Tempore
Idaho State Senate
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Re: Special Session Subject

Dear Pro Tem Winder:

You requested an opinion regarding any potential constitutional issues with the Petition and RS30783.

Questions Presented

A. Does the petition and RS30783 violate article III of the Idaho Constitution?

1. Would the legislature exceed its constitutional authority by confining a self-initiated special session to a single bill as specified in the constituting petition under article III, section 8, of the Idaho Constitution?

2. Does RS30783 comply with the single subject requirement in article III, section 16, of the Idaho Constitution?

B. Does RS30783 infringe on the right to association within the First Amendment to the Federal Constitution?

The petition and RS30783 would likely not violate the Idaho Constitution. However, we would recommend that the subject for the petition be changed to "*the revision of procedures within section 34 of the Idaho Code limited to the political party nomination process for presidential candidates.*"

There are non-trivial arguments to support that the Secretary's role within RS30783 as well as the timing of the bill infringes on the First Amendment right to association under the Federal Constitution. Additionally, the timing of this bill creates due process concerns that should be taken into account.

The analyses regarding these questions are below.

Responses

A. The Legislature would not exceed its constitutional authority by confining a self-initiated special session to a single bill as specified in the constituting petition under article III, section 8, of the Idaho Constitution. Additionally, RS30783 is in compliance with the single-subject rule.

The Legislature would not exceed its constitutional authority by confining a self-initiated special session to a single bill as specified in the constituting petition. As explained in further detail below, RS30783 could be a proper "subject" for a petition because it is specific, thereby providing notice to legislators and the public in compliance with the Idaho Constitution. However, utilizing a bill as a petition subject could unnecessarily limit the Legislature during special session. An alternative subject, which both complies with the Idaho Constitution and provides flexibility for the Legislature to potentially consider other related bills or resolutions, is "the revision of procedures within section 34 of the Idaho Code limited to the political party nomination process for presidential candidates."

Additionally, RS30783 is in compliance with the single-subject rule within the Idaho Constitution.

1. Relevant Constitutional Provisions

Article III, section 8, of the Idaho Constitution provides two mechanisms for special sessions of the Legislature: one initiated by the Governor and the other self-initiated by the Legislature through a petition process. The provision authorizing the Legislature to convene a special session states:

> The legislature, while remaining a part-time, citizen legislature, must also be convened in special session by the president pro tempore of the senate and the speaker of the house of representatives upon receipt of a joint written petition of at least sixty percent of the membership of each house, *specifying the subjects to be considered*. Such special session must commence no later than fifteen days after the petition is received by the president pro tempore of the senate and the speaker of the house of representatives. At a special session convened pursuant to this section, *the legislature shall have no power to consider or pass any bills or resolutions on any subjects other than those specified in the petition and those necessary to provide for the expenses of the session*.

Idaho Const. art. III, § 8(2) (emphasis added).

Article III, section 16, of the Idaho Constitution provides, in pertinent part: "Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title…."

Article XX, section 2, of the Idaho Constitution states, "If two or more amendments are proposed, they shall be submitted in such manner that the electors shall vote for or against each of them separately."

2. Analysis

i. Interpretation of "Subjects"

This question turns on the meaning and application of the term "subjects" in subsection 2, quoted above. Subsection 2 of article III, section 8 was added in 2022 when voters adopted S.L. 2021, Senate Joint Resolution 102. Because of its recentness, there exists no caselaw interpreting or construing the amended language. Thus, the meaning of the term "subjects" is subject to the standard rules of statutory interpretation. The prior-construction canon is a good starting point and provides that "when 'judicial interpretations have settled the

meaning of an existing statutory provision, repetition of the same language in a new statute' is presumed to incorporate that interpretation." Armstrong v. Exceptional Child Center, Inc., 575 U.S. 320, 330 (U.S., 2015) (quoting Bragdon v. Abbott, 524 U.S. 624, 645 (1998)).

The so-called "single subject rule" has been examined several times by Idaho courts. See, e.g., Idaho Watersheds Project v. State Board of Land Commissioners, 133 Idaho 55 (1999); Idaho Water Resource Bd. v. Kramer, 97 Idaho 535 (1976). The rule considers whether a proposed change can "be divided into subjects distinct and independent, … [and whether] any one of which [can] be adopted without in any way being controlled, modified, or qualified by the other." Idaho Watersheds Project, 133 Idaho at 60 (quoting Kramer, 97 Idaho at 550). This rule prevents proposed laws from addressing multiple subjects at the same time and "forcing the voters to approve or reject such amendment as a whole." Id. Thus, the rule stops "the pernicious practice of 'log-rolling' in the submission of a constitutional amendment." Id.

Consistent with this reading, the courts have interpreted the "single subject rule" for legislative acts similarly. See, e.g., Cox v. City of Sandpoint, 140 Idaho 127, 130 (Ct. App. 2003) (finding that the purpose of this amendment is to "prevent fraud and deception in the enactment of laws and to provide reasonable notice to the legislators and the public of the general intent and subject matter of the act.").

Accordingly, the meaning of "subject" is likely consistent with the dictionary definition: "material or essential substance." Subject, Merriam-Webster (Sep. 11, 2023) https://www.merriam-webster.com/dictionary/subject. In other words, a "subject" within the meaning of both the Idaho Constitution and Idaho statutes is either a distinct and independent concept or more than one concept unless any of the concepts are "incongruous and essentially unrelated." Kramer, 97 Idaho at 552 (1976) (quoting Keenan v. Price, 68 Idaho 423, 454 (1948)).

ii. Special Session Petition Constitutionality

Your special session petition appears to adhere with the Constitutional intent of article III, section 8, as it appears to put the legislature and public on notice of the subject to be addressed during special session. Additionally, RS30783 appears to comply with the single subject rule in article III, section 16 since it is focused on a single subject: the procedure for nominating presidential candidates within section 34 of the Idaho Code. It does not attempt to package multiple, independent subjects together.

However, your special session petition could have an unanticipated limiting effect. The plain meaning of article III, section 8 suggests that more than one bill or resolution can be considered or passed by the Legislature in the special session so long as each bill or resolution address the subject(s) identified in the constituting petition. By limiting the special session to a specific bill, the Legislature would not be able to consider other bills or resolutions, even if they address the same subject as identified in RS30783. An argument could also be made that the Legislature could not even consider amendments to RS30783 since the specific session "subject" is RS30783 as written and presented at the time of the petition.

To avoid such a scenario, another "subject" for the petition is "the revision of procedures within section 34 of the Idaho Code limited to the political party nomination process for presidential candidates." This subject is specific enough to provide meaningful notice, but also broad enough to provide more flexibility to the Legislature to consider other bills or resolutions related to the nomination of presidential candidates.

B. The role of the Secretary of State in overseeing the political party nomination process, specifically as outlined in RS30783, may violate the Federal Constitution's First Amendment right of association.

1. Relevant Provisions of RS30783

RS30873 seeks to amend Idaho Code section 34-606 to address pathways for political parties to nominate candidates for the

presidential election. The bill includes an addition of Idaho Code section 34-606(4), which reads as follows:

> (4) In years in which a president of the United States is to be nominated and elected, a primary election may be held for the purpose of enabling voters to choose their political party's nominee for candidate for president in conjunction with the primary election on the third Tuesday in May.
>
> (a) Participation in a primary election for president of the United States by a political party shall be optional. Any political party recognized pursuant to section 34-501, Idaho Code, that intends to nominate its candidate for president by means of a party caucus instead of a presidential primary election shall notify the secretary of state's office of its intent no later than the first day of October prior to the primary election. By no later than January 1 in the presidential election year, such political party shall also provide the secretary of state's office with a list of its caucus locations and shall certify that the party has sufficient funds to hold its nomination by caucus.
>
> (b) If a party notifies the secretary of state that it does not intend to nominate its candidate for president by caucus or if the conditions set forth in paragraph (a) of this subsection are not met, the primary election for president shall be held in conjunction with the primary election on the third Tuesday in May.

RS30873, Sixty-seventh Legislature, §34-606 (2023).

2. Analysis

There are non-trivial arguments that RS30873 intrudes on the associational rights of political parties. In the case California Democratic Party v. Jones, a proposition sought to convert the state of California's primary election from a closed primary to blanket primary. California Democratic Party v. Jones, 530 U.S. 567, 572-73 (2000).

The Court held that this violated political parties' First Amendment right of association because it interfered with a party's right to select a candidate. Id.

The California Democratic Party decision turned on whether the law was excessively intrusive. Id. at 676. Here, in order for a political party to utilize a caucus, the party must "provide the secretary of state's office with a list of its caucus locations and shall certify that the party has sufficient funds to hold its nomination by caucus." RS30873, Sixty-seventh Legislature, § 34-606 (2023). These requirements may impermissibly grant the Secretary of State too much control over a political party's right to associate and select its party nominee. Specifically, the proposed statute requires political parties to notify the Secretary of State of meeting locations and financial status. Both requirements imply the Secretary of State may have authority to deny a party its selected nomination process based on its chosen location or its lack of finances. The requirements could be understood to give the Secretary of State authority to mandate a minimum amount of finances, to audit political parties, or to choose locations. In other words, these actions would allow the Secretary to have *de facto* veto power over a political party's decisions, which would substantially intrude on the associational freedoms of the political party.

The timing of this law may also implicate the right to association. Here, political parties must let the national party know how they will be choosing delegates by October 1, 2023. For the upcoming election cycle, this may have the effect of determining which route a political party takes despite being available in future cycles. It may also provide political parties with a due process claim.

On the other hand, these requirements may not be unconstitutionally intrusive under California Democratic Party if the role of the Secretary of State is clearly ministerial. First, unlike the blanket primary proposition in California Democratic Party which disallowed party candidate selection, Id. at 567, RS307823 allows parties to nominate a candidate through a party caucus. As already discussed, the parties need to meet two conditions before doing so. Depending on their application, the conditions posed in RS307823 may be nothing more than "check-the-box" conditions. If the Secretary of State merely requires a party to: 1) notify the Secretary of State of the party's intent

to hold a caucus before October first prior to the year of the primary election, and 2) by January first, provide the Secretary of State a list of caucus locations and certifying the party has sufficient funds to hold a caucus—and nothing more—then the constitutional concern is lessened. Under this reading, the Secretary of State's role in RS307823 would be strictly ministerial. Thus, the Secretary of State has no discretion in considering whether a party has met the conditions. His role is solely to determine whether the parties have submitted the requisite notice and certification on time or not.

Second, the Secretary of State is the chief election officer of the state and is responsible for obtaining and maintaining uniformity in the application, operation, and interpretation of the election laws. Idaho Code § 34-201. As chief election officer, the Secretary of State has a vested interest in maintaining transparent and organized elections. This interest is bolstered by the California Democratic Party decision, which acknowledged that "[s]tates play a major role in structuring and monitoring the . . . election process." California Democratic Party, 530 U.S. at 567. The stipulations outlined in RS30783 are arguably simply a means for the Secretary of State to structure and monitor the state of Idaho's election process. Amending RS30783 to clarify that the Secretary of State's role is purely ministerial will strengthen your proposed legislation to survive a constitutional challenge.

This response is provided to assist you. It is an informal and unofficial expression of the views of this office based upon the research of the author.

I hope this analysis is helpful.

Sincerely,

JEFFERY J. VENTRELLA
Associate Attorney General

October 6, 2023

The Honorable Ilana Rubel
Idaho House of Representatives
P.O. Box 83720
Boise, Idaho 83720-0038
irubel@house.idaho.gov

Re: Request for AG Analysis

Dear Representative Rubel:

This letter is in response to your request for a legal opinion relating to the "ongoing strife regarding the CID in Harris Ranch."

Question Presented

Whether a community infrastructure district ("CID") is authorized to impose a "special property tax levy"—which Idaho Code refers to as either a property tax or a special assessment—to satisfy the potential debt service payment for general obligation bonds which have not yet been issued.

Short Answer

A CID is authorized to impose either a property tax levy or a special assessment against real property to pay the debt service on a general obligation bond but the best construction of the operative statutes limits that authorization to bonds that are already issued and in place.

Analysis

This question requires a two-part inquiry: (1) what types of levies or assessments is a CID authorized to impose to pay the debt service on a general obligation bond; and (2) may a CID impose a levy or assessment on a general obligation bond that has not yet been issued?

A. Does a CID possess the authority to impose a special property tax levy to pay the debt service on general obligation bonds?

A CID has authority to finance a bond obligation by imposing either a property tax or a special assessment. To finance community infrastructure consistent with its general plan, a CID has the power to: (1) "[e]stablish, impose and collect or cause to be collected special assessments on real property located within an assessment area of the district;" (2)"[l]evy property taxes on real property located within the district;" and (3) "[b]orrow money and incur indebtedness and evidence the same by certificates, notes, bonds or debentures…." Idaho Code § 50-3105(1); see also Idaho Code § 50-3107(3). Given the recency of the CID legislation and its relatively limited use, no case law exists interpreting or construing this mechanism. What the statute does make plain is that a CID is authorized to issue several types of bonds. The two most relevant here comprise general obligation bonds and special assessment bonds.

For general obligation bonds, a CID is to collect an annual property tax to pay the interest and principal on the bond. Idaho Code § 50-3108(1). For special assessment bonds, a CID is to impose a special assessment upon real property to pay the debt service. Idaho Code § 50-3109(6). "Debt service" includes the interest and principal of a bond, along with administrative costs. Idaho Code § 50-3102(4). A special assessment is not a property tax but is collected and enforced in the same manner as property taxes. Idaho Code § 50-3102(14). While general obligation bonds are in practice typically paid using a property tax, a general obligation bond "may be payable from any combination of taxes or revenues" typically reserved for paying other types of bonds. Idaho Code § 50-3111. This means the interest and principal on a general obligation bond can be paid with either a property tax or a special assessment. In answer to the first part of the question, under either Idaho Code section 50-3108(1) or Idaho Code section 50-3111, a CID has authority to impose a "special property tax levy"—either a property tax levy or a special assessment—to pay the debt service on general obligation bonds.

B. Can a CID impose a special property tax levy to finance a bond that has yet to be issued?

A CID may impose a property tax to pay the debt service on a general obligation bond only if the bond has been authorized by the electors of a CID and if the CID has issued the bond. Idaho Code section 50-3108 provides for both the authorization to issue a general obligation bond and for the issuance of a general obligation bond. The statute also outlines the process for doing so. The authorization process begins "whenever the district board shall deem it advisable to issue general obligation bonds…." Idaho Code § 50-3108(1). The CID board will then pass a resolution that calls for the issuance of the bond, specifies what projects are to be financed with the bond, provides for the collection of a property tax to pay the interest and principal of the bond, and provides for an election on the question of whether the bond should be authorized. Idaho Code § 50-3108(1), (2). The question whether the CID should be authorized to issue a general obligation bond is then submitted to the electors of the CID. Id.

If the question of authorization has been approved by two-thirds of the voters in a CID, it is within the discretion of the CID board to then issue the bonds up to the authorized amount. "[The] district board by further resolution shall be entitled to issue and sell the bonds in series or divisions up to the authorized amount without the further vote of the qualified electors, and to issue and sell such bonds at such times and in such amounts as the district board deems appropriate…." Idaho Code § 50-3108(3).

Once a general obligation bond has been authorized by the voters and issued by the board of a CID, a CID may levy a property tax to pay the debt service on the bond. To levy any property tax, including a property tax or special assessment to pay the debt service on a general obligation bond, a CID board must "make annual statements *and estimates*" of the amount to be raised from property taxes and special assessments to pay, among other things, the general obligation bonds of the district. Idaho Code § 50-3114(1). After preparing these statements and estimates, the CID board must certify to the board of county commissioners the total amount of property taxes it requires to finance its annual budget, "including the amount of money needed to satisfy annual bond payments." Idaho Code § 50-3114(2). The amount

needed from property tax is then divided by the taxable value of all property within the CID to arrive at a levy rate. Idaho Code § 63-803(3). "[A]fter receipt of this certification, the county commissioners shall make a tax levy … which, when applied to the tax rolls, will meet the budget requirements certified by such taxing districts." Id.

The statutory requirements surrounding the certification of the amount a CID requires from property tax support the conclusion that a CID may certify the amount needed to pay the debt service of a general obligation bond—and thereby impose a property tax levy for that purpose—only when the bond has been issued. For example, Idaho Code section 50-3114(1) requires that a CID make "annual statements and *estimates*" of the amount to be raised to pay a general obligation bond. As it is used in this context, the noun "estimates" means "a rough or approximate calculation." *Merriam-Webster Online, "*estimate*,"* accessed Sep. 28, 2023, ttps://www.merriam-webster.com. A rough or approximate calculation of the amount needed from property tax—an estimate—is useful when the amount needed is uncertain. An "estimate" taken outside the broader context could be used in the sense of forecasting, the broader statutory context presupposes that "estimates" relate to an existing amount owed. Put differently, while it is true that the amount needed from property tax to pay a general obligation bond can be uncertain when the bond has not been issued, the nonexistence of a bond is not necessarily the only reason an amount could be uncertain and thus require the CID to submit an estimate. Accordingly, the use of the word "estimates" is by no means an *ipso facto* implication that a CID may certify an amount required from property tax to pay the debt service on a general obligation bond that has not yet been issued. Because an estimate is useful in the face of uncertainty from either the nonexistence of a bond or from some other reason, the word "estimate" as used here creates ambiguity when viewed in isolation from the remainder of the statutory scheme. To understand what this single provision means it is necessary to consider the statute as a whole and consult related statutes that are *in pari materia* with Idaho Code section 50-3114(1). *See* Saint Alphonsus Reg'l Med. Ctr. v. Elmore Cnty., 158 Idaho 648, 653, 350 P.3d 1025, 1030 (2015). Those other provisions clarify that a CID may not certify that it requires property tax dollars to pay the debt service on a general obligation bond that does not exist.

Another provision of Idaho Code section 50-3114(1) more clearly supports the conclusion that a CID may not impose a property tax to pay the debt service on a yet unissued bond. That provision requires that a CID board must certify to the county commissioners "the amount to be raised to pay general obligation bonds and special assessment bonds *of the district*…." Idaho Code § 50-3114(1) (emphasis added). If a bond has been authorized by the voters of a CID but has not yet been issued by the board of a CID, then there is no bond in existence. If there is no bond in existence, then there can be no bond "of the district" for the district to certify. For a CID to certify an amount to be raised from a property tax to pay a general obligation bond "of the district" when there is no general obligation bond of the district is improper and would transgress the plain language of Idaho Code section 50-3114(1).

Idaho Code section 50-3114(2) also indicates that a CID may not levy a property tax to pay a bond that has not been issued. "[T]he district board, having determined…*the amount of money needed to satisfy annual bond payments*, shall cause the amount of money so determined to be certified in dollars to the board of county commissioners…." Idaho Code § 50-3114(2) (emphasis added). The "amount of money needed to satisfy annual bond payments" becomes known when – and only when -- a general obligation bond has been authorized and issued. Only once the debt obligation is in place can a CID certify that it possesses an obligation which requires property tax funds to satisfy it. A CID that certifies to the county commissioners that it has an annual bond payment to satisfy when in reality it has no annual bond payment to satisfy acts beyond the scope of its authority under Idaho Code section 50-3114. Any property tax levy calculated and imposed based on this unauthorized certification would result in a property tax to pay the debt service on a bond that has not yet been issued. Such a property tax is not permitted under Idaho law.

After a certification from the CID has been reviewed by the county commissioners, the clerk of the board of county commissioners must deliver a record of the levy based on this certification to the Tax Commission. Idaho Code § 63-808(1). The Tax Commission must "carefully examine" the record. Idaho Code § 63-809(1). By rule, the Tax Commission presumes that the amount certified in the record is "adopted in *accordance with pertinent statutory provisions* unless clear

and convincing documentary evidence establishes that [a certified amount] results in an unauthorized levy…." IDAPA 35.0l.03.803(0l)(a) (emphasis added). If it appears to the Tax Commission that the board of the CID has fixed a levy for any purpose not authorized by law, which arguably includes having not followed all the statutory protocols, the Tax Commission must notify the board of county commissioners, county treasurer, and county attorney of the illegal levy. Idaho Code § 63-809. When so notified, the county attorney must bring suit in a court of proper jurisdiction against the board of the CID to have the levy set aside. Idaho Code § 63-809(3). This Office does not have authority to direct the Tax Commission's administrative decision-making process, or its interpretation of law related to any particular case. Nor is there case law indicating how the Tax Commission or the courts have determined in the past—and likely would determine in the future—what constitutes a levy fixed for any purpose not authorized by law under Idaho Code section 63-809. To the extent that a CID property tax levy imposed to pay the debt service on a nonextant general obligation bond is for a purpose not authorized by law, as concluded herein, the remedy is likely action taken under Idaho Code section 63-809.

Conclusion

To pay the debt service on a general obligation bond a CID may impose either a property tax levy or a special assessment. To make such an imposition the bond must already have been issued, otherwise some statutory provisions would be rendered meaningless or be improperly ignored. This is because to impose a property tax levy a CID is required to certify to the county the amount needed to pay debt service on a bond of the district and the amount needed to satisfy the bond's annual payments. Hypothetical or potential bonds or amounts are not sufficient under Idaho law. A CID is therefore not authorized to impose a property tax to pay the debt service on a non-existing or merely potential general obligation bond.

This response is provided to assist you. It is an informal and unofficial expression of the views of this office based upon the research of the author. I hope you found this helpful.

Sincerely,

JEFFERY J. VENTRELLA
Associate Attorney General

October 19, 2023

The Honorable Tammy Nichols
Idaho State Senate
Idaho State Capitol
P.O. Box 83720
Boise, ID 83720-0081
tnichols@senate.idaho.gov

Re: Constitutionality of Idaho Weighted Tax & Interstate Compact Process

Dear Senator Nichols:

This letter responds to your inquiry regarding the following: 1) whether Idaho could impose a weight-mile tax on the counties of eastern Oregon if ceded to Idaho, and 2) the specifics for passing an interstate compact.

As to the Proposed Weight-Mile Tax

This office addresses matters of law, so our analysis can provide you with general legal parameters associated with weight-distance taxing schemes. You mentioned an Ady County district court had ruled that Idaho's weight-distance violated the Commerce Clause of the U.S. Constitution because it favored the products of industries that predominate in Idaho, but not in other states of the Union. This provides some guidance as to how a court may view these kinds of taxing schemes but is not binding precedent.

The general rule is that a tax that advantages in-state businesses over out-of-state businesses is likely to discriminate against interstate commerce in violation of the Commerce Clause. Nw. States Portland Cement Co. v. State of Minn., 358 U.S. 450, 458 (1959). Based on the scenario you proposed, in which Idaho would impose a weight-mile tax that disproportionately affects certain parts of the state but that does not foster discriminatory effect on out-of-state business, the Commerce Clause would likely not be implicated. However, that does not mean that the proposed tax is legally viable.

The greater constitutional concern with the proposed taxing scheme is whether it would violate the equal protection clauses of the Idaho and U.S. Constitution. Idaho Const. art. I, § 2; U.S. Const. art. XIV, § 1. The federal equal protection clause prohibits intentional and arbitrary discrimination by taxing authorities. Sunday Lake Iron Co. v. Wakefield Twp., 247 U.S. 350, 352 (1918). In ruling on an equal protection constitutional challenge of a tax statute, the Idaho Supreme Court held that the rational basis test applies, meaning that to pass muster legislation must classify the persons it affects in "a manner rationally related to legitimate governmental objectives." Tarbox v. Tax Comm'n, 107 Idaho 957, 960, 695 P.2d 342, 345 (1984).

Therefore, to satisfy equal protection, the state should have a rational basis for taxing counties that are closer to international waters differently from other counties. In other words, differing tax treatment must be rationally related to a legitimate governmental objective. In John Hancock Mut. Life Ins. Co. v. Haworth, 68 Idaho 185, 191, 191 P.2d 359, 362 (1948), the Idaho Supreme Court held that Idaho's equality clause does not forbid reasonable classifications and line drawing; therefore, a life insurance company could properly be taxed on a different basis than ordinary corporations. It further held that the state has the power for taxation purposes to make distinctions and classifications, but the classification must be reasonable and founded upon differences between the parties. Id. The Idaho court relied upon U.S. Supreme Court precedent holding that discrimination through classification violates the equality clause only when it is not made in exercise of legislative judgment and discretion. Magoun v. Illinois Tr. & Sav. Bank, 170 U.S. 283, 294 (1898).

"[W]hat satisfies [fourteenth amendment] equality has not been, and probably can never be, precisely defined." Magoun, 170 U.S. at 293. Generally, to satisfy the 14th Amendment, the law should operate equally and uniformly upon all persons in similar circumstances. Id. at 293. States possess large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation. Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359 (1973). However, clear and hostile discrimination against particular persons or classes, when unusual in character, might be found to violate the 14th Amendment. Id. at 294. These general principles, while

valid, are indeterminate, and thus fail to provide clean lines for assessing whether particular legislation satisfies equal protection.

As all legislative acts are presumed constitutional, any weight-mile tax enacted will be presumed constitutional, and the statute's challenger will bear the burden to overcome a strong presumption of validity. Olsen v. J.A. Freeman Co., 117 Idaho 706, 709, 791 P.2d 1285, 1288 (1990). Provided the state has a rational basis for the tax and the tax does not produce a discriminatory effect between in-state and out-of-state trucking operations, a Court would likely find that the tax to be constitutional and properly administered. Articulating a rational basis in support of the proposed tax is a policy matter and lies with the legislature. This office provides analysis of matters of law, and until the proposed legislation is actually drafted, we cannot say with reliability, let alone certainty whether it would satisfy constitutional standards. Predicting precisely how a court would view a particular taxing scheme is therefore not possible at this juncture.

As to Interstate Compacts

Interstate compacts are made with coordinated, reciprocal legislation passed by each state. They are usually run by a board, composed of appointees of each State's governor, with specific responsibilities set forth in the legislation creating the compact. *See* John J. Delaney, et al., Levels of Regulatory Activity–Interstate Agreements, Handling the Land Use Case § 2:9 (3d ed. 2022–2023).

Entering into an interstate compact can be cumbersome. Id. Identical forms of the agreement must be passed by all participating state legislatures and any amendments to the agreement will also require common passage by each state. Id.

You should be aware that some interstate compacts require congressional approval because of the Compact Clause of the U.S. Constitution which states, "[n]o State shall, without the Consent of Congress, ... enter into Any Agreement or Compact with another State, or with a foreign Power." Art. I, sec. 10, clause 3. Despite the foregoing, the Supreme Court has held that not all agreements between States are subject to the Compact Clause. *See* U.S. Steel Corp. v.

Multistate Tax Comm'n, 434 U.S. 452, 469 (1978). The Supreme Court has ruled that the application of the Compact Clause is limited to agreements that tend to increase the political power in the states and encroach on or interfere with the supremacy of the federal government. Id. at 469–477.

To answer your direct question, the legislature must pass a statute authorizing an interstate compact and providing a framework for the compact and its implementation. *See, e.g.* the Interstate Compact on the Placement of Children, Idaho Code §§ 16-2101–16-2107; and the Interstate Compact for Adult Offender Supervision, Idaho Code §§ 20-301–20-302. Like any law, the bill authorizing such compact must be passed by a majority vote of each house of the legislature and signed into law by the Governor. And of course, it is subject to veto by the Governor.

This response is provided to assist you. It is an informal and unofficial expression of the views of this office based upon the research of the author and the facts and circumstances provided to us. I hope this information is helpful. Please let us know if we may be of further assistance.

Sincerely,

PHILLIP BROADBENT
Chief Deputy

October 26, 2023

The Honorable Ned Burns
Minority Caucus Chair
Idaho House of Representatives
700 W. Jefferson Street
Boise, Idaho 83702

Re: Local Government Use of Opioid Settlement Funds

Representative Burns:

Pursuant to the Attorney General's obligation under Idaho Code section 67-1401 to advise the Idaho Legislature, this letter responds to your inquiry asking how Idaho's local governments, including its counties, cities, and health districts, may use their funding received through the national opioid settlements.

Question Presented

Does your interpretation of how [opioid settlement funds] can be utilized extend beyond the Idaho Behavioral Health Council, Idaho Department of Health and Welfare, to smaller units of government such as counties or cities?

Answer

Yes. Like Idaho state government, local governments must also use their opioid settlement funds for purposes relating to opioid abuse prevention and recovery programs. This includes co-occurring OUD and substance abuse disorder/mental illness. You state in your email that you are aware of the August 31, 2023 written guidance the Attorney General sent to the Idaho Behavioral Health Council (IBHC).

In that letter, we concluded that the State must use its funding for opioid treatment and prevention purposes based on: (a) Idaho Code section 57-825, (b) the opioid settlement agreements, (c) Idaho's Intrastate Allocation Agreement, and (d) Exhibit A. Unlike the State of Idaho, local governments are not bound by Idaho Code section 57-825. But they are obligated to use their opioid settlement funds for opioid

abatement as set forth in the settlement agreements, the Intrastate Allocation Agreement, and Exhibit A.

All referenced documents are available on the Attorney General's website at www.ag.idaho.gov. Exhibit A, which was developed by a panel of opioid abatement experts, identifies a multitude of approved treatment and prevention programs that local governments may use to help them develop community-specific programs.

Seven years ago, to help stem Idaho's opioid epidemic and recoup the millions of dollars the State has spent treating Idaho's opioid victims, the Attorney General began investigating the opioid industry. The settlements do not address alcohol, cocaine, methamphetamine, or other addictions. Each opioid settlement is intended solely to combat the multitude of damages that opioids have wrought on Idaho and its citizens. To ensure these funds are used to their fullest potential and that the state does not incur penalties for misusing its funds, it is imperative that all funding recipients comply with settlements' associated spending restrictions.

The Attorney General's Consumer Protection Division has worked cooperatively with local governments over the past two years to provide guidance regarding: (a) settlement terms and conditions, (b) interpretations of Exhibit A, (c) spending proposals, and (d) financial reporting requirements. Our office will continue to assist local governments in navigating the finalized and future settlements. Anyone with questions about the proper use of opioid settlement funds or other issues may contact me at 208.999.2186, james.simeri@ag.idaho.gov, or Deputy Attorney General Stephanie Guyon at 208.334.4135, stephanie.guyon@ag.idaho.gov.

I hope this information is helpful to you and your constituents. If you have further questions or wish to discuss this issue further, please give me a call.

Sincerely,

JAMES J. SIMERI
Division Chief
Consumer Protection Division

November 20, 2023

Senator Chuck Winder
President Pro Tempore
Idaho State Senate

Re: Letter received on October 25, 2023

Dear Senator Winder,

You forwarded a letter to our office on October 25, 2023, regarding the establishment of concurrent jurisdiction over civilians, including juvenile offenders, on federal military installations in Idaho. You requested that we review the letter and offer our thoughts and recommendations, and you asked whether Idaho could enact the type of laws proposed by the original letter to your office.

The U.S. Department of Defense has sought to address this issue in many states over the last several years. Historically, the federal government either obtained exclusive federal legislative jurisdiction over land by agreement with the owning state or maintained exclusive federal legislative jurisdiction over certain land after the formation of a new state. With this exclusive federal jurisdiction came the responsibility to handle all legal proceedings, including misconduct by juveniles.

The federal government has seen a growing need to address juvenile misconduct on military installations as the civilian population on military installations has grown. But federal courts typically lack the appropriate juvenile-focused resources to adjudicate juvenile misconduct, which means the misconduct is left unchecked or the juvenile may be tried as an adult.[1] The Department of Defense is trying to address this issue by retroceding jurisdiction over civilian juveniles on military installations back to the states.[2]

According to the Department of Defense, the Secretaries of the Military Departments have been instructed "to seek to establish concurrent jurisdiction over juveniles not subject to the Uniform Code of Military Justice on military installations."[3] And Congress has

authorized the Military Departments to do so, pursuant to 10 U.S.C. § 2683, "which allows [the Department of Defense] to relinquish jurisdiction via (a) retrocession, or (b) as the laws of the state may otherwise provide."[4]

Under Idaho law, the United States has been given "exclusive jurisdiction . . . with respect to all lands embraced within the military posts…." in Idaho. Idaho Code § 58-701. Idaho reserved concurrent jurisdiction only "for the execution, upon said lands, or in the buildings erected thereon, of all process, civil or criminal, lawfully issued by the courts of the state…." Id. This reservation of jurisdiction provides for the service of court documents, such as complaints or subpoenas, on military installations, but it does not grant the state jurisdiction over juvenile misconduct.

The United States could retrocede jurisdiction over juvenile misconduct on military installations to the State of Idaho, and the letter sent to your office indicates the Department of Defense would like to do so. If Idaho is interested in accepting such jurisdiction from the United States, it needs to first establish a process by which the retrocession of such jurisdiction could take place.

The letter sent to your office had attached to it draft legislation to establish the process for the United States to retrocede jurisdiction over juveniles on military installations back to Idaho. The draft legislation is similar to legislation passed by other states to accomplish a transfer of jurisdiction from the United States to an individual state. States that have passed such laws include North Carolina, Connecticut, Maryland, Washington, California, and South Carolina.[5] Wyoming is considering such a law as well.[6]

Like these states, Idaho could pass a law to allow the retrocession of concurrent jurisdiction over juveniles on military installations. The decision whether to accept concurrent jurisdiction back from the United States is a policy decision that we respectfully leave for Idaho's elected representatives. We recommend only that you involve in the conversation those elected and other officials who retrocession would affect most, including the Governor, the Director of the Department of Juvenile Corrections, and the Prosecuting Attorney and Sheriff in each county that has a military installation. Our office is

willing to participate in the conversation to the extent you would like us to do so and to review any proposed legislation after a decision is made.

I hope this information has sufficiently answered your inquiry. If you have additional questions or would like additional information, please feel free to contact me directly.

Sincerely,

JEFF NYE
Deputy Attorney General
Chief, Criminal Law Division

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[1] Concurrent Juvenile Jurisdiction, Discussion Points, U.S. Department of Defense, 2024 State Policy Priorities, available at https://download.militaryonesource.mil/StatePolicy/pdfs/2024/discussionpoints-concurrentjuvenilejurisdiction.pdf.

[2] Id.

[3] Remarks of Christopher R. Arnold, Mid-Atlantic Region Liaison, United States Department of Defense-State Liaison Office (Feb. 8, 2023), available at https://mgaleg.maryland.gov/cmte_testimony/2023/jpr/1FwplNMfYQbeKVW3qFpYljhfz-lJghdIH.pdf.

[4] Id.

[5] Concurrent Juvenile Jurisdiction, State Policy Approach, U.S. Department of Defense, 2024 State Policy Priorities, available at https://download.militaryonesource.mil/StatePolicy/pdfs/2024/statepolicyapproach-concurrentjuvenilejurisdiction.pdf.

[6] Hannah Shields, *Local Prosecutors May Be Granted Criminal Jurisdiction Over Civilian Military Base Cases*, Wyoming Tribue Eagle, (Sep. 5, 2023), available at https://www.wyomingnews.com/news/local_news/local-prosecutors-may-be-granted-criminal-jurisdiction-over-civilian-military-base-cases/article_bc29d230-4c1c-11ee-b5c1-9b3a8981d42d.html.

Topic Index

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Tables of Citation

SELECTED ADVISORY LETTERS
2023

ELECTIONS

FISH & GAME

HEALTH & WELFARE

LEGISLATURE

OPEN MEETING LAW

PUBLIC EXHIBITIONS

PUBLIC FUNDS

TAX & TAXATION

UNITED STATES CONSTITUTION CITATIONS

IDAHO CONSTITUTION CITATIONS

UNITED STATES CODE CITATIONS

IDAHO CODE CITATIONS