

Bryan D. Smith, Esq. – ISBN 4411  
SMITH, DRISCOLL & ASSOCIATES, PLLC  
414 Shoup Ave.  
P.O. Box 50731  
Idaho Falls, Idaho 83405  
Telephone: (208) 524-0731  
Facsimile: (208) 529-4166  
Email: bds@eidaholaw.com

Attorneys for Petitioner

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

Petitioner,

v.

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

Respondent.

Supreme Court No. 46545-2018

**PETITION FOR REVIEW**

I.

**INTRODUCTION**

Petitioner asks this Court to address an issue that strikes at the heart of the constitutional balance between an initiative's lawmaking power and that power's conferring an unconstitutional delegation of authority to effect the provisions of the initiative. This Court should issue a declaration that the recently passed ballot initiative, appearing on the November 6, 2018 ballot as "Proposition #2" and more commonly known as "Medicaid Expansion," is unconstitutional and therefore Chapter 2, Title 56, Idaho Code, should not be revised by the Idaho Secretary of State to include the

amending language of Proposition #2 as the law of this state, nor should Proposition #2 be in any way enforced or enforceable.

Alternatively, if the Secretary of State has already revised Chapter 2, Title 56, Idaho Code, to include the amending language of Proposition #2 by the time this Court determines that Proposition #2 is unconstitutional, this Court should order the Secretary of State to again revise Chapter 2, Title 56, Idaho Code, to remove the amending language of Proposition #2.

During the 2018 general election in Idaho, Proposition #2 was placed on the ballot and passed by the electorate. (Appendix A). Proposition #2 provides that the State of Idaho shall amend its state plan to expand Medicaid eligibility to certain persons.

Under well-established Idaho constitutional law, a lawmaking body's failure to include sufficient standards in a delegation of authority renders a law passed by that lawmaking body void. A lawmaking body may not delegate to an executive branch of government the power to set standards. Instead, the lawmaking body must set standards that are limited, reasonable, and clear to protect against arbitrary action or uncontrolled discretion. A sweeping and general delegation of legislative power with uncontrolled, unrestricted or unguided discretionary power exceeds constitutional limits as does a delegation of lawmaking authority to a state executive branch or the federal government to make future laws governing the issue.

Here, Proposition #2 states that the Department of Health and Welfare "shall amend its state plan to expand Medicaid eligibility" expressly authorizing the

Department of Health and Welfare to do so “Notwithstanding any provision of law or federal waiver to the contrary.” Proposition #2 further states that “the Department of Health and Welfare is required and authorized to take *all actions necessary* to implement the provisions of this section.” This includes a requirement that the State of Idaho “shall amend its plan to expand Medicaid eligibility . . . in accordance with sections 1902(a)(1)(A)(i)(VII) and 1902(a)(14) of the Social Security Act.”

By expressly bestowing the Department of Health and Welfare with power to ignore “any provision of law or federal waiver to the contrary,” and by delegating authority to the Department of Health and Welfare to take “all actions necessary,” Proposition #2 creates a sweeping and general delegation of legislative power without standards. Proposition #2 creates in the Department of Health and Welfare uncontrolled, unrestricted and unguided discretionary power that exceeds constitutional limits. Similarly, by amending the plan in accordance with federal statutory law without limits, Proposition #2 impermissibly delegates lawmaking authority to the federal government to make future laws governing the issue.

Accordingly, the Petitioner respectfully petitions the Court to declare Proposition #2 unconstitutional. A brief will be filed subsequently in support of this Petition.

## II.

### JURISDICTION

1. The Court has original jurisdiction to consider this Petition under Idaho Code § 34-1809(4).

### III.

#### THIS IS THE PROPER FORUM

2. This case presents important constitutional issues involving the constitutional balance between an initiative's lawmaking power and that power's conferring an unconstitutional delegation of authority to effect the provisions of the initiative.

3. Pursuant to Idaho Code § 34-1809(4), "Any elector of the state of Idaho may, at any time after the attorney general has issued a certificate of review, bring an action in the supreme court to determine the constitutionality of any initiative."

4. Moreover, whereas the constitutional challenge to Proposition #2 is ripe, (1) Proposition #2 having recently passed in the general election; and (2) the governor having issued his proclamation declaring Proposition #2 approved by a majority of those who voted, now is the appropriate time for this Court to exercise its statutory jurisdiction and consider the constitutional challenge in this Petition.

5. Time is of the essence because within 90 days of the passage of Proposition #2 the Idaho Department of Health and Welfare is required to submit plan amendments to the United States Department of Health and Human Services, Centers for Medicare and Medicaid Services ("CMS") to implement the provision of this section.

#### **IV.**

##### **PARTIES**

6. Petitioner, Brent Regan, is a qualified elector of the State of Idaho and as such has standing pursuant to Idaho Code § 34-1809(4) to bring the constitutional challenges to Proposition #2 as alleged in this Petition.

7. Respondent, Lawrence Denney, is the Secretary of State for the State of Idaho and responsible to amend Chapter 2, Title 56, Idaho Code, to include the amendments to expand Medicaid as required in Proposition #2.

#### **V.**

##### **BACKGROUND**

8. Petitioner hereby realleges and incorporates by reference the allegations contained in paragraphs 1 through 7.

9. On October 18, 2017, an initiative petition was filed in the office of the Idaho Secretary of State. (Appendix B).

10. The initiative petition proposed to add a new statute requiring that Idaho expand Medicaid eligibility.

11. This initiative petition submitted to the Secretary of State contained four substantive sections.

12. Pursuant to Idaho Code § 34-1809, the Idaho Office of the Attorney General reviewed the initiative petition and prepared advisory comments dated November 7, 2017. (Appendix C).

13. Given the strict statutory timeframe within which the Office of the Attorney General was required to review the initiative petition, the review was limited in scope offering review only in isolated areas of concern and did not provide an in-depth analysis of each issue that may present problems.

14. In this regard, the Office of the Attorney General did not conduct any analysis of the initiative petition whether it was unconstitutional under the Idaho State Constitution for impermissibly delegating lawmaking authority to either the Department of Health and Welfare and/or the federal government.

15. The Office of the Attorney General provided a summary of the initiative petition and identified that the initiative petition contained four sections.

16. Section one of the initiative petition represented the substantive portion of the initiative petition. This section required the state Medicaid program to expand its eligibility criteria to include certain individuals who are not otherwise eligible for Medicaid coverage.

17. The Office of the Attorney General noted that the language of the initiative petition to expand Medicaid “tracks exactly with the proposed expansion population initially required by the Affordable Care Act (ACA).”

18. “This definition for the expansion population also coincides with the population for which current federal law provides ninety/ten federal/state financial match rate.” (Emphasis added.)

19. Section one also required the Idaho Medicaid program to develop and submit a state plan amendment to CMS.

20. The Office of the Attorney General again noted that “the language of this section [section one] tracks with provisions of the ACA.”

21. Section two amended Idaho Code to specify that existing definitions would apply to the new Idaho Code. The Office of the Attorney General found that Section two presented no significant legal or policy issues.

22. Section three presented an emergency clause. However, given the different statutory framework surrounding the initiative process from the legislative process, the Office of the Attorney General concluded that the clause was inappropriate.

23. The Office of the Attorney General noted that “Section 4 of the initiative contained a version of a sunset clause, but instead of being tied to a specific date it is tied to a contingent condition. It declares that the expansion provision shall become null and void if the level of federal financial contribution for the expansion population is reduced below ninety percent (90%).”

24. The Office of the Attorney General concluded that the sunset clause set forth in Section four of the proposed initiative presented a unique issue. If the sunset clause were triggered, Idaho would be required to provide services for Medicaid expansion until the program could get an amendment approved by CMS to terminate the program.

25. The Office of the Attorney General stated, “there is a possibility that the amendment to remove this service could be delayed or *even denied*, either of which could limit the application of the Section 4 sunset clause.” (Emphasis added).

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

27. By the time the initiative petition sponsors completed the signature gathering and the Secretary of State placed Proposition #2 on the November 6, 2018 ballot, Proposition #2 no longer contained sections three and four in the original initiative petition. This means that Proposition #2 no longer contained the emergency or sunset clauses.

28. The effect of dropping section four is that Proposition #2 no longer becomes void if the federal government changes the level of federal financial contribution and reduces that amount below the 90%.

29. In essence, Proposition #2 has delegated to the federal government for its future determination Idaho’s percentage of financial contribution and therefore Idaho’s share of the costs Idaho will be forced to pay for Medicaid expansion.

30. As the Attorney General notes, “there is a possibility the amendment to remove this service could be denied . . . [by CMS].” In other words, if the federal government changes the percentage it pays from the stated 90% to the current 71% for



Medicaid, Idaho could have no way to avoid the effects of the federal government's lawmaking actions.

31. Proposition #2 also allows adoption of future and unknowable provisions through its reference to "sections 1902(a)(1)(A)(i)(VII) and 1902(a)(14) of the Social Security Act." These sections deal with the 133% of the poverty line or below standard for Medicaid coverage and the excluded compensation for participation when determining income eligibility. The federal government could change either or both of these unilaterally requiring Idaho to expand eligibility requirement beyond current criteria.

32. Proposition #2 contains no limiting language (such as enacting only current law) for eligibility changes or changes relating to the cost sharing between Idaho and the federal government.

33. Moreover, Proposition #2 contains no clear standards, guidelines, or limits but instead confers impermissibly broad sweeping, unrestricted, and unguided discretionary authority on the Department of Health and Welfare.

34. Specifically, Proposition #2 states that the Department of Health and Welfare "shall amend its state plan to expand Medicaid eligibility" expressly authorizing the Department of Health and Welfare to do so "Notwithstanding any provision of law or federal waiver to the contrary."

35. Moreover, Proposition #2 expressly states that "the department [the Idaho Department of Health and Welfare] is required and authorized to take *all actions necessary* to implement the provisions of this section." (Emphasis added). This

delegation of authority does not even attempt to limit the Idaho Department of Health and Welfare's delegation of authority to "reasonable actions" or even "reasonably necessary actions."

36. Instead, Proposition #2 delegates to the Idaho Department of Health and Welfare authorization "to take all actions necessary" including the authority to ignore "any provision of law to the contrary" to implement its provisions. Presumably, this broad sweeping, unrestricted, and unguided delegation of authority allows the Idaho Department of health and welfare to create even its own standards and guidelines if it determines such actions are "necessary."

37. Proposition #2 unconstitutionally delegates power because its language is uncontrolled, unrestricted, unguided, and delegates power to the Idaho Department of Health and Welfare, a department of the executive branch, without laying out guidance or standards how to implement the federal code. Even worse, Proposition #2 gives the Idaho Department of Health and Welfare a *mandate* and *authorization* "to take all *actions necessary* to implement the provisions of this section as soon as practicable." (Emphasis added).

38. Thus, with no restrictions, controls, or guidance, the Idaho Department of Health and Welfare can do more than simply enact rules and regulations if it deems some sort of other action as necessary to implement Medicaid expansion. The standards for implementation are at the complete discretion of the Idaho Department of Health and Welfare.

39. Because Proposition #2 impermissibly delegates lawmaking authority to the Idaho State Department of Health and Welfare and the federal government, Proposition #2 is unconstitutional.

## **VI.**

### **CLAIM FOR RELIEF**

40. Petitioner hereby realleges and incorporates by reference the allegations contained in paragraphs 1 through 39.

41. For all the reasons set forth in this Petition, this Court should declare that Proposition #2 is unconstitutional. This Court should further order that Chapter 2, Title 56, Idaho Code, should not be revised by the Idaho Secretary of State to include the amending language of Proposition #2 as the law of this state, nor should Proposition #2 be in any way enforced or enforceable.

42. Alternatively, if the Secretary of State has already revised Chapter 2, Title 56, Idaho Code, to include the amending language of Proposition #2 by the time this Court determines that Proposition #2 is unconstitutional, this Court should order the Secretary of State to again revise Chapter 2, Title 56, Idaho Code, to remove the amending language of Proposition #2.

## **VII.**

### **SUPPORTING DOCUMENTS**

43. This Petition is supported by the Verification of Brent Regan.

44. Appendix A is a true and correct copy of the Idaho Voters' Pamphlet published by Lawrence Denney, Idaho Secretary of State, for the General Election held

November 6, 2018. This publication contains Proposition #2 as it appeared on the November 6, 2018 ballot.

45. Appendix B is a true and correct copy of the ballot initiative filed with the Idaho Secretary of State on November 18, 2017.

46. Appendix C is a true and correct copy of the Certificate of Review conducted by the Office of the Attorney General dated November 7, 2017.

### VIII.

#### PRAYER FOR RELIEF

WHEREFORE, Petitioner prays that the Court grant the following relief:

(1) A declaration from this Court that Proposition #2 is unconstitutional and unenforceable;

(2) This Court should further order that Chapter 2, Title 56, Idaho Code, should not be revised by the Idaho Secretary of State to include the amending language of Proposition #2 as the law of this state, nor should Proposition #2 be in any way enforced or enforceable; or

(3) Alternatively, if the Secretary of State has already revised Chapter 2, Title 56, Idaho Code, to include the amending language of Proposition #2 by the time this Court determines that Proposition #2 is unconstitutional, this Court should order the Secretary of State to again revise Chapter 2, Title 56, Idaho Code, to remove the amending language of Proposition #2;

(4) For an award of attorney's fees, expenses, and costs under Idaho Code § 12-117, § 12-121, or as otherwise provided by law; and

(5) For any such further relief, including issuance of declaratory relief or other extraordinary relief as the Court deems just, equitable, reasonable and proper under the circumstances.

DATED this 20<sup>th</sup> day of November, 2018.

RESPECTFULLY SUBMITTED,

SMITH, DRISCOLL & ASSOCIATES, PLLC

By: 

Bryan D. Smith, Esq.  
Attorney for Petitioner

**VERIFICATION**

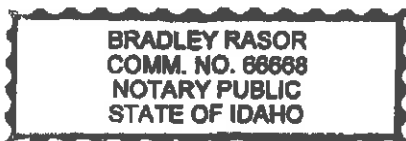
STATE OF IDAHO     )  
                                  ) ss.  
County of Kootenai    )


Brent Regan, being first duly sworn under oath, deposes and states as follows:

1. I am the Petitioner herein
2. I am a qualified elector in the State of Idaho being having registered in Kootenai County to vote and having voted in the general election held on November 6, 2018.
3. I have reviewed the foregoing Petition and am familiar with the facts asserted therein. The Petition and the facts asserted therein are true and correct to the best of my knowledge and belief.

  
Brent Reagan, Petitioner

SUBSCRIBED AND SWORN to before me this 15<sup>th</sup> day of November, 2018.



  
Notary Public for Idaho  
Residing at Coeur d' Alene, Idaho  
My Commission expires: 11/7, 2021

# APPENDIX A

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# IDAHO VOTERS' PAMPHLET

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Published by Lawrence Denney, Idaho Secretary of State



## GENERAL ELECTION

Tuesday ★ November 6, 2018

ELECTION DAY VOTING FROM 8 A.M. – 8 P.M.

Last Day for Voter Pre-Registration

**Friday, October 12**

Last Day to Request an Absentee Ballot

**Friday, October 26**

- Proposition One: Historical Horse Racing
- Proposition Two: Medicaid Eligibility Expansion
- Voter and County Clerk Contact Information

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VOTER INFORMATION AND REGISTRATION » [IdahoVotes.gov](http://IdahoVotes.gov)





which is hereby created within the pari-mutuel distribution fund; and  
 (c) The balance of gross daily receipts to the licensee.  
 All moneys in these accounts are hereby continuously appropriated to the commission for further distribution and time of payment as provided in section 54-2513, Idaho Code.  
 (5) Each licensee conducting the pari-mutuel system for historical horse races shall enter into an agreement with a horsemen's group, as the term "horsemen's group" is defined in section 54-2502, Idaho Code, that shall address, but not be limited to, establishing the percentage of the historical horse race handle that is dedicated to the live horse race purse structure. In addition, the agreement shall provide that all historical race purse moneys that are accrued as required by horsemen's agreements shall be held in the historical horse race moneys fund created pursuant to the provisions of this section.  
 (6) The historical horse race purse moneys fund is hereby created in the state treasury. Moneys in the fund shall consist of all historical horse race moneys that are accrued as required by horsemen's agreements. Moneys in the fund are hereby perpetually appropriated to the Idaho State Racing Commission for distribution pursuant to the provisions of horsemen's agreements and rules of the Commission. The Commission is authorized to promulgate rules providing for the receipt, deposit, withdrawal and distribution of such moneys. The state treasurer shall invest idle moneys in the fund and any interest received on those investments shall be returned to the fund which is created pursuant to the provisions of this section.  
 (7) The Commission shall promulgate rules pursuant to chapter 52, title 67, Idaho Code, to implement the provisions of this section.

**54-2512B. Effect.**

Notwithstanding any other provision of Idaho law, this act shall be in full force and effect after voter approval and immediately upon completion of the canvass of the votes by the Board of Canvassers. No further action by the executive or legislative branches of state government are required to implement the provisions of this act.

**54-2512C. Severability.**

The terms of this act are severable such that if any term or provision is declared by a court of competent jurisdiction to be illegal, void, or unenforceable, the remaining provisions of this act shall continue to be valid and enforceable.

**Proposition Two**

**AN INITIATIVE TO PROVIDE THAT THE STATE SHALL AMEND ITS STATE PLAN TO EXPAND MEDICAID ELIGIBILITY TO CERTAIN PERSONS.**

RELATING TO MEDICAID; AMENDING CHAPTER 2, TITLE 56, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 56-267, IDAHO CODE, TO PROVIDE THAT THE STATE SHALL AMEND ITS STATE PLAN TO EXPAND MEDICAID ELIGIBILITY TO CERTAIN PERSONS AND TO PROVIDE THAT THE DEPARTMENT OF HEALTH AND WELFARE IS REQUIRED AND AUTHORIZED TO TAKE ALL ACTIONS NECESSARY TO IMPLEMENT THE PROVISIONS OF THIS SECTION; AND AMENDING SECTION 56-262, IDAHO CODE, TO PROVIDE A CORRECT CODE REFERENCE.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Chapter 2, Title 56, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 56-267, Idaho Code, and to read as follows:

**56-267. MEDICAID ELIGIBILITY EXPANSION.**

(1) Notwithstanding any provision of law or federal waiver to the contrary, the state shall amend its state plan to expand Medicaid eligibility to include those persons under sixty-five (65) years of age whose modified adjusted gross income is one hundred thirty-three percent (133%) of the federal poverty level or below and who are not otherwise eligible for any other coverage under the state plan, in accordance with sections 1902(a)(10)(A)(i)(VIII) and 1902(e)(14) of the Social Security Act.

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

SECTION 2. That Section 56-262, Idaho Code, be, and the same is hereby amended to read as follows:

56-262. DEFINITIONS. The definitions contained in section 56-252, Idaho Code, shall apply to sections 56-260 through 56-266 ~~56-267~~, Idaho Code.

**YES on Prop One**

The Committee to Save Idaho Horse Racing, Create Jobs, and Fund Public Schools.

Bruce Newcomb, Chairman  
 John Sheldon, Treasurer  
 P.O. Box 2762  
 Boise, Idaho 83701

**YES on Prop Two**

Idahoans for Healthcare

Christy Perry, Co-Chairman  
 Emily Strizich, Co-Chairman  
 Dr. Bruce Belzer, MD., Treasurer  
 P.O. Box 2385  
 Boise, Idaho 83701  
[www.IdahoansForHealthcare.org](http://www.IdahoansForHealthcare.org)  
[Info@IdahoansForHealthcare.org](mailto:Info@IdahoansForHealthcare.org)

**Contact Information**

Secretary of State's Office  
 Elections Division  
 700 W. Jefferson St., Suite E205  
 P.O. Box 83720  
 Boise, Idaho 83720-0080  
 (208) 334-2852  
[elections@sos.idaho.gov](mailto:elections@sos.idaho.gov)

**NO on Prop One**

Stop Predatory Gambling Idaho

Jonathan Krutz, President  
 1716 N. 10th St.  
 Boise, Idaho 83702  
 (208) 841-1897

**NO on Prop Two**

Idaho Freedom Foundation

Fred Birnbaum, Vice President  
 802 W. Bannock St.  
 Suite 405  
 Boise, Idaho 83702  
[fred@dahofreedom.net](mailto:fred@dahofreedom.net)  
 (208) 258-2280, ext. 218

**Audio, Large Print, and Spanish Versions**

To download the audio, large print, or Spanish versions of this voter information pamphlet, please visit the Resources page of [IdahoVotes.gov](http://IdahoVotes.gov).

The Secretary of State and the Idaho Commission for Libraries have partnered to provide this voter information pamphlet in a format accessible to the visually impaired. An audio version of this pamphlet is available from the Talking Books Service (TBS).

# **APPENDIX B**

2017 OCT 18 PM 1:58

SECRETARY OF STATE  
STATE OF IDAHO

WARNING: It is a felony for anyone to sign any initiative or referendum petition with any name other than his own, or to knowingly sign his name more than once for the measure, or to sign such petition when he is not a qualified elector.

## INITIATIVE PETITION

To: The Honorable Lawrence Denney, Secretary of State of the State of Idaho:

"We, the undersigned citizens and qualified electors of the State of Idaho, respectfully demand that the following proposed law, to-wit:

1 AN ACT  
2 RELATING TO MEDICAID; AMENDING CHAPTER 2, TITLE 56, IDAHO CODE, BY THE  
3 ADDITION OF A NEW SECTION 56-267, IDAHO CODE, TO PROVIDE THAT THE STATE  
4 SHALL AMEND ITS STATE PLAN TO EXPAND MEDICAID ELIGIBILITY TO CERTAIN  
5 PERSONS AND TO PROVIDE THAT THE DEPARTMENT OF HEALTH AND WELFARE IS  
6 REQUIRED AND AUTHORIZED TO TAKE ALL ACTIONS NECESSARY TO IMPLEMENT  
7 THE PROVISIONS OF THIS SECTION; AMENDING SECTION 56-262, IDAHO CODE, TO  
8 PROVIDE A CORRECT CODE REFERENCE; DECLARING AN EMERGENCY; AND PROVIDING  
9 THAT THIS ACT SHALL BE NULL, VOID AND OF NO FORCE AND EFFECT UNDER CERTAIN  
10 CIRCUMSTANCES.

11 Be It Enacted by the Legislature of the State of Idaho:

12 SECTION 1. That Chapter 2, Title 56, Idaho Code, be, and the same is hereby  
13 amended by the addition thereto of a NEW SECTION, to be known and designated  
14 as Section 56-267, Idaho Code, and to read as follows:

15 56-267. MEDICAID ELIGIBILITY EXPANSION. (1) Notwithstanding any provision of law  
16 to the contrary, the state shall amend its state plan to expand Medicaid eligibility to include  
17 those persons under sixty-five (65) years of age whose modified adjusted gross income  
18 is one hundred thirty-three percent (133%) of the federal poverty level or below and who  
19 are not otherwise eligible for any other coverage under the state plan, in accordance with  
20 sections 1902(a)(10)(A)(i)(VIII) and 1902(e)(14) of the Social Security Act.

21 (2) The department is required and authorized to take all actions necessary to implement  
22 the provisions of this section as soon as practicable.

23 SECTION 2. That Section 56-262, Idaho Code, be, and the same is hereby  
24 amended to read as follows:

25 56-262. DEFINITIONS. The definitions contained in section 56-252, Idaho Code, shall  
26 apply to sections 56-260 through 56-267, Idaho Code.

27 SECTION 3. An emergency existing therefor, which emergency is hereby declared to  
28 exist, this act shall be in full force and effect on and after its passage and approval.

29 SECTION 4. This act shall become null, void and of no force or effect as of the date that  
30 federal financial participation for low-income adults is reduced below the ninety percent (90%)  
31 commitment described in 42 U.S.C. section 1396d(y). END.

# **APPENDIX C**



**STATE OF IDAHO**  
**OFFICE OF THE ATTORNEY GENERAL**  
**LAWRENCE G. WAsDEN**

November 7, 2017

The Honorable Lawrence Denney  
Idaho Secretary of State  
Statehouse  
VIA HAND DELIVERY

RE: Certificate of Review  
Proposed Initiative to Add a New Statute Requiring Idaho Expand Medicaid  
Eligibility

Dear Secretary of State Denney:

An initiative petition was filed with your office on October 18, 2017. Pursuant to Idaho Code § 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 issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only." The petitioners are free to "accept them in whole or in part." The opinions expressed in this review are only those that may affect the legality of the initiative. This office offers no opinion regarding the policy issues raised by the proposed initiative, nor the potential revenue or expense impact to the state budget.

**BALLOT TITLE**

Following the filing of the proposed initiative, this office will prepare short and long ballot titles. The ballot titles should impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While our office prepares titles for the initiative, petitioners may submit proposed titles for consideration. Any proposed titles should be consistent with the standard set forth above.

**MATTER OF FORM**

The proposed initiative is for the most part in proper legislative format, although there is a small error in Section 2. It is not necessary to underline Section 1's newly proposed Idaho Code section because it is not amending an existing section of the Idaho Code. Section 2 has a minor error in that it fails to show amendments to the existing statute by striking out deleted words and

underlining added words and should read as follows:

56-262. DEFINITIONS. The definitions contained in section 56-252, Idaho Code, shall apply to sections 56-260 through ~~56-266~~ 56-267, Idaho Code.

The remaining two sections of the proposed measure will appear only in the Session Laws and will not themselves be codified in Idaho Code.

The enactment clause and the emergency clause are consistent with the form those items take in standard legislation. Due to the unique statutory framework governing the passage and implementation of initiatives, the proponents may want to rework those portions of the petition to reflect the initiative process rather than the standard legislative process. Specifically, the enactment clause should read, "Be it Enacted by the Voters of the State of Idaho". The emergency clause is discussed in greater detail below.

#### **SUMMARY OF INITIATIVE AND MATTERS OF SUBSTANTIVE IMPORT**

The proposed initiative does the following:

Section 1 enacts a new Idaho Code § 56-267 to be added to the chapter on Public Assistance Law. This new section mandates that the state expand its Medicaid eligibility criteria to include all individuals under age sixty-five (65) whose modified adjusted gross income is less than or equal to the one hundred thirty-three percent (133%) of the federal poverty level who are not otherwise eligible for Medicaid coverage.

Section 2 amends Idaho Code § 56-262 in the chapter on Public Assistance Law to specify that definitions found in Idaho Code § 56-252 will apply to the new Idaho Code § 56-267.

Section 3 contains an emergency clause specifying that the provisions of the initiative will take full force and effect following passage and approval.

Section 4 is a version of a sunset clause, but instead of being tied to a specific date it is tied to a contingent condition. It declares that the expansion provision shall become null and void if the level of federal financial contribution for the expansion population is reduced below ninety percent (90%).

#### **Section 1**

This section represents the substantive portion of the initiative. As stated above, this section requires the state Medicaid program expand its eligibility criteria to include individuals under age sixty-five (65) with modified adjusted gross incomes less than or equal to the one hundred thirty-three percent (133%) of the federal poverty level who are not otherwise eligible for Medicaid coverage. The proposed expansion population tracks exactly with the proposed expansion population initially required by the Affordable Care Act (ACA). This definition for the

expansion population also coincides with the population for which current federal law provides a ninety/ten federal/state financial match rate.

The implementation of this section will require the Idaho Medicaid program to develop and submit a state plan amendment to the federal Centers for Medicare & Medicaid Services (CMS). Until that state plan amendment is reviewed and approved by CMS, the Idaho Medicaid program cannot implement or administer Medicaid benefits for that expansion population as contemplated by the initiative. The typical timeframe required to draft and submit a state plan amendment to CMS is anywhere between sixty (60) and ninety (90) days. Following the submission of a proposed state plan amendment, CMS has up to ninety (90) days to evaluate the proposed amendment and issue its decision. Following receipt of the decision from CMS, the Medicaid program could then begin the process of implementing the amendment including the significant IT investment that would be required to update the electronic eligibility and management systems.

As stated above, the language of this section tracks with provisions of the ACA. Those basic provisions of the ACA were upheld by the United States Supreme Court against constitutional challenge in National Federation of Independent Business v. Sebelius, 567 U.S. 519, 132 S. Ct. 2566, 183 L. Ed. 2d 450 (2012).

## **Section 2**

Section 2 presents no significant legal or policy issues.

## **Section 3**

As stated above, Section 3 is an emergency clause which would be consistent with a piece of legislation that had been passed by the legislature. However, given the different statutory framework surrounding the initiative process, this clause is inappropriate. The effective date for a law resulting from an initiative election is set forth in Idaho Code § 34-1813. Based upon the provisions of section 34-1813, a successful initiative obtains the full force and effect of law from the date of the proclamation issued by the governor declaring the initiative has been approved by a majority of the votes cast. The emergency clause will not impact the date the initiative obtains the force and effect of law as initiatives do not wait for the same July 1 effective date that applies to legislation passed by the legislature. Since the effective date of the initiative would impact only the date on which the Idaho Medicaid program would be directed to seek the amendment of the Idaho Medicaid state plan, and not the date on which the proposed state plan amendment is to take effect, the statutory effective date does not pose a significant burden upon the Idaho Medicaid program.

## **Section 4**

The sunset clause set forth in Section 4 of the proposed initiative presents a unique issue. As stated in the discussion of Section 1, the operation of the Medicaid program is governed by an approved state plan and until the program could get an amendment approved by CMS, the program

would be required to continue providing the services resulting from Section 1 of the initiative even if the sunset clause in Section 4 was triggered. The same amendment process outlined in the analysis of Section 1 would apply including the anticipated timelines for the submission approval and implementation of a state plan amendment arising because of the sunset clause in Section 4.

Although the program is not aware of CMS ever refusing to allow a state to discontinue an optional service, there is a possibility that the amendment to remove this service could be delayed or even denied, either of which could limit the application of the Section 4 sunset clause. If CMS outright denies the proposed amendment to return to the current eligibility criteria, the Medicaid program would have the opportunity to challenge that both administratively and if necessary through the courts; however, the program would be required to continue providing those services with a higher percentage of state funds until a final decision could be obtained. The time that the state would have to continue providing services could be anywhere from a few months to several years.

#### 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 a copy of this Certification of Review, deposited in the U.S. Mail to Emily Strizich, 225 N. Adams, Moscow, Idaho 83843.

Sincerely,



LAWRENCE G. WUSDEN  
Attorney General

**Analysis by:**

M. Scott Keim  
Deputy Attorney General