IN THE SUPREME COURT OF THE STATE OF IDAHO

BRENT REGAN, a qualified elector of the State of Idaho, Petitioner, v. LAWRENCE DENNY, Secretary of State of the State of Idaho, in his official capacity, Respondent, DELEENA FOSTER, an individual, PAMELA BLESSINGER, an individual, BRUCE BELZER, MD, an individual, and IDAHO MEDICAL ASSOCIATION, INC., an Idaho non-profit corporation, Intervenors-Respondents.	Docket No. 46545-2018

INTERVENORS' BRIEF

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I. STATEMENT OF THE CASE

A. Nature of the Case.

This is a unique proceeding commenced directly in the Idaho Supreme Court by the Petitioner who seeks a declaration that "**Proposition 2**", the initiative measure passed by Idaho's electorate expanding Medicaid in Idaho, is unconstitutional.

B. Course of the Proceedings.

Petitioner initiated this proceeding on November 21, 2018 by filing a Petition for Review ("**Petition**") pursuant to Idaho Code § 34-1809(4). Petition at pp. 3–4. The Petition seeks a declaration from this Court that Idaho Code § 56-267 is unconstitutional. Petition at p. 1. Petitioner filed a Brief in support of the Petition on November 29, 2018. On December 6, 2018, Deleena Foster, Pamela Blessinger, Bruce Belzer, MD, and the Idaho Medical Association, Inc., (collectively, "**Intervenors**") filed a Joint Verified Petition to Intervene as party respondents, which the Court granted on December 18, 2018. Now, pursuant to the Court's Order Granting Petition to Intervene, Intervenors submit this Intervenors' Brief opposing the relief sought by the Petition.

C. Statement of Facts.

1. Medicaid, the *Sebelius* decision, and the Medicaid gap.

Congress established the Medicaid program in 1965 to provide medical care for indigent and poor Americans. *Stafford v. Idaho Dep't of Health & Welfare*, 145 Idaho 530, 534, 181 P.3d 456, 460 (2008). "The Medicaid program is a 'cooperative endeavor [with the states] in which the Federal Government provides financial assistance to participating states to aid them in furnishing

health care to needy persons.'" *In re Estate of Wiggins*, 155 Idaho 116, 119, 306 P.3d 201, 204 (2013) (quoting *Harris v. McRae*, 448 U.S. 297, 308 (1980). Under the Medicaid program, "States make legislation and rules, which are submitted to the U.S. Secretary of Health and Human Services for approval." *Id*. (citing 42 U.S.C. § 1396a(a)-(b)). The "lion's share" of financial support for Medicaid comes from federal funds. *Stafford*, 145 Idaho at 534, 181 P.3d at 460.

"In 2010, Congress enacted the Patient Protection and Affordable Care Act ["**the ACA**"]." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538 (2012). Prior to enacting the ACA, Medicaid only offered "federal funding to States to assist pregnant women, children, needy families, the blind, the elderly, and the disabled in obtaining medical care." *Id*. at 541 (Ginsburg, J. concurring in part and dissenting in part) (citing 42 U.S.C. § 1396a(a)(10)). The goal of the ACA was "to increase the number of Americans covered by health insurance and decrease the cost of health care." *Id*. at 538. "To fulfill this goal, the ACA created the individual mandate, established insurance exchanges with subsidies, and expanded Medicaid." Dylan Scot Young, *A Judicial Solution to the Medicaid Gap: Using Section 1983 to Do What the Federal Government Cannot*, 84 Geo. Wash. L. Rev. 511, 518 (2016).

The ACA extended federal funds to states on the condition that they expand Medicaid to provide specified health care to all citizens whose income falls below a certain threshold. *Sebelius*, 567 U.S. at 530–32. As enacted, the ACA's Medicaid expansion required "States to expand their Medicaid programs by 2014 to cover *all* individuals under the age of 65 with incomes below 133 percent of the [Federal Poverty Level]." *Id*. at 576. This was a significant change to Medicaid. "Under [the ACA], Medicaid is transformed into a program to meet the health care needs of the

entire nonelderly population with income below 133 percent of the poverty level." *Id*. at 523. After the ACA, Medicaid was "no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage." *Id*. In addition to expanding Medicaid, the ACA also implemented a system of insurance exchange programs to subsidize health insurance premiums for individuals with household incomes between 100 percent and 400 percent of the Federal Poverty Level ("**FPL**"). 26 U.S.C.A. § 36B.[1]

Many benefit programs, including Medicaid, use the FPL to determine benefit eligibility. The FPL is routinely calculated by mechanically applying a formula that multiplies the existing FPL by the percentage change in the Consumer Price Index for All Urban Consumers. 42 U.S.C.A. § 9902(2); Brenda Carroll, *Legal Aid Update What Is the Federal Poverty Level?*, 21 DCBA Brief 36 (2008).[2]

[1]After this proceeding was initiated, on December 15, 2018, a federal district court in the Fifth Circuit issued a memorandum opinion and order holding the ACA's individual mandate unconstitutional and that the remainder of the ACA could not be severed. *Texas v. United States*, 2018 WL 6589412, at *15, 26 (N.D. Tex. Dec. 14, 2018). The ruling in *Texas v. United States* has no impact on this case because the constitutionality of the ACA under the U.S. Constitution has no impact on whether Idaho Code § 56-267 delegates legislative authority in violation of the Idaho Constitution. Furthermore, the district court's decision in *Texas v. United States* will not affect the operation of the ACA while appeals to the Fifth Circuit Court of Appeals and the U.S. Supreme Court run their course.

[2] For the lower 48 states, the 2018 poverty levels are set forth in 83 FR 2642-01, which provides the following levels:

Persons in family/household	Poverty level
1	$12,140
2	$16,460
3	$20,780
4	$25,100
5	$29,420
6	$33,740
7	$38,060
8	$42,380

After the ACA was enacted, 26 states, including Idaho, challenged the ACA in *Sebelius*, which made its way to the U.S. Supreme Court. In *Sebelius*, among other things, the Court analyzed the constitutionality of the ACA's Medicaid expansion. The *Sebelius* Court found the ACA's requirement that states expand Medicaid to be unconstitutionally coercive because Congress conditioned the states' continuing receipt of existing Medicaid funding on complying with ACA's Medicaid expansion. *Id*. at 585. The *Sebelius* Court did not strike the ACA as a whole; instead, it severed the portion of the ACA that made Medicaid expansion mandatory, but held that states could voluntarily expand Medicaid. *Id*. at 587 ("States, however, may voluntarily sign up, finding the idea of expanding Medicaid coverage attractive, particularly given the level of federal funding the Act offers at the outset."). That created a "gap" in healthcare coverage for individuals and families below the FPL. In November of 2018, Idaho's voters exercised their legislative initiative powers to voluntarily expand Medicaid through Proposition 2.

Proposition 2 filled the gap in healthcare coverage created by the *Sebelius* decision. As noted above, the ACA sought to provide healthcare coverage through Medicaid expansion to all Americans living below 133 percent of the FPL and by providing insurance subsidies for individuals and families from 100 percent to 400 percent of the FPL. 26 U.S.C.A. § 36B(c)(1)(A). When the *Sebelius* Court held that Medicaid expansion had to be voluntary, a healthcare coverage gap emerged "between the pre-ACA reach of Medicaid and the post-ACA reach of subsidies" in states such as Idaho that did not expand Medicaid. *Dylan Scot Young, A Judicial Solution to the Medicaid Gap: Using Section 1983 to Do What the Federal Government Cannot*, 84 Geo. Wash. L. Rev. 511, 515 (2016).

Specifically, after *Sebelius*, the ACA provides insurance subsidies for individuals who earn between 100 percent and 400 percent of the FPL.[3] However, adults whose incomes fall below 100 percent of the FPL are not entitled to Medicaid coverage or health insurance subsidies unless the state they live in voluntarily expands Medicaid. Thus, prior to the enactment of Proposition 2, Idahoans whose incomes fell below 100 percent of the FPL received no benefit from the ACA, had no affordable health insurance options, and were left in the coverage gap.

Prior to the enactment of Proposition 2, Deleena Foster and Pamela Blessinger were in the coverage gap because their annual household income is less than 100 percent of the FPL. For people like them in the Medicaid gap, affordable insurance coverage did not exist. The website of the Idaho Insurance Exchange, Your Health Idaho, contains a useful online tool to calculate insurance costs under the ACA.[4] The insurance calculator demonstrates the harsh consequences of being in the coverage gap population. Although insurance premiums vary around the state because of market conditions, a family of four living in Ada County with income just below the FPL will need to spend $903 per month for an insurance policy with an annual deductible that exceeds $10,000. Alternatively, a family of four living in Ada County with income just above the FPL will spend approximately $30 per month for the same coverage due to subsidies provided under the

[3] Idaho has implemented the ACA's insurance subsidy program by passing the "Idaho Health Insurance Exchange Act." I.C. §§ 41-6101 *et. seq.*

[4] *See* https://idahohix.yourhealthidaho.org/hix/preeligibility#.

ACA.[5] Similarly, a family of five living in Bannock County, with income just under the FPL will pay $1,036 per month for a similar policy, while the same family with income just above the FPL will pay just $50 per month.[6] The consequences of being caught in the gap are significant.

2. Proposition 2 and Idaho Code § 56-267.

On October 18, 2017, an Initiative Petition was filed with the Idaho Secretary of State to expand Medicaid in Idaho, which eventually became Proposition 2. *See* Petition, App. B, p. 1. Idaho voters approved Proposition 2 in the November 6, 2018 general election. Acting Governor Little issued a proclamation on November 20, 2018 to codify Proposition 2, and the Secretary of State did codify Proposition 2 as Idaho Code § 56-267, which states in its entirety:

> 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.

[5] If only one member of the same family in Ada County needs insurance coverage, the cost is less, but the differences are just as stark. For a 36-year-old woman in a family earning less than the FPL, the cost is $450 per month versus $37 per month with subsidies from the ACA.

[6] A 32-year-old woman living in Bannock County in a family with income just below the FPL will pay $508 per month to obtain the same coverage for herself, while the cost would be only $44 per month if her household income were just above the FPL, and she received subsidies from the ACA.

3. The Medicaid State Plan requirement.

Idaho Code § 56-267 directs the State to amend its Medicaid State Plan. The Idaho Department of Health and Welfare is the state agency tasked with administering Medicaid, including drafting and amending Idaho's State Plan. I.C. § 56-203(2); *see also Kootenai Med. Ctr. ex rel. Teresa K. v. Idaho Dep't of Health & Welfare*, 147 Idaho 872, 876, 216 P.3d 630, 634 (2009). That plan amendment will be reviewed by the Centers for Medicare and Medicaid Services ("**CMS**") for compliance with federal law. This is because:

> State participation in Medicaid is not compulsory, but participating states must comply with the Act and the regulations that implement it. *See, e.g., Managed Pharmacy Care*, 716 F.3d at 1241. The Act conditions receipt of federal funds on approval of a "state plan," *see, e.g.,* 42 U.S.C. §§ 1396–1, § 1396b(a), which "is a comprehensive written statement submitted by the [state] agency describing the nature and scope of its Medicaid program and giving assurance that it will be administered in conformity" with the Act and its accompanying regulations, 42 C.F.R. § 430.10. The Secretary of the Department of Health and Human Services ("Secretary") administers the Act, *see, e.g., Managed Pharmacy Care,* 716 F.3d at 1241; 42 U.S.C. § 1396a(b), but has delegated to the regional administrator for the Centers for Medicare and Medicaid Services ("CMS") the responsibility of reviewing in the first instance state plans for compliance with the provisions of the Act, *see* 42 C.F.R. § 430.15(b). The Secretary also requires the submission of state plan amendments ("SPAs") for certain changes to a state plan, which CMS again reviews in the first instance for compliance with the Act. *See* 42 C.F.R. § 430.12(c).

Arc of California v. Douglas, 757 F.3d 975, 979–80 (9th Cir. 2014); *Kootenai Med. Ctr. ex rel. Teresa K.*, 147 Idaho at 877, 216 P.3d at 635 ("when a state elects to provide an optional service, that service becomes part of the state Medicaid plan and is subject to the requirements of federal law.").

II. ISSUES PRESENTED BY PETITIONER

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

B. What is the legal effect of the implementation by the Department of Health and Welfare of the "planned amendments"?

III. ADDITIONAL ISSUE PRESENTED BY INTERVENORS

A. Does Petitioner lack standing?

IV. APPLICABLE STANDARDS

A. The Idaho Supreme Court's original jurisdiction.

This Court's original jurisdiction is established by Idaho's Constitution. "The Supreme Court shall also have original jurisdiction to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all writs necessary or proper to the complete exercise of its appellate jurisdiction." Idaho Const. art. V, § 9. *See also* June 2, 2003 Order *In The Matter of the Petition/Action to Determine the Constitutionality of Idaho Code Sections 67-429B and 67-429C, Enacting the Indian Gaming Initiative, Proposition One*, Case No. 29226 (dismissing a petition challenging the constitutionality of a statute adopted by initiative because the Idaho Supreme Court lacked original jurisdiction to hear the case). This Court's original jurisdiction is limited by the doctrine of justiciability, including the requirement that a petitioner have constitutional standing.

B. Statutory interpretation standard.

This Court "exercise[s] free review over statutory interpretation because it is a question of law." *Ada Cty. Highway Dist. v. Brooke View, Inc.*, 162 Idaho 138, 142, 395 P.3d 357, 361 (2017) (quoting *State v. Dunlap*, 155 Idaho 345, 361, 313 P.3d 1, 17 (2013). "Statutory interpretation begins with the statute's plain language." *Id.* "The constitutionality of a statute is a question of law." *BV Beverage Co., LLC v. State*, 155 Idaho 624, 626, 315 P.3d 812, 814 (2013) (citing *Fuchs v. Idaho State Police*, 152 Idaho 626, 629, 272 P.3d 1257, 1260 (2012)).

> When reviewing the constitutionality of a statute, this Court exercises free review. To prevail, a challenger must show that the statute is "unconstitutional as a whole, without any valid application." This Court makes "every presumption [] in favor of the constitutionality of the statute, and the burden of establishing the unconstitutionality of a statutory provision rests upon the challenger."

Guzman v. Piercy, 155 Idaho 928, 934, 318 P.3d 918, 924 (2014) (quoting *Citizens Against Range Expansion v. Idaho Fish & Game Dep't*, 153 Idaho 630, 633–34, 289 P.3d 32, 35–36 (2012)). *See also In re Bermudes*, 141 Idaho 157, 159, 106 P.3d 1123, 1125 (2005) (a "court is obligated to seek an interpretation of a statute that upholds its constitutionality."); *Alcohol Beverage Control v. Boyd*, 148 Idaho 944, 946, 231 P.3d 1041, 1043 (2010) ("The party challenging a statute on constitutional grounds bears the burden of establishing the statute is unconstitutional and 'must overcome a strong presumption of validity.'").

C. Review of statutes enacted by initiative.

When the people approve an initiative, they are exercising legislative power granted under Article III, Section 1 of the Idaho Constitution. *Westerberg v. Andrus*, 114 Idaho 401, 405, 757 P.2d 664, 668 (1988) ("[T]he initiative process is just one of three ways that the 'legislative

power of the state' is to be exercised under Article III, § 1, of the Idaho Constitution…"). "[L]egislation enacted by initiative and legislation enacted by the legislature 'are on equal footing and are subject to the same limitations.'" *Simpson v. Cenarrusa*, 130 Idaho 609, 611, 944 P.2d 1372, 1374 (1997) (quoting *Westerberg*, 114 Idaho at 407, 757 P.2d at 670). This Court reviews the constitutionality of a statute enacted by an initiative measure "by the same standards as [it] would if the legislature had enacted it." *Id*.

> In the case of statutes passed by the Legislative Assembly and assailed as unconstitutional the question is not whether it is possible to condemn, but whether it is possible to uphold; and we stand committed to the rule that a statute will not be declared unconstitutional unless its nullity is placed, in our judgment, beyond reasonable doubt. ***The same standard applies to initiatives passed by the people as to legislative actions***, ***and the two methods of enacting laws are placed on equal footing***.

Rudeen v. Cenarrusa, 136 Idaho 560, 564–65, 38 P.3d 598, 602–03 (2001) (internal citations and quotations omitted) (emphasis added).

V. ARGUMENT

A. The Court should dismiss the Petition because Petitioner does not have standing.

This proceeding should be dismissed because Petitioner lacks standing. Petitioner claims he has standing based solely on Idaho Code § 34-1809(4) because he "is a qualified elector of the State of Idaho." Petition at p. 5. Idaho Code § 34-1809 states: "Any qualified elector of the state of Idaho may, at any time after the attorney general has issued a certificate of review, bring an action in the supreme court to determine the constitutionality of any initiative." I.C. § 34-1809(4).

Petitioner also argues Idaho Code § 34-1809(4) "confers on an elector of the state a substantive right for this Court to determine the constitutionality of any initiative." Pet. Br. at 6.

Petitioner's standing argument lacks merit because it fails to satisfy the requirements of justiciability, ignores key provisions of the Idaho Constitution, and has already been rejected by this Court in *Noh v. Cenarrusa*, 137 Idaho 798, 53 P.3d 1217 (2002).

Standing is a concept included within justiciability. *State v. Philip Morris, Inc.*, 158 Idaho 874, 881, 354 P.3d 187, 194 (2015); *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002) ("The doctrine of standing is a subcategory of justiciability."). "It is a fundamental tenet of American jurisprudence that a person wishing to invoke a court's jurisdiction must have standing." *Young*, 137 Idaho at 104, 44 P.3d at 1159 (citing *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 124, 15 P.3d 1129, 1132 (2000)). "Standing 'focuses directly on the question whether a particular interest or injury is adequate to invoke the protection of judicial decision.'" *Philip Morris*, 158 Idaho at 881, 354 P.3d at 194 (quoting *Relation to Other Justiciability Doctrines,* 13B Fed. Prac. & Proc. Juris. § 3531.12 (2014 3d ed.)).

In analyzing standing, this Court looks to "decisions of the United States Supreme Court for guidance." *Id.* (quotation omitted). "Under U.S. Supreme Court jurisprudence, to establish standing a plaintiff must show (1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'like[lihood]' that the injury 'will be redressed by a favorable decision.'" *Id*. (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014)). "An injury sufficient to satisfy the requirement of an injury in fact 'must be concrete and particularized and actual or imminent, not conjectural or hypothetical.'" *Id*.

"[E]ven if a showing can be made of an injury in fact, standing may be denied when the asserted harm is a generalized grievance shared by all or a large class of citizens." *Young*,

137 Idaho at 104, 44 P.3d at 1159 (citing *Warth v. Seldin,* 422 U.S. 490, 499 (1975)). "A citizen and taxpayer may not challenge a governmental enactment where the injury is one suffered alike by all citizens and taxpayers of the jurisdiction." *Noh*, 137 Idaho at 800, 53 P.3d at 1219 (2002).

In *Noh*, relying on Idaho Code § 34-1809(4), several petitioners sought a declaration from this Court that an initiative was unconstitutional. 137 Idaho at 799, 53 P.3d at 1218. Unlike the Petitioner here, *Noh* was brought after the attorney general issued a certificate of review but before the general election. *Id*. at 801, 53 P.3d at 1220. First, the *Noh* court concluded petitioners did not have standing and that the case was not ripe. *Id*. at 800–01, 53 P.3d at 1219–20. Second, the *Noh* court examined whether Idaho Code § 34-1809(4) allows a qualified elector to invoke this Court's jurisdiction where the fundamental tenets of justiciability, such as standing and ripeness, are not met. *Id*. at 801–03, 53 P.3d at 1220–22. The court held: "***Idaho Code § 34–1809 cannot compel the Court to decide a case that lacks a judiciable controversy***." *Id*. 803, 53 P.3d at 1222. Justice Kidwell wrote a concurring opinion agreeing in all respects with the majority but advocating that Idaho Code § 34-1809(4) be found unconstitutional as a separation of powers violation under Article II, Section 1, of the Idaho Constitution. *Id*.

In this case, Petitioner has not shown, ***or even alleged***, an injury, much less a concrete and particularized injury in fact, which is required to establish standing to invoke this Court's jurisdiction. Even if Petitioner were to show an injury in fact, which he has not, such injury would not be particularized. Petitioner alleges only that he is a qualified elector. An injury suffered alike by the citizens of the State of Idaho does not confer constitutional standing. Petitioner has also

failed to show a causal connection or that an alleged harm is redressable by this Court. Accordingly, Petitioner lacks standing.

As this Court previously held in *Noh*, Idaho Code § 34-1809(4) cannot create standing or a justiciable controversy where none otherwise exists. This Court also dismissed a nearly identical petition in *In The Matter of the Petition/Action to Determine the Constitutionality of Idaho Code Sections 67-429B and 67-429C, Enacting the Indian Gaming Initiative, Proposition One*, Case No. 29226 because this Court does not have original jurisdiction to hear such a petition and because Idaho Code § 34-1809(4) cannot confer original jurisdiction.

As Justice Kidwell stated in his *Noh* concurrence, a statute that purports to convey standing in controversies that are not justiciable is unconstitutional. *Raines v. Byrd*, 521 U.S. 811, 820, n.3 (1997) ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."); *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 100 (1979) (holding that Congress may not, by means of legislation, abrogate the standing requirement that a plaintiff must always have suffered a distinct and palpable injury to have standing); *see also Mead v. Arnell*, 117 Idaho 660, 663, 791 P.2d 410, 413 (1990) (citing Idaho Constitution, art. 2, § 1 for the proposition that "[t]he principle that neither the legislature nor the executive can in any way regulate or alter the Supreme Court's jurisdiction is basic to the doctrine of separation of powers.").

Petitioner lacks constitutional standing. Idaho Code § 34-1809(4) cannot cure Petitioner's lack of standing. The Petition should be dismissed.

B. Idaho Code § 56-267 does not delegate any legislative authority to Congress.

Petitioner asserts Idaho Code § 56-267 "expressly" expands Medicaid eligibility in accordance with § 1902(a)(10)(A)(i)(VIII) and § 1902(e)(14) of the Social Security Act. Pet. Br. at pp. 11–12. Petitioner also argues that a future amendment by a future Congress of § 1902(a)(10)(A)(i)(VIII) or § 1902(e)(14) of the Social Security Act would automatically change Idaho's eligibility standards in contravention of the non-delegation doctrine. Pet. Br. at pp. 11–12. Petitioner's argument ignores the plain language of Idaho Code § 56-267, and his assertions regarding delegation of legislative authority are incorrect.

Petitioner's delegation argument is without merit because the plain language of Idaho Code § 56-267 does not delegate legislative authority, nor does Idaho Code § 56-267 expressly incorporate § 1902(a)(10)(A)(i)(VIII) or § 1902(e)(14) of the Social Security Act. Idaho Code § 56-267 cannot be amended or altered by federal action, but only by Idaho's Legislature or Idaho's voters through referendum or initiative.

Idaho Code § 56-267 states:

> 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.

I.C. § 56-267(1) (emphasis added).

The plain language of Idaho Code § 56-267 requires the State to amend the State Plan to expand Medicaid benefits to persons: (i) under 65; (ii) with modified adjusted gross income at

or below 133 percent of the FPL; and (iii) are not already covered by the State Plan. No other action is authorized or contemplated. Furthermore, no future amendments to the State Plan are authorized or contemplated by the plain language of Idaho Code § 56-267, even if Congress amends Sections 1902(a)(10)(A)(i)(VIII) or 1902(e)(14) of the Social Security Act. Simply put, Idaho Code § 56-267 does not "expressly" incorporate any federal standards nor does it unconstitutionally delegate any legislative authority to Congress. Intervenors' reading of Idaho Code § 56-267 is supported by the plain language of the statute and should be adopted by the Court. *See Bermudes*, 141 Idaho at 159, 106 P.3d at 1125 (a "court is obligated to seek an interpretation of a statute that upholds its constitutionality.").

Idaho Code § 56-267 does state that the expansion of Medicaid coverage benefits it authorizes is "***in accordance with*** sections 1902(a)(10)(A)(i)(VIII) and 1902(e)(14) of the Social Security Act." I.C. § 56-267(1) (emphasis added). In this context, the use of the words "in accordance with" is a description of an objectively ascertainable condition, not a delegation of legislative authority. It is an important factual description for Idaho's taxpayers because if Idaho's Medicaid expansion statute and related State Plan amendment were not "in accordance with" the Social Security Act, the benefits authorized and extended by the State of Idaho would not qualify for federal funding.

Furthermore, Idaho Code § 56-267 is "in accordance with" Sections 1902(a)(10)(A)(i)(VIII) and 1902(e)(14) of the Social Security Act. Section 1902(a)(10)(A)(i)(VIII) is the key section of the ACA that expands Medicaid to persons under 65, with income at or below 133 percent of the FPL that the *Sebelius* court held could be

voluntarily adopted by the states. *See infra* Section § I.C.1. Section 1902(e)(14) requires that "modified adjusted gross income" be used "for the purpose of determining income eligibility for medical assistance under the State plan". Idaho Code § 56-267 specifically uses "modified adjusted gross income" as its income determination standard, "in accordance with" existing federal law.

Petitioner also argues Idaho Code § 56-267 could be constitutional if it included "limiting language" directing the Department of Health and Welfare to amend the State Plan in accordance with the Social Security Act "as currently codified". Pet. Br. at 14–15. Ironically, and as demonstrated above, this is precisely what the plain language of Idaho Code § 56-267 currently provides. Moreover, Section 2 of Idaho Code § 56-267 provides the exact limitation Petitioner seeks by requiring the Department of Health and Welfare to amend the State Plan and submit the amendment to CMS within 90 days. When that is accomplished, the full directive of Idaho Code Section 56-267 will be accomplished. Accordingly, by Petitioner's own logic, Idaho Code § 56-267 is constitutional.

Petitioner's non-delegation argument relies almost exclusively on *Idaho Savings & Loan Association v. Roden*, 82 Idaho 128, 350 P.2d 225 (1960). *Roden* is inapplicable and should have no impact on the Court's decision in this case. The trial court in *Roden* was tasked with determining the constitutionality of several provisions of Idaho Code, Title 30, Chapter 13. The trial court first addressed Idaho Code § 30-1301Q, which required savings and loan associations to insure their accounts with the Federal Savings and Loan Insurance Corporation unless the association had been in operation for more than 15 years. *Id*. at 133, 350 P.2d at 228. The trial court found there was

no reasonable basis to exempt associations older than 15 years from the insurance requirement and severed that portion of Idaho Code § 30-1301Q, thereby requiring all savings and loan associations to be insured. *Id*. The trial court also concluded the Legislature unlawfully delegated its authority by enacting Idaho Code §§ 30-1301A, 30-1301H, 30-1301M, 30-1301Q because they required Idaho's savings and loan associations to abide by and conform with the rules and regulations of the Federal Home Loan Bank Board and Title 4 of the Housing Act, as amended. *Id*. at 134, 350 P.2d at 228. Accordingly, the trial court also severed these provisions.

The appellant argued on appeal that the trial court erred in severing Idaho Code § 30-1301Q and requiring that all savings and loan associations be insured because such insurance required Idaho associations to "observe and be bound by ***future amendments*** to the National Housing Act and ***future rules*** and regulations of the Board." 82 Idaho 128, 135, 350 P.2d 225, 229 (1960) (emphasis added). The *Roden* court agreed and held that delegating legislative authority to Congress and the Home Loan and Bank Board to regulate Idaho businesses with future laws and rules was unconstitutional. *Id*.

Here, unlike *Roden*, Idaho Code § 56-267 does not delegate any power to Congress or a federal agency "to make future laws and regulations governing" Idahoans. As stated above, Idaho Code § 56-267 directs only that the State Plan be amended within 90 days of approval to expand Medicaid to persons: (i) under 65; (ii) with modified adjusted gross income at or below 133 percent of the FPL; and (iii) are not already covered by the State Plan. Idaho Code § 56-267 also acknowledges that it is currently in accordance with relevant portions of the Social Security

Act but does not require future amendments to mirror unknown future amendments to the Social Security Act.

Notwithstanding that *Roden* is inapplicable, its holding was called into doubt by this Court's decision 17 years later in *State v. Kellogg*, 98 Idaho 541, 568 P.2d 514 (1977). In *Kellogg*, the defendant was charged with selling a prescription drug in violation of Idaho Code § 37-2210. *Id*. at 542, 568 P.2d at 515. The trial court dismissed the case because it concluded Idaho Code § 37-2210 unconstitutionally delegated legislative authority. *Id*. The State appealed. *Id*. Idaho Code § 37-2210 criminalized the sale of "drugs required by the laws of this state ***or of the United States***, or by the rules and regulations of the board to be sold on a prescription order." *Id*. (emphasis added). On appeal, because no state law specified what drugs had to be sold by prescription, the court found "the only method by which a drug may become a prescription drug in Idaho is by the operation of federal law." *Id*. at 543, 568 P.2d at 516. Despite the delegation and reliance on the federal standards, the court reversed and remanded the case. In reversing the trial court, this Court reasoned:

> Although the legislature cannot delegate its power to make a law or complete one, it can empower an agency or an official to ascertain the existence of the facts or conditions mentioned in the act upon which the law becomes operative.
>
> If the rule were otherwise, the legislature would indeed be at a great disadvantage in solving many of the complex and difficult problems with which it is confronted.

Id at 543, 568 P.2d at 516 (quoting *Foeller v. Hous. Auth. of Portland*, 198 Or. 205, 256 P.2d 752, 780 (1953)).[7]

Idaho Code § 56-267 does not delegate legislative authority. Further, Idaho Code § 56-267 does not require any future amendments to the State Plan. Accordingly, Petitioner's argument that Idaho Code § 56-267 unconstitutionally delegates legislative authority by expressly incorporating federal standards lacks merit and should be rejected.

C. Idaho Code § 56-267 does not delegate legislative authority to the Department of Health and Welfare.

The Petition states Idaho Code § 56-267 unconstitutionally delegates legislative authority to the Idaho Department of Health and Welfare by giving the department "uncontrolled, unrestricted and unguided discretionary power that exceeds constitutional limits." Petition at pp. 2–3 and 9–11. Petitioner fails to support this assertion with any authority, and it should be dismissed outright.

This Court's November 21, 2018 Order required Petitioner to "provide briefing in support of … the alleged legal effect of the implementation by the Department of Health and Welfare of the 'planned amendments'". Additionally, this Court has consistently held that issues raised

[7] After *Kellogg*, the majority in *Sun Valley Co. v. City of Sun Valley*, called into question the continued viability of the non-delegation doctrine in Idaho, stating:

> The non-delegation doctrine, as it is called, traditionally required that laws delegating legislative authority to either the executive branch or the judiciary contain meaningful "standards." … However, because of the impracticality and the inflexibility of such a requirement, the non-delegation doctrine has long been dead in the federal courts, 1 K. Davis, Administrative Law Treatise § 3.2 (1978), and has since been recast in many state courts. *Id.* § 3.14. The modern view is that broad delegation of legislative authority is proper and indeed necessary. *Id.* § 3.15 (Supp. 1980).

109 Idaho 424, 427–28, 708 P.2d 147, 150–51 (1985) (emphasis added).

without supporting argument and authority will not be considered. *See Bach v. Bagley*, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010) ("We will not consider an issue not supported by argument and authority in the opening brief.") (quotation omitted).

In this case, Petitioner's briefing in support of the Petition does not provide argument and authority that Idaho Code § 56-267 unconstitutionally delegates legislative authority to the Idaho Department of Health and Welfare. *See generally* Pet. Br. Because Petitioner has failed to provide argument and authority that Idaho Code § 56-267 unconstitutionally delegates legislative authority to the Idaho Department of Health and Welfare, the Court should not consider the unsupported allegation raised by the Petition.

Even if the Court were to consider the issue, it is clear that Idaho Code § 56-267 does not unconstitutionally delegate any legislative authority to the Department of Health and Welfare. Section 1 of Idaho Code § 56-267 outlines the scope of Medicaid expansion enacted by the voters with Proposition 2. Section 1 instructs the State of Idaho to amend its State Plan to provide Medicaid coverage to persons: (i) under 65; (ii) with modified adjusted gross income at or below 133 percent of the FPL; and (iii) are not already covered by the State Plan. Section 2 of Idaho Code § 56-267 addresses the implementation of the Medicaid expansion authorized by Section 1. Section 2 provides:

> 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***.

I.C § 56-267(2) (emphasis added).

The plain language of Idaho Code § 56-267 directs the Idaho Department of Health and Welfare to accomplish a specific task–amend the State Plan to implement the policy decision to expand Medicaid that the voters legislatively approved. The State Plan amendments Idaho Code § 56-267 directs the Idaho Department of Health and Welfare to make are expressly limited to the amendments outlined in Section 1 of Idaho Code § 56-267. Legislation directing the Idaho Department of Health and Welfare to implement express policy changes is not a delegation of legislative authority. It not only is completely within the executive branch's authority, it is its constitutional obligation to do so, and it is a common practice that has been endorsed by this Court. *See e.g. Mead*, 117 Idaho at 664, 791 P.2d at 414 (quoting *State v. Taylor,* 58 Idaho 656, 664, 78 P.2d 125, 128 (1938)) ("[T]he legislature may constitutionally leave to administrative agencies the selection of the means and the time and place of the execution of the legislative purpose..."); *see also Kerner v. Johnson*, 99 Idaho 433, 450–51, 583 P.2d 360, 377–78 (1978) ("[T]he legislature can empower an agency or an official to ascertain the existence of facts or conditions upon which the law becomes operative … In deciding whether a delegation is proper the court must bear in mind the practical context of the problem to be remedied and the policy to be served.").

In sum, Petitioner has waived any argument that Idaho Code § 56-267 unconstitutionally delegates legislative authority to the Department of Health and Welfare by failing to provide argument and authority in support. Even if the argument had not been waived, Idaho Code § 56-267 does not confer legislative authority on the Department of Health and Welfare.

D. Using the FPL to determine eligibility does not unconstitutionally delegate legislative authority.

Petitioner argues Idaho Code § 56-267 unconstitutionally delegates legislative authority to Congress by using the FPL as the Medicaid eligibility standard. Pet. Br. at p. 11. Petitioner misunderstands the plain language of Idaho Code § 56-267 and the legislative policy decision made with Proposition 2 to establish a class of citizens eligible for Medicaid benefits.

Petitioner raises two "what ifs?" in support of this argument. First, what if the ACA is amended and Medicaid expansion is further extended to include persons above 133 percent of the FPL? Pet. Br. at p. 11. Second, what if the FPL calculation changes? Pet. Br. at p. 11.

Petitioner's first hypothetical does not result in an unconstitutional delegation. If Congress amends the ACA to further expand Medicaid above 133 percent of the FPL, it would have no effect on Idaho Code § 56-267 whatsoever. This is because Idaho Code § 56-267 does not dynamically incorporate future changes to the ACA's standards. As discussed above, Idaho Code § 56-267 directs the Department of Health and Welfare to amend the State Plan within 90 days to expand Medicaid benefits to persons at or below 133 percent of the FPL. No delegation has occurred.

Petitioner's second hypothetical also lacks merit. Idaho voters exercised their legislative authority to extend Medicaid benefits to a specific class of citizens using the FPL as one of the elements of eligibility. This legislative decision reflects the overall policy goal of Proposition 2 to fill in the coverage gap created by *Sebelius*. In order to fully address the *Sebelius* gap, Medicaid benefits must be extended to persons under 65 years of age at or below 133 percent of the FPL.

Idaho Code 56-267 does this. Additionally, Idahoans have made no delegation by deciding to use FPL as an element of the eligibility standard because Idaho Code § 56-276 simply adopts the FPL as the applicable base for its eligibility calculation. Furthermore, the FPL is calculated based on a statutory formula that multiplies the existing FPL by the percentage change in the Consumer Price Index for All Urban Consumers. 42 U.S.C.A. § 9902(2). This is a routine administrative task carried out annually.

More fundamentally, Petitioner misunderstands that Medicaid, particularly Medicaid expansion, is a ***voluntary*** and ***cooperative*** federal and state administered program. This Court has repeatedly recognized the voluntary and cooperative nature of Medicaid. *See e.g. In re Estate of Wiggins*, 155 Idaho 116, 119, 306 P.3d 201, 204 (2013); *Idaho Dep't of Health & Welfare v. McCormick*, 153 Idaho 468, 471–72, 283 P.3d 785, 788–89 (2012); *Stafford*, 145 Idaho at 534, 181 P.3d at 460.

Although Medicaid is a cooperative endeavor and the states may operate programs of their own design, certain standards established by the federal government must be met. *Stafford*, 145 Idaho at 534, 181 P.3d at 460. State Medicaid programs must be "consistent with federal standards and regulations. *Id*. (quoting *Cleary ex rel. Cleary v. Waldman*, 167 F.3d 801, 805 (3d Cir. 1999)). Participation in the Medicaid program requires the determination of eligibility to be based on the FPL. *See generally* 42 U.S.C.A. § 1396a(a)(10)(A)(i)(VIII). Idaho has voluntarily elected to participate in a cooperative federal and state program that is consistent with federal standards and regulations. Idaho has not unconstitutionally delegated any of its legislative authority. Petitioner's arguments to the contrary lack merit and should be rejected.

VI. CONCLUSION

For the reasons set forth above, Intervenors respectfully request this Court dismiss this Petition because the Petitioner lacks standing or, in the alternative, deny the relief Petitioner seeks and uphold Idaho Code § 56-267 as constitutional.

DATED this 22nd day of December, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December, 2018, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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