STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

September 20, 2016

Representative Paul E. Shepherd
Idaho State Representative
P.O. Box 277
Riggins, ID 83549

Re: Constitutional Analysis of DRMPN482 – Our File No. 16-55689

Dear Representative Shepherd:

This letter is in response to your recent inquiry of this office regarding DRMPN482, a proposed statute that would elevate the authority of the Idaho Legislature above that of the state and federal courts with regard to constitutional and statutory interpretation. As explained in greater detail below, this proposal likely violates the Separation of Powers clause within the Idaho Constitution, and the Supremacy Clause of the United States Constitution. It also intrudes on the authority of each legislative chamber to establish its own rules of proceeding. Finally, DRMPN482 improperly alters the United States Constitution's allocation of the power of judicial review. For these reasons and as explained in greater detail below, this office would be unable to present a reviewing court with a reasonable defense of this statute if enacted. The result would be that the statute, if enacted, would be struck down.

A. DRMPN482 is unconstitutional under the Idaho Constitution.

1. DRMPN482 violates the Idaho Constitution's provisions for separation of powers by providing for the Legislature to exercise the judicial power of determining whether a government act is unconstitutional.

Section 2 of DRMPN482 states that the State of Idaho "asserts its legitimate authority to interpose [itself] between [Idaho's] citizens and the federal government and declares a procedure to make void and of no effect acts of Congress, federal regulations and court decisions that violate the 10th Amendment" and that the State "on behalf of its citizens, is the final arbiter of whether an act of Congress, a federal regulation or a court decisions is unconstitutional." In Section 3 the Legislature is designated as the branch of government to determine whether a Federal

P.O. Box 83720, Boise, Idaho 83720-0010
Telephone: (208) 334-2400, FAX: (208) 854-8071
Located at 700 W. Jefferson Street, Suite 210

executive order, statute, rule, or case decision is unconstitutional.[1]

Article II, sec. 1, provides for separation of powers among the legislative, executive, and judicial departments of Idaho's government and provides that persons in one branch shall not exercise any authority belonging to another:

> **§ 1. Departments of government. —** The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and 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.

The question then becomes: Under the Idaho Constitution's separation-of-powers principles, may the Legislature designate itself as the body to determine whether a Federal executive order, Act of Congress, regulation or case decision is unconstitutional under the United States Constitution? The answer is no.

One of the most fundamental principles of American constitutional law is that the branch of government with authority to enact statutes is not the branch of government with authority to render judgments on whether orders, statutes, rules, or case law are constitutional, *i.e.*, the branch that exercises the Legislative Power cannot also exercise the Judicial Power. Thus, the Idaho Constitution distinguishes between the Legislative Power (lawmaking), which art. III, sec. 1, places in the Senate and House of Representatives and in the people themselves, and the Judicial Power (entering orders and judgments declaring legal rights and obligations), which, with the exception of trial of impeachments, art. V, sec. 2, places in the Idaho Supreme Court, the District Courts, and other courts that have been established by the Legislature.

Further, art. V, sec. 13, strongly protects the Courts' exercise of the Judicial Power by prohibiting the Legislature from encroaching upon it: "**§ 13. Power of legislature respecting courts. —** The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government; … ."

It has long been held that determining whether a government act is constitutional or not is an exercise of the Judicial Power:

> ***Passing on the constitutionality of statutory enactments***, even enactments with political overtones, ***is a fundamental responsibility of the judiciary***, and has been

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[1]Section 3 of DRMPN482 would enact a new Idaho Code Section 67-515, subsection (1) of which provides for the Legislature to determine the constitutionality of acts of the Federal Government:

> (1) The Legislature is providing a process for invalidating certain public laws, regulations or cases. If … such bill [that claims an executive order, a congressional law or a federal regulation or a federal or U.S. Supreme Court is not constitutional as compared to the original intent of the United States Constitution] shall be introduced and if it is enacted into law, such laws, regulations or court cases are hereby declared to be unconstitutional … . Such laws, regulations or court cases shall not be recognized by the state of Idaho and are null and void and of no effect in this state.

> so since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1813). ... Constitutional rights, as well as ***this Court's duty to faithfully interpret our constitution and the federal constitution, do not wane before united efforts of the legislature and the governor.***

Miles v. Idaho Power Co., 116 Idaho 635, 640, 778 P.2d 757, 762 (1989) (emphasis added). Thus, an executive branch "agency was unable to consider the constitutionality of the statute in question, because '[p]assing on the constitutionality of statutory enactments, even enactments with political overtones, is a fundamental responsibility of the judiciary ....' " *Alcohol Beverage Control v. Boyd*, 148 Idaho 944, 946, 231 P.3d 1041, 1043 (2010), citing *Miles*.

The Idaho Supreme Court has held that the Legislature cannot itself determine whether a statute is constitutional. "Neither can [the] legislature bind the courts by its declaration that the act shall not be construed to be in violation of certain provisions of the constitution. The limitations of the constitution are binding upon the legislature, and cannot be nullified or avoided by the simple device of declaring them inapplicable." *Village of Moyie Springs v. Aurora Mfg. Co.*, 82 Idaho 337, 348, 353 P.2d 767, 774 (1960). Given that the authority to determine whether a government act is unconstitutional is a Judicial Power, the Legislature cannot determine that a statute is unconstitutional because that is an exercise of the Judicial Power. Proposed subsection 67-515(1)'s provision for the Legislature to determine the constitutionality of various acts of the Federal government violates the separation of powers provisions of the Idaho Constitution because the Legislature would be exercising the Judicial Power.[2]

2. <u>DRMPN482's procedures for introducing a bill are inconsistent with each house's constitutional authority to set its own rules.</u>

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[2]State courts have authority to review the constitutionality of a Federal action. For example, 28 U.S.C. § 1257 authorizes the United States Supreme Court can review a State court's decision "where the validity of a treaty or statute of the United States is drawn in question ... or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." Federal law has recognized the jurisdiction and authority of State courts to entertain Federal Constitutional questions since the beginning. Section 25 of the Judiciary Act of 1789 provided as follows:

> **SEC. 25. [Supreme Court Jurisdiction over Appeals from State Courts. —]** And be it further enacted,
>
> [a] That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had,
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> [i] where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or
>
> ...
>
> [iii] where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States ... .

Bracketed materials added; section reformatted to show internal divisions not contained in the original. This provision of the Judiciary Act of 1789 shows that from 1789 forward the power to declare an Act of Congress unconstitutional was considered to be a Judicial Power, not a Legislative Power.

Section 3 of DRMPN482 sets forth a procedure for introduction of a bill.[3] This procedure is inconsistent with art. III, sec. 9, which provides: "**§ 9. Powers of each house.** — Each house when assembled shall ... determine its own rules of proceeding ... ." DRMPN482 is unconstitutional in two ways. First, it would bind future Legislatures regarding their rules for introducing a bill, which each house must determine "when assembled." Second, it would require the introduction of a bill under circumstances for which there is no provision in House or Senate rules to introduce a bill and would thus override constitutional requirements for each house to be operating according to "its own rules of proceedings."[4]

B. DRMPN482 is unconstitutional under the United States Constitution.

1. DRMPN482 violates the Supremacy Clause by directing State Court judges not to apply Federal law

Article VI, paragraph 2 of the United States Constitution, provides that the judges of every State shall be bound by the Constitution and Laws of the United States:

> This Constitution, and the Laws of the United States, which shall be made in Pursuance thereof; ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Subsection (3) of proposed section 67-515 would directly contradict this provision of the United States Constitution by ordering judges not to be bound by the laws and case decisions of the Federal Government.[5]

2. DRMPN482 violates the Supremacy Clause by the State purporting to be the final arbitrator of what is or is not constitutional.

Subsection (4) would give orders to Federal officials not to enforce Federal law and subsection (6) would provide for a civil action for doing so; both of these sections would violate the Supremacy Clause to the extent they were applied to Federal officers.[6] "Neither state law nor the

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[3]Section 3 of DRMPN482 would enact a new Idaho Code Section 67-515, subsection (1) of which would establish a procedure for introduction of a bill:

> (1) The Legislature is providing a process for invalidating certain public laws, regulations or cases. If six (6) or more members of the legislature sign a petition that claims an executive order, a congressional law or a federal regulation or a federal or U.S. Supreme Court decision is not constitutional as compared to the original intent of the United States Constitution, such a bill shall be introduced ... .

[4]For example, the Senate and the House have rules determining when a bill may be introduced and which member or committee may introduce a bill. Senate Rule 11; House Rule 24.

[5]Section 3 of DRMPN482 would enact a new Idaho Code Section 67-515, subsection (3) of which would require Idaho State Court judges not to issue certain orders based on Federal law:

> (3) No judge of an Idaho state court shall issue any order to levy or execute on the property of any Idaho citizen to collect any amounts assessed against such citizen for failure to comply with any provision of the law, regulations or court cases referenced in subsection (1) of this section.

[6]Section 3 of DRMPN482 would enact a new Idaho Code Section 67-515, subsection (4) of which would purport to prohibit Federal officials from enforcing Federal law:

state constitution can control federal officers' conduct." *State v. Johnson*, 75 Wash. App. 692, 699, 879 P.2d 984, 988 (1994), citing *State v. Bradley*, 105 Wash.2d 898, 902–03, 719 P.2d 546 (1986).

In a larger sense, the entirety of proposed section 67-515 would violate the Supremacy Clause. Its theory that State officers have the final say over what is or is not constitutional under the United Stated Constitution was put to rest by the Supreme Court of the United States in a case dealing with Arkansas's continuing resistance to school desegregation:

> Article VI of the Constitution makes the Constitution the 'supreme Law of the Land.' In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as 'the fundamental and paramount law of the nation,' declared in the notable case of *Marbury v. Madison*, 1 Cranch [5 U.S.] 137, 177, 2 L.Ed. 60 [1803], that 'It is emphatically the province and duty of the judicial department to say what the law is.' This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, ¶ 3 'to support this Constitution.' Chief Justice Taney, speaking for a unanimous Court in 1859, said that this requirement reflected the framers' 'anxiety to preserve it [the Constitution] in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State ... .' *Ableman v. Booth*, 21 How. 506, 524, 16 L.Ed. 169 [1859]. No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. Chief Justice Marshall spoke for a unanimous Court in saying that: 'If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery ... .' *United States v. Peters*, 5 Cranch [9 U.S.] 115, 136, 3 L.Ed. 53 [1809]. A Governor who asserts a power to nullify a federal court order is similarly restrained. If he had such power, said Chief Justice Hughes, in 1932, also for a unanimous Court, 'it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases ... .' *Sterling v. Constantin*, 287 U.S. 378, 397-398, 53 S.Ct. 190, 195 [1932].

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(4) No federal ... official, agent or employee of the United States government ... shall levy or execute on the property of any Idaho citizen to collect any amounts assessed against such citizen for failure to comply with any provision of the law, regulations or court cases referenced in subsection (1) of this section.

Cooper v. Aaron, 358 U.S. 1, 18-19, 78 S. Ct. 1401, 1409-10 (1958).

Marbury v. Madison, *Ableman v. Booth*, and *United States v. Peters*, which were cited in *Cooper v. Aaron*, were all the law of the land when Idaho was admitted to the Union on July 3, 1890. *Peters* in particular held that a statute of the Pennsylvania legislature that in effect annulled a judgment of the Supreme Court of the United States was unconstitutional by its observation: "[C]onsequently the State of Pennsylvania can possess no Constitutional right to resist the legal process which may be directed in this cause." 5 Cranch at 141. What was true for Pennsylvania in 1809 was no less true for Idaho when it was admitted to the Union in 1890 and no less true 126 years later in 2016.

Accordingly, a Legislative attempt to declare various actions of the Federal Government unconstitutional is in violation of the Supremacy Clause.

I hope you find this letter helpful.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

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