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

January 27, 2017

The Honorable Paul E. Shepherd
Idaho State Representative
Statehouse
VIA HAND DELIVERY

Re: RS24987C1 – Our file No. 17-56630

Dear Representative Shepherd:

You asked this office for an analysis of RS24987C1, particularly whether the Tenth Amendment provides the Idaho Legislature the authority to "make void and of no effect acts of Congress." The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." The Tenth Amendment "makes clear [that] the States enjoy all powers that the Constitution does not withhold from them." *United States v. Kebodeaux*, 133 S. Ct. 2496, 2511 (2013). As James Madison wrote in The Federalist No. 45, the Tenth Amendment embodies the principle that the powers of Congress are "few and defined," while the powers that "remain in the State governments are numerous and indefinite." The "laws of Congress are made the supreme law of the land only when they are made in pursuance of the legislative power specified in the Constitution . . . any legislation by Congress beyond the limits of the power delegated, would be trespassing upon the rights of the States or the people, and would not be the supreme law of the land, but null and void; and it would be the duty of the courts to declare it so." *Gordon v. United States*, 69 U.S. 561, 561 (1864). The determination of whether an act of Congress exceeds the limits of its delegated powers is "emphatically the province and duty of the judicial department." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

Keeping those fundamental principles in mind, this letter provides a section-by-section analysis of the draft legislation.

Section 1. Section 1 consists of a short title and poses no legal concerns.

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Section 2. RS24987C1 appears to be based on the premise that the United States Constitution is a compact between the States, with the federal government being delegated certain powers by the States. Such premise has limited legal support. The Constitution is based on the premise that ultimate sovereignty resides in the people, not the States. *See Pac. States Tel. & Tel. Co. v. State of Oregon,* 223 U.S. 118, 145 ([t]he ultimate power of sovereignty is in the people"). "The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by 'the people of the United States.'" *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 324 (1816). Therefore, the Constitution is not a delegation of State sovereignty to the federal government, but rather sets forth the people's allocation of their sovereignty between the federal and state governments.

Because the Constitution was formed by "[w]e the people," a single state cannot render a federal law void and of no effect. James Madison, a primary author of the Constitution, stated that a state's declaration that certain federal acts were null and void did not "annul the acts" because the attempted annulment came "from the Legislature only, which was not even a party to the Constitution." *The Writings of James Madison 1819-1836* 445 (Nabu Press 2013). Thus Madison concluded that there was "not a shadow of countenance to the doctrine of nullification." *Id.* at 587. Such declarations, in Madison's view, "are expressions of opinion, unaccompanied with any other effect than what they may produce on opinion by exciting reflection." *Letters and Other Writings of James Madison* 553 (Univ. Mich. 1865).

Section 3. Echoing Madison's conclusions, state legislation declaring a federal law unconstitutional would be an expression of opinion only, and could not prevent the operation or enforcement of federal law. Due to the Supremacy Clause, the state legislature and state executive officers must "enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law, and . . . all state actions constituting such obstruction are *ipso facto* invalid. *Printz v. United* States, 521 U.S. 898, 913 (1997). Section 3 purports, in part, to make it a crime for federal officials to levy or execute on the property of any Idaho citizen to collect any amounts assessed under federal laws declared unconstitutional by the Idaho Legislature. Such an active obstruction of federal law would not survive court review.

Nor could the Legislature, by declaring a federal law null and void, seek to void enforcement of federal laws restricting state action if such laws were within the constitutional authority delegated to Congress, such as Congress' power, under the Fourteenth Amendment, to "enforce, by appropriate legislation," the provision that no State may "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *See, e.g., Milliken v. Bradley*, 433 U.S. 267, 291 (1977) ("[t]he Tenth Amendment's reservation of nondelegated powers to the states is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment"). And, it is well-established that Congress may "subject state governments

to generally applicable laws." *New York v. United States*, 505 U.S. at 160. For example, state government employers must comply with the Fair Labor Standards Act. *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985). State legislation declaring the state exempt from compliance with such laws would not be enforceable.

On the other hand, the legislature, under the Tenth Amendment to the Constitution, cannot be required to pass legislation necessary to comply with federal directives. *New York. v. United States*, 505 U.S. 144, 179 (1992). Thus, the legislature is free to refuse enactment of legislation necessary to carry out federal laws. Likewise, Congress cannot compel state executive officers to enforce federal laws and programs. *Printz*, 521 U.S. at 912. Therefore, if the legislature concludes that a federal law or rule purporting to require state agencies to take an active role in its implementation is, as provided in RS24987C1, not "constitutional as compared to the original constitution[,]" it may direct state agencies to not implement the federal law or rule. Again, however, the legislature could not direct state agencies to actively obstruct implementation of federal laws, rules, or court orders.

An additional caution is that the Tenth Amendment does not prohibit federal laws that require state participation as a condition of federal funding. Such requirements are constitutional "when a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds [because in] such a situation, state officials can fairly be held politically accountable for choosing to accept or refuse the federal offer." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602-03 (2012). Thus, any legislation enacted under the Section 3 of RS24987C1 may result in significant loss of federal funds.

Section 3, subsection 3 purports to declare that no Idaho court may issue an order to levy or execute on the property of an Idaho citizen to collect amounts assessed against such citizen for violation of federal laws declared unconstitutional by the legislature. Such provision, by purporting to prohibit enforcement of certain federal laws, may be unconstitutional. Art. VI, sec. 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, 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.

Given the express language of art. VI, sec. 2, a reviewing court would likely conclude that the direction to Idaho courts to refuse to enforce certain federal laws is unenforceable. Indeed, the Supreme Court has held numerous times that state courts are not free to refuse enforcement of claims based in federal laws. *See Testa v. Katt*, 330 U.S. 386, 392-94 (1947) (citing multiple cases). Moreover, a reviewing court may conclude that such a directive violates art. V, sec. 13 of the Idaho Constitution, which provides that "[t]he 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."

I can recommend an alternative approach for your consideration that would reconcile the limitations on legislative authority with the concerns of federal overreach. Under that approach, a committee would be created as your draft bill provides, but with the limited power to recommend to the legislature and governor whether acceptance of federal conditions and funds should occur. This recommendation would enable the legislature to weigh in on the state's participation in certain federal programs consistently with the Tenth Amendment and state sovereignty.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

BK/tjn