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Idaho Supreme Court
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IN THE SUPREME COURT FOR THE STATE OF IDAHO

HAWKINS COMPANIES, LLC, an Idaho limited liability company; PACIFIC WEST COMMUNITIES, INC., an Idaho corporation; and FJ MANAGEMENT INC., a Utah corporation, Petitioners, vs. STATE OF IDAHO, acting by and through its DEPARTMENT OF ADMINISTRATION, acting as the statutory agent for the STATE OF IDAHO TRANSPORTATION DEPARTMENT; and IDAHO STATE BOARD OF EXAMINERS, Respondents. and MIKE MOYLE, IN HIS CAPACITY AS SPEAKER OF THE HOUSE OF Representatives of the State of Idaho, and the IDAHO HOUSE OF REPRESENTATIVES, Intervenor-Respondent.	DOCKET NO. 51788-2024

PETITIONERS' CONSOLIDATED REPLY BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. REPLY TO STATE OF IDAHO AND RESPONDENT BOARD OF EXAMINERS. 3

A. Response to Statement of Facts and Motion to Strike. 4

B. The Incorrect Facts Cited in the BOE Answer Infect the BOE Brief, Which Misportrays the Actual Requirements of the Surplus Statute. 6

III. REPLY TO DEPARTMENT OF ADMINISTRATION AND IDAHO TRANSPORTATION DEPARTMENT RESPONSE BRIEF 9

IV. REPLY TO SPEAKER MOYLE AND IDAHO HOUSE OF REPRESENTATIVES 10

A. Procedural Matters. 11

B. The Petitioners Have Standing 13

C. The House's Attempt to Claim a Procedural Defect Cannot Be Considered in this Proceeding. Regardless, the Surplus Resolution Satisfies the Requirements of the Surplus Statute. 15

D. Neither HB770 Nor 726 Satisfy the Single-Subject Requirement 19

V. CONCLUSION 26

TABLE OF AUTHORITIES

Cases

Bracken v. City of Ketchum, 172 Idaho 803, 537 P.3d 44 (2022) 16
Hailey v. Huston, 25 Idaho 165, 136 P. 212 (1913)..... 2
Idaho Power & Light Co. v. Blomquist, 26 Idaho 222, 141 P. 1083, 1088 (1914)..... 27
Kansas Nat'l Educ. Ass'n v. State, 305 Kan. 739, 739, 387 P.3d 795, 797 (2017)..... 21
Kaseburg v. State, Bd. of Land Comm'rs, 154 Idaho 570, 577, 300 P.3d 1058, 1065 (2013)..... 18
Kerner v. Johnson, 99 Idaho 433, 452, 583 P.2d 360, 379 (1978)..... 20
Nation v. State Dep't of Correction, 144 Idaho 177, 193, 158 P.3d 953, 969 (2007)..... 16
Regan v. Denney, 165 Idaho 15, 437 P.3d 15 (2019) 14
State v. Banks, 37 Idaho 27, 215 P. 468 (1923)..... 20
State v. Pioneer Nurseries Co., 26 Idaho 332, 143 P. 405, 406 (1914)..... 26
Two Jinn, Inc. v. Idaho Dept. of Ins., 154 Idaho 1, 3, 293 P.3d 150, 152 (2012)) 18
Ybarra v. Legislature by Bedke, 166 Idaho 902, 906, 466 P.3d 421, 425 (2020)..... 11

Statutes

H.B. 460 (2024) 24
I.C. § 67-2001 5
I.C. § 67-5279(3)..... 6
I.C. § 67-5709A 6, 17
I.C. § 67-6519(6)..... 16
I.C. § 67-6521(d)..... 16
I.C. § 67-6535(3)..... 16
I.C. § 73-113(1)..... 16

Other Authorities

Idaho Const., Art. IV, § 18..... 5
Idaho Const., Art. III, § 16..... 21
Kansas Const., Art. 2, § 16 21

I. INTRODUCTION

This is not a case where the "State of Idaho" has decided it does not want to sell the ITD Campus,[1] as suggested by the Attorney General's response. Nor is it a debate over whether the "policy" underlying the decision to sell the ITD Campus is proper, as suggested by Speaker Moyle and the House of Representatives. The matter confronting this Court is instead a conflict between two co-equal branches of government, with the Executive-agency Respondents attempting to carry out the requirements of the Surplus Statute, and the Legislature attempting to intervene in that process by rescinding (at least temporarily) the effect of that same statute. The Dep't of Administration has not cancelled the sale of the ITD Campus; instead, these agencies find themselves cornered between two competing mandates – either comply with the Surplus Statute and complete the sale of the ITD Campus for the "highest price possible," or comply with the Administration and ITD Budget Bills and end the sales process.

Petitioners are caught in the same vise. There is no debate that the ITD Campus was declared surplus. Nor is there debate over whether the Petitioners are the high bidders in the sale that followed or that Petitioners offered well above the State's own appraisal. And despite inaccurate factual claims in filings with questionable verification, there is no debate that Petitioners and the Dep't of Administration negotiated a purchase agreement that would be signed today if not for the Legislature's attempts to rescind a sales process that is both based on a statute the Legislature

[1] Except as otherwise indicated, capitalized but defined terms herein are as set forth in Petitioners' *Brief in Support of Verified Petition for Writ of Prohibition and Writ of Mandate*.

itself passed, and that was undertaken pursuant to a plan to relocate ITD that the Legislature has itself funded to the tune of tens of millions of dollars. *Verified Petition*, at 5-6.[2]

The Legislature has the power of the purse and has the right to choose to fund activities of government agencies through appropriations bills. These appropriations bills can "turn out the lights" by failing to fund a particular mandate. That is not what happened here. The Legislature is not taking away funding to accomplish a sale; indeed, no funding is necessary.

Instead, the Legislature is instructing the Dep't of Administration to disregard otherwise applicable *general* law. As argued in Petitioner's Brief in Support, the Legislature's position that it can modify general law (i.e., the requirements of the Surplus Statute) by means of an *appropriations* bill violates the single-subject requirement of the Idaho Constitution. Quick resolution of this matter is imperative as it affects not only the Dep't of Administration and ITD budgets for FY2024, but it bears on what appears to be—per the Legislature's own admission—a growing practice[3] that violates the longstanding prohibition set forth in *Hailey v. Huston*, 25 Idaho 165, 136 P. 212 (1913). Either this Court will uphold *Hailey*, or the Legislature will be free to modify general law through the abbreviated (and non-public) appropriations process. And the implications are significant. Taken to its logical conclusion, there is no limit on which areas of general law that can be addressed with appropriations. The Legislature suggests no such limit.

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[2] Petitioners also note House Concurrent Resolution No. 29 (2017), which states the Legislature's intent in connection with acquiring the Chinden Campus: "… to provide financing to construct new, or purchase existing, office and/or warehouse space to establish a single-destination complex to house state agencies." *Available at* https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2017/legislation/HCR029.pdf (last accessed June 4, 2024).

[3] *See House Brief*, at 32.

If the practice is not corrected, everything from tax code revisions to judicial reform could be handled with appropriations bills that never receive public comment in a typical committee hearing and that are likely to be leveraged (log-rolled) through financial pressure. That clearly is not what the drafters of the Idaho Constitution intended, nor is it what the *Hailey* Court decided a century ago.

In short, while the resolution of this matter addresses a single sale of real estate, its implications are far broader and are a matter of significant public importance.

II. REPLY TO STATE OF IDAHO AND RESPONDENT BOARD OF EXAMINERS

The filing by the Office of the Attorney General on behalf of the Idaho State Board of Examiners ("**BOE**") and the "State of Idaho" was discordant to those actually involved in the transaction and familiar with its facts. As shown below, this briefing is based on the incorrect factual premises that (i) no purchase and sale agreement was negotiated, and (ii) the "State of Idaho" no longer wants to go forward with the sale. This disconnect and facts related to its filing (discussed below) suggest the verification and authority to file are suspect and should be revisited by this Court.

Even if these filings are accepted at face value, the incorrect facts alleged lead to "straw man" hypotheticals that are far afield from reality. There was and is no "fire sale". The Dep't of Administration has accepted the highest price offered; indeed, it vastly exceeds appraised value. There has been no indication by the Executive agencies involved in this transaction that they no longer intend to proceed with the sale; instead, it is only the Budget Bills that have caused the sales process to be put on hold. The State of Idaho and BOE Answer and Brief not only lack factual credibility but misportray the actual legal standards and should be disregarded.

A. Response to Statement of Facts and Motion to Strike.

On May 15, 2024, the Office of the Attorney General appeared and filed an answer and brief on behalf of the "State of Idaho" and the Idaho State Board of Examiners (the "**BOE Answer**" and the "**BOE Brief**," respectively). Approximately five minutes later, the Office of the Attorney General filed a Motion for Extension of Time and a Declaration of Counsel indicating that the Dep't of Administration and ITD were requesting a one-week extension to file their own verified answers and briefing. On May 22, 2024, the Dep't of Administration and ITD filed a Notice of Substitution of Counsel replacing the Office of the Attorney General with private counsel, who then filed a verified answer and brief on behalf of the agencies (the "**Admin/ITD Answer**" and the "**Admin/ITD Brief**," respectively).

These answers and briefs vary in significant ways and allege contrary facts that are critical to the resolution of this matter. For example, Paragraph 20 of the BOE Answer states: "Respondents… *specifically deny* that a mutually agreeable form of the draft agreements were ready for execution by the parties." (emphasis added). The BOE Answer doubles down in the following paragraph, stating, "Respondents only admit the Department of Administration and the Idaho Transportation Department did not execute the draft agreements and *deny the parties reached an agreement*." (emphasis added). Meanwhile, the Admin/ITD Answer, which is verified by the Director of the Idaho Transportation Department and the Director of the Department of Administration, states:

> Department of Administration admits, and Respondent ITD admits based on information and belief, that Petitioners and the Department of Administration arrived at a mutually agreeable form of the Purchase and Sale Agreement that was ready for execution by all parties and that the Department of Administration received a copy of the Purchase and Sale Agreement signed by the Petitioners…

Admin/ITD Answer, Para. 13 (emphasis added). While the BOE Answer "specifically" denies a purchase was negotiated, the parties involved have testified otherwise. Additionally, there is no indication in the Admin/ITD Answer that the "State of Idaho" (generically) no longer wishes to go forward with the sale; instead, the Admin/ITD Brief requests direction from this Court as to which mandate the agencies are to follow – the Surplus Statute or the Budget Bills.

In addition to these factual discrepancies, stories in the news media cast doubt on the verifications placed on the BOE Answer. The Governor's office has claimed that the Board of Examiners was not consulted before this filing and did not verify the facts alleged.[4] The Secretary of State issued a similar statement.[5] In addition, the verifications attached to the BOE Answer are pursuant to the more lenient standard of Idaho Code Section 9-1406 and are by the Chief Deputy Attorney General (for the State of Idaho) and the Deputy Chief of Staff of the Office of the State Controller (for the Board of Examiners). The only members of the Board of Examiners are the Governor, Secretary of State, and the Attorney General (Idaho Const. Art. IV, Section 18), with the State Controller operating only as the ex officio secretary. I.C. § 67-2001. Given all of the foregoing, there is a reasonable question as to whether these verifications are authorized, valid, or are based on actual personal knowledge and belief.

Accordingly, Petitioners object to the BOE Answer as there is significant evidence to show that the BOE Answer was not properly verified. This Court should require BOE and the State of

[4] *See Lawsuit over ITD Headquarters Sale Highlights Rift Between Idaho Gov. Little, AG Labrador*, Idaho Statesman (May 24, 2024), *available at*: https://www.idahostatesman.com/news/politics-government/state-politics/article288683650.html (last accessed June 4, 2024).

[5] *See New Outside Lawyers Replace Labrador on ITD Campus Sale, Make Change in Legal Argument*, BoiseDev.com (May 24, 2024), *available at*: https://boisedev.com/2024/05/23/itd-department-of-admin-hire-outside-lawyer-after-labrador-files-brief-without-approval/ (last accessed June 4, 2024).

Idaho[6] to show cause as to why and on what basis the BOE Answer should be accepted as properly verified in light of the matters identified above. If the BOE Answer is improper, then the BOE Brief should also be rejected for failure to satisfy Idaho Appellate Rules' requirement that any appearance be accompanied by verified answer. I.A.R. 5(d).

B. The Incorrect Facts Cited in the BOE Answer Infect the BOE Brief, Which Misportrays the Actual Requirements of the Surplus Statute.

The BOE Brief argues, in summary, that (i) the State no longer "wants" to sell the ITD Campus and nothing in the Surplus Statute requires it to complete the sale, and (ii) a writ cannot issue because nothing in the Surplus Statute requires the State to take any action. As shown below, these arguments are factually inaccurate and legally incorrect.

A significant premise of the BOE Brief is that "[a]ny sale of the property is discretionary." *BOE Brief*, at 12. Petitioners agree that there is discretion on the part of the Dep't of Administration as to the *specific procedures* it will follow to conclude any sale. It is a hallmark of administrative law that agency actions will be upheld so long as, among other things, there is no abuse of the agency's discretion. *See, e.g.*, I.C. § 67-5279(3). However, the overarching direction to the Dep't of Administration is not only clear but it is mandatory: "…the department **shall** obtain an appraisal and commence procedures to sell the property for the highest price possible." I.C. § 67-5709A (emphasis added). The actual language of the Surplus Statute, with its nine instances of "shall" statements, is

[6] Petitioners further object to the Office of the Attorney General's portrayal of the (generic) State of Idaho as a party to this case. The Petition is stylized with the first respondent being the "State of Idaho *acting by and through its Department of Administration…*" (emphasis added). The State of Idaho (generically) is not a party; instead, the actual party is the Dep't of Administration, which has appeared through independent counsel and has filed its own, separate answer.

not cited anywhere in the BOE Brief. Suggesting that there are not mandatory elements of the Surplus Statute ignores its actual language.

While the process of pursuing a sale is mandatory, the Surplus Statute does not require a "fire sale" *BOE Brief*, at 10. Petitioners acknowledge and agree that the Dep't of Administration has discretion in the manner in which it conducts the sales process. This discretion protects against the slippery slope relied upon in the BOE Brief. While the Dep't of Administration "shall" obtain an appraisal of any property that has been identified for surplus, its next obligation is to obtain the "highest price possible." The Dep't of Administration has discretion to determine that the "highest price possible" has not been achieved in any sale process (just like any ordinary real estate seller). In that case, the Dep't of Administration would declare it had not been offered the "highest price possible" and it would determine next steps, which might involve re-advertising the property or instructing bidders to sharpen their pencils and come in with higher bids.

The problem with the BOE Brief is that it portrays the "fire sale" hypothetical as a reflection the actual facts and relies on this "straw man" throughout. There was no "fire sale"; instead, there was a competitive bidding process that resulted in several offers <u>well above</u> the State's own appraisal, with the Petitioners submitting the highest offer. *Verified Petition*, Para. 18. As confirmed in the Admin/ITD Answer, the parties <u>did</u> reach an agreement on both the amount of the sale and the form of the purchase agreement. There has been no determination by Dep't of Administration that the "price is grossly inadequate" (*BOE Brief*, at 10); to the contrary, the Dep't of Administration awarded the opportunity to purchase the ITD Campus to Petitioners and proceeded to complete

negotiation of a mutually acceptable purchase and sale agreement. There has been no determination by the Dep't of Administration that the sale did not result in the "highest price possible".

If this matter is to be properly adjudicated, the parties must properly characterize the status of the sale and the nature of the Legislature's intervention. Again, the Dep't of Administration could have decided that the price was not the "highest price possible." It could have told Petitioners and the competing bidders to try again and come back with higher prices. It did not. To Petitioners' knowledge, neither the Dep't of Administration nor any other Executive agency charged with carrying out this sale has made any such comment and Petitioners have certainly not been informed that the sales process and is being terminated because the "highest prices possible" has not been achieved. The sale has not been cancelled by the Dep't of Administration, as suggested in the BOE Brief at page 12. If not for the Budget Bills, the sale would be proceeding. The Dep't of Administration and ITD have requested the same direction sought by Petitioners – i.e., resolution of the constitutional "log jam" that has been created by the Legislature's use of appropriations bills (i.e., the Budget Bills) to modify existing general law that equally binds the agencies in question (i.e., the Surplus Statute).

In sum, the actual (not hypothetical) facts show the discretionary elements of the Surplus Statute have been removed from the process. But for the Offending Provisions of the Budget Bills, the sale would be completed to the Petitioners. It is the constitutional conflict between the Offending Provisions and the Surplus Statute that (i) gives Petitioners standing, and (ii) makes a writ and original jurisdiction the appropriate—and exclusive—means of redress of the current dispute.

III. REPLY TO DEPARTMENT OF ADMINISTRATION AND IDAHO TRANSPORTATION DEPARTMENT RESPONSE BRIEF

Petitioners appreciate the clarifications to the record provided in the Admin/ITD Brief and Answer—clarifications provided by the agencies most directly involved. Petitioners agree with the position taken in the Admin/ITD Brief that an additional indication of the constitutional problems created by the Budget Bills is their periodic nature. The temporary nature of an amendment of general law through a year-to-year appropriations bill reinforces the single-subject constitutional infirmity of the Budget Bills' Offending Provisions.

Petitioners depart from the Admin/ITD Brief in connection with its treatment of the proposed writ of mandate. The Admin/ITD Brief argues, "… the Surplus Statute is silent as to the Department of Administration (or any official thereof) concluding a sale of surplus property" and, accordingly, a writ of mandate is not appropriate given the lack of specific direction. *Admin/ITD Brief,* at 7. Petitioners acknowledge wrestling with this concept; however, Petitioners continue to believe that a writ of mandate is appropriate based upon the limited relief that Petitioners have requested. Petitioners' request is for "a preemptory or alternative writ of mandate requiring the Dep't of Administration to conclude the sale of the ITD Campus pursuant to the Surplus Statute." *Verified Petition*, at 16. To be clear, Petitioners' request for writ of mandate does not require any particular outcome. Instead, the proposed writ of mandate would simply direct the Dep't of Administration to continue with and conclude the mandatory process of sale that is identified in the Surplus Statute and that has been interrupted by the Budget Bills. To use an analogy, Petitioners agree that the Surplus Statute does not instruct the Dep't of Administration how, where, or when to land the proverbial plane – it only instructs the Dep't of Administration that the plane needs to be landed. Petitioners'

requested writ directs the Dep't of Administration to continue with the process of landing the plane – whatever that might look like – given the mandatory language of the Surplus Statute. There is no discretion as to whether the Dep't of Administration is to continue with the process; accordingly, a writ of mandate is appropriate to that limited extent.

IV. REPLY TO SPEAKER MOYLE AND IDAHO HOUSE OF REPRESENTATIVES

The response brief filed by Speaker Moyle and the Idaho House of Representatives (the "**House Brief**") begins with the claim that, "[t]his case is an effort by private interests, aligned with certain elements in the [lower-case] executive branch, to interfere with the [upper-case][7] Legislature's ability to set fiscal policy for the state." *House Brief*, at 1. The House Brief later alleges that this, "is a feigned or collusive action involving parties in the [lower-case] executive branch." *Id.* at 3. If there has been collusion, Petitioners must be really terrible at it, given that they: (i) participated in a competitive bid process that lasted over two months and included multiple bidders that resulted in Petitioners agreeing to pay *$14,000,000.00 over the State's appraisal*; (ii) negotiated with Deputy AGs for *nearly six months* (far longer than any commercially reasonable contract negotiation and well into the legislative session) before getting to a negotiated form of purchase agreement; (iii) worked on their own to defeat the Budget Bills while the Dep't of Administration held an executed copy of the purchase agreement and would not sign until the legislative maneuverings played out; (iv) failed to receive support in the form of a veto (or line-item veto) from the Governor's office; and (v) watched as the Attorney General's office appeared and

[7] These inserts are made to emphasize what may have been a Freudian slip by the House (i.e., leaving "executive" in lower case while capitalizing the "Legislature"), but that reflects an important dynamic in this case. The Executive and Legislative branches are co-equal. The Executive agencies involved in this case have been left in a position of contrary mandates by the Legislature, which is an issue that the Judicial branch should resolve.

filed an inaccurate answer on behalf of the BOE that went against Petitioners' interests. Petitioners were subsequently relieved to see the Dep't of Administration and ITD correct the record, but this was their duty given the obligation of candor to this Court. There is and was no collusion. Suggestions otherwise are an improper attempt to taint the proceedings.

Petitioners are also troubled by the House Brief's statement that this, "… Court does not exist to provide direction. This Court exists to render judgments in justiciable controversies." *House Brief*, at 3. The Dep't of Administration and ITD concur that this is a justiciable controversy that requires direction from this Court. Petitioners see an obvious constitutional conflict between the [upper-case] Executive and [upper-case] Legislative branches that should be resolved by the third, and also co-equal, [upper-case] Judicial branch. *See, e.g., Ybarra v. Legislature by Bedke*, 166 Idaho 902, 906, 466 P.3d 421, 425 (2020).

A. Procedural Matters.

Idaho Appellate Rule 5 identifies the manner in which parties are to appear in the event of a special writ. I.A.R. 5(d) states: "Appearance in response to the writ *by any interested party* shall be by verified answer and by brief." (emphasis added).

As the Court is aware, the Idaho Senate has not sought permission to participate in this litigation.[8] Speaker Moyle and the House of Representatives' initial attempt to intervene in this matter was not supported by verification and had to be repeated. That oversight was later corrected. But the failure to verify is once again at issue. At this time, no verified answer has been prepared or

[8] As such, any suggestion that the Speaker and the House of Representatives through the House Brief represent the position of the Legislature is without foundation.

submitted by Speaker Moyle or the House of Representatives as required by I.A.R. 5. This is important as nearly half of the House Brief is devoted to a "Statement of the Facts". There is no verification of any of the facts alleged; yet the House Brief relies on these new (and unverified) facts to support what appears to be an argument that the Budget Bills were justified on a policy basis.

As one significant example, the House Brief states on page 7 that, "[w]hile it is not clear from the ITD Board minutes why ITD believed [the Boise real estate market is favorable], members of JFAC were told that an ITD working group estimated sales proceeds would be about $80 to 100 million." House Brief, at 8. The only citation: debate by Senator Kevin Cook, who himself spearheaded the effort to abort the ITD Campus sale. No other source for the "$80 to 100 million" figure was provided during floor debate and none is provided with the House Brief, which is important given the State's own appraisal identified value at approximately $38 million. There is no suggestion let alone any verified factual basis to suggest why anyone would think that a sale of the ITD Campus for more than $1 million per acre is undervalued.[9] Other statements are simply ambiguous. For example, the House Brief states: "Perhaps because a sale had not yet occurred, JFAC declined to fund the request…" *Id.* at 11. No basis for the statement is provided.

These unverified factual statements are apparently offered to justify the policy that the House intended to express with the Budget Bills. This is, of course, beside the point. The "policy" is not at issue; instead, it is the means pursued, which are unconstitutional. But setting that point aside, the manner in which the House Brief has presented the factual basis for their argument is outside of any

[9] This claim of value is inconsistent with later points asserted by the House. For example, the House Brief later suggests that Senator Herndon believed "the value of a large property in Boise could not be quantified". House Brief, at 15. We leave it to the Court to evaluate this statement.

verified or sworn statements. The House has not appeared and presented a verified answer and brief as required by the Appellate Rules. Accordingly, just like the initial petition to intervene, the House Brief fails to satisfy Idaho Appellate Rule 5(d) and should be rejected.

B. The Petitioners Have Standing

The House Brief suggests Petitioners do not have standing because, "[t]he failure of a real estate deal to go through is a disappointment, not an injury." *House Brief*, at 18. Again, it is incorrect to claim that the "real estate deal" has been terminated; instead, the process was initiated by the Surplus Resolution, followed the Surplus Statute, and is now in limbo as a result of the Budget Bills. In other words, the past-tense treatment of this "real estate deal" is inaccurate. Instead, there is a present controversy in which Petitioners are the high bidders, the purchase and sale agreement has been signed by the Petitioners, and the only impediment to completing the sale is the Budget Bills. As noted in the Admin/ITD Answer, the purchase agreement has been fully negotiated (*Admin/ITD Answer*, Para. 13) and "… the Department of Administration is not executing the Purchase and Sale Agreement because of the legal uncertainty about its authority to sign that agreement given the provisions in its appropriation and budget." *Id.* Para. 23.

The House Brief also suggests that there is no standing because there is no causation between the Dep't of Administration's failure to sign the negotiated purchase agreement and the Budget Bills. This is, of course, laughable. Any Executive agency is aware of the politics that go into the funding of such agency and who controls those purse strings. Indeed, the House Brief answers its own question a page later, stating, "[t]he House suspects the real reason behind the Department of Administration's reluctance to sign the purchase agreement is the Legislature's refusal to fund

certain budget requests." *House Brief*, at 19. Ultimately, whatever happened in the interim is not relevant; as things stand today, the Budget Bills are the reason the ITD Campus sale is not going forward. That is the lens through which this case should be considered.

If Petitioners had had their way (or, perhaps, were better at colluding), the Dep't of Administration would have signed the purchase agreement and brought the controversy to a close while the Budget Bills were still being debated. In that case, Petitioners agree with the House Brief's statement that, "… the Legislature could not have passed a law revoking it." *House Brief*, at 19. Regardless, the current state of affairs (attested to by verified facts) is that the Dep't of Administration has not signed the purchase agreement "because of the legal uncertainty about its authority to sign that agreement given the provisions in its appropriation and budget." *Admin/ITD Answer*, at 6. Clearly, there is a causal connection between the redress sought and the constitutionality of the Budget Bills.

Even if standing were a closer call, this is an important question that concerns a significant and distinct constitutional violation with no other person having standing to bring a claim, justifying the relaxed standing requirements identified in *Regan v. Denney*, 165 Idaho 15, 437 P.3d 15 (2019). The House Brief is inconsistent on this point. While claiming that Petitioners "… do not allege a significant constitutional violation" (*House Brief*, at 20), the House Brief later states that an outcome confirming that the Budget Bills cannot modify general law would "radically alter" the way the Legislature does business: "To hold that the Legislature may not engage in this longstanding practice would radically alter how certain appropriations, such as public school appropriations, may be made on an annual basis and would needlessly increase the amount of legislation." *House Brief*, at 32-33.

By the House's own admission, this is a significant constitutional issue. In addition to affecting the manner in which (the House claims) the Legislature does its business, the issue directly pits the Executive and Legislative branches against each other, with the Petitioners caught in the pinch point of a sale that is held up for no reason other than the constitutional conflict created by the Budget Bills. The Petitioners have standing.

C. The House's Attempt to Claim a Procedural Defect Cannot Be Considered in this Proceeding. Regardless, the Surplus Resolution Satisfies the Requirements of the Surplus Statute.

The House Brief next claims that the ITD Campus was never lawfully offered for sale as ITD allegedly failed to comply with the provisions of the Surplus Statute. Not only is this argument procedurally improper, the House Brief fails to show why the Surplus Statute was not followed. This Court should not adopt the hyper-technical, "magic words" analysis offered by the House Brief; instead, it should adhere to the common-sense approach typically applied to administrative action.

As an initial point, the matter that is before this Court is a question of whether certain legislative action is constitutional, with the outcome being direction to the affected agencies as to whether they should continue with the sale of the ITD Campus or consider that process terminated. The House's argument is something different altogether. In claiming that the Surplus Resolution is invalid, the House is challenging an administrative action taken by ITD, an administrative agency. As such, the House's claim is subject to the requirements of the Idaho Administrative Procedures Act and review must be undertaken in that context. If the House believed the Surplus Resolution was invalid, it should have followed the requirements of Idaho Code Section 67-5271 through -5279, including filing of a petition for judicial review within twenty-eight days. I.C. § 67-5273(3). Failure

to do so was a failure to exhaust administrative remedies available to the House, meaning the House is barred from raising this issue now. "If an administrative remedy is provided by statute, relief must first be sought by exhausting such remedies before the courts will act." *Nation v. State Dep't of Correction*, 144 Idaho 177, 193, 158 P.3d 953, 969 (2007). Collateral attacks on administrative decisions are unavailable when review is available under the appropriate statute. *See*, *e.g.*, *Bracken v. City of Ketchum*, 172 Idaho 803, 537 P.3d 44 (2022) (holding in the land use context (also subject to review under the standards identified in the Idaho Administrative Procedures Act (*see* I.C. §§ 67-6519(6), -6521(d), and -6535(3)) that, "… direct collateral attacks on land use decisions are unavailable when review is available under LLUPA."). The House never challenged the Surplus Resolution at the time[10]; indeed, the Legislature took action consistent with the Surplus Resolution in funding ITD's move to the Chinden Campus. The requested declaration invalidating the Surplus Resolution is an afterthought, and the House has failed to exhaust administrative remedies necessary to assert such a claim. This is simply an unauthorized collateral attack.

Even if the House Brief's argument can be considered, it flounders given basic rules of statutory interpretation. Under Idaho law, "[t]he language of a statute should be given its plain, usual and ordinary meaning… The literal words of a statute are the best guide to determining legislative intent." I.C. § 73-113(1). The Surplus Statute should be given its "plain, usual and ordinary meaning" and its only requirement is that an agency declare a "facility is not needed or is

[10] Indeed, if there was a belief that the ITD Campus was never lawfully offered for sale, what need did the Legislature have to insert language in the Budget Bills revoking authority to sell the property?

unsuitable for its purposes." I.C. § 67-5709A. Meanwhile, the Surplus Resolution includes statements of intent by Director Stokes and ITD Board Member DeLorenzo, as follows:

- "Director Stokes reported on ITD's request to declare the Headquarters State Street building surplus. The building that was dedicated in 1961 has been the topic of relocation for the past 10-years. The January flood accelerated the process in finding a different headquarters building."
- "Member DeLorenzo commented that a lot of effort has gone into this decision and recognized there are better and more efficient buildings for ITD to work."

Verified Petition, Ex. A. The resolution itself points to the same flood, the years of effort to relocate ITD to the Chinden Campus, and ultimately states that the ITD Campus is "surplus property for the purpose of allowing the Department of Administration to transfer the property to the Idaho State Board of Examiners in preparation of disposal of the property in accordance with law." *Id.* In short, the Surplus Resolution describes the facts and circumstances leading to the decision to sell the ITD Campus and specifically references the Surplus Statute in arriving at its conclusion.

To suggest that the Surplus Resolution does not establish that the ITD Campus "is not needed or is unsuitable for its purposes" is to put form over substance and ignore the plain meaning of both the Surplus Statute and the Surplus Resolution. The House Brief's hyper-technical approach to this argument suggests that there are "magic words" that had to be included in the Surplus Resolution in order for it to be effective; in other words, the House believes the Surplus Resolution is invalid because it did not specifically recite the words: "facility is not needed or is unsuitable for its purposes." *House Brief*, at 21. The Surplus Resolution may not use those specific words, but it does

repeatedly declare the ITD Campus as "surplus," and by its plan and ordinary meaning, "surplus" refers to "more than the amount that is needed."[11] Under any interpretation, the plain usual and ordinary meaning of the words employed in the Surplus Resolution match the meaning and intent of the Surplus Statute.

This "magic words" approach is not supported by this Court's traditional treatment of an administrative agency's interpretation of statutes that they are entrusted with administering:

> An agency's interpretation of a statute that it is entrusted with administering is entitled to deference so long as it is reasonable and not contrary to the express language of the statute. We interpret the words of a statute according to their plain, usual, and ordinary meaning, and do not use any other tools of construction if the meaning of the statute is unambiguous from its words alone.

Kaseburg v. State, Bd. of Land Comm'rs, 154 Idaho 570, 577, 300 P.3d 1058, 1065 (2013) (quoting *Two Jinn, Inc. v. Idaho Dept. of Ins.*, 154 Idaho 1, 3, 293 P.3d 150, 152 (2012)). The Surplus Resolution's statement that the "largest building on campus [is] uninhabitable and would require extensive renovation to reoccupy" sure sounds like it is "unsuitable for [ITD's] purposes." The Surplus Resolution's statement that "ITD has committed to relocating its Headquarters to a renovated building 3 at the State of Idaho Chinden Campus" sure sounds like the property "is not needed." ITD's use of the word "surplus" is certainly "reasonable and not contrary to the express language of the statute." It is consistent with the Surplus Statute's "plain, usual, and ordinary meaning." Accordingly, the Surplus Resolution satisfies the Surplus Statute's requirement that the ITD Campus be declared "not needed or… unsuitable for its purposes."

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[11] See Merriam-Webster Online Dictionary, *Surplus*, *available at*: https://www.merriam-webster.com/dictionary/surplus (last accessed June 4, 2024).

The House Brief then attempts to pry into the Surplus Resolution a suggestion that the entirety of the 44-acres was not surplused based solely on ITD's request to temporarily lease back portions of the ITD Campus, including for a testing facility. This argument might have some merit if portions of the ITD Campus were to be held back from the sale and retained in perpetuity and in fee simple; however, that was not the case. Instead, the request was to temporarily lease back portions of the ITD Campus while replacement facilities were being designed and constructed. *Verified Petition*, at 19. In other words, the lease-back provisions (common in many real estate purchase and sale agreements) were intended to allow for an orderly transition to the Chinden Campus. A lease is, by its nature, temporary. The fact that Petitioners were willing to accommodate ITD in the purchase and subsequent development of the ITD Campus by offering temporary leases of portions of the ITD Campus while replacements were being developed does not belie the fact that ITD determined the entirety of the ITD Campus to be surplus.

Finally, the House suggests that the entire ITD relocation project (a project in which the Legislature participated to the tune of tens of millions of dollars) was simply a "pretext" to "place public property in private hands." *House Brief*, at 21-22. Once again, if the House is going to allege corruption (or collusion), it should at least do so based on verified facts. The House should not be so irresponsible as to suggest impropriety on the part of the Executive agencies involved. If it is going to do so, it should swear to the facts underlying the authenticity of its claims.

D. Neither HB770 Nor 726 Satisfy the Single-Subject Requirement

The House Brief next turns to the crux of the matter, which is whether the Budget Bills satisfy the single-subject test.

Petitioners agree that "the legislative power of the State of Idaho is vested in the Senate and House of Representatives." House Brief, at 23.[12] This goes without saying. Petitioners also agree that an act may embrace many subjects if they are connected with and adequately described in the subject of the act. *See, e.g., Kerner v. Johnson*, 99 Idaho 433, 452, 583 P.2d 360, 379 (1978). Petitioners agree.

That does not mean that an appropriations act may modify a general law. As noted in Petitioners' moving brief, this has been the law since *Hailey* and is consistent with the law in many states. Contrary to the House Brief's claims, this is not dicta; even if it were, this Court reiterated the same holding in *State v. Banks*, 37 Idaho 27, 215 P. 468 (1923), quoting the *Hailey* Court in its statement that even if the subject of a modification of salary were indicated in the title, "the act would be obnoxious to the constitution under another provision of sec. 16, which declares that every act shall embrace but one subject and matters connected therewith." In other words, the *Hailey* decision rejects the House Brief's narrow interpretation of its holding.

The only citation that the House can produce suggesting that appropriations acts may be combined with substantive general legislation is not from Idaho, but instead from Kansas. Comparison of the two provisions shows that the Kansas case law relied upon by the House is not applicable here.

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[12] This same page of the brief includes a Footnote 24, in which the House claims H.B. 409 was not "presented in the House debate as a way to stop the sale of the State Street Property." "H.B. 409 passed the House unanimously" precisely because it was not "presented" that way. The House Brief fails to point to the intent of H.B. 409, which was clearly stated by one of its sponsors, Speaker Moyle, who went to the press and stated: "I'm hoping the governor pulls back on that, and we have another look at that (sale). *That's why that bill is there*." *Verified Petition*, Para. 22 (emphasis added). H.B. 409 was thereafter held in committee on the Senate side even after unanimous approval in the House (*id*. at Para. 23), no doubt in large part due to the understanding of the intent of H.B. 409 articulated by Speaker Moyle to the press.

The Idaho single-subject rule states:

> Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title.

Idaho Const., Art. III, § 16. Meanwhile, the Kansas single-subject rule states, in relevant part:

> No bill shall contain more than one subject, except appropriation bills and bills for revision or codification of statutes... The provisions of this section shall be liberally construed to effectuate the acts of the legislature.

Kansas Const., Art. 2, § 16. There are multiple distinctions between these provisions that, in Petitioners view, drive the different outcomes in *Hailey* as compared to *Kansas Nat'l Educ. Ass'n v. State*, 305 Kan. 739, 739, 387 P.3d 795, 797 (2017). First, the Kansas provision provides for an exception for appropriation bills. No such exception is included in the Idaho Constitution. While many other courts have determined that such an appropriations exception does not allow for mixing of appropriations with general law (*see Petitioners' Brief*, at 14 - 16), Kansas held otherwise. But the basis on which the Kansas court did so (i.e., the exception for appropriation bills) does not exist in the Idaho Constitution. Furthermore, the Kansas provision includes a requirement that its single-subject rule "be liberally construed to effectuate the acts of the legislature." The *Kansas Nat'l* court relied on this directive, which does not exist in the Idaho Constitution's recitation of the single-subject rule. While Kansas may have approved a more liberal construction, its single-subject rule is distinguishable and we have existing Idaho case law in the form of *Hailey* holding otherwise.

The House also tries to differentiate *Hailey* based on whether an appropriation was "general" or an "appropriation act". As the House admits, neither the Idaho Constitution nor the *Hailey* case include such a distinction. In fact, the term "general appropriation" appears nowhere in Idaho Code

or the Constitution. The House admits this as well, so Petitioners are unclear as to what the House means by this distinction. It is certainly short-lived in the House Brief, as the following paragraph completely undermines the former, with the House admitting: "… the Idaho Constitution draws no distinction between general appropriation acts, appropriation acts, and other acts for purposes of the single-subject requirement." *House Brief*, at 31. Petitioners agree. Under Idaho law, all acts of the Legislature are subject to the single-subject requirement.[13]

This Court's definitions of an "appropriation" supports this distinction. In *Leonardson v. Moon*, 92 Idaho 796, 451 P.2d 542 (1969), this Court defined an appropriation as: "1) authority from the legislature, (2) expressly given, (3) in legal form, (4) to proper officers, (5) to pay from public monies, (6) a specified sum, and no more, and (7) for a specified purpose, and no other." *Leonardson*, 92 Idaho at 804. Nothing in Section 4 of the Administration Budget Bill accomplishes

[13] If we look beyond Idaho to secondary sources, *Corpus Juris Secundum* acknowledges that the "general appropriations" concept might be differentiated in other states' formulations of the single-subject requirements. It refers to general appropriations as "those acts that relate to ordinary government expenses for a fiscal year or budget bills." C.J.S. *Statutes* 255. While there may be exclusions for general appropriations bills allowing them to cover a variety of subjects as they allocate funds within a general state budget, even in those cases:

> an express exclusion from the single-subject and clear or descriptive title rules set forth in a state constitution does not grant to the legislature a carte blanche to include in an appropriations bill measures wholly unrelated and not germane to the subject of the allocation and expenditure of monies. **While the legislature is free to impose conditions and restrictions on appropriated funds within the body of an appropriations bill, it may not enact or amend a law on a subject other than appropriations or substantively legislate in that bill in a manner that changes, amends, or repeals existing law. An appropriation bill may not contain substantive law. Any legislative bill that purports to combine appropriations with the enactment or amendment of general or substantive law necessarily contains more than one subject in violation of a state constitutional provision limiting the scope of bills, and such a bill does not fall within the single-subject requirement's exception for general appropriation bills**.

Id. (emphasis added).

payment of a specific sum for a specified purpose. As to Section 7 of the ITD Budget Bill, certain money is appropriated but conditioned on revocation of authority for the sale of the ITD Campus – an unconstitutional modification of the Surplus Statute. The revocation of authority to sell the ITD Campus does not meet this Court's definition of an "appropriation," further emphasizing the single-subject violation.

The House concludes this argument by stating, without citation, that "there is no rule in the Idaho Constitution providing that an appropriation act may not amend or modify law." *House Brief,* at 31. Of course, the Idaho Constitution does include a single-subject limitation that has been interpreted in *Hailey* exactly as alleged. Ignoring the constitutional limitation is not a defense.

The House also argues that "it does this all the time," pointing to various instances where the Legislature has been modified general law. For example, in Footnote 29 the House points to H.B. 460 (2024), which not only sets budgets, but also modifies statutory language setting forth the salaries of certain educational system professionals. Recall that the issue in *Hailey* was that the salary of the librarian of the State Historical Society was set by statute. The question before the *Hailey* Court was "whether the Legislature can amend a salary statute or suspend its operation by a general appropriation bill appropriating a larger sum for the salaries for such office than is fixed by the salary statute." *Hailey*, 136 P. at 213, 214. And, of course, this Court held that, while the "desire was a laudable one", "[s]aid appropriation in the general appropriation bill would not and could not amend the statute fixing the salary of the officer referred to." *Id.* at 214.

Now compare Section 10 of H.B. 460, shown below:

SECTION 10. That Section 33-1004E, Idaho Code, be, and the same is hereby amended to read as follows:

33-1004E. DISTRICT'S SALARY-BASED APPORTIONMENT. Each district shall be entitled to a salary-based apportionment calculated as provided in this section.

* * *

(6) To determine the apportionment for district administrative staff, first determine the district average experience and education index by placing all eligible certificated administrative employees on the statewide index provided in section 33-1004A, Idaho Code. The resulting average is the district index. If the district does not employ any administrative staff, the district administrative index shall equal the statewide average index for purposes of calculating administrative salary-based apportionment. On and after July 1, ~~2023~~ 2024, the district administrative staff index shall be multiplied by the base salary of ~~forty-three thousand one hundred fifty-one dollars ($43,151)~~ forty-three thousand five hundred eighty-three dollars ($43,583). The amount so determined shall be multiplied by the district staff allowance for administrative staff determined as provided in section 33-1004(4), Idaho Code. The resulting amount is the district's salary-based apportionment for administrative staff.

(7) On and after July 1, ~~2023~~ 2024, to determine the apportionment for classified staff, multiply ~~thirty-eight thousand eight hundred two dollars ($38,802)~~ thirty-nine thousand one hundred ninety dollars ($39,190) by the district classified staff allowance determined as provided in section 33-1004(5), Idaho Code. The amount so determined is the district's apportionment for classified staff.

H.B. 460 does exactly what *Hailey* said the Legislature could not as it modifies the statutorily identified salary of a state employee using an appropriations bill. As noted in the Admin/ITD Brief (regarding the Budget Bills), this leads to a disjointed and chaotic situation as H.B. 460 (an appropriations bill) is only effective for one year, meaning the amendment to general law (I.C. § 33-1004E) presumably reverts to the prior language at the next fiscal year, further illustrating the constitutional conundrum created by the Legislature's practice of mixing subjects. **H.B. 460 (2024) is not at issue in this case and is not being challenged**, but the House's reliance upon it emphasizes the need for direction clarifying the limits in line with *Hailey*.

While simultaneously claiming to have the authority to modify 67-5709A, the House also claims it did not do so. "H.B. 770 does not change one word of I.C. 67-5709A or any other statute." *House Brief*, at 32. Rather, the House claims that H.B. 770 "shall prevail as the appropriate directive to Respondents regarding the disposition of the State Street Property… in the event of a conflict." *Id.* Not only was there a conflict, the Budget Bills explicitly acknowledge the conflict. The House was clearly aware of the conflict as it attempted to repeal the Surplus Statute with H.B. 409, which Speaker Moyle specifically stated to the press. The Legislature then attempted to take away authority (not fail to fund, but to deny authority) clearly given by general law and directed the Dep't of Administration to ignore the mandates of the Surplus Statute. This is not an inconsistency between two statutes. The Budget Bills state "[n]otwithstanding any provision of law to the contrary" as the talisman against operation of the Surplus Statute. To suggest that the intent and explicit language of the Budget Bills do not purport to amend Section 67-5709A (at least during FY2024) is, frankly, a frivolous argument.

The House again undermines its own argument on the following page by arguing that, "H.B. 770 is both a more recent expression of legislative intent and far more specific in its application, [accordingly] it is the controlling authority on the handling of the State Street Property." *House Brief*, at 33. The rule of statutory interpretation the House cites requires a valid enactment and conflicts between *general* laws; because the Budget Bills are unconstitutional, the rule of statutory interpretation never applies. What the argument does establish, however, is an additional admission that the Legislature attempted to do exactly what is precluded by the Idaho Constitution.

V. CONCLUSION

In 1914, this Court held that the purpose of the single-subject rule "is to prevent fraud and deception in the enactment of laws, to prevent log-rolling legislation, to avoid inconsistent and incongruous legislation, and to reasonably notify legislators and the people of the legislative intent to be enacted in the law." *State v. Pioneer Nurseries Co.*, 26 Idaho 332, 143 P. 405, 406 (1914). Now consider the Budget Bills. They were passed at the end of the session as literally one of the final acts of the Legislature before adjournment. They followed other attempts to repeal the Surplus Statute. They were controversial and were initially defeated. As the Budget Bills made their way to a final vote, not only the legislators involved but also the Governor were put in an incredibly difficult position, as there was massive pressure to pass the ITD and Dep't of Administration budgets and ensure other priorities were advanced before concluding the session. The ITD Budget Bill alone included nearly six hundred million dollars (*Verified Petition*, Ex. G), which would of course include a number of legislative and executive priorities. Would the Governor veto this "policy" in the Budget Bills and risk losing the entire ITD budget? Would concerned legislators stand in the way of a six hundred-million-dollar appropriation if they disagreed on this single point? Would they keep the Legislature in session over this issue?

Is this not the definition of "log-rolling"?

This was not a policy debate and it was not treated as one; instead, language modifying general law was inserted in the Budget Bills in order to achieve a policy outcome. If the House's theory is correct, the literal effect will be that all sorts of policy can be addressed in the appropriations process – as noted above, everything from tax reform to judicial reform will be fair

game and will proceed without public opportunity for review and comment (orally and in writing) at committee; instead, "policy" will go directly to the floor of the House and Senate after a modified hearing process (that does not include public comment) and be voted in through appropriations that are only effective for one year.

"The Constitution of the state of Idaho is a limitation upon the legislative power in all matters of legislation, and is not a grant of power." *Idaho Power & Light Co. v. Blomquist*, 26 Idaho 222, 141 P. 1083, 1088 (1914). This Court should uphold *Hailey* and the limitations it imposes on the Legislature and determine that the Offending Provisions of the Budget Bills are unconstitutional, thus resolving the conflicting mandates addressed to the Dep't of Administration in the transaction in which Petitioners are currently involved.

DATED this 5th day of June 2024.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of June 2024, I caused a true and correct copy of the above to be served upon the following individuals in the manner indicated below:

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