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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IN THE MATTER OF: THE IDAHO ATTORNEY GENERAL'S INVESTIGATION OF THE COMMUNITY PARTNER GRANT PROGRAM – CIVIL INVESTIGATIVE DEMAND FOR DAVE JEPPESEN, JENNIFER PALAGI, and SHANE LEACH	Case No. CV01-23-04832 **PETITIONERS' MEMORANDUM OF COSTS AND FEES**

Petitioners Dave Jeppesen, Jennifer Palagi, and Shane Leach ("Petitioners"), by and through their attorneys of record, Gjording Fouser PLLC, hereby submit Petitioners' Memorandum of Costs and Fees. This Memorandum is submitted pursuant to I.R.CP. 54 and has been filed within 14 days of the entry of judgment. The costs and fees set forth herein have been incurred by Petitioners as set forth in the Declaration of Counsel filed herewith.

FEES AND COSTS PURSUANT TO I.R.C.P. 54(d) and (e)

1. Filing Fees $ 228.74

2. Process Server Fees		$ 528.22
3. Attorney Fees		$119,122.50
Total Fees and Costs as a Matter of Right		$119,879.46

REASONABLE EXPENSES UNDER IDAHO CODE §§ 12-117 & 48-614

1. Transcript and Recording Costs		$ 820.17
2. Copying and Printing Costs		$ 280.65
3. Online Research		$ 720.45
	Total	$1,821.27

ATTORNEY FEES UNDER IDAHO CODE §§ 12-121; 12-117; 67-1406; & 48-614

1. Attorney Fees[1]	$119,112.50

LEGAL SUPPORT FOR REQUESTS FOR COSTS AND FEES

In early March 2023, Attorney General Raúl Labrador and former Deputy Attorney General Lincoln Wilson ("Respondents") issued Civil Investigative Demands ("CIDs") against Idaho Department of Health and Welfare ("IDHW") officers Dave Jeppesen, Jennifer Palagi, and Shane Leach ("Petitioners"), despite Petitioners being the clients of Respondents.[2] The CIDs were purportedly issued to investigate whether IDHW had properly administered the community partner grant program, which distributed federal COVID relief funds to entities throughout Idaho to address the impacts that the pandemic had on school-aged children, particularly the learning loss caused by the pandemic.

The specific issue sought to be investigated by Respondents was whether funds had been distributed to programs that served children under the age of five in addition to

[1] These fees are the same as those requested above; Petitioners are not requesting duplicate attorney fees.

[2] Because this Court is well aware of the factual and procedural background of this case, only a brief background will be provided.

children between the ages of five and thirteen. After Petitioners were served with the CIDs, Petitioners were required to obtain outside counsel. Petitioners promptly moved to set aside the CIDs and disqualify Respondents based on their conflict of interest. This Court granted Petitioners' motion to disqualify Respondents on August 10, 2023, and allowed Respondents 21 days to appoint independent counsel to pursue the CIDs.

Special Deputy Attorney General Christopher Boyd was appointed on August 29, 2023. On September 20, 2023, a hearing on the substance of Petitioners' Petition to Set Aside Civil Investigative Demands was set for November 21, 2023. Shortly thereafter, on October 6, 2023, Mr. Boyd withdrew the CIDs. Mr. Boyd's stated reason for withdrawing the CIDs was the August 21, 2023, issuance of an audit report conducted by the Legislative Services Office, despite that audit having been in process since before the CIDs were signed and served.

The CIDs, in this case, should have never been served on Petitioners, and Petitioners should not have been forced to take this action. For that reason, and as more fully set forth below, Petitioners move this Court for an award of fees and costs.

A. Petitioners are the prevailing parties in this matter.

Petitioners are the prevailing parties in this matter because they have achieved the relief they sought: dismissal of the CIDs. *Petition to Set Aside Civil Investigative Demands*, p. 19. Under Idaho Rule of Civil Procedure 54(d)(1)(B), "[i]n determining which party to an action is a prevailing party and entitled to costs, the trial court must, in its sound discretion, consider the final judgment **or result** of the action in relation to the relief sought by the respective parties." (emphasis added). *See also Chadderdon v. King*, 104 Idaho 406, 411, 659 P.2d 160, 165 (Ct. App. 1983).

This action resulted in the Petitioners being granted the relief sought, which was the dismissal of the CIDs. Rather than proceed to enforcement of the CIDs, Mr. Boyd chose to withdraw the CIDs. Likewise, Respondents did not achieve their request because this Court did not enforce the CIDs. Though the determination of a prevailing party is a matter of discretion for the Court, *see City of Middleton v. Coleman Homes, LLC*, 163 Idaho 716, 722, 418 P.3d 1225, 1231 (2018), that discretion is limited by law. *See Lunneborg v. My Fun Life*, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018). At times, that discretion can lead to only one conclusion, particularly where a party obtains all relief they have sought. *See Daisy Mfg. Co. v. Paintball Sports, Inc.*, 134 Idaho 259, 262, 999 P.2d 914, 917 (Ct. App. 2000), abrogated on other grounds by *BECO Const. Co. v. J-U-B Engineers Inc.*, 149 Idaho 294, 233 P.3d 1216 (2010). Petitioners contend that this is such a case, as they have obtained all relief they have sought.

B. Petitioners are entitled to attorney fees under Idaho Code §§ 48-614; 12-117; and 12-121 because Attorney General Labrador lacked a reasonable basis in fact or law to issue the CIDs and because Attorney General Labrador acted frivolously, unreasonably, or without foundation.

Under both Idaho Code §§ 48-614 and 12-117, an award of attorney fees and reasonable expenses is available to the prevailing party when the non-prevailing party lacks a "reasonable basis in fact or law."

Idaho Code § 48-614 provides the statutory authority for the attorney general to seek an order requiring compliance with a CID, including under the two statutory schemes cited here by Attorney General Labrador as justification for the CIDs, the Idaho Charitable Solicitation Act and the Idaho Charitable Assets Protection Act. That statute further provides that "[t]he court *shall* award the prevailing party reasonable expenses and attorney fees incurred in obtaining an order under the provisions of this section if the court

finds that the attorney general's request for an order under this section . . . was without a reasonable basis in fact or law." I.C. § 48-614(2) (emphasis added). Here, there is no question that the attorney general requested an order that Petitioners comply with the CIDs. *See Brief in Support of Motion to Disqualify Petitioners' Counsel*, p. 18 (in which Respondents request attorney fees under Idaho Code § 48-614(2)).

Meanwhile, Idaho Code § 12-117 provides the applicable standards for an award of attorney fees in cases involving the government. Two subsections of the statute are potentially applicable here. First, Idaho Code § 12-117(1) states:

> Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

Next, Idaho Code § 12-117(4) states:

> In any civil judicial proceeding involving as adverse parties a governmental entity and another governmental entity, the court shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses. For purposes of this subsection, "governmental entity" means any state agency or political subdivision.

Accordingly, if both Petitioners and Respondents are deemed governmental entities, fees shall be awarded to Petitioners as the prevailing parties regardless of whether the non-prevailing party acted with a reasonable basis in law or fact. On the other hand, if only one of the parties is a governmental entity, then attorney fees shall be awarded only if the non-prevailing party acted without a reasonable basis in fact or law. Here, the CIDs were issued to Petitioners in their official capacity, as confirmed by former Deputy Attorney General

Lincoln Wilson.[3] *Decl. of Trudy Hanson Fouser*, Ex. E.[4] Further, Respondents are also a governmental entity within the statute's meaning. *See Idahoans for Open Primaries v. Labrador*, 172 Idaho 466, 533 P.3d 1262, 1287 (2023) (in which the Idaho Supreme Court awarded attorney fees because "the Attorney General acted without a reasonable basis in law in this matter.").

"The purpose of I.C. § 12–117 is: 1) to serve as a deterrent to groundless or arbitrary action, and 2) to provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies should never have made." *State, Dep't of Fin. v. Res. Serv. Co.*, 134 Idaho 282, 283, 1 P.3d 783 (2000), *overruled on other grounds by City of Osburn v. Randel*, 152 Idaho 906, 277 P.3d 353 (2012).

Under Idaho Code § 12-121, on the other hand, "[i]n any civil action,[5] the judge may award reasonable attorney's fees to the prevailing party or parties when the judge finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation." As such, Idaho Code § 12-121 provides a similar standard for an award of attorney fees as the standard imposed by Idaho Code §§ 48-614 and 12-117.[6] *Idahoans for Open Primaries*, 533 P.3d at 1287 ("The standard for evaluating whether a party's conduct was 'without a reasonable basis in fact or law' under section 12-117 is substantially similar

[3] At times, Respondents attempted to argue that Petitioners were served in their individual capacity, but it is clear that Respondents were attempting to investigate IDHW.
[4] Filed April 28, 2023.
[5] Under Idaho Rule of Civil Procedure 3(b), "[a] civil action must be commenced by filing a complaint, **petition** or application with the court." (emphasis added).
[6] Because Idaho Code § 12-117 and Idaho Code § 12-121 are interpreted similarly, only one analysis is provided below.

to the standard for evaluating whether a party pursued an action 'frivolously, unreasonably, or without foundation' under section 12-121."[7] (citation omitted)).

Respondents lacked a reasonable basis in fact or law to issue the CIDs for six reasons: (1) Attorney General Labrador issued the CIDs despite his office having previously opined that Petitioners' conduct was lawful; (2) by serving the CIDs, Attorney General Labrador created an adversarial process against his own clients; (3) Respondents had no statutory authority to issue the CIDs; (4) Petitioners' interpretation of the appropriations language was correct; (5) Respondents withdrew the CIDs following the release of an audit report by the Legislative Services Office though Petitioners had, from the outset of this litigation, identified that the authority to audit government spending was placed in the Legislative Services Office and not the Attorney General; and (6) Respondents' conduct through this litigation was unreasonable. In other words, Attorney General Labrador initiated an action against his own clients for which he lacked statutory authority and was based upon a misreading of appropriations language, then attempted to enforce the CIDs unreasonably. Then, Respondents withdrew the CIDs based upon the issuance of an audit report, even though Petitioners had noted that the audit mechanism was the appropriate way to investigate this matter from the outset of this litigation.

1. *Respondents lacked a reasonable basis in law or fact because Attorney General Labrador issued CIDs to Petitioners despite his office having previously opined that the Idaho Department of Health and Welfare had administered the grant program correctly.*

As this Court is aware, the Idaho Department of Health and Welfare sought a formal legal opinion from the Idaho Attorney General on whether IDHW's administration of the community partner grant program was lawful. In response, the Idaho Attorney

[7] Unlike Idaho Code § 12-117, an award of attorney fees under Idaho Code § 12-121 may be granted even if none of the parties are a governmental entity.

General's Office twice advised IDHW – including, by extension, Petitioners – that IDHW's administration of the community partner grant program was indeed lawful. Specifically, the legal opinions stated that IDHW had correctly interpreted the language provided by two appropriations bills[8]:

> Notably, federal guidelines emphasize enabling access to high-quality child care, without regard for age. State guidelines emphasize serving school-aged participants aged 5-13, "as allowable by federal guidance," and also require the Department to ensure that applications comply "with grant guidelines." Read together, the guidelines do not preclude serving children younger than five years of age – toward whom federal guidelines are arguably geared (as child care needs lean heavily toward younger children). Rather, the combined-guidelines indicate that applicants should include – and not exclude – serving children ages 5-13.

D*ecl. of Dave Jeppesen*, ¶ 9, Ex. A.

Despite having advised IDHW that it had lawfully administered the community partner grant program and that IDHW had correctly interpreted the relevant appropriations language, Attorney General Labrador served Petitioners (his own clients, as further addressed below) with Civil Investigative Demands ("CIDs") in early March 2023. The CIDs sought to investigate Petitioners for the very same conduct that was the subject of the legal opinions issued by the Idaho Attorney General's Office.

After Petitioners filed their Petition, Attorney General Labrador claimed that he was unaware of the existence of the legal opinions. *See Response in Opposition to Petition*, p. 2. ("[T]he first time the Attorney General learned of these opinions was when they were filed in this action, since they were kept from any review by his Executive Office."); *Decl. of Lincoln Wilson*, Ex. 16 ("Dewhirst Dec"), ¶ 5 ("Neither the Attorney General nor his

[8] The appropriations bills at issue are HB 400 (2021) and HB 764 (2022). Each appropriations bill contained substantively similar appropriations language.

Executive Office had any knowledge of these opinions until he read articles in the press reporting that the opinions had been filed (in redacted form) in an action by Dave Jeppesen, Director of IDHW, on March 23, 2023."). In and of itself, Attorney General Labrador's failure to inquire as to whether his own office had analyzed the community partner grant program prior to serving CIDs against his own clients indicates Respondents' lack of a reasonable basis in fact or law to issue the CIDs.

Attorney General Labrador, rather than withdraw the CIDs at that juncture in light of the fact that his office had advised Petitioners that the program had been lawfully administered, instead chose to attempt to, through this litigation, impugn the integrity of Petitioners and the Deputy Attorney General who drafted the legal opinions. Respondents stated that the opinions "were issued under suspicious circumstances, used flawed analysis, and have been rescinded," even though the author of the opinions, Deputy Attorney General Huang, was a long-tenured Deputy Attorney General well known for her thoroughness and subject matter expertise. *Response in Opposition to Petition*, p. 18. Further, Respondents never outlined how the opinions were flawed. Attorney General Labrador even claimed that these opinions somehow "add[ed] to his 'reason to believe'" that the law was violated and that they "underscore[d] the need to investigate." *Id.*, pp. 21; 18.

2. Respondents lacked a reasonable basis in law or fact because Attorney General Labrador created an adversarial relationship against his own clients.

Compounding matters, the CIDs were issued by Respondents to clients whom Attorney General Labrador was statutorily mandated to represent. Not only did Respondents institute an action against their own clients, but Respondents further failed to take any steps to arrange for or provide alternative counsel for their clients prior to serving the CIDs. Then, according to Respondents, "[a]fter Petitioners received CIDs, the Governor

asked the Attorney General to appoint an SDAG to represent them under Idaho Code § 67-1406(4)–(5).[9] But the Attorney General declined for the specific purpose of *preventing* a conflict." *Response in Opposition to Petition*, p. 23 (citations omitted). In addition to failing to arrange for alternative counsel, Attorney General Labrador instructed that the Deputy Attorneys General assigned to IDHW refrain from providing advice or counsel to Petitioners on CIDs. *Declaration of Chelsea Kidney*, ¶ 3 ("Mr. Dewhirst instructed that neither I nor any other DAG within the Division of Health and Human Services shall provide any legal representation or advice to Director Jeppesen, Ms. Palagi, Mr. Leach, or Ms. Rupp regarding the CIDs or the Office of Idaho Attorney General's purported investigation into the CPG program."). Even now, Respondents are refusing to take responsibility for their actions and refusing to pay the attorney fees his clients incurred in successfully defending against Attorney General Labrador's actions, necessitating the instant memorandum.

Further, Respondents also failed to abide by the firewall they supposedly erected in this matter. After learning of the issuance of the opinions discussed above, Respondents set out to "investigate the circumstances that led to these opinions being issued." *Response in Opposition to Petition*, p. 2. Respondents did so by attempting to intercept communications between Petitioners and their attorneys by seizing the phone of former IDHW Division Chief General Chelsea Kidney with "no data removed from the phone." *Wilson Dec*, Ex. 16 ("Dewhirst Dec"), ¶ 11. Respondents attempted to seize Ms. Kidney's phone after demanding her resignation.

[9] Mr. Hall's request was not limited to one subsection as described by Respondents.

As this Court previously observed, "this attempted removal of an item to be investigated from IDHW through an assigned IDHW DAG shows the Attorney General's Office did not actually keep the acting DAGs and the community partner grant program investigation team wholly separate." *Memorandum Decision*, p. 27. Respondents made their demand for Ms. Kidney's phone through, ironically, former Deputy Attorney General Huang, whom Attorney General Labrador had appointed as Acting Chief Deputy following Ms. Kidney's resignation. Ms. Huang's refusal to share her client's privileged communications with a litigation adversary, like the issuance of the opinions themselves, was deemed by Respondents to be "suspicious behavior" and "disturbing." *Response in Opposition to Petition*, p. 19.

Respondents' decision to serve CIDs against their own clients further indicates that Respondents lacked a reasonable basis in law to issue the CIDs here. Respondents' decision has been compounded by Attorney General Labrador's failure to mitigate his conflict of interest and by Respondents' litigation tactics, as addressed below. Rather than withdraw the CIDs or appoint independent counsel after being confronted with their conflict of interest, Respondents attempted to defend their actions, significantly increasing the costs of this litigation. Respondents even accused *Petitioners' Counsel* of having a conflict of interest, which again required the parties to expend significant resources to resolve. Even now, Respondents refuse to take responsibility for their actions and to pay the attorney fees they caused to be incurred.

3. Respondents lacked a reasonable basis in law or fact because Petitioners' interpretation of the appropriations bills was correct.

Attorney General Labrador issued these CIDs to investigate whether IDHW and grant recipients complied with the conditions imposed by the appropriations bills at issue.

Specifically, Respondents' primary stated reason for issuing the CIDs was grant money was provided to organizations that serve children under the age of five in addition to children between the ages of five and thirteen.[10] *Response in Opposition to Petition*, p. 16.

It is important to recognize that the appropriations bills at issue were passed into law approximately one year apart. In the period between the two appropriations bills being passed, IDHW administered the community partner grant openly and in the same manner that is being challenged now. The Idaho Legislature, after knowing full well that IDHW had interpreted the appropriations bills as permitting grant funds to be awarded to organizations that serve some children under the age of five so long as the organizations also served children between five and thirteen – including programs like 4-H's "Cloverbuds" program and programs offered by Boys and Girls Clubs – provided the same appropriations language in the second appropriations bill. Had the Idaho Legislature disagreed with IDHW's interpretation, it would have clarified that funds could not be used for any program that served any children under the age of five. But the Idaho Legislature did not do that. Instead, it adopted the same appropriations language, and the Idaho Legislature's adoption of the same appropriations language operates as an endorsement of IDHW's interpretation.

Further, the language of the appropriations bills shows that IDHW's interpretation of those bills was correct. Specifically, the appropriations bills provided that "Community provider grants **shall be used only** for in person educational and enrichment activities that focus on student needs and for providing behavioral health supports to address student

[10] Respondents also stated that the CIDs were issued to investigate whether the funding caps provided in the appropriations bills were exceeded. Respondents' argument to that point, however, is belied by the plain language of the appropriation language. It is further unclear as to why CIDs would be necessary, as the grant program (along with the payment dates and amounts) was issued openly and transparently. Respondents also sought to investigate a purported conflict of interest, despite that conflict of interest being analyzed by Deputy Attorney General Huang, who found no such conflict of interest.

needs." HB 764 (emphasis added). Next, the appropriations bills stated that "Grants **shall be used for serving school-aged participants ages 5 through 13 years, as allowable by federal guidance.**" *Id*. (emphasis added).

As such, the Legislature knew how to place strict requirements on the use of grant funds when it wanted to. In requiring that the funds be used for in-person activities, the Legislature wrote that the funds "shall only be used" in that manner. In contrast, in setting forth the guideline on the age of program participants, the Legislature declined to provide the same language, instead stating that the funds "shall be used" to serve children five through thirteen, and then, only in a manner that is "allowable by federal guidance." As Governor Little put it, "[t]he order and meaning of words in appropriation language matter, not one's subjective intent."

In addition, as a state agency, it is IDHW's interpretation of the appropriations that should be given deference. Under Idaho law, IDHW's interpretation of the guidelines set forth in the appropriations bills is entitled to deference because IDHW is the department that the Idaho Legislature charged with administering the funds. *See Duncan v. State Bd. Of Accountancy*, 149 Idaho 1, 4, 232 P.3d 322 (2010) ("Normally, this Court defers to the agency interpretation of statutes and rules."); *Garner v. Horkley Oil,* 123 Idaho 831, 834 n. 1, 853 P.2d 576.

Further, while *this* case was still in its infancy, this Court found in a different case that IDHW's interpretation of the appropriations language was correct:

> Based upon the difference in the language of the guides and House Bills 400 and 764 authorizing the Community Partner Grant program, this Court finds that there is reason for the Attorney General to believe that grant recipients did, are or are about to engage in acts that violate House Bills 400 and/or 764 **if the recipients only serve children four years old or**

> **younger or only provide online educational or enrichment activities.**

Memorandum Decision and Order Granting in Part, Denying in Part Preliminary Injunction (*Children v. Labrador*), p. 20 (emphasis added). While this Court's holding in the *Children v. Labrador* case is not binding as to this matter, Respondents were on notice of this Court's ruling since it was issued on April 27, 2023, and yet Respondents still failed to rescind the CIDs or to revise them in any way until the CIDs were withdrawn by Special Deputy Attorney General Boyd on October 6, 2023.

Further, Respondents' misinterpretation of the appropriations bills must be considered in the context of Respondents' conflict of interest and the flimsy statutory basis Respondents used to justify these CIDs, as addressed below. Respondents' decision to issue these CIDs and to attempt to enforce them in this action was without a reasonable basis in law or fact because Respondents simply misinterpreted the appropriations language.

4. *Respondents lacked a reasonable basis in law or fact because neither the Idaho Charitable Assets Protection Act nor the Idaho Charitable Solicitations Act grant Attorney General Labrador statutory authority to serve CIDs upon Petitioners.*

In addition to the above, when Respondents first issued the CIDs, Respondents relied on two statutory schemes regarding the Attorney General's authority to regulate charities to investigate IDHW's administration of the community grant program. Importantly, Respondents issued these CIDs to investigate Petitioners' administration of the community grant program. As this Court noted, "the purpose of the CIDs served in this case is to investigate to prove or disprove that the IDHW was in violation of the law, despite the Attorney General's Office issuing prior opinions that IDHW acted in conformity with the law." *Memorandum Decision*, p. 24. In using the Idaho Charitable Assets Protection Act

and the Idaho Charitable Solicitation Act as justification for issuing the CIDs to these Petitioners, Respondents contend that when the Idaho Legislature passed an act expressly on the subject of charitable assets, the Legislature actually intended to pass a law granting the Attorney General the sweeping power to audit nearly every government spending program. No previous attorney general had ever attempted to use these statutory schemes to justify an investigation of a government spending program.

Fortunately, the Idaho Legislature wisely placed the legislative purpose of each act into statute, meaning that such intent must be considered when construing the meaning of the statutes. *Saint Alphonsus Reg'l Med. Ctr. V. Elmore Cnty.*, 158 Idaho 648, 653, 350 P.3d 1025 (2015) ("[S]tatutes are taken together and construed as one system, and the object is to carry into effect the intention. It is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy and was intended to be consistent and harmonious in its several parts and provisions."); *see also Marquez v. Pierce Painting, Inc.*, 164 Idaho 59, 64, 423 P.3d 1011 (2018) ("In construing a statute, not only must we examine the literal wording of the statute, but we also must study the statute in harmony with its objective."); *Nelson v. Evans*, 166 Idaho 815, 821, 464 P.3d 301 (2020). Those statutes show that neither the Idaho Charitable Assets Protection Act nor the Idaho Charitable Solicitation Act provide authority for the Idaho Attorney General to investigate government spending programs. The Idaho Charitable Solicitation Act is intended to "safeguard **the public** against deceit and financial hardship . . ." I.C. § 48-1201(2) (emphasis added). Similarly, the statutorily provided purpose of the Idaho Charitable Asset Protection Act is to ensure that "charitable assets" are used for "the charitable purposes *for which they were donated*" and for the benefit of those who "were intended to be benefitted by the *charitable*

donation." I.C. § 48-1901(1) (emphasis added). There is little question that federal government grant funds are not donations.

Respondents' reliance on these two statutes – and defense of the CIDs on that basis – lacked a reasonable basis on law or fact. Though "a governmental agency does not act without a reasonable basis in fact or law when its interpretation of a statute that has not been previously construed by the courts is incorrect, but not unreasonable," it is not reasonable for Respondents to use these two statutes to investigate IDHW and Petitioners' administration of the community grant program. *Hauser Lake Rod & Gun Club, Inc. v. City of Hauser*, 162 Idaho 260, 265, 396 P.3d 689 (2017) (quoting *City of Osburn v. Randel*, 152 Idaho 906, 277 P.3d 353 (2012)). In *Hauser Lake Rod & Gun Club*, the City of Houser interpreted an ordinance as allowing the City to enforce its Code outside City limits. *Id.* After the district court awarded fees, the City argued on appeal that its interpretation of the ordinance was reasonable because it had not been previously interpreted. *Id.* The Idaho Supreme Court held that the City's interpretation of the ordinance was not reasonable. *Id.* Likewise, just because Respondents' interpretation of the two statutes was novel does not mean the interpretation was reasonable. It was not, and for that additional reason, Respondents' issuance and defense of these CIDs was without a reasonable basis in law or fact.

5. *Respondents' claim that the CIDs have been dismissed due to a legislative audit further demonstrates that Attorney General Labrador acted without a reasonable basis in fact or law.*

The claimed basis for the Attorney General withdrawing the CIDs is because of the existence of an audit performed by the Legislative Services Office. That audit was approved by Idaho's Joint Finance Appropriations Committee on February 27, 2023, or four days

before the CIDs at issue in this Petition were signed (on March 3, 2023) and approximately one week before the CIDs were served upon Petitioners (on March 6, 2023, and March 7, 2023, respectively). The Idaho Legislature then passed the language approved by JFAC on March 30, 2023, and the bill was signed into law on April 5, 2023, or twelve days before Respondents filed their Response in Opposition to Petition.

More significantly, Petitioners identified from the very outset of this litigation that the Attorney General had no authority to issue the CIDs in this matter and that, instead, the authority to investigate such matters was granted to the Legislative Services Office. *Petition to Set Aside Civil Investigative Demands*, p. 12. As such, to the degree that Respondents are claiming that the issuance of the audit report obviated the need to pursue the CIDs, Respondents are admitting that Petitioners were correct and that the CIDs were never necessary. As such, withdrawing the CIDs based on an audit report that has been pending throughout this litigation again demonstrates that Respondents lacked a reasonable basis in law or fact to serve the CIDs and to attempt to enforce them in this action.

6. Respondents' litigation tactics otherwise demonstrate the lack of a reasonable basis in fact or law.

In addition to the above, many of the individual motions filed by Respondents lacked a reasonable basis in law or fact and required an unnecessary expenditure of time and attorney fees by both parties. "The purpose of I.C. § 12–117 is to serve as a deterrent to groundless or arbitrary action and to provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies should never have made." *Canal/Norcrest/Columbus Action Comm. V. City of Boise*, 136 Idaho 666, 671, 39 P.3d 606, 611 (2001). The Idaho Supreme

Court has considered a party's tactics prior to and during litigation, along with the costs incurred because of those tactics, in determining whether an award of attorney fees is appropriate under Idaho Code § 12-117. *See id.*

Here, Respondents unnecessarily increased the costs of litigation. Respondents filed: (1) a motion to disqualify Petitioners' counsel; (2) an untimely "Motion for Leave to File Supplemental Brief Regarding Special Prosecutor"; (3) an inappropriate attempt at a sur-reply in the form of a "Notice of Lodging Presentation Slides From Hearing on Motion to Disqualify Petitioners' Counsel"; (4) a "Notice of Supplemental Authority"; and (5) a "Motion to Stay Pending Audit." Each of these motions was denied, and each unnecessarily multiplied the costs to the parties.

Respondents' Motion to Disqualify Petitioners' Counsel was made by Respondents despite Respondents: (1) failing "to specifically demonstrate any actual conflict of interest," *Memorandum Decision*, p. 38; and (2) attempting to create their own continued prejudice by refusing to allow Petitioners' counsel to withdraw from other SDAG cases, *Id.*, p. 37. Though this Court found that Respondents did not file the motion to disqualify for the purposes of harassment, this Court convincingly found against Respondents on three of the four relevant factors. Respondents accordingly lacked a reasonable basis in law and fact to file that motion. As to the other motions, this Court summarily denied each. *Id.*, pp. 1-5. As to Respondents' request to present supplemental authority, this Court found that "The Respondent had ample opportunity to argue the issue before the Court. The Respondent did not set the motion for hearing, and one day is not a reasonable time for response if considered without additional oral argument." *Id.*, p. 5. Each of these motions multiplied the costs to the parties and added to Respondents' failure to pursue this matter with a

reasonable basis in law or fact and to the fact that Respondents' defended this matter unreasonably and without foundation.

C. Petitioners are entitled to attorney fees under Idaho Code § 67-1406 because Petitioners were required to hire counsel as a direct result of Attorney General Labrador's conflict of interest.

Because it is undisputed that Petitioners' counsel was retained because of the Attorney General's conflict of interest, Petitioners are entitled to attorney fees as a matter of right under Idaho Code § 67-1406.

Idaho Code § 67-1406 provides exemptions to the general rule that legal services for the state of Idaho are consolidated in the Attorney General's Office. Consistent with the Idaho Constitution's vesting of supreme executive power in the Governor and the Governor's Constitutional mandate to "see that the laws are faithfully executed," Idaho Code § 67-1406(1) provides that "the governor may employ attorneys other than those under the supervision of the attorney general, and such attorneys may appear in any court." Idaho Const. Art. IV, Sec. 5. Further, the statute provides that if the Governor employs other attorneys as a result of a conflict in representation by the attorney general, the attorneys employed by the Governor shall be compensated by the attorney general:

> Any separate counsel employed pursuant to the foregoing exceptions shall be compensated with funds appropriated to such state entity, **unless such separate counsel shall have been employed… because of a conflict in representation by the attorney general.**

I.C. § 67-1406(5) (emphasis added). Notably, and though Petitioners are the prevailing parties here, no prevailing party analysis is required under the statute to award Petitioners the attorney fees they incurred due to Attorney General Labrador's conflict of interest.

Here, there is no question that Petitioners' counsel was employed because of a conflict in representation by Attorney General Labrador. Not only did this Court disqualify Attorney General Labrador because of his conflict of interest in representation, Respondents conceded the existence of a conflict in representation at the outset of this case.

After Respondents served the CIDs upon Petitioners, and after Petitioners learned that Attorney General Labrador was refusing to provide legal advice to Petitioners and refusing to appoint them counsel, Petitioners contacted Governor Little's office to request legal assistance with responding to the CIDs. Brady Hall, General Counsel to Governor Little, attempted to contact former Deputy Attorney General David Dewhirst to discuss the retention of outside legal counsel for Petitioners. *Decl. of Brady Hall*, ¶ 7. When Mr. Dewhirst was unavailable, Mr. Hall spoke with former Solicitor General Theo Wold, who informed Mr. Hall that he would respond to Mr. Hall's request. Mr. Wold then sent Mr. Hall an email, which conceded the existence of the conflict and the appropriateness of the Governor retaining counsel for Petitioners under Idaho Code § 67-1406(1). Specifically, Mr. Wold wrote:

> We see Subparagraph 1 of the statute you cite as the relevant text. It says that the "…Governor may employ attorneys other than those under the supervision of the attorney general…" The statute, therefore, authorizes the Governor to obtain outside counsel to defend executive officials during an investigation. This also appears to be the only ethically appropriate approach. Rather than have the AG select and fund counsel for the subjects of an AG investigation (which would raise separate ethical concerns), the Governor can unilaterally obtain and fund such counsel for his executive agency employees.
>
> Indeed, to the extent you request that we both appoint and fund counsel for the executive officials who received CIDs, it would in this instance negatively implicate the separation of powers and the AG's separate statutory mandate to

> independently investigate unlawful behavior under the charitable orgs & assets statute (and likely the AG's common law duties, too).

Id., ¶ 8, Ex. B. Mr. Wold, however, disputed that Idaho Code § 67-1406(5) required the Idaho Attorney General to fund the counsel caused by his conflict of interest, stating that "As for the funding piece, subparagraph 5 doesn't clearly require *the AG* to fund the officials' counsel, and—for the reasons just articulated—cannot impose that requirement in these circumstances." *Id*.

The language of Idaho Code § 67-1406(5), however, is straightforward. If the Attorney General has a conflict of interest, which is not in dispute, and if counsel was retained pursuant to Idaho Code § 67-1406(1), which is also not in dispute, then it is not the state entity who pays for the representation. And, if it is not the state entity that pays for the representation, the clear implication is that it is the attorney general. The statute's meaning is especially clear when the default arrangement is considered, in which the attorney general provides legal services for state entities, and the costs from rendering that legal service are paid into the general fund by those entities. I.C. § 67-1408.

Further, it would be inequitable to require a state entity to pay attorney fees from its own appropriation for a conflict of interest entirely of the Attorney General's doing. Petitioners did not ask Attorney General Labrador to abandon his duty to represent them by serving CIDs against them. Attorney General Labrador created this situation, and he should bear the consequences of his actions.

CONCLUSION

In this case, the CIDs should never have been issued, and Respondents should never have attempted to enforce them. Unfortunately for all involved, Respondents did both. As

such, and for the foregoing reasons, Petitioners are entitled to an award of the attorney fees and expenses incurred in moving to set aside the CIDs issued by Respondents.

DATED this 27th day of November 2023.

GJORDING FOUSER PLLC

By /s/ Trudy Hanson Fouser
Trudy Hanson Fouser – Of the Firm
Eric W. Stokes – Of the Firm
Attorneys for Dave Jeppesen, Shane Leach, and Jennifer Palagi

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of November 2023, a true and correct copy of the foregoing was served on the following by the manner indicated:

Christopher D. Boyd
prosecutor@co.adams.id.us
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Council, Idaho 83612

☐ Email:
☒ iCourt E-File

/s/ Heather Perry
Heather Perry