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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 DEMANDS FOR DAVE JEPPESEN, JENNIFER PALAGI, and SHANE LEACH	Case No. **PETITION TO SET ASIDE CIVIL INVESTIGATIVE DEMANDS**

I. INTRODUCTION

Attorney General Raúl Labrador has launched an investigation into whether the Idaho Department of Health and Welfare ("IDHW) provided community grants to organizations that might use portions of the grants to serve children under five years of age, rather than only those between the ages of five to thirteen.[1] Petitioners Dave Jeppesen, Director of IDHW; Jennifer Palagi, Deputy Director of IDHW; and Shane Leach,

[1] *See Opposition to Ex Parte Motion for Temporary Restraining Order*, Case No. CV01-23-04242 ("somehow, the program issued millions of dollars in grants to organizations devoted to pre-K education.").

Self-Reliance Division Administrator at IDHW (collectively, "Petitioners") were served with Civil Investigative Demands ("CIDs") demanding documents and information related, generally, to the administration of federal grant funds pursuant to HB 764.[2][3]

The CIDs issued to Petitioners indicate that the Attorney General is investigating alleged wrongdoing on the part of IDHW. However, the law does not allow the Attorney General to serve CIDs on Petitioners because, by doing so, the Attorney General is creating an adversarial relationship with his own clients, is investigating without any statutory authority, without any probable cause, and despite a non-waivable conflict.

The issue centers not on the production of documents related to the administration of the funds. As set forth in more detail below, the Community Partner Grant Program was administered transparently by IDHW. Further, most of the documents and information requested by the CIDs have already been provided in response to at least one public records request and have already been reviewed by or made available to the Attorney General's office. Rather, the issue centers around the process being employed by the Attorney General.

As background, the initial response to the implementation of the Community Partner Grant Program was overwhelmingly positive. IDHW shared news of the awardees from the beginning and provided highlights to legislators. It was even featured nationally as an innovative program. A lobbyist, John Foster, raised the first concern about the

[2] Mr. Jeppesen and Ms. Palagi were served on March 6, 2023, while Mr. Leach was served on March 7, 2023. *Decl. of Dave Jeppesen*, ¶ 10.
[3] HB 764 set forth the Idaho Legislature's guidelines for administering federal grant funds allocated by the American Rescue Plan Act to benefit the children of the State of Idaho.

Community Grant Program during the fall of 2022.[4] He argued that the funds should be awarded exclusively to agencies that serve children ages five to thirteen and that none of the funds should be used to serve children one to four years old. In response to Mr. Foster's concerns, IDHW requested that their lawyer, the Attorney General, advise them on whether their determination of grant recipients was legal under both federal and Idaho law. On November 30, 2022, and again on January 25, 2023, the Attorney General's office assured IDHW that the way IDHW had determined grant recipients raised no legal concerns. Attorney General Labrador's Office specifically opined that IDHW's administration of the grant program complied with federal and (more importantly here) state guidelines and specifically found that 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."

Less than two months after Attorney General Labrador's Office assured IDHW that funds were allowed to serve children ages one to four so long as the program also served children five to thirteen, Idaho Attorney General Raúl Labrador issued an unknown number of CIDs, including the three CIDs at issue here, to purportedly investigate the very same grant program that his own office has already deemed lawful. The CIDs issued to Petitioners by their own attorney seek to compel Petitioners to provide largely the same documentation and the same information that the Attorney General's Office either already

[4] According to the Idaho Secretary of State website, Mr. Foster is a registered lobbyist for 30 organizations, including the Idaho Alliance of Boys & Girls Clubs. The Idaho Alliance of Boys and Girls Clubs, in addition to six other Boys and Girls Clubs organizations, applied for and were granted funds under the Community Grant Program.

reviewed or had access to when it found IDHW's administration of the grant program to be lawful.[5]

In addition to the fact that the administration of funds has already been deemed to be lawful, Attorney General Labrador issued the CIDs lacking the statutory authority and the requisite probable cause to do so in the first place. Attorney General Labrador attempts to shoehorn two statutes, which were established to protect Idaho *consumers* from the misuse of charitable solicitations and assets, to try to justify an investigation. Indeed, neither of the statutes cited by Attorney General Labrador as justification for issuing the CIDs allows the Attorney General to issue CIDs to investigate the administration of federal grant funds, much less to issue CIDs to his own clients. Perhaps more significantly, the Attorney General's Office cannot claim to have the requisite probable cause to issue the CIDs in question because the Attorney General's Office has already found that IDHW's administration of the programs was lawful.

It is difficult to understand why the Attorney General would choose to issue CIDs to his own clients. Under ordinary circumstances, when a legitimate request is made, the Idaho Attorney General has a clear mechanism for obtaining documents from his clients: he simply asks. It is (or at least was) a matter of routine for the agencies of the State of Idaho, including IDHW, to provide documents to the attorney general. Further, the documents

[5] The documents and information requested by the CIDs that are not already in the possession of the Attorney General are, mainly, if not entirely, those that are plainly irrelevant and overbroad to any legitimate investigation. As an example, the CIDs issued to Petitioners demand that each Petitioner identify "all charitable organizations for which" each person who worked on the grant program "is a board member, director, volunteer, or donor." It is difficult to imagine how Director Jeppesen, Deputy Director Palagi, or Self-Reliance Division Administrator Leach would or could conceivably be aware of such information or how such information would pertain to a legitimate investigation. Further, the request is likely an infringement of IDHW employees' privacy and First Amendment right to free association.

requested are largely available through a simple public records request.[6] This is not a case in which IDHW has or could be credibly accused of withholding documents. The documents and information sought were largely available (if not already in the possession of the Attorney General) and remain so.

This is not a simple matter of an overbroad request for documents, it is a matter of government overreach.[7] Attorney General Labrador has informed his clients that the Attorney General will not provide representation to Petitioners and that they will need to retain their own outside counsel. He has created an adversarial relationship against his own clients, which has generated and will generate entirely unnecessary costs that will ultimately be borne by the people of the State of Idaho, in violation of his statutory obligation to represent and advise Petitioners.

Accordingly, Petitioners hereby request that this Court set aside the CIDs. Petitioners do so on three grounds. First, having already declared the grant program to have been lawfully administered, the Attorney General does not have the requisite probable cause to issue the CIDs. Second, the statutes cited by the Attorney General do not grant him the authority to investigate the allocation of federal grant funds. Third, the Attorney General has created an inescapable conflict of interest by issuing the CIDs to his own clients and cannot be permitted to investigate his own clients. Petitioners further request that this Court award the reasonable attorney fees incurred in this matter as the Attorney General did not have a reasonable basis in fact or law to issue the CIDs in question.

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[6] For example, Mr. Foster submitted a public records request and received all of the applications for the awarded federal funds under the Community Partner Grant Program.

[7] To be clear: Petitioners are not attempting to hide any documents or avoid public scrutiny. As set forth in more detail below, the Community Partner Grant Program was administered transparently by IDHW. Further, as already noted, much of the information requested by the CIDs has already been provided in response to at least one public records request.

II. FACTUAL ALLEGATIONS

In 2021, the United States Congress passed the American Rescue Plan Act ("ARPA"). Through ARPA, Congress appropriated funding for childcare through three funding streams, one of which was the Child Care and Development Fund ("CCDF"). The United States Department of Health and Human Services ("HHS") Guidance for the program states that "[c]hild care is essential to our children, our families, and our communities" and that "chronic underfunding has led to a child care system of uneven quality that is unaffordable and inaccessible for many families."

In 2022, the Idaho Legislature passed HB 764[8], which offered state guidance for the expenditure of federal funds appropriated to IDHW, which was Idaho's lead agency for implementing the CCDF program. Section 6 of HB 764 is captioned: GUIDELINES FOR COMMUNITY PARTNER GRANTS. Section 6 provides, in relevant part, that "$36,000,000 shall be used for community partner grants to address COVID-19 pandemic impacts on school-aged children, including learning loss." HB 764 further provided that "[c]ommunity

[8] The Idaho Legislature previously authorized IDHW to administer ARPA funds. In 2021, the Idaho Legislature passed HB 400, which similar to HB 764, provided that "[g]rants shall be used for serving school-aged participants aged 5 through 13 years, as allowable by federal guidance." HB 400 (2021). At the time, the Idaho Press quoted Rep. Caroline Nilsson Troy, R-Genesee, as follows:

> "We feel really strongly that we have a window of this next year and perhaps the year afterwards to help provide these children with a little extra help," Troy said. Speaking of the block grants funds, she said, "**Although the funds are available from 0-13 we're going to focus more clearly on those children between the ages of 5 and 13.** We tried to be very thoughtful on how this might work to support those community options in particular programs like the Boys & Girls Club, my personal favorite 4-H, and other organizations that can provide in-person learning and enrichment opportunities for our children over the next year. So I'd appreciate the support for this budget."

https://www.idahopress.com/eyeonboise/jfac-approves-child-care-aid-funds-on-17-2-vote/article_b6ce318e-ed4c-5ead-a3eb-9169c219fd68.html (Accessed March 21, 2023) (emphasis added).

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 needs." In addition, "[g]rants shall be used for serving school-aged participants ages 5 through 13 years, **as allowable by federal guidance**." (emphasis added). Finally, HB 764 provides that "[t]he Department of Health and Welfare shall require grant applications from community providers that are in compliance with grant guidelines." Consistent with the Idaho Legislature's guidance, IDHW began administering the Community Partner Grant Program. IDHW did so transparently. IDHW issued press releases that disclosed the names of all grant recipients.

In October 2022, John Foster, a lobbyist with the firm Kestrel West, submitted a public records request that sought documents regarding IDHW's administration of the grant program. *Decl. of Dave Jeppesen*, ¶ 4. Over the next several months, Mr. Foster discussed the program with IDHW officials, generally expressing his concerns that IDHW had approved some grant funds to entities that served children aged 1-4.[9] *Id*., ¶ 5.

On November 30, 2022, in response to a request from IDHW, the Idaho Attorney General's Office provided a legal opinion that reviewed IDHW's implementation of HB 764 and found it to be lawful and consistent with the federal and state guidelines. *Id*., ¶¶ 6-7. The opinion also addressed another of Mr. Foster's allegations, which was that one of IDHW's employees had a conflict of interest, finding that no such conflict of interest existed. *Id*.

On January 25, 2023, in response to a request from IDHW to issue an opinion that separated the conflict-of-interest issue, the Idaho Attorney General's Office issued largely

[9] He also expressed concern that the United Way programs had received funds based on his claim of a conflict.

the same opinion regarding IDHW's administration of the grant program. *Id.*, ¶ 9, Ex. A. Specifically, the Idaho Attorney General's Office wrote that:

> 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.
>
> …
>
> The Department's Self-Reliance Division created a Grant Guide for Child Care Providers, providing all information about the grant and how to apply for one, including eligibility requirements, the review process, deadlines, and accountability expectations. See Idaho Child Care Grant: Phase 2 (Grant Guide for Child Care Providers). The Department's application form and instructions note that eligible programs must: administer in-person; serve Idaho children ages 5-13; and address one or more of (1) education learning loss, (2) behavioral health supports for children, and (3) expanded access to services. The Department's application process is consistent with the federal and state guidelines.
>
> The application instructs that an eligible program must serve children 5-13 – in other words, a program that excludes children 5-13 would be ineligible – consistent with the combined federal and state guidelines. See Grant Guide at 5. The application instructions also outline that the eligible program must address topics encouraged by the combined-guidelines – education learning loss, behavioral health supports, or expanded access to services – all of which would serve children 5-13, or younger children.

Id.

Without providing notice to Petitioners, on March 3, 2023, Idaho Attorney General Raúl Labrador, through Deputy Attorney General Lincoln Wilson, issued an unknown number of CIDs to individuals and entities involved in the grant program. *Id.*, ¶ 11.

Three of the CIDs were issued to Petitioners, all of whom are current employees of IDHW: Dave Jeppesen, Director of IDHW; Shane Leach, Self-Reliance Division Administrator at IDHW; and Jennifer Palagi, Deputy Director of IDHW. *Id.*, ¶ 10, Exs. B-D. The CIDs issued to Petitioners generally seek information about the grant program but also include requests for information beyond the scope of any reasonable investigation, including:

> Provide the names of all individuals currently or formerly employed by IDHW that worked on the Community Grant Program in any capacity. For each person identified, provide the following information:
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> …
>
> e. A list of all charitable organizations for which the person is a member, board member, director, volunteer, or donor. "Charitable Organizations" means the same thing here as it does under Idaho Code § 48-1903(4).

Id.

The CIDs do not explicitly state either the legal basis for the CIDs or the subject matter the Attorney General purports to investigate. However, the Attorney General, in response to a motion to set aside the CIDs issued to 35 non-profit organizations, stated that the Attorney General is investigating whether the ARPA funds were impermissibly issued to organizations that provide "pre-K education." *Opposition to Ex Parte Motion for Temporary Restraining Order*, Case No. CV01-23-04242, p. 1.

III. LEGAL STANDARD

Under Idaho law, the Attorney General may only issue a CID when the Attorney General has the statutory authority to do so. The Attorney General cites three statutes to justify issuing the CIDs in question here: Idaho Code §§ 48-1908(1); 48-1204(1); and 48-611(1). Idaho Code § 48-611(1) provides the authority for the Attorney General to issue a

CID to investigate suspected violations of the Idaho Consumer Protection Act, which is plainly inapplicable here, and appears to have only been cited because it is referenced by the other two statutes.

Accordingly, the first statutory basis cited by the Idaho Attorney General is Idaho Code § 48-1908(1), which provides that:

> INVESTIGATORY AUTHORITY OF ATTORNEY GENERAL. Whenever the attorney general has reason to believe that an accountable person or charitable organization has violated or is violating the provisions of section 48-1906, 48-1907, or 48-1909, Idaho Code, the attorney general may:
>
> (1) Serve investigative demands using the same procedures and in the same manner as described in section 48-611, Idaho Code.

The second statutory basis identified by the Idaho Attorney General to issue a CID in this case is under Idaho Code § 48-1204(1), which provides that the "attorney general and the district court shall have the same authority in enforcing and carrying out the provisions of this chapter as is granted the attorney general and district courts under the Idaho consumer protection act, chapter 6, title 48, Idaho Code."

In addition, the Attorney General may only issue a CID to investigate a potential violation of the law if the Attorney General "has probable cause to believe that a person has done, or is about to do, something that is declared to be unlawful." *In re W. Acceptance Corp., Inc.*, 117 Idaho 399, 400, 788 P.2d 214 (1990).

Under Idaho Code § 48-611(2), the recipient of a CID may file a petition in the district court in Ada County "to modify or set aside the demand, stating good cause."

IV. ARGUMENT

A. Attorney General Labrador lacks statutory authority to issue the CIDs.

The Attorney General is permitted to investigate violations of law in limited circumstances, none of which are present here. In Idaho, "the office of attorney general is not constitutionally vested with any common law powers and duties that are immune to legislative change." *Padgett v. Williams*, 82 Idaho 28, 36, 348 P.2d 944, 948, *supplemented*, 82 Idaho 114, 350 P.2d 353 (1960). Further, the Idaho Constitution vests the power to see that the laws are faithfully executed in the Governor, and not the Attorney General. *Idaho Constitution*, Article IV, Section 4. Meanwhile, "[u]nder art. IV, section 1 of the Idaho Constitution, the Attorney General, as one of the executive officers of the State of Idaho is to 'perform such duties as are prescribed by this Constitution and as may be prescribed by law.'" *Newman v. Lance*, 129 Idaho 98, 101, 922 P.2d 395, 398 (1996). Accordingly, where the Idaho Legislature has defined the Attorney General's duties and powers, those duties and powers should be strictly construed.

For example, the Idaho Legislature has clearly identified the circumstances under which the Attorney General is permitted to investigate government officials. Idaho's public corruption statute only permits the Idaho Attorney General to conduct investigations of *state criminal law* against *elected county officers* who are serving in their *official capacities*. I.C. § 31-2002. At the Idaho Attorney General's website states, "[i]f a complaint does not meet all three of these criteria, the public corruption statute does not authorize the Office of the Attorney General to investigate."[10] Petitioners, employees of IDHW, are not elected county officers, and that statute accordingly does not permit the Idaho Attorney General to

[10] Public Corruption - Idaho Office of Attorney General: https://www.ag.idaho.gov/office-resources/public-corruption/ (as of March 21, 2023).

conduct the investigation he purports to undertake here. Further, Idaho law vests the authority to investigate whether funds are being appropriately applied to the Legislative Services Office, and not to the Attorney General. The Attorney General accordingly lacks authority to investigate the allocation of government grants here. I.C. § 67-702.

1. *Neither of the two statutory bases cited by the Attorney General permit him to issue CIDs in this case.*

Perhaps more significantly, the Attorney General's cited bases for his investigation do not grant him authority to investigate the matter he seeks to investigate here.

The first statutory basis cited by the Attorney General to justify his issuance of CIDs in this matter is Idaho Code § 48-1908(1), which is found under the Idaho Charitable Assets Protection Act ("ICAP"). Under Idaho Code § 48-1902, the legislative intent of ICAP was to ensure that charitable organizations abide by their "legal duty to use their charitable assets according to the charitable purposes designated in their governing documents" and to prevent the "misuse or misappropriation of charitable assets occurs to the harm of the charitable purposes for which they were donated and the communities that were intended to be benefitted by the charitable donation."

The Attorney General's authority to issue CIDs for a purported violation of ICAP is limited to violations of "section 48-1906, 48-1907, or 48-1909, Idaho Code." I.C. § 48-1908. Idaho Code § 48-1907 applies to the sale or transfer of charitable assets and Idaho Code § 48-1909 applies to voluntary compliance or consent judgments, neither of which can credibly be argued to be applicable here. Meanwhile, Idaho Code § 48-1906 states in relevant part that:

> 48-1906. UNLAWFUL ACTS. (1) It is unlawful for an accountable person or charitable organization to knowingly

> use, or allow to be used, the charitable organization's charitable assets in a manner that is inconsistent with:
>
> (a) Law applicable to the charitable asset;
>
> (b) The restrictions contained in a gift instrument[11] regarding the charitable assets; provided, however, that nothing in this section shall prevent a person from seeking a release or modifying the charitable purposes or restrictions contained in a gift instrument, pursuant to section 33-5006, Idaho Code, or other applicable Idaho law; or
>
> (c) The charitable purpose of the charitable organization that holds the charitable asset.

An "accountable person" under ICAP is defined as "a director, officer, executive, manager, trustee, agent, or employee of a charitable organization." I.C. § 48-1903(1). A "charitable organization" is "a person who holds charitable assets regardless of the legal form." I.C. § 48-1903(4). A "person" is "an individual, a corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity." I.C. § 48-1903(6); I.C. § 15-1-201(34). Petitioners cannot credibly be argued to meet the definition of either an "accountable person" or a "charitable organization" under the statute.

Here, the Attorney General is attempting to stretch the statutory language of ICAP well beyond its intended purpose. There has been no argument that the grant recipients were not using "their charitable assets according to the charitable purposes designated in their governing documents." I.C. § 48-1902. Similarly, it cannot be said that the grant recipients misused or misappropriated their "charitable assets… to the harm of the charitable purposes for which they were donated and the communities that were intended

[11] Under I.C. § 33-5002(3), "Gift instrument" is defined as "a record or records, including an institutional solicitation, under which property is granted to, transferred to, or held by an institution as an institutional fund."

to be benefitted by the charitable donation," because an allocation of government funds is not a "charitable asset."

Under ICAP, a "charitable asset" is "any interest in real or personal property and any other article, commodity, or thing of value that is impressed with a charitable purpose." I.C. § 48-1903(3). The Idaho Supreme Court has found that government grants are not charitable donations. *Cmty. Action Agency, Inc. v. Bd. of Equalization of Nez Perce Cnty.*, 138 Idaho 82, 86, 57 P.3d 793, 797 (2002) ("This Court held that because Housing Southwest was funded by government loans and grants, rather than private donations, it was not a charitable corporation."). In *Housing Southwest*, Housing Southwest argued that federal or state grants are donations for the purposes of tax exemptions. *Id.* (discussing *Housing Southwest, Inc. v. Washington County,* 128 Idaho 355, 336, 913 P.2d at 69). The Idaho Supreme Court held that government grants were not donations, stating that "[t]here is no legislative direction that indicates federal subsidies qualify as donations. In fact, the burden is merely shifted from one group of taxpayers to another, and government is not relieved of an obligation it would otherwise have." *Housing Southwest,* 128 Idaho at 339–40.

The second statutory basis cited by the Attorney General, Idaho Code § 48-1204, is found under the Idaho Charitable Solicitation Act ("ICSA"). The legislative purpose of the Idaho Charitable Solicitation Act is to prevent "Idahoans and legitimate charities" from suffering losses "because of misrepresentations and failures to disclose material facts by those who *falsely claim to represent a charitable organization or purpose*." I.C. § 48-1201(1) (emphasis added).

Under ICSA, the authority of the Attorney General to issue CIDs is limited to investigating acts made unlawful under the act. ICSA provides that:

> It is unlawful for any person, except a religious corporation, a religious association, a religious educational institution or a religious society, in the planning, conduct or execution of any charitable solicitation, to utilize any unfair, false, deceptive, misleading or unconscionable act or practice. In deciding whether an act or practice is unfair, false, deceptive, misleading or unconscionable within the meaning of this subsection, definitions, standards and interpretations relating thereto under the Idaho consumer protection act and regulations promulgated thereunder shall apply.

I.C. § 48-1203(1).

A "charitable solicitation" under ICSA is defined as:

> [A]ny oral or written request, directly or indirectly, for money, credit, property, financial assistance or other thing of value on the plea or representation that such money, credit, property, financial assistance or other thing of value or any portion thereof, will be used for a charitable purpose or benefit a charitable organization. No contribution need be made in order for a charitable solicitation to be deemed to have taken place.

I.C. § 48-1202(3).

Once again, it cannot be credibly argued that the grant recipients (much less IDHW or its employees) "falsely represented a charitable organization or purpose," and the Attorney General is accordingly stretching the statute well beyond the Idaho Legislature's intent. More significantly, and for the same reasons noted above, applying for a government grant is not a "charitable solicitation." *Housing Southwest,* 128 Idaho at 339–40. Government grants are not donations; they are allocations of public funds (in this case, federal funds) to achieve a governmental purpose.

B. Attorney General Labrador lacks the requisite probable cause to issue the CIDs.

The Idaho Attorney General may only issue a CID when the Attorney General has "has probable cause to believe that a person has done, or is about to do, something that is declared to be unlawful." *In re W. Acceptance Corp., Inc.*, 117 Idaho 399, 400, 788 P.2d 214

(1990). "Probable cause is the possession of information that would lead a person of ordinary care and prudence to believe or entertain an honest and strong presumption" that a person has acted unlawfully. *State v. Williams*, 162 Idaho 56, 66, 394 P.3d 99 (Ct. App. 2016) (defining probable cause in the criminal context).

Here, the Idaho Attorney General's Office has already determined that IDHW's implementation of the grant program was lawful and within both state and federal guidelines. *Decl. of Dave Jeppsen*, ¶ 9, Ex. A. As noted above, the Idaho Attorney General's Office examined the implementation of the program and specifically found that the Self-Reliance Division of IDHW's implementation "raises no concerns of statutory violations." *Id.* Yet, now, the Attorney General purports to investigate that very same issue. The Attorney General cannot credibly claim to have probable cause that someone has done something unlawful when his office has already determined that the conduct was lawful. The CIDs should be set aside on this ground alone.

C. Attorney General Labrador, Deputy Attorney General Wilson, and the Attorney General's Office lack the authority to issue CIDs to their own clients and have a non-waivable conflict of interest and should be disqualified from this matter.

An Attorney General issuing CIDs to government officers who are his own clients appears to be unprecedented in Idaho. Under Idaho law, Petitioners are the clients of the Attorney General. The Idaho Attorney General has a statutory duty "[t]o perform all legal services for the state and to represent the state and all departments, agencies, offices, officers, boards, commissions, institutions and other state entities in all courts and before all administrative tribunals or bodies of any nature." I.C. § 67-1401(1). The Idaho Attorney General is further required "[t]o advise all departments, agencies, offices, officers, boards,

commissions, institutions and other state entities in all matters involving questions of law." I.C. § 67-1401(2). Petitioners are officers of an agency of the state of Idaho.

Here, the Attorney General, acting apparently of his own volition, has instituted an adversarial proceeding against clients whom the Attorney General is statutorily mandated to represent. This is not a case in which the Attorney General is obligated to represent two adverse Idaho agencies, as sometimes occurs. This is a case in which the Attorney General has himself instituted an adversarial proceeding against his own clients on a matter in which the Attorney General's Office has provided counsel to those same clients. In a California case, the California Supreme Court found that the Attorney General had no authority to initiate an adversarial position against his own clients when he had formerly advised them on the issue:

> There is no question that at such time as he believed a potential conflict existed, the Attorney General could, as he did, properly withdraw as counsel for his state clients and authorize them to employ special counsel. The issue then becomes whether the Attorney General may represent clients one day, give them legal advice with regard to pending litigation, withdraw, and then sue the same clients the next day on a purported cause of action arising out of the identical controversy. We can find no constitutional, statutory, or ethical authority for such conduct by the Attorney General.

People ex rel. Deukmejian v. Brown, 29 Cal. 3d 150, 154–55, 624 P.2d 1206, 1207 (1981); *see also Chun v. Bd. of Trustees of Employees' Ret. Sys. of State of Hawaii*, 87 Haw. 152, 176, 952 P.2d 1215, 1239 (1998) (finding that the Attorney General of Hawaii lacked the power to appeal on an agency's behalf without that agency's authorization).

Although the Attorney General will claim that he has initiated this investigation in service of the public interest (which he has unilaterally determined), "the attorney general

is not authorized to place himself in the position of litigant so as to represent his concept of public interest." 7 Am. Jur. 2d Attorney General § 17. Further,

> Even when the attorney general's vision of the state's legal interests is at variance with that of his or her statutory client, once the state officer or instrumentality whom the attorney general represents has determined a course he or she desires litigation to take, it is the duty of the attorney general to zealously advocate the public policy positions of his or her client in pleadings, in negotiations, and in the courtroom and to avoid even the appearance of impropriety by appearing to be in conflict with the desires of his or her client.

Id. Accordingly, and as in *Duekmejian*, the Attorney General possesses neither constitutional, statutory, nor ethical authority to continue to pursue the CIDs issued to Petitioners, and the CIDs should be set aside on this basis.

Additionally, the Attorney General's Office's conflict of interest requires its disqualification. "[R]esolving a matter regarding a potential conflict of interest, when properly raised, is precisely the kind of ethical question that trial courts may properly address during litigation." *Hepworth Holzer, LLP v. Fourth Jud. Dist. of State*, 169 Idaho 387, 394, 496 P.3d 873 (2021). As noted, the Attorney General's Office has created an adverse action against his own clients, despite the fact that the Attorney General's Office previously advised Petitioners that the very conduct that the Office seeks to investigate was and is lawful. The Attorney General's Office did not seek to consult with Petitioners over the issuance of the CIDs and whether there was an alternative course of action. *Decl. of Dave Jeppesen*, ¶ 11. The Attorney General's Office simply served Petitioners with the CIDs. The Attorney General's Office conflict of interest here is clear and requires its disqualification.

In short, the Attorney General's choice to investigate his own clients creates two issues. First, the Attorney General does not have the authority to maintain an adverse action against Petitioners on a matter that the Attorney General's Office has previously advised Petitioners upon; and second, the Attorney General has created an impermissible conflict of interest by seeking to investigate his own clients. As such, the Attorney General lacks authority to continue to pursue the CIDs issued to Petitioners, and, further, the Attorney General's Office must be disqualified from this matter.

V. CONCLUSION

Attorney General Labrador has acted beyond the scope of his office by issuing the CIDs to Petitioners. This Court should set aside the CIDs because: (1) the Attorney General lacks the requisite probable cause to issue the CIDs; (2) the Attorney General lacks the statutory authority to issue the CIDs to investigate the allocation of government grants; and (3) the Attorney General lacks authority to issue CIDs to his own clients and has an inescapable conflict of interest.

Petitioners request that this Court set aside the CIDs and further request that this Court award Petitioners reasonable attorney fees under Idaho Code §§ 12-121, 48-614(2), and 12-117 as the Attorney General lacked a reasonable basis in fact and law for the issuance of the CIDs.

Petitioners request oral argument.

DATED this 23rd day of March 2023.

GJORDING FOUSER PLLC

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