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Docket No. 46742

IN THE SUPREME COURT OF THE STATE OF IDAHO

EMPLOYERS RESOURCE MANAGEMENT COMPANY, an Idaho Corporation,

Plaintiff/Appellant,

-vs-

BOBBI-JO MEULEMAN, in her capacity as Director of the IDAHO DEPARTMENT OF COMMERCE,

Defendant/Respondent.

APPELLANT'S BRIEF

Appeal from the District Court of the Fourth Judicial District Court
for Ada County, State of Idaho

The Honorable Samuel Hoagland, District Judge Presiding

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I. NATURE OF THE CASE

In 2014, the Idaho Legislature enacted the Idaho Reimbursement Incentive Act ("IRIA" or the "Act"), which delegated authority to an Economic Advisory Council ("EAC") within the Idaho Department of Commerce to grant tax subsidies to businesses that established an office in Idaho and created at least 20 new jobs. Under the Act, the EAC is granted broad discretion to grant or deny tax credits to businesses; the Act also strictly limits judicial review of agency action.

In 2016, the EAC granted a tax credit worth $6.5 million to Paylocity, an Illinois Corporation. Paylocity is a direct competitor of Appellant Employers Resource Management Company, an Idaho Corporation ("Employers"). By providing a $6.5 million government subsidy to Paylocity, the EAC will cover a substantial portion of Paylocity's overhead and operating expenses, giving Paylocity a competitive advantage over Employers in attracting and servicing Idaho business. To compete with Paylocity, Employers will have to match or beat the fees Paylocity charges for its services, but without the benefit of a multi-million dollar government subsidy.

The Idaho Constitution empowers the Legislature, and it alone, to create tax policy for the state of Idaho and ensure the uniform application of Idaho's tax laws. The Legislature can delegate the administration of tax laws to executive agencies. However, by authorizing the EAC to waive taxes levied on selected companies, without strictly limiting the discretion that the EAC exercises in selecting those companies, and by limiting judicial review of the EAC's decisions, the Legislature has abdicated its legislative taxing power and delegated it to an administrative body not elected by the people without adequate judicial review.

A. COURSE OF PROCEEDINGS

Employers filed this lawsuit to challenge the constitutionality of the Act. This appeal is taken from an order granting the Defendant/Appellee's motion for summary judgment. Employers filed its Complaint on March 23, 2016. (Clerk's Record "R" p. 5). Defendant Megan Ronk was the Director of the Idaho Department of Commerce ("Department") and was named in her official capacity in the Complaint. Bobbie Jo Meuleman succeeded Ms. Ronk and is now the named Defendant/Respondent. On May 4, 2016, the Department filed its Motion to Dismiss for lack of standing. On May 20, 2016, Employers filed its Opposition to the Department's motion. The Department's Reply Memorandum was filed on July 15, 2016. The district court set the motion for hearing on July 20, 2016. Employers filed a Motion for leave to file an Amended Complaint on May 26, 2016. At the hearing on July 20, 2016, the district court granted Employer's Motion to file an Amended Complaint. On July 26, 2016, the Order granting leave to file an amended complaint was entered by the court and Employer's Amended Complaint was filed. (R p. 30). On August 1, 2016, the Department renewed its Motion to Dismiss and a hearing was held on August 2, 2016.

At the conclusion of the hearing on the Department's Motion to Dismiss, the court took the matter under advisement and rendered its Memorandum Decision and Order Granting Motion to Dismiss for Lack of Standing on August 15, 2016. A judgment of dismissal was entered on August 15, 2016.

Employers appealed from that judgment of dismissal and this Court accepted briefing and conducted oral argument on August 16, 2017. (*See Supreme Court Oral Argument number 44511*). During the oral argument several Justices expressed concern regarding the limitation on judicial review, but the Court limited its specific holding to the standing issue in its decision

issued November 3, 2017. It concluded that Employers did have standing and noted that if Employers received the relief sought, a finding that the IRIA is unconstitutional, "the competitive advantage currently enjoyed by Paylocity will be eliminated and the parties will compete on a level playing field." *Employers Resource Management Company v. Ronk*, 162 Idaho 774, 780, 405 P.3d 33, 39 (2017). The Court remanded the case to the district court.

The Department then filed its Answer to the Amended Complaint and Employers filed its Motion for Summary Judgment on August 6, 2018. (Limited Clerk's Record ("LCR") pp. 8 and 14). The Department responded on September 19, 2018 and agreed that there were no genuine issues of material fact and the issue was purely one of law. (LCR p. 53). The district court conducted a hearing on October 3, 2018 and issued its Judgment and Memorandum Decision and Order Denying Plaintiff's Motion for Summary Judgment and Granting Defendant's Motion for Summary Judgment on January 3, 2019. (LCR pp. 86 and 99). Employers' Notice of Appeal was timely filed on January 31, 2019. (LCR p. 101).

B. STATEMENT OF FACTS

Article III, §1 of the Idaho Constitution provides: "The legislative power of the state shall be vested in a senate and house of representatives." Further, the Constitution provides that these powers are not to be exercised by any other branch of Idaho State Government. Article II, §1 states:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

The Idaho Constitution vests all taxing power in the Legislature. This plenary authority of the Legislature is not delegable, and the Idaho Constitution forbids a delegation of unrestricted and unguided taxing power.

The Legislature exercises its taxing power subject to Article VII, §5 of the Idaho Constitution, which states that "[a]ll taxes shall be uniform upon the same class of subjects [and] the legislature may allow such exemptions from taxation from time to time as shall seem necessary and just."

The Idaho Department of Commerce is an agency within the executive branch of Idaho State Government. Pursuant to Article II, §1 of the Idaho Constitution, all agencies within the executive branch are prohibited from exercising any of the powers reserved to the legislative or the judicial branch of Idaho state government.

In 2014, the Idaho Legislature passed the Idaho Reimbursement Incentive Act ("IRIA"), which was then amended in 2015. Idaho Code § § 67-4737 *et seq.* The IRIA authorizes tax credits to be issued by the Director of the Department of Commerce to a qualified business entity. To qualify for the tax credit, a business entity files an application with the Department of Commerce. The application is reviewed by the Director to determine if all the information required by the statute is present. The completed application is then reviewed by an Economic Advisory Council ("EAC") within the Department of Commerce, whose members are appointed by the Governor. The EAC is established under Idaho Code §67-4704.

The only requirement that the Legislature included in Idaho Code §67-4739 for a business to obtain EAC approval of a tax credit application, apart from providing information to the Director of the Department of Commerce, is the creation of "new jobs." In order to claim the tax credit, an entity must create a minimum number of new jobs in the state of Idaho. "Minimum

new jobs" is defined in Idaho Code §67-4738(11) as "not less than twenty (20) such jobs over the term of the project if created within a rural community, or not less than fifty (50) such jobs over the term of the project if created within an urban community."

Idaho Code §67-4739(1)(a) - (m) specifies information required to be provided as part of the tax credit application process. However, in enacting this statute, the Idaho Legislature did not establish standards, guidelines, or requirements as to how or whether this information is to be used in the process of approving an application for issuance of a tax credit. Further, the statute does not mandate that the EAC issue any required factual findings in support of the approval or disapproval of an applicant's request for a tax credit. Without standards -- objective or even subjective -- in place, decisions of the EAC are, for all practical purposes, exempt from meaningful substantive review by the judicial branch of Idaho state government.

Idaho Code §67-4739 gives the EAC discretion to grant or deny an application based on its subjective determination of a business's qualifications. The only requirement that is even potentially objective is the required number of "new jobs" that a business must create in order to qualify for the tax credit. But even that requirement is subject to the Department's determination that the jobs are in fact "new" and not simply renamed or artificially generated in some other way. What is more to the point is that creating "new jobs" is not the sole or determining factor for receipt of a tax credit. The EAC retains absolute discretion over other factors that are entirely subjective. For example, Idaho Code §67-4739(1) requires an applicant to provide the following:

> (a) A complete description of the proposed project and the economic benefit that will accrue to the state as a result of the project;
> (c) Proof of a community match;
> (f) Known or expected detriments to the state or existing industries in the state;
> (k) A detailed description of the estimated new state tax revenues to be generated by the project.

While the Act specifies the categories of information that are to be provided, no standards, guidelines, or rules are set out as to how the information is to be used or evaluated by the EAC. Its determination as to whether an applicant is entitled to a tax credit is totally subjective and within the EAC's administrative discretion. It is therefore not subject to any meaningful judicial review.

EAC's conclusion that an entity qualifies for a tax credit is at once arbitrary and capricious, in that the EAC alone evaluates all of the information submitted, without any required objective criteria for that evaluation, and without any required findings of fact to support its decision. Thus, the EAC has virtually unlimited discretion to grant or deny any business's application, regardless of the quality and content of the information submitted.

Idaho Code §§67-4704(1) and (2) limit the duty of the Director of the Department of Commerce to determining whether the application is complete. If it is, the Director must submit the application to the EAC, whose decision to grant or deny a tax credit is conclusive.

Although provision has been made for judicial review of a rejected application by the aggrieved applicant, the law provides that a denial is not considered a "contested case," and the law with regard to appeal of an administrative agency decision requires the court to defer to the agency's exercise of discretionary authority. Therefore, as a practical matter, an aggrieved applicant has no genuine judicial remedy for arbitrary agency action. In addition, there is no avenue for a competitor to challenge an award to an applicant.

Employers is one of Idaho's top privately-held companies. The EAC granted one of Employer's competitors, Paylocity, an Illinois company, a 28% credit against its future tax liabilities in return for its promise to create "new jobs" in Boise. The estimated tax credit granted to Paylocity by the EAC is approximately $6,500,000. (R p. 65).

C. ISSUES PRESENTED ON APPEAL

1. **Is the IRIA unconstitutional as it delegates judicial power to the EAC and attempts to limit judicial review.**
2. **Is the IRIA unconstitutional as it grants the EAC legislative power to grant tax subsidies.**
3. **Is Employers entitled to an award of attorney's fees on appeal pursuant to Idaho Code § 12 – 117 as the Department has acted without a reasonable basis in law.**

II. ARGUMENT

A. STANDARD OF REVIEW

The issues in this case are questions of law, and this Court exercises *de novo* review.

"Constitutional issues are purely questions of law ...." *Meisner v. Potlatch Corp*, 131 Idaho 258, 261, 954 P.2d 676, 679 (1998) (quoting *Harris v. State Department of Health & Welfare*, 128, Idaho 295, 297, 847 P.2d 1156, 1158 (1992)).

> We must deal with this question as strictly a judicial one, however clear our convictions are that the purposes sought to be obtained are praiseworthy and beneficial to the public. We cannot for that or any other reason usurp authority which does not belong to us, and by judicial construction make ineffectual a plain constitutional provision, however long innocently violated. Where the Constitution, being the supreme law of the state, forbids an act, no legislative enactment can legalize it. And for this Court to do other than to adhere strictly to the provision of the Constitution would be an act of judicial lawlessness. Nor will the best and most patriotic intentions make that law which contradicts the principles of the Constitution or contravenes it justifiable.

Fluharty v. Board of County Commissioners, 29 Idaho 203, 211, 158 P. 320, 322 (1916).

Employers acknowledges that courts presume that legislative acts are constitutional and that it must overcome a presumption of validity. *State v. Delling*, 152 Idaho 122, 125, 267 P.3d 709, 712 (2011)(dealing with criminal statute). But a court has an obligation to consider the

constitutionality of a statute and hold it to be unconstitutional if it violates the provisions of the Constitution. "While such a legislative declaration is entitled to great weight, it is not conclusive. There are limits beyond which the Legislature cannot go." *State ex rel. Beck v. City of York*, 164 Neb. 223, 82 NW.2d 269, 273 (quoted in *Village of Movie Springs v. Aurora Mfg. Co.*, 82 Idaho 337, 348, 353 P.2d 767 (1960)). Employers submits that the IRIA is unconstitutional because it violates the separation of powers mandated by Article II, Section 1 of the Idaho Constitution. It is fundamental that the Constitution prevails against conflicting statutory provisions. *State v. Johnson,* 50 Idaho 363, 296 P. 588 (1931). An unconstitutional act is not a law at all. *Smith v. Costello,* 77 Idaho 205, 290 P.2d 742 (1956).

B. THE IRIA UNCONSTITUTIONALLY DELEGATES JUDICIAL POWER TO THE EAC AND ATTEMPTS TO LIMIT THE COURTS' JUDICIAL REVIEW BY ITS FAILURE TO SET STANDARDS OR GUIDELINES THAT LIMIT THE EAC'S DISCRETION, THE ABSENCE OF A REQUIREMENT FOR FINDINGS OF FACT, AND THE DECLARATION THAT DECISIONS ARE NOT TO BE CONSIDERED "CONTESTED CASES."

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

Further, Article V, § 13, strongly protects the courts' exercise of the judicial power by prohibiting the Legislature from encroaching upon it:

> The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government; but the legislature shall provide a proper system of appeals, and regulate by law, when necessary, the methods of proceeding in the exercise of their powers of all the courts below the Supreme Court, so far as the same may be done without conflict with this Constitution . . . .

The IRIA violates this provision of the Idaho Constitution by making the EAC's decisions virtually non-reviewable. The Act's omissions and restrictions prevent any meaningful judicial review and it is clear under multiple Idaho Supreme Court decisions that while legislation may confer upon administrative agencies quasi-judicial powers, this delegation is constitutional only when "such legislation does not attempt to give such finality to the determinations made by the administrative agency thereunder that property and constitutional rights of citizens may be conclusively determined without right to adequate judicial review." *State v. Concrete Processors*, 85 Idaho 277, 282, 379 P.2d 89, 94 (1963). In *Electors of Big Butte Area v. State Bd of Education*, 78 Idaho 602, 607, 308 P.2d 225, 230 (1957), the Court held that to attach finality to the Board's proceedings would in essence constitute judicial action and hence exercise of the powers of the judicial branch of government, prohibited by Article 2, § 1 of the Constitution. That is the situation under the IRIA as well.

While the IRIA lists factors that must be discussed in each application, it does not set out any standards or guidelines by which those factors must be evaluated. In that regard, this Court described the Director's statutory function under the IRIA as follows:

> The Director conducts a technical review and economic impact analysis of each application. IDAPA 28.04.01.151.07. After the Director determines that the application meets the requirements of IRIA, the application is forwarded to the Economic Advisory Council (the "EAC"), a body created

> under authority of Idaho Code §67-4704. . . . The EAC is given broad discretion to approve or deny applications for the IRIA tax credit.

Emplrs Res. Mgmt. Co. v. Ronk, 162 Idaho 774, 776, 405 P.3d 33, 35 (2017).

Moreover, IDAPA 28.04.01.003 provides that there is no administrative appeal under these rules, although nothing shall prohibit "an aggrieved applicant" from seeking judicial review. This echoes I.C. § 67-4739(2), which provides that the decision of the EAC shall not be considered a contested case although an "aggrieved applicant" can seek judicial review. Thus the statute attempts to insulate the decision of the Director/EAC from judicial review except for aggrieved applicants contesting the rejection of their applications. No one else can ask the courts to review the decision.

Even as to "aggrieved applicants," judicial review is illusory. Since the EAC is not required to make any findings of fact to support its decisions, a reviewing court would have no evidentiary record to consider. And since the EAC's consideration of an application is not treated as a "contested proceeding," there is no evidentiary record or statutory requirement that would provide a basis for meaningful substantive judicial review. The Idaho Administrative Procedure Act, I.C. §67-5279, provides:

> (1) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.
>
> (2) When the agency was not required by the provisions of this chapter or by other provisions of law to base its action exclusively on a record, the court shall affirm the agency action unless the court finds that the action was:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure; or
> (d) arbitrary, capricious, or an abuse of discretion.

The reviewing court must defer to the judgment of the EAC with respect to its consideration of each application. Even if the court had the application before it, since the Legislature did not include any statutory standards or guidelines as to the weight to be given to each of the listed factors, no denial by the EAC could be considered "arbitrary, capricious or an abuse of discretion."

In addition, without findings of fact issued by the EAC, a court could not know how the EAC arrived at its decision, and would therefore be bound to uphold it in every case as it is not considered a contested case pursuant to the APA. Thus, real judicial review is illusory.

Contrary to the holding in *Kerner v. Johnson,* 99 Idaho 433, 583 P.2d 360 (1978), since the EAC has no binding standards or guidelines it is required to follow, and it is not required to make reviewable findings of fact to support its decision, its decision is not only conclusive within the Commerce Department but is not judicially reviewable. The EAC's delegated power therefore constitutes an unconstitutional delegation of judicial power in violation of the Idaho Constitution.

There is no real judicial review of any decision of the EAC. The IDAPA regulations provide there is no administrative appeal. The statute permits an "aggrieved applicant" to seek judicial review, but this is an illusory provision because the statute provides that the decision of the EAC shall not be considered a contested case. And since the EAC is not required to make any findings of fact to support its decisions, a reviewing court would have no evidentiary record to consider.

There is no avenue at all for a competitor to seek review of an approved application as there would be no "aggrieved applicant." The Department made an argument to the district court that there could be review of an approved application, even if there is no "aggrieved applicant,"

based on this Court's decision in the previous appeal. The district court appeared to accept that argument in its Memorandum Decision by noting that the Supreme Court granted standing to Employers to challenge the constitutionality of the IRIA and therefore "in another case, an injured competitor could challenge the specific credit granted to an applicant, upon proper grounds." (Memorandum Decision and Order at 11, LCR p. 86.) Employers does not understand this Court's previous opinion to add a provision for judicial review in the IRIA, but simply to hold that a competitor such as Employers had the right to challenge the constitutionality of the statute itself. The Supreme Court did not change the statute but merely allowed Employers to challenge it.

C. THE IRIA DOES NOT LIMIT THE EAC TO FINDING FACTS, BUT UNCONSTITUTIONALLY GRANTS THE EAC LEGISLATIVE POWER TO GRANT TAX SUBSIDIES AND THEREFORE VIOLATES THE IDAHO CONSTITUTIONAL REQUIREMENT OF SEPARATION OF POWERS.

The delegation of discretionary authority to the Department of Commerce and the EAC violates the Idaho Constitution's requirement of separation of powers. Article II, § 1, provides for separation of powers among the legislative, executive, and judicial departments of Idaho's government and provides that persons in one branch shall not exercise any authority belonging to another.

The Idaho Constitution grants all legislative power to the Idaho House and Senate, Article III, §1. The Idaho Supreme Court has held that the functions of the Legislature are to be exercised by it alone. The Legislature has plenary authority in all matters of taxation except those prohibited or limited by the Constitution. *Union Pacific R. Co. v. Board of Tax Appeals,* 103 Idaho 808, 654 P.2d 901 (1982). Article VII, §5, states that "all taxes shall be uniform upon the same class of subjects [but] the legislature may allow such exemptions from taxation from time to time as shall seem necessary and just." (Emphasis added).

The Idaho Constitution vests all taxing power in the Legislature. This plenary authority of the Legislature is not delegable, and the Constitution forbids delegation of unrestricted and unguided taxing power. The Supreme Court has stated: "[W]e emphasize that certain constitutional standards must be met in any delegation of legislative authority to a lesser entity of government." *Greater Boise Auditorium Dist. v. Royal Inn,* 106 Idaho 884, 888, 684 P.2d 286, 290 (1984).

In order to apply for a tax credit under the IRIA, Idaho Code §67-4707 requires a business to submit an application that includes information listed in § 67-4707(1). The Director of the Department of Commerce "conducts a technical review and economic impact analysis of each application." *Emplrs Res. Mgmt. Co. v. Ronk*, 162 Idaho 774, 775, 405 P.3d 33, 34 (2017). After the Director determines that the IRIA requirements have been met, i.e., that all of the listed information is included, she submits the application to the EAC, which thereafter has sole and exclusive authority to grant or deny it.

The IRIA application requirements are nothing more than a listing of factors. Idaho Code §67-4704 provides:

> (1) A business entity may claim a refundable tax credit for creating a minimum number of new jobs in the state of Idaho. In order to be considered for participation, an applicant or its designated representative must submit an application to the director and shall include:
>
> (a) A complete description of the proposed project and the economic benefit that will accrue to the state as a result of the project;
> (b) A description or explanation of whether the project will occur or how it will be altered if the tax credit application is denied by the council;
> (c) Proof of a community match;
> (d) A letter from the tax commission confirming that the applicant is in good standing in the state of Idaho and is not in unresolved arrears in the payment of any state tax or fee administered by the tax commission;

(e) A detailed statement with an estimate of Idaho goods and services to be consumed or purchased by the applicant during the term;
(f) Known or expected detriments to the state or existing industries in the state;
(g) An anticipated project inception date and proposed schedule of progress;
(h) Proposed performance requirements and measurements that must be met prior to issuance of the tax credit;
(i) A detailed description of the proposed capital investment;
(j) A detailed description of jobs to be created, an approximation of the number of such jobs to be created and the projected average wage to be paid for such jobs;
(k) A detailed description of the estimated new state tax revenues to be generated by the project;
(l) Identification of any individual or entity included within the application that is entitled to a rebate pursuant to section 63-3641 or 63-4408, Idaho Code, or is required to obtain a separate seller's permit pursuant to chapter 36, title 63, Idaho Code; and
(m) The federal employer identification or social security number for each individual or entity stated as the business entity in the agreement.

(2) Upon satisfaction by the director that all requirements are met pursuant to this chapter, the director shall submit such application to the council [Economic Advisory Council]. The council shall review the application, may request additional information and shall approve or reject the application. An approval or rejection from the council shall not be considered a contested case pursuant to chapter 52, title 67, Idaho Code; provided, however, that nothing in this section shall prohibit an aggrieved applicant from seeking judicial review as provided in chapter 52, title 67, Idaho Code.

(3) If the council approves the application, the council shall instruct the director to enter into an agreement with the applicant with the terms of the council's approval. If the council rejects an application, the applicant may reapply with a new application.

The Director's function appears to be limited to conducting a limited technical review of the application in order to verify that the information described in items (a) through (m) is included. Since the statute also requires that a business create a minimum number of new non-seasonal full-time jobs in order to qualify for tax relief, presumably the Director or the EAC confirms that this information is also included in the application. The Director then submits the

application to the EAC if it meets the "requirements" of the statute. The term "requirements" is arguably vague. "Requirements" means either that the entire list of factors has been discussed in the application, or that the factors have been evaluated substantively on their merits. Presumably, the EAC is tasked with evaluating an application on its merits, which would limit the Director's function to simply determining that the statutory list has been covered in the application.

It is at this point in the process that a question arises. If the Director has already substantively evaluated the application on the merits, what need is there for further consideration by the EAC? If, however, the Director has only evaluated the application's contents to verify that all listed factors have been dealt with in it, then it makes sense that the EAC is conducting an evaluation of the merits, but this is problematic given the absence of substantive guidelines or standards.

Whether the Director conducts an examination of the merits of an application or just verifies the contents of the application is entirely superfluous. Substantive and final evaluation of each application is committed solely to the EAC, which makes the final and unreviewable decision to grant or deny a tax subsidy to a business applicant. The language of the statute in §67-4704(3) makes it clear that the EAC, not the Director, exercises ultimate and final authority over that decision. It states:

> If the council approves the application, ***the council shall instruct the director to enter into an agreement with the applicant*** with the terms of the council's approval.

(Emphasis added.)

The application's discussion of the list of factors in §67-4704(1)(a)-(m), together with the requirement that any business applying for a tax subsidy must agree to create a minimum number of new non-seasonal full-time jobs, constitute the only requirements of the statute. There are no standards or guidelines upon which to weigh the information provided, to grade an application

based on each factor, or to determine whether an application meets the legislative intent of the statute. The statute lists the factors to be considered by the EAC, but provides no guidance whatsoever as to how those factors must be considered or applied. That is left entirely to the unbridled discretion of the EAC. As stated above, Idaho case law makes clear that "certain constitutional standards must be met in any delegation of legislative authority to a lesser entity of government." *Greater Boise Auditorium Dist. v. Royal Inn*, 106 Idaho 884, 888, 684 P.2d 286, 290 (1984). *See also Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978); *State v. Kellogg*, 98 Idaho 541, 568 P.2d 514 (1977); *Board of County Commissioners of Twin Falls County v. Idaho Health Facilities Authority*, 96 Idaho 498, 531 P.2d 588 (1976); *Boise Redevelopment Agency v. Yick Kong Corp.*, 94 Idaho 876, 499 P.2d 575 (1972); *State v. Heitz*, 72 Idaho 107, 238 P.2d 439 (1951). These standards have not been met in the IRIA and it is therefore unconstitutional.

D. EMPLOYERS IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES AGAINST THE DEPARTMENT.

Idaho Code § 12–117 provides that a court, including on appeal, shall award the prevailing party reasonable attorneys' fees in a proceeding involving a state agency if the court finds that the non-prevailing party acted without a reasonable basis in fact or law. Employers submits that the Department's defense of the constitutionality of the IRIA is without a reasonable basis in law as it is clear that the statute violates the constitutional separation of powers and this Court (or at least of several justices thereof) so suggested in the previous oral argument. Accordingly, Employers requests an award of attorney's fees for bringing this action and appeal.

II. CONCLUSION

Employers submits that the Legislature's delegation of unfettered discretion to the EAC in the IRIA violates the Idaho Constitution's requirement of separation of powers both as it attempts to restrict or eliminate judicial review or make such review illusory, and as it grants

legislative power to the EAC to award tax subsidies. Employers requests this Court to declare that the IRIA is unconstitutional and find that the EAC's decisions are void ab initio.

Respectfully submitted this 29th day of May, 2019.

EBERLE, BERLIN, KADING, TURNBOW
& McKLVEEN, CHARTERED

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing document was served upon the following attorney(s) this 29th day of May, 2019, as indicated below and addressed as follows:

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