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

REPRESENTATIVE SCOTT BEDKE, in his official capacity as SPEAKER OF THE HOUSE OF REPRESENTATIVES, and SENATOR BRENT HILL, in his official capacity as SENATE PRESIDENT PRO TEMPORE,

Plaintiffs-Respondents,

vs.

JULIE ELLSWORTH, in her official capacity as the IDAHO STATE TREASURER,

Defendant-Appellant.

Docket No. 48268-2020

APPELLANT'S REPLY BRIEF

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

HONORABLE NANCY BASKIN, District Judge

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The Appellant ("Treasurer"), by and through her attorneys of record, Hopkins Roden Crockett Hansen & Hoopes, PLLC, appeals from the decision of the District Court, and respectfully submits this Reply Brief in support of her Appeal.

ARGUMENT

Idaho Code Section 67-1602 (the "Statute") lies at the heart of this case. For ease of reference, it provides:

> IDAHO STATE CAPITOL – ALLOCATION AND CONTROL OF SPACE. The space within the interior of the capitol building shall be allocated and controlled as follows:
>
> (1) Public space. The interior within the rotunda, the hallways on the first and second floors, the restrooms located adjacent thereto, the elevators, the stairways between the first, second, third and fourth floors (excepting the interior stairways between the third and fourth floors within the legislative chambers), shall be space within the capitol building open to the public ("public space"). Subject to this chapter, the director of the department of administration shall maintain all public space.
>
> (2) Executive department. The governor shall determine the use and allocate the space within the second floor. The director of the department of administration shall maintain such space.
>
> (3) Legislative department. The legislative department shall determine the use of the space on the first, third and fourth floors as well as the basement, which basement shall include the underground atrium wings. All space within the first, third and fourth floors and the basement shall be allocated by the presiding officers of the senate and house of representatives. The presiding officers shall maintain such space and provide equipment and furniture thereto, provided however, that the presiding officers may contract with the director of the department of administration to maintain such space and provide equipment and furniture thereto.

I.C. § 67-1602 (emphasis added).

1. **As amended in 2007, the Statute unambiguously requires, for the first time, the Legislative Department to act to "determine the use" of the first floor of the Capitol.**

Respondents argue, and the District Court found, the Statute is "self effectuating," and requires no further action by the Legislative Department to determine the use of the first floor. Respondent's Brief ("RB"), pp. 13-14. That is not the case.

While the word control is not found in the body of the Statute itself, it does appear in the introduction, and there is no question that the Statute assigns control of certain parts of the Capitol to either the Executive or Legislative Departments of government. The 2007 amendment of the Statute, as quoted above, changed control of the first floor of the Capitol from the Executive Department to the Legislative Department. Being given control, it then became the duty of the Legislative Department to determine the use of its new floor, and the duty of its presiding officers to allocate the space within the framework of use as prescribed by the Legislative Department.

This was something unprecedented, created out of a compromise between the Governor and the then presiding officers to facilitate renovation of the Capitol building, and it brought existing uses of the first floor by the Executive Department into conflict with the new control given to the Legislative Department. Recognizing this, the Governor, Legislative Leadership and various members discussed and negotiated the way in which the conflicting interests could be made to live together.

It was agreed that the Treasurer's office could remain in its traditional place on the first floor so long as the Treasurer elected to remain there.

Respondents have chosen to ignore the history and series of events that has given the Legislative Department control of the first floor of the Capitol. They assert that the affidavits and documents which detail those events have been stricken. RB, pp. 2-3. They have not. Tr. pp. 15:24-16:5. They would have the Court ignore that on two occasions, i.e., the 2007 amendment of I.C. §67-1204 contemplating the Treasurer's office would move back to its space on the first floor once the renovation was complete, (2007 Idaho Session Laws, Chapter 41, § 2), and the approval and funding of the Capitol Commission's plan for renovations providing for the Treasurer's office to remain in its traditional location, (2007 Idaho Session Laws, Chapter 157, §§ 1 and 2), the Legislative Department has determined a use of the Capitol's first floor, or at least the southeast quadrant of it, where the Treasurer's offices are located.

Respondents are contending that once control of the first floor was given over to the Legislative Department, Respondents could go forward with allocation of the space. Their argument has the effect of rendering the Legislative Department's explicit statutory duty to "determine the use" superfluous, violating the rules of statutory interpretation. *See, Nelson v. Evans,* 166 Idaho 815, ___, 464 P.3d 301, 306 (2020). They also argue that if additional action by the Legislative Department was required to determine the use, the Statute would have included words to that effect, like "to vote" before the words "shall determine the use." But that is what legislatures do, they vote as a body to take action. Finally, they argue that the Legislative Department has never been asked to determine the use of space on the 3rd and 4th floors of the Capitol which have always been controlled by the Legislature, and refer to several housekeeping examples of leadership's allocation of space, such as: creating space for a break room or a lounge, repurposing a hearing room for a conference room and relocating a room for the Senate Pages. RB, pp. 6-8,17. That allocation of space is certainly what the Statute has in

mind. Those floors have been traditionally used for general legislative purposes and the job of allocating space for those purposes on a day-by-day basis belongs to the presiding officers.

The matter before the Court is not that. In this instance control of the first floor has been changed from the Executive Department to the Legislative Department. The southeast corner of the first floor is occupied by the Treasurer, a constitutional officer of the State of Idaho who has occupied that part of the first floor since the Idaho State Capitol building came to be. This is not "day-to-day" allocation of space as Respondents argue. See, RB p. 21. The Legislative Department has twice said the Treasurer's office should remain on the first floor, thereby determining the use at least in part. It has never prescribed otherwise.

The Treasurer's opening Brief discussed at some length the meaning of the operative words of the statute and their distinct differences. Appellant's Brief ("AB"), pp. 12-16. The Statute gave control of the first floor of the Capitol to the Legislative Department. Control having been granted, it then became the duty of the Legislative Department to exercise that control by determining the use to which the first floor would be put and then delegating the presiding officers to allocate on a day-by-day basis the space within the uses as prescribed. Determining the use is a function of control. The importance of determining the use of an entire floor of the Capitol, twenty-five percent of which has historically been occupied by the Treasurer, a constitutional officer of the State of Idaho, should not be delegated to two members of the Legislature, and the Statute does not intend that it be done that way.

Respondents have also chosen to ignore that on four occasions in 2019, the Legislative Department considered four appropriation bills to fund removal of the office of the State Treasurer from its historic space in the Capitol. All four attempts failed. R. pp. 94-95, 97-105.

Judge Baskin did a thorough job of dealing with the many issues this case presented to her on the trial court level, but in the end, she just got it wrong. She declared, correctly, that the Legislative Department has the sole authority under I.C. § 67-1602(3) to control the first floor of the Capitol. But she incorrectly conflated the right to "control" with the right to "determine the use." "Control" and "determine the use" are not equivalent or synonymous terms. AB, p. 15. The right to control granted to the Legislative Department the right to determine the use, but Judge Baskin mistakenly declared that no further action of the Legislative Department was necessary to determine the use, thereby rendering superfluous that requirement so clearly expressed in I.C. §67-1602(3). The Judge would grant the two members of Legislative Leadership, the Respondents in this case, the right, without more, to oust the Treasurer's office from its traditional place on the Capitol's first floor. That conclusion must be reversed.

2. The Governor's agreement with the presiding officers in 2007 is relevant, admissible and significant.

In their argument on this issue, Respondents first mischaracterize the history of the "deal" and the related negotiations between the Governor and the then presiding officers as "uncertain." RB, p. 22-23. That is not the case.

In fact, all three principals to the "deal," Governor Otter, Senate Pro Tem Geddes and House Speaker Denny, have expressly confirmed the existence of the "deal" in their affidavits filed in this case. R., pp. 257, 264–65, 270–71. Other evidence of the "deal" and the overall negotiations that occurred between them is abundant in the record. R., pp. 83–84, 86–88, 109–35, 257–58, 263–66, 270–71, 337–38.

Respondents next assert that the "deal" is unrelated to "the alleged ambiguity" and therefore irrelevant. RB, pp. 23-24. But the Treasurer does not allege an ambiguity in the first place, and if there is one, it relates to the place and duration of the Treasurer's office in the Capitol, which is precisely the subject of the "deal" in question, and therefore highly relevant.

In concluding their argument discounting the significance of negotiations between the Governor and Legislative Leadership having to do with location of the Treasurer's office at a time preceding passage of H. B. 218, Respondents argue that had the Legislature intended that the Treasurer's office was to remain on the Capitol's first floor, it could have amended the Statute to say so. RB, pp. 25-26. Likewise, the Legislature could have acted to amend the Statute to provide that the Treasurer's office could no longer occupy the first floor. It did not do so then, and it has not done so to date. At the time H. B. 218 passed both legislative houses and went to the Governor's desk, the Legislature had passed the amendment to I.C. § 67-1204 contemplating that the Treasurer would return to the Capitol once renovation was complete. R., p. 248; 2007 Idaho Session Laws, Chapter 41, § 2. It had also approved and funded the Capitol Commission's Plan for renovation which expressly included the Treasurer's office on the first floor. 2007 Idaho Session Laws, Chapter 157, §§ 1 and 2. The Legislature had acted twice, and had no reason to act further.

3. Respondents' argument that the 2007 amendment of the vault statute has no bearing on this case is unpersuasive.

Respondents attempt to discount the significance of the 2007 amendment of the "vault statute," as they call it, arguing it has "no bearing" on the interpretation of the Statute, and only "addressed the location of the moneys, not the location of the Treasurer's office." RB, pp. 26-28. Respectfully, that is not the case.

Respondents would have the Court ignore the long historical ties between the Treasurer's office, the vault in the Capitol and the monies in the Treasurer's custody. As discussed in the Treasurer's opening brief, they have been located together on the first floor since the first original phase of the Capitol was built in 1905. AB, p. 3. The old manganese safe was actually rolled down State Street from the former capitol building and slid into place inside the new Treasurer's office in new Capitol building before the outside wall was even completed. Id. The original vault statute was also enacted that same year, 1905. *See,* I.C. § 67-1204 (legislative history).

As amended in 2007, the statute also documents the close association between the Treasurer's office and vault, (and monies kept therein). Subsection 1 required that: "1) All state moneys in the custody of the state treasurer … shall be kept in the vault and safe as provided for that purpose in the capitol building and in no other place." 2007 Idaho Session Laws, Chapter 41, § 2 (subsection 1 of 67-1204) (emphasis added). Then Subsection 2 of the statute provided:

> (2) During the capitol building renovation, beginning in fiscal year 2007, or during relocation due to an emergency, these same moneys as set forth above, shall be kept in a vault within the office of the state treasurer's temporary location. Upon completion of this renovation, the provisions of subsection (1) shall apply.

2007 Idaho Session Laws, Chapter 41, § 2 (subsection 2 of 67-1204)(emphasis added).

In other words, the monies in the Treasurer's custody and kept in the Treasurer's vault in the Capitol by law temporarily followed the Treasurer to his temporary location during the renovation, then returned with him to the vault in the Capitol after the renovation was complete. Any other reading of 2007 amendment of the statute is strained, and supported by neither history nor logic.

Then Respondents assert that in 2019, the Legislature again amended the statute so that when Treasurer's office was relocated, she would be relieved of the "inconvenience" of keeping moneys in the Capitol vault. RB, p. 27.

In suggesting that the 2007 amendment to the statute has nothing to do with the location of the Treasurer's office, then suggesting the 2019 amendment has everything to do with its location, the Respondents attempt to have it both ways. The 2007 amendment obviously contemplated the location of the Treasurer's office as it temporarily moved elsewhere during the renovation and then returned to first floor of the Capitol after the renovation was complete, where it has remained to the present day.

4. The District Court ultimately held that in passing the Statute, the Legislature "expressly delegated all of its power" to the presiding officers, which is an unconstitutional delegation of legislative power, an argument which the Court should consider on appeal.

Respondents contend that the Treasurer cannot argue that the District Court's interpretation of the Statute causes an unconstitutional delegation of legislative power because the argument was not made below and cannot be raised for the first time on appeal. RB, p. 28. However, the rule of appellate review Respondents rely on is not as absolute as they suggest.

A party may refine issues that they have raised below with additional legal arguments so long as the substantive issue and the party's position on that issue remain the same. *Siercke v. Siercke,* No. 47196, slip op. at 8 (Idaho, November 20, 2020); *Ada Cnty. Highway Dist. v. Brooke View, Inc.*, 162 Idaho 138, 142 n.2, 395 P.3d 357, 361 n.2 (2017). A distinction exists between a refined issue, appropriate for review, and a new issue, unfit for consideration. *See, State v. Gonzalez*, 165 Idaho 95, 98–99, 439 P.3d 1267, 1270–71 (2019).

Here, the "substantive issue" at stake is the proper interpretation of the Statute, and the Treasurer's position on that issue remains the same now as it was below, i.e., the Statute, properly interpreted, requires action by the Legislative Department to determine the use of the first floor. The fact that the District Court's ultimate and incorrect interpretation of the Statute on summary judgment precipitated the additional legal argument that its interpretation causes an unconstitutional delegation of legislative power is just that – a permissible "additional legal argument" that should be considered by this Court. *Siercke,* No. 47196, slip op. at 8.

Respondents also assert that the Treasurer's delegation argument fails in any event, primarily because there cannot be an unconstitutional delegation of legislative authority within the Legislative Department. RB, pp. 29-30. Respondents also incorrectly assert that "the prohibition against delegation of legislative authority is, at its core, an issue involving separation of powers among the three branches of Idaho's government" and "to implicate the non-delegation doctrine, the delegation must be from the legislative branch to another, co-equal branch of Idaho's government, such as the Executive Department." Id.

Are we to believe the Legislature could constitutionally delegate its entire legislative or lawmaking power to its leadership, allowing the presiding officers alone to consider and vote to pass legislation? Or for that matter, to someone else who does not happen to be a co-equal branch of Idaho's government? The answer is fortunately and emphatically no.

Instead, while separation of powers among the co-equal branches of government can be and often is implicated in delegation issues, the core of the non-delegation doctrine is the fact that the legislative power of the state is vested exclusively in the Senate and House of Representatives pursuant to Article 3, § 1 of the Constitution.

As Respondents point out, the *Employers Resource* case also requires a consideration of the "practical context of the problem to be remedied and the policy to be served." *Employers Resource Management Co. v. Kealey,* 166 Idaho 449, ___, 461 P.3d 731, 736 (2020). It is no doubt practical for the leadership to supervise its organizational rules as their argument points out, and to allocate space for day-to-day purposes such as for lounges or conference rooms or a place for clerks to be. But is it practical, could it reasonably be understood that two members of Legislative Department would be delegated the authority to determine the use of the first floor in a manner that deprives the Treasurer, a constitutional officer, who has occupied the Capitol's first floor since its earliest times? It should not be.

When the District Court ruled that the Statute is self-effectuating, requiring no need for further determination by the Legislative Department as to the use to be made of the first floor and the area currently occupied by the Treasurer specifically, it interpreted the Statute in an unconstitutional manner that violates the non-delegation doctrine.

5. <u>This case presents a political question which this Court should not address</u>.

In their response to the Treasurer's argument on the political question doctrine, Respondents repeatedly remind us that it is the Court's duty to declare what the law is. RB, pp. 31-36. Respectfully, we can agree with what was said in *Marbury v. Madison,* 5 U.S. 137 (1803) over two hundred years ago. But that is not the issue here, because in one form or another, that is what courts always do, they declare what the law is.

The issue here is whether this case presents a political question that the Court should refrain from deciding. Deciding that question is itself a form of declaring what the law is. Traditions that spring from the heart of our form of government and the roles the judiciary and

the other branches play in it have generated a long line of precedent establishing that a court should sometimes refrain from "declaring what the law is," what a constitutional provision requires or what a statute means in certain circumstances, including situations where a political question is presented. That line of precedent is no less valid than the line that flows from *Marbury*.

In *Miles v. Idaho Power Co., 116 Idaho* 635, 778 P.2d 757 (1989), this Court noted that the political question issue, and justiciability issues in general, are more appropriately considered under the doctrine of separation of powers in Idaho, which is specifically embraced in Article 2, § 1 of the Idaho Constitution. *Miles,* 116 Idaho at 639, 778 P.2d at 761. As Respondents note in their brief, the doctrine is triggered when (1) a textually demonstrable constitutional commitment assigns the matter to a particular branch of government; or (2) the matter implicates another branch's discretionary authority." *Tucker v. State,* 162 Idaho 11, 29, 394 P.3d 54, 72 (2017) (*citing, Miles,* 116 Idaho at 639-40, 778 P.2d at 761-2).

Respondents assert in their brief that the Treasurer's argument fails to implicate either triggering event outlined in *Tucker*. RB, p. 34. Not true.

As outlined in the Treasurer's opening brief, textually demonstrable constitutional commitments assign exclusive roles to the Governor and the Legislature with respect to the enactment of legislation, the Legislature through the passage of bills by the Senate and House of Representatives, and the Governor through the veto power. Idaho Constitution, Art. 3 § 1; Art. 4 § 10. A necessary part of these constitutionally vested powers is the inherent -- and discretionary -- ability of the Governor and the Legislature to negotiate and perhaps agree on legislation and its effect. Thus, both triggering events outlined in *Tucker* are present in this case, contrary to Respondents' assertion.

The dual constitutional roles of the Governor and the Legislature here make this case more analogous to *Troutner v. Kempthorne*, 142 Idaho 389, 393, 128 P.3d 926, 930 (2006), which held that a political question was presented, than it is to *Miles* and the other recent cases Respondents rely upon in which it was not. In *Troutner*, the dual constitutional powers of the Governor's power to nominate and the Senate's power to confirm nominees were involved. *Troutner*, 142 Idaho at 393, 128 P.3d at 930. Here it is the Legislature's power to pass legislation and the Governor's power to veto, coupled with the necessary power to negotiate between themselves, that gives rise to the doctrine.

The Legislature, through its presiding officers and the Governor reached a comprehensive agreement regarding the renovation of the Capitol which included a documented agreement to leave the Treasurer's office where it has been since the Capitol was originally built, until such time as a Treasurer might choose to leave, as outlined in detail in the Treasurer's opening brief. This agreement is amply demonstrated in the record before this Court. R., pp. 83–84, 86–88,109–35, 257–58, 263–66, 270–71,337–38.

This case presents a political question, and the Court should decline to entertain it.

6. Respondents do not have standing to bring this action.

Respondents assert they have standing because the Statute grants them authority to allocate the space on the first floor of the Capitol and therefore, their standing is "consistent with" the standing granted to the entire Arizona Legislature in *Arizona State Legislature v. Arizona Independent Redistricting Commission,* 576 U.S. 787 (2015). RB, pp. 36-39. Such is not the case.

In *Arizona Legislature*, the controlling issue involved an institutional injury to the entire legislature caused by the adoption of Proposition 106, by vote of the people, that created

the Arizona Independent Redistricting Commission (the "AIRC"), and deprived the legislature of power to decide legislative redistricting issues. *Arizona Legislature,* 576 U.S. at 792, 802. The legislature sued the AIRC in federal court seeking a declaration that the AIRC and its map for congressional districts violated the "Elections Clause" of the U.S. Constitution. *Arizona Legislature, 576 U.S.* at 792. The Court held that the legislature had standing to pursue its claim. *Arizona Legislature, 576 U.S.* at 803-4.

In doing so, the Court distinguished its prior decision in *Raines v. Byrd,* 521 U.S. 811 (1997), which held that six individual members of Congress did not have standing to challenge the Line Item Veto Act. *Arizona Legislature,* 576 U.S. at 801-2. *Raines* also involved a claim of institutional injury (the diminution of legislative power). *Raines,* 521 U.S. at 821. In *Raines* however, the Court found it important that the members of Congress bringing the suit "have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit." *Raines,* 521 U.S. at 829 (emphasis added). In contrast, the Court distinguished *Raines* in the *Arizona Legislature* case on the basis that the legislature was "an institutional plaintiff asserting an institutional injury, and it commenced this action after authorizing votes in both of its chambers[…]" *Arizona Legislature,* 576 U.S. at 802 (emphasis added).

The *Raines* case involved individual members of Congress claiming an institutional injury where the suit had not been authorized by Congress, the institutional body involved. By contrast, the *Arizona Legislature* case involved the Arizona Legislature, the institutional body itself, asserting an institutional injury where the suit had actually been authorized by votes in both houses. Given those circumstances, it is not surprising that the Court found no standing in *Raines.* but found standing in *Arizona Legislature.*

Here, Respondents concede the alleged injury at stake is an institutional injury allegedly suffered by the "Legislative Department," i.e., the Legislature as a whole. RB, p. 38. And they further contend they have been authorized to seek judicial redress for that institutional injury on behalf of the entire Legislature, because the Statute provides they can allocate the space on the first floor of the Capitol.

Notwithstanding the fact that that they are authorized to allocate space under the Statute, the Legislature has not authorized them to bring this suit on its behalf for an admittedly institutional injury. There is no evidence that the Legislature has done so. This case is like *Raines*, not *Arizona Legislature*, and Respondents lack standing to bring this action.

CONCLUSION

Should the Court agree that leadership lacks standing to bring this action, or that a political question is presented, it must be dismissed.

If not, and if plain meaning is the lodestar of statutory interpretation, the Court must find that I.C. § 67-1602(3) intends that the Legislative Department must first determine the use of the new space it was given control of on the first floor of the Capitol, before leadership can allocate it. It has done so twice: first by amending the statute to provide a return of the Treasurer's office to the first floor once renovation of the Capitol was complete, and a second time by approving and funding the Capitol Commission's plan for renovation that specifically provided for the Treasurer's office continued presence on the first floor.

The Court should conclude either that the Legislative Department has determined that the use of the first floor is to include the Treasurer; or, that the Legislative Department must still act to determine the use; in either case the District Court's opinion giving that power to leadership alone, must be reversed.

Respectfully submitted this 28th day of December, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was on this date served upon the person(s) named below, at the addresses set out below, either by mailing, hand delivery, email service, facsimile or Odyssey E-File.

Dated this 28th day of December, 2020.

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