



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
RAÚL R. LABRADOR

ATTORNEY GENERAL OPINION NO. 24-01

TO: The Honorable Mike Moyle
Idaho House of Representatives
P.O. Box 83720
Boise, Idaho 83843

On March 4, 2024, we received your letter dated March 1 requesting a written opinion from the Attorney General regarding the scope of the authority of the University of Idaho Board of Regents and whether it may acquire, own, or operate a private institution of higher education by creating or authorizing the creation of a corporation. You have also asked whether a *quo warranto* action by the Attorney General would be appropriate if the Board has exceeded its constitutional authority. Your request raises important questions of Idaho law, and therefore this opinion is published as an official opinion of the Idaho Office of the Attorney General.

QUESTIONS PRESENTED

1. What is the scope of authority of the Board of Regents of the University of Idaho under Article IX, Section 10 of the Idaho Constitution?
2. What limitations, if any, are there to the scope of authority of the Board of Regents of the University of Idaho under Article IX, Section 10 of the Idaho Constitution?
3. Does the State Board of Education, in its capacity as the Board of Regents of the University of Idaho or in any other capacity, have the constitutional or statutory authority to:
 - a. Acquire a private institution of higher education?
 - b. Own a private institution of higher education?
 - c. Operate a private institution of higher education?
 - d. Create a corporation?
 - e. Authorize the creation of a corporation?

4. If the Board of Regents of the University of Idaho, in its corporate capacity, has exceeded its constitutional authority, would an action in the nature of *quo warranto* filed by you pursuant to I.C. § 6-602 be appropriate?

BRIEF ANSWER

The Board of Regents' scope of authority under the Idaho Constitution is limited to supervising and governing the University of Idaho. It may exercise "all powers necessary or convenient to accomplish" that object. IDAHO CONST. art. IX, § 10; 15th Territorial Sess. Laws (1888–89), pp. 17–21 ("Territorial Act").¹ But there are three limits on the Board's power that are relevant here: (1) the Board may not govern or supervise any institution other than the University of Idaho; (2) the Board may not exercise power that belongs to another branch of government; and (3) the Board cannot engage in activities that have a primarily private purpose. The Board's current effort to acquire, own, and operate the University of Phoenix through a private non-profit corporation that would be separate and distinct from the University of Idaho exceeds all three limits. And for the same reasons, the Board may not create, or authorize the creation of, a non-profit corporation to acquire, own, and operate a private institution of higher education.² The Board's actions may be challenged by the Attorney General through a direct claim under Idaho Code § 6-602, which is an action in the nature of *quo warranto*, a declaratory judgment action, or by seeking a writ of prohibition, all of which are appropriate vehicles to challenge the impermissible corporate charter.

BACKGROUND

To properly analyze your questions, certain relevant background information is necessary to provide context. We begin with a brief overview of the Board of Regent's actions related to the formation of Four Three Education, Inc., and the planned acquisition of the University of Phoenix.

On May 15, 2023, counsel for the University of Idaho, Kent Nelson, incorporated NewU, Inc. (later renamed Four Three Education, Inc.). He did so before the Board of Regents considered the action in an open meeting and before the Board authorized creation of NewU. That approval came later, on May 18, 2023, when the Board "authoriz[ed] creation of NewU, Inc."³ Nevertheless, NewU's existence began on May 15 and, as described below, the Board of Regents purported to serve as its sole member.

¹ The territorial act is set forth in its entirety in *Dreps v. Board of Regents of University of Idaho*, 65 Idaho 88, 139 P.2d 467, 468 n.1 (1943).

² This opinion does not address the more general question of whether the Board of Regents may ever form a corporation under any circumstances and for any purposes whatsoever.

³ May 18, 2023 Board of Education Meeting Minutes at 8, available at [May 18, 2023 Special Board meeting minutes \(idaho.gov\)](#).

The Articles of Incorporation that Mr. Nelson signed and filed made “the University of Idaho” the sole member of NewU, which again, is now Four Three.⁴ Somewhat differently, Four Three’s Bylaws identify the sole member as “the Regents of the University of Idaho.”⁵ The discrepancy is likely a result of imprecise drafting, and the Board of Regents appears to be the only legal entity serving as Four Three’s member. But when it comes to operating Four Three, the Articles of Incorporation invest all governing authority in a Board of Directors composed of no fewer than three persons. The Bylaws make clear that “all corporate powers shall be exercised by or under the direction of, and the business and affairs of the Corporation shall be managed under the direction of the Board of Directors.”⁶ Four Three is also required to have a President, Secretary, and Treasurer as corporate officers, and the President is required to be a member of the Board of Directors.⁷ The President is the “principal executive officer” of Four Three and “shall, in general, supervise and control all of the business and affairs of the Corporation.”⁸

Four Three’s stated purpose is to acquire and “operate the business of [the University of Phoenix] separately from, but in affiliation with” the University of Idaho.⁹ At the same time that the Board of Regents authorized creation of Four Three, it also authorized Four Three to execute an asset purchase agreement to acquire substantially all of the assets and assume certain liabilities of the University of Phoenix. Regarding liabilities, the Board of Regents has agreed to “co-sign University of Phoenix’s Program Participation Agreement and be financially responsible for their Title IV liability related to pre- and post-closing matters.”¹⁰

The base purchase price under the asset purchase agreement is \$550 million. But the Board of Regents has said that the transaction will require Four Three to obtain \$685 million in bond debt to finance the transaction. Although Four Three has not obtained financing commitments yet, it has said that the Board of Regents will obligate itself up to \$10 million per year for five years to secure the contemplated financing.¹¹ Without secured financing, it is uncertain whether Four Three will actually be able to sell bonds without additional backing from the Board of Regents.

⁴ NEWU, Inc. Articles of Incorporation, art. VII.

⁵ Bylaws § 2.1, available at [01 Agenda-Material Complete.pdf \(idaho.gov\)](#).

⁶ *Id.* § 3.1

⁷ *Id.* § 4.5.

⁸ *Id.*

⁹ May 18, 2023 Resolution; *see also* NewU, Inc. Articles of Incorporation, art. V § 1 (“To establish, operate, conduct, and administer a[n] . . . institution of higher education affiliated with The Regents of the University of Idaho”).

¹⁰ May 18, 2023, Board of Education Meeting Minutes at 5.

¹¹ *See* Testimony of C. Scott Green, JFAC Committee Hearing, June 16, 2023 (01:23:00–01:25:10).

The Board has stated repeatedly that the transaction will maintain a distinction between the University of Idaho and the University of Phoenix. During a June 2023 Joint Finance-Appropriations Committee oversight hearing, Board Member Dr. David Hill testified that Four Three will be “a separate affiliate entity that is not being merged into the University of Idaho” and that the two will be “separate and distinct.”¹² University of Idaho President C. Scott Green also told the House State Affairs Committee that “[t]he University of Phoenix is going to continue to operate as the University of Phoenix.”¹³ “They’re going to have their own management team, they will be moved into [Four Three] and continue to do business as the University of Phoenix. They will have their own independent board.”¹⁴ One reason President Green gave for the “independent” operation of the University of Phoenix as a private institution was “risk mitigation.”¹⁵

ANALYSIS

A proper analysis of your questions must start first with setting out several fundamental principles of law. This is particularly called for because the legal analysis provided by the Board to date has thus far leapfrogged, or simply ignored, the important rules of law on which Idaho’s constitutional scheme is premised.¹⁶ Each of the below principles provides a framework for analyzing the Board of Regent’s actions in forming Four Three and pursuing the University of Phoenix. And keeping them in mind focuses the analysis and demonstrates why the Board of Regents has acted beyond its constitutional authority.

1. The People’s Delegation of Constitutional Power is Limited.

In our political order, the people are sovereign, and the government may only exercise power that the people have delegated to it.¹⁷ That is why the Idaho Constitution explicitly provides that “[a]ll political power is inherent in the people.” IDAHO CONST. art. I, § 2. The Idaho Constitution is the instrument by which the people of Idaho have “instituted the government to do their will,” animating constitutional officers with “delegated power” to execute limited political functions. *Reclaim Idaho v. Denney*, 169 Idaho 406, 426, 497 P.3d 160, 180 (2021). In other words, because the original source of any governmental power is the people’s inherent power, and because the Idaho Constitution is the sole source of the

¹² *Id.* (33:59–34:36).

¹³ Testimony of C. Scott Green, House State Affairs Committee, Feb. 29, 2024 (01:10:21–01:10:25).

¹⁴ *Id.* (01:10:33–01:10:36).

¹⁵ *Id.* (58:42–58:51).

¹⁶ Memorandum (Feb. 28, 2024), available at [Hawley-Troxell-2.28.24.pdf \(idahoednews.org\)](https://www.idahoednews.org/Hawley-Troxell-2.28.24.pdf).

¹⁷ See The Declaration of Independence para. 2 (U.S. 1776) (“Governments are instituted among Men, deriving their just powers from the consent of the governed”).

delegation of that inherent power from the people to the government, the government may only exercise the power which has been expressly delegated by the Idaho Constitution.

As is plain from the provisions of the Idaho Constitution, the people have not made an unlimited grant of power. Indeed, the people have “retained” all rights not granted, IDAHO CONST. art I, § 21, and “the essential nature of all free governments” requires that governments possess only “limited and defined powers” to respect the people’s retained rights. *Citizens’ Savs. & Loan Ass’n v. City of Topeka*, 87 U.S. 655, 662-63 (1874). Those entrusted with constitutional power therefore may not act “beyond [the] constitutional authority” that has been expressly conveyed to them. *Reclaim Idaho*, 169 Idaho at 426, 497 P.3d at 180. The Idaho Supreme Court has described this limitation as a “fundamental principle.” *Id.*

2. The Idaho Constitution’s Separation of Power’s Provision Further Limits the Exercise of Governmental Power.

The Idaho Constitution provides another check on governmental power by “prohibit[ing] any branch of government from exercising powers that properly belong to another branch, unless expressly directed or permitted by the Idaho Constitution.” *State v. Moore*, 161 Idaho 166, 169, 384 P.3d 413, 416 (Ct. App. 2016). It is well known that the founders of the United States government feared the accumulation of powers in any one branch of government and believed the “preservation of liberty requires that the three great departments of power should be separate and distinct.”¹⁸ The resulting separation is “designed to preserve the liberty of all the people” by diffusing power and creating a “safeguard against the encroachment or aggrandizement of one branch at the expense of the other.” *Collins v. Yellen*, 141 S. Ct. 1761, 1780 (2021) (first quote); *Mistretta v. United States*, 488 U.S. 361, 382 (1989) (second quote).

That “separation of powers” principle is implicit in the United States Constitution, but it has been made explicit in Article II, Section 1 of the Idaho Constitution, which provides:

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.

Simply put, powers that the Idaho Constitution has given to one constitutional actor “cannot be delegated to another,” period. *Emps. Res. Mgmt. Co. v. Kealey*, 166 Idaho 449, 452, 461 P.3d 731, 734 (2020).

¹⁸ The Federalist No. 47 (James Madison).

3. The Public Purpose Doctrine Requires Government Activity to Advance Public Rather Than Private Ends.

The Idaho Constitution also forbids any state body from exercising its powers for primarily private rather than public ends. The “public purpose doctrine” provides that “no entity created by the state can engage in activities that do not have primarily a public, rather than a private purpose, nor can it finance or aid any such activity.” *Bd. of Cnty. Comm’rs of Twin Falls Cnty. v. Idaho Health Facilities Auth.*, 96 Idaho 498, 502, 531 P.2d 588, 592 (1974) (citation omitted). The Supreme Court has held that the public purpose restriction is “inherent throughout state government” and operates as “a fundamental limitation upon the power of state government under the Idaho Constitution.” *Id.* “A public purpose is an activity that serves to benefit the community as a whole and which is directly related to the functions of government.” *Idaho Water Res. Bd. v. Kramer*, 97 Idaho 535, 559, 548 P.2d 35, 59 (1976). “[A]n incidental or indirect benefit to the public” cannot “transform a private industrial enterprise into a public one, or imbue it with a public purpose.” *Vill. of Moyie Springs v. Aurora Mfg. Co.*, 82 Idaho 337, 346, 353 P.2d 767, 773 (1960).

A previous Attorney General opinion has summarized the reasons for the public purpose doctrine:

There are several justifications for this inferred constitutional principle. First, it prevents the public’s money from passing into the control of private associations or parties. *Fluharty v. Board of County Comr’s of Nez Perce County*, 29 Idaho 203, 158 P. 320 (1916). Likewise, it prevents the state or one of its subdivisions from aiding or promoting a particular commercial or industrial enterprise to the detriment of others in the field, *Village of Moyie Springs v. Aurora Mfg. Co.*, 82 Idaho 337, 353 P.2d 767 (1960), or conferring favored status on any private enterprise or individual in the application of public funds, *Boise Redevelopment Agency v. Yick Kong Corp.*, 94 Idaho 876, 499 P.2d 575 (1972). Finally, and perhaps most importantly, this limitation on government power precludes state action which principally aims to aid private schemes. *Idaho Water Resource Board v. Kramer*, 97 Idaho 535, 548 P.2d 35 (1976).

Idaho Att’y Gen. Opinion 95-7, 1995 WL 646503 at *2 (1995).

Questions 1 & 2: What is the scope of, and what are the limits on, the Board of Regents’ authority under Article IX, Section 10.

The Board of Regents is a public entity with a limited charter granting it only those powers that are “necessary or convenient to accomplish the objects and perform the duties prescribed by law.” 15th Territorial Sess. Laws (1888-89), pp. 17-21; *see also Dreps v. Board of Regents of University of Idaho*, 65 Idaho 88, 139 P.2d 467, 468 (1943). That grant of power provides it latitude to govern the University of Idaho without material interference but at the

same time limits it from undertaking separate and distinct endeavors, such as forming a non-profit to acquire, own, and operate a private institution of higher education.

In Article IX, Section 10, the Idaho Constitution did three general things related to the Board of Regents. It fixed the location of the University of Idaho; it incorporated the act of the territorial legislature that established the University of Idaho; and it confirmed that the Board of Regents would retain general supervision of the University. As relevant here, that section provides:

The location of the University of Idaho, as established by existing laws, is hereby confirmed. All the rights, immunities, franchises, and endowments, heretofore granted thereto by the territory of Idaho are hereby perpetuated unto the said university. The regents shall have the general supervision of the university, and the control and direction of all the funds of, and appropriations to, the university, under such regulations as may be prescribed by law.

Article IX, Section 10 limits the Board's authority to the "rights, immunities, franchises, and endowments, heretofore granted thereto by the territory of Idaho." IDAHO CONST. art. IX, § 10. The Idaho Constitution further grants to the Board the "general supervision of the university, and the control and direction of all funds of, and appropriations to, the university under such regulations as may be prescribed by law." *Id.* The Idaho Supreme Court has stated that the "regulations as may be prescribed by law" referred to in Article IX, Section 10 "refer to methods and rules for the conduct of its business and accounting to authorized officers," but "must not be of a character to interfere essentially with the constitutional discretion of the board, under the authority granted by the Constitution." *State ex rel. Black v. State Bd. of Educ.*, 33 Idaho 415, 196 P. 201, 204 (1921). In other words, the legislature may regulate matters that touch on the University of Idaho as long as its regulations do not frustrate or substantially interfere with the Board's exercise of its constitutional powers.

Beyond the limited text in the Constitution, the Supreme Court explained in *Dreps v. Board of Regents of University of Idaho* that Article IX, Section 10 incorporated the Territorial Act creating the University of Idaho "as fully as if it had been set out at length in the constitution." 65 Idaho at 95, 139 P.2d at 470. Section 3 of the Territorial Act provides that the "government of the University shall vest in a Board of Regents," which the Act constituted as "a body corporate" with "all the powers necessary or convenient to accomplish the objects and perform the duties prescribed by law." The Act also mandates that the Board of Regents "shall have the custody of the books, records, buildings and other property of said University." Section 5 of the Act provides that the "Board of Regents shall enact laws for the government of the University in all its branches." And Section 9 of the Act provides that the "object of the University of Idaho, shall be to provide the means of acquiring a thorough knowledge of the various branches of learning."

The Territorial Act places several important limitations on the Board's authority. For example, Section 3 permits the Board to take only such actions as are "necessary or convenient to accomplish the objects and perform the duties prescribed by law," but does not allow the Board to assume for itself new objects and new duties. Section 5 of the Territorial Act cabins the Board's authority to "enact laws for the government of the University in all its branches," but it has no authority to do so for other entities. And Section 9 defines the "object of the University of Idaho" as "providing the means of acquiring a thorough knowledge of the various branches of learning" through a public education, but it has no grant to engage or invest in private education.

The Idaho Supreme Court has had several occasions to examine the authority of the Board. On the one hand, the Court has stated that the "legislature has no power to impair, dissolve or destroy [the Board]." *Dreps*, 65 Idaho at 96, 139 P.2d at 471. Because the Board "received its charter and authority from the people at the same time and in the same manner the legislature was created," each is "independent and exclusive of the other in the sphere of its own purpose and objects." *Id.* But on the other hand, the Court has made equally clear that the Board of Regents may only exercise "granted powers," and it lawfully exercises power only "within the scope of its authority." *Black*, 33 Idaho at 429, 196 P. at 205 (emphasis added).¹⁹

In 1944, then-University of Idaho President Harrison Dale published a book entitled "Statutes and Decisions Relating to the University of Idaho" analyzing the legal foundations of the University of Idaho and its Board of Regents.²⁰ President Dale recorded some analysis from Pendleton Howard, then Dean of the University's College of Law, about whether the legislature could move the College of Agriculture outside of Moscow.²¹ After exhausting Idaho authorities, Dean Howard drew from Minnesota authority given Minnesota's identical constitutional provision.²² His analysis quotes from *Fanning v. University of Minnesota*, which explains that respect for the authority of the University's Board of Regents "does not mean that the people created a corporation or institution which is above the law" and that "[t]he board must keep within the limits of its grant."²³ He further explains that the Board of Regents "is charged with the duty of maintaining a university for the purpose of higher education," but "[t]here are many things which the board may not do," and because "the property of the

¹⁹ The Board has relied on *Black* as authority for its actions related to Four Three. But *Black* stands for the simple proposition that neither the legislature, nor any other constitutional actor, may prevent the Board from exercising its duly granted constitutional powers. The question at issue here is antecedent to the question the Supreme Court addressed in *Black*, namely whether the Constitution grants the Board authority in the first place to form a non-profit corporation to acquire, own, and operate a private institution of higher education. And on that question, the answer under the Idaho Constitution is "no." Indeed, *Black*'s only relevance to the questions posed is its emphasis that the Board must exercise powers within the scope of its authority.

²⁰ Harrison C. Dale, *Statutes and Decisions Relating to the University of Idaho* (1944).

²¹ *See id.* at 24.

²² *See id.* at 29.

²³ *Id.* at 29–30 (quoting *Fanning v. University of Minnesota*, 236 N.W. 217, 219 (1931)).

university is the property of the state which through its taxpayers is its chief supporter, . . . [t]he board cannot divert it to other than university purposes.”²⁴ The Board “must govern a university which the territorial statute and the Constitution established and perpetuated.”²⁵

So while the Board has been given the discretion to manage the affairs of the University of Idaho without material interference from another branch of government, that discretion is durable only so long as the Board is “functioning within the scope of its authority.” *Black*, 33 Idaho at 429, 196 P. at 205. Thus, the Board is no different from any other government actor—it has “granted power” and it must exercise that power “within the scope of its authority.” *See id.* And, perhaps most importantly, the Board “must govern a university which the territorial statute and the Constitution established and perpetuated,” not any other institution. Its charter is limited to the University of Idaho itself.

* * * * *

Question 3: May the Board of Regents acquire, own, and operate a private institution of higher learning and may it create, or authorize the creation of, a corporation to do so.

Idaho law does not allow the Board of Regents to acquire, own, and operate the University of Phoenix through Four Three Education, Inc. The Idaho Constitution grants the Board the power to “supervise” and “govern[]” the University of Idaho, a state institution of higher education. IDAHO CONST. art IX, § 10; Territorial Act § 2. The Board has powers “necessary or convenient” to “accomplish” the “objects” of the University of Idaho, but it does not have authority to take actions with an object other than supervising or governing the University of Idaho. Because the acquisition of the University of Phoenix is aimed at supervising and governing a private entity separate and distinct from the University of Idaho, it falls outside the scope of the Board’s constitutional power. *Reclaim Idaho*, 169 Idaho at 426, 497 P.3d at 180 (government actors cannot act “beyond [their] constitutional authority”).²⁶

In a related context, the United States Supreme Court has construed Congress’s “necessary and proper” clause to require that the Congress use means that are “plainly adapted” to an end it is empowered to pursue. *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819). By attempting to acquire and operate a private educational institution, the Board is exceeding both the subject—supervising the University of Idaho—and the object—public education—of its constitutional powers. *See id.* The Board’s exercise of power is not lawful simply because

²⁴ *Id.*

²⁵ *Id.*

²⁶ The analysis may be different if the University of Idaho were to acquire the assets of the University of Phoenix directly and use those assets in furtherance of the objects of the University of Idaho, but the University of Idaho has made clear that will not be the case. University of Idaho Office of the President, University of Phoenix FAQ, available at [University of Phoenix Affiliation FAQ | University of Idaho \(uidaho.edu\)](#) (last visited Mar. 7, 2024).

it claims that that the transaction furthers an educational mission. A closer connection is required, otherwise the Board could pursue any number of endeavors nationwide with merely an asserted connection to the University of Idaho. But the people did not empower the Board to acquire, own, or operate private enterprises—they entrusted the governance and supervision of their land-grant university to the Board.

That conclusion is facially plain from the text of the Constitution and structure of the transaction. But it can also be seen from the effects of the transaction. The Board's attempt to operate a nationwide educational institution distinct from the University of Idaho exceeds its granted authority and encroaches on the Legislature's authority to make decisions about higher education policy outside of the University of Idaho. *E.g.*, Chap. 21, Title 33, Idaho Code (governing the creation of community colleges in Idaho); Idaho Code § 33-4001 (creating Boise State University). The Board's overreach assumes for itself a power that the people have given to the Legislature alone—and that power is the determination of educational directives in Idaho.²⁷

The Board's proposed course of action would also violate the Idaho Constitution's public purpose doctrine. Creating a non-profit, authorizing the non-profit to acquire a private institution of higher learning by taking on \$685 million in bond debt, operating that private institution through a private Board of Directors that will have complete control over the functions and monies generated by the private institution, assuming the past and future liabilities of the private institution—which could measure in the hundreds of millions—and using that non-profit to educate students in dozens of foreign countries and nearly every sister state is not a primarily public purpose for an Idaho state body. Indeed, 99% of the University of Phoenix's enrollment does not even reside in Idaho, and there has been no mention of providing services that specifically focus on Idahoans or offering in-state tuition for Idahoans.²⁸

To be sure, promoting education as a general matter has a public purpose. But the “how” matters. And here, the “how” is overwhelmingly imbued with a private character. Again, the University of Idaho has made clear that the University of Phoenix will continue to operate as a private entity, whose employees “will not be state employees” and whose monies will be at the disposal and under the control of a private corporation. In addition, the new entity will be governed by a private Board of Directors.²⁹ The only “public” connection is the

²⁷ Apparently, the University of Idaho was previously collaborating with other state universities regarding an online education initiative, but those efforts have likely been materially impacted now that the Board of Regents is pursuing the University of Phoenix. That is just one small example of the Board of Regents' decision impacting broader Idaho educational policies. *See generally* House State Affairs Committee, Feb. 29, 2024 (01:25:25–01:27:59)

²⁸ *See* House State Affairs Committee, Feb. 29, 2024 (01:35:09–01:35:19).

²⁹ According to Four Three's Bylaws, the University of Phoenix will be governed by a private Board of Directors, with its own president who does not report to the Board of Regents. In fact, President Green told

state's credit and obligation to secure financing for the private endeavor.³⁰ But all of that underscores the private nature of the University of Phoenix and Four Three and runs headlong into the Idaho Constitution's prohibition on using state power to finance and aid private enterprises.³¹ Under the public purpose doctrine, the Board of Regents, therefore, may not engage in operating the University of Phoenix as a private higher education institution nor may it fund the acquisition, as it is slated to do.³² *Bd. of Cnty. Comm'rs of Twin Falls Cnty.*, 96 Idaho at 502, 531 P.2d at 592. Incidental benefits to the University of Idaho, whether monetary or other, do not change that conclusion. *Moyie Springs*, 82 Idaho at 346, 353 P.2d at 773.

Requiring public entities to act for public purposes preserves the ability of the people from whom the Board "gets its authority" to oversee the use of that authority. *Dreps*, 65 Idaho at 97, 139 P.2d at 471. If the Board could conduct a portion of its operations through a self-created private division, those operations would likely be insulated from the oversight and limitations that the people have placed on the exercise of government power, potentially including the Open Meeting Law, Public Record Act, and audits by the Legislative Services Office. Idaho Code § 74-203 (requiring the "governing body of a public agency" to hold open meetings); Idaho Code § 74-102 (requiring "public records" to be made available to the public); Idaho Code § 67-702(2) (permitting the legislative services office to audit any institution that receives an appropriation).³³ Whereas the Board is required to comply with these laws, nothing will require Four Three to comply with them.

Even assuming that acquiring and operating the University of Phoenix as a private institution of higher learning were within the scope of the Board's authority (*i.e.*, necessary and convenient to accomplishing its public education objective), it would be improperly delegating the "ultimate responsibility for fulfilling [its] constitutional duty" to Four Three's officers and Board of Directors. *See Osmunson v. State*, 135 Idaho 292, 296, 17 P.3d 236, 240 (2000). Maintaining a removal power over those private parties by virtue of being the sole member of Four Three is not enough where those private parties are authorized to "supervise and control

the State Affairs Committee that current University of Phoenix president, Chris Lynn, would continue to serve as president upon Four Three's acquisition of the University of Phoenix.

³⁰ University of Idaho Office of the President, University of Phoenix FAQ, available at [University of Phoenix Affiliation FAQ | University of Idaho \(uidaho.edu\)](https://www.uidaho.edu/affiliation-faq) (last visited Mar. 7, 2024).

³¹ *Cf.* IDAHO CONST. art. VIII, § 2(1) ("The credit of the state shall not, in any manner, be given, or loaned to, or in aid of any individual, association, municipality or corporation; nor shall the state directly or indirectly, become a stockholder in any association or corporation").

³² University of Idaho Office of the President, University of Phoenix FAQ, available at [University of Phoenix Affiliation FAQ | University of Idaho \(uidaho.edu\)](https://www.uidaho.edu/affiliation-faq) (last visited Mar. 7, 2024) ("Should the not-for-profit corporation miss payments on debt related to the acquisition, U of I is agreeing to guarantee up to \$10 million annually to cover the payment").

³³ Similarly, no policy or law exists that would require Four Three to offer in-state tuition rates to Idaho residents. *Cf.* Idaho Code § 33-3717A.

all of the business and affairs of the Corporation.”³⁴ Four Three’s Board of Directors would not need to receive approval from the Board of Regents on *any* decision. Additionally, the Territorial Act requires the Board of Regents to maintain “custody” over all “property” of the University of Idaho. It has no power to authorize a transaction that ultimately vests ownership of the property with a separate entity, as will be the case with Four Three and the University of Phoenix.

Ironically, the Board’s argument that it is merely exercising its constitutionally delegated powers by using a non-profit to carry out its essential functions makes the structure of the University of Phoenix transaction unconstitutional because it affords the Legislature impermissible power over the Board. The two government bodies are to be “independent and exclusive of the other in the sphere of its own purpose and objects,” *Dreps*, 65 Idaho at 96, 139 P.2d at 471, so if acquiring, owning, and operating the University of Phoenix were a proper object of the Board (and, for the reasons described, it is not), the Board cannot make itself “subject to the control or supervision” of the Legislature in carrying out that function. *Black*, 33 Idaho at 429, 196 P. at 205. But a non-profit corporation is a “creature of statute” whose powers and limitations are proscribed by the Legislature. *State v. Adjustment Dep’t Credit Bureau, Inc.*, 94 Idaho 156, 158, 483 P.2d 687, 689 (1971); IDAHO CONST. art. XI, § 2 (“the legislature shall provide by general law for the organization of corporations hereafter to be created: provided, that any such general law shall be subject to future repeal or alteration by the legislature”). The Board’s operation of Four Three would therefore improperly subject the Board to legislative control, entangling two bodies whose spheres of authority must be kept separate.

The Board is a constitutional entity with one constitutionally assigned role: to govern and supervise the University of Idaho. It may not unilaterally expand its role beyond what the people have authorized. And the Board’s chimerical self-transformation into a quasi-public and quasi-private body is particularly concerning. Its hybrid status would allow it to accept the benefits of governmental status and funds while simultaneously insulating itself from public oversight laws. Accordingly, the acquisition of the University of Phoenix (or the concomitant transformation it would effect) is inconsistent with Idaho’s constitutional limitations on the Board’s authority.

* * * * *

Question 4: Whether an Attorney General action in the nature of quo warranto, Idaho Code § 6-602, is appropriate in the event the Board of Regents has exceeded its authority by forming Four Three to acquire and operate the University of Phoenix.

Idaho Code § 6-602 provides for an action in the nature of *quo warranto* to “be brought in the name of the people of the state against any person who usurps . . . or exercises any

³⁴ Bylaws § 4.5.

office or franchise . . . without authority of law.” *See also People ex rel. Neilson v. Wilkins*, 101 Idaho 394, 396, 614 P.2d 417, 419 (1980) (Section 6-602 “is a quo warranto proceeding”). The Attorney General is charged by the statute with “the duty” to prosecute the action “when the office or franchise relates to the state.” *Id.* Historically, an action in the nature of *quo warranto* has been used as a vehicle to challenge the validity of a corporate charter. *See Clemens v. Pinehurst Water Dist.*, 81 Idaho 213, 219–20, 339 P.2d 665, 669–70 (1959).³⁵ Thus, a direct action under Section 6-602 is appropriate to challenge the Board of Regents’ creation of Four Three.³⁶

There are also other vehicles to challenge the Board of Regents’ action, including a declaratory judgment action and a writ of prohibition. The Attorney General would have standing to bring both based on Idaho Code § 6-602’s mandatory language giving the Attorney General the duty of enforcing the statute as well as on his “unique position . . . as counsel for the State of Idaho.” *Wasden v. St. Bd. of Land Comm’rs*, 153 Idaho 190, 195–96, 280 P.3d 693, 698–99 (2012) (“[I]t seems axiomatic that the Attorney General must step forward to defend the constitution”). Regarding a writ of prohibition, the Idaho Supreme Court has noted that early cases examining the issuance of the writ “conspicuously failed to closely examine the question of a ‘plain, speedy, and adequate alternative’” to the writ. *Wasden ex rel. State v. Idaho St. Bd. of Land Comm’rs*, 150 Idaho 547, 553, 249 P.3d 346, 352 (2010) (rejecting application for writ of prohibition); Idaho Code § 7-402. Because the Declaratory Judgment Act and Idaho Code § 6-602 likely provide an adequate remedy at law in many circumstances where the Attorney General could challenge the validity of a corporate charter, the writ of prohibition may be unavailable. *See* Idaho Code § 10-1201.³⁷

To the extent it is unclear which vehicle would be proper, nothing prevents the Attorney General from pursuing an action in the nature of *quo warranto* and seeking a declaratory judgment and writ of prohibition in the alternative. *See* I.R.C.P. 8(d)(3) (“A party may state as many separate claims or defenses as it has, regardless of consistency”).³⁸

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³⁵ *See also* Bart W. Harwood, *Law of Quo Warranto in Idaho*, 4 Idaho L. Rev. 26, 37–38 (1967).

³⁶ This opinion does not address who would be a proper defendant in such an action. Whether an action may be brought against Four Three, the Board of Regents, the incorporator of Four Three, or some other person is beyond the scope of the opinion request.

³⁷ Moreover, because “[t]he writ of prohibition is not a remedy in the ordinary course of law, but is an extraordinary remedy,” the Supreme Court will only issue it “with caution.” *The Associated Press v. Second Jud. Dist.*, 172 Idaho 113, 529 P.3d 1259, 1266 (2023).

³⁸ Whether a party could invoke the Supreme Court’s original jurisdiction to seek these forms of relief depends on whether the declaratory judgment and *quo warranto* forms of relief are “necessary to resolve [his] writ claim.” *Idaho State Athletic Comm’n ex rel. Stoddard v. Off. of the Admin. Rules Coordinator*, 542 P.3d 718, 727 (Idaho 2024).

For the reasons above, the Board lacks the authority to acquire, own, and operate the University of Phoenix through a non-profit corporation. While the Board has broad authority to take actions necessary to accomplish the objects of the University of Idaho, its authority is limited by the Constitution to governing the University of Idaho. The Board has not been granted the authority by the Constitution to govern a separate private university through a distinct non-profit corporation—that authority rests with the legislature. Finally, given the University of Idaho’s intention to operate the University of Phoenix as a separate and distinct private university, the proposed transaction violates the public purpose doctrine.

AUTHORITIES CONSIDERED

1. Idaho Constitution:

Article I, § 2
Article I, § 21
Article VIII, § 2
Article IX, § 10
Article XI, § 2

2. Idaho Code:

§ 6-602
§ 7-402
§ 10-1201
§ 33-3717A
§ 33-4001
§ 67-702
§ 74-102
§ 74-203

3. Idaho Cases:

Bd. of Cnty. Comm’rs of Twin Falls Cnty. v. Idaho Health Facilities Auth.,
96 Idaho 498, 531 P.2d 588 (1974)
Clemens v. Pinehurst Water Dist.,
81 Idaho 213, 339 P.2d 665 (1959)
Dreps v. Board of Regents of University of Idaho,
65 Idaho 88, 139 P.2d 467 (1943)
Emps. Res. Mgmt. Co. v. Kealey,
166 Idaho 449, 452, 461 P.3d 731, 734 (2020)

Idaho State Athletic Comm'n ex rel. Stoddard v. Off. of the Admin. Rules Coordinator,
542 P.3d 718 (Idaho 2024)
Idaho Water Res. Bd. v. Kramer,
97 Idaho 535, 548 P.2d 35 (1976)
Osmunson v. State,
135 Idaho 292, 17 P.3d 236 (2000)
People ex rel. Neilson v. Wilkins,
101 Idaho 394, 614 P.2d 417 (1980)
Reclaim Idaho v. Denney,
169 Idaho 406, 497 P.3d 160 (2021)
State ex rel. Black v. State Bd. of Educ.,
33 Idaho 415, 196 P. 201 (1921)
State v. Adjustment Dep't Credit Bureau, Inc.,
94 Idaho 156, 483 P.2d 687 (1971)
State v. Moore,
161 Idaho 166, 384 P.3d 413 (Ct. App. 2016)
The Associated Press v. Second Jud. Dist.,
172 Idaho 113, 529 P.3d 1259 (2023)
Vill. of Moyie Springs v. Aurora Mfg. Co.,
82 Idaho 337, 353 P.2d 767 (1960)
Wasden ex rel. State v. Idaho St. Bd. of Land Comm'rs,
150 Idaho 547, 249 P.3d 346 (2010)
Wasden v. St. Bd. of Land Comm'rs,
153 Idaho 190, 280 P.3d 693 (2012)

4. Other Cases

Citizens' Savs. & Loan Ass'n v. City of Topeka,
87 U.S. 655 (1874)
Collins v. Yellen,
141 S. Ct. 1761 (2021)
McCulloch v. Maryland,
17 U.S. 316 (1819)
Mistretta v. United States,
488 U.S. 361 (1989)

5. Other Authorities:

15th Territorial Sess. Laws (1888–89)

Bart W. Harwood, Law of Quo Warranto in Idaho, 4 Idaho L. Rev. 26 (1967)

The Declaration of Independence (U.S. 1776)

The Federalist No. 47 (James Madison)

Harrison C. Dale, Statutes and Decisions Relating to the University of Idaho (1944)

Idaho Att'y Gen. Opinion 95-7, 1995 WL 646503 (1995)

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Dated this 11th day of March, 2024.

A handwritten signature in blue ink that reads "Raúl R. Labrador". The signature is fluid and cursive, with the first name "Raúl" and last name "Labrador" clearly distinguishable.

RAÚL R. LABRADOR

Attorney General