# IDAHO ATTORNEY GENERAL'S ANNUAL REPORT

# OPINIONS

# CERTIFICATES OF REVIEW

AND

# SELECTED ADVISORY LETTERS

FOR THE YEAR

## 2019

**Lawrence G. Wasden**
Attorney General

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This volume should be cited as:

2019 Idaho Att'y Gen. Ann. Rpt.

Thus, the Official Opinion 19-1 is found at:

2019 Idaho Att'y Gen. Ann. Rpt. 5

Similarly, the Certificate of Review of April 8, 2019 is found at:

2019 Idaho Att'y Gen. Ann. Rpt. 21

The Advisory Letter of January 11, 2019 is found at:

2019 Idaho Att'y Gen. Ann. Rpt. 123

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**Lawrence G. Wasden**

Attorney General

## INTRODUCTION

My Fellow Idahoans:

2019 marked my 17th year as your Attorney General. A year into my fifth term, I remain proud of the work my office has performed as the state's chief legal resource. It is an honor to serve in this capacity and I am pleased to offer the following volume as a representation of my office's work during the past year.

As you use this resource, my hope is that a main guiding principal during my time in office is clear - adherence to the Rule of Law and serving the state with accurate and objective legal advice. Seventeen years into my tenure as Attorney General, I remain as steadfastly committed to this mission as ever.

New to my office in 2019 was the podcast *Counsel for the State*, launched in April. By the end of its first season, we produced 14 episodes focusing on the work of the Office of the Attorney General. Topics included consumer protection issues, government transparency, as well as open meetings and public records law. My goal with this outreach tool is to speak directly to Idahoans about the role of the Attorney General in Idaho's government.

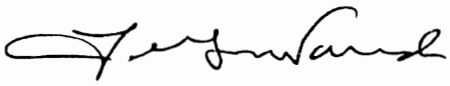
The office also launched an updated website for the Internet Crimes Against Children (ICAC) Unit. ICAC, headquartered in the office's Criminal Law Division, remains a leader in the protection of Idaho children from predators looking to exploit them via digital means. The new website contains information for children, parents and educators and will further ICAC's mission of providing Idahoans with information they can use to help protect children online.

And, once again, my staff and I partnered with Idahoans for Openness in Government, and several news outlets, holding three fall seminars in McCall, Boise and Nampa. Since 2004, we have conducted 46 of these trainings around the state.

The accomplishments listed above were in addition to the steady, principled and sage legal counsel dozens of dedicated Deputy Attorneys General provided to offices, agencies and boards throughout Idaho state government.

I encourage you to visit my website at www.ag.idaho.gov to learn more about the office, the work being done, the resources available for consumers, and other legal matters.

Thank you for your interest in Idaho's legal affairs.



LAWRENCE G. WASDEN
Attorney General

# OFFICE OF THE ATTORNEY GENERAL
# LAWRENCE G. WASDEN
# ATTORNEY GENERAL
## 2019
## STAFF ROSTER

### ADMINISTRATION

| | | | | |
|---|---|---|---|---|
| Sherman Furey III<br>Chief Deputy | Brian Kane<br>Assistant Chief Deputy | Janet Carter<br>Executive Assistant | Kimi White<br>Paralegal | Kara Holcomb<br>Receptionist/Secretary |

### DIVISION CHIEFS

Tara Orr, Administration & Budget
Steven Olsen, Civil Litigation
Brett DeLange, Consumer Protection
Andrew Snook, Contracts & Administrative Law
Paul Panther, Criminal Law
Nicole McKay, Health & Human Services
Darrell Early, Natural Resources

### DEPUTY ATTORNEYS GENERAL

| | | | | |
|---|---|---|---|---|
| Robert Adelson | Katylyn DeVries | Kenneth Jorgensen | Owen Moroney | James Stoll |
| Lawrence Allen | Thomas Donovan | Amber Kauffman | David Morse | Steven Strack |
| LaMont Anderson | Merritt Dublin | Angela Kaufmann | Stephanie Nemore | Lincoln Strawhun |
| James Baird | Douglas Fleenor | John Keenan | Charina Newell | Floyd Swanton Jr |
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| Timothy Davis | Matthew Hunter | John McKinney | Erick Shaner | Hannah Young |
| Patrick Denton | Blair Jaynes | Madison Miles | Karen Sheehan | Scott Zanzig |
| | Edward Jewell | Alana Minton | Phil Skinner | |

### INVESTIGATORS

| | | | | |
|---|---|---|---|---|
| Ken Boals | Chris DeLoria | Asmir Kararic | Chris McCormick | Robert Solito |
| Mark Dalton | Tami Faulhaber | Eric Lewis | Dana Miller | Michael Steen |
| Arena Dawson | Chris Hardin | Gregg Lockwood | Jeffrey Peterson | Tyler Teuscher |
| | David Holt | | Tamara Pittz | |

### PARALEGALS

| | | | | |
|---|---|---|---|---|
| Mandy Ary | Kimberle English | Bernice Myles | Christine Riggs | Stephanie Sze |
| Patricia Campbell | Rita Jensen | Catherine Minyard | Victoria Rutledge | Lisa Warren |
| Suzy Cooley-Denney | Beth Kittelmann | Angel O'Brien | Sandra Seevers | Paula Wilson |
| Mathew Cundiff | | Rena Rallis | | Colleen Young |

### NON-LEGAL PERSONNEL

| | | | | |
|---|---|---|---|---|
| Renee Ashton | Patrick Donnellon | Jacob Kofoed | Kathleen Popp | Carla Shupe |
| Kelly Bassin | Deborah Forgy | Melanie Kolbasowski | Lee Post | Rebekah Skriletz |
| Kriss Bivens Cloyd | Colleen Funk | Elaine Maneck | Lorraine Robinson | Alicia Spero |
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| Melinda Bouldin | Leslie Gottsch | Ronda Mein | Dustin Russell | Teresa Taylor |
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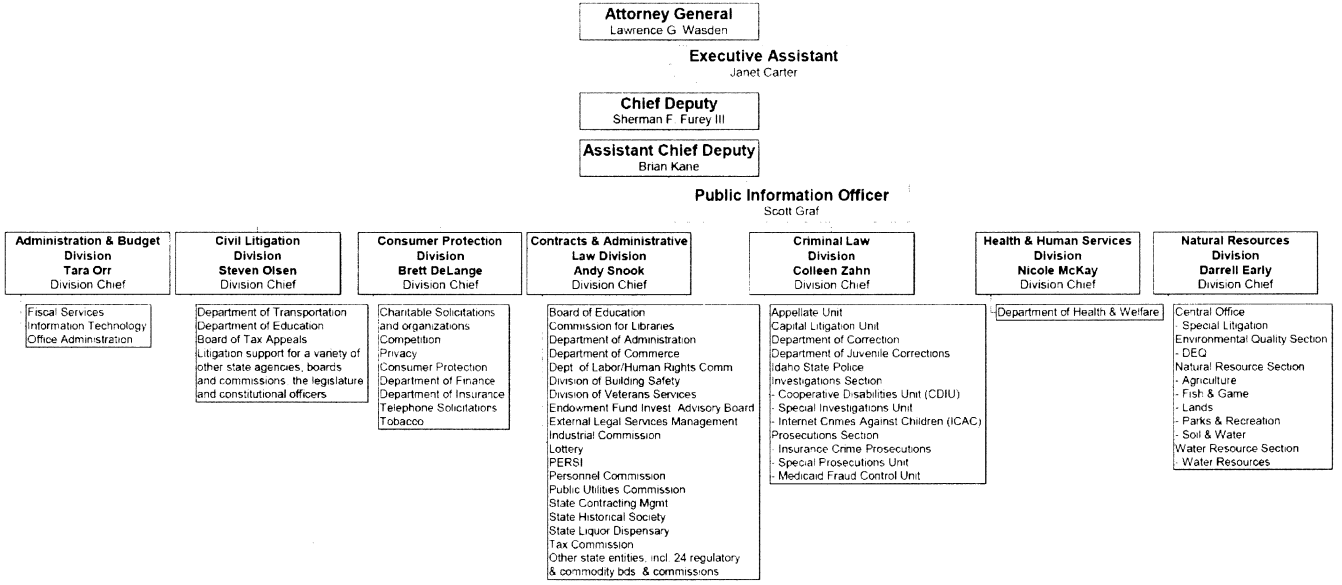
| Kevin Day | Rebecca Ihli | Mariah Nilges | Micki Schlapia | Robert Wheiler |
| DeLayne Deck | Trudy Jackson | Frances Nix | Kayla Sharp | Victoria Wigle |

# Office of the Idaho Attorney General
## Organizational Chart - 2019



# OFFICIAL OPINIONS
# OF
# THE ATTORNEY GENERAL
# FOR THE YEAR 2019

**LAWRENCE G. WASDEN**

**ATTORNEY GENERAL**
**STATE OF IDAHO**

## ATTORNEY GENERAL OPINION NO. 19-1

TO: Ed Schriever, Director
Idaho Department of Fish and Game
P. O. Box 25
Boise, ID 83707

Per Request for Attorney General's Opinion

This letter responds to your questions concerning terms required by the U.S. Department of Agriculture (USDA) in permits for USDA sites. Specifically, the USDA has requested that the Idaho Department of Fish and Game (IDFG) indemnify the United States and that it provide commercial insurance policies naming the United States as an additional insured. Alternatively, the USDA has offered that it will accept a self-insurance program if the State of Idaho names the United States as an insured and the program provides coverage up to the limits of the required commercial insurance.

### QUESTIONS PRESENTED

1. Can the State of Idaho contract to indemnify another party to an agreement?

2. Does the State of Idaho's self-insurance program offer status as an additional insured for a party to an agreement with the State of Idaho?

3. Is there a limit to payments under the State of Idaho's self-insurance program?

### CONCLUSION

For the reasons discussed below, I conclude that the terms requested by the USDA are contrary to Idaho law. Unless funded by a specific appropriation, a contractual indemnification obligation violates the Idaho Constitution and Idaho statutes based on the Constitution. Idaho law also does not establish a program of insurance for the State

of Idaho with authority to name parties contracting with the state as additional insureds or provide specific limits of payment similar to private insurance coverage.

## ANALYSIS

### A. A Contractual Indemnification Must be Funded by Legislative Appropriation

An indemnification is a contractual promise to pay for and provide a legal defense for a claim related to the contract and made against another contracting party. In addition, an indemnification is a promise to pay any costs arising from the claim, such as costs imposed through a settlement or court judgement. When the promise will be called is indefinite. An indemnification obligation can arise during the current Idaho budget year or in a future budget year.

In Idaho Attorney General Opinion No. 79-13, the Attorney General opined that a contractual indemnity clause where a city and a county agreed to hold the federal government harmless from contingent or tort damages arising from the federal government's acts or omissions under the agreement would likely violate the Idaho Constitution's limit of indebtedness by local governments. 1979 Idaho Att'y Gen. Ann. Rpt. 77. Although the Attorney General has not issued a formal opinion concerning contractual indemnity terms for state agencies, it has consistently advised that such terms are in violation of Idaho law.

The Idaho Constitution contains a limitation on indebtedness by the State of Idaho that parallels the provision for local governments. Idaho Const. art. VIII, § 1. In addition, the Idaho Constitution provides that "[n]o money shall be drawn from the treasury, but in pursuance of appropriations made by law." Idaho Const. art. VII, § 13. The Idaho Legislature has further defined the limits established by the Idaho Constitution in statute. The following prohibition, first enacted in 1914, provides:

> No officer, employee or state board of the state of Idaho, or board of regents or board of trustees of any state institution, or any member, employee or agent

> thereof, shall enter, or attempt to offer to enter into any contract or agreement creating any expense, or incurring any liability, moral, legal or otherwise, or at all, in excess of the appropriation made by law for the specific purpose or purposes for which such expenditure is to be made, or liability incurred, except in the case of insurrection, epidemic, invasion, riots, floods or fires.

Idaho Code § 59-1015; *see* 1982 Idaho Att'y Gen. Ann. Rpt. 117 (opining that Idaho Code section 59-1015 prohibits establishing a debt or liability in excess of an appropriation that is for the debt or liability and exists at the time the debt or liability is incurred). The two Idaho Code sections following this prohibition provide that any term in violation of the prohibition is void and penalize public officials who enter agreements with a term imposing an unappropriated expense. Idaho Code §§ 59-1016 and 59-1017. In 2015, the Idaho Legislature specifically affirmed in the Rules of the Division of Purchasing that terms imposing an indemnification obligation without a specific appropriation for the obligation are void under Idaho Code section 67-9213. IDAPA 38.05.01.112.02.a.

In limited circumstances, an indemnification obligation is authorized by the Idaho Legislature. *See* Idaho Code §§ 6-903 (providing for indemnification of public employees acting in the course and scope of employment), 14-520 (providing that the unclaimed property administrator shall indemnify and defend a holder delivering unclaimed property to the administrator in good faith against a claim for the property delivered). In the instances where indemnification is authorized in Idaho statute, a corresponding fund for payment of the resulting costs is also established. *See* Idaho Code §§ 6-919 (establishing the retained risk program funded by the retained risk account) and 14-523 (authorizing payments from the continuously appropriated unclaimed property account); *see also,* Idaho Code § 6-922 (limiting unfunded tort liability to payment from appropriations for such liability). Absent legislative authorization and corresponding appropriation, an indemnification violates article VII, section 13 and article VIII, section 1 of the Idaho Constitution; Idaho Code section 59-1015; and, where IDAPA 38.05.01.112.02.a. is applicable, Idaho Code section 67-9213.

Many states find the same prohibition in corresponding constitutional and statutory provisions.[1] Federal agencies are subject to a similar prohibition. Indemnification Agreements & the Anti-Deficiency Act, 8 Op. O.L.C. 94, 1984 WL 178357 (1984) (discussing application of the anti-deficiency act to indemnification agreements); *see also* The Anti-Deficiency Act Implications of Consent by Gov't Employees to Online Terms of Serv. Agreements Containing Open-Ended Indemnification Clauses, 2012 WL 5885535 (O.L.C. Mar. 27, 2012) (reviewing the anti-deficiency act and indemnification agreements in online terms of service).

In correspondence to the Idaho Office of the Attorney General, the USDA provided excerpts from Forest Service guidance concerning "standard, nationally approved modified liability clauses for states." These standard terms provide an unqualified indemnification of the United States "subject to" the limits on the state party's liability in the state's tort claims act. Indemnification is an obligation assumed under a contract. The Idaho Tort Claims Act waives the state's sovereign immunity for claims arising in tort up to a statutory limit. The Act does not waive immunity related to or address claims arising in contract such as an indemnification agreement. As discussed above, an indemnification obligation in a state agency contract not funded by legislative appropriation is void and state agencies do not have authority to accept such an obligation. Conditioning a contractual indemnification obligation on the Idaho Tort Claims Act does not avoid the Idaho constitutional and statutory limits on the contractual obligation. *See* 1999 Miss. Att'y Gen. Op. 241, 1999 WL 535496 (Miss. A.G.) ("[T]he addition of the phrase 'to the extent permitted by Mississippi law' to the limitation of liability and to the indemnification and hold harmless language . . . , in our opinion, has no legal effect.").

**B. The Liability Terms Requested by the USDA Are Private Insurance Terms Not Authorized Under the State of Idaho's Self-Insurance Program**

The USDA has also requested that the Department of Fish and Game procure commercial general liability (CGL) insurance with a limit of one million dollars per incident and two million dollars in the aggregate naming the United States as an additional insured. Alternatively, the USDA has offered that it will accept a self-insurance

program if the State of Idaho names the United States as an "additional insured" and provides "coverage" to the dollar limit provided by the requested private insurance.

Idaho law has not established a self-insurance program with authority to grant "additional insured" status or to provide specific dollar limit coverage as is provided under private insurance policies. Idaho law provides for a comprehensive liability plan known within Idaho State government as the "retained risk program." The retained risk program is to be provided by the Administrator of the Department of Administration's Division of Insurance Management (Risk). Idaho Code § 6-919. The retained risk program is not a policy of insurance under Idaho law because it is not a contract between the State of Idaho and any other party. *See* Idaho Code §§ 41-102 (definition of insurance) and 41-103 (definition of insurer).

The retained risk program is funded by the continuously appropriated retained risk account. Idaho Code § 67-5776. Idaho law provides that the retained risk account shall be used solely for the purposes set forth in Idaho Code section 67-5776, which include the costs of private insurance, the costs of maintaining the Risk office, and payment of losses "suffered by the state as to property and risks which at the time of the loss were eligible for such payment under guidelines theretofore issued by the director of the department of administration." Unlike an additional insured on a private insurance policy, a third party cannot make a claim against the retained risk account. Except as provided in the Idaho Tort Claims Act, there is no monetary limit to payment of losses within the retained risk program in Idaho law and nothing akin to the per occurrence or aggregate coverage of a private insurance policy.

If the USDA's terms are not adjusted to account for the nature of the retained risk program, the IDFG may request that the Director of the Department of Administration consider the purchase of private insurance policies providing the requested coverage. The Idaho Legislature has required the Director of the Department of Administration to determine the nature and extent of agency needs for private insurance coverages. Idaho Code § 67-5773. In addition, only the Risk Administrator is authorized to procure private liability insurance on behalf of the state. Idaho Code § 6-920. Absent the consent of the

Director and the purchase by Risk, the IDFG is not authorized to provide a private policy of insurance for the benefit of the United States.

Even if the Director of the Department of Administration determines a private insurance policy is appropriate and the Risk Administrator is able to procure a policy, the inclusion of a third party as an additional insured on the policy could raise legal concerns. At least two state attorneys general have concluded that doing so is equivalent to an agreement to indemnify a third party. 2007 Okla. Att'y Gen. Op. 41, 2007 WL 4699715; 2000 Fla. Att'y Gen. Op. 22, 2000 WL 347547 (opining that county was not authorized to "purchase insurance for the benefit of the other party to a contract, effectively providing for the indemnification of the other party.").

**C. Template Idaho Terms**

Following the USDA's contact with IDFG, legal counsel for USDA contacted the Idaho Office of the Attorney General and requested that this Office provide a "template for the liability language in Idaho's permits." The information submitted with the request indicates that the permits at issue involve counties, cities, higher education institutions, school districts, and highway districts. The Idaho Office of the Attorney General does not represent these entities or negotiate contracts on their behalf.

Below I provide sample language the Idaho Office of the Attorney General has previously recommended for use by State of Idaho agencies in agreements with agencies of the United States.

> Allocation of Risk. Federal Entity and Idaho Agency shall be responsible only for the acts, omissions or negligence of such party's own employees and agents. Nothing in this Agreement shall extend the tort responsibility or liability of the State of Idaho or the United States beyond that required by law, including for the State of Idaho the Idaho Tort Claims Act, Idaho Code section 6-901, *et seq*.
>
> Each party shall be responsible for damage to property of the other party caused by its employees and agents

in the performance of the Agreement. If a property claim or damage is not covered by the party's self-insurance or other property coverage, the responsible party shall pay the costs arising from such claim or damage to the extent funds are legally available therefor. If a claim or damage arises from more than one party's performance of the Agreement or is not allocable to any party, each party shall pay the costs to such party arising from the claim or damage.

Insurance. Insurance requirements in the Agreement may be evidenced by a Certificate of Financial Responsibility or other evidence of a self-insurance or a pooled or cooperative liability program for the State of Idaho or Federal Entities. If any coverage required by the Agreement is provided by private insurers or quasi-governmental entities regulated under applicable insurance codes or laws, the insured party shall provide coverage and evidence of coverage as set forth in the Agreement.

Idaho higher education institutions and political subdivisions are governed by provisions in the Idaho Constitution, Idaho statutes, ordinances of the political subdivision, and policies of the higher education institution's regents or governing board imposing similar restrictions as those applicable to State of Idaho agencies. Political subdivisions and their legal counsel may find that the above terms require limited modification to meet the entity's requirements.

## CONCLUSION

The Idaho Constitution establishes the appropriation process to ensure both the Idaho legislative and executive branches approve the expenditure of public funds. A contractual indemnity not funded through the appropriation process is contrary to Idaho law and State of Idaho agencies do not have the authority to agree to an unfunded contractual indemnification term.

The State of Idaho retained risk program is not a policy of insurance regulated under the Idaho insurance code. The retained risk

program cannot insure third parties, including the USDA. In addition, the only limits on the amount of a payment under the retained risk program in Idaho law are the Idaho Tort Claims Act and the statutory and constitutional limits on expenditures exceeding an appropriation.

## AUTHORITIES CONSIDERED

### 1. Idaho Constitution:

Art. VII, § 13.
Art. VIII, § 1.

### 2. Idaho Code:

§ 6-901, *et seq.*
§ 6-903.
§ 6-919.
§ 6-920.
§ 6-922.
§ 14-520.
§ 14-523.
§ 41-102.
§ 41-103.
§ 59-1015.
§ 59-1016.
§ 59-1017.
§ 67-5773.
§ 67-5776.
§ 67-9213.

### 3. Idaho Administrative Code:

IDAPA 38.05.01.112.02.a.

### 4. Other Authorities:

Agreements & the Anti-Deficiency Act, 8 Op. O.L.C. 94, 1984 WL 178357 (1984).

The Anti-Deficiency Act Implications of Consent by Gov't Employees to Online Terms of Serv. Agreements Containing Open-Ended Indemnification Clauses, 2012 WL 5885535 (O.L.C. Mar. 27, 2012).

1979 Idaho Att'y Gen. Ann. Rpt. 77.
1982 Idaho Att'y Gen. Ann. Rpt. 117.

1980 Ga. Att'y Gen. Op. 141, 1980 WL 26351.
1982 Tenn. Att'y Gen. Op. U82-008.
1982 Tex. Att'y Gen. Op. MW-475, 1982 WL 173817.
71 Md. Att'y Gen. Op. 274, 1986 WL 287651.
1985-86 Va. Att'y Gen. Op. 36, 1986 WL 221191.
1989 S.C. Att'y Gen. Op. 116, 1989 WL 406133.
1989 Wis. Att'y Gen. Op. 1-89.
1995 Fla. Att'y Gen. Op. 12, 1995 WL 66343.
1996 Ohio Att'y Gen. Op. 060, 1996 WL 708356.
1999 Miss. Att'y Gen. Op. 241, 1999 WL 535496 (Miss. A.G.).
2000 Fla. Att'y Gen. Op. 22, 2000 WL 347547.
2005 Alaska Att'y Gen. Inf. Op., 2005 WL 2098268 (Alaska A.G.).
2006 La. Att'y Gen. Op. 250, 2006 WL 3616638.
2006 Miss. Att'y Gen. Op. 610, 2006 WL 1900660 (Miss. A.G.).
2006 Okla. Att'y Gen. Op. 11, 2006 WL 1987826.
2007 Okla. Att'y Gen. Op. 41, 2007 WL 4699715.
2008 Or. Att'y Gen. Op. 1, 2008 WL 1991485.
2010 N.M. Att'y Gen. Inf. Op., 2010 WL 311646 (N.M.A.G.).
2013 Wa. Att'y Gen. Op. 2, 2013 WL 4517409.

Dated this 30th day of September, 2019.

LAWRENCE G. WASDEN
Attorney General

**Analysis by:**

JULIE K. WEAVER
Deputy Attorney General

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[1] 2010 N.M. Att'y Gen. Inf. Op., 2010 WL 311646 (N.M.A.G.) (opining that indemnification obligations that require use of general revenues "can run

afoul of the 'debt' provisions" of the constitution); 2006 Miss. Att'y Gen. Op. 610, 2006 WL 1900660 (Miss. A.G.); 2006 Okla. Att'y Gen. Op. 11, 2006 WL 1987826 (reviewing cases holding that a hold harmless provisions assuming the contingent liability of another is in violation of law); 2005 Alaska Att'y Gen. Inf. Op., 2005 WL 2098268 (Alaska A.G.); 1996 Ohio Att'y Gen. Op. 060, 1996 WL 708356; 1995 Fla. Att'y Gen. Op. 12, 1995 WL 66343 (opining that a state agency may not waive the defense of sovereign immunity or increase its liability through an indemnification clause); 1989 S.C. Att'y Gen. Op. 116, 1989 WL 406133 (extending prior opinions that agencies do not have authority to enter indemnification agreements to contracts with other government entities, including federal entities); 1989 Wis. Att'y Gen. Op. 1-89; 71 Md. Att'y Gen. Op. 274, 1986 WL 287651 (opining that indemnification is "flatly inconsistent with the public policy" in the constitutional and statutory limits on expenditure in excess of appropriation); 1982 Tenn. Att'y Gen. Op. U82-008; 1982 Tex. Att'y Gen. Op. MW-475, 1982 WL 173817; 2013 Wa. Att'y Gen. Op. 2, 2013 WL 4517409 (opining that in the absence of a specific grant of authority by the legislature, public entity lacks the power to indemnify); 2006 La. Att'y Gen. Op. 250, 2006 WL 3616638 (opining that Louisiana statute prohibits indemnification clauses except as between Louisiana government entities); 2008 Or. Att'y Gen. Op. 1, 2008 WL 1991485 (opining that indemnification obligations create contingent liabilities that must be funded under the Oregon Constitution); 1985-86 Va. Att'y Gen. Op. 36, 1986 WL 221191 (opining that indemnification agreements limited to the funds provided by the legislature also require case-by-case analysis to determine if they violate the Virginia Constitution's prohibitions on lending the credit of the state); 1980 Ga. Att'y Gen. Op. 141, 1980 WL 26351 (opining that indemnification agreement violates constitutional prohibitions on the lending of the state's credit and the sovereign immunity of the state).

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and

# Tables of Citation

OFFICIAL OPINIONS
2019

## IDAHO CONSTITUTION CITATIONS



## IDAHO CODE CITATIONS

# ATTORNEY GENERAL'S CERTIFICATES OF REVIEW FOR THE YEAR 2019


**LAWRENCE G. WASDEN**

**ATTORNEY GENERAL**
**STATE OF IDAHO**

April 8, 2019

The Honorable Lawerence Denney
Idaho Secretary of State
Statehouse
VIA HAND DELIVERY

RE: Certificate of Review
Proposed Initiative Amending the Minimum Wage Law, Title 44, Chapter 15, Idaho Code, to Increase the General Minimum Wage Rate and the Direct Wage Rate for Tipped Employees, to Authorize Counties and Municipalities to Enact Higher Minimum Wage Rates, and to Strike Provisions that Allow Lower Minimum Wage Rates for Employees Under Twenty (20) Years of Age

Dear Secretary of State Denney:

An initiative petition was filed with your office on March 11, 2019. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only." The petitioners are free to "accept them in whole or in part." This office offers no opinion with regard to the policy issues raised by the proposed initiative or the potential revenue impact to the state budget from likely litigation over the initiative's validity.

**BALLOT TITLE**

Following the filing of the proposed initiative, this office will prepare short and long ballot titles. The ballot titles should impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While our office prepares titles for the initiative, petitioners

may submit proposed titles for consideration. Any proposed titles should be consistent with the standard set forth above.

## MATTER OF FORM

The proposed initiative has only one section. This section is not in the proper legislative format for showing amendments to statutory provisions because:

(a) the existing text of subsection (2) of Idaho Code § 44-1502 is not quoted correctly: The first sentence of subsection (2) of the statute states in part: "the direct wages paid to the employee by the employer shall not be in an amount less than three dollars and thirty-five cents ($3.35) an hour."; however, the proposed initiative does not indicate that the initiative would strike the text "~~three dollars and thirty-five cents ($3.35) an hour~~" and add the text "<u>: as of June 1, 2021,</u>";

(b) the proposed initiative would strike in its entirety the existing text of subsection (3) of Idaho Code § 44-1502 and replace the stricken text with new text also numbered subsection (3), but the initiative does not underline the proposed new text to indicate that it is being added to the statute; and

(c) the proposed initiative has three (3) minor clerical errors in subsection (1) of Idaho Code § 44-1502: On the first line of proposed subsection (1) in the initiative, the single space after the word "provided" should be underlined; on the third line of proposed subsection (1) in the initiative, the open parentheses before the word "seven" is a typographical error and should be removed; and on the fourth line of proposed subsection (1) in the initiative, where it reads "wage <u>provided</u>" the space between the two words should be underlined or, better yet, an underlined semicolon and underlined space should be added after the word "wage."

## SUMMARY OF INITIATIVE AND MATTERS OF SUBSTANTIVE IMPORT

### I. Summary of Proposed Initiative

The proposed initiative would amend the Minimum Wage Law, Idaho Code §§ 44-1501, *et seq.* ("Minimum Wage Law"), by adding and striking language from Idaho Code § 44-1502 to increase the state's general minimum wage above the rate established by the federal Fair Labor Standards Act of 1938 ("FLSA").[1]

The significant changes to the statute that would be effected by the proposed initiative are:

(a) increasing the minimum wage rate applicable to most non-exempt employees annually for four (4) consecutive years, and establishing a formula for subsequent years to annually adjust the minimum wage rate in direct proportion to any increases in a specified federal consumer price index;

(b) increasing the minimum amount of direct wages that must be paid to tipped employees annually for four (4) consecutive years, and providing further that on January 1 of each year following the fourth increase, the direct wages to be paid to tipped employees shall not be three dollars and ninety cents ($3.90) less than minimum wage;

(c) adding provisions authorizing counties and cities to enact laws setting higher minimum wages than those prescribed by the statute and striking provisions to the contrary in the statute; and

(d) striking provisions in the statute setting a lower minimum wage for persons under twenty (20) years of age for a period of ninety (90) days after hire.

Each of these changes is discussed more fully below.

**A. Increasing the Minimum Wage Rate.** Over a four (4) year period, the proposed initiative would increase Idaho's minimum wage rate for employees established by Idaho Code § 44-1502(1) from its current level of seven dollars and twenty-five cents ($7.25) an hour to twelve dollars ($12.00) an hour as follows:

(a) to eight dollars and seventy-five cents ($8.75) per hour on June 1, 2021;

(b) to nine dollars and seventy-five cents ($9.75) per hour on June 1, 2022;

(c) to ten dollars and seventy-five cents ($10.75) per hour on June 1, 2023; and

(d) to twelve dollars ($12.00) per hour on June 1, 2024.

The proposed initiative also would add language to Idaho Code § 44-1502(1) requiring the director of the Department of Commerce on September 30 of each year, beginning in 2024, to calculate an adjusted minimum wage rate "in direct proportion to the increase, if any" in the United States Department of Labor's consumer price index for Urban Wage Earners and Clerical Workers (CPI-W) over the prior year (measured from July 1 to June 30). These adjusted minimum wage rates would become the minimum wage rate under the Minimum Wage Law effective on January 1 of the year following each annual calculation.

**B. Increasing the Direct Wage Rate that Employers Must Pay Tipped Employees.** The proposed initiative would increase the minimum amount of direct wages that employers must pay to tipped employees from the current rate of three dollars and thirty-five cents ($3.35) an hour set by Idaho Code § 44-1502(2) to eight dollars and ten cents ($8.10) an hour on June 1, 2024. This increase would occur over the course of four (4) consecutive years, with increases:

(a) to four dollars and eighty-five cents ($4.85) per hour on June 1, 2021;

(b) to five dollars and eighty-five cents ($5.85) per hour on June 1, 2022;

(c) to six dollars and eighty-five cents ($6.85) per hour on June 1, 2023; and

(d) to eight dollars and ten cents ($8.10) per hour on June 1, 2024.

The proposed initiative provides that on January 1, 2025, and each January 1 thereafter, the minimum amount of direct wages shall not be less than the minimum wage minus three dollars and ninety cents ($3.90).

**C. Expressly Providing that Counties and Cities May Prescribe Higher Minimum Wages.** The proposed initiative states that counties and cities (municipal corporations) "may establish and enforce minimum wage laws higher than the minimum wages provided in [Idaho Code § 44-1502]." At the same time, the proposed initiative would strike language in the statute that now restricts counties, cities, and other "political subdivisions" as defined by title 6, chapter 9, Idaho Code,[2] from passing laws setting minimum wage rates higher than those of Idaho Code § 44-1502.

**D. Removing the Minimum Wage Rate Provisions for New Employees Under Twenty (20) Years of Age.** As it reads now, subsection (3) of Idaho Code § 44-1502, subject to certain restrictions on employers, allows a minimum wage rate of four dollars and twenty-five cents ($4.25) for employees under the age of twenty (20) years for a period of ninety (90) days after they are initially employed.[3] The proposed initiative strikes in its entirety all the language in this subsection (3), which would increase the minimum wage rate for newly hired employees under twenty (20) years of age to the general minimum wage rate.

## II. Substantive Analysis

There is little doubt but that the legislature may enact laws that establish minimum wage rates and tipped employee rates that are higher than the minimum rates under federal law. Currently, the

general minimum wage rate is the same under the FLSA and the Minimum Wage Law. However, under Idaho Code § 44-1502(2), the amount of direct wages that employers must pay to tipped employees is three dollars and thirty-five cents ($3.35) an hour, which exceeds the FLSA's minimum direct wage rate of two dollars and thirteen cents ($2.13) an hour.[4]

A state may have higher minimum wage rates than federal law because the FLSA does not preempt state law. The FLSA contains a savings clause specifically authorizing states to set stricter standards: "No provision of [the FLSA] or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under [the FLSA] . . . ." 29 U.S.C. § 218(a). As a result, states are free to adopt and enforce minimum wage rates and overtime rules that afford greater protections for workers than the FLSA.[5] In fact, currently 31 states have minimum wage rates that are higher than the FLSA.[6] Thus, the higher minimum wage rates set by the proposed initiative would be lawful under the FLSA.

With respect to the provision in the proposed initiative that would authorize counties and cities to adopt minimum wage rates higher than those set by Idaho Code § 44-1502, the home rule provision of the Idaho Constitution grants to counties and cities broad police power, provided the exercise of that local power is "not in conflict . . . with the general laws" of the state.[7] Thus, there does not appear to be anything unlawful about the provision in the proposed initiative expressly authorizing counties and cities to enact higher minimum wage rates.

If the proposed initiative were to become law, and a county or city was to enact an ordinance relating to minimum wage rates, such an ordinance, to be lawful, would need to meet three general restrictions: "(1) it must be confined to the territorial limits of the enacting body; (2) it must not conflict with the general laws of the State; and (3) it must not be an unreasonable or arbitrary enactment." State v. Doe, 148 Idaho 919, 927, 231 P.3d 1016, 1024 (2010); *citing* Hobbs v. Abrams, 104 Idaho 205, 207, 657 P.2d 1073, 1075 (1983). This legal standard, however, does not apply to the text of the proposed initiative.

A similar legal analysis would apply to the remaining provisions of the proposed initiative. They all appear to be proper subjects of legislation and within the legislative power of the State of Idaho.

**CERTIFICATION**

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Rod Couch, 5299 North Maidstone Way, Boise, Idaho 83713.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

**Analysis by:**

Douglas A. Werth
Deputy Attorney General

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[1] Fair Labor Standards Act of 1938 ("FLSA"), Pub. L. No. 75-718, 52 Stat. 1060, *codified as amended at* 29 U.S.C. §§ 201, *et seq.*

[2] Subsection (2) of Idaho Code § 6-902 defines a "political subdivision" as:

> . . . any county, city, municipal corporation, health district, school district, irrigation district, an operating agent of irrigation districts whose board consists of directors of its member districts, special improvement or taxing district, or any other political subdivision or public corporation.

This subsection also provides: "As used in [the Idaho Tort Claims Act], the terms 'county' and 'city' also mean state licensed hospitals and attached nursing homes established by counties pursuant to chapter 36, title 31, Idaho Code, or jointly by cities and counties pursuant to chapter 37, title 31, Idaho Code."

[3] These provisions mirror those of the FLSA. *See* 29 U.S.C. § 206(g).

[4] *See* 29 C.F.R. § 531.59.

[5] The Second Circuit Court of Appeals reached a similar conclusion in Shahriar v. Smith & Wollensky Rest. Grp., Inc., 659 F.3d 234 (2d Cir. 2011):

> . . . [T]he FLSA's "savings clause" [29 U.S.C. § 218(a)] makes clear that states may enact wage laws that are more protective than those that are provided in the act . . . . We have held that this clause demonstrates Congress' intent to allow state wage laws to co-exist with the FLSA by permitting explicitly, for example, states to mandate greater overtime benefits than the FLSA.

*Id.* at 247–48, *citing* Overnite Transp. Co. v. Tianti, 926 F.2d 220, 221–22 (2d Cir.1991) (rejecting the argument that the FLSA preempts state wage laws); *and* Ervin v. OS Rest. Servs., Inc., 632 F.3d 971, 997 (7th Cir. 2011)] (same).

[6] *See* U.S. Department of Labor, Wage and Hour Division, *Minimum Wage Laws in the States*, March 29, 2019, <https://www.dol.gov/whd/minwage/america.htm> (April 2, 2019).

[7] The home rule provision of the Idaho Constitution, art. XII, sec. 2, states: "Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws." The constitutional grant of these powers to local governments is also reflected in the Idaho Code. *See, e.g.,* Idaho Code § 50-301 ("Cities governed by this act [may] . . . exercise all powers and perform all functions of local self-government in city affairs as are not specifically prohibited by or in conflict with the general laws or the constitution of the state of Idaho."); Idaho Code § 50-302(1) ("Cities shall make all such ordinances, bylaws, rules, regulations and resolutions not inconsistent with the laws of the state of Idaho as may be expedient, in addition to the special powers in this act granted, to maintain the peace, good government and welfare of the corporation and its trade, commerce and industry.").

April 11, 2019

The Honorable Lawerence Denney
Idaho Secretary of State
Statehouse
VIA HAND DELIVERY

RE: Certificate of Review
Proposed Initiative Amending the Minimum Wage Law, Title 44, Chapter 15, Idaho Code, to Increase the General Minimum Wage Rate and the Direct Wage Rate for Tipped Employees, and to Strike Provisions that Allow Lower Minimum Wage Rates for Employees Under Twenty (20) Years of Age

Dear Secretary of State Denney:

An initiative petition was submitted to your office on March 26, 2019. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only." The petitioners are free to "accept them in whole or in part." This office offers no opinion with regard to the policy issues raised by the proposed initiative or the potential revenue impact to the state budget from likely litigation over the initiative's validity.

## BALLOT TITLE

Following the filing of the proposed initiative, this office will prepare short and long ballot titles. The ballot titles should impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While our office prepares titles for the initiative, petitioners may submit proposed titles for consideration. Any proposed titles should be consistent with the standard set forth above.

## MATTER OF FORM

The proposed initiative has only one section. This section is, for the most part, in the proper legislative format for showing amendments to statutory provisions. There are two minor corrections that would be appropriate:

(a) in subsection (1) of Idaho Code § 44-1502, on the first line of proposed subsection (1) in the initiative, the single space after the word "provided" should be underlined; and

(b) in subsection (1) of Idaho Code § 44-1502, on the fourth line of proposed subsection (1) in the initiative, where it reads "wage provided" the space between the two words should be underlined or, better yet, an underlined semicolon and underlined space should be added after the word "wage."

## SUMMARY OF INITIATIVE AND MATTERS OF SUBSTANTIVE IMPORT

### I. Summary of Proposed Initiative

The proposed initiative would amend the Minimum Wage Law, Idaho Code §§ 44-1501, *et seq.* ("Minimum Wage Law"), by adding and striking language from Idaho Code § 44-1502 to increase the state's general minimum wage above the rate established by the federal Fair Labor Standards Act of 1938 ("FLSA").[1]

The significant changes to the statute that would be effected by the proposed initiative are:

(a) increasing the minimum wage rate applicable to most non-exempt employees annually for four (4) consecutive years, and establishing a formula for subsequent years to annually adjust the minimum wage rate in direct proportion to any increases in a specified federal consumer price index;

(b) increasing the minimum amount of direct wages that must be paid to tipped employees annually for four (4) consecutive years, and providing further that on January 1 of each year following the fourth increase, the direct wages to be paid to tipped employees shall not be less than the minimum wage minus three dollars and ninety cents ($3.90); and

(c) striking provisions in the statute setting a lower minimum wage for persons under twenty (20) years of age for a period of ninety (90) days after hire.

Each of these changes is discussed more fully below.

**A. Increasing the Minimum Wage Rate.** Over a four (4) year period, the proposed initiative would increase Idaho's minimum wage rate for employees established by Idaho Code § 44-1502(1) from its current level of seven dollars and twenty-five cents ($7.25) an hour to twelve dollars ($12.00) an hour as follows:

(a) to eight dollars and seventy-five cents ($8.75) per hour on June 1, 2021;

(b) to nine dollars and seventy-five cents ($9.75) per hour on June 1, 2022;

(c) to ten dollars and seventy-five cents ($10.75) per hour on June 1, 2023; and

(d) to twelve dollars ($12.00) per hour on June 1, 2024.

The proposed initiative also would add language to Idaho Code § 44-1502(1) requiring the director of the Department of Commerce on September 30 of each year, beginning in 2024, to calculate an adjusted minimum wage rate "in direct proportion to the increase, if any" in the United States Department of Labor's consumer price index for Urban Wage Earners and Clerical Workers (CPI-W) over the prior year (measured from July 1 to June 30). These adjusted minimum wage rates would become the minimum wage rate under the Minimum Wage

Law effective on January 1 of the year following the each annual calculation.

**B. Increasing the Direct Wage Rate that Employers Must Pay Tipped Employees.** The proposed initiative would increase the minimum amount of direct wages that employers must pay to tipped employees from the current rate of three dollars and thirty-five cents ($3.35) an hour set by Idaho Code § 44-1502(2) to eight dollars and ten cents ($8.10) an hour on June 1, 2024. This increase would occur over the course of four (4) consecutive years, with increases:

(a) to four dollars and eighty-five cents ($4.85) per hour on June 1, 2021;

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(c) to six dollars and eighty-five cents ($6.85) per hour on June 1, 2023; and

(d) to eight dollars and ten cents ($8.10) per hour on June 1, 2024.

The proposed initiative provides that on January 1, 2025, and each January 1 thereafter, the minimum amount of direct wages for tipped employees shall not be less than the minimum wage minus three dollars and ninety cents ($3.90).

**C. Removing the Minimum Wage Rate Provisions for New Employees Under Twenty (20) Years of Age.** As it reads now, subsection (3) of Idaho Code § 44-1502, subject to certain restrictions on employers, allows a minimum wage rate of four dollars and twenty-five cents ($4.25) for employees under the age of twenty (20) years for a period of ninety (90) days after they are initially employed.[2] The proposed initiative strikes in its entirety all the language in this subsection (3), which would increase the minimum wage rate for newly hired employees under twenty (20) years of age to the general minimum wage rate.

## II. Substantive Analysis

There is little doubt but that the legislature may enact laws that establish minimum wage rates and tipped employee rates that are higher than the minimum rates under federal law. Currently, the general minimum wage rate is the same under the FLSA and the Minimum Wage Law. However, under Idaho Code § 44-1502(2), the amount of direct wages that employers must pay to tipped employees is three dollars and thirty-five cents ($3.35) an hour, which exceeds the FLSA's minimum direct wage rate of two dollars and thirteen cents ($2.13) an hour.[3]

A state may have higher minimum wage rates than federal law because the FLSA does not preempt state law. The FLSA contains a savings clause specifically authorizing states to set stricter standards: "No provision of [the FLSA] or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under [the FLSA] . . . ." 29 U.S.C. § 218(a). As a result, states are free to adopt and enforce minimum wage rates and overtime rules that afford greater protections for workers than the FLSA.[4] In fact, currently 31 states have minimum wage rates that are higher than the FLSA.[5] Thus, the higher wage rates set by the proposed initiative would be lawful under the FLSA.

A similar legal analysis would apply to the remaining provisions of the proposed initiative. They all appear to be proper subjects of legislation and within the legislative power of the State of Idaho.

### CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Rod Couch, 5299 North Maidstone Way, Boise, Idaho 83713.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

**Analysis by:**

Douglas A. Werth
Deputy Attorney General

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[1] Fair Labor Standards Act of 1938 ("FLSA"), Pub. L. No. 75-718, 52 Stat. 1060, *codified as amended at* 29 U.S.C. §§ 201, *et seq.*

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[5] *See* U.S. Department of Labor, Wage and Hour Division, *Minimum Wage Laws in the States*, March 29, 2019, <https://www.dol.gov/whd/minwage/america.htm> (April 2, 2019).

April 12, 2019

The Honorable Lawerence Denney
Idaho Secretary of State
Statehouse
VIA HAND DELIVERY

RE: Certificate of Review
Proposed Initiative Amending the Minimum Wage Law, Title 44, Chapter 15, Idaho Code, to Increase the General Minimum Wage Rate, to Authorize Counties and Municipalities to Enact Higher Minimum Wage Rates, and to Strike Provisions that Allow Lower Minimum Wage Rates for Employees Under Twenty (20) Years of Age

Dear Secretary of State Denney:

An initiative petition was submitted to your office on March 26, 2019. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only." The petitioners are free to "accept them in whole or in part." This office offers no opinion with regard to the policy issues raised by the proposed initiative or the potential revenue impact to the state budget from likely litigation over the initiative's validity.

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(c) striking provisions in the statute setting a lower minimum wage for persons under twenty (20) years of age for a period of ninety (90) days after hire.

Each of these changes is discussed more fully below.

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are free to adopt and enforce minimum wage rates and overtime rules that afford greater protections for workers than the FLSA.[5] In fact, currently 31 states have minimum wage rates that are higher than the FLSA.[6] The wage rates set by the proposed initiative would not be unlawful under the FLSA.

With respect to the provision in the proposed initiative that would authorize counties and cities to adopt minimum wage rates higher than those set by Idaho Code § 44-1502, the home rule provision of the Idaho Constitution grants to counties and cities broad police power, provided the exercise of that local power is "not in conflict . . . with the general laws" of the state.[7] Thus, there does not appear to be anything unlawful about the provision in the proposed initiative expressly authorizing counties and cities to enact higher minimum wage rates.

If the proposed initiative were to become law, and a county or city was to enact an ordinance relating to minimum wage rates, such an ordinance, to be lawful, would need to meet three general restrictions: "(1) it must be confined to the territorial limits of the enacting body; (2) it must not conflict with the general laws of the State; and (3) it must not be an unreasonable or arbitrary enactment." State v. Doe, 148 Idaho 919, 927, 231 P.3d 1016, 1024 (2010); *citing* Hobbs v. Abrams, 104 Idaho 205, 207, 657 P.2d 1073, 1075 (1983). This legal standard, however, does not apply to the text of the proposed initiative.

A similar legal analysis would apply to the remaining provisions of the proposed initiative. They all appear to be proper subjects of legislation and within the legislative power of the State of Idaho.

**CERTIFICATION**

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Rod Couch, 5299 Maidstone Way, Boise, Idaho 83713.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

**Analysis by:**

Douglas A. Werth
Deputy Attorney General

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[1] Fair Labor Standards Act of 1938 ("FLSA"), Pub. L. No. 75-718, 52 Stat. 1060, *codified as amended at* 29 U.S.C. §§ 201, *et seq.*

[2] Subsection (2) of Idaho Code § 6-902 defines a "political subdivision" as:

> . . . any county, city, municipal corporation, health district, school district, irrigation district, an operating agent of irrigation districts whose board consists of directors of its member districts, special improvement or taxing district, or any other political subdivision or public corporation.

This subsection also provides: "As used in [the Idaho Tort Claims Act], the terms 'county' and 'city' also mean state licensed hospitals and attached nursing homes established by counties pursuant to chapter 36, title 31, Idaho Code, or jointly by cities and counties pursuant to chapter 37, title 31, Idaho Code."

[3] These provisions mirror those of the FLSA. *See* 29 U.S.C. § 206(g).

[4] *See* 29 C.F.R. § 531.59.

[5] The Second Circuit Court of Appeals reached a similar conclusion in Shahriar v. Smith & Wollensky Rest. Grp., Inc., 659 F.3d 234 (2d Cir. 2011):

> . . . [T]he FLSA's "savings clause" [29 U.S.C. § 218(a)] makes clear that states may enact wage laws that are more protective than those that are provided in the act . . . . We have held that this clause demonstrates Congress' intent to allow state wage laws to co-exist with the FLSA by permitting explicitly, for example, states to mandate greater overtime benefits than the FLSA.

*Id.* at 247–48, *citing* Overnite Transp. Co. v. Tianti, 926 F.2d 220, 221–22 (2d Cir.1991) (rejecting the argument that the FLSA preempts state wage laws); *and* Ervin v. OS Rest. Servs., Inc., 632 F.3d 971, 997 (7th Cir. 2011)] (same).

[6] *See* U.S. Department of Labor, Wage and Hour Division, *Minimum Wage Laws in the States*, March 29, 2019, <https://www.dol.gov/whd/minwage/america.htm> (April 2, 2019).

[7] The home rule provision of the Idaho Constitution, art. XII, sec. 2, states: "Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws." The constitutional grant of these powers to local governments also is reflected in the Idaho Code. *See, e.g.,* Idaho Code § 50-301 ("Cities governed by this act [may] . . . exercise all powers and perform all functions of local self-government in city affairs as are not specifically prohibited by or in conflict with the general laws or the constitution of the state of Idaho."); Idaho Code § 50-302(1) ("Cities shall make all such ordinances, bylaws, rules, regulations and resolutions not inconsistent with the laws of the state of Idaho as may be expedient, in addition to the special powers in this act granted, to maintain the peace, good government and welfare of the corporation and its trade, commerce and industry.").

April 22, 2019

The Honorable Lawerence Denney
Idaho Secretary of State
Statehouse
VIA HAND DELIVERY

Re: Certificate of Review
Proposed Initiative Creating New Medical Marijuana Act by Adding Chapter 92 to Title 39, Idaho Code, to Legalize the Use of Medical Marijuana

Dear Secretary of State Denney:

An initiative petition was filed with your office on March 28, 2019. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only." The petitioners are free to "accept them in whole or in part." Due to the available resources and limited time for performing the reviews, we did not communicate directly with the petitioner as part of the review process. The opinions expressed in this review are only those that may affect the legality of the initiative. This office offers no opinion with regard to the policy issues raised by the proposed initiative.

## BALLOT TITLES

Following the filing of the proposed initiative, this office will prepare short and long ballot titles. The ballot titles should impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While our office prepares titles for the initiative, petitioners may submit proposed titles for consideration. Any proposed titles should be consistent with the standard set forth above.

## MATTERS OF SUBSTANTIVE IMPORT

### A. Summary of the Initiative

The initiative is self-titled the "Idaho Medical Marijuana Act" (hereafter "Act") and is denominated as Idaho Code § 39-9201, *et seq.*[1] Primarily, the initiative seeks to amend title 39, Idaho Code, by adding a new chapter 92, which declares that persons engaged in the use, possession, manufacture, sale, and/or distribution of marijuana to persons suffering from debilitating medical conditions, as authorized by the Act, are protected from arrest, prosecution, property forfeiture, and criminal and other penalties under Idaho law.

In general, the Act authorizes the Idaho Department of Health & Welfare ("Department") to establish a comprehensive registration system for instituting and maintaining the production and dispensing of marijuana for use by persons diagnosed with a debilitating medical condition. Prop. I.C. § 39-9206. The Act directs the Department to approve or deny applications for "registry identification cards" presented by "qualifying patients," their "designated caregivers," and "agents" of "medical marijuana organizations." Prop. I.C. §§ 39-9202(3), 39-9202(17), and 39-9208 to 39-9213. The Department is required to issue "registration certificates" to qualifying "medical marijuana organizations," defined as "medical marijuana production facilities," "medical marijuana dispensaries,"[2] and "safety compliance facilities." Prop. I.C. §§ 39-9202(11), 39-9202(16), 39-9207, 39-9213, and 39-9215. The Act permits, without state civil or criminal sanctions, marijuana to be produced by medical marijuana production facilities throughout the state (and qualified patients and/or designated caregivers whose registry identification cards allow them to "cultivate" marijuana), tested for potency and contaminants at safety compliance facilities, and transported to medical marijuana dispensaries for sale to qualifying patients and/or their designated caregivers.

Section 1 of the Act insulates from arrest, prosecution, and property forfeiture, "qualifying patients" diagnosed with having a "debilitating medical condition" who use marijuana for medicinal purposes, as well as their "designated caregivers." The Act establishes a complex regulatory system whereby "agents" of medical marijuana organizations – medical marijuana production facilities, medical

marijuana dispensaries, and safety compliance facilities – are insulated from civil forfeitures and penalties under state law. Discrimination against participants in the Act is prohibited in regard to education, housing, and employment. The Department is required to formulate rules and regulations to implement and maintain the Act's measures. Section 2 excludes from arrest, fine, or prosecution, any persons who possess marijuana paraphernalia who are participants in the Act's medical marijuana program. Section 3, entitled "Hemp Legalization," defines, legalizes, and regulates hemp consistent with federal law. Section 4 excludes "hemp" from the definition of "marijuana" as a Schedule I hallucinogenic controlled substance. Lastly, Section 5 is a "severability" provision which declares that, if any provision of the Act is declared invalid, the remaining portions of the Act remain valid.

Section 1 of the Act provides that: (1) qualifying patients ("patients") may possess up to four (4) ounces of marijuana and, if a patient's registry identification card states that the patient "is exempt from criminal penalties for cultivating marijuana," the patient may also possess up to six (6) marijuana plants in an enclosed locked facility, etc., and any marijuana produced from those plants; and (2) designated caregivers ("caregivers") to assist up to three (3) patients' medical use of marijuana, and to independently possess, for each patient assisted, the same amounts of marijuana described above. Prop. I.C. §§ 39-9202(2), 39-9202(6), and 39-9202(15). Apart from indicating that patients and caregivers may be designated as "exempt from criminal penalties for cultivating marijuana," there is no provision for anyone else to cultivate marijuana apart from a marijuana production facility.

In order to become a "qualifying patient," a person must have a "practitioner" (defined as a person authorized to prescribe drugs pursuant to the Medical Practice Act (Idaho Code §§ 54-1800, *et. seq.*)) provide a written recommendation that, in the practitioner's professional opinion, the patient "is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the patient's debilitating medical condition or symptoms associated with the debilitating condition." Prop. I.C. §§ 39-9202(14), 39-9202(15), and 39-9202(22). The recommendation must specify the patient's debilitating medical condition and may only be signed (and dated) in the course of a "practitioner-patient relationship after the practitioner has completed a full assessment of the qualifying patient's medical history and current

medical condition." *Id.* Minors are also entitled to be issued registry identification cards as patients under certain criteria. Prop. I.C. § 39-9210(2).

A "debilitating medical condition" means not only the conditions listed (such as cancer, glaucoma, HIV, AIDS, Alzheimer's disease, post-traumatic stress disorder, etc.), but also "[a] chronic or debilitating disease or medical condition or its treatment that produces cachexia or wasting syndrome, severe pain, chronic pain, severe nausea, seizures, including those characteristic of epilepsy, or severe and persistent muscle spasms, including those characteristic of multiple sclerosis," any terminal illness with life expectancy of less than twelve (12) months, or "[a]ny other medical condition or its treatment added by the Department pursuant to section 39-9204." Prop. I.C. § 39-9202(4). The Act provides that the public may petition the Department to add debilitating medical conditions or treatments to the list of those established in Prop. I.C. § 39-9202(4).

"Agents" are defined as principal officers, board members, employees, or volunteers of a medical marijuana organization who are at least twenty-one (21) years old and who have "not been convicted of a felony offense." Prop. I.C. § 39-9202(1). A "felony offense" means a felony which is either a "violent crime" or a violation of a state or federal controlled substance law; it does not include an offense "for which the sentence, including any term of probation, incarceration, or supervised release, was completed five or more years earlier." Prop. I.C. § 39-9202(8). Designated caregivers have the same "felony offense" restriction, are required to be at least twenty-one (21) years old, and "agree to assist no more than three (3) qualifying patients" at the same time. Prop. I.C. § 39-9202(6).

Patients may apply for registry identification cards for themselves and their caregivers by submitting a written recommendation issued by a practitioner within the last ninety (90) days, application, fee, and a "designation as to who will be allowed to cultivate Marijuana plants for the qualifying patient's medical use if a Medical Marijuana dispensary is not operating within five (5) miles of the qualifying patient's home and the address where the Marijuana plants will be cultivated." Prop. I.C. § 39-9209(1).[3] The Department is obligated to verify the information in an application (or renewal request)

for a registry identification card, and approve or deny the application within ten (10) days after receiving it, and must issue a card within five (5) more days thereafter. Prop. I.C. § 39-9210(1). If a registry identification card "does not state that the cardholder is authorized to cultivate Marijuana plants, the Department must give written notice to the registered qualifying patient . . . of the names and addresses of all registered medical Marijuana dispensaries." Prop. I.C. § 39-9210(3). The registry identification cards must include a "random twenty (20) digit alphanumeric identification number that is unique to the cardholder," and a "clear indication of whether the cardholder has been authorized by this chapter to cultivate Marijuana plants for the qualifying patient's medical use." Prop. I.C. § 39-9211(1)(d), (g). The Department may deny an application or renewal request for a registry identification card for failing to meet the requirements of the Act, and must provide written notice of its reasons for doing so. Prop. I.C. § 39-9212. Registry identification cards expire after one (1) year, and may be renewed for a fee. Prop. I.C. § 39-9213.

Medical marijuana organizations must have operating documents that include procedures for the oversight of the organization and accurate recordkeeping, and are required to implement security measures to deter theft of marijuana and unauthorized entrance into areas containing marijuana. Prop. I.C. § 39-9215. Medical marijuana production facilities must restrict marijuana cultivation, harvesting, etc., within an enclosed, locked facility only accessible to registered agents. Prop. I.C. § 39-9215(3). Medical marijuana production facilities and dispensaries "may acquire usable Marijuana or Marijuana plants from a registered qualifying patient or a registered designated caregiver only if the . . . patient or . . . caregiver receives no compensation for the Marijuana." Prop. I.C. § 39-9215(4).

The Act adopts a tax of four percent (4%) on medical marijuana sales. Prop. I.C. § 39-9218(1). "After retaining no more than five percent (5%) of the tax revenue collected, the Idaho State Tax Commission shall disperse the remaining fifty percent (50%) to the Idaho Division of Veterans Services and the other fifty percent (50%) to the Idaho Department of Education[,]" which are "in addition to any funds regularly dispersed" to those entities. Prop. I.C. § 39-9218(2).

The Department is required to "establish and maintain a verification system for use by law enforcement personnel and registered medical Marijuana organization agents to verify registry identification cards." Prop. I.C. § 39-9219(1). Patients are required to notify the Department within ten (10) days of any change in name, address, designated caregiver, and their preference regarding who may cultivate marijuana for them, and, upon receipt of such notice, the Department has ten (10) days to issue a new registry identification card. Prop. I.C. § 39-9220(1), (4). If the patient changes the caregiver, the Department must notify the former caregiver that "his/her duties and rights . . . for the qualifying patient expire fifteen (15) days after the Department sends notification." Prop. I.C. § 39-9220(6).

The Department must submit an annual public report to the legislature with information set out in Prop. I.C. § 39-9221. The Department is required to keep all records and information received pursuant to the Act confidential, and any dispensing of information by medical marijuana organizations or the Department must identify cardholders and such organizations by their registry identification numbers and not by name or other identifying information. Prop. I.C. § 39-9222(1), (2).

Department employees may notify state or local law enforcement about suspected fraud or criminal violations "if the employee who suspects the falsified or fraudulent information was submitted has conferred with his supervisor and both agree the circumstances warrant reporting." Prop. I.C. § 39-9222(6)(a). Similarly, and somewhat redundantly, subsection (b) states that the Department may notify law enforcement "about apparent criminal violations of this chapter if the employee who suspects the offense has conferred with his supervisor and both agree the circumstances warrant reporting." Prop. I.C. § 39-9222(6)(b). To the extent the two "reporting" provisions disallow anyone, on their own, from reporting suspected crimes to law enforcement authorities, they are most likely unenforceable restrictions on the First Amendment's right to free speech. In contrast, Department employees may, on their own, notify the board of medical examiners "if they have reason to believe that a practitioner provided a written recommendation without completing a full assessment of the qualifying patient's medical history and current medical condition, or if the Department has reason to believe the

practitioner violated the standard of care, or for other suspected violations of this chapter." Prop. I.C. § 39-9222(6)(c).

Prop. I.C. § 39-9223 is entitled "Presumption of Medical Use of Marijuana – Protections – Civil Penalties." Prop. I.C. § 39-9223(1) creates a rebuttable presumption in criminal, civil, and administrative court proceedings that patients and caregivers are deemed to be lawfully engaged in the medical use of marijuana if their conduct complies with the Act. The presumption may be rebutted with evidence that the conduct "was not for the purpose of treating or alleviating the qualifying patient's debilitating medical condition or symptoms." *Id.* The proposed statute provides that qualifying patients, visiting qualifying patients, and designated caregivers are not subject to arrest, prosecution, or penalty in any manner, or denial of any right or privilege, including any civil penalty or disciplinary action by a court or occupational or professional licensing board or bureau for conduct authorized by the Act. Prop. I.C. § 39-9223(2), (3). Additionally, practitioners are protected from sanctions for conduct "based solely on providing written recommendations" (or for otherwise stating) with the required diagnosis, but may be subject to sanction by a professional licensing board for "failing to properly evaluate a patient's medical condition or otherwise violating the standard or care for evaluating medical conditions." Prop. I.C. § 39-9223(4). No person is subject to criminal or civil sanctions for selling marijuana paraphernalia to a cardholder or medical marijuana *organization*, being in the presence of "the [authorized] medical use of Marijuana," or assisting a patient as authorized by the Act. Prop. I.C. § 39-9223(5). Although it may be reasonable to sell marijuana paraphernalia to a medical marijuana dispensary for resale, the need to sell marijuana paraphernalia to either a medical marijuana production facility or a safety compliance facility is unclear.

The Act makes medical marijuana organizations and their agents immune from criminal and civil sanctions, and searches or inspections, if their conduct complies with the Act. Prop. I.C. § 39-9223(6)-(8). Further, the mere possession of, or application for, a registry identification card "may not constitute probable cause or reasonable suspicion, nor may it be used to support the search of the person or property of the person possessing or applying for the registry identification card." Prop. I.C. § 39-9223(10). Prop. I.C. § 39-9223(11)

states that no school, landlord, or employer may be penalized or denied any benefit under state law for enrolling, leasing to, or employing a cardholder, and no landlord may be penalized or denied any benefit under state law for leasing to a registered Medical Marijuana organization."[4]

Prop. I.C. § 39-9223(9) reads:

> (9) Property, including all interests in the property, otherwise subject to forfeiture under Title 37, Idaho Code that is possessed, owned, or *used in connection* with the Medical use of Marijuana authorized under this chapter or *acts incidental* to the Medical use of Marijuana authorized under this chapter, is not subject to seizure or forfeiture. This subsection does not prevent civil forfeiture if the basis for the forfeiture is *unrelated* to the medical use of Marijuana.

The italicized words in the above Prop. I.C. § 39-9223(9) make the provision subject to constitutional challenges due to their vagueness.

Prop. I.C. § 39-9223(12) (emphasis added) states that an attorney "may not be subject to disciplinary action by the state bar association or other professional licensing association for providing legal assistance to a person *related to activity that is not subject to criminal penalties* under state law pursuant to this chapter." This provision appears to insulate attorneys from disciplinary action unless their representation relates to a *client's* activity that is subject to criminal penalties under state law. That condition would make it impossible for the state bar association to sanction an attorney for having a conflict of interest, mishandling of funds, case inaction, failure to communicate, and other types of professional malpractice, where the client's matter "is not subject to criminal penalties." Why the criminal aspect of a client's matter should determine whether the state bar can discipline an attorney for sub-par or unethical representation is not clear.

Prop. I.C. § 39-2223(13) (emphasis added) protects patients and caregivers from criminal penalty and parental rights sanctions due to medical marijuana use unless the court makes written findings based on substantial evidence that such use has resulted in the patient's (or

caregiver's) "impairment *that interferes with the performance of parenting functions*." This language may be read to require that the harm to the child was caused by the patient's *ongoing* impairment from marijuana use -- not from occasional marijuana use that does not impair the general ability to parent. Additionally, the determination of when a criminal or parental rights sanction is "due to" medical marijuana use is open to constitutional challenge due to vagueness, as there would likely be many cases in which such use is an indirect or contributing factor.

Subsection (14) of Prop. I.C. § 39-2223 precludes schools and landlords from penalizing persons based on their status as a medical marijuana cardholder (referred to as "license holder" in this section), unless doing so "would imminently cause the school or landlord to lose a monetary or licensing related benefit under federal law or regulations." Subsection (15) employs the same monetary-licensing exception in precluding employers from discriminating against cardholders ("license holder"), and allows employers to take action against an employee if the cardholder "uses or possesses marijuana" at work during work hours.

Prop. I.C. § 39-2223(17) (emphasis added) states, "No person holding a medical marijuana license may *unduly* be withheld from holding a state issued license by virtue of their being a medical marijuana license holder." The word "unduly" is vague, and subject to constitutional challenge.

Prop. I.C. § 39-2223(18) reads, "No city or local municipality may unduly change or restrict zoning laws to prevent the opening of a retail marijuana establishment." Again, the word "unduly" may make the provision unconstitutionally vague. To the extent the provision limits the inherent ability of a governmental entity to enact reasonable zoning regulations, it would likely be held unconstitutional.

Prop. I.C. § 39-9205(4) states that the Medical Marijuana Act's provisions do not authorize persons to operate, etc., any motor vehicle, aircraft, or motorboat "while under the influence of marijuana[.]" The provision further states that qualifying patients and visiting qualifying patients may not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana "without noticeable actions of impairment including slurred

speech and lethargic movements." *Id.* The provision does not explain who, or under what circumstances, a law enforcement officer, employer, or teacher, etc., would be precluded from "considering" whether a patient is under the influence of marijuana. Additionally, the requirement that a patient cannot be deemed to be under the influence of marijuana because of metabolites in their system "without noticeable actions of impairment *including* slurred speech and lethargic movements" appears to mandate the latter two (2) symptoms when metabolites are present. (Emphasis added.) This overlooks several other physical symptoms law enforcement officers, including drug recognition experts, are trained to detect regarding marijuana use.[5] *See* State v. Johnson, 137 Idaho 656, 660, 51 P.3d 1112, 1116 (Ct. App. 2002) ("Johnson's failure of that test, together with other factors—his dilated pupils, bloodshot eyes, body tremors, and excessive nervousness—enhanced Wunsch's suspicion that Johnson may have been using marijuana."); State v. Morin, 158 Idaho 622, 625, 349 P.3d 1213, 1216 (Ct. App. 2015) ("He opined that dilated pupils, confusing speech patterns, impairments to balance and other psychomotor function, 'lack of convergence,' and a green coating of the tongue were all diagnostic indications of marijuana intoxication exhibited by Morin."). In short, Prop. I.C. § 37-9205(4) attempts to restrict how persons in authority may detect whether patients are under the influence of marijuana.

The Department is given the task of making extensive rules, pursuant to the Idaho Administrative Procedure Act ("IDAPA") for implementing the Act's measures, including rules for: the form and content of applications and renewals, a system to "numerically score competing medical marijuana dispensary applicants," the prevention of theft of marijuana and security at facilities, oversight, recordkeeping, safety, dispensing of medical marijuana "by use of an automated machine," and safe and accurate packaging and labeling of medical marijuana. Prop. I.C. § 39-9206. Notably, the provision requires that, in establishing application and renewal fees for registry identification cards and registration certificates, "[t]he total amount of all fees must generate revenues sufficient to implement and administer this chapter, except fee revenue may be offset or supplemented by private donations." Prop. I.C. § 39-9206(1)(g)(i). The same self-funding requirement is repeated in Prop. I.C. § 39-9206(1)(g)(iii). A "medical marijuana fund" is established by Prop. I.C. § 39-9229. The fund

consists of "fees collected, civil penalties imposed, and private donations," and is to be administered by the Department.

Under the heading "Affirmative Defense," the Act provides that patients, visiting patients, and caregivers "may assert the medical purpose for using Marijuana as a defense to any prosecution of an offense involving Marijuana intended for a qualifying patient's or visiting qualifying patient's medical use, and this defense must be presumed valid if," several criteria are met. Prop. I.C. § 39-9224(1). If evidence shows that the listed criteria are met, the defense "must be presumed valid." *Id.* Further, Prop. I.C. § 39-9224(2) allows a person to assert the "medical use" affirmative defense "in a motion to dismiss, and the charges must be dismissed following an evidentiary hearing if the person shows the elements listed in subsection (1)." Prop. I.C. § 39-9224 clearly creates a conclusive presumption, which is not only disfavored in law, but is also inconsistent with the way affirmative defenses operate – i.e., by requiring the defense to present prima facie evidence at trial to support an affirmative defense before a jury instruction on the affirmative defense is deemed warranted. Moreover, the provision gives defendants the opportunity of having an affirmative defense be the basis not only of acquittal at trial, but dismissal prior to trial. Finally, if the patient or caregiver succeeds in demonstrating a medical purpose for the patient's use of marijuana, there can be no disciplinary action by a court or occupational or professional licensing board, etc. Prop. I.C. § 39-9224(3).

Under the heading, "Discrimination Prohibited," the Act makes it illegal for schools, landlords, nursing facilities, intermediate care facilities, hospice houses, hospitals, etc., to penalize a person solely for his or her status as a cardholder, unless to do so would violate federal law or cause the entity to lose a monetary or licensing benefit under federal law. Prop. I.C. § 39-9225(1). Subsection (5) of the proposed statute further states:

> (5) In any criminal, child protection, and family law proceedings, allegations of neglect or child endangerment by a qualified patient or qualified caregiver for conduct allowed under this chapter are not admissible to the court, without *substantial evidence* that the person's behavior creates an unreasonable danger

> to the safety of the minor(s) as established by written findings of *clear and convincing evidence* that such neglect or child endangerment is a direct outcome of a qualifying patient or caregiver's medical use or cultivation of Marijuana.

Prop. I.C. § 39-9225(5) (emphasis added). There are several problems with the proposed provision. First, the "substantial evidence" and "clear and convincing" standards are incompatible with each other, and run counter to the Idaho Rules of Evidence and the authority of the Idaho Supreme Court in determining the criteria for admitting evidence at trial. Next, the requirement that a court enter "written findings of clear and convincing evidence" that "such neglect or child endangerment is a direct outcome" creates a *de facto* presumption that, as explained above, is inconsistent with the way affirmative defenses function at trial. Lastly, requiring a court to essentially hear and decide the merits of a case prior to trial by one of the highest standards of proof is virtually unprecedented.

The Act has measures for revoking registry identification cards and registration certificates for violations of its provisions, including notice and confidentiality requirements. Prop. I.C. §§ 39-9227 and 39-9228. Subsection (8) of Prop. I.C. § 39-9228 reads, "A person who intentionally makes a false statement to a law enforcement official about any fact or circumstance relating to the medical use of Marijuana to avoid arrest or prosecution is guilty of an infraction . . . ." It is questionable whether the phrase "any fact or circumstance relating to the medical use of Marijuana" would withstand a "void for vagueness" constitutional challenge in court. Prop. I.C. § 39-9229(1) establishes a Medical Marijuana Fund, consisting of "fees collected, civil penalties imposed, and private donations received[,]" which are to be administered by the Department.

If the Department fails to adopt rules to implement the Act within one hundred twenty (120) days of the Act's enactment, any citizen may commence a mandamus action to compel compliance. Prop. I.C. § 39-9230(1). If the Department fails to issue or deny an application or renewal for a registry identification card within forty-five (45) days after submission of such application, a copy of the application is deemed a valid registry identification card. Prop. I.C. § 39-9230(3). Further, if the

Department is not accepting applications or has not adopted rules for applications within one hundred forty (140) days after enactment of the Act, a "notarized statement" by a patient containing the information required in an application, with a written recommendation issued by a practitioner, etc., will be deemed a valid registry identification card. Prop. I.C. § 39-9230(4).

In sum, Section 1 of the Act generally decriminalizes under state law the possession of up to four (4) ounces of marijuana and (if authorized as a "cultivator") six (6) marijuana plants for patients and caregivers. The Act also protects agents of medical marijuana production facilities, medical marijuana dispensaries, and safety compliance facilities from civil forfeitures and penalties under state law, and makes it illegal under state law to discriminate against all such participants in regard to education, housing, and employment. Patients receiving a written recommendation by a practitioner stating that they have a debilitating medical condition may obtain marijuana for medicinal use from their (or their caregiver's) cultivation of marijuana (if authorized on the registry identification card), the patient's caregiver or a medical marijuana dispensary. Patients, caregivers, and agents of medical marijuana organizations must obtain registry identification cards, and medical marijuana organizations must obtain registry certificates from the Department, and continuously update relevant information. The Department is tasked with an extensive list of duties, including, *inter alia*: formulating rules and regulations to implement and maintain the Act's numerous and far-reaching measures, verifying information and timely approving applications and renewal requests submitted for registry identification cards and registration certificates, establishing and maintaining a law enforcement verification system, providing rules for security, recordkeeping, oversight, maintaining and enforcing confidentiality of records, and providing an annual report to the Idaho Legislature.

Section 2 of the Act is very short. It adds Prop. I.C. § 37-2734A(4), which states that "[a]ny person who provides proof of their qualification and participation in the Idaho Medical Marijuana Program, or another State's medical Marijuana program, is excluded from any arrest, fine, or prosecution for possessing Marijuana paraphernalia, as is anyone that provides the qualified patient the paraphernalia, and any seized paraphernalia must be returned." Taken literally, anyone in the

Medical Marijuana Program could sell marijuana paraphernalia to *anyone*, and be protected from arrest, fine, and prosecution for possessing drug paraphernalia. The "return" requirement of the provision does not state when paraphernalia must be returned, leaving open the possibility that it could be kept until related court proceedings (and appeal) are final.

Section 3 is entitled "Hemp Legalization" or the "Idaho Hemp Regulation Provision." It is likely that the inclusion of its provisions within the Idaho Medical Marijuana Act violates the single-subject rule set forth in art. XX, sec. 2 of the Idaho Constitution, which states, "If two (2) or more amendments are proposed, they shall be submitted in such manner that the electors shall vote for or against each of them separately." In Idaho Watersheds Project v. State Bd. of Land Comm'rs, 133 Idaho 55, 60, 982 P.2d 358, 363 (1999), the Idaho Supreme Court invalidated an initiative amending the Idaho Constitution that both established a fund in which the proceeds from the sale of school lands must be deposited and also required that the sale of school lands must take place at public auctions. The defendant argued that the single-subject rule was satisfied simply because "[a]ll of the language [of the amendment] relates to the subject of the sale of land and the use of the proceeds of the sale of land." *Id.* The Court rejected that argument, stating:

> [W]e find that the subject of how school endowment land proceeds are invested differs essentially from the subject of whether auctions should take place regarding only sales, as opposed to leases and sales, of school endowment lands. We conclude that the proposed amendments to the two sections of Article 9 do not in any way depend upon one another. They are "incongruous and essentially unrelated," and consequently should have been submitted separately to the voters. [Citation omitted.] We therefore hold that the amendments proposed by H.J.R. 6 violate Article 20, § 2 of the Idaho Constitution.

*Id.* Here too, the Idaho Medical Marijuana Act and Idaho Hemp Regulation Provision "are incongruous and essentially unrelated," and "do not in any way depend upon one another." *Id.* Therefore, the

initiative violates the single-subject rule of art. XX, sec. 2 of the Idaho Constitution and should be limited to presenting the Idaho Medical Marijuana Act.[6]

Even if considered, there are several concerns with the Hemp Legalization provisions. Prop. I.C. § 22-1802 defines hemp as Cannabis sativa L. with not more than 0.3% of tetrahydrocannabinol ("THC") on a dry weight basis. The provisions dealing with the promulgation of rules, non-interference by state and local agencies in hemp-related activities (Prop. I.C. § 22-1803(1)), protection from arrest, prosecution, and imprisonment (Prop. I.C. § 22-180(2)), and the return of seized hemp (Prop. I.C. § 22-1803(3)), all have the same flaw; they incorporate the "state law where the hemp originated" as one of the alternate limitations on the authority of Idaho state law. For example, Prop. I.C. § 22-1803(3) (emphasis added), states, "Any hemp seized shall be returned if legally utilized under federal law, Idaho law or regulations, *or the law of the state where the hemp originated*." That italicized clause, repeated in the three above-cited provisions, effectively makes less restrictive hemp laws of the originating state become the hemp laws of Idaho within the context of each provision.

Section 4, "Hemp Exclusion," excludes hemp from the definition of "marijuana" in Idaho Code § 37-2701(t). However, it fails to exclude hemp from the statute that makes any substance containing "any quantity" of THC an illegal Schedule I hallucinogenic substance, Idaho Code § 37-2705(d)(27).

Section 5, "Severability," provides that "if any provision of this acts [sic] or the application of such provision . . . is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this act."

### B. If Enacted, the Initiative Would Have No Legal Impact on Federal Criminal, Employment, or Housing Laws Regarding Marijuana

Idaho is free to enforce its own laws, just as the federal government is free to do the same. The United States Supreme Court has explained:

> In *Bartkus v. Illinois*, 359 U.S. 121 [1959], . . . and *Abbate v. United States*, 359 U.S. 187 [1959], . . . this Court reaffirmed the well-established principle that a federal prosecution does not bar a subsequent state prosecution of the same person for the same acts, and a state prosecution does not bar a federal one. The basis for this doctrine is that prosecutions under the laws of separate sovereigns do not, in the language of the Fifth Amendment, "subject [the defendant] for the same offence to be twice put in jeopardy":
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> > An offence [sic], in its legal signification, means the transgression of a law. . . . Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. . . . *That either or both may (if they see fit) punish such an offender, cannot be doubted.*"

United States v. Wheeler, 435 U.S. 313, 317, 98 S. Ct. 1079, 1082-93, 55 L. Ed. 2d 303 (1978) (superseded by statute) (quoting Moore v. People of State of Illinois, 55 U.S. 13, 19-20, — S. Ct. —, 14 L. Ed. 306 (1852)) (footnote omitted; emphasis added); *See* State v. Marek, 112 Idaho 860, 865, 736 P.2d 1314, 1319 (1987) ("[T]he double jeopardy clause of the fifth amendment does not prohibit separate sovereigns from pursuing separate prosecutions since separate sovereigns do not prosecute for the 'same offense.'"). Under the concept of "separate sovereigns," the State of Idaho is free to create its own criminal laws and exceptions pertaining to the use of marijuana. However, the State of Idaho cannot limit the federal government, as a separate sovereign, from prosecuting marijuana related conduct under its own laws.

In United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 486, 121 S. Ct. 1711, 1715, 149 L. Ed. 2d 722 (2001), the United States Supreme Court Supreme Court described a set of

circumstances that appear similar to the system proposed in the Initiative:

> In November 1996, California voters enacted an initiative measure entitled the Compassionate Use Act of 1996. Attempting "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes," Cal. Health & Safety Code Ann. § 11362.5 (West Supp. 2001), the statute creates an exception to California laws prohibiting the possession and cultivation of marijuana. These prohibitions no longer apply to a patient or his primary caregiver who possesses or cultivates marijuana for the patient's medical purposes upon the recommendation or approval of a physician. *Ibid.* In the wake of this voter initiative, several groups organized "medical cannabis dispensaries" to meet the needs of qualified patients. [Citation omitted.] Respondent Oakland Cannabis Buyers' Cooperative is one of these groups.

A federal district court denied the Cooperative's motion to modify an injunction that was predicated on the Cooperative's continued violation of the federal Controlled Substance Act's "prohibitions on distributing, manufacturing, and possessing with the intent to distribute or manufacture a controlled substance." *Id.* at 487. On appeal, the Ninth Circuit determined "medical necessity is a legally cognizable defense to violations of the Controlled Substances Act." *Id.* at 489. However, the United States Supreme Court reversed the Ninth Circuit and held:

> It is clear from the text of the [Controlled Substances] Act that Congress determined that marijuana has no medical benefits worthy of an exception. The statute expressly contemplates that many drugs "have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people," § 801(1), but it includes no exception at all for any medical use of marijuana. Unwilling to view this omission as an accident, and unable in any event to

> override a legislative determination manifest in a statute, we reject the Cooperative's argument.
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> . . . .
>
> For these reasons, we hold that medical necessity is not a defense to manufacturing and distributing marijuana. The Court of Appeals erred when it held that medical necessity is a "legally cognizable defense." 190 F.3d. at 1114. It further erred when it instructed the District Court on remand to consider "the criteria for a medical necessity exemption, and, should it modify the injunction, to set forth those criteria in the modification order." *Id.*, at 1115.

*Id.* at 493-95.

The Oakland Cannabis Buyer's Cooperative decision makes clear that prosecutions under the federal Controlled Substances Act are not subject to a "medical necessity defense," even though state law precludes prosecuting persons authorized to use marijuana for medical purposes, as well as those who manufacture and distribute marijuana for such use. Therefore, passage of the initiative would not affect the ability of the federal government to prosecute marijuana related crimes under federal laws.

In sum, Idaho is free to pass and enforce its own laws creating or negating criminal liability relative to marijuana. But, as the United States Supreme Court's Oakland Cannabis Buyer's Cooperative decision demonstrates, even if the initiative is enacted, persons exempted from state law criminal liability under its provisions would still be subject to criminal liability under federal law.

The same holds true in regard to federal regulations pertaining to housing and employment. In Assenberg v. Anacortes Housing Authority, 268 Fed. Appx. 643, 644 (unpublished) (9th Cir. 2008), contrary to the plaintiff's contention that, because he was authorized under state law to use marijuana for medical purposes, he was illegally denied housing, the Ninth Circuit explained:

> The district court properly rejected the Plaintiffs' attempt to assert the medical necessity defense. *See Raich v. Gonzales*, 500 F.3d 850, 861 (9th Cir.2007) (stating that the defense may be considered only when the medical marijuana user has been charged and faces criminal prosecution). The Fair Housing Act, Americans with Disabilities Act, and Rehabilitation Act all expressly exclude illegal drug use, and AHA did not have a duty to reasonably accommodate Assenberg's medical marijuana use. *See* 42 U.S.C. §§ 3602(h), 12210(a); 29 U.S.C. § 705(20)(C)(i).
>
> AHA did not violate the Department of Housing and Urban Development's ("HUD") policy by automatically terminating the Plaintiffs' lease based on Assenberg's drug use without considering factors HUD listed in its September 24, 1999 memo. . . . .
>
> Because the Plaintiffs' eviction is substantiated by Assenberg's illegal drug use, we need not address his claim . . . whether AHA offered a reasonable accommodation.
>
> The district court properly dismissed Assenberg's state law claims. Washington law requires only "reasonable" accommodation. [Citation omitted.] Requiring public housing authorities to violate federal law would not be reasonable.

Similarly, the Oregon Supreme Court has held that, under Oregon's employment discrimination laws, an employer was not required to accommodate an employee's use of medical marijuana. Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industries, 230 P.3d 518, 520 (Or. 2010). Therefore, the provisions of the initiative, Prop. I.C. §§ 39-9201, *et seq.*, cannot interfere or otherwise have an effect on federal laws, criminal or civil, which rely, in whole or in part, on marijuana being illegal under the federal Controlled Substances Act.

### C. Recommended Revisions or Alterations

In addition to the legal and non-legal problems previously

discussed, the initiative has several other aspects that merit consideration, described as follows:

1. All references to title 39, chapter 92, Idaho Code need to be changed because chapter 92 is currently assigned to the Idaho Direct Primary Care Act. Assuming no other currently pending legislation is reserved for chapter 96, it would be the next available chapter in title 39 for new statutes. Additionally, Prop. I.C. § 39-9212 is mistakenly numbered 39-9112; subsection (1)(a) should refer to 39-9202(15) instead of 39-9203(14); subsection (2)(a) should cite 39-9202(6) instead of 39-9203(6); and subsection (3)(a) should cite 39-9202(1) instead of 39-9203(1).

2. The Act skips from Prop. I.C. § 39-9202 to Prop. I.C. § 39-9204. Therefore, Prop. I.C. § 39-9204 needs to be changed to Prop. I.C. § 39-9203, and each successive provision needs to be modified accordingly.

3. Prop. I.C. § 39-9202(15) should add that it must be a "practitioner" that diagnoses a minor as having a debilitating medical condition.

4. Prop. I.C. § 39-9207(3)(e) states that one of the conditions for a medical marijuana dispensary to receive a registration certificate is:

> It is located in a county with more than twenty thousand (20,000) permanent residents and the county *already contains the maximum number* of medical Marijuana dispensaries allowed for each 20,000 permanent residents.

(Emphasis added.) The above provision may read the opposite way intended, i.e., that "the county *does not already contain* the maximum number of medical Marijuana dispensaries allowed for each 20,000 permanent residents."

5. Prop. I.C. § 39-9218(1) should read in part "sold by *a* Medical Marijuana organization." Subsection (2) should read in part "shall disperse fifty percent (50%) of the remaining amount" . . . .

6. Prop. I.C. § 39-9220(5) should change the two references to "certifying practitioner" to "recommending practitioner."

7. Prop. I.C. § 39-9221(6) should omit the "and" at the end, and subsection (7) should omit the period at the end and add "; and".

8. Prop. I.C. § 39-9223(15) states that "an employer may not discriminate against a person in hiring . . . or otherwise penalize a person based upon *either*: 1. The person's status as a medical marijuana license holder; *or* 2. Employers may take action against a holder of a medical marijuana license holder if . . . ." The second prohibition ("2.") does not fit the either/or set up of this anti-discrimination provision. Rather, it should be a stand-alone provision that, under certain conditions, allows employers to sue employees who are medical marijuana license holders.

9. Under Prop. I.C. 39-9227(1), (2), (3), (6), (7) and (8), the references to 39-9227 should be changed to 39-9228.

10. Prop. I.C. § 39-9228(1)'s reference to 39-9219 should be changed to 39-9220.

11. In Section 3, under 22-1803, subsection (3) should be subsection (2).

12. In Section 4, the subsection "(1)" is unnecessary because there are no other subsections in that statutory provision.

**CERTIFICATION**

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to John Belville, 1606 N. Irene Drive, Nampa, Idaho 83687.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

**Analysis by:**

John C. McKinney
Deputy Attorney General

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[1] References to "proposed" I.C. § 39-9201, *et seq.*, will read, "Prop. I.C. § 39-9201," etc.

[2] The Act limits the number of medical marijuana dispensaries to "5 per 20,000 permanent residents in each county." Prop. I.C. §§ 39-9207(1) and 39-9216(2).

[3] The Act also allows "visiting qualifying patients" from other states to possess medical marijuana while in Idaho. Prop. I.C. § 39-9202(21).

[4] However, the Act "does not prevent the imposition of any civil, criminal, or other penalties" for possessing or engaging in the medical use of marijuana on a school bus, on the "grounds of any licensed daycare, preschool, primary or secondary school," in a correctional facility, or smoking marijuana on any public transportation or in any public place. Prop. I.C. § 39-9205.

[5] Instead of reading "*including* slurred speech and lethargic movements," a provision stating "*such as* slurred speech" would not limit the symptoms a law enforcement officer could consider in determining whether a person is affected by marijuana use.

[6] It should be noted that, as of this date, the Idaho House of Representatives has passed a Hemp Bill, House Bill 122, which is pending consideration by the Idaho Senate.

April 25, 2019

The Honorable Lawerence Denney
Idaho Secretary of State
Statehouse
VIA HAND DELIVERY

Re: Certificate of Review
Proposed Initiative Repealing and Replacing Title 34, Chapter 18 and Enacting a New Title 34, Chapter 18 Relating to Initiatives and Referendums

Dear Secretary of State Denney:

An initiative petition was filed with your office on March 27, 2019. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only." The petitioners are free to "accept or reject them in whole or in part." This office offers no opinion with regard to the policy issues raised by the proposed initiative or the potential revenue impact to the state budget from likely litigation over the initiative's validity.

## BALLOT TITLE

Following the filing of the proposed initiative, this office will prepare short and long ballot titles. The ballot titles should impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While our office prepares titles for the initiative, petitioners may submit proposed titles for consideration. Any proposed titles should be consistent with the standard set forth above.

## MATTER OF FORM

Section 1 of the proposed initiative contains a statement that would repeal the entire contents of title 34, chapter 18, Idaho Code,

extant at the time of vote on the proposed measure.[1] Section 2 indicates that the portion of the initiative petition described as Section 3 would be codified in the Idaho Code as title 34, chapter 18. As this office understands these Sections, they would not be codified in Idaho Code. The portion of the initiative petition in Section 3 would be codified in Idaho Code as title 34, chapter 18. It appears likely that the intention of the petitioner is to have the "Findings and Purpose" section at the beginning of Section 3 replace current Idaho Code § 34-1801 as Section 34-1801. However, the petition does not clearly reflect this.

## SUMMARY OF INITIATIVE AND MATTERS OF SUBSTANTIVE IMPORT

### I. Summary of Proposed Initiative.

The proposed initiative would repeal the entire contents of title 34, chapter 18, Idaho Code, as existing at the time of the vote on the initiative measure. The proposed initiative would replace title 34, chapter 18, Idaho Code, with new sections, which would be known and designated as title 34, chapter 18, Idaho Code, proposed sections 34-1801A through 34-1823. In general, the new sections of the proposed initiative are largely the same as the sections currently in title 34, chapter 18, Idaho Code. The current title 34, chapter 18 establishes the process by which the people may enact initiatives and conduct referendums in Idaho.

In the interests of brevity, I will only describe the significant changes and reenactments the proposed initiative would work to title 34, chapter 18, Idaho Code.

**A. Proposed Section – "Findings and Purpose".** The initiative proposal would replace the current Statement of Legislative Intent and Legislative Purpose in Idaho Code § 34-1801, which finds that there have been incidents of fraud and misleading practices in obtaining petition signatures and determines the steps needed to prevent and deter such behavior. It appears that the intention of petitioner was to create a new section 34-1801 titled "Findings and Purpose," however, this paragraph does not contain a section label. There is no replacement section 34-1801 in the initiative petition. There is a paragraph titled "Findings and Purpose," which states that the

voters of the State of Idaho find it necessary to protect their rights to referendums and initiatives, that the voters "find that the idea that one group can be granted greater electoral strength than another hostile to the one person, one vote basis of our government," and states that the provisions of the initiative measure strike the "right balance" of ensuring support without disenfranchising voters.

**B. Section 34-1801A.** The proposed initiative would replace the current Idaho Code § 34-1801A with proposed section 34-1801A, which has two subsections. The new subsection (1) would state that an initiative petition may not contain an effective date sooner than January 1 of the year following the vote on the ballot initiative and, if no effective date is specified in the petition, the effective date of an initiative approved by the electorate is July 1 of the following year. The new subsection (2) would contain the requirements as to the form of the initiative petition currently contained in Idaho Code § 34-1801A.

**C. Section 34-1802.** The proposed initiative makes two notable changes to the repealed provision. Proposed subsection (1) would allow initiative proponents "twelve (13) [sic] months from the date" petitioners receive the official ballot title from the secretary of state or until "April 30 of the year of the next general election," whichever is earlier, to circulate the petition for signatures. Currently, Idaho Code § 34-1802(1) provides that proponents have 18 months, or until April 30, whichever is earlier, to circulate initiative petitions. Proposed subsection (2) would require that the petitioner submit the signatures to the county clerk for verification by "the first day of May in the year an election on the initiative will be held, or nineteen (13) [sic] months" from receipt of the official ballot title, whichever is earlier. Currently, Idaho Code § 34-1802(2) states that signatures must be submitted for verification "not later than the close of business on the first day of May in the year an election on the initiative will be held, or eighteen (18) months" from receipt of the official ballot title, whichever is earlier.

**D. Section 34-1804.** The proposed initiative would increase the number of signatures that the petitioner must submit to the secretary of state with the petition before circulating it for signatures to at least "twenty-five (25) qualified electors." Currently, the requirement under Idaho Code § 34-1804 is at least "twenty (20) qualified electors."

However, the proposed initiative would continue to require that "[n]ot more than twenty (20) signatures on one (1) sheet shall be counted."

**E. Section 34-1805.** The proposed initiative would decrease the number of legislative districts from which the signatures of legal voters must be obtained in order to qualify a measure for the ballot to "at least seventeen (17) legislative districts." Currently, Idaho Code § 34-1805 requires that signatures of legal voters must be obtained in at least eighteen (18) legislative districts. The current requirements of Idaho Code § 34-1805 that "signatures of legal voters equal in number to not less than six percent (6%) of the qualified electors at the time of the last general election" in each of the required legislative districts and that the "total number of signatures shall be equal to or greater than six percent (6%) of the qualified electors of the state at the time of the last general election" would be reenacted unchanged. It is worth noting that the initiative petition contains a duplicate section 34-1805.

**F. Sections 34-1815 and 34-1821.** The proposed initiative would reenact these two sections unchanged from the current Idaho Code. Section 34-1815 would make it a crime "for any person to willfully or knowingly circulate, publish or exhibit any false statement or representation, whether spoken or written, or to fail to disclose any material provision in a petition, concerning the contents, purport or effect of any petition . . . for the purpose of obtaining any signature to any such petition, or for the purpose of persuading any person to sign any such petition." Idaho Code section 34-1821 would make it a felony to "offer . . . or attempt to sell . . . any petition or any part thereof or of any signatures . . . ."

**G. Sections 34-1801C.** Section 34-1801C does not differ from current Idaho Code § 34-1801C. This section is notable in that the initiative petition contains a duplicate Section 34-1801C.

## II. Matters of Substantive Import.

### A. The Legal Standards Governing the Imposition of Conditions on the Enactment of Initiatives and Referendums Stem from the Idaho and U.S. Constitutions.

The proposed initiative measure would impose a legal framework for how the people may enact initiatives and pass referendums in Idaho.[2] While this framework would be largely unchanged from the current framework in place under title 34, chapter 18, Idaho Code, a discussion of the legal standards governing this framework is required to analyze whether the changes in the proposal would be legally permissible.

Article III, section 1 is the relevant provision of the Idaho Constitution governing the right of the citizenry to enact law via initiative. It provides, in pertinent part:

> The people reserve to themselves the power to propose laws, and enact the same at the polls independent of the legislature. This power is known as the initiative, and legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, initiate any desired legislation and cause the same to be submitted to the vote of the people at a general election for their approval or rejection.[3]

The right of the people to initiate laws and hold referendums is not self-executing.[4] This right "can only be exercised 'under such conditions and in such manner as may be provided by acts of the legislature.'"[5]

In Dredge Mining Control—Yes!, Inc. v. Cenarrusa, 92 Idaho 480, 445 P.2d 655 (1968) ("*Dredge*"), the Idaho Supreme Court examined the "conditions" and "manner" the legislature may establish for the exercise of the right to initiate laws without violating the right to initiate itself.[6] The court analyzed whether the requirement in then-Idaho Code § 34-1805 that an initiative petition be signed by "legal voters equal in number to not less than ten per cent (10%) of the electors of the state based upon the aggregate vote cast for governor at the general election next preceding the filing of such . . . petition" was a permissible condition on the right to initiate laws.[7]

The trial court had upheld the requirement, concluding "[t]he legislative procedures outlined in Chapter 18 of Title 34, Idaho Code, are not unreasonable and must be complied with. While they may be

cumbersome they are nevertheless workable. . . . "[8] The appellants challenged the trial court's conclusion, arguing the certification of the signatures by the clerks of the district courts was "a practical impossibility" and "unworkable" under Idaho voter registration laws, raising concerns about the clerks' ability to verify signatures.[9]

The Idaho Supreme Court concluded the "statutory scheme set up by the legislature, although restrictive and perhaps cumbersome, is reasonable and workable."[10] It identified work-arounds to the concerns appellants raised about the ability of clerks to verify signatures and noted that no signatures in the lower court case had been rejected for lack of genuineness.[11] Ultimately, "the provisions of law enacted by the legislature pertaining to the initiative procedures are reasonable."[12]

Thus, under the standard established by the Idaho Supreme Court, the "conditions" and "manner" established for the exercise of the right to initiate and hold referendums must be "reasonable and workable" to avoid violating the rights contained in article III, section 1 of the Idaho Constitution, although they may be "restrictive and perhaps cumbersome."[13]

There is no corresponding federal right to initiate legislation or to hold referendums.[14] That said, restrictions on qualifying an initiative or referendum for the ballot may directly or indirectly impact core political speech and thereby violate the First Amendment of the U.S. Constitution.[15] Restrictions related to qualifying an initiative or referendum for the ballot may also violate the Equal Protection Clause of the U.S. Constitution.[16]

With regard to the First Amendment, "[t]he [U.S.] Supreme Court has identified at least two ways in which restrictions on the initiative process can severely burden 'core political speech.'"[17] First, a restriction could "restrict one-on-one communication between petition circulators and voters."[18] Second, it could make it less likely that a proponent of a measure could gather the necessary signatures to place an initiative on the ballot, thereby "'limiting their ability to make the matter the focus of statewide discussion.'"[19]

In analyzing First Amendment concerns related to initiative and referendum procedures, the court will first ask whether the law imposes

a "severe burden" on plaintiff's rights.[20] Laws imposing severe burdens must be "narrowly tailored and advance a compelling state interest."[21] "Lesser burdens . . . trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions."[22]

As noted above, laws governing the exercise of the right to initiate laws and hold referendums may also run afoul of the Equal Protection Clause of the U.S. Constitution. "Voting is a fundamental right subject to equal protection guarantees under the Fourteenth Amendment."[23] When a state gives its citizens the right to enact laws by initiative and hold referendums, "it subjects itself to the requirements of the Equal Protection Clause."[24] Laws governing the process may not engage in impermissible vote dilution nor may they discriminate against an identifiable class of voters.[25]

### B. Laws Setting the Conditions and Manner Governing How the Rights of Initiative and Referendum May be Exercised Are Likely a Proper Subject for Initiative.

While article III of the Idaho Constitution expressly gives the legislature the power to control the conditions and manner by which the right to initiate laws may be exercised, this is likely a proper subject for an initiative.[26] Generally, where the legislature may legislate, the people may initiate.[27]

The Idaho Supreme Court has previously found that a power explicitly granted to the legislature may be exercised by the people under the right to initiate laws. In Rudeen v. Cenarrusa, the Court upheld the Idaho Term Limits Act Initiative of 1994, which limited multi-term incumbents' right to ballot access.[28] The Court upheld the initiated laws as a valid exercise of the power vested in the legislature and the people of Idaho granted by the combination of article III, section 1 and article VI, section 4 of the Idaho Constitution.[29]

Article VI, section 4 of the Idaho Constitution provides "*[t]he legislature* may prescribe qualifications, limitations, and conditions for the right of suffrage, additional to those prescribed in this article, but shall never annul any of the provisions in this article contained."[30] The Rudeen Court interpreted this provision as granting the people, as well

as the legislature, authority to add limitations to the right of suffrage.[31] Despite the fact that the provision specifically named the legislature as the authorized entity, the Court concluded that the authority extended to the people under the right of initiative, upholding the initiative under articles III and VI of the Idaho Constitution.[32]

The reverse is also true. In Westerburg, the Idaho Supreme Court held the people may not enact a lottery through the initiative process when the legislature is prohibited from so doing.[33] Westerburg indicates that any restrictions on the legislature's ability to set the conditions and manner for the exercise of the right of initiative also apply when the people set the conditions and manner for the exercise of the initiative.

A reviewing court would therefore likely find that the people may set the conditions and manner for the exercise of the right of initiative via initiative as long as the procedure established by the people complies with the constitutional standards discussed above.

### C. The Provisions Governing the Effective Dates for Laws Enacted Via Initiative are Ambiguous.

The proposed initiative would replace the current Idaho Code § 34-1801A with proposed section 34-1801A, which has two subsections. The new subsection (1) would state that an initiative petition may not contain an effective date sooner than January 1 of the year following the vote on the ballot initiative and, if no effective date is specified in the petition, the effective date of an initiative approved by the electorate is July 1 of the following year. The new subsection (2) would contain the requirements as to the form of the initiative petition currently contained in Idaho Code § 34-1801A.[34]

However, the language of proposed subsection 34-1801A(1) directly conflicts with proposed Idaho Code section 34-1813, which provides that the secretary of state must canvass the votes for each measure within 30 days of the election, or sooner if all the returns are received, and "the governor shall forthwith issue his proclamation, giving the whole number of votes cast in the state for and against such measure and question, and declaring such measures as are approved by a majority of those voted thereon to be *in full force and effect as the*

*law of the state of Idaho from the date of said proclamation . . . .*" This conflict would result in significant ambiguity as to when laws enacted via initiative would go into effect and invite legal challenge.

Were it not for this conflict, a reviewing court would likely find proposed subsection 34-1801A(1)'s requirements related to the effective dates of initiatives to be reasonable and workable under the standard set forth above for the Idaho Constitution's right to initiate laws.

Further, given that the effective date requirements do not restrict one-on-one communication or make it more difficult to get an initiative on the ballot, a reviewing court is unlikely to find First Amendment concerns implicated by the effective date requirements.[35] And as the requirements would apply to all initiatives equally and do not affect the weight of the votes cast for initiatives, it is unlikely that federal equal protection concerns would be implicated by the changes.[36]

### D. The Requirements that Petitioners Gather Signatures of 6% of the Qualified Electors in at Least 17 Legislative Districts Within 12 or 13 Months to Put an Initiative Measure or Referendum on the Ballot is Likely Constitutional.

Under current Idaho Code § 34-1802(1), initiative petitioners have 18 months from the date they receive the official ballot title from the secretary of state or until April 30 of the year of the next general election, whichever occurs earlier, to circulate their petitions and gather signatures. Referendum petitioners must file petitions with the secretary of state with the requisite number of signatures attached not more than 60 days after the final adjournment of the session of the state legislature which passed on the bill on which the referendum is demanded.[37] Current Idaho Code § 34-1805 requires that initiative and referendum petitioners collect:

> . . . the signatures of legal voters equal in number to not less than six percent (6%) of the qualified electors at the time of the last general election in each of at least eighteen (18) legislative districts; provided however, the

> total number of signatures shall be equal to or greater than six percent (6%) of the qualified electors of the state at the time of the last general election.

The proposed initiative would decrease the window to gather signatures for initiative petitions to "twelve (13) [sic] months from that date or April 30 of the year of the next general election, whichever occurs earlier" with proposed section 34-1802(1).[38] Proposed section 34-1805 would require that initiative and referendum petitioners gather the signatures of not less than 6% of the qualified electors at the time of the last general election in each of at least 17 legislative districts, rather than 18.[39] The total number of signatures gathered would still be required to be equal to or greater than 6% of the qualified electors of the state at the time of the last general election.[40]

Whether the proposed window is 12 or 13 months, these signature-gathering requirements would likely be found constitutional for initiative petitions. No Idaho court has yet looked at the constitutionality of signature-gathering requirements under the Idaho Constitution. As discussed above, it appears that these requirements will survive scrutiny under article III, section 1 of the Idaho Constitution if they are "reasonable and workable."[41]

Signature-gathering requirements that meet this standard are also likely to survive First Amendment scrutiny. Under First Amendment jurisprudence, as long as ballot access restrictions do not "significantly inhibit the ability of initiative proponents to place initiatives on the ballot," they will be upheld as long as the rule furthers "an important regulatory interest."[42] A ballot access restriction works a significant inhibition when "reasonably diligent" initiative proponents are unable to qualify an initiative for the ballot as a result of the restrictions.[43]

In short, precedent interpreting the First Amendment is instructive to analyze whether these signature-gathering requirements would survive scrutiny under the Idaho Constitution, as well as under the First Amendment.

Similar signature-gathering requirements have been approved individually on First Amendment grounds. Courts that have reviewed

signature deadlines have found the far shorter deadlines reasonable: 180 days;[44] 188 days;[45] and approximately seven months.[46] Further, the U.S. Supreme Court has noted, in the context of signature-gathering requirements for candidates, "the petition period must end at a reasonable time before election day to permit nomination papers to be verified."[47]

Courts have also approved total signature requirements of 8% of the votes cast in a previous election[48] and 10% of the registered voters in a state.[49]

As for the legislative district requirement, the Ninth Circuit Court of Appeals has approved a requirement that initiative proponents collect signatures from a certain number of registered voters in *all* of the state's congressional districts.[50] Other courts have similarly approved geographic distribution requirements.[51]

The signature-gathering requirements are likely also constitutional in the aggregate under the Idaho and U.S. Constitutions.[52] Most notably, in 2004, the Utah Supreme Court upheld as constitutional under the Utah Constitution requirements that an initiative sponsor obtain the signatures of equal to 10% of the cumulative total of all votes cast for candidates for governor at the last regular general election at which a governor was elected on a statewide level and in each of at least 26 of Utah's 29 senate districts (89.7% of districts) within one year.[53]

The requirement had been challenged under Utah Constitution, article VI, section 1, which states, "The legal voters of the State of Utah in the numbers, under the conditions, in the manner, and within the time provided by statute, may initiate any desired legislation . . . ."[54] The court determined the requirement did not "unduly burden" the right to initiative by assessing "whether the enactment [was] reasonable, whether it [had] a legitimate legislative purpose, and whether the enactment reasonably tend[ed] to further that legislative purpose."[55] In approving the one-year time requirement to obtain signatures as reasonable, the court noted that it had previously approved a 35 day signature requirement for submitting referenda.[56] The court noted that, although the signature requirements for initiatives were more exacting,

it could not articulate a reason on the evidence before it that a one-year time period would be unreasonable.[57]

Based on the above precedent, it is likely that the signature-gathering requirements for initiatives would be upheld as constitutional against a facial challenge individually and in the aggregate. That said, the signature-gathering requirements could be vulnerable to an as-applied challenge if credible evidence was brought forward that the signature-gathering requirements in the aggregate prevented a reasonably-diligent initiative proponent from getting an initiative measure on the ballot.

A question remains as to whether the new signature-gathering requirements would be constitutional with regard to referendum petitions. Assuming that the measure a petitioner wished to subject to referendum was a law passed at the end of the legislative session, the petitioner would have fewer than 60 days to collect the required signatures.[58] This is because the referendum petition would be subject to certificate of review and ballot title requirements before it could be circulated for signatures and the Attorney General has 20 working days to complete the certificate of review process and 10 working days to provide ballot titles, which could leave fewer than 30 days for signature gathering.[59] It is possible that a reviewing court would find that the reduced time frame to gather signatures, combined with the increased signature-gathering requirement, renders the requirements unworkable and unconstitutional.[60]

### E. The Increase in Signatures a Petitioner is Required to File with the Secretary of State is Likely Constitutional.

The proposed section 34-1804 would provide "before or at the time of beginning to circulate any petition . . . for the referendum . . . or . . . initiative" the petitioner "shall send or deliver to the secretary of state a copy of such petition duly signed by at least twenty-five (25) qualified electors of the state . . . ." This filing triggers the Attorney General's certificate of review and the subsequent assignment of ballot titles.[61]

This language is unchanged from the current Idaho Code §§ 34-1804 and 34-1809 with the exception that the proposed section 34-

1804 would require the signatures of at least 25 qualified electors, rather than the current requirement of 20 qualified electors.

It is unlikely that a reviewing court would find the minor increase in signatures unreasonable or that it prevents a reasonably-diligent initiative proponent from getting a measure on the ballot. Therefore, it is unlikely that this increase in signatures would work a violation of either the Idaho Constitution or the First Amendment under the standards discussed above.

### F. The Criminalization of Certain Actions Related to Circulating Initiative Petitions is Likely Unconstitutional.

The proposed initiative petition, if approved by the voters, would re-enact the current Idaho Code § 34-1815, making it a crime "for any person to willfully or knowingly circulate, publish or exhibit any false statement or representation, whether spoken or written, or to fail to disclose any material provision in a petition, concerning the contents, purport or effect of any petition . . . for the purpose of obtaining any signature to any such petition, or for the purpose of persuading any person to sign any such petition."

In Idaho Coalition United For Bears, the U.S. District Court for the District of Idaho struck down as unconstitutional identical language in Idaho Code § 34-1815.[62] The District Court found the sentence in Idaho Code § 34-1815, which is identical to the proposed language in the initiative petition, unconstitutionally vague in part and, created, in another part, an unconstitutional strict liability offense that impermissibly chilled First Amendment speech.[63]

The initiative petition also proposes to re-enact Idaho Code § 34-1821 as section 34-1821, making it a felony to "offer . . . or attempt to sell . . . any petition or any part thereof or of any signatures . . . ." However, the U.S. District Court for the District of Idaho has also struck down subsection (a) of Idaho Code § 34-1821 on First Amendment grounds as unconstitutionally chilling protected speech.[64]

As the initiative petition proposes to re-enact the unconstitutional provisions of Idaho Code §§ 34-1815 and 34-1821(a),

these re-enacted provisions are likely to be struck down as unconstitutional.

**CERTIFICATION**

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via copy of this Certificate of Review, deposited in the U.S. Mail to Jane Rohling, 582 Palmetto Dr., Eagle, Idaho 83616.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

**Analysis by:**

Megan A. Larrondo
Deputy Attorney General

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[1] The title of the proposed law stated just before Section 1 contains a typographical error misspelling Referendums.

[2] It is worth noting that the Constitution provides that the initiative and referenda are established by the legislature. This initiative purports to establish those regulations through the people. It is likely that a reviewing court would permit this exercise of authority because through an initiative, the people stand in the place of the legislature and have reserved this authority unto themselves. But this is an open question of law in Idaho.

[3] Idaho Const. art. III, § 1.

[4] *See* Johnson v. Diefendorf, 56 Idaho 620, 57 P.2d 1068, 1075 (1936) (holding the right of referendum also provided in article III, section 1 is not self-executing, but rather its exercise is dependent upon the statutory scheme enacted by the legislature).

[5] Westerberg v. Andrus, 114 Idaho 401, 404, 757 P.2d 664, 667 (1988) (quoting Idaho Const. art. III, § 1).

[6] 92 Idaho 480, 445 P.2d 655 (1968).

[7] 92 Idaho at 481, 455 P.2d at 656.

[8] *Id.*, 92 Idaho at 483, 455 P.2d at 658.

[9] *Id.* The trial court had interpreted "legal voters" to mean registered electors and the Idaho Supreme Court upheld this conclusion. *Id.*, 92 Idaho at 483, 455 P.2d at 658.

[10] *Id.*, 92 Idaho at 484, 455 P.2d at 659 (citations omitted).

[11] *Id.*

[12] *Id.*

[13] *Id.* (citations omitted).

[14] Angle v. Miller, 673 F.3d 1122, 1133 (9th Cir. 2012) (citation omitted).

[15] *See id.* at 1132 (citations omitted).

[16] See Idaho Coal. United for Bears v. Cenarrusa, 342 F.3d 1073, 1076-77 (9th Cir. 2003), aff'd, 342 F.3d 1073 (9th Cir. 2003).

[17] Angle, 673 F.3d at 1132 (quoting Meyer v. Grant, 486 U.S. 414, 422, 108 S. Ct. 1886, 1892, 100 L. Ed. 2d 425 (1988)).

[18] *Id.* (citation omitted).

[19] *Id.* (quoting Meyer, 486 U.S. at 423).

[20] *Id.*

[21] *Id.* (citation omitted).

[22] *Id.* (alteration in original) (citation omitted); Burdick v. Takushi, 504 U.S. 428, 433, 112 S. Ct. 2059, 2063, 119 L. Ed. 2d 245 (1992).

[23] Idaho Coal. United for Bears, 342 F.3d at 1076 (citation omitted).

[24] *Id.* at 1077 n.7 (citation omitted).

[25] Angle, 673 F.3d at 1128.

[26] *See* Idaho Const. art. III, § 1 ("legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, initiate any desired legislation . . . .").

[27] *See* City of Boise City v. Keep the Commandments Coal., 143 Idaho 254, 256, 141 P.3d 1123, 1125 (2006) ("If a subject is legislative in nature, it is appropriate for action by initiative.").

[28] Rudeen v. Cenarrusa, 136 Idaho 560, 38 P.3d 598 (2001).

[29] *Id.*, 136 Idaho at 567-68, 38 P.3d at 605-06.

[30] Idaho Const. art. VI, § 4 (emphasis added).

[31] Rudeen, 136 Idaho at 567, 38 P.3d at 605.

[32] *Id.*, 136 Idaho at 567-68, 38 P.3d at 605-06.

[33] Westerburg, 114 Idaho at 406, 757 P.2d at 669.

[34] The (2) marking subsection (2) of proposed Idaho Code section 34-1801A has an underscore that appears to be a typographical error.

[35] *See* Angle, 673 F.3d at 1132-33.

[36] *See id.* at 1128-29.

[37] Idaho Code § 34-1803.

[38] There appears to be a typo in the initiative petition: it is not clear whether the window to collect signatures would be reduced to 12 or 13 months. Similarly, there is a typographical error in proposed section 34-1802(2), which states an initiative petitioner would have until the first day of May in the year

an election on the initiative will be held or "nineteen (13) [sic] months" from the date the petitioner receives the official ballot title, whichever is earlier, to submit the petition containing signatures to the county clerk for verification. Currently, Idaho Code § 34-1802(2) provides until the first day of May or 18 months, whichever is earlier, to submit the petitions containing signatures to the county clerk.

[39] The Ninth Circuit Court of Appeals has repeatedly indicated that states may permissibly ensure statewide support for initiative petitions by requiring initiative proponents to obtain signatures from districts having equal population, such as state legislative districts, without violating the Equal Protection Clause of the U.S. Constitution. *See* Angle, 673 F.3d at 1131; Am. Civil Liberties Union of Nev. v. Lomax, 471 F.3d 1010, 1021 (9th Cir. 2006); Idaho Coal. United for Bears, 342 F.3d at 1078. That said, a federal district court in Colorado recently struck down a Colorado requirement that an initiative proponent obtain the signatures of at least 2% of the voters in each state senate district as a violation of the Equal Protection Clause based on evidence of significant variation in registered voters in each state senate district. Semple v. Williams, 290 F. Supp. 3d 1187, 1203 (D. Colo. 2018). This decision is currently on appeal to the Tenth Circuit Court of Appeals.

[40] *See* proposed Idaho Code section 34-1805.

[41] Dredge, 92 Idaho at 484, 445 P.2d at 659.

[42] Angle, 673 F.3d at 1133, 1135 (citation omitted).

[43] *Id.* at 1134.

[44] Jenness v. Fortson, 403 U.S. 431, 433, 442, 91 S. Ct. 1970, 1972, 29 L. Ed. 2d 554 (1971).

[45] Libertarian Party of Fla. v. State of Fla., 710 F.2d 790, 794 (11th Cir. 1983).

[46] Libertarian Party of N.H. v. Gardner, 843 F.3d 20, 27-30 (1st Cir. 2016).

[47] Storer v. Brown, 415 U.S. 724, 743, 94 S. Ct. 1285, 1284, 39 L. Ed. 2d 714 (1974).

[48] Protect Marriage Ill. v. Orr, 463 F.3d 604, 605-06, 608 (7th Cir. 2006).

[49] Dobrovolny v. Moore, 126 F.3d 1111, 1112-13 (8th Cir. 1997).

[50] *See* Angle, 673 F.3d at 1135-36.

[51] *See also* Libertarian Party v. Bond, 764 F.2d 538, 543 (8th Cir. 1985) (requirement that signatures be obtained from either all, or at least one-half, of Missouri's nine congressional districts and that party obtain signatures of at least one or two percent respectively of votes cast for Governor in last gubernatorial election to place party's name on ballot was not overly burdensome); Moritt v. Governor of N.Y., 366 N.E.2d 1285, 1287 (N.Y. Ct. App. 1977) (upheld requirement of 20,000 signatures with at least 100 signatures from each district for statewide office).

[52] *See* Jenness, 403 U.S. at 438 (six months to collect the signatures of 5% of the eligible electorate for the office in question is permissible); Libertarian Party of Fla., 710 F.2d at 793-94 (188 days to collect signatures of 3% of the state's registered voters provides a realistic means of ballot access).

[53] *See* Utah Safe to Learn-Safe to Worship Coal., Inc. v. State, 94 P.3d 217, 229, 231 (Utah 2004).

[54] *Id.* at 226 (quoting Utah Const. art. VI, § 1) (alteration omitted).

[55] *Id.* at 228.

[56] *Id.* at 231 (citation omitted).

[57] *Id.*

[58] *See* proposed section 34-1803.

[59] *See* proposed section 34-1809(1)(a) and (2)(a).

[60] *See* Storer, 415 U.S. at 739-40 (remanding requirement of 5% of voters in 24 days to see if excessively burdensome in light of the fact that the pool of available signers was diminished by the disqualification of those who voted in the primary).

[61] *See* proposed section 34-1809.

[62] 234 F. Supp. 2d at 1167.

[63] *Id.*

[64] *See id.*, 234 F.Supp.2d at 1166.

July 22, 2019

The Honorable Lawerence Denney
Idaho Secretary of State
Statehouse
VIA HAND DELIVERY

Re: Certificate of Review
Proposed Initiative Creating New Medical Marijuana Act by Adding Chapter 96 to Title 39, Idaho Code, to Legalize the Use of Medical Marijuana

Dear Secretary of State Denney:

An initiative petition was filed with your office on June 27, 2019. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only." The petitioners are free to "accept them in whole or in part." Due to the available resources and limited time for performing the reviews, we did not communicate directly with the petitioner as part of the review process. The opinions expressed in this review are only those that may affect the legality of the initiative. This office offers no opinion with regard to the policy issues raised by the proposed initiative.

## BALLOT TITLES

Following the filing of the proposed initiative, this office will prepare short and long ballot titles. The ballot titles should impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While our office prepares titles for the initiative, petitioners may submit proposed titles for consideration. Any proposed titles should be consistent with the standard set forth above.

## MATTERS OF SUBSTANTIVE IMPORT

## A. Summary of the Initiative

The initiative is self-titled the "Idaho Medical Marijuana Act" (hereafter "Act") and is denominated as Idaho Code §§ 39-9601, *et seq.*[1] Primarily, the initiative seeks to amend title 39, Idaho Code, by adding a new chapter 96, which declares that persons engaged in the use, possession, manufacture, sale, and/or distribution of marijuana to persons suffering from debilitating medical conditions, as authorized by the Act, are protected from arrest, prosecution, property forfeiture, and criminal and other penalties under Idaho law.

In general, the Act authorizes the Idaho Department of Health & Welfare ("Department") to adopt regulations necessary for the implementation of a registration-based system for instituting and maintaining the production and dispensing of marijuana for use by persons diagnosed with a debilitating medical condition. Prop. I.C. § 39-9605. The Act directs the Department to approve or deny applications for "registry identification cards" presented by "qualifying patients" and their "designated caregivers."[2] Prop. I.C. §§ 39-9602(6), (15); 39-9607 to 39-9611. The Department is required to issue a "registration certificate" to a qualifying "medical marijuana organization," defined as a "medical marijuana dispensary, a medical marijuana production facility, or a safety compliance facility." Prop. I.C. §§ 39-9602(10), 39-9605 to 39-9606, 39-9611, and 39-9613. The Act permits, without state civil or criminal sanctions, marijuana to be produced by medical marijuana production facilities throughout the state, tested for potency and contaminants at safety compliance facilities, and transported to medical marijuana dispensaries for sale to qualifying patients and/or their designated caregivers.

Section 1 of the Act insulates from arrest, prosecution, and property forfeiture, "qualifying patients" ("patients") diagnosed with having a "debilitating medical condition" who use marijuana for medicinal purposes, as well as their "designated caregivers" ("caregivers"). The Act establishes a complex regulatory system whereby medical marijuana production facilities, medical marijuana dispensaries, and safety compliance facilities are insulated from civil forfeitures and penalties under state law. Discrimination against participants in the Act is prohibited in regard to education, housing, and employment. The Department is required to formulate rules and

regulations to implement and maintain the Act's measures. Section 1 also excludes from arrest, fine, or prosecution, any persons who possess marijuana paraphernalia who are participants in the Act's medical marijuana program. Section 2 states that any measures "concerning the legalization, control, regulation, or taxation of marijuana for medical use that are on the same ballot "shall be deemed to be in conflict with this measure," and that this measure prevails over other measures if it "receives a greater number of affirmative votes[.]" Section 3 is a "severability" provision which declares that, if any provision of the Act is declared invalid, the remaining portions of the Act remain valid. This review discusses the more notable provisions of the proposed Act in roughly the same sequence in which they occur.

Many of the "Definitions" in Prop. I.C. § 39-9602 are also substantive requirements under the Act. In short, they provide that: (1) patients may possess up to four (4) ounces of marijuana and, if a patient's registry identification card states that the patient has a "hardship cultivation designation," the patient may also possess up to six (6) marijuana plants in an enclosed locked facility (etc.), and any marijuana produced from the plants grown at the premises or at the patient's residence,[3] and (2) caregivers may assist up to three (3) patients' medical use of marijuana, and possess, for each patient assisted, the same amounts of marijuana described above. Prop. I.C. § 39-9602(2), (6), and (15). Apart from indicating that patients and caregivers are "not subject to arrest, prosecution, or penalty in any manner [etc.]," Prop. I.C. § 39-9621(1), there is no provision for any other person or entity to cultivate marijuana -- except a marijuana production facility.

In order to become a "qualifying patient," a person must have a "practitioner" (defined as a person authorized to prescribe drugs pursuant to the Medical Practice Act (Idaho Code §§ 54-1801, *et. seq.*)) provide a written recommendation that, in the practitioner's professional opinion, the patient "is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the patient's debilitating medical condition or symptoms associated with the debilitating medical condition." Prop. I.C. § 39-9602(14), (15), and (19). The recommendation must specify the patient's debilitating medical condition and may only be signed (and dated) in the course of a "bona fide practitioner-patient relationship after the practitioner has completed

a full assessment of the patient's medical history and current medical condition." Prop. I.C. § 39-9602(19). Minors are also entitled to be issued registry identification cards as patients under certain criteria. Prop. I.C. § 39-9607(3).

A "debilitating medical condition" means not only the conditions listed (such as cancer, glaucoma, HIV, AIDS, Alzheimer's disease, post-traumatic stress disorder, etc.), but also "[a] chronic or debilitating disease or medical condition or its treatment that produces cachexia or wasting syndrome, severe pain, chronic pain, severe nausea, seizures, including those characteristic of epilepsy, or severe and persistent muscle spasms, including those characteristic of multiple sclerosis," any terminal illness with life expectancy of less than twelve (12) months as determined by a licensed medical physician[,]" or "[a]ny other serious medical condition or its treatment added by the Department pursuant to section 39-9616." Prop. I.C. § 39-9602(4). The Act provides that the public may petition the Department to add debilitating medical conditions or treatments to the list of those established in Prop. I.C. § 39-9616.

"Agents" are defined as principal officers, board members, employees, or volunteers of a medical marijuana organization who are at least twenty-one (21) years old and who "meet the qualifications of this act." Prop. I.C. § 39-9602(1). Agents of medical marijuana organizations – marijuana dispensaries, marijuana production facilities, and marijuana safety compliance facilities – are exempt from "prosecution, search, or inspection, except by the Department pursuant to 39-9613(6), seizure, or penalty in any manner, and may not be denied any right or privilege, including civil penalty or disciplinary action by a court or business licensing board or entity, for acting pursuant to [the Act]." Prop. I.C. § 39-9621(6) to (8).

Prop. I.C. § 39-9603 – "Limitations" – states that the Act's provisions do not "prevent the imposition of any civil, criminal, or other penalties" for:

(1) "Undertaking any task under the influence of marijuana that would constitute negligence or professional malpractice".

(2) "Possessing or engaging in the medical use of marijuana:
(a) On a school bus; or
(b) In any correctional facility."
(3) "Smoking marijuana:
(a) On any form of public transportation;
(b) On the grounds of a licensed daycare, preschool, primary or secondary school; or
(c) In any public place[;]" or
(4) Operating (etc.) "any motor vehicle, aircraft, train, motorboat, or other motorized form of transport while under the influence of marijuana."
. . .

Under subsection (4) of Prop. I.C. § 39-9603, cardholders and nonresident cardholders "may not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment."

Prop. I.C. § 39-9603(5) states that the Act does not "prevent the imposition of any civil, criminal or other penalties" for persons engaging in "Solvent-based extractions on marijuana using solvents *other than water, glycerin, propylene glycol, vegetable oil, or food grade ethanol* by a person not licensed for this activity by the Department." (Emphasis added.) This implies that persons engaged in solvent-based extractions on marijuana using solvents consisting of "water, glycerin, propylene glycol, vegetable oil, or food grade ethanol" are not subject to such penalties. Whether such a provision is based upon accepted and reasonable scientific, health, and safety considerations is beyond the scope of this review.

Prop. I.C. § 39-9604(1) – "Facility Restrictions" – allows any "nursing facility, intermediate care facility, hospice house, hospital, or other type of residential care or assisted living facility" to adopt "reasonable restrictions" on the medical use of marijuana. Those facilities do *not* have to store a qualifying patient's supply of marijuana or provide marijuana to qualifying patients. Prop. I.C. § 39-9604(1)(a) to (b). The facilities may require that "marijuana is consumed by a

method other than smoking," and may specify the place where marijuana may be consumed. Prop. I.C. § 39-9604(1)(c) to (d).

The Department is given the task of making extensive rules, pursuant to the Idaho Administrative Procedure Act ("IDAPA") for implementing the Act's measures, including rules for: the form and content of applications and renewals, a system to "score numerically competing medical marijuana dispensary applicants," the prevention of theft of marijuana and security at facilities, oversight, recordkeeping, safety," and safe and accurate packaging and labeling of medical marijuana. Prop. I.C. § 39-9605. Notably, the provision requires that, in establishing application and renewal fees for registry identification cards and registration certificates, "[t]he total amount of all fees must generate revenues sufficient to implement and administer this chapter, except fee revenue may be offset or supplemented by private donations." Prop. I.C. § 39-9605(1)(k)(i).

Upon satisfactory application by a medical marijuana organization, the Department must approve a registration certificate within ninety (90) days. Prop. I.C. § 39-9606. Medical marijuana organizations must have operating documents that include procedures for the oversight of the organization and accurate recordkeeping, and are required to implement adequate security measures. *Id.* Medical marijuana production facilities must restrict marijuana cultivation, harvesting, etc., within a secure, locked facility only accessible to registered agents.[4] Prop. I.C. § 39-9613(2). Medical marijuana production facilities and dispensaries "may acquire marijuana or marijuana plants from a registered qualifying patient or a registered designated caregiver only if the . . . patient or . . . caregiver receives no compensation for the marijuana." Prop. I.C. § 39-9613(3).

Patients may apply for registry identification cards for themselves and their caregivers by submitting a written recommendation issued by a practitioner within the last ninety (90) days, application, fee, and a designation "as to whether the qualifying patient or the designated caregiver will be allowed to cultivate marijuana plants for the qualifying patient's medical use if the qualifying patient qualifies for a hardship cultivation designation." Prop. I.C. § 39-9607(1).[5] This provision suggests that, if a patient has such a designation, *either* the patient or the caregiver may cultivate six (6)

marijuana plants and retain the marijuana from those plants – not both (which would allow a total of twelve (12) marijuana plants). The Department is obligated to verify the information in an application (or renewal request) for a registry identification card, and approve or deny the application within twenty (20) days after receiving it, and must issue a card within ten (10) more days thereafter. Prop. I.C. § 39-9607(2). If a registry identification card "of either a qualifying patient or the qualifying patient's designated caregiver does not state that the cardholder is permitted to cultivate marijuana plants,[6] the Department must give written notice to the registered qualifying patient . . . of the names and addresses of all the registered medical marijuana dispensaries." Prop. I.C. § 39-9607(4). The Department may deny an application or renewal request for a registry identification card for failing to meet the requirements of the Act, and must provide written notice of its reasons for doing so. Prop. I.C. § 39-9610. Registry identification cards expire after one (1) year, and may be renewed for a fee. Prop. I.C. § 39-9611. A registry identification card must contain the cardholder's identifying information, and clearly indicate "whether the cardholder is permitted to cultivate marijuana plants for the qualifying patient's medical use" (i.e., whether the patient has a "hardship cultivation designation"). Prop. I.C. § 39-9608.

The Department is required to "establish and maintain a verification system for use by law enforcement personnel to verify registry identification cards." Prop. I.C. § 39-9612(1). Patients are required to notify the Department within ten (10) days of any change in name, address, designated caregiver, and their preference regarding who may cultivate marijuana for them, and, upon receipt of such notice, the Department has ten (10) days to issue a new registry identification card. Prop. I.C. § 39-9618(1) to (3). If the patient changes the caregiver, the Department must notify the former caregiver that "his/her duties and rights . . . for the qualifying patient expire fifteen (15) days after the Department sends notification." Prop. I.C. § 39-9618(5).

Cities and counties "may enact reasonable zoning ordinances and regulations not in conflict with the chapter . . . governing the time, place and manner of medical marijuana organization operations." Prop. I.C. § 39-9614(1). However, a medical marijuana dispensary cannot be located within one thousand (1,000) feet of a public or private

school, and its renewal cannot be denied "if a school opens or moves within" that distance of the dispensary. Prop. I.C. § 39-9614(2).

Prop. I.C. § 39-9615 states that before dispensing marijuana to a patient or caregiver, a "medical marijuana dispensary agent *must not believe* that the amount dispensed would cause the cardholder to possess more than the allowable amount of marijuana." (Emphasis added.) The italicized portion of the provision is subject to a constitutional challenge based on vagueness.

The Act adopts a tax of four percent (4%) on medical marijuana sales. Prop. I.C. § 39-9617(1). After disbursing tax revenue to the Department "to cover reasonable costs incurred . . . in carrying out this chapter[,]" the remaining amount of revenue is to be equally distributed with fifty percent (50%) to the Idaho Division of Veterans Services (in additional to any funds regularly dispersed to it) and the other fifty percent (50%) to the General Fund. Prop. I.C. § 39-9617(2).

The Department must submit an annual public report to the legislature with information set out in Prop. I.C. § 39-9619. The Department is required to keep all records and information received pursuant to the Act confidential, and any dispensing of information by medical marijuana organizations or the Department must identify cardholders and such organizations by their registry identification numbers and not by name or other identifying information. Prop. I.C. § 39-9620(1) to (2).

Information and records kept by the Department are confidential, and may only be disclosed as authorized by the Act. Prop. I.C. § 39-9620(1). Department employees may notify state or local law enforcement about falsified or fraudulent information submitted to the Department, and "about apparent criminal violations" of the Act. Prop. I.C. § 39-9620(4)(a) and (b). Department employees may "notify the board of medical examiners if they have reason to believe that a practitioner provided a written recommendation without completing a full assessment of the qualifying patient's medical history and current medical condition, or if the Department has reason to believe the practitioner violated the standard of care, or for other suspected violations of this chapter." Prop. I.C. § 39-9620(4)(c).

The heart of the Act is Prop. I.C. § 39-9621 – "Protections for the Medical Use of Marijuana." Subsection (1) sets the pattern by stating, "a cardholder who possesses a valid registry identification card is not subject to arrest, prosecution, or penalty in any manner, or denial of any right or privilege, including any civil penalty or disciplinary action by a court, or occupational or professional licensing board or bureau[.][7] Subsections (1)(b) (nonresident cardholders), (3) (practitioners), (6) (medical marijuana dispensaries and their agents), (7) (medical marijuana production facilities and their agents), and (8) (safety compliance facilities and their agents), are given the same criminal, civil, and administrative protections in regard to their various functions under the Act.

Prop. I.C. § 39-9621(2) creates a rebuttable presumption in criminal, civil, and administrative court proceedings that cardholders are deemed to be "engaged in the medical use of marijuana pursuant to this chapter if the person is in possession of a registry identification card and an amount of marijuana that does not exceed the allowable amount." The presumption may be rebutted with evidence that the conduct "was not for the purpose of treating or alleviating the qualifying patient's debilitating medical condition or symptoms associated with the qualifying patient's debilitating medical condition pursuant to this chapter." *Id.*

Practitioners are protected from sanctions for conduct "based solely on providing written recommendations or for otherwise stating that, in the practitioner's professional opinion, a patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana, . . . but nothing . . . prevents a professional licensing board from sanctioning a practitioner for failing to properly evaluate a patient's medical condition or otherwise violating the standard of care for evaluating medical conditions." Prop. I.C. § 39-9621(3).

Under Prop. I.C. § 39-9621(5)(a) to (c), no person is subject to arrest, prosecution, other penalty, or denial of right or privilege, for providing or selling marijuana paraphernalia to a cardholder, nonresident cardholder, or medical marijuana organization, or for being in the presence or vicinity of, or assisting in, the authorized medical use of marijuana.

Prop. I.C. § 39-9621(9) reads:

> (9) Property, including all interests in the property, otherwise subject to forfeiture under state or local law that is possessed, owned, or used in any activity permitted under this chapter is not subject to seizure or forfeiture. This subsection does not prevent *civil* forfeiture if the basis for the forfeiture is *unrelated* to the medical use of marijuana.

(Emphases added.) Prop. I.C. § 39-9621(9) may be an attempt to state that no property is subject to seizure or forfeiture on the basis of it being used as authorized by this Act. However, the proposed statute could be construed as preventing the seizure or forfeiture of property in regard to *criminal* activity under all circumstances. Additionally, whether a civil forfeiture is "unrelated" to the medical use of marijuana is potentially subject to a constitutional challenge due to vagueness.

The mere possession of, or application for, a registry identification card "may not constitute probable cause or reasonable suspicion, nor may it be used to support the search of the person or property of the person possessing or applying for the registry identification card." Prop. I.C. § 39-9621(10).

Under the heading, "Discrimination Prohibited," Prop. I.C. § 39-9622 makes it illegal for schools, landlords, nursing facilities, intermediate care facilities, hospice houses, hospitals, etc., to penalize a person "for engaging in conduct allowed under this chapter, unless doing so would violate federal law or regulations or cause" the entity "to lose a monetary or licensing-related benefit under federal law."[8] Prop. I.C. § 39-9622(1). Subsection (2) gives patients the same rights (and privileges, etc.) as persons prescribed medications with regard to interactions with employers, drug testing by an employer, and drug testing required by state or other governmental authorities. Subsection (4) states that no employer is required to allow the ingestion of marijuana in any workplace (etc.), and repeats that a patient "shall not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of cannabis that appear in insufficient concentration to cause impairment." *See* Prop. I.C. § 39-9603(4). Subsections (5) through (7) preclude discrimination in regard

to organ and tissue transplants, child custody and visitation rights, and firearm possession or ownership. Subsection (8) states, "[n]o school, landlord, or employer may be penalized or denied any benefit under state law for enrolling, leasing to, or employing a cardholder."

Under the heading "Affirmative Defense," the Act provides that patients, visiting patients, and caregivers "may assert the medical purpose for using marijuana as a defense to any prosecution of an offense involving marijuana intended for a qualifying patient's or visiting qualifying patient's medical use so long as the evidence shows" that (essentially), the requirements of the Act were complied with. Prop. I.C. § 39-9623(1).

The Act allows the Department, "after investigation and opportunity at a hearing at which the medical marijuana organization has an opportunity to be heard," to fine, suspend, or revoke a registration certificate for violations of the Act. Prop. I.C. § 39-9624(1). Also, "[t]he Department may revoke the registry identification card of any cardholder who knowingly violates this chapter." Prop. I.C. § 39-9624(2). Revocation is subject to review under title 67, chapter 52, Idaho Code.

If the Department fails to adopt rules to implement the Act within one hundred twenty (120) days of the Act's enactment, any citizen may commence a mandamus action to compel compliance. Prop. I.C. § 39-9625.

In sum, Section 1 of the Act generally decriminalizes under state law the possession of up to four (4) ounces of marijuana and (if given a "hardship cultivator" designation) six (6) marijuana plants for patients or caregivers. The Act also protects agents of medical marijuana production facilities, medical marijuana dispensaries, and safety compliance facilities from civil forfeitures and penalties under state law, and makes it illegal under state law to discriminate against all such participants in regard to education, housing, and employment. Patients receiving a written recommendation by a practitioner stating that they have a debilitating medical condition may obtain marijuana for medicinal use from their (or their caregiver's) cultivation of marijuana or a medical marijuana dispensary. Patients, and caregivers must obtain registration identification cards, and medical marijuana organizations

must obtain registration certificates from the Department, and continuously update relevant information. The Department is tasked with an extensive list of duties, including, *inter alia*: formulating rules and regulations to implement and maintain the Act's numerous and far-reaching measures, verifying information and timely approving applications and renewal requests submitted for registry identification cards and registration certificates, establishing and maintaining a law enforcement verification system, providing rules for security, recordkeeping, oversight, maintaining and enforcing confidentiality of records, and providing an annual report to the Idaho Legislature.

As noted at the beginning of this review, Section 2 states that any measures "concerning the legalization, control, regulation, or taxation of marijuana for medical use that are on the same ballot "shall be deemed to be in conflict with this measure," and that this measure prevails over other measures if it "receives a greater number of affirmative votes[.]"

Section 3, "Severability," provides that if any provision of the Act is declared invalid, the remaining portions of the Act remain valid.

## B. If Enacted, the Initiative Would Have No Legal Impact on Federal Criminal, Employment, or Housing Laws Regarding Marijuana

Idaho is free to enforce its own laws, just as the federal government is free to do the same. The United States Supreme Court has explained:

> In *Bartkus v. Illinois*, 359 U.S. 121 [1959], . . . and *Abbate v. United States*, 359 U.S. 187 [1959], . . . this Court reaffirmed the well-established principle that a federal prosecution does not bar a subsequent state prosecution of the same person for the same acts, and a state prosecution does not bar a federal one. The basis for this doctrine is that prosecutions under the laws of separate sovereigns do not, in the language of the Fifth Amendment, "subject [the defendant] for the same offence to be twice put in jeopardy":

> "An offence [sic], in its legal signification, means the transgression of a law. . . . Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. . . . *That either or both may (if they see fit) punish such an offender, cannot be doubted.*"

United States v. Wheeler, 435 U.S. 313, 316, 98 S. Ct. 1079, 1082, 55 L. Ed. 2d 303 (1978) (superseded by statute) (quoting Moore v. People of State of Illinois, 55 U.S. 13, 19-20, — S. Ct. —, 14 L. Ed. 306 (1852)) (footnote omitted; emphasis added); *See* State v. Marek, 112 Idaho 860, 865, 736 P.2d 1314, 1319 (1987) ("[T]he double jeopardy clause of the fifth amendment does not prohibit separate sovereigns from pursuing separate prosecutions since separate sovereigns do not prosecute for the 'same offense.'"). Under the concept of "separate sovereigns," the State of Idaho is free to create its own criminal laws and exceptions pertaining to the use of marijuana. However, the State of Idaho cannot limit the federal government, as a separate sovereign, from prosecuting marijuana related conduct under its own laws.

In United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 486, 121 S. Ct. 1711, 1715, 149 L. Ed. 2d 722 (2001), the United States Supreme Court Supreme Court described a set of circumstances that appear similar to the system proposed in the Initiative:

> In November 1996, California voters enacted an initiative measure entitled the Compassionate Use Act of 1996. Attempting "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes," Cal. Health & Safety Code Ann. § 11362.5 (West Supp. 2001), the statute creates an exception to California laws prohibiting the possession and cultivation of marijuana. These prohibitions no longer apply to a patient or his primary caregiver who possesses or cultivates marijuana for the patient's

> medical purposes upon the recommendation or approval of a physician. *Ibid.* In the wake of this voter initiative, several groups organized "medical cannabis dispensaries" to meet the needs of qualified patients. [Citation omitted.] Respondent Oakland Cannabis Buyers' Cooperative is one of these groups.

A federal district court denied the Cooperative's motion to modify an injunction that was predicated on the Cooperative's continued violation of the federal Controlled Substance Act's "prohibitions on distributing, manufacturing, and possessing with the intent to distribute or manufacture a controlled substance." *Id.* at 487. On appeal, the Ninth Circuit determined "medical necessity is a legally cognizable defense to violations of the Controlled Substances Act." *Id.* at 489. However, the United States Supreme Court reversed the Ninth Circuit and held:

> It is clear from the text of the [Controlled Substances] Act that Congress has made a determination that marijuana has no medical benefits worthy of an exception. The statute expressly contemplates that many drugs "have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people," § 801(1), but it includes no exception at all for any medical use of marijuana. Unwilling to view this omission as an accident, and unable in any event to override a legislative determination manifest in a statute, we reject the Cooperative's argument.
>
> . . . .
>
> For these reasons, we hold that medical necessity is not a defense to manufacturing and distributing marijuana. The Court of Appeals erred when it held that medical necessity is a "legally cognizable defense." 190 F.3d. at 1114. It further erred when it instructed the District Court on remand to consider "the criteria for a medical necessity exemption, and, should

> it modify the injunction, to set forth those criteria in the modification order." *Id.*, at 1115.

*Id.* at 493-95.

The Oakland Cannabis Buyer's Cooperative decision makes clear that prosecutions under the federal Controlled Substances Act are not subject to a "medical necessity defense," even though state law precludes prosecuting persons authorized to use marijuana for medical purposes, as well as those who manufacture and distribute marijuana for such use. Therefore, passage of the initiative would not affect the ability of the federal government to prosecute marijuana related crimes under federal laws.

In sum, Idaho is free to pass and enforce its own laws creating or negating criminal liability relative to marijuana. But, as the United States Supreme Court's Oakland Cannabis Buyer's Cooperative decision demonstrates, even if the initiative is enacted, persons exempted from state law criminal liability under its provisions would still be subject to criminal liability under federal law.

The same holds true in regard to federal regulations pertaining to housing and employment. In Assenberg v. Anacortes Housing Authority, 268 Fed. Appx. 643, 644 (unpublished) (9th Cir. 2008), contrary to the plaintiff's contention that, because he was authorized under state law to use marijuana for medical purposes, he was illegally denied housing, the Ninth Circuit explained:

> The district court properly rejected the Plaintiffs' attempt to assert the medical necessity defense. *See Raich v. Gonzales*, 500 F.3d 850, 861 (9th Cir.2007) (stating that the defense may be considered only when the medical marijuana user has been charged and faces criminal prosecution). The Fair Housing Act, Americans with Disabilities Act, and Rehabilitation Act all expressly exclude illegal drug use, and AHA did not have a duty to reasonably accommodate Assenberg's medical marijuana use. *See* 42 U.S.C. §§ 3602(h), 12210(a); 29 U.S.C. § 705(20)(C)(i).

> AHA did not violate the Department of Housing and Urban Development's ("HUD") policy by automatically terminating the Plaintiffs' lease based on Assenberg's drug use without considering factors HUD listed in its September 24, 1999 memo. . . . .
>
> Because the Plaintiffs' eviction is substantiated by Assenberg's illegal drug use, we need not address his claim . . . whether AHA offered a reasonable accommodation.
>
> The district court properly dismissed Assenberg's state law claims. Washington law requires only "reasonable" accommodation. [Citation omitted.] Requiring public housing authorities to violate federal law would not be reasonable.

Similarly, the Oregon Supreme Court has held that, under Oregon's employment discrimination laws, an employer was not required to accommodate an employee's use of medical marijuana. Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industries, 230 P.3d 518, 520 (Or. 2010). Therefore, the provisions of the initiative, Prop. I.C. §§ 39-9601, *et seq.*, cannot interfere or otherwise have an effect on federal laws, criminal or civil, which rely, in whole or in part, on marijuana being illegal under the federal Controlled Substances Act.

**C. Recommended Revisions or Alterations**

In addition to the legal and non-legal problems previously discussed, the initiative has several other aspects that merit consideration, described as follows:

1. All references to title 39, chapter 96, Idaho Code, need to be changed because chapter 96 was assigned in the 2019 legislative session to "Maternal Mortality Review."

2. Prop. I.C. § 39-9602(11) should have a comma inserted between "stores" and "delivers."

3. "Usable marijuana" is referred to only three times in the Act, with each reference occurring in the provision for "Protections for the Medical Use of Marijuana" relating to safety compliance facilities and their agents, and it is not defined in the Act. *See* Prop. I.C. § 39-9621(8)(a), (b), and (e). It is suggested that, for clarity, either "usable marijuana" be defined or the word "usable" be omitted.

4. Prop. I.C. § 39-9605(1)(c)(iv) should refer to "Chapter 5, Title 65, Idaho Code" instead of "Section 65-502."

5. The introductory sentence of Prop. I.C. § 39-9605(1)(e) should end with a full colon.

6. Prop. I.C. § 39-9610(1)(e) has two miss-typed words: (1) "caregiver '**is**' younger than twenty-one (21) years of age and '**is**' not . . . ."

7. Prop. I.C. § 39-9620(1)(c) omits the word "**of**" between "information" and "persons."

8. Prop. I.C. § 39-9621(1)(a) should read in part, "if the cardholder '**is**' allowed to . . . ." It is also suggested that the sentence end with "or are being transported '**in accordance with this Act**;'"

9. Prop. I.C. § 39-9622(1) ("Discrimination Prohibited") should add I.C. § 39-9603 in the "Except as provided in 39-9604" introductory phrase because Prop. I.C. § 39-9603 includes limitations on medical marijuana use in schools.

**CERTIFICATION**

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to John Belville, 1606 N. Irene Drive, Nampa, Idaho 83687.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

**Analysis by:**

John C. McKinney
Deputy Attorney General

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[1] References to "proposed" I.C. §§ 39-9601, *et seq.*, will read, "Prop. I.C. § 39-9601," etc.

[2] A "designated caregiver" can be a natural person or "an entity licensed in Idaho to provide healthcare services to assist with qualifying patients' medical use of marijuana[.]" Prop. I.C. § 39-9602(6).

[3] If a qualifying patient's access to a marijuana dispensary is limited by proximity, financial hardship, or physical incapacity, the Department shall issue a "hardship cultivation designation," allowing the patient and the patient's caregiver to "cultivate up to six (6) marijuana plants" and keep the marijuana produced from those plants on the premises. Prop. I.C. §§ 39-9602(2)(a)(ii), (b)(ii); 39-9602(6), (15); and 39-9609. Although the "hardship cultivation designation" requires the six (6) marijuana plants to be "contained in an enclosed, locked facility" (unless being transported), there is no parallel provision in regard to "marijuana produced from the plants." *See* Prop. I.C. § 39-9602(2)(a)(ii), (2)(b)(ii).

[4] Although patients and caregivers must be given registry identification cards, there is no similar provision for identifying "agents" as authorized participants in the Act.

[5] The Act also allows a "nonresident cardholder" from another state to possess medical marijuana while in Idaho. Prop. I.C. § 39-9602(13).

[6] The "cultivator" notation refers to the Act's "hardship cultivation designation." *See* Prop. I.C. § 39-9609.

[7] The proposed statute specifically protects cardholders for (a) the medical use of marijuana pursuant to the Act, (b) payment by patients and caregivers for goods or services for the patient's medical use of marijuana, (c) transferring marijuana to a safety compliance facility for testing, (d) compensating a medical marijuana dispensary or safety compliance facility for goods or services, (e) offering or providing marijuana to a cardholder for a patient's medical use, or to a medical marijuana dispensary if nothing of value is transferred in return. Prop. I.C. § 39-9621(1)(a) to (e).

[8] The Act "does not prevent the imposition of any civil, criminal, or other penalties" for possessing or engaging in the medical use of marijuana on

a school bus, on the "grounds of any licensed daycare, preschool, primary or secondary school," in a correctional facility, or smoking marijuana on any public transportation or in any public place. Prop. I.C. § 39-9603(1) to (3).

September 24, 2019

The Honorable Lawerence Denney
Idaho Secretary of State
Statehouse
VIA HAND DELIVERY

Re: Certificate of Review
Proposed Initiative Relating to Increasing the Individual Income Tax

Dear Secretary of State Denney:

An initiative petition was filed with your office on August 30, 2019. Pursuant to Idaho Code section 34-1809, this office has reviewed the petition and prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only." The petitioners are free to "accept or reject them in whole or in part." This office offers no opinion with regard to the policy issues raised by the proposed initiative. The opinions expressed in this review are limited to those potentially affecting the legality of the initiative.

## BALLOT TITLES

Following the filing of the proposed initiative, this office will prepare short and long ballot titles. The ballot titles should impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While our office prepares titles for the initiative, petitioners may submit proposed titles for consideration. Any proposed titles should be consistent with the standard set forth above.

## MATTERS OF SUBSTANTIVE IMPORT

### I. Summary of the Proposed Initiative

The proposed initiative presents amendments to code sections found in Idaho Code, title 63 (hereinafter "Tax Code") and proposes a new section to be added to Idaho Code, title 33 (hereinafter "Education Code"). The amendments to the Tax Code would increase the individual income tax rate on amounts earned in excess of $250,000 a year and increase the tax rate on the income earned by corporations. The proposed new section of the Education Code, along with a further amendment to the Tax Code, creates and appropriates money to a new "quality education fund." The money for this fund is to come from tax revenue the state receives as a result of the increased tax rates. Each section of the initiative will be described in turn.

### A. Section One of the Initiative Proposes an Amendment to Idaho's Individual Income Tax Rate.

Section one of the initiative proposes an amendment to Idaho Code section 63-3024, the section of Idaho Code which defines the individual income tax rates. As it currently exists, the code section lists seven tax brackets ranging from "Less than $1,000" to "$7,500 and over." Idaho Code § 63-3024(a). For each of these seven brackets, there is an associated tax rate ranging from 1.125% to 6.925%. Id.

The initiative proposes two modifications to the tax brackets: first modifying the seventh tax bracket (the "$7,500 and over" bracket) and second adding an eighth tax bracket. The modification to the seventh tax bracket changes it from "$7,500 and over" to "$7,500 but less than $250,000." The proposal does not change the tax rate (6.925%) for the seventh bracket. The proposed eighth tax bracket would be for taxable income "$250,000 and over." The initiative would set the tax rate on taxable income in this bracket at 9.925%.

Section one also contains an amendment to Idaho Code section 63-3024(a) for adjusting this new eighth bracket for inflation. This adjustment mirrors the language already in statute for adjusting the other seven brackets for inflation; however, it differs in what base year is used for the adjustment. Where the other seven brackets are adjusted using a base year of 1998, the initiative specifies that the base year for the eighth bracket is 2022.

### B. Section Two of the Initiative Proposes an Amendment to Idaho's Corporate Income Tax Rate.

The second section of the initiative seeks to increase Idaho's corporate income tax rate. Presently Idaho Code section 63-3025(1) establishes a tax rate on corporate income of 6.925%. The initiative proposes amending this rate to 8%.

### C. Section Three of the Initiative Proposes an Amendment to How Income Tax Revenue is Distributed and Appropriates Tax Revenue to the Quality Education Fund.

The third section of the initiative proposes an amendment to Idaho Code section 63-3067(2). This code section states how tax revenue received by the state is to be distributed by the Idaho State Tax Commission. As it presently stands, all money—except for revenue received from the withholding of lottery winnings—"received by the state . . . shall be deposited . . . and become part of the general account [fund] under the custody of the state treasurer." Idaho Code § 63-3067. Revenue received from the withholding of lottery winnings is to be distributed such that half is deposited in the "public school income fund" and the other half is use for "county juvenile probation services."

Section three proposes to amend this section by adding a second exception for distributing received revenue. The amendment proposes that the additional revenue received as a result of increasing the individual income tax rate and corporate income tax rate should not be distributed to the general account but should be distributed to a new fund: the Quality Education Fund.

### D. Section Four of the Initiative Proposes the Creation of a New "Quality Education Fund."

The fourth section of the initiative proposes that a brand new section be added to the Education Code. This section, titled "Quality Education Fund—Rulemaking-Definitions," proposes the creation of a new continuously appropriated fund that is to be "expended by" the State Board of Education. Money for this fund is to come from "legislative transfers or appropriations, from the sales tax account, from

the state income tax and from any other governmental or private sources."

The purpose of the fund is to allow the state to "invest in betterment of public schools in Idaho." It proposes to achieve this goal by allowing the State Board of Education to use the money in the Quality Education Fund to:

- Reduce class sizes;
- Prevent class size increases;
- Provide current and adequate classroom materials, such as textbooks and supplies;
- Provide career technical education;
- Provide full day kindergarten;
- Provide art programs;
- Provide music programs;
- Provide drama programs; and
- Provide special education services.

In addition to these specifically enumerated actions, the State Board of Education is also given the open-ended instruction of "including, attracting and retaining highly qualified teachers." The State Board of Education is to achieve this goal by taking actions "including but not limited to . . . providing competitive salaries, offering continuing education opportunities, and providing support for new educators." The money in the fund expressly may not be used to "pay superintendents', principals' or other administrators' salaries or other compensation."

The money in the Quality Education Fund is to be distributed in a manner similar to the distribution of money held in the School District Building Account. See Idaho Code § 33-905(2). The money in the Quality Education Fund is to be distributed from the fund to school districts and public charter schools "not later than August 31." The money is distributed to each school district and public charter school in proportion to their average daily attendance of the district (or charter school) as compared to the total average daily state-wide attendance. The distribution section also contains a special provision for schools of the deaf and the blind. For the purpose of distribution, such schools are treated as if each were a separate school district.

The Quality Education Fund is intended as a supplement to—and not a replacement of—the typical "K-12 public school support." The money in the fund is meant to "augment" the "state's general account appropriation."

Finally, the State Board of Education is tasked with "promulgat[ing] rules to implement the provisions of this section."

### E. Section Five of the Initiative is a Severability Clause.

The fifth section of the initiative states that the provisions of the initiative are "severable . . . if any provision of [the] initiative . . . is . . . invalid."

### F. Section Six of the Initiative States the Effective Date.

The sixth section of the initiative states that the initiative's effective date is January 1, 2021.

## II. Substantive Analysis

### A. There is a Risk that the Initiative Violates the Single-Subject Rule of the Idaho Constitution.

Because the initiative seeks to both raise income tax rates and create a new fund to promote education in Idaho, there is a risk that the initiative violates the single-subject rule set forth in article III, section 16 of Idaho Constitution. That section states:

> Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title.

Idaho Const. art. III, § 16. The Idaho Court of Appeals, in interpreting this provision, has found that a bill (or initiative) may make several changes to law so long as each of the changes relate back to the same "general subject." In particular, so long as all of the portions of the

initiative "fall[] within [the] subject" and "are germane to" and "not incongruous with" the subject, then the initiative does not violate the single-subject rule. Cheney v. Smith, 108 Idaho 209, 210, 697 P.2d 1223, 1224 (Ct. App. 1985).

For the present initiative, there is nothing particularly incongruous about an income tax rate increase and a new fund for promoting education being put forth in the same initiative. However, these two policies are also not obviously germane to one another. The proposed initiative does connect the two policy changes by specifying that any additional revenue received from the income tax rate increases be used for the promotion of education in Idaho. However, there is a risk that this connection is not substantial enough for the initiative to survive if it is challenged in court on the single-subject rule. See, e.g., Idaho Watersheds Project v. State Bd. of Land Comm'rs, 133 Idaho 55, 60, 982 P.2d 358, 363 (1999) (Finding that a constitutional amendment that made two adjustments related to school endowment land violated a similar single-subject rule controlling constitutional amendments).

**B. The Initiative Deviates from the Present Statutory Definitions of the Tax Brackets.**

The initiative deviates in two ways from how the legislature has previously defined the tax brackets. First, the rate column for the seventh tax bracket ("$7,500 but less than $250,000"), defines the rate as 6.925% of "the amount over $7,500 but less than $250,000." This phrase in the rate column—in particular the portion that reads "but less than $250,000"—does not appear in any of the other brackets in the statute. Instead, the other tax brackets have some variation of the following phrase: the rate applies to "the amount over $5,000." Putting the phrase "but less than $250,000" into the rate column does not appear to substantively change the provision, but it is inconsistent with the statutory language for the other brackets.

Second, in the rate column for the proposed eighth bracket ("$250,000 and over"), the initiative has failed to include the base amount of tax due from taxpayers with income of over $250,000. Idaho's tax rate is progressive, this meaning that the first $999 earned by every taxpayer is taxed according to the first tax bracket's ("Less than $1,000") rate of 1.125%, the second $1,000 is taxed according to

the second tax bracket's ("$1,000 but less than $2,000") rate of 3.125%, the third $1,000 earned is taxed according to the third tax bracket's ($3,000 but less than $4,000) rate of 4.625%, and so forth. All of the other brackets include a base amount of tax in the starting point reflecting this progressive tax adjustment and the inclusion of this figure is critical for accurately determining tax due. An individual associated with Reclaim Idaho, an organization interested in the drafting of this initiative, has indicated that the exclusion of the base tax was an oversight.

### C. The Initiative Deviates from How Other Tax Revenue Is Distributed by Basing its Distribution on "Taxable Income."

The initiative's proposed amendment to Idaho Code's income tax distribution section, section 63-3067, states that "an amount equal to three percent (3%) of taxable income" will be distributed to the Quality Education Fund. The use of the phrase "taxable income" to make this distribution diverges from the other methods of distributing income tax described in Idaho Code section 63-3067. Specifically, the other methods for distributing income tax revenue rely on the amount of tax revenue the state has collected as the base for distribution. The initiative diverges from this scheme because the base it has selected, "taxable income," is not the same as the amount of income tax revenue the state has collected. Instead, "taxable income" is only an amount reported on a taxpayer's tax return as a part of the process of determining tax liability—it does not reflect the amount of tax paid by a taxpayer to the State of Idaho.

The phrase "taxable income" is defined as "federal taxable income as determined under the Internal Revenue Code." Idaho Code § 63-3011B. Multiplying a tax rate against this figure would not yield the amount of tax a taxpayer actually pays to the state. Two categories of adjustments must be made to determine how much tax a taxpayer must pay. First, after that amount of taxable income is ascertained, a taxpayer is permitted to make state-specific adjustments to their "taxable income" to reach a figure known as "Idaho taxable income." Idaho Code § 63-3011C. Second, after Idaho taxable income is determined and the appropriate tax rates are applied, a taxpayer may be entitled to credits that will directly reduce their tax liability. See Idaho

Code § 63-3029P. Both types of adjustment will lead to a substantially different amount of income tax owed than had the taxpayer multiplied the tax rates against his or her taxable income. In short, the phrase taxable income cannot stand in as measure for income tax revenue collected.

Similarly, for the distribution of corporate income tax, the initiative proposes using "taxable corporate or franchise income" as the base for determining how much corporate income tax revenue is to be distributed to the Quality Education Fund. This phrase is not a defined phrase in the Tax Code, however, its use produces the same problem as the use of the phrase "taxable income." The phrase taxable income cannot be used as a corollary for income tax revenue collected.

It appears that the intent of the initiative is to only distribute the increase of tax revenue attributable to the proposed rate increases. The initiative states "that the amounts collected" as a result of the rate increase "shall be remitted to the quality education fund." To accomplish this goal more directly, the initiative should not use taxable income as the base for determining how much of the income tax revenue should be distributed.

### D. The Initiative Does Not Match the Structure of Idaho Code Section 63-3067.

In its current form, the structure of Idaho Code section 63-3067 follows this pattern: (1) the exception to the general distribution of income tax revenue and (2) the general distribution of the remaining portion of income tax revenue. In its proposed amendment to Idaho Code section 63-3067, the initiative proposes to add a further exception to the general distribution of income tax revenue. In doing so it proposes changing the structure of Idaho Code section 63-3067 to (1) an exception to the general distribution, (2) the general distribution of the remaining portion, and (3) another exception to the general distribution. The initiative would better match the current statutory structure if it were to list its proposed exception to the general distribution of income tax revenue immediately following the first exception to the distribution of the revenue.

**E. The Initiative Overlaps with Other Education Statutes.**

Some of what the initiative seeks to accomplish overlaps with statutes that already exist. Specifically, Idaho Code has provisions addressing the following:

- Managing class size, Idaho Code § 33-1004(g);
- Providing suitable classroom materials, such as textbooks and supplies, Idaho Code § 33-512(3);
- Providing career technical education, Idaho Code § 33-1635 and § 33-1002G;
- Providing special education services, Idaho Code § 33-2001, et. seq.; and
- Compensating teachers, Idaho Code §§ 33-1004A – 1004J.

Apart from stating that the Quality Education Fund is intended to be a supplementary source of funding for the state's education system, the initiative does not address these overlapping provisions. It is unknown how an additional source of revenue will affect the application of these overlapping provisions.

**F. The Initiative's Provision that the Quality Education Fund Supplement and Not Replace General Account Appropriations May Be Ineffective.**

The initiative appears intended to stop the legislature from offsetting any increase in education spending due to the Quality Education Fund with a reduction in general account appropriations; however, this provision may be ineffective. The initiative seeks an overall increase in education spending in Idaho. To this end, it states that the Quality Education Fund is to "augment and not replace K-12 public school support." It continues by stating that money from the Quality Education Fund is to be provided in addition to the state's general account appropriation "and not in place of any part of that appropriation."

The difficulty with this provision is in determining whether the money from the Quality Education Fund takes the place of any part of an appropriation. Appropriations are made by the legislature on a year-

to-year basis based on detailed reports, budget requests, and statutory frameworks. See Idaho Code § 33-1001, et. seq. Each year, the appropriation is a separate act of the legislature and not necessarily related to the appropriation made the year before. It is difficult to compare year-to-year appropriation amounts and it may be difficult to determine whether any year-to-year decrease in an appropriation is caused by the Quality Education Fund.

Additionally, the plain language of the initiative may make the supplementary provision difficult to enforce. Because this provision does not call for any year-to-year comparison of appropriated amounts, it is possible that the requirements of the provision are satisfied so long as the legislature appropriates any amount of revenue from the general account in addition to the Quality Education Fund.

## III. Recommended Revisions, Alterations, Suggestions, and Miscellaneous Issues

In addition to the comments already made in this certificate of review, the following are recommended revisions, alterations, suggestions, and miscellaneous issues for Section 1:

1. In the amendment to the paragraph following the enumeration of the tax bracket and rates, the initiative states, "For the top bracket contained in subsection (a) of this section." The phrase "top bracket" is ambiguous as it could refer to the "$250,000 and over" bracket or to the bracket at the top of the list of brackets. Perhaps refer to it as the "$250,000 and over" bracket or some other designation that is more specific.

2. In that same paragraph as described in ¶ 1, the initiative uses the phrase "for the amount" and "the amount" to refer to what the other portions of the statute call the "bracket amounts." To be consistent, and to avoid ambiguity, perhaps change the initiative's phrasing to "bracket amount."

The following are recommended revisions, alterations, suggestions, and miscellaneous issues for Section 3:

1. In the amendment to subsection (2) of Idaho Code section 63-3067, the initiative uses the word "remitted." This word is not otherwise used to describe the distribution of income tax revenue. To be consistent with the rest of the statute, perhaps use the word "distributed."

2. In the same paragraph as described in ¶ 1, the initiative uses the phrase "corporations and franchises." The use of the word "franchise" in this phrase is redundant and only serves to introduce confusion. It appears that the initiative uses this word to tie its distribution language to the franchise tax found in Idaho Code § 63-3025A. However, as that tax only applies to corporations, it is not necessary for the initiative to separately refer to "franchises."

3. In the same paragraph as described in ¶ 1, the initiative starts its second and third sentences of its proposed amendment with a prepositional phrases; it should punctuate those phrases with commas. "From each single person or married persons filing separately an amount equal to three percent . . ." should be, "From each single person or married persons filing separately, an amount equal to three percent . . . ." "For corporations and franchises an amount equal to 1.075% . . ." should be, "For corporations and franchises, an amount equal to 1.075% . . . ."

4. In the same paragraph as described in ¶ 1, the initiative fails to consistently write out the distribution percentages. The initiative first uses the phrase, "an amount equal to three percent (3%)," but later uses the phrase "an amount equal to 1.075%." In this later instance, perhaps write out "an amount equal to one and seventy-five one-thousandths percent (1.075%)."

5. Additionally, in the same sentence described in ¶ 4, the initiative joins two independent clauses together with an "and;" the initiative should either divide the two independent clauses into two separate sentences or punctuate this sentence with a comma. "From each single person or married persons filing separately an amount equal to three percent (3%) of the taxable income in excess of $250,000 and for married persons filing jointly an amount equal to three (3%) of the taxable income in excess of $500,000" should be, "From each single person or married persons filing separately, an amount equal to

three percent (3%) of the taxable income in excess of two hundred fifty thousand dollars ($250,000). For married persons filing jointly an amount equal to three (3%) of the taxable income in excess of five hundred thousand dollars ($500,000)."

6. Once more, in the same sentence described in ¶ 4, the initiative incorrectly makes the word "person" plural in the phrase "married persons filing separately." As the sentence is about "each" person, there is no need to say "married persons.

7. In the same paragraph as described in ¶ 1, the three sentences that the initiative proposes to add are not wholly consistent with one another. The first sentence states that the intent is to distribute the excess amounts collected as a result of increasing the individual and corporate income tax rates to the Quality Education Fund. The second and third sentences however set forth formulas for distributing revenue that are not tied to the amount of revenue collected. Rather, these formulas are tied to the amount of taxable income taxpayers have reported. The drafters of the initiative may wish to reformulate its proposed method of distribution to better align the distribution formulas with the intent of the initiative.

8. In the same paragraph as described in ¶ 1, the initiative concludes the first sentence of its amendment with the phrase "as follows," punctuating that phrase with a period. As used in Idaho statute, the phrase "as follows" is nearly always followed by a colon and not a period. Often the phrase is used before subsections. The drafters of the initiative may wish to reconsider its use of the phrase "as follows" or modify the initiative to match the statutory norm.

9. In subsection three (3) of the Idaho Code § 63-3067, there appears to be a scrivener's error. The initiative does not appear to intend to make any modifications to this subsection, however, the language in the initiative does not match the language of the statute. Idaho Code § 63-3067(3) states:

> Any unencumbered balance remaining in the state refund account on June 30 of each and every year in excess of the sum of one million five hundred thousand dollars ($1,500,000) shall be transferred to the general

> fund and the state controller is hereby authorized and directed on such dates to make such transfers unless the board of examiners, which is hereby authorized to do so, changes the date of transfer or sum to be transferred.

While the initiative states:

> Any unencumbered balance remaining in the state refund account on June 30 of each and every year in excess of the sum of one million five hundred thousand dollars ($1,500,000) shall be transferred to the general fund and the state controller is hereby authorized and directed on such dates to make such transfers unless the board of examiners, which is hereby authorized and directed on such dates to make such transfers unless the board of examiners, which is hereby authorized to so, changes the date of transfer or sum to be transferred.

(Emphasis added.) The initiative has added the language indicated in italics. This added language appears to be just a mistake in copying the language of the statute.

The following are recommended revisions, alterations, suggestions, and miscellaneous issues for Section 4:

1. In subsection one (1) of proposed Idaho Code section 33-911, the second sentence of the proposed section needs an Oxford comma to improve clarity. The sentence presently states, "The fund shall consist of moneys made available through legislative transfers or appropriations, from the sales tax account, from the state income tax and from any other governmental or private sources." The sentence should state, "The fund shall consist of moneys made available through legislative transfers or appropriations, from the sales tax account, from the state income tax, and from any other governmental or private sources."

2. The second half of the same paragraph as described in ¶ 1 contains a complicated list of what the State Board of Education

may fund with money from the Quality Education Fund. This list lacks conjunctive terms and does not use semi-colons consistently. The list states: "Reducing class sizes and preventing class size increases; attracting and retaining highly qualified teachers and support staff, including but not limited to, providing competitive salaries, offering continuing education opportunities, and providing support for new educators; providing current and adequate classroom materials, such as textbooks and supplies for students; providing career technical education, providing full day kindergarten, providing art, music and drama programs, providing special education services." The list should state, "Reducing class sizes and preventing class size increases; attracting and retaining highly qualified teachers and support staff, including but not limited to, providing competitive salaries, offering continuing education opportunities, and providing support for new educators; providing current and adequate classroom materials, such as textbooks and supplies for students; providing career technical education; providing full day kindergarten; providing art, music and drama programs; and providing special education services."

3. In subsection two (2) of proposed Idaho Code section 33-911, a phrase in the first sentence is missing the article "the." The phrase states, "moneys in the fund pursuant to distribution provided in subsection (1) . . . ." This phrase should be, "moneys in the fund pursuant to the distribution provided in subsection (1) . . . ."

4. In the same paragraph referred to in ¶ 2, the final sentence lacks an Oxford comma. That sentence presently states, "Moneys from the fund shall not be used to pay superintendents', principals' or other administrators' salaries or other compensation." The sentence should be, "Moneys from the fund shall not be used to pay superintendents', principals', or other administrators' salaries or other compensation."

**CERTIFICATION**

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certification of Review, deposited in the

U.S. Mail to Reclaim Idaho c/o Jeremy Gugino, 701 E. Jefferson St., Boise, Idaho 83712.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

Nathan Nielson
Deputy Attorney General

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# ATTORNEY GENERAL'S SELECTED ADVISORY LETTERS FOR THE YEAR 2019

**LAWRENCE G. WASDEN**

**ATTORNEY GENERAL**
**STATE OF IDAHO**

January 11, 2019

The Honorable Regina Bayer
Idaho State Senate
700 W. Jefferson St., Room WG45
Boise, ID 83702
VIA HAND DELIVERY AND EMAIL: rbayer@senate.idaho.gov

Re: Request for AG Analysis Regarding 2015 SB1026

Dear Senator Bayer:

This letter is in response to your recent inquiry regarding 2015 Senate Bill 1026. Specifically you asked as to whether its effective date applied retroactively to those convicted of a DUI prior to its enactment? As explained in more detail below, Idaho's Supreme Court has held that it does not.

Prior to 2015, Idaho Code § 18-8005 provided that, upon conviction of a felony DUI (third conviction within 10 years), the court must impose a driver's license suspension for a minimum period of one year and could impose a driver's license suspension up to five years. Whatever driver's license suspension the sentencing court imposed, whether it was for one, two, three, four or five years, the suspension was absolute. In other words, the sentencing court did not have authority to grant restricted privileges following the one-year mandatory suspension during any suspension imposed in the judgment under the statutory provision.

In 2015, the legislature amended the provision to require an absolute one-year suspension followed by up to four years, during which the court could grant a restricted license. The Idaho Supreme Court specifically rejected a claim that the 2015 amendment would apply retroactively to suspensions entered prior to the amendment. State v. Tollman, 162 Idaho 798, 405 P.3d 583 (2017). The Court held: "The Amendment provides defendants convicted of driving under the influence a new avenue of relief by allowing them to apply for restricted driving privileges. I.C. § 18-8005(6)(d)." *Id.* at 802-03, 405 P.3d at 587-88. The Supreme Court limited the reach of SB1026 "[b]ecause

Tollman's sentence was final at the time the Amendment was enacted, and there is no legislative intent that the Amendment apply retroactively, the district court properly denied Tollman's request for restricted driving privileges." *Id.* at 803, 405 P.3d at 588.

Based on Tollman, the 2015 amendment is not retroactive. If the judgment imposing the driver's license suspension upon your constituent was final on or before July 1, 2015, then the suspension as entered was final and the suspension period would have been an absolute suspension for whatever time was imposed by the sentencing court.

I hope that you find this analysis helpful.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

January 11, 2019

The Honorable Laurie Lickley
Idaho House of Representatives
700 W. Jefferson Street, Room EW38-4
Boise, ID 83702
VIA HAND DELIVERY AND EMAIL: llickley@house.idaho.gov

Re: Analysis on the Constitutionality of Idaho Law Regarding Mandatory Vaccinations

Dear Representative Lickley:

I am writing in response to your January 10, 2019 request for an analysis of the constitutionality of Idaho law regarding mandatory vaccinations. Although vaccinations are not mandatory in the State of Idaho, an overview of the requirements for children in daycare and schools, the exemptions from those requirements, and the constitutional authority for those requirements follows below.

According to Idaho Code § 39-4801, "any child in Idaho of school age may attend grades preschool and kindergarten through twelve (12) of any public, private or parochial school operating in this state if otherwise eligible, provided that upon admission, the parent or guardian shall provide an immunization record to the school authorities regarding the child's immunity to certain childhood diseases." A similar requirement applies to "a child's initial attendance at any licensed daycare facility." Idaho Code § 39-1118.

However, Idaho Code § 39-4802 provides broad exemptions from these vaccination requirements for those with medical, religious, or other objections:

> (1) Any minor child whose parent or guardian has submitted to school officials a certificate signed by a physician licensed by the state board of medicine stating that the physical condition of the child is such that all or any of the required immunizations would

> endanger the life or health of the child shall be exempt from the provisions of this chapter.
> (2) Any minor child whose parent or guardian has submitted a signed statement to school officials stating their objections on religious or other grounds shall be exempt from the provisions of this chapter.

The constitutional authority for vaccination requirements stems back to at least the early twentieth century with the Unites States Supreme Court's opinion in Jacobson v. Massachusetts, 197 U.S. 11, 24-25, 25 S. Ct. 358, 360-61, 49 L. Ed. 643 (1905). In that case, during a deadly smallpox outbreak, the City of Cambridge, Massachusetts, issued an order requiring all adults to be vaccinated against the disease. The case eventually reached the United States Supreme Court, which upheld the power to order a general vaccine program to stop the spread of the deadly disease. As the Court explained, "The state legislature proceeded upon the theory which recognized vaccination as at least an effective, if not the best-known, way in which to meet and suppress the evils of a smallpox epidemic that imperiled an entire population." *Id.* at 30-31.

In 1922, the United States Supreme Court echoed the Jacobson Court in Zucht v. King, 260 U.S. 174, 43 S. Ct. 24, 67 L. Ed. 194 (1922), finding that a school system could refuse admission to a student who did not meet vaccination requirements.

Based upon the foregoing, the vaccination requirements contained in Idaho Code § 39-4801 and Idaho Code § 39-1118 are constitutional, and the broad exemptions set out in Idaho Code § 39-4802 make clear that vaccinations are not mandatory.

I hope you find the content of this letter helpful. If you would like to discuss this issue in greater detail, please contact me.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

January 14, 2019

Senator Mark Harris
Idaho Senate
VIA EMAIL: mharris@senate.idaho.gov

Dear Senator Harris:

Deputy Attorney General Brian Kane asked me to prepare a response to your questions arising from Bear Lake County ranchers:

1. Can a county have fencing requirements different from those in the code? (47 inches, 3 strand, 9 gauge barb) - e.g. can the County require 5 strand 52 inch fence...?

2. Who is liable if the county requires a single side fenced but the three remaining sides are open? Bear Lake is an open range county.

Language from what appears to be a proposed ordinance was also provided with the above questions. The provided language is:

> **X. Boundary Fencing.** New subdivisions will be required to construct fencing where property abuts agricultural land. Maintenance of fencing will follow state provisions that specify abutting landowners are responsible for half of the duty/cost of maintenance. Formation of a homeowners' association will be mandatory and will serve as the single entity/responsible party for the lots in the subdivision when the need arises to maintain perimeter/boundary fencing.
>
> **"Fencing"** fencing will be considered as meeting county standard for subdivisions abutting agricultural land when it conforms to the following standards: Fencing will be a minimum of 54" tall measured at the top wire and will consist of a five horizontal domestic barbed wire strands with posts spaced 12' apart.

## SUMMARY CONCLUSIONS

1. Yes. Counties are not preempted from passing local land use ordinances specifying fencing requirements.

2. Changes to fencing requirements by a county will not alter the existing laws relating to liability relating to livestock in an open range county.

**QUESTION 1**: Can a county have fencing requirements different from those in the code? (47 inches, 3 strand, 9 gauge barb) - e.g. can the County require 5 strand 52 inch fence...?

This first question raises issues of preemption. Can the county require a different fence standard than the State-defined "lawful fence?" The Idaho Constitution, article XII, section 2, provides that a county "may make and enforce, within its limits, all such local police, sanitary and other regulations," but also provides that county regulations are preempted if "in conflict with . . . the general laws." Explicit conflict, and hence preemption, exists where the county "expressly allow[s] what the state disallows, and vice versa." Envirosafe Servs. of Idaho, Inc. v. County of Owyhee, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987). Conflict, and hence preemption, is implied "[w]here it can be inferred from a state statute that the state has intended to fully occupy or preempt a particular area, to the exclusion of [local governmental entities][.]" *Id.* (quoting Caesar v. State, 101 Idaho 158, 161, 610 P.2d 517, 520 (1980)). Preemption is also implied "where uniform statewide regulation is called for due to the particular nature of the subject matter to be regulated." *Id.* With this background, we can examine the authority of counties to regulate land use and the laws applicable to fencing in Idaho.

## LOCAL LAND USE PLANNING ACT ("LLUPA')

The Local Land Use Planning Act (title 67, chapter 65, Idaho Code) gives local governing boards broad powers in the area of planning and zoning. White v. Bannock Cty. Comm'rs, 139 Idaho 396, 80 P.3d 332 (2003). Zoning ordinances may "establish standards to regulate and restrict the height, number of stories, size, construction, reconstruction, alteration, repair or use of buildings and structures;

percentage of lot occupancy, size of courts, yards, and open spaces; density of population; and the location and use of buildings and structures." Idaho Code § 67-6511. Local governments may adopt ordinances imposing standards for public and private developments that address such things as building design, tracts of land, roadways, public access, and rights-of-way. Idaho Code § 67-6518. When local ordinances "impose higher standards than are required by any other statute or local ordinance, the provisions of [the local] ordinances . . . shall govern." *Id.* The State of Idaho and its agencies are directed to "comply with all plans and ordinances adopted under this chapter unless otherwise provided by law." Idaho Code § 67-6528. The LLUPA allows local governments to impose higher standards than are required by any other statute. The ordinance in question imposes a higher standard than the statutorily defined "lawful fence." Unless preempted, a court would likely find such an ordinance enforceable.

**FENCES IN GENERAL**

Title 35, chapter 1, Idaho Code, generally addresses fences. Idaho Code § 35-102 describes 'lawful fences.' Idaho Code § 35-102(4) describes the specifications for a lawful wire fence. This specification includes the '47 inch high, 3 barbed wires, not less than 9 gauge wires' noted in the question. Importantly, however, this section does not make a taller fence, nor a fence with more wire strands, illegal. Thus when examining the ordinance in question, it does not allow "what the state disallows, and vice versa." Envirosafe, 112 Idaho at 689, 735 P.2d at 1000. Nor is there anything to indicate that the legislature intended to preempt counties from regulating fence standards. Title 35 does not express any legislative intent to preempt nor contain any preemption provision. Accordingly, there is no express preemption. Finally, there does not appear to be any implied preemption. The standards set forth in Idaho Code § 35-102(4) set minimum standards for fencing where required. There is no indication that a uniform statewide regulation of fences is called for because of the particular nature of fences throughout the state. Title 35 does not express, either explicitly or impliedly, an intent to preempt the operation of local land use planning authorities, and thus a court would likely conclude local authorities are allowed to impose higher standards.

**QUESTION 2**: Who is liable if the county requires a single side fenced but the three remaining sides are open? Bear Lake is an open range county.

The second question concerns liability where a county is requiring a single sided fence in an open range county. The provided regulation language sets a fence standard for new subdivisions where property abuts agricultural land. This language only addresses required fencing where new subdivision property abuts agricultural land, and does not appear to address perimeter fencing around the entirety of a new subdivision. The question does not specify whether the liability concern is for vehicle damage or injury from a highway collision, or for property damage from trespassing animals.

## OPEN RANGE

The Idaho Supreme Court has provided a good background discussion of laws related to livestock and fencing:

> At common law it was the duty of an owner of livestock to fence his animals in, and an adjoining landowner had no duty to fence his property so as to prevent others' animals from entering it. [Citation omitted.] However, that English common law rule does not prevail in Idaho and the "fence out" rule prevails in this state wherein if a landowner's property is not within a herd district, and is outside a city or village, the landowner desiring to prevent animals of others from straying onto his property must fence them out. [Citations omitted.]
>
> Herd districts are a legislative exception to the "fence out" rule. A majority of the landowners of more than 50% of the land within a proposed district may petition county commissioners for the creation of a herd district. I.C. § 25-2403. It is held that a herd district provides an alternative to landowners who wish to protect their land from damage caused by roaming stock but do not wish, or cannot afford, to fence their land. [Citation omitted.] Once a herd district is created, the rule of fencing out which requires landowners to keep out another's

> livestock by construction of a fence no longer applies. Rather, an owner of stock who allows animals to run at large in a herd district is guilty of a misdemeanor. I.C. § 25-2407. Additional civil liability is imposed for damage caused by trespasses of such animals without regard to the condition of the landowner's fence. I.C. § 25-2408.

Easley v. Lee, 111 Idaho 115, 117, 721 P.2d 215, 217 (1986).

Idaho has a number of statutes which address the liability of livestock owners. *See* Idaho Code § 25-2118 (Animals on open range – No duty to keep from highway); Idaho Code § 25-2119 (Owner or possessor of animal not liable for animal on highway); title 25, chapter 22, Idaho Code (Trespass of Animals); title 25, chapter 23, Idaho Code (Estrays); and title 25, chapter 24, Idaho Code (Herd Districts).

The provided ordinance language does not alter existing Idaho law regarding animal owner or possessor liability. Assuming the liability concern is for trespass and property damage on the new subdivision property, then the party claiming damages would need to show that the area was not 'open range,' or that their property was fully enclosed with a 'lawful fence' and the animals broke into the enclosure in order to establish liability on an animal owner.

## CONCLUSION

The answer to the first question is "Yes;" the county may impose a more restrictive fence standard than the 'lawful fence' requirement set in statute. With regard to the second question, the provided ordinance language does not conflict with or alter existing Idaho law and liability of an animal owner would be governed by the applicable law.

I hope this information is helpful to you.

Sincerely,

W. DALLAS BURKHALTER
Deputy Attorney General

January 14, 2019

The Honorable Dan Johnson
Senator
Idaho State Senate
Via Email Only: djohnson@senate.idaho.gov

Re: Idaho Millennium Fund

Dear Senator Johnson:

This letter responds to your January 11, 2019 request regarding expenditures from the Idaho Millennium Fund and the powers and duties of the Joint Millennium Fund Committee (Millennium Committee). Specifically, you ask three questions:

> First, must all funding recommendations originate with the Committee? In other words, must there be a request for an application followed by a hearing, evaluation, and recommendation from the Committee to receive moneys from the Fund?
>
> Secondly, could the Governor's office, legislator or other committee, make a recommendation to the legislature for the use of the moneys in the Fund without going through the Committee?
>
> Lastly, if all funding recommendations must originate with the Committee, would it be permissible for the Governor's office, legislator or other committee to make a recommendation on the recommendations of the Committee?

By way of background, after the Tobacco Master Settlement Agreement (MSA) between Idaho and various tobacco companies was executed, the Idaho Legislature created the "Idaho Millennium Fund" (Millennium Fund), *see* Idaho Code §§ 67-1801, *et seq.* (Millennium Fund Act), into which Idaho's MSA payments are deposited. Pursuant to the Millennium Fund Act, once a year, five percent of the net value

of the Millennium Fund is deposited into the "Idaho Millennium Income Fund" for legislative appropriation. In 2006, the Idaho Constitution was amended to create the Idaho Millennium Permanent Endowment Fund, which now receives 80% of Idaho's MSA payments. The other 20% of Idaho's MSA payments continue to be deposited in the Idaho Millennium Fund.[1] *See* Idaho Const. art. VII, § 18. Like the Millennium Fund, once a year, 5% of the net value of the Idaho Millennium Permanent Endowment Fund is deposited in the Millennium Income Fund for legislative appropriation. What is important to note is that neither the Millennium Fund Act nor the constitutional provision set forth directions on how the moneys are to be appropriated other than to state that the uses of the Idaho Millennium Income Fund "shall be determined by legislative appropriation." Idaho Code § 67-1806.

When the Millennium Fund was created, the Millennium Fund Act also created the Millennium Committee. Idaho Code § 67-1807. Idaho Code section 67-1808 of the Millennium Fund Act authorizes and empowers (but does not mandate) the Millennium Committee to (1) meet twice a year; (2) establish rules for governance of committee proceedings; (3) request applications for funding from the Millennium Income Fund; (4) meet and hear testimony to consider such applications; (5) evaluate the actual and potential success of programs funded from the Millennium Income Fund; and (6) present recommendations annually to the Legislature for the use of the moneys in the Millennium Income Fund. Again, of note, the Millennium Fund Act does not authorize the Millennium Committee to appropriate Millennium Income Fund moneys, only to make recommendations.

With that background, your questions are answered in turn below:

1. **Must all funding recommendations originate with the Committee? In other words, must there be a request for an application followed by a hearing, evaluation, and recommendation from the Committee to receive moneys from the Fund?**

No. We do not read the Millennium Fund Act as mandating that funding recommendations "must" originate with the Millennium Committee or that Millennium Income Fund moneys may only be

expended after applications for those moneys have first been heard, evaluated, and recommended by the Millennium Committee. The Millennium Fund Act speaks in terms of powers and duties conferred upon the Millennium Committee, ultimately resulting in recommendations for appropriation by the Legislature in any given year, not an exclusive process that must be followed before Millennium Income Fund moneys can be appropriated.

**2. Could the Governor's office, legislator or other committee, make a recommendation to the legislature for the use of the moneys in the Fund without going through the Committee?**

Yes. For the same reasons set forth above, we do not read the statute as prohibiting other interested parties from recommending to the Legislature various uses of moneys from the Millennium Income Fund.

**3. If all funding recommendations must originate with the Committee, would it be permissible for the Governor's office, legislator or other committee to make a recommendation on the recommendations of the Committee?**

We answered question number 2 in the negative, so there is no need to separately answer this question. It is worth noting that although not legally required, it may be politically advisable for entities seeking Millennium Fund monies to work through the Millennium Committee process.

We hope this letter answers your questions. If you would like further information or there are items we can further clarify with regards to your letter, please do not hesitate to contact me.

Sincerely,

BRETT T. DELANGE
Deputy Attorney General
Consumer Protection Division

[1] In any instance in which the Millennium Fund balance exceeds $100 million after a 5% distribution has been made, the Millennium Fund Act directs that the surplus is to be deposited into the constitutional Millennium Permanent Endowment Fund. Idaho Code § 67-1805.

January 15, 2019

The Honorable Bert Brackett
Idaho State Senate
700 W. Washington Street, Room WW33
Boise, Idaho 83702
DELIVERED VIA HAND DELIVERY AND EMAIL:
bbracket@senate.idaho.gov

Re: Our File No. 19-64166 - Request for AG Analysis Regarding Surplus Eliminator Funds

Dear Senator Brackett:

This letter is in response to your inquiry of this office regarding the use of the surplus eliminator funds. Specifically, you have asked whether the funds may be used for new large scale water projects.

HB 312aa was adopted in 2015. The legislation created a "surplus eliminator fund," which is named the Strategic Initiatives Program Fund. Idaho Code § 40-719(2)(a). This fund consists of 50% of any general fund excess as provided for by in Idaho Code § 40-719(2)(a). *Id.* These funds are appropriated to the Idaho Transportation Department and limited by the enabling legislation in Section 11 of HB 312aa:

> It is the intent of the Legislature that all additional funds collected under the provisions of this act, remitted to the Idaho Transportation Department or entities subject to the distribution provisions of Section 40-709, Idaho Code, shall be used exclusively for road and bridge maintenance and replacement projects both at the state and local level.

2015 Idaho Sess. Laws 1287.

Idaho Code § 40-719 additionally references transportation projects and places 60% of the fund within the discretion of the Idaho Transportation Department for projects within its six districts. Forty

percent of the fund is allocated to local units of government to implement a strategic initiatives program through the Local Highway Technical Assistance Council. Consistent throughout the allocation of the strategic initiative fund is that the use is for transportation, road, bridge, and replacement projects at the state and local levels.

This office could find no authorization for allocation of the funds to develop new large scale water projects.

I hope that you find this analysis helpful.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

January 22, 2019

Representative Caroline Nilsson Troy
Idaho House of Representatives
Capitol Building
Boise, ID 83720
Via Statehouse Mail and Email: cntroy@house.idaho.gov

Re: Inquiry Regarding Pardons and Other Forms of Clemency

Dear Representative Troy:

You asked our office to identify the powers of the Governor and the Idaho Commission of Pardons and Parole with regard to clemency and pardons, pursuant to article IV, section 7 of the Idaho Constitution.

## Question Presented

What are the respective powers of the Governor and the Idaho Commission of Pardons and Parole regarding pardons or other forms of clemency?

## Brief Answer

The Idaho Constitution, statutes, and administrative rules vest the Idaho Commission of Pardons and Parole with the authority to remit fines and forfeitures, grant commutations, and grant pardons. In cases involving murder, voluntary manslaughter, rape, kidnapping, lewd and lascivious conduct with a minor child, and manufacture or delivery of controlled substances, the Commission's decision on a petition for a commutation or pardon serves only as a recommendation to the Governor, who must make a final decision. The Governor has the power to grant a respite or reprieve, a temporary remedy which does not extend beyond the Commission's next session. The power to commute or pardon in cases of treason or imprisonment on impeachment is reserved to the Idaho Legislature.

## Analysis

This response will focus on commutations, pardons, and reprieves, to which I believe your inquiry is directed. It might be helpful to distinguish between a commutation, a pardon, and a respite or reprieve, as these exist under Idaho law. A commutation may shorten or otherwise change a sentence currently being served. In contrast, a pardon may occur only after the underlying sentence is served, and it does not change a sentence currently in effect. A respite or reprieve is, basically, a temporary stay of the execution of a sentence, which the Governor can grant until the Commission can meet and make a decision on a petition for commutation.

A brief review of the relevant provisions of the Idaho Constitution, Idaho statutes, and the Idaho Administrative Code may also be helpful. I have attached copies of each of the following provisions for your convenience.

### I. Constitutional Provisions

Article IV, section 7 of the Idaho Constitution provides that the pardoning power is vested in a board "created or provided by legislative enactment" to be known as "the board of pardons." This board has the power to "remit fines and forfeitures, and, only as provided by statute, to grant commutations and pardons after conviction of a judgment," and it can grant commutations and pardons, either absolutely or under such conditions as it may impose. This board must hold a full hearing in open session on each request for commutation or pardon, with four weeks of prior notice by publication. The board's decision must be in writing and filed with the secretary of state, and it must include the signed dissent of any board member who disagrees with the majority's decision. This power does not extend to cases involving treason or conviction upon impeachment, which are reserved for the Idaho Legislature.

Article IV, section 7 also gives the Governor of Idaho the power to grant "respites or reprieves in all cases of convictions for offenses against the state, except treason or conviction on impeachment[.]" These are temporary, and "shall not extend beyond the next session of the board of pardons; and such board shall at such session continue or

determine such respite or reprieve, or they may commute or pardon the offense . . . ." *Id.* In cases of treason, the Governor may suspend the execution of the sentence until the case is reported to the legislature at its regular session, "when the legislature shall either pardon or commute the sentence, direct its execution, or grant a further reprieve." *Id.*

## II. Statutory Provisions

The "board of pardons" referred to in article IV, section 7 of the Idaho Constitution is, by legislative enactment, the Idaho Commission of Pardons and Parole. Idaho Code §§ 20-201, 20-210. This Commission has "the powers relating to commutation, pardon and remission of fines and forfeitures as set forth in section 7, article IV, of the Idaho constitution." Idaho Code § 20-210A(1).

Idaho Code § 20-240 provides, in keeping with article IV, section 7, that the Governor may grant respites or reprieves, except in cases of treason or imprisonment on impeachment, but these do not extend beyond the next session of the Commission. It also provides, in keeping with article IV, section 7, that the Commission has authority to grant commutations and pardons except as to sentences for murder, voluntary manslaughter, rape, kidnapping, lewd and lascivious conduct with a minor child, and manufacture or delivery of controlled substances, and that in such cases, the Commission's decision constitutes a recommendation to the Governor, who must make the final decision. Idaho Code § 20-240 vests the Commission with authority to make rules for commutation and pardon proceedings. Section 20-240 provides that no commutation or pardon for the enumerated offenses shall be effective until presented to and approved by the Governor, and that any commutation or pardon recommendation not so approved within 30 days of the Commission's recommendation shall be deemed denied.

## III. Administrative Rules

Pursuant to Idaho Code § 20-240, the Idaho Commission for Pardons and Parole promulgated administrative rules governing petitions for commutations and pardons, at IDADA 50.01.01.450 and 50.01.01.550, respectively. Both provisions provide that the

Commission has full authority to grant commutations or pardons, as the case may be, but its decision as to a sentence for murder, voluntary manslaughter, rape, lewd and lascivious conduct with a minor child, and manufacture or delivery of a controlled substance is only a recommendation to the Governor, who must make the final decision. Both the commutation and pardon processes require open hearings by the Commission after four weeks published notice, and both provide that a petition will be deemed denied if not granted by the Governor within 30 days of the Commission's recommendation.

## IV. Additional Considerations

Four points are worth additional mention.

First, to commutations, the Commission has authority to change (or recommend that the Governor change) a consecutive sentence to a concurrent sentence, reduce the maximum length of a sentence, reduce the minimum fixed term of a sentence, change a fixed sentence to an indeterminate sentence, or change a sentence "in any other manner not described" in the rule. IDAPA 50.01.01.450.01.c. Thus, for example, the Commission could reduce a sentence for aggravated assault from five years to two years, but as to murder, it could only recommend to the Governor that he commute a death sentence to a fixed life or lesser sentence.

Second, while the Commission may generally consider only one application per person in any 12 month period, and while petitions for commutation are generally scheduled for consideration at the Commission's quarterly meetings, IDAPA 50.01.01.450.05.d allows the Commission to consider a commutation petition for a death sentence at any time. In exigent circumstances, the Governor could issue a reprieve to allow the Commission's process to take its course.

Third, a pardon granted by the Commission does not expunge or remove a crime from the applicant's criminal history. IDAPA 50.01.01.550.

Fourth, IDAPA 50.01.01.550.01 provides that an application for a pardon may not be considered until "a period of time has elapsed since the applicant's discharge from custody," which could range from

three to five years, depending on the crime. Idaho does not have a process whereby a preemptive pardon that would preclude prosecution could be issued.

## Conclusion

The Idaho Commission for Pardons and Parole has authority to grant commutations and pardons, except in cases involving murder, voluntary manslaughter, rape, lewd and lascivious conduct with a minor child, manufacture or delivery of a controlled substance, and treason or conviction on impeachment. A commutation or pardon for the latter two offenses is reserved for the Idaho Legislature; as to the remaining enumerated offenses, a decision by the Commission constitutes a recommendation, which the Governor may accept or reject. If the Governor takes no action within 30 days of the Commission's recommendation, a petition for commutation or pardon will be deemed denied. As to any other criminal offense, the Commission retains full authority to issue a commutation or pardon.

I hope this analysis is helpful. Please feel free to contact our office if you have any questions.

Sincerely,

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

January 24, 2019

Senator Mark Harris
State Capitol
P. O. Box 83720
Boise ID 83720-0081
Via Statehouse Mail and Email: mharris@senate.idaho.gov

Dear Senator Harris:

You posed the following question to our office.

## QUESTION PRESENTED

Are private solid waste collectors and private delivery services exempt from criminal liability for trespass under Idaho Code §18-7008(6) or (7)?

## BRIEF ANSWER

Pursuant to Idaho Code § 18-7008(2)(a), a criminal trespass occurs where a person enters onto or remains on the real property of another, knowing or having reason to know that his presence there is not permitted. Idaho Code § 18-7008(6) and (7) contain exemptions from this criminal liability and provide that other exemptions could exist as well. A finding of criminal trespass would be heavily dependent on the specific facts of each individual case. In two common scenarios, where a waste collector enters property and goes no further than permitted to pick up waste pursuant to an agreement with the owner, and where a delivery person knocks on the door of a residence or enters a business that is not posted with a no trespassing sign to deliver a package, Idaho Code § 18-7008 would appear to exempt these activities from criminal prosecution. However, additional facts could change the outcome in either case.

## ANALYSIS

Idaho Code § 18-7008, as amended in the Idaho Legislature's 2018 session, governs criminal trespass in Idaho. As relevant to this

inquiry, Idaho Code § 18-7008(2)(a) provides that, "A person commits criminal trespass . . . when he enters or remains on the real property of another without permission, knowing or with reason to know that his presence is not permitted." The statute goes on to describe circumstances in which a person has reason to know that his presence is not permitted. For purposes most likely to be relevant to this inquiry, these include among other things, a failure to depart upon notice by the owner or his agent to do so; returning without permission or invitation within one year unless the owner or his agent have specified a longer period; where the property is reasonably associated with a residence or place of business; where the property is fenced or otherwise enclosed in a manner a reasonable person would recognize as delineating a private property boundary; and where the property is unfenced and uncultivated but posted with "no trespassing" signs or in a manner putting a reasonable person on notice that he is on private land. Idaho Code § 18-7008(2)(a)(i) – (iv).

However, Idaho Code § 18-7008(6) and (7) provide exemptions from criminal liability for trespass. One of these, in subsection (6), applies where a person has an established right of entry onto the property, which may be, but is not limited to, entry by an express or implied invitation, where the property is open to the public, and by a license, lease, easement, contract, privilege or "other legal right." Subsection (7) provides that examples of the exclusion from criminal liability in subsection (6) "include, but are not limited to:" a customer remaining in a store during business hours who has not been asked to leave; a person knocking on the front door of a property that is not posted; a meter reader acting in the course and scope of his employment; a postal employee delivering mail or packages; power company personnel fixing downed lines; and others.

Thus, under Idaho Code § 18-7008(2)(a), the two elements of a criminal trespass are (1) entering or remaining on the real property of another, and (2) knowing or with reason to know that one's presence is not permitted. In both scenarios you posed, there is an entry onto the property in question, so the remaining inquiry is whether the potential defendant knows or has reason to know his presence is not permitted. In both scenarios, an answer depends on the facts of the case, and in both scenarios, a myriad of factual variables could exist that might change the outcome.

As to solid waste collectors, I will assume for the sake of this response that an agreement exists between the property owner and the waste collection business for that business to pick up waste from the owner's property, and that entry onto the property, or at least a designated part of it, is part of that agreement. In such a case, there would seem to be an express or implied invitation to enter the land, and the waste collector would have no reason to know his presence on the property was not permitted, and, their presence would be expressly or impliedly invited by the owner. Thus, a waste collector should be exempt from criminal liability under Idaho Code § 18-7008(6), as long as he does not venture into parts of the property for which he has no permission to enter. Again, however, if other facts exist, the outcome could be different.

Your inquiry as to private delivery services is also dependent on the specific facts of each case. If, for example, an owner ordered some books from Amazon to be delivered to his residence, there would seem to be an express or implied invitation for the delivery service to enter onto the owner's property to deliver them, and the delivery person would have no reason to think his presence was not permitted. If the property in question was posted with "no trespassing" signs, a delivery person may have reason to know that his presence there was not permitted, and that perhaps he should seek the owner's permission before entering or make some other arrangement for delivery. Even then, if deliveries had taken place in the past without incident, such an arrangement could be construed as an express or implied invitation for the delivery person to enter the property in spite of the "no trespassing" signs. In what is probably the most common circumstance, where a delivery person goes to property that is not posted and simply knocks on the door to deliver a package, Idaho Code § 18-7008(7) provides an exemption from criminal liability for exactly that activity, i.e., "a person knocking on a front door of a property that is not posted." However, this is only one of any number of possible factual scenarios and outcomes.

## CONCLUSION

A response to your inquiries regarding the application of Idaho Code § 18-7008 to solid waste collectors and private delivery services is dependent on the facts present in each case. For the sake of this

response, I have assumed two fairly common scenarios, in which a waste collection service would have an agreement with a property owner to pick up waste from the property, and in which a private delivery service employee knocks on the door of a residence or enters a place of business which is not posted with no trespassing signs to deliver a package. In these hypothetical scenarios, the waste collector and delivery person would not have reason to know their presence was not permitted and they should not be criminally liable. However, there could be a host of factual variables that would change these outcomes.

As a final caution, Idaho Code § 31-2226 vests Idaho's county sheriffs and county prosecutors with the primary authority for enforcing the penal laws of Idaho. As such, these officials are not bound by the opinions of this office and they exercise their own discretion. Their view of any given matter, including the hypothetical scenarios I posed above, may be different from that of this office, and they are the decision-making authority in matters related to charging or prosecuting the crime of trespass. Thus, while it may be unlikely that a waste collector or delivery person would be charged or prosecuted for the actions described above, it is not out of the realm of possibility.

I hope this addresses your concerns. Please feel free to contact this office if you have any questions.

Sincerely,

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

February 12, 2019

Representative Chad Christensen
Idaho House of Representatives
Capitol Building
Boise, ID 83720
Via Statehouse Mail and Email: cchristensen@house.idaho.gov

Dear Representative Christensen:

You asked our office to review the constitutionality of a proposed bill, DRRCB162 (herein, the "proposed bill"). During that process, our review indicated some additional issues you may wish to consider. I have therefore taken the liberty of posing your inquiry as follows:

## QUESTIONS PRESENTED

1. Are the amendments to Idaho Code § 18-3302C and Idaho Code § 18-3302D in the proposed bill, which would allow the carrying of concealed weapons on school grounds, constitutional?

2. Are there other issues with the proposed bill that merit additional consideration?

## BRIEF ANSWERS

1. The amendment to Idaho Code § 18-3302C in Section 1 of the proposed bill, which would allow the carrying of a concealed weapon in a private or public school by a person possessing a concealed weapons license issued pursuant to Idaho Code § 18-3302C or carrying a concealed weapon pursuant to Idaho Code § 18-3302(4)(f), is constitutional. The amendment to Idaho Code § 18-3302D, in Section 2 of the proposed bill, is constitutional as to public schools, but may conflict with the private property rights and religious rights of a private school. However, and very importantly, both amendments conflict with federal criminal law, which would control.

2. Yes. The provisions in Sections 1 and 2 of the proposed bill, governing the carrying of weapons on school property, appear to be inconsistent with one another. Additionally, use of the term "immediate control" may result in litigation, with further definition of that term to be provided by the courts.

## ANALYSIS

## I. CONSTITUTIONALITY OF PROPOSED AMENDMENTS

Before proceeding with this section, one item should be noted. There appears to be a typographical error in Section 2 of the bill, on page 2, line 47, in which there is a reference to the enhanced concealed weapons license "issued pursuant to section 18-3302**J**, Idaho Code" (emphasis added). It appears that this should instead refer to "section 18-3302**K**, Idaho Code" (emphasis added), which governs enhanced concealed weapons licenses.

### A. The Proposed Amendment to Idaho Code § 18-3302C(1) in Section 1 of the Proposed Bill, is Constitutional.

The Second Amendment to the United States Constitution provides that the right to keep and bear arms shall not be abridged. The United States Supreme Court has held that this is an individual right, although it remains subject to some limitations.

The Idaho Constitution, at article I, section 11, provides in relevant part that:

> The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person . . . .

Under this provision, the Idaho Legislature may not abridge the right to keep and bear arms, but it may pass laws governing the carrying of concealed weapons "on the person." However, the Legislature is not compelled to exercise the authority it possesses and, accordingly, is not required to criminalize or restrict by statute the carrying of

concealed weapons in schools as it has done under current law. The Legislature may, consistent with the Idaho Constitution, either prohibit, allow or regulate the carrying of concealed weapons on school grounds.

The amendment to Idaho Code § 18-3302C(1) proposed in DRRCB162 decriminalizes the carrying of concealed weapons in private and public schools by persons with a concealed weapons permit obtained under Idaho Code § 18-3302 or carrying such weapons pursuant to Idaho Code § 18-3302(4)(f), which allows certain persons to carry concealed weapons without a permit. This amendment does not compel private schools to allow concealed carry on their property. This amendment does not violate the Idaho Constitution, nor would it violate the United States Constitution's Second Amendment.

**B. The Proposed Amendments to Idaho Code § 18-3302(4), in Section 2 of the Proposed Bill, are Constitutional as to Public Schools. In the Context of Private Schools, They Could Conflict with Other Constitutional Rights.**

As to the amendments in Section 2 of the proposed bill, the term "school" is defined in Idaho Code § 18-3302D(2)(e), and if amended, section 18-3302D(2)(f), as "a private or public elementary or secondary school." The proposed amendments, at Idaho Code § 18-3302D(4) and (5), would allow the carrying of a deadly weapon on both public and private school grounds or during school activities by a person possessing an enhanced concealed weapons license, would prohibit both public and private school authorities from compelling a person to disclose that he or she is carrying such a weapon, and would prohibit the disciplining of an employee by a public or private school or school district by their employer for carrying such a weapon.

For the reasons discussed in the previous section, these amendments are constitutional as to public schools. However, to the extent that they would require private schools to allow concealed carry on their grounds, they create a potential conflict with private property rights. Article I, section 1 of the Idaho Constitution enumerates certain inalienable rights, among which is the right of "acquiring, possessing

and protecting property." As the Idaho Supreme Court observed in Newland v. Child, 73 Idaho 530, 537, 254 P.2d 1066, 1069 (1953):

> The right to own and enjoy private property is fundamental. It is one of the natural, inherent and inalienable rights of free men. It is not a gift of our constitutions, because it existed before them. Our constitutions embrace and proclaim it as an essential in our conception of freedom. This right of property, though of such high order, is nevertheless subject to reasonable limitation and regulation by the state in the interests of the common welfare. Indeed, a statute imposing any limitation upon the right must be supported by such purpose.

(Citations omitted.) Elsewhere, the Idaho Supreme Court has noted that "[a] man's house is still his castle. He may exclude whom he chooses." Rowe v. City of Pocatello, 70 Idaho 343, 352, 218 P.2d 695, 700 (1950).

As a private entity, a private school is not subject to preemption under Idaho's firearms regulation preemption statute, Idaho Code § 18-3302J. In the event of a challenge by a private school, or by a person seeking to engage in concealed carry on the grounds of a private school that prohibits weapons on campus, an Idaho appellate court would have to determine whether the amended provisions of Idaho Code § 18-3302D are reasonable limitations or regulations by the State on private property in the interest of the common welfare, or whether they impinge on the fundamental rights of private property owners. This would be an issue of first impression in Idaho, and there is no guidance from Idaho case law at present as to how a reviewing court might view this issue.

The proposed amendments may also impinge on the religious rights of private schools. The First Amendment to the United States Constitution guarantees, among other things, the right to the free exercise of one's religion. Article I, section 4 of the Idaho Constitution similarly guarantees "the exercise and enjoyment of religious faith and worship." The United States Supreme Court has held that "only those interests of the highest order and those not otherwise served can

overbalance legitimate claims to the free exercise of religion." Wisconsin v. Yoder, 406 U.S. 205, 215, 92 S. Ct. 1526, 1533, 32 L. Ed. 2d 15 (1972). A private school may be affiliated with a church or religion that does not believe in the use of deadly force as an option of first resort for self-defense, and that would bar weapons on its campus for religious reasons. A law which would require such a school to allow concealed weapons on their campus, and require that its employees who wish to carry concealed weapons be allowed to do so, could conflict with that school's rights under the First Amendment's Free Exercise Clause and article I, section 4 of the Idaho Constitution. This would also be an issue of first impression in Idaho.

Guidance on how a court might view both of these conflicts can possibly be found in a case decided by the Eleventh Federal Circuit Court of Appeals, GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244, 1261-66 (11th Cir. 2012). There, the court addressed the issue of a person's right to carry a firearm on private property, in that case, a place of worship. The court held that:

> In sum, to the extent Plaintiffs' argument implies that the Second Amendment—in light of the [United States Supreme] Court's decisions in *Heller* and *McDonald*—somehow abrogates the right of a private property owner—here, a place of worship—to determine for itself whether to allow firearms on its premises and, if so, under what circumstances, the argument badly misses the mark. We conclude that the Second Amendment does not give an individual a right to carry a firearm on a place of worship's premises against the owner's wishes because such right did not pre-exist the Amendment's adoption.

*Id.* at 1266 (emphasis omitted). If Idaho courts reached the same conclusion, the private property and religious rights of private schools would control over the rights of Idahoans to bear concealed weapons on the property of private schools.

### C. Both Amendments Allowing the Carrying of Weapons on School Property Conflict with Controlling Federal Law.

The Federal Gun Free School Zones Act, at 18 U.S.C. § 922(q)(2)(A), prohibits a person from possessing a firearm that has moved in or affects interstate commerce in a school zone. Subsection 2(B)(ii) then exempts from the prohibition anyone who is licensed to possess such firearm under the laws of the applicable state. A violation of this provision is a felony, carrying a possible sentence of up to five years in prison and a fine. 18 U.S.C. § 924(a)(1). Thus, while the amendments to Idaho Code §§ 18-3302C and 18-3302D, which decriminalize concealed carry without a permit on school grounds, are not unconstitutional under either the Idaho or United States Constitutions, they both also conflict with controlling federal law. Idahoans engaging in concealed carry on school property pursuant to these amendments would be open to federal prosecution, imprisonment, and the imposition of a fine.

## II. OTHER POTENTIAL ISSUES ARISING FROM THE PROPOSED BILL

### A. Sections 1 and 2 of the Proposed Bill are Inconsistent in the Decriminalizing of Concealed Carry on School Property.

Section 1 of the proposed bill deals with Idaho Code § 18-3302C(1), which currently prohibits the carrying of a concealed weapon in courthouses, juvenile detention facilities, jails, and public and private schools by persons obtaining a concealed weapons license under Idaho Code § 18-3302 or carrying a weapon pursuant to Idaho Code § 18-3302(4). Idaho Code § 18-3302(6) through (24) provide for the issuance of a "non-enhanced" concealed weapons license. Idaho Code § 18-3302(4)(f) provides that no license to carry a concealed handgun is required for Idaho residents or members of the armed forces who are over 21 and not otherwise disqualified from obtaining a license. Also, Idaho Code § 18-3302(20) allows a county sheriff to issue a non-enhanced concealed weapons license to someone between the ages of 18 and 21 if such a person would, but for their age, qualify for a concealed weapons license under Idaho Code § 18-3302K.

If the proposed bill was enacted, as a result of removing the current prohibition against concealed carry in Idaho Code § 18-

3302C(1), the following persons would no longer be prohibited from carrying a concealed deadly weapon in a school:

(1) Anyone with an Idaho non-enhanced concealed weapons license;

(2) Anyone carrying a concealed handgun, with or without a license of any kind, who is over 21, an Idaho resident or member of the military, and not otherwise disqualified by statute from obtaining a non-enhanced license; and

(3) Anyone between 18 and 21, who the county sheriff determines would qualify for an enhanced license, but for their age.

Thus, this amendment would legalize concealed carry in a school by a fairly broad spectrum of persons, potentially including students who are at least 18 years old.

Section 2 of the proposed bill deals with Idaho Code § 18-3302D, which provides that it is a misdemeanor for any person to possess a firearm or other deadly weapon on school grounds or on property where a school activity is taking place, or while riding on school-provided transportation. This provision applies to students and non-students. Idaho Code § 18-3302D(1)(a), (b). The proposed amendment to Idaho Code § 18-3302D(4) in Section 2 would exempt persons holding an enhanced concealed weapons license pursuant to Idaho Code § 18-3302K from prosecution. Pursuant to Idaho Code § 18-3302K(4), an applicant for an enhanced license must be over 21 and must be a legal resident of Idaho for at least six months or hold a current license in their own state of residence, and must complete a required course of training, which is merely optional under Idaho Code § 18-3302.

Section 1 would thus decriminalize the carrying of concealed weapons on school property by a different and potentially much broader category of persons than would Section 2. Assuming the amendments are intended to be consistent, the drafters may wish to revisit them to ensure the same categories of persons are exempt from criminal liability under both statutes.

### B. Courts May Define the Parameters of the Term "Immediate Control."

The proposed bill defines the term "immediate control" in Section 2 as "to possess on or within one's own clothing or in a manner so that no other person may easily gain control." Under the proposed Idaho Code § 18-3302D(4)(h), a person carrying a weapon on school grounds or at a school activity would be required to carry it concealed and to maintain "immediate control over it."

While "to possess on or within one's own clothing" is fairly straightforward, the parameters of "in a manner that no other person may easily gain control" are unclear. Could this mean that a weapon could be kept in a desk or locker in addition to being carried on the person? Must it be under lock and key? If the proposed bill is enacted, school policies may define "in a manner that no other person may easily gain control" to give guidance to employees. But, in the event of litigation, this may be a fact-specific inquiry and courts may end up defining the meaning of "in a manner that no other person may easily gain control" that goes beyond what the drafters of the proposed bill intend.

## CONCLUSION

The amendment to Idaho Code § 18-3302C in DRRCB162, which would decriminalize the carrying of a concealed weapon on private or public school grounds by a person who has obtained a concealed weapons license pursuant to Idaho Code § 18-3302 or who is carrying such a weapon pursuant to Idaho Code §18-3302(4)(f), is constitutional. The amendments to Idaho Code § 18-3302D, which would add new subsections (4)(h) and (5), are constitutional as to public schools, but may create conflicts with other constitutional rights where private schools are concerned.

As currently drafted, the amendments to Idaho Code §§ 18-3302C and 18-3302D, in Sections 1 and 2 of DRRCB162, respectively, are inconsistent as to the categories of persons who would be allowed to carry concealed weapons in schools or on school grounds. Additionally, the use of the term "immediate control" may eventually be defined by courts.

I hope this analysis is helpful. Please feel free to contact our office if you have any questions.

Sincerely,

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

February 12, 2019

The Honorable James Holtzclaw
Idaho House of Representatives
STATE OF IDAHO
Via Hand-Delivery

Re: Proposed Bill Amending Idaho Code § 55-115

Dear Representative Holtzclaw:

Thank you for allowing the Attorney General's Office an opportunity to comment on your proposed changes to Idaho Code § 55-115. It appears the bill's intent is threefold: (1) to limit homeowner associations'[1] authority, (2) to impose specific duties on boards, and (3) to provide members with an enforcement mechanism when associations fail to comply with the law.

This letter[2] first discusses the provisions in your bill that current law already addresses and makes recommendations for reconciling potential conflicts. Second, this letter outlines an alternative to enforcement under Idaho Code § 74-208. Finally, this letter identifies other problematic provisions that fundamentally change the purpose of homeowner associations.

## I. Homeowner Associations and the Idaho Nonprofit Corporation Act

Although not required to incorporate, homeowner associations in Idaho usually are organized as nonprofit corporations under the Idaho Nonprofit Corporation Act, title 30, chapter 30, Idaho Code. The Act governs the structure, duties, authorities, liabilities, and dissolution of corporations, their boards, and their members. The Nonprofit Corporation Act acts as a baseline for corporate standards and actions and serves, in some instances, as a default when a corporation's governing documents fail to cover a particular issue.

A homeowner association organized under the Nonprofit Corporation Act must comply with the Act's requirements. This is not

to say, however, that Idaho law cannot impose more stringent standards on homeowner associations than what the Nonprofit Corporation Act provides. But to avoid conflicts between the Act and Idaho Code § 55-115, a provision needs added to section 55-115 that specifically excludes homeowner associations from conflicting provisions of the Nonprofit Corporation Act. An example of such a provision reads:

> *In the event of any conflict between the provisions of this section and the provisions of the Idaho Nonprofit Corporation Act, chapter 30, title 30, Idaho Code, the provisions of this section shall control.*

Some requirements in your bill mirror or are less strict than those of the Nonprofit Corporation Act. These provisions are problematic for two main reasons: (1) associations and members may not know which law applies (absent any exclusionary language), and (2) members' protections are diminished under your bill.

The first problem is easily addressed through the language recommended above in italics, but to resolve the second and more serious issue, we recommend either (a) deleting the problematic provisions (identified below) from the bill to allow the Nonprofit Corporation Act to govern, or (b) strengthening the bill's provisions to clearly delineate them from the Act.

***Section 55-115(6)***

In section 55-115(6) of the bill, you propose requiring an association's board to include no "less than three members" who "serve terms totaling [no] more than six consecutive years."

The Nonprofit Corporation Act provides, "[t]he board of directors must consist of three (3) or more individuals, with the number specified in or fixed in accordance with the articles or bylaws." Idaho Code § 30-30-603(1). Because the required number of directors in your bill is identical to the number the Nonprofit Corporation Act requires, you should delete this requirement from your bill.

The Nonprofit Corporation Act limits board members' service to terms of no more than five years, but allows successive terms. Idaho Code § 30-30-605(1). Your bill allows board members to serve one additional year. While a six-year term is reasonable, because it differs from section 30-30-605(1), you should consider modifying the language of 55-115(6) to read:

> *No board member shall serve terms totaling more than five (5) consecutive years without an intervening period of five (5) years of being neither a board member nor an officer of the homeowners association.*

***Section 55-115(7)(a) & (j)***[3]

Subparagraph 55-115(7)(a) outlines the notice requirement for "board meetings"—30 days in advance of the meeting date—but it does not identify (a) to whom notice must be given, (b) how notice must be given, or (c) what notice, if any, is required for non-regular meetings.

Additionally, subparagraph 55-115(7)(j) specifies that *all* board meetings are open to members. It should be noted that, depending on timing and logistics, providing notice to all members for special or emergency meetings, can be challenging if not impractical.

Section 30-30-104 of the Nonprofit Corporation Act defines notice is general, while a host of other sections govern the specific notice required for (a) regular and emergency board meetings, (b) annual, regular and special member meetings, (c) court-ordered meetings, and (d) various other types of meetings. The Nonprofit Corporation Act does not require notice for regular board meetings, but does require notice for member meetings.

While the bill includes a minimum notice period of 30 days, it does not have a maximum notice period. Section 30-30-505(3)(a) of the Nonprofit Corporation Act considers notice "reasonable" if it occurs by first-class or electronic mail no fewer than 10 days nor more than 60 days before the meeting date.

If your intent is to require homeowner associations to notify all members of regular board meetings only, you need to specify that in

your bill. You also need to define what constitutes reasonable notice and when notice becomes effective. For example, you could modify paragraph (7)(a) to read:

> *Board members and members must receive written notice of all regular board meetings at least 30 days, but no more than 60 days, before the date of the board meeting. For purposes of this subparagraph only, written notice includes notice sent to board members and members by regular, first-class U.S. mail, electronic mail or hand-delivery. Notice is effective upon mailing or upon delivery if notice is hand-delivered.*

***Section 55-115(7)(d)***

Paragraph (7)(d) of your bill provides: "Action on board items require a quorum to take action and a majority vote of the total board." From this language, it appears it is up to the homeowner association to define, preferably in its bylaws (although not specified), what constitutes a quorum. If it fails to do so, the Nonprofit Corporation Act provides a fallback, which states: "a quorum of a board of directors consists of a majority of the directors *in office immediately before a meeting begins*." Idaho Code § 30-30-616(1) (emphasis added). In no event, however, may any nonprofit corporation authorize "a quorum of fewer than the greater of one-third (1/3) of the number of directors in office or two (2) directors." Idaho Code § 30-30-616(1). If your intent is to designate what constitutes a board quorum or to avoid application of the Nonprofit Corporation Act, you should clarify subparagraph (7)(d) to read:

> *Action on a board item requires a quorum consisting of a majority of the total board membership in office immediately before a meeting begins. If a quorum is present when a vote is taken, the affirmative vote of a majority of the board is the act of the board.*

***Section 55-115(7)(f) & (10)***

Record-keeping is a perpetual problem for small organizations that experience regular leadership changes. The bill includes two

provisions specific to records—paragraph (7)(f) and paragraph (10).[4] The first requires documentation of votes within meeting minutes and retention as a "permanent record." The second paragraph requires homeowner associations to give members and realtors access to associations' financial records.

Part 11 of the Nonprofit Corporation Act includes detailed provisions concerning a nonprofit corporation's creation and retention of, as well as members' access to, corporate records and reports. Idaho Code § 30-30-1101(1) requires a corporation to "keep as permanent records minutes of all meetings of its members and board of directors, a record of all actions taken by the members or directors without a meeting, and a record of all actions taken by committees of the board of directors as authorized in section 30-30-617(4), Idaho Code." Members may inspect and copy the nonprofit corporation's accounting and other records at a reasonable time and location with at least 15 business days' written notice. Idaho Code § 30-30-1102(2)(b).

It is unreasonable to require homeowner associations, which are typically small and lack dedicated staffs, to respond to unwritten record requests within five days. Record requests should be submitted in writing and homeowner associations should have at least 15 business days to respond.

If you intend to supersede Part 11 of the Nonprofit Corporation Act with your bill, you need to include all relevant portions of Part 11. Incorporating the necessary parts of Part 11 into your bill helps provide consistency to both associations and members. This also allows inclusion of licensed real estate agents in paragraph (10).

***Section 55-115(9)***

Paragraph (9) of section 55-115 imposes a fiduciary duty on homeowner association boards to ensure "proper financial controls." This paragraph also requires associations with annual revenues of over $500,000 to conduct independent audits of their financial statements. In theory, we have no objections to this paragraph. In practice, however, it ignores the importance of the Nonprofit Corporation Act's

fiduciary duties statutes and may impose unreasonable liabilities on nonprofit board members.

The Nonprofit Corporation Act sets forth three fiduciary duties for directors and officers who serve nonprofits: (1) the duty of care, (2) the duty of loyalty, and (3) the duty of obedience. Idaho Code §§ 30-30-618, 30-30-620, and 30-30-623. Included within these duties is the responsibility to act (a) in good faith, (b) with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and (c) in a manner that is in the best interests of the corporation. Idaho Code §§ 30-30-618(1) and 30-30-623(1).

Board members, however, enjoy certain protections from liability, including the fact that they may reasonably rely on the opinions and advice of legal counsel, accountants, or other professionals. Idaho Code § 30-30-618(2)(b). Also, board members are not trustees with respect to nonprofit corporations or the property they hold. Idaho Code § 30-30-618(5).

To address the conflicts between section 55-115(9) and the Nonprofit Corporation Act, we recommend removing the fiduciary duty language from paragraph (9) and allowing the above provisions of the Nonprofit Corporation Act to control. The requirement that large associations conduct independent financial audits is reasonable, but the provision needs to refine the language to (a) clarify what constitutes "annual revenue;" (b) specify how often the audit must occur; (c) clarify which "financial statements" require an audit; (d) define the qualifications of an "auditor;" and (e) identify the method for selecting an "independent" auditor. For example:

> *Alternative 1: $500,000 in Annual Earned Revenue*
>
> *At the close of a homeowner association's accounting year, a homeowner association reporting five hundred thousand ($500,000) or more in annual earned revenue, including, if applicable, exempt function income, shall retain, as selected upon the board's majority vote, an independent, licensed certified public accountant, to prepare an audit opinion of the homeowner association's year-end financial statements. Upon the*

*board's review and acceptance of the report, the board shall make the report available, upon written request, to the members.*

*Alternative 2: $500,000 in Total Assets*

*At the close of a homeowner association's accounting year, a homeowner association reporting five hundred thousand ($500,000) or more in total assets, shall retain, as selected upon the board's majority vote, an independent, licensed certified public accountant, to prepare an audit opinion of the homeowner association's year-end financial statements. Upon the board's review and acceptance of the report, the board shall make the report available, upon written request, to the members.*

## II. Enforcement Through Idaho Code § 74-208

Paragraph (7)(k) of the draft bill proposes treating homeowner associations as "governing bodies" and members as "citizens" for purposes of applying the enforcement provisions of Idaho Code § 74-208 to any violations of section 55-115. We recognize the statute, as presently codified, lacks its own enforcement provision. However, members and board members are not completely without enforcement authority.

Section 30-30-411 of the Nonprofit Corporation Act authorizes members having 5% or more of the voting power or any director of a nonprofit to bring an action in the right of a nonprofit corporation to obtain action. This section understandably provides little relief to the single member of a homeowner association who possesses one vote and who cannot afford to file a court action simply to obtain the association's meeting minutes.

However, rather than resorting to remedies intended to address government violations, we recommend crafting and including in section 55-115 an enforcement provision specific to homeowner associations. To help deliver speedy, cost efficient resolutions to what often amount to minor disputes, homeowner associations should implement and offer

their members an internal dispute resolution procedure. Then, if the homeowner association's informal procedure fails or if a member's dispute requires court intervention, the member can choose to file a private action in district court. The following paragraphs present these two remedies.

*Internal Dispute Resolution Process*

*(13) (a) This section applies to homeowner associations that do not otherwise define a fair, reasonable and expedient internal dispute resolution procedure within the homeowner association's governing documents. The procedure outlined in this paragraph constitutes a fair, reasonable and expedient internal dispute resolution procedure.*

*(b) A member with a dispute concerning an obligation imposed on the homeowner association under this section or the homeowner association's governing documents may invoke the following procedure:*

*(i) A member may request his homeowner association meet and confer in an effort to resolve the member's dispute. The member's request shall be in writing.*

*(ii) The board shall promptly designate a director to meet and confer with the member.*

*(iii) The parties shall meet promptly at a mutually convenient time and place, explain their positions to each other, and confer in good faith in an effort to resolve the dispute. The parties may be assisted by an attorney or another person at their own cost when conferring.*

*(v) A resolution of the dispute agreed to by the parties shall be memorialized in writing and signed by the parties, including the board designee on behalf of the homeowner association.*

*(c) A written agreement reached under this paragraph binds the parties and is judicially enforceable if it is signed by both parties and both of the following conditions are satisfied:*

*(i) The agreement is not in conflict with any law or the governing documents of the homeowner association.*

*(ii) The agreement is either consistent with the authority granted by the board to its designee or the agreement is ratified by the board.*

*(d) A member shall not be charged a fee to participate in the procedure.*

*(e) A homeowner association shall not refuse a member's written request to meet and confer unless a majority of the board finds in writing that the member has substantially abused the homeowner association's internal dispute resolution procedure.*

*Private Cause of Action*

*(14) (a) A member may bring a private action against a homeowner association to enforce an obligation imposed on the homeowner association under this section or the homeowner association's governing documents.*

*(b) An action brought under subsection (a) of this paragraph must be brought in the county where the homeowner association is located or in the county where the alleged violation occurred.*

*(c) Costs shall be allowed to the prevailing party unless the court otherwise directs. In any action brought by a member under this section, the court shall award, in addition to the relief provided in this section, reasonable attorney's fees to the plaintiff if he prevails. The court in its discretion may award attorney's fees to a prevailing defendant if it finds that the plaintiff's action is spurious or brought for harassment purposes only.*

*(d) Parties to a dispute arising under this section or the governing documents may agree at any time to resolve the dispute by any form of binding or nonbinding alternative dispute resolution.*

## III. Idaho Code § 55-115(5): Comments and Recommendations

Paragraph (5) of the proposed bill includes provisions that eliminate standard use and aesthetic restrictions typically found in a homeowner association's "covenants, conditions and restrictions" (CC&Rs). A harmonic relationship between property owners and homeowner associations requires the parties' equitable assumption of obligations in exchange for individual and communal benefits. Through common interest agreements like CC&Rs, property owners can ensure their communities maintain and homeowner associations enforce agreed upon standards. Maintenance and enforcement of such standards ensures cleaner, safer, and higher-valued neighborhoods.

Generally, the calls and complaints the Attorney General's Consumer Protection Division receives from members do not concern property use restrictions. Rather, the Consumer Protection Division hears regularly from members and board leaders about dysfunctional, apathetic homeowner associations that fail to hold board meetings, elect officers, keep board minutes, prepare financials, file taxes, and, among other things, produce records.

Prohibiting standard CC&R restrictions—those that typically promote uniformity, protect property values, and benefit the community as a whole—may appease a few members, but ultimately is something a majority of members should decide. If a majority of members want to change or eliminate, within the bounds of applicable law, outdated, unwanted, or unpopular restrictions, they certainly can do so.

### *Idaho Code § 55-115(5)(e)*

Subparagraph (5)(e) reads: "No homeowners association may add, amend or enforce any covenant, condition or restriction that limits or prohibits any reasonable use of backyards, side yards or fenced yards not visible from residential streets including, but not limited to, . . . domestic pet use." The statute does not define "domestic pet" or "use."

Property owners have valid reasons for restricting the type, number, and use of animals within their neighborhood. Even in areas without homeowner associations, residents must comply with state

laws and local ordinances limiting animal ownership. For example, the City of Idaho Falls prohibits persons from keeping or maintaining within the City (1) any horse, mule, ox, cow, swine, goat, sheep, fowl, bison, or llama, regardless of weight; or (2) any other domestic animal weighing in excess of 50 pounds, except domestic dogs, cats, canaries, parrots, or fish. Under certain conditions, homeowners may keep up to six hen chickens in their backyards. *See* City of Idaho Falls City Code § 5-5-3(A) through (D).

The following examples illustrate how two Idaho homeowner associations restrict animals and pets on members' properties:

> Example 1
>
> No farm animals, animals creating a nuisance, or animals in violation of governmental ordinances shall be kept on any property. No more than two domestic cats and no more than two domestic dogs shall be allowed to inhabit any one lot. Any kennel or dog run shall be screened from view of adjacent lots and must be approved by the board.
>
> Example 2
>
> Domestic animals, including dogs, cats and other household pets, are permitted, but only if such animals are kept and housed in a manner consistent with the peaceful decorum of the community. No animal may be kept, raised, bred or displayed in violation of any applicable laws, ordinances or regulations. Other than the domestic animals described herein, no other animals or livestock may be kept, raised, bred or displayed on any lot or parcel.

Given the above discussion, you may want to consider modifying the language in the bill concerning domestic pet use as follows:

> *(5) No homeowner association may add, amend or enforce any covenant, condition or restriction that does the following:*
>
> *(d) Limits or prohibits any member's reasonable use of his back, side or fenced yards not visible from residential streets or adjacent lots, including, but not limited to, the following activities:*
>
> *(i) Gardening;*
>
> *(ii) Installation or use of athletic or recreational equipment for noncommercial purposes; or*
>
> *(iii) Ownership or use of domestic animals, including dogs, cats and other household pets, but only if such animals are kept and housed in a manner consistent with any applicable laws, ordinances or regulations. Other than the domestic animals described herein, no other animals or livestock may be kept, raised, bred or displayed on any lot or parcel.*

***Idaho Code § 55-115(5)(e)***

This subsection provides: "No homeowners association may add, amend or enforce any covenant, condition or restriction that limits or prohibits a member from parking a motor vehicle that weighs less than twenty thousand (20,000) pounds on a driveway or parking pad including when the vehicle is used by the member as part of his or her employment so long as it is parked in such a manner as to entirely on the owner's property and not encroaching on sidewalks or streets." Because the bill does not define "motor vehicle," we will apply, for purposes of our analysis, the definition from title 49, chapter 1, Idaho Code, which defines "motor vehicles" as:

> Every vehicle which is self-propelled, and for the purpose of titling and registration meets federal motor vehicle safety standards as defined in section 49-107, Idaho Code. Motor vehicle does not include vehicles moved solely by human power, electric personal assistive mobility devices, personal delivery devices, electric-assisted bicycles, and motorized wheelchairs or other such vehicles that are specifically exempt

> from titling or registration requirements under title 49, Idaho Code.

Idaho Code § 49-123(2)(h).

Property owners have an interest in protecting their neighborhoods from looking like parking lots, especially when parked vehicles are dilapidated or unsightly. The following provisions from separate Idaho associations' CC&Rs illustrate this interest:

> Example 1
>
> No boats, trailers, campers, all-terrain vehicles, motorcycles, recreational vehicles, motor homes, bicycles, dilapidated or unrepaired and unsightly vehicles or similar equipment shall be placed upon any portion of the property (including, without limitation, streets, parking areas and driveways) unless enclosed by an approved concealing structure. No vehicles taller than nine feet or longer than 25 feet shall be allowed to be stored on any portion of the property.

> Example 2
>
> The use of all vehicles shall be subject to the declaration, which prohibits or limits the use thereof within the property. No abandoned or inoperable, oversized, dilapidated or unrepaired and unsightly vehicles or similar equipment shall be placed upon any portion of the property including, without limitation, streets, parking areas and driveways, unless the same are enclosed by a structure concealing then from view. "Abandoned and inoperable vehicle" shall be defined as any vehicle which has not been driven under its own propulsion for a period of three (3) weeks or longer; provided, however, this shall not include vehicles parked by owners while on vacation. "Oversized" vehicles shall be defined as vehicles which are too high to clear the entrance to a residential garage.

To ensure property owners can continue to keep their neighborhoods from becoming junkyards (if they so choose), you could modify subparagraph (5)(e) of the bill to read:

> *(5) No homeowner association may add, amend or enforce any covenant, condition or restriction that does the following:*
>
> *(e) Limits or prohibits a member from lawfully parking a motor vehicle that weighs less than twenty thousand (20,000) pounds on a driveway or parking pad including when the vehicle is used by the member as part of his or her employment so long as it is parked in such a manner as to be entirely on the member's property and not encroaching on sidewalks or streets. Nothing in this subparagraph is intended to prevent a homeowner association from prohibiting a member from parking an abandoned, inoperable, dilapidated, unsafe or unsightly motor vehicle on any portion of the member's property. For purposes of this subparagraph only, "motor vehicle" has the same meaning as that term is defined in section § 49-123, Idaho Code.*

***Idaho Code § 55-115(5)(f)***

In subparagraph 55-115(5)(f), you propose disallowing property owners the right to control the aesthetic design of their neighborhoods. Specifically, this subparagraph reads: "No homeowners association may add, amend or enforce any covenant, condition or restriction that [a]llows the homeowners association . . . control over grounds of the home." The terms "control" and "grounds" are not defined.

CC&Rs govern the use and aesthetics of members' properties. It is unfair to property owners to wholly eliminate their ability to control the exterior conformity of their neighborhood. More reasonable approaches are to:

- define the specific actions the homeowners association may not govern (e.g., solar panel installation, xeriscaping, lighting); or

- change the language to address only the members' use of their property. For example:

> *(5) No homeowner association may add, amend or enforce any covenant, condition or restriction that does the following:*
>
> *(f) prevents members from using their property in a manner that otherwise complies with local, state and federal law.*

I hope these comments and suggestions are helpful to you. Please feel free to call me at 208-334-4135 or email me at stephanie.guyon@ag.idaho.gov if you need further assistance.

Sincerely,

STEPHANIE N. GUYON
Deputy Attorney General
Consumer Protection Division

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[1] Idaho Code §§ 55-115 and 45-810(6) use the term "homeowner's association," which is grammatically incorrect as any association includes more than one homeowner. To correct this problem, but for purposes of this letter only, I use the term "homeowner association."

[2] Except when we propose alternative language (set forth in *italic*), we do not identify or correct any typos or misspellings within the draft bill.

[3] Your bill excludes paragraph (7)(e). To accommodate this error, we refer to your paragraphs identified as (7)(f)-(m) as (7)(e)-(k) through the remainder of this letter. As such, our references to subparagraph (7)(j) here corresponds to your subparagraph (7)(l).

[4] Your bill includes three paragraphs numbered (9). The first paragraph numbered (9) should be numbered (8). The third paragraph numbered (9) is actually paragraph (10), which reads, in part, "All current financial records of the homeowners association shall be available and open for inspection to any member or licensed relator and within 5 days of request."

February 15, 2019

The Honorable Michelle Stennett
Minority Leader
Idaho State Senate
Statehouse
TRANSMITTED VIA ELECTRONIC MAIL:
mstennett@senate.idaho.gov

Re: Our File No. 19-64535 - Request for AG Analysis on Delegation Issue Related to SB1040

Dear Senator Stennett:

You have requested an analysis of the constitutionality of the proposed delegation of power to issue liquor licenses by the Legislature to cities and counties contained in SB1040. Specifically, you have asked, "Is the bill unconstitutional as an unlawful delegation of power from the Legislature to Cities and Counties?"

SB1040 would work a significant change in the existing statutory regime governing the sale of intoxicating liquor in Idaho. I confine my analysis of the bill to the delegation of authority to issue liquor licenses to cities and counties and to whether there is a constitutional property right in the currently issued liquor licenses.

## CONCLUSIONS

1. It is unlikely that a reviewing court would find SB1040 to work an unlawful delegation of power from the Legislature to cities and counties.

2. Idaho Supreme Court precedent establishes there is no constitutionally protected property right in liquor licenses.

## SUMMARY OF PROPOSED LEGISLATION ANALYZED

The following is a brief summary of the most relevant portions of SB1040. SB1040 would change the current system for how licenses

for the retail sale of liquor by the drink are issued. Currently, liquor licenses are issued by the State pursuant to a quota system.

SB1040 would allow cities and counties to issue—or choose not to issue—licenses to eating establishments and lodging facilities. Counties would be allowed to issue municipal licenses to qualified establishments outside of incorporated city limits within said county. Their licensees would be authorized to sell liquor by the drink in accordance with the provisions of title 23, chapter 9, Idaho Code, and any rules or ordinances established by the board of county commissioners of the licensing county.

Similarly, incorporated cities would be authorized to issue municipal licenses to qualified establishments within their corporate limits. Their licensees would be authorized to sell liquor by the drink in accordance with the provisions of title 23, chapter 9, Idaho Code, and any rules or ordinances established by the city council.

SB1040 would empower boards of county commissioners and city councils to create rules, requirements, and criteria for the equitable and fair administration of municipal licenses consistent with state law and to make rules providing for the inspection of licensed premises.

SB1040 lays out requirements for how applicants may apply for municipal licenses. The county or city is allowed discretion in what information it wishes to obtain from the applicant and about the premises where liquor would be sold; SB1040 would require that all applicants possess valid state and county beer licenses. The suspension of a license for the sale of beer or wine would automatically result in the suspension of the municipal license for the same period.

The bill also sets out basic qualifications for holders of municipal licenses, such as requirements related to the holder's criminal history, and requirements regarding information to be recorded on the license itself. Municipal licenses would be site-specific and non-transferable.

In general, the many provisions and requirements of title 23, chapter 9, Idaho Code, would apply to municipal liquor license holders.

## ANALYSIS

**1. It is unlikely that a reviewing court would find SB1040 to work an unlawful delegation of power from the Legislature to cities and counties.**

Article III, section 26 of the Idaho Constitution states as follows:

> Power and authority over intoxicating liquors. — From and after the thirty-first day of December in the year 1934, the legislature of the state of Idaho shall have full power and authority to permit, control and regulate or prohibit the manufacture, sale, keeping for sale, and transportation for sale, of intoxicating liquors for beverage purposes.

A brief overview of the history of the Legislature's authority to regulate the licensing of liquor is helpful to understanding the Legislature's ability to delegate under article III, section 26.

Article III, section 24 of the Idaho Constitution provides, "The first concern of all good government is the virtue and sobriety of the people, and the purity of the home. The legislature should further all wise and well directed efforts for the promotion of temperance and morality." Article III, section 24 became part of Idaho's Constitution in 1889.[1]

Article III, section 26 of the Idaho Constitution was originally adopted in 1916 in furtherance of article III, section 24 to prohibit the manufacture, sale, keeping for sale, and transportation for sale of intoxicating liquors for beverage purposes.[2]

In 1934, the people ratified an amendment to article III, section 26 of the Idaho Constitution to give the Legislature full power and authority to authorize the sale of intoxicating liquors for beverage purposes and to regulate and control the traffic therein in every way and in all respects.[3] Since 1934, article III, section 26 has read as quoted above.

In January 1935, the Legislature passed a liquor control act,

reserving to the State the right to buy, sell, and generally traffic in intoxicating liquors.[4] The liquor control act of 1935 was repealed in 1939 and replaced by the Idaho Liquor Act, which, with amendments, is currently in force today.[5] "The act vested in the liquor board full power and authority to do everything necessary to be done in order to control the liquor traffic."[6]

The Idaho Liquor Act has been revised many times since, but it has consistently delegated power to the executive branch to permit, license, inspect, and regulate the sale and delivery of alcoholic liquor.[7] Licensing authority for the retail sale of liquor by the drink now rests with the Idaho State Liquor Division and the director of the Idaho State Police.[8]

In other words, essentially since article III, section 26 of the Idaho Constitution was adopted, the Legislature has interpreted its "full power and authority" to permit and regulate the sale of intoxicating liquors as enabling it to delegate its licensing powers. It does not appear that the Legislature's delegation of its licensing powers to the executive branch has ever been challenged.

The Idaho Supreme Court analyzed what was meant by "full power and authority to . . . control and regulate" in article III, section 26 of the Idaho Constitution in Taylor v. State, 62 Idaho 212, 109 P.2d 879 (1941). There, the Court analyzed whether the Legislature infringed on the constitutional authority of the Attorney General by empowering the liquor board to employ legal counsel, set its compensation and fix its duties.[9] In reaching its decision, the Court carefully analyzed the meaning of "full power and authority to . . . control and regulate."[10] It concluded the phrase appeared "to have the meaning of the right to govern, regulate, dominate, restrain or subdue, without restraint, qualification, reserve, abatement or diminution, and implies of necessity the power and authority to do all things necessary, convenient and proper to such complete domination."[11]

"[I]t necessarily follows that the legislature exercising such 'full power and authority to . . . control and regulate' may adopt such means and measures, and employ such assistants and help as in its judgment as are necessary to carry out and effectuate such full power of control and regulation."[12] Thus, the Court concluded, the Legislature

necessarily had all "incidental and implied powers and authority as may be necessary to enable it to exercise the power expressly granted, including the right to appoint legal counsel."[13]

It appears from the foregoing that the Legislature's "full power and control" to regulate liquor licenses enables it to delegate its authority to issue liquor licenses to such entities or assistants as it deems appropriate, including to cities and counties, just as it has done for many years to the executive branch.

It is worth noting that SB1040 contains numerous limitations that cabin the discretion of local governments in issuing licenses. Most notably, municipal license holders must still obtain beer licenses through the State, meaning that such licensees are still screened to some degree under State standards. Courts have often found that legislative delegations of authority are permissible when the delegation of authority is cabined by standards set by the Legislature.[14] As summarized above, the delegation of authority to local governments is subject to numerous statutory requirements and conditions established by the Legislature. To survive scrutiny for a proper delegation, three conditions must be met. The Legislature must establish the policy to be set, in this instance liquor licensing, it must identify the entity to administer the law, in this instance municipal and county governments, and it must place limitations on the delegation, which in this instance are the numerous statutory criteria that govern the administration and issuance of licenses.[15] Notably, the Legislature maintains the authority to take back its delegated authority or to alter the scope of the delegated authority at any time.

It is difficult to imagine a court agreeing that the Legislature would violate its constitutional "full power and authority" by delegating its authority to local governments to issue municipal liquor licenses as contemplated in SB1040.

**2. Idaho Supreme Court precedent establishes there is no constitutional property right in liquor licenses.**

The Idaho Supreme Court has consistently held that there is no constitutionally protected property right in liquor licenses.[16] It is "universally accepted that no one has an inherent or constitutional right

to engage in the business of selling or dealing in intoxicating liquors."[17] This is in part because article III, section 26 of the Idaho Constitution gives the Legislature "full power and authority" to regulate intoxicating liquor for beverage purposes.[18]

Instead of a protected property right,

> [a] liquor license is simply the grant or permission under governmental authority to the licensee to engage in the business of selling liquor. Such a license is a temporary permit to do that which would otherwise be unlawful; it is a privilege rather than a natural right and is personal to the licensee; it is neither a right of property nor a contract, or a contract right.[19]

It is highly unlikely that a reviewing court would find SB1040 affects a constitutionally protected property right.

## CONCLUSION

Based on the foregoing, it is unlikely a court would find SB1040's licensing system to be an unconstitutional delegation of power, particularly given the limitations imposed by the bill on how and to whom municipal licenses can be issued. Further, it is well-established that liquor licenses are not constitutionally protected property rights.

I hope you find this analysis helpful. If you have additional questions, please contact me.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

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[1] Jenny Crane Grunke, *Idaho's Alcohol Beverage Laws: Past, Present and Future*, 56 Advocate 24 (2013).

[2] *See* State v. Musser, 67 Idaho 214, 218, 176 P.2d 199, 200 (1946).

[3] *Id.* at 219, 176 P.2d at 200.

[4] *Id.*

[5] *Id.*; Idaho Code §§ 23-101, *et seq.*

[6] Musser, 67 Idaho at 219, 176 P.2d at 201.

[7] *See, e.g.,* Idaho Code §§ 23-201 and 23-203.

[8] *Id.;* Idaho Code § 23-903(1); Jenny Crane Grunke, *Idaho's Alcohol Beverage Laws: Past, Present and Future*, 56 Advocate 24 (2013).

[9] Taylor, 62 Idaho at 216, 109 P.2d at 880.

[10] *Id.* at 217, 109 P.2d at 880-81.

[11] *Id.* at 218, 109 P.2d at 881.

[12] *Id.*

[13] *Id.* at 220, 109 P.2d at 882.

[14] *See* Kerner v. Johnson, 99 Idaho 433, 450-51, 583 P.2d 360, 377-78 (1978).

[15] *See* State v. Kellogg, 98 Idaho 541, 544, 568 P.2d 514, 517 (1977) (quoting Am. Power & Light Co. v. Sec. & Exch. Comm'n, 329 U.S. 90, 67 S. Ct. 133, 91 L. Ed. 103 (1946)). It is worth noting that the Idaho Supreme Court subsequently cast doubt on the continued viability of even these restrictions on the Legislature's ability to delegate, particularly when the Legislature is delegating power to local legislative bodies. *See* Sun Valley Co. v. City of Sun Valley, 109 Idaho 424, 428, 708 P.2d 147, 151 (1985), abrogated on other grounds by Moon v. N. Idaho Farmers Ass'n, 140 Idaho 536, 96 P.3d 637 (2004) (stating that, instead of standards to control discretion, the legislation itself or the agency's internal guidelines should provide meaningful standards to control discretion, such as a right to hearing or judicial review of agency decision making).

[16] Fuchs v. State, Dep't of Idaho State Police, Bureau of Alcohol Beverage Control, 152 Idaho 626, 631, 272 P.3d 1257, 1262 (2012) (holding there is no property right in a place on liquor license priority waiting lists); Alcohol Beverage Control v. Boyd, 148 Idaho 944, 947, 231 P.3d 1041, 1044 (2010); Crazy Horse, Inc. v. Pearce, 98 Idaho 762, 765, 572 P.2d 865, 868 (1977) (there is no constitutionally guaranteed right to compete in the retail liquor market).

[17] Gartland v. Talbott, 72 Idaho 125, 131, 237 P.2d 1067, 1070 (1951).

[18] Alcohol Beverage Control, 148 Idaho at 947, 231 P.3d at 1044 (citing Taylor, 62 Idaho at 219, 109 P.2d at 881).

[19] Alcohol Beverage Control, 148 Idaho at 947, 231 P.3d at 1044 (quoting BHA Invs., Inc. v. State, 138 Idaho 348, 354-55, 63 P.3d 474, 480-81 (2003)); Nampa Lodge No. 1389, Benev. & P. O. of E. of U.S. v. Smylie, 71 Idaho 212, 215-16, 229 P.2d 991, 993 (1951).

February 21, 2019

The Honorable Christy Zito
Idaho State Representative
VIA EMAIL: czito@house.idaho.gov

Re: Correspondence Request from Representative Christy Zito

Dear Representative Zito:

On February 21, 2019, your correspondence request was received and your list of questions reviewed.

> **Does the Library require the approval of the City each time they want to discard outdated or damaged library materials? This question only applies to physical library materials purchased with library funds; not technology devices, furniture, etc.**

The Idaho Code states that the Board of Trustees of a city library ("Board") has the power to:

> (4) **With the approval of the city**:
> (a) To acquire real property by purchase, gift, devise, lease or otherwise;
> (b) To own and hold real and personal property and to construct buildings for the use and purposes of the library;
> (c) **To sell, exchange or otherwise dispose of real or personal property when no longer required by the library; and**
> (d) To insure the real and personal property of the library;
> (5) To prepare and adopt a budget for review and approval by the city council;

Idaho Code § 33-2607(4)–(5) (emphasis added). A strict interpretation of this language is that the Board requires city council approval before disposing of outdated or damaged library materials.

**Does the Library Board and/or Director set the library staff's pay based on funds available in the appropriated budget?**

The Board may "prepare and adopt a budget for review and approval by the city council." Idaho Code § 33-2607(5). The statute does not explicitly address whether the city council approves the overall budget amount, or whether the city council approves a line item budget. However, library staff pay would be included in the budget. Thus, it would seem to be subject to approval by the city council on some level.

**Does the Library Board and/or Director determine what benefits are provided to employees based on available benefits to other city employees?**

The Code states:

> With the recommendation of the library director, the board shall hire other employees as may be necessary for the operation of the library in accordance with city policies and procedures. These employees shall be employees of the city and **subject to the city's personnel policies and classifications** unless otherwise provided by city ordinance.

Idaho Code § 33-2608 (emphasis added). Library employees are city employees that are subject to the city's personnel policies and classifications. Benefits are typically provided based on classifications. Thus, a strict interpretation of the Code would be that the city council determines benefits available to library employees based on the classifications that the city council sets.

**Does the Library Board and/or Director have the authority to create, update and finalize job descriptions for the library employees?**

Library employees are city employees that are "subject to the city's personnel policies and classifications." Idaho Code § 33-2608. The statute is not explicit as to whether personnel policies and classifications include job descriptions.

**Does the Library Board and/or Director have the authority to move (promote, reassign) staff positions to different internal positions without the approval of the City Council?**

As noted, library employees are city employees that are "subject to the city's personnel policies and classifications." Idaho Code § 33-2608. The statute is not explicit as to whether the Board may promote or reassign staff positions without the approval of the city council.

**It is our understanding that the Council's role is to approve the overall budget amount and the Library Board determines how those funds are allocated among staff and operations. Is that correct based on Title 33, Chapter 26?**

The Board has the power to "prepare and adopt a budget for review and approval by the city council." Idaho Code § 33-2607(5). The statute does not explicitly address whether the city council approves the overall budget amount, or whether the city council approves a line item budget. The Board may, however, "exercise such other powers, not inconsistent with law, necessary for the orderly and efficient management of the library." Idaho Code § 33-2607(12). The plain language of the statutes do not give an explicit answer to this question.

## CONCLUSION

While the Office of the Attorney General provides guidance on a number of questions, resolution of questions that require analysis or application or interpretation of the law with regard to specific facts is beyond the scope of this response. We recommend the library seek its own legal counsel to assist it in evaluating the legal ramifications and risk implications of the varying courses of conduct.

Sincerely,

ALI BRESHEARS
Deputy Attorney General
Contracts & Administrative Law Division

February 22, 2019

The Honorable Muffy Davis
Idaho House of Representatives
Statehouse
TRANSMITTED VIA HAND DELIVERY

Re: Our File No. 19-64691 – Response to Your Questions on House Bill 133

Dear Rep. Davis:

I am writing in response to your February 20, 2019 questions concerning House Bill 133 (H. 133), which relates to immunization requirements and exemption for children attending Idaho schools and daycare facilities. Your questions are followed by my individual responses:

**1. How does H. 133 affect private daycare centers and private schools that do not receive public funds? Are they excluded from our state law that requires immunizations or allows exemptions?**

Idaho Code § 39-4801 provides that immunization requirements apply to any child in "grades preschool and kindergarten through twelve (12) of any public, private or parochial school operating in this state . . . ." Students whose parent or guardian claim an exemption under Idaho Code § 39-4802 are exempt from immunization.

Idaho Code § 39-1118, in Idaho's Basic Day Care License law, applies to all children attending licensed daycare facilities, regardless of whether those facilities receive public funds. IDAPA 16.02.11.100 contains a list of the immunizations required by children who attend licensed daycare facilities. However, according to Idaho Code § 39-1108(1), a city or county may adopt daycare license regulations mandating compliance with immunization requirements at least as stringent as required in section 39-1118. Thus, a city or county could adopt local regulations requiring immunizations, without exemptions, for all attending children.

H. 133 would add a requirement to Idaho's Basic Day Care License law that licensed daycare providers must advise parents or guardians of the exemptions to immunization permitted in Idaho Code § 39-1118(2). The proposed bill would require facilities—whether public or private—to advise parents or guardians of the immunization exemptions. It would not impact Idaho Code §§ 39-4801 or 39-4802.

**2. Could these private schools/daycare centers legally require that all students must be vaccinated in order to attend, therefor this proposed legislation would require that they add language, specifically immunization exemptions, which they in fact do not allow?**

As noted above, H. 133 is an addition to Idaho's Basic Day Care License law and therefore has no impact on Idaho Code §§ 39-4801 or 39-4802.

However, as explained above with regard to daycare facilities, if a city or county were to adopt regulations which are more stringent than those set out in title 39, chapter 11, Idaho Code, it could empower licensed day care facilities to require immunizations and not permit exemptions at all. A jurisdiction opting for the local option exemption in Idaho Code § 39-1108 would be not be required to comply with H. 133 because it would be exempt from the entire chapter 11.

I hope you find the content of this letter helpful. If you would like to discuss this issue in greater detail, please contact me.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

February 25, 2019

The Honorable Heather Scott
Idaho House of Representatives
State of Idaho
Statehouse
TRANSMITTED VIA HAND DELIVERY

Re: Our File No. 19-64660 – Additional Questions Regarding Idaho Code §§ 18-4001 and 18-4016(2)(a)

Dear Representative Scott:

You have asked this Office to provide a response to certain questions that you have regarding Idaho Code §§ 18-4001 and 18-4016(2)(a). Following our analysis in a letter to you, you had two additional questions, which we answer below.

First, you ask for the legal basis supporting the opinion that prosecutions for fetal homicide is constitutional. Although there are no Idaho cases that address this question, language from other courts is instructive. Courts in other jurisdictions have found that the legal principles discussed in Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), do not apply to statutes that criminalize the unlawful killing of a fetus without a mother's consent.

For example, in People v. Davis, 872 P.2d 591 (Cal. 1994), the defendant shot and killed a woman and her fetus and was convicted of murdering the fetus in the course of a robbery, among other crimes. *Id.* at 593. On appeal, the defendant argued that the fetus was not viable and argued that reasoning from Roe v. Wade should have been used to determine viability. *Id.* The court analyzed Roe v. Wade, noting that:

> In 1973, the United States Supreme Court issued a decision that balanced a mother's constitutional privacy interest in her body against a state's interest in protecting fetal life, and determined that in the context of a mother's abortion decision, the state had no legitimate interest in protecting a fetus until it reached the point of

> viability, or when it reached the 'capability of meaningful life outside the mother's womb.'

*Id.* at 594-95 (citations omitted). The court went on to note that Roe v. Wade "does not hold that the state has no legitimate interest in protecting the fetus until viability" and:

> 'By holding that the Fourteenth Amendment does not cover the unborn, the Supreme Court was left with only one constitutionally mandated right, that of the mother's privacy, to be considered along with the legitimate state interest in protecting an unborn's potential life. The *Roe* decision, therefore, forbids the state's protection of the unborn's interests only when these interests conflict with the constitutional rights of the prospective parent. The Court did not rule that the unborn's interests could not be recognized in situations where there was no conflict.'

*Id.* at 597 (citations omitted) (emphasis added). As a result, "when the mother's privacy interests are not at stake, the Legislature may determine whether, and at what point, it should protect life inside a mother's womb from homicide." *Id.* at 599; *see also* People v. Valdez, 23 Cal. Rptr. 3d 909, 913 (Cal. Ct. App. 2005) (noting that the legal principles in Roe v. Wade were not applicable to a statute that criminalizes the unlawful killing of a fetus without the mother's consent); State v. Merrill, 450 N.W.2d 318, 321-22 (Minn. 1990); Brinkley v. State, 322 S.E.2d 49, 53 (Ga. 1984); People v. Ford, 581 N.E.2d 1189, 1199 (Ill. Ct. App. 1991).

Your second question asks whether the word "feticide" used in our February 5, 2019, letter referred to lawful abortion. The answer to this question is "no." By "feticide" we were referring to the unlawful killing of a fetus, *i.e.*, the unlawful killing of a fetus as defined in Idaho Code § 18-4001.

I hope that you find this analysis helpful. Please let me know if you have any other questions.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

March 1, 2019

Representative Sally J. Toone
Idaho House of Representatives
Idaho State Legislature
State Capitol
P. O. Box 83720
Boise, ID 83720-0038
SENT VIA STATEHOUSE MAIL & ELECTRONIC MAIL:
stoone@house.idaho.gov

Re: Local-Options Tax, Resort City Population Limit

Dear Representative Toone:

This letter addresses your question of what happens to a local-options tax when a resort city's population exceeds 10,000.

**QUESTION**

Idaho law allows the voters of a resort city with a population of 10,000 or less to authorize a local-option tax; is the city required to cease applying the tax if the city population grows to more than 10,000?

**ANSWER**

No, the city may continue applying its local-option tax until it expires. The population threshold is only required in order for the voters to authorize such a tax. There does not appear to be any consequence under the law if the city population grows to exceed 10,000.

However, when a city presents a local-options tax ordinance to be voted on, it must state the duration of the tax. That duration cannot be extended unless the voters of the city are presented again with another proposal. If a city's population grows to exceed 10,000, there appears to be no authority in the law to conduct a vote to reenact or extend the tax.

## ANALYSIS

Idaho Code § 50-1044 provides if a city is a "resort city" and the city population is 10,000 or less, then the voters of the city can authorize their city government to: adopt, implement, and collect a local-option nonproperty tax.

The language of the statute appears to say that the 10,000 population requirement only needs to be met in order for the voters to "authorize." Once the valid authorization has been given for the city to adopt, implement, and collect, then the local-option tax just stays in place even if the population rises.

However, Idaho Code § 50-1047 dictates that there must be a duration established for the tax when it is put up for a vote:

> In any election, the ordinance submitted to city voters shall: (a) state and define the specific tax to be approved; (b) state the exact rate of the tax to be assessed; (c) state the exact purpose or purposes for which the revenues derived from the tax shall be used; and (d) state the duration of the tax. No tax shall be redefined, no rate shall be increased, no purpose shall be modified, and no duration shall be extended without subsequent approval of city voters.

Once the established duration expires, the city would need to have another vote to reenact or extend the local option tax. If the population at that point in time has increased to exceed 10,000, the authority provided by Idaho Code § 50-1044 to conduct such a vote would no longer exist. The statute is not perfectly clear that the population requirement applies when voting to extend the tax, but that is the most reasonable reading of the statute in my opinion.

Please let me know if you have any follow up questions or wish to discuss further. Also, see here on the City of Ketchum's website an example of the duration at play (Ketchum had a 15-year duration when first passed in 1997, then they brought a new vote in 2011 and the voters approved the tax for another 15 years): http://www.ketchumidaho.org/index.aspx?NID=440.

Regards,

PHIL SKINNER
Lead Deputy Attorney General
Contracts & Administrative Law Division

March 4, 2019

The Honorable Priscilla Giddings
Idaho House of Representatives
State of Idaho
TRANSMITTED VIA ELECTRONIC MAIL:
pgiddings@house.idaho.gov

Re: Our File No. 19-64836 – Religious Exemption from Immunization

Dear Representative Giddings:

I am writing in response to your February 26, 2019 email asking whether Moscow's ordinance—that has no religious exemption for daycare immunization requirements—violates freedom of religion in Idaho Code § 73-402, or parental rights under Idaho Code § 32-1010. As explained below, under Idaho and United States Supreme Court caselaw, Moscow's daycare ordinance does not violate Idaho laws protecting religious and parental rights.

Moscow's Day Care Ordinance Section 10-17(B) requires parents of children attending daycare to provide a statement of immunization or a certificate that immunization would endanger the life or health of the child. Section 10-17(B) does not provide an exemption—allowed in Idaho's Basic Day Care License law, Idaho Code § 39-1118(2)—for parents who provide a statement objecting to immunization "on religious or other grounds." As discussed in my [February 6, 2018] letter, by omitting this exemption, Moscow's ordinance is "at least as stringent as" state immunization requirements, and therefore complies with Idaho Code § 39-1108(1), allowing cities and counties to adopt a local option.

## Application of Idaho Code § 73-402

Idaho's Free Exercise of Religion law provides that "government shall not substantially burden a person's exercise of religion" unless it demonstrates it would be "[e]ssential to further a compelling governmental interest" and is the "least restrictive means of furthering

that compelling governmental interest." Idaho Code § 73-402. In other words, to burden one's exercise of religion, the government must satisfy the "strict scrutiny" standard of judicial review. *See* Bradbury v. Idaho Judicial Council, 136 Idaho 63, 69, 28 P.3d 1006, 1012 (2001). The Idaho Court of Appeals considered whether an inmate's right to freely exercise his Native American religion was violated under Idaho Code § 73-402 in Roles v. Townsend, 138 Idaho 412, 64 P.3d 338 (Ct. App. 2003).

In Roles, the inmate challenged the State Board of Correction's tobacco-free policy. The Court found the Board "demonstrated beyond any genuine dispute," that it has compelling interests in prohibiting tobacco to "promote public heath, provide an environment free from second-hand smoke, reduce litigation related to second-hand smoke, protect buildings against property damage, and curtail rising medical costs." Roles, 138 Idaho at 413, 64 P.3d at 339. The Court further found the Board's policy was "the least restrictive means" to further its policy. *Id.* Applying Roles, the question is whether Moscow's ordinance passes strict scrutiny: does it have a compelling governmental interest, and is it the least restrictive means to further its policy?

The United States Supreme Court has long-recognized the State's interest in curbing the spread of communicable disease through vaccinations. In 1905, the Court held it was within a state's authority to enact laws requiring vaccination "for the protection of the public health and the public safety." Jacobson v. Massachusetts, 197 U.S. 11, 39, 25 S. Ct. 358, 367, 49 L. Ed. 643 (1905). In 1922, the Court found no "sufficiently substantial" question as to the constitutional validity of an ordinance requiring immunization to attend public or private school. Zucht v. King, 260 U.S. 174, 176-77, 43 S. Ct. 24, 25, 67 L. Ed. 194 (1922). Also, the Court has recognized that, "The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." Prince v. Massachusetts, 321 U.S. 158, 166, 64 S. Ct. 438, 442, 88 L. Ed. 645 (1944) (Upholding application of child labor laws to nine-year-old soliciting for the Jehovah's Witness religion at her parents' direction, the Court held, "the family itself is not beyond regulation in the public interest, as against a claim of religious liberty."). These cases support

that Moscow has a compelling public health reason for its ordinance requiring proof of immunizations in daycares.

In reviewing challenges to other states' compulsory immunization requirements, none discussed any less-restrictive means of furthering the state's public health policy; indeed, I am aware of no successful challenge to a state's compulsory immunization law. *See* Workman v. Mingo Cty. Bd. of Educ., 419 Fed. App'x 348 (4th Cir. 2011) (West Virginia law); McCarthy v. Boozman, 212 F. Supp. 2d 945 (W.D. Ark. 2002) (Arkansas law); Sherr v. Northport-East Northport Union Free Sch. Dist., 672 F. Supp. 81 (E.D.N.Y. 1987) (New York law); Brown v. Stone, 378 So. 2d 218 (Miss. 1979) (Mississippi law); Davis v. State, 451 A.2d 107 (Md. 1982) (Maryland law). Thus, Moscow's ordinance is unlikely to be found to violate Idaho Code § 73-402.

**Application of Idaho Code § 32-1010**

Idaho's Parental Rights law recognizes parents' due process right, under Idaho's Constitution, "to nurture and direct their children's destiny, upbringing and education." Idaho Code § 32-1010(3), (4). Section 32-1010 also provides that any government action interfering with parents' fundamental rights must satisfy the same "strict scrutiny" standard identified in Idaho's Free Exercise of Religion law. *See* Idaho Code §§ 32-1013, 73-402. As already discussed, Moscow's ordinance is likely to survive strict scrutiny review under U.S. Supreme Court cases addressing the constitutionality of compulsory vaccination laws.

Notably, Idaho Code § 32-1010(6) provides, "Nothing in this act shall be construed as altering the established presumption in favor of the constitutionality of statutes and regulations." "A city ordinance is a law of the state[.]" Zucht, 260 U.S. at 176. To challenge a local ordinance, one must overcome the presumption of its validity. The U.S. Supreme Court has held, "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare . . . this includes, to some extent, matters of conscience and religious conviction." Prince, 321 U.S. at 167. Given the cited U.S. Supreme Court holdings, Moscow's ordinance is also unlikely to be found to violate Idaho Code § 32-1010.

I hope that you find this analysis helpful. If you have further questions, please do not hesitate to contact me.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

March 7, 2019

Representative Ryan Kerby
Idaho House of Representatives
Capitol Building
Boise, ID 83720-0010
Via Statehouse mail and email: rkerby@house.idaho.gov

Re: Charitable Auction Sales of Alcoholic Beverages

Dear Representative Kerby:

You asked our office to look into the legality of the sale by auction of alcoholic beverages at fundraising events for charities, nonprofit corporations or similar associations, where the proceeds of such sales go to the sponsoring entity. For purposes of this response, and in light of the terminology used in the controlling statutes, I am rephrasing your inquiry as follows:

## QUESTION PRESENTED

May a person or entity who does not possess a license to sell alcoholic beverages in Idaho sell liquor, wine or beer for benevolent, charitable or public purposes which it has acquired by purchase or donation?

## BRIEF ANSWER

Idaho law does not allow the selling of liquor by an unlicensed person under any circumstances. An unlicensed person may sell purchased or donated wine for benevolent, charitable or public purposes. An unlicensed person may sell beer for such purposes if the beer is purchased from or donated by a dealer, wholesaler or retailer, as defined in the Idaho Code. In the case of both beer and wine, the person selling the beverages must obtain a permit from the Director of the Idaho State Police.

## ANALYSIS

**I. An unlicensed person or entity may not sell liquor under any circumstance, and thus may not sell liquor at auction for benevolent, charitable or public purposes.**

Idaho Code § 23-105(b) defines "alcoholic liquor" to include "spirits," that is, beverages containing alcohol obtained by distillation, including drinks like brandy, rum, whiskey and gin. Alcoholic liquor, in Idaho Code § 23-105(c), also includes "wine," that is, a beverage containing alcohol obtained by fermentation of the natural sugar content of fruits or other agricultural products. The sale of wine is more specifically regulated by title 23, chapter 13, Idaho Code, which will be discussed later. For purposes of this response, I will use the term "liquor" to refer to "spirits," that is, beverages containing alcohol obtained by distillation as defined in Idaho Code § 23-105(b).

The sale of liquor in Idaho is regulated and controlled by the State of Idaho, and the Idaho Legislature has granted the State Liquor Division exclusive authority to sell liquor, subject to certain exceptions. Idaho Code § 23-102. There is no provision allowing any person not possessing a license to sell liquor of any kind. Further, sales of liquor by the bottle, other than at a state liquor store, are prohibited by Idaho Code § 23-921, which provides that:

> It shall be unlawful for any licensee to sell, keep for sale, dispense, give away, or otherwise dispose of any liquor in the original containers or otherwise than by retail sale by the drink.

There is no provision allowing a manufacturer of liquor to donate liquor for sale by an unlicensed person. In fact, such a practice appears to be prohibited by Idaho Code § 23-509, which provides that:

> No manufacturer, wholesaler, or distributor shall give away any alcoholic liquor of any kind at any time in connection with his business, except for testing or sampling purposes only.

Thus, it would be illegal for an unlicensed person to sell liquor, even if the proceeds are to be used for a benevolent, charitable or public purpose.

**II. An unlicensed person may sell donated wine for benevolent, charitable or public purposes, provided the person or entity complies with Idaho Code § 23-1336.**

Wine is regulated pursuant to the Idaho County Option Kitchen and Table Wine Act in title 23, chapter 13, Idaho Code. There, "wine" is defined as "table wine and dessert wine, unless the context requires otherwise." Idaho Code § 23-1303(n). "Table wine" is wine "containing not more than sixteen percent (16%) alcohol by volume," and "dessert wine" is defined as a beverage containing more than sixteen (16) but less than twenty-four (24) percent alcohol by volume, while a "low proof spirit beverage" is one which contains no more than fourteen percent (14%) alcohol by volume obtained by distillation mixed with water, fruit juice or other substances. Idaho Code § 23-1303(a), (g), (k) and (n).

Idaho Code § 23-1336 provides that where wine "has been sold or donated to a person or association which desires to dispense or sell such wine and to donate the proceeds from the sale or dispensing thereof for benevolent, charitable or public purposes," the Director of the Idaho State Police (ISP) may issue a permit for the sale or dispensing of wine by that person or association. The same statute provides that the Director must be satisfied that the sale proceeds, after deducting reasonable expenses, will be donated for a benevolent, charitable or public purpose. Further, the Director may require disclosure of relevant information before issuing the permit, including the names of "donors" of the wine. *Id.* And, he may charge a fee of twenty dollars ($20) for issuance of a permit. *Id.*

Under Idaho Code § 23-1336, it is legal for an unlicensed person to sell donated wine at auction. There are no restrictions in the statute on who may be a "donor."

**III. An unlicensed person may sell beer for benevolent, charitable or public purposes if that beer has been sold or donated to the unlicensed person by a dealer, wholesaler**

**or retailer, provided that person complies with Idaho Code § 23-1007A.**

Idaho Code § 23-1007A(1) provides that:

> Notwithstanding the provisions of section 23-1007, Idaho Code, to the contrary, nothing shall prevent any licensed dealer, wholesaler or retailer from selling or donating unbroken packages of beer or kegs of beer to a person which has not been issued any license for the sale of alcoholic beverages in this state, for benevolent, charitable or public purposes, if a permit has been issued to the person or nonprofit entity as provided in subsection (2) of this section.

Idaho Code § 23-1007A(2) allows the Director of ISP to issue a permit authorizing the sale or dispensing of beer for benevolent, charitable or public purposes if he is satisfied that the proceeds will be used for such purposes. Subsection (2) also sets forth the information which the Director of ISP may require the unlicensed person to disclose for issuance of a permit, which may include:

> (c) Names of the dealer or wholesaler from whom the beer is to be received;
> (d) The retailer, if any, designated by such person or nonprofit entity to receive, store or dispense beer on behalf of the permittee[.]

Idaho Code § 23-1007A(2) also allows ISP to charge a twenty dollar ($20) fee for issuance of a permit. Idaho Code § 23-1007A(4) further provides that:

> A licensed retailer may, on behalf of the permittee, receive or store beer to be used at the event and may dispense such beer to attendees of the benevolent, charitable or public purpose event for which the permit was issued.

A "dealer" is a person who is licensed to import beer into Idaho for sale to a wholesaler. Idaho Code § 23-1001(d). A "wholesaler" is a

person licensed to sell beer to retailers, wholesalers, permittees or consumers, and distribute beer from a warehouse. Idaho Code § 23-1001(k). A "retailer" is a person licensed to sell beer to consumers at premises described in the license. Idaho Code § 23-1001(i).

Thus, a licensed dealer, wholesaler or retailer may sell or donate unopened packages or kegs of beer to an unlicensed person for sale by that person for benevolent, charitable or public purposes, and such a person may sell that beer if he or she obtains a permit to do so. As part of the permitting process, the person or entity may be required to disclose the identity of a dealer or wholesaler providing beer. A retailer may receive, store, and sell beer for the unlicensed person.

There is no provision addressing sales or donations by private parties to an unlicensed person for benevolent, charitable or public purposes. Therefore, the sale of beer purchased from or donated by an unlicensed private individual appears to be illegal.

There is also no provision in Idaho Code § 23-1007A allowing a "brewer," defined in Idaho Code § 23-1001(b) as a person licensed to manufacture beer, to donate or sell beer to an unlicensed person for those purposes. However, under Idaho's "small brewers' exception" in Idaho Code § 23-1003, a brewer who produces less than 30,000 gallons of beer annually may be licensed as a wholesaler for the sale of its own beer to retailers. Idaho Code § 23-1003(f). Thus, a brewery qualifying as wholesaler's license under that statute should be able to donate or sell beer to an unlicensed person for resale for benevolent, charitable or public purposes.

## CONCLUSION

It is not legal for an unlicensed person to sell liquor under any circumstance. This includes the sale of liquor by auction for benevolent, charitable or public purposes.

It is legal for an unlicensed person to sell wine, which has been sold or provided to it for benevolent, charitable or public purposes, provided that the person obtains a permit for this activity from the Director of ISP.

It is also legal for an unlicensed person to sell beer, which has been sold or provided to it by a dealer, wholesaler or retailer for benevolent, charitable or public purposes, provided, again, that the unlicensed person obtains the requisite permit from the Director of ISP. There is no provision allowing such a person to sell beer, which has been sold or donated to it by a private party.

I hope this letter adequately addresses your concerns. Please feel free to contact our office if you have any further questions regarding this subject.

Sincerely,

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

March 14, 2019

Representative Caroline NilssonTroy
Idaho House of Representatives
Capital Building
Boise, ID 83720

Dear Representative Troy:

You inquired of our office whether, under Section 297B of the recently enacted federal Farm Bill of 2018, which can be found at 7 U.S.C.A. § 1639o, *et seq.* (the "Act"), Indian Tribes can submit a plan to the United States Department of Agriculture to grow, transport, and process hemp, without it being legal in the State of Idaho?

The answer, in brief, is "yes." However, until the Secretary of the United States Department of Agriculture (USDA) enacts regulations, guidelines, and a plan that will implement the Act, it is premature for states and Indian Tribal nations to submit a plan for approval to the USDA.[1]

Incorporated into the 2018 Farm Bill is "subtitle G – Hemp production," Pub. L. No. 115-334, § 10113, codified at 7 U.S.C. §§ 1639o-1639s, commonly referred to as the "Hemp Act." After defining hemp as the Cannabis sativa L. plant (or any part of the plant) that contains "not more than 0.3 percent of THC (dry weight)," *see* 7 U.S.C. § 1639o(1), the Hemp Act states:

> State or Indian tribe desiring to have primary regulatory authority over the production of hemp in the State or territory of the Indian tribe shall submit to the Secretary [defined as the Secretary of Agriculture], through the State department of agriculture (in consultation with the Governor and chief law enforcement officer of the State) or the Tribal government, as applicable, a plan under which the State or Indian tribe monitors and regulates that production as described in paragraph (2).

7 U.S.C. § 1639p(a)(1) (explanation added). From the plain language of the above provision, the states and Indian Tribes may choose—independent of each other—whether to submit a plan to the Secretary of Agriculture for monitoring and regulating the production of hemp.

The autonomy given to the states and Indian Tribes to choose whether to submit plans to the Secretary of Agriculture is maintained throughout the Hemp Act's provisions. The Hemp Act's "No Preemption" provision states that it does not preempt or limit "any law of a State or Indian tribe that (i) regulates the production of hemp; and (ii) is more stringent than this subtitle." 7 U.S.C. § 1639p(a)(3)(A). Therefore, if an Indian Tribe in Idaho submitted a plan to the Secretary of Agriculture to monitor and regulate the production of hemp, and assuming the plan's approval once the federal implementing regulations are in place, Idaho would still be free to regulate the production of hemp with the more "stringent" laws it currently has.

Under Subsection (b), once a plan is submitted to the Secretary of Agriculture, the Secretary has 60 days "after receipt of a State or Tribal plan" to "approve the State or Tribal plan[.]" 7 U.S.C. § 1639p(b)(1)(A). However, the 60 day time period for approval will begin once the federal regulations are effective.[2] The Hemp Act culminates with a note, entitled "Transportation of Hemp and Hemp Products," which states:

> No State or Indian Tribe shall prohibit the transportation or shipment of hemp or hemp products produced in accordance with subtitle G of the Agricultural Marketing Act of 1946 (as added by section 10113) through the State or the territory of the Indian Tribe, as applicable.

7 U.S.C. § 1639o note.

Under the note in 7 U.S.C. § 1639o, if an Indian Tribe produces hemp, or hemp products, in compliance with the Hemp Act's requirements, the State of Idaho cannot legally "prohibit the transportation or shipment" of such hemp (or products) through its own state boundaries. However, it is important to note that until the federal implementing regulations are in place, any hemp transported in Idaho

will not have the protections of interstate commerce because any such hemp must be produced in compliance with Subtitle G, which is the regulatory scheme that is yet to be implemented by the USDA.

I hope this response addresses your concerns. Please feel free to contact our office if you have any additional questions.

Sincerely,

JOHN C. McKINNEY
Deputy Attorney General
Appellate Unit

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[1] The Act requires the Secretary of the USDA to "promulgate regulations and guidelines to implement" the subchapter "as expeditiously as practicable." 7 U.S.C.A. § 1639r(a)(1)(A). The USDA has begun the process of gathering information for rulemaking, and "[o]nce complete, this information will be used to formulate regulations that will include specific details for both federally regulated hemp production and a process for the submission of State, and Indian tribal plans to USDA." USDA Agricultural Marketing Serv., Hemp Production Program (Feb. 27, 2019), https://www.ams.usda.gov/content/hemp-production-program. The USDA has specifically noted that, states and Indian Tribal nations "do not need to submit plans for approval until [the federal] regulations are in place." *Id.* If a state or Indian Tribal nation does submit a plan prematurely, the USDA will hold that submission until the federal regulations have been promulgated. *Id.* The USDA is required to complete its review of any state plan within 60 days once the federal regulations are effective. *Id.* The federal regulations are intended to be ready in the fall of 2019. *Id.*

[2] USDA Agricultural Marketing Serv., Hemp Production Program (Feb. 27, 2019), https://www.ams.usda.gov/content/hemp-production-program.

March 20, 2019

Brian Brooks
Executive Director
Idaho Wildlife Federation
P. O. Box 6426
Boise, ID 83707
VIA EMAIL: BBROOKS.IWF@GMAIL.COM

Dear Mr. Brooks:

Thank you for your letter dated March 6, 2019 requesting the Office of the Idaho Attorney General to investigate and, if appropriate, prosecute DF Development, LLC for alleged violations of Idaho Code § 36-1603, which generally prohibits the posting of any public lands to indicate private ownership. Your letter asserts that DF Development's actions in placing gates on Forest Road 374 bearing no trespassing signs constitutes such a violation. We are aware of the significant public interest and concerns raised by the gates in question. And, we are likewise aware of the dispute between DF Development and the United States Forest Service over those same gates. However, we must advise that the Office of the Attorney General does not have authority to prosecute this matter under the circumstances.

In Idaho, the primary authority for enforcement of penal laws is vested in county sheriffs and county prosecutors. Idaho Code § 31-2227. The Office of the Attorney General has no authority to supervise county prosecutors or direct them in how to perform their duties, as the Idaho Supreme Court made clear in Newman v. Lance, 129 Idaho 98, 922 P.2d 395 (1996). While the Idaho Department of Fish and Game is vested with authority to enforce the provisions of the fish and game code (*see* Idaho Code §§ 36-1301 to 36-1304), there is no concurrent jurisdiction granted to the Idaho Attorney General's office. Compare for example, Idaho Code § 39-109. Therefore, as a general rule, we can only become involved in a criminal matter if a county prosecutor or board of county commissioners requests that we act as a special prosecutor pursuant to Idaho Code § 31-2603.

The specific provisions of the fish and game code make this clear. Idaho Code § 36-1302(b) provides: "All actions brought for violation of the provisions of this title shall be in the name of the state of Idaho and shall be prosecuted by an attorney representing the county having jurisdiction." (Emphasis added.) Any prosecution in this circumstance must therefore be by the Boise County Prosecutor's Office.

Sincerely,

DARRELL G. EARLY
Deputy Attorney General
Chief, Natural Resources Division

March 22, 2019

The Honorable Lawerence Denney
Idaho Secretary of State
Statehouse
TRANSMITTED VIA HAND DELIVERY

Re: Our File No. 19-65063 – Request for AG Analysis Regarding Initiatives Filed with the Secretary of State

Dear Secretary Denney:

This letter is in response to your recent inquiry of this office regarding S. 1159 and three initiatives that have recently been submitted to the Secretary of State's Office. At this point in time, each of the initiatives is currently undergoing the certificate of review process outlined in Idaho Code § 34-1809(1). None of the three submitted initiative proposals has had ballot titles issued under Idaho Code § 34-1809(2). Under Idaho Code § 34-1802(1), no petition may be circulated until the Secretary of State issues the ballot title to the initiative sponsors. In sum, although submitted, the initiatives have not met the statutory procedural requirements for circulation.

At this point in time, it appears petitioners have an inchoate right, which is a right that has not fully developed, matured, or vested. Schoorl v. Lankford, 161 Idaho 628, 631, 389 P.3d 173, 176 (2017). This scenario is similar to In re Hidden Springs Trout Ranch, Inc. v. Allred, 102 Idaho 623, 636 P.2d 745 (1981), where the appellant had filed an application for a water appropriation permit. While that application was pending, the legislature amended the statute to add a fifth criteria. The district court held that the amendment applied to the appellant, who appealed, contending that applying the amendment to a pending application was a retroactive application of the statute as amended. The Idaho Supreme Court disagreed with appellant:

> It reasoned that filing the application for a permit did not grant the appellant any vested right because it only obtained an inchoate right which could ripen into a vested interest upon following the requirements of the

> statute. We stated: "We do not find that the mere initiation of the statutory process for water appropriation immediately grants the applicant vested rights in the water. The applicant gains but an inchoate right upon filing of the application which may ripen into a vested interest following proper statutory adherence." *Id.* at 625, 636 P.2d at 747. Therefore, the statutory amendment did not interfere with any vested right. "Accordingly, in the instant case, at the time the legislation in question was enacted, the status of the appellant had progressed no further than that of an applicant with a pending application. Appellant therefore possessed no vested right which could be interfered with by application of the legislation." *Id.* This Court upheld the district court's holding that the statutory amendment adding a fifth criteria to consider when reviewing the appellant's application for a permit applied to the consideration of that application. *Id.*

Schoorl, 161 Idaho at 631, 389 P.3d at 176 (citing Hidden Springs Trout Ranch, 102 Idaho at 625, 635 P.2d at 747).

This Office's reading of the statutory requirements for a petition are similar to that of the water permit discussed in Hidden Springs Trout Ranch, namely that because the initiative petitions are pending review by the Attorney General, ballot titles must still be prepared and the petitions have not yet been approved for circulation, the initiative "right" has not yet been not perfected.

Courts in other states have similarly held that the right to place an initiative on the ballot is not a 'vested right' protected from changes in statutory law. *See* Comm. for Better Health Care for All Colo. Citizens v. Meyer, 830 P.2d 884, 891 (Colo. 1992); Jacober v. Bd. of Comm'rs of City of Covington, 607 S.W.2d 126, 128 (Ky. Ct. App. 1980).

The Colorado Supreme Court's decision in Committee for Better Health Care for All Colorado Citizens provides helpful guidance here. There, the plaintiff filed its proposed initiative with the Secretary of State on May 5, 1989. 830 P.2d at 887. On June 7, 1989, the Initiative Title Setting Board met and established the title, submission clause and a

summary pursuant to the then-effective statute. *Id.* On June 10, 1989, amendments to the statutory scheme regulating the initiative process became effective. *Id.* The plaintiffs began collecting signatures. *Id.* After a number of signatures were rejected by the Secretary of State, plaintiffs attempted to exercise a curative process available under the previous statutory scheme. *Id.* at 888. The Secretary disallowed the curative process, instead applying the newly amended law. The Court approved the Secretary's application of the amended statutory scheme to all events that transpired after June 10, 1989, concluding that the plaintiffs did not have vested rights in the procedural and remedial measures available under the prior statutory scheme. *Id.* at 891.

If the legislature adopts S. 1159 with an emergency clause, and it is signed into law by the Governor, S. 1159 will apply to the initiatives, with the caveat that S. 1159 may only apply to all events that occur in the initiative process after the effective date of S. 1159.

I hope that you find this analysis helpful.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

April 11, 2019

The Honorable Scott Bedke
Speaker of the Idaho House of Representatives
Statehouse
TRANSMITTED VIA HAND DELIVERY

Re: Request for AG Analysis Regarding Administrative Rules

Dear Speaker Bedke:

This letter is in response to your recent inquiry of this office regarding the legislature's authority to approve or reject administrative rules. Specifically, you have asked whether the requirement in Idaho Code § 67-5292 is constitutionally necessary? As provided for below, it appears that Idaho Code § 67-5292 contains requirements that may exceed the requirements of article III, section 29 of the Idaho Constitution, but those requirements, although not necessary, are within the discretion of the legislature.

Article III, section 29 of the Idaho Constitution provides:

> Legislative response to administrative rules. The legislature may review any administrative rule to ensure it is consistent with the legislative intent of the statute that the rule was written to interpret, prescribe, implement or enforce. **After that review, the legislature may approve or reject, in whole or in part, any rule as provided by law.** Legislative approval or rejection of a rule is not subject to gubernatorial veto under section 10, article IV, of the constitution of the state of Idaho.

(Emphasis added.) This provision of the Constitution was adopted in November 2016. It provides that the legislature has the discretion to review all rules. If the legislature chooses to review the rules, it may then approve or reject the rules as provided by law. Prior to the enactment of article III, section 29 of the Idaho Constitution, the Idaho

Supreme Court recognized the authority of the Idaho Legislature to review and reject administrative rules. Mead v. Arnell, 117 Idaho 660, 670, 791 P.2d 410, 420 (1990).

Idaho Code § 67-5292 sets forth the process by which the legislature approves or rejects administrative rules. In operative part, Idaho Code § 67-5292 provides:

> Expiration of administrative rules. (1) Notwithstanding any other provision of this chapter to the contrary, every rule adopted and becoming effective after June 30, 1990, shall automatically expire on July 1 of the following year **unless the rule is extended by statute.** Extended rules shall then continue to expire annually on July 1 of each succeeding year unless extended by statute in each such succeeding year.

(Emphasis added.) This provision indicates that in order for rules to be approved they must be approved by statute, which requires adoption by both chambers of the legislature, and presentment to the Governor. This provision was last amended in 2014 and thus predates article III, section 29 by two years.

Article III, section 29 specifically assigns the legislature the ability to review rules, and does not contain any requirement for review of rules by the Governor. But, the legislature must provide for its approval or rejection of rules "by law." Idaho Code § 67-5292 is the law that has been provided for approval or rejection of rules and requires that the approval be by the legislature through adoption of a statute. Idaho Code § 67-5292 adds the requirement that it be presented to the Governor for approval or disapproval as provided under article IV, section 10 of the Idaho Constitution.[1] In sum, Idaho Code § 67-5292 does not lower the minimum constitutional requirements of article III, section 29—namely that the legislature approve or reject all rules. Section 67-5292 adds gubernatorial approval, but that requirement is within the discretion of the legislature because the minimum constitutional requirement of legislative review is still met. In this regard, Idaho Code § 67-5292 is not unconstitutional, but rather creates an extra-constitutional requirement through presentment to the Governor.

Recognizing that Idaho Code § 67-5292 predates adoption of article III, section 29, this offices recommends that the legislature review Idaho Code §§ 67-5291 and 67-5292 and its processes for rules review, approval, and rejection to insure that they meet the legislature's intent.

I hope that you find this letter helpful.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

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[1] Practically speaking, if administrative rules are exercises of executive authority, in some measure the administrative rules have already been approved by the Governor prior to their consideration by the legislature. It seems odd that a legislative enactment approving rules issued by executive agencies would then be subject to a veto.

May 29, 2019

Patrick M. Braden
Civil Deputy Prosecuting Attorney
Office of the Kootenai County Prosecuting Attorney
P. O. Box 9000
Coeur d'Alene, ID 83816-9000

Re: Request for Opinion – Building Code Ordinance "Opt-Out" Provision

Dear Mr. Braden:

This letter is in response to your question regarding a 2018 Kootenai County ordinance that the Kootenai County Commission subsequently repealed. This analysis provides a general overview of my understanding of your question based on title 39, chapter 41, Idaho Code, and should not be interpreted as a determination of the legality of the ordinance or as a substitute for the advice of your office. Idaho Code section 39-4104 states, "Local governments that adopt building codes shall enforce all of the provisions of this chapter that govern application by local governments." Thus, local governments that adopt building codes must ultimately determine how to apply and enforce relevant provisions of title 39, chapter 41, Idaho Code.

As required by Idaho Code section 39-4116, the ordinance you reference adopted the same version of the Idaho Residential Code[1] (IRC) that the Idaho Building Code Board had adopted. Kootenai County, Idaho, Ordinance 522 § 8 (April 19, 2018). That version of the IRC requires a building permit, plan review, and inspection to build a residential structure. *See* Idaho Residential Code §§ R104, R105, R106, R109 (2017), *available at* https://codes.iccsafe.org/content/chapter/10211/. The ordinance also allowed a property owner to opt out of obtaining a building permit, plan review, or inspection and instead obtain a location permit to build a residential structure. Kootenai County, Idaho, Ordinance 522 § 5 (April 19, 2018). You ask whether adoption of such an opt-out provision is consistent with current Idaho law.

**An opt-out provision is likely inconsistent with the plain language of Idaho Code section 39-4116.**

Adoption of an opt-out provision does not appear to be consistent with the authority granted to local governments in Idaho Code section 39-4116.[2] Idaho Code section 39-4116 states:

> (1) Local governments enforcing building codes shall do so only in compliance with the provisions of this section. . . .
>
> (2) Local governments that issue building permits and perform building code enforcement activities shall, by ordinance effective January 1 of the year following the adoption by the Idaho building code board, adopt the following codes[:]
>
> . . .
>
> (b) Idaho residential code, parts I-III and IX . . . . Local jurisdictions shall not adopt provisions, chapters, sections or parts of subsequent versions of the International Residential Code . . . that have not been adopted by the Idaho building code board except as provided in subsection (4) of this section.
>
> . . .
>
> (4) Except as provided in this subsection, local governments may amend by ordinance the adopted codes or provisions of referenced codes to reflect local concerns, provided such amendments establish at least an equivalent level of protection to that of the adopted building code.
>
> . . .
>
> (c) Local jurisdictions may amend by ordinance the following provisions of the Idaho residential code to reflect local concerns:
>
> (i) Part I, Administrative;
>
> (ii) Part II, Definitions;
>
> (iii) Part III, Building Planning and Construction, Section R 301, Design Criteria; and (iv) Part IX, Appendices.

While Idaho Code section 39-4116 grants a local government authority to adopt and enforce building codes, that authority is circumscribed by the provisions of the statute. The statute requires a local government that enforces building codes to adopt and enforce the specifically enumerated codes and parts and authorizes a local government to amend those codes and parts to reflect local concerns only if "such amendments establish at least an equivalent level of protection to that of the adopted building code." Idaho Code § 39-4116(4). The statute does not appear to authorize a local government to adopt an ordinance that allows a property owner to opt out of obtaining a building permit, plan review, or inspection.

Even if a local government adopted an opt-out provision as an amendment to the adopted codes to reflect local concerns, there is little question that such an amendment would not "establish at least an equivalent level of protection to that of the adopted building code." Idaho Code § 39-4116(4). Accordingly, the statute also does not appear to authorize a local government to amend the adopted codes to reflect local concerns in way that allows a property owner to opt out of obtaining a building permit, plan review or inspection.

**An opt-out provision is likely inconsistent with the intent of title 39, chapter 41, Idaho Code.**

Adoption of an opt-out provision also does not appear to be consistent with the intent of title 39, chapter 41, Idaho Code. The intent of title 39, chapter 41, Idaho Code, is to create uniform, minimum building standards throughout the state. *See* Idaho Code § 39-4101. By adopting an opt-out provision, a local government would create building standards within its jurisdiction that would be both inconsistent with and less restrictive than the building standards adopted throughout the rest of the state.

I hope you find this analysis helpful. If you have any additional questions or if I can provide further assistance, please do not hesitate to contact me.

Sincerely,

SPENCER HOLM
Deputy Attorney General

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[1] The Idaho Residential Code consists of the "version of the International Residential Code adopted by the Idaho building code board, together with the amendments, revisions or modifications adopted by the Idaho building code board through the negotiated rulemaking process, except for parts IV, V, VI, VII and VIII, as they pertain to energy conservation, mechanical, fuel gas, plumbing and electrical requirements." Idaho Code § 39-4109(1)(b).

[2] Idaho is a Dillon's Rule state. Caesar v. State, 101 Idaho 158, 160, 610 P.2d 517, 519 (1980). Under Dillon's Rule, a local government "may exercise only those powers granted to it by either the state constitution or the legislature and the legislature has absolute power to change, modify or destroy those powers at its discretion." *Id.*

June 26, 2019

Senator Grant Burgoyne
Idaho Senate
Capitol Building
Boise, ID 83720

Re: Warrantless Misdemeanor Arrests Outside Presence of Law Enforcement

Senator Burgoyne:

You posed the following question to our office regarding the constitutionality of warrantless misdemeanor arrests that take place outside the presence of law enforcement officers under the United States Constitution.

## QUESTION PRESENTED

> [W]hether the United States Constitution permits warrantless misdemeanor arrests, by a law enforcement officer, for incidents outside of a law enforcement officer's presence.

## BRIEF ANSWER

Probably. While the United States Supreme Court has not issued a definitive opinion directly on point, other courts have reached a consensus that the United States Constitution does not require an offense be committed in an officer's presence in order to authorize a warrantless arrest. Rather, the test for constitutionality of arrest under the Fourth Amendment is whether the officer had probable cause to believe that an offense has been committed and the arrestee committed it.

## ANALYSIS

**A warrantless arrest satisfies constitutional standards if it is based upon probable cause.**

Probable cause is sufficient to justify an arrest. *See* Whren v. United States, 517 U.S. 806, 819, 116 S. Ct. 1769, 1777, 135 L. Ed. 2d 89 (1996); Virginia v. Moore, 553 U.S. 164, 168, 128 S. Ct. 1598, 1602, 170 L. Ed. 2d (2008).

> We are convinced that the approach of our prior cases is correct, because an arrest based on probable cause serves interests that have long been seen as sufficient to justify the seizure. Arrest ensures that a suspect appears to answer charges and does not continue a crime, and it safeguards evidence and enables officers to conduct an in-custody investigation.

Moore, 553 U.S. at 173 (first citing Whren, 517 U.S. at 817; then citing Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001); and then citing W. LaFave, Arrest: The Decision to Take a Suspect into Custody, 177-202 (1965)). In Moore, while the United States Supreme Court noted, "In a long line of cases, we have said that when an officer has probable cause to believe a person committed even a minor crime in his presence, the balancing of private and public interests is not in doubt. The arrest is constitutionally reasonable," *id.* at 171, it also "adhere[d] to the probable-cause standard [for warrantless arrests]," *id.* at 175. In fact, the Supreme Court has never specifically addressed whether a warrantless arrest requires the offense be committed in the officer's presence. *See* Atwater, 532 U.S. at 340, n.11 ("We need not, and thus do not, speculate whether the Fourth Amendment entails an 'in the presence' requirement for purposes of misdemeanor arrests." (citing Welsh v. Wisconsin, 466 U.S. 740, 756, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984) (White, J., dissenting) ("[T]he requirement that a misdemeanor must have occurred in the officer's presence to justify a warrantless arrest is not grounded in the Fourth Amendment"))).

However, other courts that have discussed the issue have reached a consensus that any "presence" requirement is based on statutory, not constitutional, requirements.

> As for the second Fourth Amendment issue regarding warrantless misdemeanor arrests, whether the "in presence" requirement is constitutional in nature, the consensus is that the answer here is also no. Though

> the Supreme Court has asserted that "warrants of arrest are designed to meet the dangers of unlimited and unreasonable arrests of persons who are not at the moment committing any crime," it has never held that a warrant for lesser offenses occurring out of the presence of an officer is constitutionally required.

W. LaFave, 3 Search & Seizure § 5.1(b) (5th ed., 2017); *see also* W. LaFave, 3 Search & Seizure § 5.1(c) (5th ed., 2017) (the presence test is not mandated by the Fourth Amendment); Welsh, 466 U.S. at 756 (authority to make warrantless arrests, including outside the presence of an officer, may be enlarged by statute) (White, J., dissenting).

Many federal circuits concur that the "in the presence" requirement relies upon state law. For example, the Seventh Circuit found an "overwhelming consensus" of circuit courts have declined to adopt an "in the presence" requirement to justify a warrantless misdemeanor arrest. *See* Woods v. City of Chicago, 234 F.3d 979, 994-95 (7th Cir. 2000); *see also* United States v. McNeill, 484 F.3d 301, 311 (4th Cir. 2007) (court did not address specific question whether the Fourth Amendment required an offense occur in officer's presence, but cited prior circuit case law declining to find such a constitutional requirement); Pyles v. Raisor, 60 F.3d 1211, 1215 (6th Cir. 1995) (Fourth Amendment only requires arrest be based on probable cause and contains no "presence" requirement); Fields v. City of South Houston, Tex., 922 F.2d 1183, 1189-90 (5th Cir. 1991) (while states may impose greater requirements, Fourth Amendment only requires probable cause for arrest). Likewise, the Ninth Circuit has long recognized that, while state law may require an offense be committed in the officer's presence to justify a warrantless misdemeanor arrest, the requirement was not rooted in the Fourth Amendment. Barry v. Fowler, 902 F.2d 770, 772 (9th Cir. 1990).

Some state courts have also determined that the Fourth Amendment includes no "in the presence" requirement. *See, e.g.*, State v. Walker, 138 P.3d 113, 119 (Wash. 2006) ("We can find no cases from this state or any other state, nor any statutes or other laws that support the argument that a person's private affairs encompass the constitutional right to be free from warrantless misdemeanor arrests. So long as legislative authority exists and any such arrest is based on

probable cause, the arrest is valid."); State v. Harker, 240 P.3d 780, 786-87 (Utah 2010) (warrantless misdemeanor arrest passed constitutional muster based on probable cause notwithstanding additional state statutory requirements). In light of the foregoing cases, it is likely that warrantless misdemeanor arrests, based on probable cause and authorized under state law, would satisfy the United States Constitution's prohibition against unreasonable searches and seizures embodied in the Fourth Amendment.

I hope you find this analysis useful. Should you have any additional questions, please feel free to contact our office.

Sincerely,

KRISTINA M. SCHINDELE
Deputy Attorney General

July 1, 2019

Senator Dan G. Johnson
Idaho State Senate
P. O. Box 2117
Lewiston, ID 83501
SENT VIA U.S. MAIL & ELECTRONIC MAIL TO:
djohnson@senate.idaho.gov

Re: City Indebtedness & Funds Transfers

Dear Senator Johnson:

You requested some guidance on whether the City of Lewiston ("City") has violated the Idaho Constitution or the state's statutes by lending itself money out of its sewer, water, and garbage funds to finance its construction of a library and some infrastructure improvements. It is important to note at the outset that this office is not familiar with the procedure, terms, or facts associated with this specific deal, nor is this office a substitute for the legal advice provided by the City Attorney. It is likely that the City Attorney for Lewiston has reviewed this transaction to determine its legal defensibility. With this in mind, I offer the following general analysis under Idaho law. Small changes in the facts as understood could result in different legal conclusions being reached. To assist your review, I have identified three main issues. The issues, along with my short answer to each, are below:

**Is it a violation of article VIII, section 3 of the Idaho Constitution for a city to lend itself money?**

It is possible for a city to violate article VIII, section 3 of the Idaho Constitution by lending itself money. The Constitution requires that a city first get approval of two-thirds of its voters before it can incur debt. However, the Constitution does provide two exceptions to this general prohibition. A city may incur liability if: (1) it has the capacity to repay the entirety of the liability in the year it is incurred, or (2) it has a strict necessity for the debt. It is possible that the City of Lewiston violated this constitutional provision by incurring debt without a vote. However,

a more robust factual inquiry is necessary to make a definitive conclusion as one of the exceptions could apply.

**Did the City violate statute or ordinance by repurposing funds from its sewer, water, and garbage fund?**

The City has not clearly violated any state statute by transferring funds, but it may have violated its own ordinances. Idaho Code § 50-1014 allows cities to transfer money between funds. However, my understanding is that Section 2-79.4 of Lewiston's city ordinances may prohibit such transfers. That section states that "[n]o . . . elected official shall . . . transfer[] or loan[] money from one (1) city fund to another except in the event of an emergency declared by . . . the city council or if required by law." As such, it is possible the City violated this ordinance, however I do not have sufficient information to determine if the exception stated in the ordinance applies.

**Did the City violate Idaho's Constitution by imposing a disguised tax through the fee it charges for the water, sewage, and garbage services?**

While a city may collect fees from its residents, it is prohibited by article VII, section 6 of the Idaho Constitution from imposing a tax without legislative approval. Cities run afoul of this constitutional prohibition if they disguise a tax as a fee. A fee must reasonably relate to the services a city provides. A fee is a disguised tax if it is imposed primarily to raise revenue and not for the purpose of reimbursing the city for services rendered. Manwaring Invs., L.C. v. City of Blackfoot, 162 Idaho 763, 772, 405 P.3d 22, 31 (2017). The question of whether the City has disguised a tax as a fee arises because the City appears to have money in its water, sewer, and garbage funds that may exceed amounts necessary to reimburse the City for services rendered. However, merely having excess money in a fund is not conclusive evidence that a fee is a disguised tax. Instead, the inquiry is whether the fee is reasonably related to the costs of the service rendered. *Id.* At this point, there is not enough information to determine if the fees the City charged for water, sewage, and garbage services were reasonably related to those services.

Please find a more thorough examination of these question below.

**1. Did the City violate article VIII, section 3 of the Idaho Constitution when it lent itself money?**

By lending money to itself, the City may have violated Idaho's Constitution. A city may not incur debt without first getting approval of two-thirds of its voters. Idaho Const. art. VIII, § 3. Any debt incurred contrary to this constitutional prohibition is "void." *Id.* However, the Constitution does provide exceptions to this general rule which may apply to this matter.

The first of these exceptions is that a city may incur a liability so long as it has the capacity to pay off the entirety of the liability in the year it is incurred. *Id.* The city must be able to pay off "the aggregate payments due over the total term of a contract rather than merely for what is due the year in which the contract was entered." Greater Boise Auditorium Dist. v. Frazier, 159 Idaho 266, 272, 360 P.3d 275, 281 (2015).

The second exception is that a city may incur debt to fund the "ordinary and necessary expenses authorized by the general laws of the state." Idaho Const. art. VIII, § 3. This exception is known as the "proviso clause" and has been narrowly construed by the Idaho Supreme Court. *See* City of Challis v. Consent of the Governed Caucus, 159 Idaho 398, 400-01, 361 P.3d 485, 487-88 (2015). The Idaho Supreme Court has read the term "necessary" as it is used in the proviso clause to require an "urgency" requirement. *Id.* "[I]n order for an expenditure to qualify as 'necessary' under the proviso clause of Article VIII, § 3 there must exist a necessity for making the expenditure at or during such year." *Id.* at 401, 361 P.3d at 488 (internal quotations and citations removed). "The required urgency can result from a number of possible causes, such as threats to public safety, the need for repairs, maintenance, or preservation of existing property, or a legal obligation to make the expenditure without delay." *Id.* In short, a city may incur debt without the approval of its voters if there is an urgent reason to do so.

In the present matter, the City of Lewiston—by lending itself money—has gone into debt. While it is borrowing the funds from itself, it has subjected itself to pay "a specific sum of money due by agreement." *Debt*, Black's Law Dictionary (11th ed. 2019). It appears as though the City has obligated itself to make payments over the term of 30 years, with interest. The obligation means that the City no longer has discretion over those funds because they are committed to repayment of the debt. As such, it is subject to the general rule expressed in article VIII, section 3 of the Idaho Constitution unless an exception applies.

The first exception—that the city may incur liabilities it can pay off in a year—probably does not apply as the amount borrowed by the City likely exceeds the City's capacity to repay in the year the debt was incurred. While the facts provided for this review are sparse, it appears that the costs of the projects the City has funded or is seeking to fund through its borrowing, such as constructing a library or building infrastructure, are substantial. It is unlikely that the City had the capacity to repay the debt incurred to fund these projects in the year the debt was incurred. As such, the first exception likely does not apply.

The second exception for "ordinary and necessary expenses" also may not apply for a lack of clear urgency to complete the projects funded by the City. As I understand it, the City funded building a library and making infrastructure improvements. Of these projects, it is unlikely that building a library would satisfy the urgency requirement of the proviso clause. It is possible that infrastructure construction would satisfy the urgency requirement. At this point, a more robust factual inquiry identifying what specific projects were funded and what circumstances attended those projects is needed before reaching a firm conclusion about whether this exception applies.

Based on the information provided, it appears that by incurring debt, the City of Lewiston may have violated Idaho's Constitution. However, a more thorough inquiry is necessary to determine if the "ordinary and necessary" exception applies.

**2. Did the City violate statute or ordinance by repurposing funds from its sewer, water, and garbage fund?**

Idaho Code § 50-1014 generally permits the transfer of funds by a city. But, Lewiston has adopted an ordinance prohibiting the transfer of city funds except in the case of an emergency.

Idaho statute does not prohibit a city from transferring money between funds. In fact, Idaho's statute expressly permits such transactions. "The city council of the cities may transfer an unexpended balance in one fund to the credit of another fund." Idaho Code § 50-1014. Thus, generally, a city does not violate Idaho's statute by transferring money between funds.[1]

While the City does not appear to be violating statute by transferring money between funds, it does appear to be violating its own ordinances. The City "maintains separate funds to account for specific revenues and expenditures." Lewiston Code § 36.5-1. The City maintains a separate "water fund," "wastewater fund," and "solid waste fund." *Id.* The fees collected to provide for the water services, wastewater services, and solid waste services are "deposited into [these] funds." Lewiston Code § 2-79.3.

The "use" of these funds is "restricted to those funds except in the event of an emergency declared by a majority vote of the city council." *Id.* "No elected or appointed city official shall approve or issue any financial instrument that . . . transfer[s] or loan[s] monies from one (1) city fund to another except in the event of an emergency declared by a majority vote of the city council or if required by law." Lewiston Code § 2-79.4. "Excess funds accumulated from fees and special taxes shall be refunded to those who paid such excess fees or special taxes." Lewiston Code § 2-79.3. The only exception that the City ordinance provides is if there is an emergency. Its ordinance defines an emergency as being an "extraordinary physical or financial disaster." Lewiston Code § 2-79.2(a).

In this instance, the City possibly violated its ordinances by transferring money. It was required by law to keep the fees it received for its sewer, water, and garbage services in separate funds. It further was not permitted to transfer money from those funds or use those funds for other purposes. It also was required to refund excess money accumulated in these funds. By using the funds for purposes other than

refunding the fees or for providing sewer, water, and garbage services, the City possibly violated its own ordinances.

I do not have enough information to determine whether the emergency exception applies. After reviewing material posted by the Lewiston City Council to the City's website, I was unable to find information demonstrating that the City of Lewiston had declared an emergency. It is possible that the transfer of funds was made following an emergency declaration, however I could not readily identify such a declaration.

**3. Did the City violate Idaho's Constitution by imposing a disguised tax through the fee it charges for water, sewage, and garbage services?**

Possibly, however, more information is needed. Idaho's Constitution prohibits a City from imposing a tax without legislative approval. Idaho Const. art. VII, § 6; and *see* Brewster v. City of Pocatello, 115 Idaho 502, 503, 768 P.2d 765, 766 (1988). This prohibition also applies to disguised taxes, which are fees that act like a tax. "In a general sense a fee is a charge for a direct public service rendered to the particular consumer, while a tax is a forced contribution by the public at large to meet public needs." Manwaring Invs., 162 Idaho at 772, 405 P.3d at 31 (internal quotations and citation removed). If a rate is "imposed primarily for revenue raising purposes [it is] in essence [a] disguised tax[] and subject to legislative approval and authority." *Id.*

A fee does not need to perfectly reflect the expense of providing a service. "The fees, rates and charges imposed by the municipality must be reasonable and produce sufficient revenue to support the system at the lowest possible cost as required by the Idaho Revenue Bond Act." Loomis v. City of Hailey, 119 Idaho 434, 442, 807 P.2d 1272, 1280 (1991). An attempt to make a fee perfectly reflect the costs of a service provided would "be overly consuming of time and treasure." Manwaring Invs., 162 Idaho at 770, 405 P.3d at 29. As such, fees only need to reasonably relate to the service provided.

This reasonableness standard can lead to a city lawfully collecting excess fees. *Id.* "Excess money lawfully collected" may be

used for purposes related to the fund—such as upgrading equipment or repair. *Id.* at 772, 405 P.3d at 31. However, the Idaho Supreme Court has been clear that "[t]he power to spend money lawfully collected in order to extend the system is not the power to base a fee on the cost to extend the system to whatever size is desired." *Id.* While this reasonableness standard provides some room for a fee to generate excess money, it does not permit a city to use a fee to generally raise revenue.

In the present instance, there is not enough information available to determine if the fees charged for the sewer, water, and garbage services are disguised taxes. The fact that there is excess money in these funds is not enough to determine if the fees are disguised taxes. A more in-depth factual inquiry is necessary to determine if the fees charged for these services reasonably relate to the service provided.

It should be noted that the City of Lewiston may not fall under the general rule that a city may use excess money in a fund to upgrade or maintain a system related to the fund. The City's ordinance states, "Excess funds accumulated from fees and special taxes shall be refunded to those who paid such excess fees or special taxes." Lewiston Code § 2-79.3. This clause appears to restrict Lewiston's use of fees collected.

## CONCLUSION

It is possible that the City of Lewiston violated article VIII, section 3 of the Idaho Constitution by creating a debt without first getting approval from its voters. It is also possible that the City violated its own ordinances by transferring money between funds. Finally, there is not enough information to determine whether the City's collection of fees for its sewer, water, and garbage services constitutes a disguised tax as would violate article VII, section 6 of the Idaho Constitution, which requires that all city taxes be approved by the legislature. As indicated at the outset of this analysis, this office defers to the City Attorney's determination of the legality of these transactions and recognizes that the City Attorney bears the responsibility of its defense.

Please let us know if we may be of further assistance.

Sincerely,

NATHAN H. NIELSON
Deputy Attorney General

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[1] Please note that the general statute permitting transferring money between funds could be offset by a more specific statute. I did not find any statute that specifically restricts the City from transferring money from its separate sewer, water or garbage funds.

August 5, 2019

Senator Dean M. Mortimer
Idaho State Senate
7403 South 1st East
Idaho Falls, ID 83404
SENT VIA USPS MAIL & ELECTRONIC MAIL TO:
dmortimer@senate.idaho.gov

Re: Bonneville County Library District

Dear Senator Mortimer:

You requested guidance on the legal validity of the Bonneville County Library District (the District) and its associated ability to collect library fees for funding. It is important to note that the Idaho State Tax Commission (the Commission) does not currently participate in any program that certifies the validity of individual taxing districts. Accordingly, the following general analysis under applicable Idaho law is offered. To assist in your review, I have identified two main issues, as set forth below:

- Is the Bonneville County Library District a legally valid taxing district?
    - Yes. Under the laws applicable during the period that the District was organized, there appear to be no deficiencies in formation that would affect the District's validity. While the statute that allowed for the District's creation—Idaho Code § 33-2722—was subsequently repealed in 1990, when the District was organized, the requirements were satisfied.
- Can the Bonneville County Library District collect associated library fees?
    - Yes. Idaho Code § 33-2724(1) (formerly Idaho Code § 33-2714) provides that library districts are typically funded by a property tax levy. However, pursuant to

Idaho Code § 63-1311(1): "any taxing district may impose and cause to be collected fees for those services provided by that district which would otherwise be funded by property tax revenues." Together, these provisions of Idaho law allow for collection of a library fee in connection with those services in the place of a property tax. The relevant portions of these statutes have remained in effect since the time of the District's formation in 1980.

A more thorough examination of these issues is presented below.

**1. Is the Bonneville County Library District a legally valid taxing district?**

When the District was created in 1980, Idaho law provided two distinct avenues for the creation of a library taxing district. The first, governed by Idaho Code §§ 33-2704(1) and 33-2705 (1980), required the filing of a petition with the Board of County Commissioners and an election regarding the proposed library district.

Alternatively, Idaho Code § 33-2722 (1980) provided a separate method for "organization of a library district." This process began with the filing of a petition signed by 51% of voting resident electors in the affected area. This petition, once verified, was to be filed with the Board of County Commissioners in which the proposed library district was located. After notice was provided and a public hearing held, the Board of County Commissioners was required to decide whether to create the library district as requested. If the district was created, the Board of County Commissioners was required to appoint the members of the first Board of Trustees for the newly created library district within five days. Upon completion of this process, the district was to be considered a valid legal entity formed according to Idaho law. This was the avenue engaged to create the District at issue in April and May of 1980.

Review of Bonneville County records reflects that the Bonneville County Board of County Commissioners (the Board) accepted the petition for creation of the District on April 16, 1980. The Board

resolved to accept the petitions and to hold a public hearing on the proposed creation of the District. The public hearing was held on May 6, 1980, with public support on both sides of the issue. Of those citizens that were opposed to creation of the District, the main reason given was the perceived increase in property taxes that would result. After reviewing the issues and expressing that the Board prefer a service-fee based funding model, the Board resolved to create the District on May 9, 1980. The first meeting of the newly appointed Bonneville County Library Board of Trustees occurred on June 2, 1980.

Review of the District's relevant history does not reveal any deficiency which calls the District's legal validity into question.

**2. Can the Bonneville County Library District collect associated library fees?**

Library districts in Idaho are typically funded by ad valorem property tax revenues. From the time of the District's creation until today, Idaho Code § 33-2724 (formerly Idaho Code § 33-2714) has provided the taxing procedures. Alternatively—under Idaho Code § 63-2201A at the time of the District's creation and under Idaho Code § 63-1311 today—a taxing district may instead collect fees for services of the district that would be otherwise funded by property tax revenues.

Provided that the fees collected by the District relate to services that would normally be funded by property tax revenues, the District may collect fees as an alternate source of funding.

**3. Requirements to collect property taxes.**

While this does not directly affect the answer to either of the main questions analyzed, it should be noted that the District does not have the current ability to levy property taxes because it has failed to comply with the requirements of Idaho Code § 63-215. Importantly, the substance of this statute existed at the time of the District's formation as Idaho Code § 63-2215. This statute requires any taxing district to record with the Commission an appropriately prepared "legal description and map . . . ." Idaho Code § 63-215(1); *see* Idaho Code § 63-2215(a) (1980). Failure to comply with the requirements of this section restricts the District's ability to collect property tax pursuant to

the Idaho State Commission's Property Tax Administrative Rule 225(6). IDAPA 35.01.03.225.06. Thus, should the District desire to cease collecting fees and instead be funded by property taxes, the District must first comply with the requirements of Idaho Code § 63-215(1).

## CONCLUSION

From my review of the Bonneville County records, there do not appear to be any deficiencies that would affect the legal validity of the District. Further, the District's use of service fees for funding is acceptable under Idaho Code § 63-1311.

Please let us know if we may be of further assistance.

Sincerely,

KOLBY K. REDDISH
Deputy Attorney General

August 13, 2019

The Honorable Lawerence Denney
Idaho Secretary of State
Statehouse
TRANSMITTED VIA HAND DELIVERY

Re: Letter from the Ada County Clerk, Phil McGrane

Dear Mr. Secretary:

This letter is in response to your inquiry seeking legal advice regarding a letter received from the Ada County Clerk, Phil McGrane. Within that letter, Mr. McGrane seeks advice and direction from the Secretary of State as the Chief Election Officer of the State of Idaho under Idaho Code §§ 34-201 and 34-203.

Consistent with the authority assigned the Secretary of State under Idaho Code § 34-203, this office recommends that the Ada County Clerk be advised to deny the City of Boise's request to place a "special ballot question" pertaining to any individual City of Boise-funded project helping to create or substantially improve a City of Boise asset where the City is reasonably expected to expend twenty-five million dollars or more in City general funds on the ballot because no express or implied authority exists for a city to create an election not authorized by the general laws of the State of Idaho. I will refer to the above-described ballot question as the "special ballot question" for the purposes of analysis.

This recommendation is explained in greater detail below.

**Cities Only Possess Powers Expressly or Impliedly Granted By the Constitution or Statute.**

In Idaho, municipal corporations are creations of the State. Within their creation, cities are granted only that authority which is expressly or impliedly authorized by the Idaho Constitution or a statute. This authority is known as *Dillon's Rule*. Caesar v. State, 101 Idaho 158, 160-61, 610 P.2d 517, 519-20 (1980). In order to determine

whether a city has the ability to place the "special ballot question" on the ballot, one must analyze whether the city has either express authority in the form of a statute or implied authority in an area not covered by the general law or not in conflict with the general law. *See id.* (citations omitted).

**No Express Authority Permits a City to Place the "Special Ballot Question" Before the Voters.**

Idaho's election code comprises 22 chapters within title 34, plus an additional chapter in title 50. Nowhere within those statutes is express authority for the "special ballot question" found.[1] Additionally, these statutes comprehensively address which elections may be held and at what time those elections will be held. Idaho Code § 34-106 (Limitation Upon Elections).[2]

As there is no express authority allowing the City of Boise to place the "special ballot question" before the voters, this analysis will review the Idaho Constitution and statutes to determine if implied authority exists.

**No Implied Authority Permits a City to Place the "Special Ballot Question" Before the Voters.**

Although cities enjoy a direct grant of power by Idaho's Constitution, that power is limited. Article XII, section 2 limits the authority of local governments as follows:

> Local police regulations authorized. Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations **as are not in conflict with its charter or with the general laws.**

(Emphasis added.) This constitutional provision establishes that the legislature has substantial authority with regard to the police powers of local governments.

The analysis of a city's authority to place the "special ballot question" on the ballot turns on whether the comprehensive statutory

election system enacted by the legislature fully occupies the field of elections to the exclusion of cities. Caesar, 101 Idaho at 161, 610 P.2d 520. If the State has fully occupied the election field, then a city ordinance will be held to be in conflict with state law, even if not specifically prohibited. *Id.* (citing United Tavern Owners of Philadelphia v. Sch. Dist. of Philadelphia, 272 A.2d 868, 870 (P.A. 1971)).

The authority of cities with regard to elections is limited. As set forth below, the legislature has fully occupied the field of city elections with the intent of limiting municipal discretion regarding those elections. Idaho Code § 50-405 limits city elections as follows:

> General and special city elections. (1) A general election shall be held in each city governed by this title, for officials as in this title provided, on the Tuesday following the first Monday of November in each odd-numbered year. All such officials shall be elected and hold their respective offices for the term specified and until their successors are elected and qualified. **All other city elections that may be held under authority of general law** shall be known as special city elections.

(Emphasis added.) Idaho Code § 50-402(b) defines "special election" as "any election other than a general election held at any time **for any purpose provided by law**." (Emphasis added.)

Idaho Code § 50-405 therefore expressly limits city elections to only those authorized by the general laws. In other words, a city does not have the authority to create any election that has not already been authorized by law. Idaho Code sets out specific special elections that a city is authorized by law to hold. *See, e.g.*, Idaho Code § 50-803 (authorizing special elections on the question of adopting a council-manager plan); Idaho Code § 50-2104 (authorizing special elections related to city consolidation); Idaho Code § 50-326 (authorizing special elections related to water, light, power, and gas plants); Idaho Code § 50-1044 (authorizing special elections in certain resort cities related to local-option nonproperty taxes).

Notably, advisory ballot questions are permitted only at the county level. *See* Idaho Code § 31-718. Had the legislature intended to allow cities to hold advisory ballot questions on any topic, it would have not limited its authorization to counties.

Idaho Code also establishes more generally that the legislature intended to fully occupy the field of city elections. Elections within Idaho have been consolidated with supervisory roles for the Secretary of State and county clerks. *See generally*, title 34, chapter 2, Idaho Code (assigning virtually all election authority to these two offices). Idaho Code § 50-403 expressly assigns the county clerk as the chief elections officer of city elections. Further, the county clerk is installed as the supervisory authority over local elections officials under Idaho Code §§ 34-206 and 34-209, including related to the payment for the costs of the election. Perhaps the most straightforward analysis is that a city cannot be permitted to create elections for which the county must pay—the legislature intended to limit the costs of elections through consolidation.

Additionally, the county clerk is responsible for the registration of all city electors under Idaho Code § 50-404. The legislature has defined the qualifications for ballot access for candidates. Idaho Code §§ 50-406 and 50-407. Additionally, the legislature has set forth a comprehensive system for ballot access for municipal initiatives and referenda. *See* Idaho Code § 50-418; title 34, chapter 18, Idaho Code. Importantly, the legislature repealed the previous municipal authority to set election rules related to initiatives and referenda in 2015. 2015 Idaho Sess. Laws 1158 (repealing former Idaho Code § 50-501). Idaho Code § 34-106 also places a variety of limitations on how elections may be held, consistent with its title, "Limitation Upon Elections."

In sum, it is clear that the legislature has both fully occupied the field of municipal elections, and done so in a manner expressly limiting municipal authority over elections. This office cannot identify any gap within the comprehensive election code enacted by the legislature to reasonably defend a city's creation of the "special ballot question."

**The Code Provisions Advanced by the City of Boise Do Not Provide the Requisite Authority.**

The City of Boise's reliance on Idaho Code §§ 50-301, 50-302, and 50-405(1) is misplaced. Idaho Code § 50-405(1) only authorizes a city to conduct elections as authorized by the general laws. As established above, no Idaho statute authorizes the "special ballot question" or provides for the creation of elections by city ordinance.

Idaho Code §§ 50-301 and 50-302 are general authority statutes and are limited by the general laws as well. Idaho Code § 50-301 is both general and specific:

> Cities governed by this act shall be bodies corporate and politic; may sue and be sued; contract and be contracted with; accept grants-in-aid and gifts of property, both real and personal, in the name of the city; acquire, hold, lease, and convey property, real and personal; have a common seal, which they may change and alter at pleasure; may erect buildings or structures of any kind, needful for the uses or purposes of the city; and exercise all powers and perform all functions of local self-government in city affairs as are not specifically prohibited by or in conflict with the general laws or the constitution of the state of Idaho.

Reading through this provision, nothing indicates that a city has the authority to create a new election for an advisory vote on a specific topic by its citizens. If anything, this statute provides the city with its identity as a municipal corporation and allows for it to transact business as such. This provision should not be read as a broad grant of authority to cities on virtually any topic, particularly when a comprehensive series of more specific statutes govern.

Similarly, Idaho Code § 50-302(1) appears inapplicable:

> Promotion of general welfare — Prescribing penalties. (1) Cities shall make all such ordinances,

> bylaws, rules, regulations and resolutions not inconsistent with the laws of the state of Idaho as may be expedient, in addition to the special powers in this act granted, to maintain the peace, good government and welfare of the corporation and its trade, commerce and industry. Cities may enforce all ordinances by fine, including an infraction penalty, or incarceration; provided, however, except as provided in subsection (2) of this section, that the maximum punishment of any offense shall be by fine of not more than one thousand dollars ($1,000) or by imprisonment not to exceed six (6) months, or by both such fine and imprisonment.

This statute makes no reference to elections, and appears to be specifically drafted to allow cities to make ordinances as allowed by law that can carry civil and criminal penalties with them. The creation of an advisory election cannot reside comfortably in the shade of this statute because it is not any sort of enforcement ordinance as contemplated by Idaho Code § 50-302. Idaho Code § 50-302 cabins city authority consistently with article XII, section 2 of the Idaho Constitution by limiting city ordinance authority to only those not inconsistent with the laws of the state of Idaho.

As demonstrated above, the legislature has created a comprehensive and consolidated series of election statutes with clearly delineated authority for state, county, and other political subdivisions. The broad grant of implied authority required by the City of Boise to place the "special ballot question" upon the ballot is simply not found within existent Idaho law.

Based upon the analysis above, this office advises that the Secretary of State recommend that the Ada County Clerk deny the City of Boise's attempt to place the "special ballot question" upon the ballot.

Please contact me if you would like to discuss any of this in greater detail.

Sincerely,

BRIAN P. KANE
Assistant Chief Deputy

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[1] The legislature permits counties to hold advisory ballot questions under Idaho Code § 31-718, but no corresponding authority has been granted cities.

[2] This provision also expressly authorizes the Secretary of State to provide interpretations for the conduct of elections under this statute. Idaho Code § 34-106(5).

August 30, 2019

The Honorable Steve Berch
Idaho House of Representatives
Idaho State Capitol
Boise, ID 83720

Re: CBD Oil Questions

Dear Representative Berch:

In correspondence to this office, you presented three questions in regard to Idaho law concerning CBD oil. This opinion letter, which embodies my own review and the analysis of Deputy Attorney General John McKinney, will address those questions.

## QUESTIONS PRESENTED

I. Would Idaho statutes permit the possession, transport, or use of cannabidiol oil (CBD Oil) that has zero THC?

II. Would a purchaser or consumer be criminally liable for the possession of CBD oil that was represented to them through a label that indicated zero THC but upon testing revealed a measurable THC amount?

III. What statutory changes would be recommended to clearly make legal possession and/or consumption of CBD oil with zero THC?

## BRIEF ANSWERS

I. Assuming CBD oil contains no trace of THC, the legality of the substance under Idaho law depends entirely upon whether it contains "any quantity" of "marijuana" as defined by Idaho Code § 37-2701(t). If it does, it is a Schedule I(d) illegal "hallucinogenic substance"

under title 37, chapter 27, "Uniform Controlled Substances," of the Idaho Code. If it does not, it is not illegal under Idaho law.

II. Assuming a purchaser or consumer of CBD oil cannot be shown to have known that the CBD oil contained any THC, or that the substance was produced from "marijuana" (as defined by Idaho Code § 37-2701(t)), that purchaser or consumer should not be held criminally liable for possessing the CBD oil.

III. The only statutory change required to make it legal under Idaho law to possess and/or consume CBD oil containing "zero THC" is to exclude such CBD oil from the definition of "marijuana" under Idaho Code § 37-2701(t).

## ANALYSIS

### I. Would Idaho statutes permit the possession, transport, or use of cannabidiol oil (CBD Oil) that has zero THC?

The answer to this question depends on whether both requirements—not just one—for CBD oil to be considered legal under Idaho law have been met.

Idaho Code § 37-2705(a) states, the "controlled substances listed in this section are included in schedule I." Subsection (d) of that list—"Hallucinogenic substances"—includes "[a]ny material, compound, mixture or preparation which contains *any quantity* of the following hallucinogenic substances, their salts, isomers and salts of isomers unless specifically excepted . . . :

> . . .
> (19) Marihuana;
> . . .
> (27) Tetrahydrocannabinols or synthetic equivalents of the substances contained in the plant, or in the resinous extractives of Cannabis . . . .

(Emphasis added.) Under a plain reading of Idaho Code § 37-2705(a) and (d)(19) and (27), if a substance contains *any quantity* of *either* marijuana or Tetrahydrocannabinols ("THC") (etc.), it is a Schedule I controlled substance.

As your question states, this analysis will be based on the assumption that the CBD oil contains "zero" THC. Therefore, the only remaining question is whether the CBD oil constitutes "marijuana" (or "marihuana") as defined by statute. That statue, Idaho Code. § 37-2701(t), reads as follows:

> "Marijuana" means all parts of the plant of the genus Cannabis, regardless of species, and whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture salt, derivative, mixture, or preparation of such plant, its seeds or resin. *It does not include the mature stalks of the plant unless the same are intermixed with prohibited parts thereof, fiber produced from the stalks, oil or cake made from the seeds or the achene of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks*, except the resin extracted therefrom or where the same are intermixed with prohibited parts of such plant, fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

(Emphases added.) The first sentence of Idaho Code § 37-2701(t) provides the basic definition of illegal "marijuana." The italicized part of the statute excludes from that definition "the mature stalks of the plant" (etc.). The underscored portion of the statute creates an exception to the exception—defining "resin extracted" from the mature stalks as illegal "marijuana."

In sum, if the CBD oil (a) does not come from "the mature stalks of the plant" (etc.), and (b) even if it does, if it is "resin extracted" from the mature stalks (etc.), it is illegal under Idaho law. Conversely, if the "zero THC" CBD oil falls within the "mature stalks" exception, and is not "resin extracted" from the mature stalks (etc.), it is legal in Idaho.

**II. Would a purchaser or consumer be criminally liable for the possession of CBD oil that was represented to them through a label that indicated zero THC but upon testing revealed a measurable THC amount?**

Possession of a controlled substance is a general intent crime. State v. Fox, 124 Idaho 924, 925-26, 866 P.2d 181, 182-83 (1993). The requisite intent "is not the intent to commit a crime, but is merely the intent to knowingly perform the interdicted act . . . ." *Id.* at 926, 866 P.3d at 183 (internal quotation and citation omitted). Lack of knowledge that the substance possessed was illegal "is irrelevant." *Id.* Under Idaho's controlled substance laws, "the individual need not know the substance possessed is a controlled substance." State v. Blake, 133 Idaho 237, 240, 985 P.2d 117, 120 (1999). Thus, for example, "if a person is charged with possession of cocaine, *he need only know he is possessing cocaine*. He need not know that cocaine is a controlled substance." *Id.* at 241 n.1, 985 P.2d at 121 n.1 (emphasis added). In short, the person possessing the substance must be shown to know what the substance is, not that it is "controlled" by law.

By stating that the CBD oil label read "zero THC," this analysis assumes that the purchaser or consumer cannot be shown to have otherwise known that the CBD oil contained any amount of THC, or that the CBD oil was derived from "marijuana" as defined by Idaho Code § 37-2701(t). Under those facts, the purchaser or consumer should not be held criminally liable for possessing CBD oil.

If, despite the label reading "zero THC," the purchaser or consumer could be shown to have known that the CBD oil contained any quantity of THC, or that the CBD oil was produced from the part of the marijuana plant statutorily defined as "marijuana," that person could be held criminally liable for possessing the product.

### III. What statutory changes would be recommended to clearly make legal possession and/or consumption of CBD oil with zero THC?

Because your question asks what statutory changes would clearly make the possession or consumption of CBD oil with "zero THC" legal, the THC requirement for legality has been met. Therefore, the only other statutory change necessary to make CBD oil (with "zero" THC) legal under Idaho law would be to exclude it from the definition of "marijuana," as set forth in Idaho Code § 37-2701(t).

A final consideration deserves mention. In Idaho, the legislature has designated county sheriffs and county prosecutors as the primary authorities for enforcing Idaho's criminal laws. Idaho Code § 31-2227. This office does not have the authority to direct the actions of these local officials, who have discretion in arresting and prosecuting persons within their jurisdictions. The opinions stated in this letter are not binding on these officials, nor are they binding on Idaho courts. Thus, while this letter states the conclusions we have reached after reviewing this matter carefully, it is not a guarantee against arrest, prosecution or even conviction.

I hope this response to your inquiry is satisfactory. If you have any questions or comments, please feel free to contact me at your convenience.

Sincerely,

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

October 2, 2019

Douglas G. Abenroth
Cassia County Prosecuting Attorney
1459 Overland Avenue, 3rd Floor
P. O. Box 7
Burley, ID 83318
SENT VIA USPS MAIL & ELECTRONIC MAIL TO:
dabenroth@cassiacounty.org

Re: Religious Property Exemption Application Procedures

Dear Mr. Abenroth:

You requested guidance on the interpretation of the exemption application requirements contained in Idaho Code section 63-602 as applied to properties seeking the religious property exemption under 63-602B—specifically whether these types of properties require an annual or one-time application for the exemption. As I understand, several Cassia County officials have posited two different interpretations of the application requirements applied to the religious property exemption: (1) requiring religious properties to submit an annual application by April 15 of the taxing year at issue to qualify for the exemption, or (2) requiring religious properties to submit an application only by April 15 of the first year that the property qualifies for the exemption. After our brief discussion on the phone, I have drafted this email [letter] to confirm our discussion and these application requirements. In short, either interpretation of the application requirements that we have discussed is a reasonable application of the statute.

As a preliminary matter, the language in Idaho Code section 63-602(3) primarily conveys discretion to the Boards of County Commissioners to decide the process for these types of exemption applications. Accordingly, the following analysis is entirely for advisory purposes only. Additionally, it should be noted that there may be other interpretations of the requirements that also satisfy the statute that we have not yet been asked to opine on. As such, the two alternative applications discussed below should not be viewed as the only ways to

satisfy the statute's application requirements, particularly given the Legislature's delegation of discretion to the appropriate county officials.

The relevant portions of Idaho Code section 63-602(3) provide the governing law on the application procedures for property tax exemptions:

> All exemptions from property taxation claimed shall be approved annually by the board of county commissioners or unless otherwise provided:
> . . .
> [Enumerated list of exemptions] do not require application or approval by the board of county commissioners. For all other exemptions in title 63, Idaho Code, the process of applying is as specified in the exemption statutes or, **if no process is specified and application is necessary to identify the property eligible for the exemption, annual application is required.** Exemptions in other titles require no application.
> . . .
> For exemptions that require an application, provided such exemptions are for property otherwise subject to assessment by the county assessor, the application must be made to the county commissioners by April 15
> . . . .

(Emphasis added.) This language was added by a 2012 amendment and marked a change from the strict requirement that every exemption be considered through application to the Boards of County Commissioners every year without exception. Review of the 2012 legislative history does not clearly support one of the two interpretations over the other.

> Idaho Code section 63-602B provides an exemption for:
>
> [P]roperty belonging to any religious limited liability company, corporation or society of this state, used exclusively for and in connection with any combination of religious, educational, or recreational purposes or

> activities of such religious limited liability company, corporation or society, including any and all residences used for or in furtherance of such purposes.

This section does not provide any specific application process for the exemption, nor is this exemption included in the enumerated list of exemptions that require no application found in 63-602(3)(a). Accordingly, the emphasized language above would govern application for this exemption because "no process is specified . . . ." Idaho Code § 63-602(3)(a). Importantly, the clause emphasized above contains inherent ambiguity in the phrase "if . . . application is necessary to identify the property eligible for the exemption . . . ." Idaho Code § 63-602(3)(a). Due to this ambiguity in the statute, as well as the legislative discretion conveyed to the individual counties, both interpretations of the statute are likely reasonable interpretations, pursuant to each county's view on what information is "necessary."

For example, particularly in counties with a greater number of parcels, an application process may be desired "to identify the property eligible for the exemption" every year. In counties with a lower number of parcels, the County Assessor may believe that after the first year's religious exemption application, it is no longer "necessary to identify the property . . . ." Which approach any particular county chooses to adopt will depend entirely upon the needs of the county and the elected officials' use of the discretion conveyed by the statute. From my review, either interpretation is equally permissible under the language of the statute. Clearly, when an application is required, it must be submitted by April 15 of the tax year at issue.

Please let us know if we may be of further assistance.

Sincerely,

KOLBY K. REDDISH
Deputy Attorney General

October 22, 2019

The Honorable Barbara Ehardt
Idaho House of Representatives
961 J. Street
Idaho Falls, Idaho 83402
TRANSMITTED VIA ELECTRONIC MAIL: behardt@house.idaho.gov

Re: Our File No. 19-67017 – Analysis of Proposed Draft Legislation Establishing Provisions Regarding Biological Sex of Students

Dear Representative Ehardt:

You requested an analysis of the proposed bill amending chapter 16, title 33, Idaho Code, with the addition of a new section, which proposes to establish a provisions regarding the biological sex of students. This letter responds to your request by identifying potential legal issues, ambiguities, and inconsistencies, although other issues not identified herein may exist.

## I.
## SUMMARY

The draft legislation raises legal issues under the Equal Protection Clause, Title IX, and an injunction requiring the Idaho Department of Health and Welfare to allow transgender individuals to amend the sex listed on their birth certificates. It is worth noting that this area of law is currently being developed. Although there is scant controlling precedent, courts around the Nation have made rulings that will make defense of the draft legislation constitutionally challenging under the Equal Protection Clause.

As to the Title IX concerns, the U.S. Supreme Court is currently deciding three cases which could impart some guidance as to what constitutes discriminatory conduct under Title IX. At issue in one of those cases is whether a transgender individual is protected by Title VII's prohibition against sex discrimination. Courts consistently look to how the language prohibiting sex discrimination is interpreted under

Title VII when interpreting the same prohibition under Title IX. Under the reasoning currently employed by a majority of federal courts, the draft legislation would require schools to impermissibly discriminate on the basis of sex; but it is possible that this reasoning may be overturned.

## II.
## OVERVIEW OF DRAFT LEGISLATION

Throughout this letter, the following terms will be used: "Transgender" refers to someone who presents as a gender different than the sex assigned at birth, whether medical interventions (such as operations or hormone therapy) are used or not. "Transgender male" refers to a person assigned the female sex at birth who presents as male, and "transgender female" refers to a person assigned the male sex at birth who presents as female. "Gender identity" refers to an individual's concept of himself or herself as male or female. "Intersex" refers to someone born with a reproductive or sexual anatomy that does not fit the typical definitions of female or male.

The draft legislation would impose requirements and restrictions upon State educational institutions with regard to the "biological sex" of students. These requirements are in the categories of sex-specific sports participation, school records and correspondence, the use of pronouns, and bathroom and locker room use. The draft legislation also declares a policy that the State of Idaho recognizes sex as binary and determined before birth according to a person's chromosomes.

Under the draft legislation, no one assigned the male sex at birth can compete on a girls' team, but those assigned the female sex at birth may compete on boys' teams when a girls' team is unavailable, or may compete on a girls' team when one is available. By implication, a transgender female cannot compete on a team designated for girls, but a transgender male can compete on a boys' team when no girls' team is available, or may compete on a girls' team. However, a transgender male student undergoing hormone therapy "for a nonphysical condition" may not compete against female students if the therapy provides a "physical advantage." The term "physical advantage" is not defined.

When a sports team has limited positions for people of a certain sex, a male student may not participate on a female team and a female

student may not participate on a male team. By implication, because sex is defined in the draft legislation as referring to the sex assigned at birth, a transgender male cannot compete on a male team, and a transgender female cannot compete on a female team.

An intersex student may participate on a team "appropriate to the student's physical condition," if a physician provides a note describing the student's chromosomal makeup, describing the nature of the student's genitals and internal sex organs at birth, or stating that the physician "has otherwise diagnosed a disorder of sexual development wherein the physician has determined through genetic testing that the student does not have the normal sex chromosome structure for a male or female."

No boy can be penalized for refusing to compete in a contact sport against someone assigned the female sex at birth. By implication, a boy could not be penalized for refusing to compete against a transgender male—who may or may not be presenting physically as female, with or without female sex organs—but could be penalized for refusing to compete against a transgender female—who also may or may not be presenting physically as male, with or without male sex organs. In either case, the athlete against whom the boy refuses to compete may or may not have similar physical attributes and hormone levels as the boy who refuses to compete, yet the sex assigned to the athlete at birth makes the difference between whether the boy may refuse to compete with the athlete or not.

The draft legislation would require that any "biological male" be referred to by masculine pronouns in "official school records, school correspondence, or school instruction, including instructional materials" even in the case of a transgender student that prefers feminine pronouns. The same would be required with regard to a "biological female" student being referred to with feminine pronouns. The draft legislation further requires that "No person shall be penalized for using biological sex-based pronouns for any other person."

Finally, the draft legislation would require that every student use the restroom, locker room, or shower room corresponding with the sex listed on the student's "original birth certificate," regardless of a

subsequent birth certificate indicating a different sex, unless the student is intersex.

The draft legislation does not specify how these provisions are enforced or what penalty is imposed for a violation, such as using the incorrect pronoun in school documents or using the wrong restroom.

## I.
## ANALYSIS

The draft legislation raises several questions of law that are ultimately unsettled. Because of the nature of the legislation, however, it is virtually guaranteed to be challenged. Plaintiffs will likely bring challenges based on the Equal Protection Clause and Title IX. The draft legislation also raises concerns regarding an injunction against the Department of Health and Welfare requiring that transgender people be allowed to amend the sex listed on their birth certificates.

### A. Equal Protection Clause

The Fourteenth Amendment's Equal Protection Clause requires that the government treat similarly situated individuals alike unless the government can show that a particular exception to this rule meets the relevant legal standard.[1] Which legal standard applies depends on the class of individuals that would be treated differently.[2] Courts have found that governmental actions distinguishing between transgender individuals and those whose gender identities are congruent with the sex assigned at birth is a type of sex-based discrimination.[3] As such, courts apply "heightened scrutiny" in Equal Protection cases regarding different treatment because of an individual being transgender.[4] In order to show that a governmental action is constitutional when it treats transgender individuals differently than those whose gender identity is congruent with the sex assigned at birth, the government must show that the action is substantially related to an important governmental objective.[5]

This is not a simple hurdle to clear. Under this level of scrutiny, the government is required to "demonstrate an exceedingly persuasive justification" for the action.[6] For example, earlier court cases found that that privacy concerns justify separate restroom facilities based on sex

as listed on a person's birth certificate.[7] In recent cases, however, courts have not been persuaded by attempts to require students to use restrooms corresponding with the sex assigned at birth based on concerns for privacy.[8] Convincing a court that a provision treating transgender people differently than others requires the government to clear a high hurdle.

### 1. Sports Provisions

Regarding participation in sports, the draft legislation treats transgender students differently than students whose gender identity is congruent with the sex assigned at birth. Transgender females are excluded from girls' teams—but a student whose gender identity is congruent with the female sex assigned at birth may compete on girls' teams. Transgender males are excluded from competing on a boys' varsity basketball team if a girls' varsity basketball team is available—but a student whose gender identity is congruent with the male sex assigned at birth may compete on the boys' varsity team. A transgender male student undergoing hormone therapy is essentially banned from varsity basketball altogether, although hormone levels and body type may be similar to the athletes on the boys' varsity team. This creates a potential, and legally unresolved, Equal Protection issue because transgender boys and girls are treated differently than other boys and girls.[9]

Under the draft legislation, transgender students are generally excluded from teams matching their gender identity, but other students are not. To be constitutional, this different treatment must be substantially related to an important governmental objective, and the government must provide an exceedingly persuasive justification.

The Ninth Circuit Court of Appeals discussed at length the interest of an Arizona sports authority in not allowing a boy to participate on a girls' volleyball team in the 1982 case Clark ex rel. Clark v. Arizona Interscholastic Association.[10] The court recognized the appropriateness of "taking into account actual differences between the sexes, including physical ones" so long as the policy does not rely on "archaic and overbroad generalizations" or "old notions."[11] The court further explained that the government has a legitimate and important

interest in "redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes."[12]

The court in Clark then went on to decide whether excluding boys from girls' volleyball teams was substantially related to those important interests. In discussing this, the court considered the evidence presented to it and was persuaded "that due to average physiological differences, males would displace females to a substantial extent if they were allowed to compete for positions on the volleyball team. Thus, athletic opportunities for women would be diminished."[13] Because the Arizona sports authority was "simply recognizing the physiological fact that males would have an undue advantage competing against women for positions on the volleyball team," the court found that the policy of excluding boys from competing on girls' volleyball teams was substantially related to "the goal of redressing past discrimination and providing equal opportunities for women."[14]

The court in Clark also explained that "the exclusion of boys is not *necessary* to achieve the desired goal," and that there were other ways to more fully equalize athletic opportunities: "For example, participation could be limited on the basis of specific physical characteristics other than sex, a separate boys' team could be provided, a junior varsity squad might be added, or boys' participation could be allowed but only in limited numbers."[15] Nevertheless, given the evidence provided to the court regarding the impact integrating boys into the girls' team would have on the equality of athletic opportunity, the policy at issue was found to be constitutional.

A transgender student challenging the draft legislation's provisions regarding sports participation would present a different case than the one encountered in Clark. The interest in redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes has not waned in importance. However, the draft legislation may not be as substantially related to those goals as the general division between boys' and girls' teams.

First, the court in Clark was provided evidence showing the physiological differences in average males and females, and demonstrating how males would displace females "to a substantial

extent" if allowed to compete on girls' teams. Where the ratio of males to females is roughly 1:1, transgender students are a very small minority of the population. It may be difficult to provide evidence that could convince a court that transgender female athletes displace "to a substantial extent" athletes whose gender identity is congruent with the female sex assigned at birth—if a court would even differentiate the two for purposes of this issue, which it might not.

Second, the court in Clark was persuaded by the physiological differences in average males and females, and explained that there could be better ways to take these differences into account for purposes of ensuring fair competition, such as separating athletes by physical characteristics other than sex. In the case of transgender athletes, however, the evidence supporting the "average" male and female degrees of athletic capability likely do not apply. A new record of evidence would likely be needed to show, for example, that the average female cannot compete with the average transgender female in order to justify requiring a transgender female to compete with students of the opposite gender identity.

As the court in Clark observed, athletes could instead be required to compete with those with similar physical characteristics—similarly to how the draft legislation treats intersex athletes. For example, the International Olympic Committee differentiates athletes by testosterone level, requiring transgender athletes transitioning to female to have maintained the required testosterone level for over a year, or longer if deemed necessary to ensure fair competition.[16] Because of such alternatives, an argument based on physiological differences may appear less than an "exceedingly persuasive justification" for a strict birth-sex-based separation.

The precise Equal Protection issues that the draft legislation raises regarding transgender athletes have not yet been decided by the U.S. Supreme Court. There is uncertainty in the law as to whether such provisions would be ultimately upheld. In the current legal climate, the draft legislation would certainly be challenged, and both the Federal District Court and the Ninth Circuit Court of Appeals would likely determine that the provisions are unconstitutional for the reasons described above. Whether the Supreme Court would take up the appeal and how it would rule is unknown at this time. But the legislation

would certainly embroil the State in litigation with a poor chance at success before the District Court and the Ninth Circuit Court of Appeals.[17]

**2. Birth Certificate**

To the extent that the draft legislation requires a school to ignore a transgender student's gender identity as reflected on a birth certificate, that requirement treats transgender students differently than students whose gender identity is congruent with the sex assigned at birth. Therefore, the requirement implicates the Equal Protection Clause.

The draft legislation states a policy that Idaho recognizes sex as determined "at the chromosomal level," and not by a student's birth certificate when the birth certificate is not "reflective of the student's actual biological sex." The draft legislation further states that official school records and correspondence will only refer to a student's sex as assigned at birth.

In F.V. v. Barron,[18] a Federal District Court in Idaho evaluated under the Equal Protection Clause the Idaho Department of Health and Welfare's policies regarding amendments to birth certificates. The court in F.V. found that IDHW's policy of denying the applications of transgender people to amend the birth-assigned sex on their birth certificates to align with their gender identity treated transgender people differently because IDHW allowed amendments to birth certificates in other situations such as adoption—and these amendments gave "certain people access to birth certificates that accurately reflect who they are, while denying transgender people, as a class, access to birth certificates that accurately reflect their gender identity."[19] The court further found that policies regarding amendments to birth certificates for transgender people must meet heightened scrutiny to be constitutional under the Equal Protection Clause.[20] The court issued a permanent injunction against automatically rejecting applications from transgender people to change the sex listed on their birth certificates.[21]

The draft legislation would require schools to ignore a transgender student's amended birth certificate, a result that would contradict with the ruling and injunction in F.V. If the court requires

IDHW to allow changes to birth certificates, the State cannot require schools to ignore the amendments without meeting heightened scrutiny. Given the ruling in F.V., and the requirement that IDHW allow transgender people to amend the sex listed on their birth certificates, it would be extremely difficult to present a sufficiently important governmental interest in requiring all school records and correspondence to ignore a student's sex as described on the birth certificate. This provision in the draft legislation is likely unconstitutional under the Equal Protection Clause and would conflict with the permanent injunction ordered in F.V.

### 3. Pronouns

It is unclear whether or not a policy that requires schools to use pronouns that do not reflect a student's gender identity is constitutional. At least one court has recognized that deliberate misgendering could be considered objectively offensive behavior.[22] Other courts have found that, in the corrections context, individual acts of misgendering do not amount to a constitutional violation.[23] However, these cases do not discuss a state-wide policy that requires misgendering transgender students in school records, correspondence, and instructional materials.[24]

Such a policy treats transgender students differently than students whose gender identity is congruent with the sex assigned at birth, because one set of students is referred to, addressed, and described on official documents according to their individual gender identities, and the other set of students is not. It may be difficult to identify a governmental interest sufficiently important and exceedingly persuasive enough to justify this treatment, and a reviewing court may decide that the policy was primarily motivated by animus against transgender people,[25] despite good-faith justifications for the policy.[26]

Likewise, the provision allowing any person to misgender a transgender person without being penalized may appear to a court to be State-sanctioned harassment of transgender people, without a corresponding ban on punishing individuals for harassment based on any other characteristic.[27] This provision also has the practical effect of carving out an exception to legislative efforts aimed at preventing

bullying,[28] even though transgender students are at a high risk of being the victims of bullying and at a high risk of suicide.

Because the policy appears to single out a historically unpopular group for differential treatment that has been recognized as offensive, there is a risk that courts will find that the policy violates the Equal Protection Clause, especially in the Ninth Circuit, where courts are known for historically being more liberal and progressive.[29] However, this is currently an unsettled question of law.

**4. Facilities**

The government treats transgender students differently than similarly situated students when it disallows transgender students from using the restroom that corresponds with their individual gender identities, but allows other students to use the restroom that corresponds with each of their gender identities.[30] To justify this different treatment, the government must show that it is substantially related to an important government interest and provide an exceedingly persuasive justification.

As described above, other government entities in other parts of the country have attempted to justify requiring transgender people to use the bathroom corresponding with the sex assigned at birth by arguing that it protects an interest in privacy and security. These arguments have been unpersuasive.[31] One court observed that the restroom policy is not substantially related to privacy concerns when there is no record of student complaints regarding transgender students' restroom behavior.[32] Further, the court observed that the privacy argument ignored the practical realities of how transgender students use a restroom—and the court cited other cases describing how transgender male students used stalls with closed doors.[33] The court ultimately decided that the privacy argument was based on "sheer conjecture and abstraction."[34]

As to locker rooms, one court found that where individual stalls were provided, the reasoning with regard to restroom privacy equally applies, and a policy of excluding transgender students from the locker room corresponding with gender identity was not substantially related to the asserted privacy interest.[35] Another court declined to find that

students have an expansive right to privacy in a place like a locker room "where it is not only common to encounter others in various stages of undress, it is expected. . . . '[p]ublic school locker rooms . . . are not notable for the privacy they afford.'"[36]

Just as with transgender participants on sex-separated sports teams, the question of whether it is constitutional to bar transgender students from using the restroom and locker room facilities corresponding with their individual gender identities has not been definitively decided by a controlling court. However, because courts all over the country appear united in holding that such a policy would violate the Equal Protection Clause, it appears likely that the draft legislation's provisions regarding restrooms would be ruled unconstitutional in the District Court and Ninth Circuit Court of Appeals.

**B. Title IX**

Title IX provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[37] When interpreting the phrase "on the basis of sex," courts look to decisions interpreting language in Title VII, which prohibits workplace discrimination on the basis of sex.[38] Utilizing the rationale from VII cases, many federal courts have held that discrimination against transgender individuals constitutes discrimination on the basis of sex, reasoning that it is a kind of "gender stereotyping" that Title IX prevents.[39]

The United States Supreme Court is currently deciding whether discriminatory conduct against individuals based on their transgender status is discrimination based on sex and thus prohibited by Title VII. Oral argument before the Court was held on October 8, 2019.[40] The Idaho Attorney General submitted an amicus brief, with 14 other states, arguing that the language of Title VII, which prohibits discrimination on the basis of sex, does not extend protection to transgender individuals and that to interpret Title VII to extend that protection usurps the role of Congress. Because courts interpret the word "sex" in Title IX by looking to how it is interpreted under Title VII, the Supreme Court's upcoming ruling in the Title VII cases could determine whether Title IX prohibits discrimination on the basis of transgender status."

At this time there is no controlling law to determine definitively the defensibility of the draft legislation under Title IX. However, the rulings of multiple courts suggest that defense of this legislation will be constitutionally challenging. Depending on when the U.S. Supreme Court issues its decision in the Title VII cases referenced within this analysis, the legal defense of the proposed legislation may become more predictable.

I hope that you find this analysis helpful.

Sincerely,

BRIAN KANE
Deputy Attorney General

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[1] City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439-40, 105 S. Ct. 3249, 3254, 53 U.S.L.W. 5022 (1985).

[2] *See id.* at 439-41.

[3] *E.g.*, Glenn v. Brumby, 663 F.3d 1312, 1316-17 (11th Cir. 2011); Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267, 285-86 (W.D. Pa. 2017).

[4] *See* Karnoski v. Trump, 926 F.3d 1180, 1199-1202 (9th Cir. 2019); F.V. v. Barron, 286 F. Supp. 3d 1131, 1144-45 (D. Idaho 2018).

[5] F.V., 286 F. Supp. 3d at 1142.

[6] United States v. Virginia, 518 U.S. 515, 531, 116 S. Ct. 2264, 2274, 135 L. Ed. 2d 735 (1996).

[7] *E.g.*, Carcaño v. McCrory, 203 F. Supp. 3d 615, 645 (M.D.N.C. 2016).

[8] A.H. ex rel. Handling, v. Minersville Area Sch. Dist., No. 3:17-CV-391, 2019 WL 4875331, at *33 (M.D. Pa. Oct. 2, 2019) (collecting cases); Grimm v. Gloucester Cty. Sch. Bd., No. 4:15CV54, 2019 WL 3774118, at *12-13 (E.D. Va. Aug. 9, 2019); Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cty., Fla., 318 F. Supp. 3d 1293, 1319 (M.D. Fla. 2018) (rejecting earlier decisions, like Carcaño, in light of newer decisions); Evancho, 237 F. Supp. 3d at 289-91.

[9] The draft legislation also treats transgender males differently than transgender females in some situations involving sports teams. This, too, could give rise to potential Equal Protection concerns.

[10] 695 F.2d 1126, 1127 (9th Cir. 1982).

[11] *Id.* at 1129.

[12] *Id.* at 1131.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] Int'l Olympic Comm., *IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism November 2015*, available at https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf.

[17] As explained below, the U.S. Supreme Court is hearing a case this term regarding whether Title VII's prohibition on discrimination on the basis of sex includes a prohibition on discrimination on the basis of being a transgender person. Because the Equal Protection Clause issue also implicates the question of whether discrimination regarding transgender status constitutes sex-based discrimination, the Supreme Court's ruling may be informative on the Equal Protection issue as well.

[18] 286 F. Supp. 3d 1131 (D. Idaho 2018).

[19] *Id.* at 1141.

[20] *Id.* at 1144-45.

[21] *Id.* at 1146.

[22] Rumble v. Fairview Health Servs., No. 14-CV-2037 SRN/FLN, 2015 WL 1197415, at *26 (D. Minn. Mar. 16, 2015).

[23] Renee v. Neal, No. 3:18-CV-592-RLM-MGG, 2018 WL 3861610, at *1 (N.D. Ind. Aug. 13, 2018) (finding that correctional personnel refusing to call prisoner by chosen name and feminine pronouns is "at most, simple verbal harassment, which doesn't rise to the level of a constitutional violation"); Stevens v. Williams, No. 05-CV-1790-ST, 2008 WL 916991, at *14 (D. Or. Mar. 27, 2008) (finding that there was no constitutional violation for refusing to call a prisoner by the pronouns associated with prisoner's gender identity, but also finding that being "transsexual" was not a suspect classification and applying minimal scrutiny).

[24] Because this provision requires certain pronouns to be used in "correspondence, and instructional materials," a school teacher or other school employee might object to being required to misgender a student. This raises potential free speech concerns.

[25] *See* United States v. Windsor, 570 U.S. 744, 769-72, 133 S. Ct. 2675, 2692-94, 186 L. Ed. 2d 808 (2013) ("The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages . . . was more than an incidental effect of the federal statute. It was its essence.").

[26] *See id.* at 796-97 (Scalia, J., dissenting) (describing the practical purposes for DOMA regarding estate tax laws in light of varying state definitions of marriage, and opining "[t]hat is not animus—just stabilizing prudence").

[27] Additionally, the provision's expansive language—"No person shall be penalized for using biological sex-based pronouns for any other person"—raises serious concerns regarding a private organization's right to police the conduct of its members or employees.

[28] *See, e.g.*, Idaho Code § 18-917A (making it an infraction for a student to harass, intimidate, or bully another student); Idaho Code § 33-1631(3) (requiring school districts to create policies with graduated consequences for harassment, intimidation, and bullying).

[29] Or the Due Process clause, for that matter. The Supreme Court has begun to meld the two doctrines in its last major gay rights decisions, as illustrated below:

> The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right.

Obergefell v. Hodges, -- U.S. --, 135 S. Ct. 2584, 2602-03, 192 L. Ed. 2d 609 (2015). If a court finds that animus was the motivating factor behind the draft legislation, it will likely find that the legislation fails to pass even the lowest scrutiny under substantive due process. *See* Witt v. Dep't of Air Force, 548 F.3d 1264, 1275 (9th Cir. 2008) (O'Scannlain, Cir. J., dissenting from the denial of rehearing en banc) (describing how the "Supreme Court [has] struck down, under the rational basis test, laws that on inspection seemed to reflect little more than 'bare animus' and 'irrationality'").

[30] Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267, 285 (W.D. Pa. 2017).

[31] Note 8, *supra*.

[32] Grimm v. Gloucester Cty. Sch. Bd., No. 4:15CV54, 2019 WL 3774118, at *12 (E.D. Va. Aug. 9, 2019).

[33] *Id.*

[34] *Id.*

[35] M.A.B. v. Bd. of Educ. of Talbot Cty., 286 F. Supp. 3d 704, 724-25 (D. Md. 2018).

[36] Doe ex rel. Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 531 (3d Cir. 2018) (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657, 115 S. Ct. 2386, 2392-93, 132 L. Ed. 2d 564 (1995)).

[37] 20 U.S.C. § 1681(a).

[38] *E.g.*, Jennings v. Univ. of N. Carolina, 482 F.3d 686, 695 (4th Cir. 2007) (citing Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999)).

[39] *E.g.*, Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1046-50 (7th Cir. 2017); Grimm, 2019 WL 3774118, at *4 n.4; Prescott v. Rady Children's Hosp.-San Diego, 265 F. Supp. 3d 1090, 1099-1100 (S.D. Cal. 2017).

[40] The three cases on the issue are called Bostock v. Clayton County, Georgia, Altitude Express Inc. v. Zarda, and R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission.

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