



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

April 1, 2004

The Honorable Ben Ysursa
Secretary of State
HAND DELIVERY

Re: Certificate of Review Initiative for Defense of Marriage Amendment

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on March 12, 2004. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. It must be stressed that, given the strict statutory time frame in which this office must respond and the complexity of the legal issues raised in this petition, this office's 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," and the petitioners are free to "accept or reject them in whole or in part."

BALLOT TITLE

Following the filing of the proposed initiative, our 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 the titles, if petitioners would like to propose language with these standards in mind, we would recommend that they do so, and their proposed language will be considered.

MATTERS OF SUBSTANTIVE IMPORT

Petitioners have submitted the following proposed law:

Until the Congress of the United States of America shall have proposed an amendment to the United States Constitution that only (a) defines marriage as between a man and a woman or (b) ensures to each state the right to decide for itself the definition of marriage for all its residents, then, the Legislature of each session of this State shall, prior to the

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passage of any new legislation by the Legislature, call for the convening of a United States Constitutional Convention. Such call shall be for a Convention with the same authority and rules as the original founding Convention and shall be valid for a period of seven years once made. The Legislature shall take all such additional acts as necessary, including the appointment of representatives, to call, attend and fully participate in such a Convention. Such representatives shall meet at a place designated by the sponsors of this law no later than May 14 of each year, and shall as one of their first items of business determine whether there is adequate participation so that a Convention has authority to proceed. When, in consequence of such a Convention, any Constitutional amendment adopted shall either (a) define marriage as only between a man and a woman or (b) ensure to each state the right to decide for itself the definition of marriage for all its residents, then the Legislature of this State shall thereafter have no further obligation to issue a new call for election.

Although this is a proposal for a new law, it does not contain a title, a chapter or any other indication of where within the code it should be placed. This is problematic for organizational reasons within the Idaho Code.

It should also be noted that this proposal does not appear to be as much of a law as it is a mandate that the legislature act. Laws passed by initiative are on equal footing with legislation enacted by the legislature, and the two must comply with the same constitutional requirements. Westerberg v. Andrus, 114 Idaho 401, 757 P.2d 664 (1984). This initiative seeks to enact a law, which will mandate that the legislature call for a constitutional convention prior to passage of any legislation. In essence, this statute attempts to limit the constitutional authority of the legislature, as outlined within Article III, § 1 of the Idaho Constitution. A reviewing court would likely conclude that this limitation appears impermissible, because the legislature is granted plenary authority over the setting of its rules of order and procedure by the Idaho Constitution. Idaho Constitution Art. III, §§ 9-10. In short, an initiative cannot restrict the actions of future legislatures absent a constitutional mandate.

As this initiative seeks to compel the legislature to issue a call for a national constitutional convention, there is no reason to discuss the policy reasons for the convention call.

CONCLUSION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style and matters of substantive import and that the recommendations set forth above

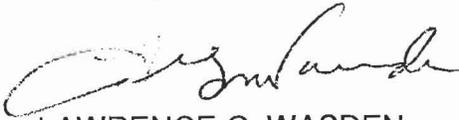
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have been communicated to petitioner Vivian T. Wayment by deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,

A handwritten signature in black ink, appearing to read "Lawrence G. Wasden", written in a cursive style.

LAWRENCE G. WASDEN
Attorney General

Analysis by:

Brian P. Kane
Deputy Attorney General