



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

February 17, 2010

The Honorable Ben Ysursa
Idaho Secretary of State
STATEHOUSE MAIL

Re: Certificate of Review
Proposed Initiative Related to the Idaho Health Insurer Protection Act

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on January 19, 2010. 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 or reject them in whole or in part." 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 must 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

State Law Cannot Supersede or Nullify Federal Law

The proposed initiative is likely unconstitutional. The initiative seeks to nullify any “law, code, mandate, or regulation” of the federal government if it takes any of a series of enumerated actions. This initiative seeks to elevate state law above that of the federal law. As outlined below, this elevation likely violates the Supremacy Clause.

The Supremacy Clause of the United States Constitution provides: “This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.” U.S. Const. art. VI, § 2 (emphasis added). State laws that conflict with federal law are “without effect.” Altria Group, Inc. v. Good, — U.S. —, 129 S. Ct. 538, 543, 172 L.Ed.2d 398 (2008). Under the Preemption Clause, it is “clear that federal law is as much the law of the several States as are the laws passed by their legislatures.” Haywood v. Drown, — U.S. —, 129 S. Ct. 2108, 2114, 123 L.Ed.2d 920 (2009). “Pre-emption doctrine stems from the Supremacy Clause of the United States Constitution and invalidates any state law that contradicts or interferes with any Act of Congress.” Hayfield Northern Railroad Co., Inc. v. Chicago and Northwestern Transp. Co., 467 U.S. 622, 627, 104 S. Ct. 2610, 81 L.Ed.2d 527 (1984). This bill would clearly and plainly (and in fact has the stated purpose) of contradicting and interfering with acts of Congress.

The rationale of the proposed initiative seems to be that federal statutes that exceed the grant of limited powers in the Constitution can be nullified or declared void by the state. Even assuming this underlying premise, the fatal flaw in this bill is that it usurps the constitutional authority to declare federal law unconstitutional. It is simply not within the state’s authority to declare federal laws null and void; that authority lies exclusively with the Supreme Court of the United States and the federal courts created by Congress. U.S. Const. art. III. Both state and federal courts are constitutionally bound to declare void any state action that contradicts or interferes with the acts of Congress.

CONCLUSION

For the reasons set forth above, it is likely that a court reviewing this initiative, if enacted, would find its content to be unconstitutional. Additionally, this initiative raises numerous ancillary legal issues, most of which would likely be fatal, too numerous to mention given the strict timeframe in which this analysis must occur.

The Honorable Ben Ysursa

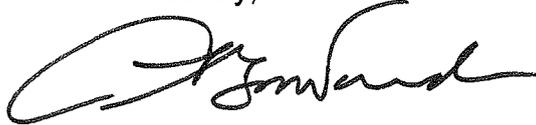
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CERTIFICATION

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 Alanna Grimm, 2817 E. St. James Ave., Hayden, Idaho 83835-7544.

Sincerely,

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

LAWRENCE G. WASDEN
Attorney General

Analysis By:

BRIAN P. KANE
Deputy Attorney General