



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 Protection of Idahoans from Unlawful IRS  
Prosecution and Seizures

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**

#### **A. Summary of the Proposal**

The proposed initiative sets forth a new chapter to be designated as Idaho Code § 63-4701, *et seq.*, entitled "Protection of Idahoans from Unlawful IRS Prosecution and Seizures." We understand the proposed initiative to intend the following general results: (1) the United States government will be required to produce to the Idaho Secretary of State documentation supporting the authority of the United States and the Internal Revenue Service ("IRS") to collect personal income taxes; (2) following a public comment period, the Idaho Attorney General will review the aforesaid documentation and issue a legal opinion and "certification of taxability" concerning the authority of the United States and the IRS to collect personal income taxes; (3) actions taken in conjunction with the attempted collection of personal income tax will be prohibited if the Idaho Attorney General does not issue a "certification of taxability"; and (4) notwithstanding the issuance of a "certification of taxability," the State of Idaho may still prohibit the enforcement of federal personal income tax statutes, and a county sheriff may prevent the enforcement of any such "tax statutes that he considers to be unlawful or nullified based on his own personal knowledge of the law."

## **B. The Proposed Initiative 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, cl. 2. The Idaho Constitution similarly provides that "[t]he state of Idaho is an inseparable part of the American Union, and the Constitution of the United States is the supreme law of the land." Idaho Const., art. I, § 3. Pursuant to the Supremacy Clause, a state cannot ignore federal legislation or pass state legislation providing that federal law will not be followed within the state. See, e.g., Haywood v. Drown, —U.S.—, 129 S. Ct. 2108, 2114-16, 173 L.Ed.2d 920 (2009) (holding that a state cannot pass a law that nullifies a federal claim or cause of action); Howlett By and Through Howlett v. Rose, 496 U.S. 356, 371, 110 S. Ct. 2430, 2440, 110 L.Ed.2d 332 (1990) ("The Supremacy Clause forbids state courts to disassociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source."); Oxygenated Fuel Ass'n, Inc. v. Davis, 331 F.3d 665, 667 (9<sup>th</sup> Cir. 2003) (holding that state law is preempted when it conflicts with federal law).

The proposed initiative likely violates the Supremacy Clause, because its intent is to prohibit the enforcement of particular federal income tax statutes and to criminalize any actions associated with enforcement of those statutes. According to the proposed initiative, even if the Idaho Attorney General issues a "certificate of taxability," verifying that the IRS has the authority to enforce these federal statutes, the state would still be permitted to pass legislation prohibiting their enforcement. Furthermore, county sheriffs would be permitted to prohibit their enforcement based upon their own subjective interpretation of the federal statutes' validity, "even if a certification exists." Additionally, during the time period between the effective date of the Act and the issuance of a "certification of taxability" by the Attorney General, enforcement of the federal statutes would be prohibited by the proposed initiative.

This nullification of federal statutes enacted pursuant to the United States Constitution, even to the extent such nullification may be temporary or may be applied sporadically, would almost certainly violate the Constitution.

Furthermore, as the United States Supreme Court has clarified, it is the role of the federal judiciary, not the separate states, to interpret federal law. “[I]t is emphatically the province and duty of those [federal] judges to say what the law is. At the core of this power is the federal courts’ independent responsibility – independent from . . . the separate authority of the several States – to interpret federal law.” Williams v. Taylor, 529 U.S. 362, 378-79, 120 S. Ct. 1495, 1505, 146 L.Ed.2d 389 (2000) (internal quotation marks and citation omitted). The Williams court clarified that “requir[ing] the federal courts to cede this authority to the courts of the States would be inconsistent with the practice that federal judges have traditionally followed in discharging their duties under Article III of the Constitution.” *Id.* The provisions in the proposed initiative allowing the state – through the Attorney General’s office – to pass final judgment on the validity of the federal income tax statutes, regardless of what the United States Supreme Court may hold on the subject, does not comport with the Supremacy Clause or with the basic premise that the federal courts are the final authority with respect to the interpretation of federal law.

Additionally, the state does not have the authority to regulate the conduct of the federal government unless it has clear and unambiguous congressional authorization to do so. See Hancock v. Train, 426 U.S. 167, 96 S. Ct. 2006, 2012, 48 L.Ed.2d 555 (1976) (holding that “the activities of the Federal Government are free from regulation by any state”) (internal citation omitted). The proposed initiative attempts to regulate federal agents’ enforcement of federal income tax laws and additionally attempts to direct the federal government to undertake particular conduct (providing the documentation delineated in the proposed initiative). Absent clear and unambiguous congressional authorization to regulate these federal activities, these provisions are likely unenforceable.

### **C. The Proposed Initiative May Be Unconstitutionally Vague**

In addition to the above, the provisions of the proposed initiative that are intended to prohibit actions related to enforcement of federal income tax statutes may be unconstitutionally vague. As the Idaho Supreme Court has articulated:

The void-for-vagueness doctrine is premised upon the due process clause of the Fourteenth Amendment to the U.S. Constitution. **This doctrine requires that a statute defining criminal conduct be worded with sufficient clarity and definiteness that ordinary people can understand what conduct is prohibited and that the statute be worded in a manner that does not allow arbitrary and discriminatory enforcement.** It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Furthermore, as a matter of due process, no one may be required at the peril of loss of

liberty to speculate as to the meaning of penal statutes. This Court has held that due process requires that all “be informed as to what the State commands or forbids” and that “men of common intelligence” not be forced to guess at the meaning of the criminal law. A statute may be void for vagueness if it fails to give adequate notice to people of ordinary intelligence concerning the conduct it proscribes, or if it fails to establish minimal guidelines to govern law enforcement or others who must enforce the statute.

State v. Korsen, 138 Idaho 706, 711-12, 69 P.3d 126, 131-32 (2003) (internal citations omitted and emphasis added).

As discussed previously, the proposed initiative provides, regardless of whether the Idaho Attorney General certifies that the United States has the authority to collect personal income tax, that county sheriffs may disregard this authority and prevent enforcement of the statutes. In addition, enforcement of the federal statutes must also “remain in compliance with other acts of the State which might still otherwise prohibit the enforcement of certain personal income tax statutes.” Thus, the proposed initiative is not sufficiently clear and definite so that ordinary people can understand what conduct associated with enforcement of the federal income tax statutes is prohibited. For example, the proposed initiative criminalizes the act of “threatening [a] person with the enforcement of a law or code which would be nullified by this act,” but the proposed initiative does not clarify when such a law or code is actually “nullified,” as individual sheriffs would have the authority to subjectively determine whether nullification is appropriate. In addition, the statute allows for arbitrary enforcement, as it permits individual sheriffs to decide whether or not the conduct of enforcing the federal income tax statutes is “unlawful . . . based on [their] own personal knowledge of the law . . . , even if a certification exists.”

Additionally, it is unclear whether the “covered actions” set forth in proposed section 63-4703 are intended to be prohibited, or if only the “unauthorized seizures” and “color of law violations” set forth in sections 63-4707 and 63-4708 are prohibited. Consolidation of all prohibited actions into a single section – and clarification of exactly what conduct is prohibited – would be advisable.

#### **D. Additional Comments**

Following are some additional recommendations on more minor issues.

It may be advisable to remove quoted language from section 63-4701 of the proposed initiative or to instead paraphrase the substance of the language at issue. Quoted language is unusual in a statute, and it does not appear to materially add to the substance of the stated purpose of the initiative.

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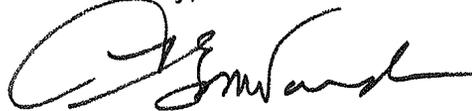
Subsections 63-4703(1) and 63-4703(2) are identical. One of these subsections should be removed.

Subsection 63-4703(3) is missing the word "person." The subsection should presumably read as follows: "Enforcement of any liens against personal property of any natural [person] relating to failure to file personal income tax returns or pay personal income taxes."

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

Sincerely,



LAWRENCE G. WASDEN  
Attorney General

**Analysis by:**

KARIN D. JONES  
Deputy Attorney General