IDAHO ATTORNEY GENERAL'S ANNUAL REPORT

OPINIONS

CERTIFICATES OF REVIEW

AND

SELECTED ADVISORY LETTERS

FOR THE YEAR

2016

Lawrence G. Wasden
Attorney General

Printed by The Caxton Printers, Ltd.
Caldwell, Idaho

This volume should be cited as:

2016 Idaho Att'y Gen. Ann. Rpt.

Thus, the Official Opinion 16-1 is found at:

2016 Idaho Att'y Gen. Ann. Rpt. 5

Similarly, the Certificate of Review of March 14, 2016 is found at:

2016 Idaho Att'y Gen. Ann. Rpt. 31

The Advisory Letter of January 26, 2016 is found at:

2016 Idaho Att'y Gen. Ann. Rpt. 75

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JIM JONES 1983-1990
LARRY ECHOHAWK..... 1991-1994
ALAN G. LANCE..... 1995-2002
LAWRENCE G. WASDEN 2003

Lawrence G. Wasden

Attorney General

INTRODUCTION

Dear Fellow Idahoans:

I welcome the opportunity to share with you, as citizens and elected officials, my office's most significant achievements over the past year. 2016 was once again a successful year for the Office of the Attorney General and its contributions toward bettering the lives of Idahoans took many forms.

In my Natural Resources Division, significant steps were taken toward resolving the longstanding conflict over conjunctive management of surface and ground water in the Eastern Snake River Plain. Progress was also made on the Coeur d'Alene/Spokane River Basin adjudication. Attorneys also assisted the Department of Environmental Quality with the delegation of the Clean Water Act authority.

Consumer Protection Division highlights included obtaining $2 million for Idaho consumers from tech company Apple as resolution to our lawsuit alleging the company engaged in price fixing in the sale of eBooks. We also reached a settlement with automaker Volkswagen over emissions fraud and consumer protection violations. The Division also helped stop numerous phone, email and mail scammers attempting to prey on Idahoans.

The year saw the resolution of a high profile case from Adams County. In July, I announced that no criminal charges would be filed against two law enforcement officers in the death of Jack Yantis. This was a tragic and controversial case and one that consumed my office's Criminal Law Division for months. In the end, our investigation revealed that evidence was insufficient to support a conviction of the two deputies beyond a reasonable doubt.

My office once again held trainings across the state to promote open and transparent government. Workshops I hosted in Idaho Falls and Pocatello were joint ventures with Idahoans for Openness in Government, the Idaho Press Club and the League of Women Voters of Idaho. This focus on Idaho's Open Meeting and Public Records

INTRODUCTION (Cont.)

laws continues to serve as a model for educating local elected officials, news media and citizens on these important matters.

Finally, 2016 was my 14th year in office. As has been the trademark of my tenure, I once again conducted my office's business with this important philosophy at the forefront: To provide accurate and objective legal advice that defends Idaho's laws and sovereignty, while adhering to the Rule of Law. My office will continue to represent Idaho's legal interests in this manner throughout my tenure as Attorney General.

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

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

LAWRENCE G. WASDEN
Attorney General

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LAWRENCE G. WASDEN
ATTORNEY GENERAL
2016
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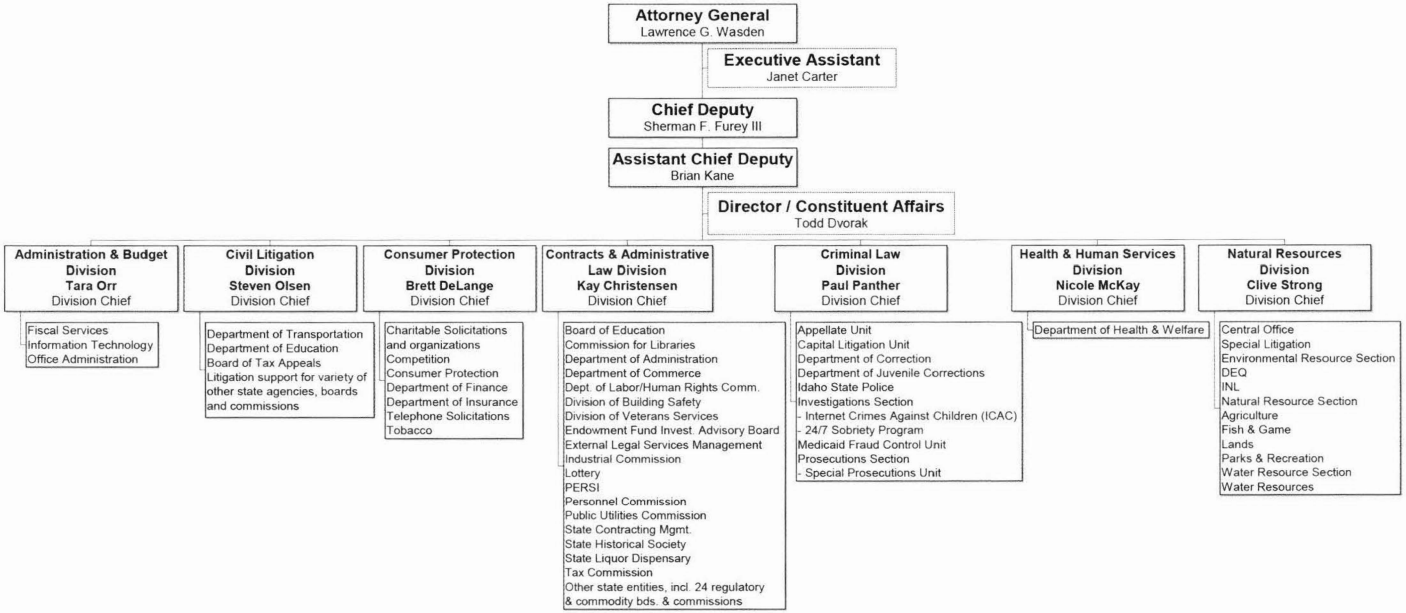
Office of the Idaho Attorney General
Organizational Chart - 2016



OFFICIAL OPINIONS
OF
THE ATTORNEY GENERAL
FOR THE YEAR 2016

LAWRENCE G. WASDEN

ATTORNEY GENERAL
STATE OF IDAHO

ATTORNEY GENERAL OPINION NO. 16-1

TO: The Honorable Lee Heider
Idaho State Senator
Statehouse
VIA HAND DELIVERY

The Honorable Fred Wood
Idaho State Representative
Statehouse
VIA HAND DELIVERY

Per Request for Attorney General's Opinion

You have asked this office for an answer to the following two questions:

QUESTIONS PRESENTED

1. Based upon the Supreme Court's decision in *North Carolina State Board of Dental Examiners v. F.T.C.,* __ U.S. __, 135 S.Ct. 1101 (2015), how must the State actively supervise Idaho's boards and commissions to preserve their immunity from antitrust liability under the State Action Doctrine?

2. What steps should the Legislature take to assist Idaho's boards and commissions in order to protect them from antitrust liability and litigation?

CONCLUSION

1. Under North Carolina Dental Exam'rs v. F.T.C., — U.S. —, 135 S. Ct. 1101, 191 L. Ed. 2d 35 (2015), the actions of certain of Idaho's boards and commissions must be overseen by a State official who is not a participant of the market the board or commission is regulating. The State official must have the authority, substantively, to review board and commission actions and veto or modify them when necessary to accord with State policy

2. It is recommended that the Legislature inquire as to the membership and control of the State's boards and commissions and determine which of those entities are "controlled" by "participants" of

the market the specific entity regulates. For such "market-participant controlled" entities, the Legislature should consider providing substantive, independent State oversight of the entities' regulatory actions.

ANALYSIS

I.

BACKGROUND TO UNDERSTANDING APPLICATION OF IMMUNITIES UNDER FEDERAL AND STATE ANTITRUST LAW

Recently, in North Carolina Dental, the U.S. Supreme Court articulated a new standard for determining whether certain state boards and commissions are entitled to immunity from antitrust actions under what is called the "State Action Doctrine." This immunity is important because it shields these boards and commissions from adverse judgments, and the expense and burden of antitrust litigation. Where the State Action Doctrine applies, it deters lawsuits from being filed. Even where a suit is filed, however, the state can promptly move to dismiss it, often before expensive and time-consuming discovery (the norm in antitrust litigation) commences. This saves the state, its boards or commissions, and their members the burden of defending such lawsuits. The State Action Doctrine is important because it allows state boards, commissions, their members, and employees to exercise their discretion over their required duties under the law without the interference of the threat of antitrust litigation.

Before North Carolina Dental, many understood that state licensing boards were afforded a broader or easier to obtain protection from antitrust suits under the State Action Doctrine's immunity. North Carolina Dental narrowed that protection by looking specifically at the composition of the boards with market participants and the actions of those boards to protect their respective markets. This means that Idaho will need to examine the composition, statutory framework and operations of its licensing boards and commissions to determine whether their activities can withstand scrutiny under North Carolina Dental.

A. Overview of Antitrust Law[1]

The federal Sherman, Clayton, and Federal Trade Commission Acts operate in concert to outlaw monopolies and other practices resulting in the unreasonable restraints of trade. They form the core of federal antitrust law. The purpose of these antitrust laws, and Idaho's Competition Act, is to promote competition in the market place. The premise for these laws is that they protect consumers from the harmful effects of monopolies and various unreasonable restraints in trade, such as price fixing, promote robust innovation, and ensure the best possible consumer choice and service. The antitrust laws work to keep the free-enterprise system functioning properly. As the Legislature has stated in the Idaho Competition Act:

> The Idaho legislature finds that fair competition is fundamental to the free market system. The unrestrained interaction of competitive forces will yield the best allocation of Idaho's economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic and social institutions.

Idaho Code § 48-102(1).

B. State Agencies Are Subject to Antitrust Law

Under principles of federalism, "States possess a significant measure of sovereignty . . . ." North Carolina Dental, 135 S. Ct. at 1110 (citations omitted). In enacting the antitrust laws, Congress has not intended to preclude states from limiting or restricting competition in order to promote other policies of import to the state. Thus, the Supreme Court has ruled that the federal antitrust laws do not reach anticompetitive conduct engaged in by a state that is acting in its sovereign capacity. Parker v. Brown, 317 U.S. 341, 351-52, 63 S. Ct. 307, 313-14, 87 L. Ed. 315 (1943). The effect of this is that the state may "impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives." North Carolina Dental, 135 S. Ct. at 1109.

But this principle of federalism does not does not automatically confer immunity from antitrust law on every state agency or commission and its members for all of its actions and decisions. How and when this immunity attaches, then, is the result of a number of U.S. Supreme Court cases, and these decisions have come to formulate what is known as the "State Action Doctrine" or "State Action Immunity."

C. State Action Immunity

In Parker v. Brown, the U.S. Supreme Court first recognized antitrust immunity for anticompetitive conduct by states, so long as the state was acting in its sovereign capacity. As the North Carolina Dental Court states, while

> [t]he Sherman Act . . . serves to promote robust competition[,] . . . . [t]he States . . . need not adhere in all contexts to a model of unfettered competition. . . . [T]hey [the States] impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives. If every . . . state law or policy were required to conform to . . . the Sherman Act, thus promoting competition at the expense of other values a State may deem fundamental, federal antitrust law would impose an impermissible burden on the States' power to regulate. [Citations omitted.]
>
> For these reasons, . . . *Parker v. Brown* interpreted the antitrust laws to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity. [Citation omitted.] [*Parker*] recognized Congress' purpose to respect the federal balance and to "embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution." [Citation omitted.]

135 S. Ct. at 1109-10 (citations omitted).

The State Action Doctrine or State Action Immunity was first known as "Parker Immunity." Since Parker, the Supreme Court has extended and fleshed out the application of this immunity. There are three general groups or entities that qualify (some under specific enumerated conditions) for State Action Immunity: (1) the state acting as sovereign; (2) subordinate state-created governmental entities and municipalities; and (3) subordinate state-created governmental entities in which private parties serve on the entity's board or commission.

1. Actions by the State as a Sovereign

Actions taken directly by the state in its sovereign capacity (i.e., the legislative, judicial, or executive branch) are automatically exempted from antitrust liability. Hoover v. Ronwin, 466 U.S. 558, 574, 579-80, 104 S. Ct. 1989, 1998, 2001, 80 L. Ed. 2d 590 (1984). The sovereign's State Action Immunity is broad and complete. It is not affected by whether the state's action in question was illegal or the result of bribery. City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 378, 111 S. Ct. 1344, 1353, 113 L. Ed. 2d 382 (1991). Nor will this antitrust immunity be defeated because the state officials have conspired with private parties. *Id.* at 374. With the possible exception of instances where the state itself is acting as a market participant, *any* action of the state in its sovereign capacity qualifies for State Action Immunity and is per se exempt from the scope of the antitrust laws.

2. Actions by Subordinate Government Entities and Municipalities Without Private Participants on the Entities' Board or Commission

"State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity." North Carolina Dental, 135 S. Ct. at 1111. Subordinate state governmental entities and municipalities have State Action Immunity, but only so long as they are acting pursuant to a "clearly articulated and affirmatively expressed state policy to displace competition," the details of which are discussed below. If the subordinate state governmental entity includes private parties on the entity's board or

commission, however, then there is an additional requirement to be satisfied before immunity will attach, discussed next.

3. Actions by Subordinate Government Entities and Municipalities With Private Participants on the Entities' Board or Commission

A subordinate state government entity that includes private parties serving on its board or commission can qualify for State Action Immunity only if the anticompetitive conduct at issue satisfies two separate tests. First, as is true for subordinate state governmental entities in general, the action must be pursuant to a "clearly articulated and affirmatively expressed state policy" to displace competition. The second requirement is that the action at issue must also be "actively supervised by the State itself." Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 100 S. Ct. 937, 940, 63 L. Ed. 2d 233 (1980). These two tests are discussed in detail below.

Prior to North Carolina Dental, many assumed that state licensing boards and commissions fit within the second group of subordinate state entities and that to obtain State Action Immunity all the regulatory board or commission needed to do was establish that its contested action was pursuant to the "clearly articulated and affirmatively expressed state policy" test mentioned above. North Carolina Dental invalidates that assumption, at least with respect to those entities where the board or commission is "controlled" by market participants.

a. Market-Participant-Controlled-State Agencies

It is first necessary to define a market-participant-controlled-state agency. According to the Federal Trade Commission (F.T.C.),[2] a market participant is a person who (i) is licensed by the board or commission engaged in the alleged anticompetitive conduct or who (ii) provides any service that is subject to the regulatory authority of the board. Thus, a doctor on a medical board would be a market participant. A shampooer on a cosmetology board that not only regulates cosmetologists but shampooers would be a market participant, too. *F.T.C. Staff Guidance on Active Supervision of State*

Regulatory Boards Controlled by Market Participants, p. 7 (October 2015).

The F.T.C. has stated that a person who "temporarily suspends" his or her active participation in an occupation "for the purpose of serving on a board or commission that regulates his or her former (and intended future) occupation" will still be considered a market participant. *Id.*[3]

If a state board or commission has market participants serving on them, then the inquiry focuses on whether these persons "control" the regulating entity. The F.T.C. has also discussed what constitutes "control" of boards or commissions by market participants:

> Active market participants need not constitute a numerical majority of the members of a state regulatory board in order to trigger the requirement of active supervision. A decision that is controlled, either as a matter of law, procedure, or fact, by active participants in the regulated market *(e.g.,* through veto power, tradition, or practice) must be actively supervised to be eligible for the state action defense.

F.T.C. Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants, p. 8 (October 2015).

The sum of this is that those entities in which market participants constitute a majority of the board or commission will meet the test of an entity controlled by market participants. The mere lack of a majority of market participants on a board or commission will not be definitive of whether the entity is controlled by market participants. Rather, there will need to be additional scrutiny, on a fact-specific basis, of whether the entity is nonetheless controlled by market participants through veto power, tradition, or practice. And, it is fair to say that there will be instances in which a board or commission is deemed controlled by market participants even when the majority of the board or commission is made up of non-market participants.

State entities that are "controlled" by "market participants," then, will need to satisfy the two tests mentioned above and

discussed in detail below to obtain State Action Immunity. It is to these two tests we now turn.

b. The Clear Articulation Test

The clear articulation test requires the anticompetitive action under review to be a foreseeable result of the action authorized by the state. An express statement that the state intends the action to have anticompetitive effects is ideal, but not necessary. Generalized grants of power, on the other hand, are insufficient to express a state policy to displace competition.

With respect to the clear articulation test, if the statutory provision or rule plainly shows that the state contemplated the sort of activity which is challenged, the "clear articulation" requirement is satisfied. Town of Hallie v. City of Eau Claire, 471 U.S. 34, 44, 105 S. Ct. 1713, 1719, 85 L. Ed. 2d 24 (1985). In S. Motor Carriers Rate Conference, Inc. v. U.S., 471 U.S. 48, 64-65, 105 S. Ct. 1721, 1730-31, 85 L. Ed. 2d 36 (1985) (citations omitted), the Court held that "a state policy that expressly *permits*, but does not compel, anticompetitive behavior may be 'clearly articulated . . .'" *Id.* at 61, (footnote omitted). The most recent Supreme Court case to address the clear articulation test is F.T.C. v. Phoebe Putney Health Sys., Inc., — U.S. —, 133 S. Ct. 1003, 185 L. Ed. 2d 43 (2013). In that case, the Court stated that the clear articulation requirement is satisfied "where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals." *Id.* at 1013.

As noted above, the State's clear articulation of the intent to displace competition is not alone sufficient to trigger State Action Immunity for those regulatory licensing boards and commissions controlled by market participants. The reason for this, according to the U.S. Supreme Court, is that a legislature's clearly-articulated delegation of authority to such a state regulatory entity to displace competition may be "defined at so high a level of generality as to leave open critical questions about how and to what extent the market should be regulated." The concern for such boards or commissions,

then, is that the delegated discretion will be used by active market participants to pursue private interests in restraining trade, in lieu of implementing the state's policy goals. North Carolina Dental, 135 S. Ct. at 1112. Accordingly, the Supreme Court has also required that the conduct at issue of such market-participant-controlled boards or commissions be actively supervised by the state.

c. The Active Supervision Test

With respect to the active supervision test, in order to meet this requirement, it must be shown that the state "'exercise[s] ultimate control over the challenged anticompetitive conduct.'" F.T.C. v. Ticor Title Ins. Co., 504 U.S. 621, 634, 112 S. Ct. 2169, 2177, 119 L. Ed. 2d 410 (1992) *quoting* Patrick v. Burget, 486 U.S. 94, 101, 108 S. Ct. 1658, 1663, 100 L. Ed. 2d 83 (1988). The test requires that "'state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.'" *Id.* In other words, the inquiry is "whether private parties or public authorities made the operative decisions regarding the challenged anticompetitive conduct." Mun. Utilities Bd. v. Ala. Power Co., 934 F.2d 1493, 1503 (11th Cir. 1991).

Active supervision does not require the state to micromanage a board or commission or even be involved on a daily basis. On the other hand, it is clear that rubber-stamped approval will be inadequate. Active supervision lies somewhere between these two positions. There must be enough state involvement and oversight to make the actions of the agency those of the state and not a hidden advancement of private interests.

The North Carolina Dental Court provided three benchmarks for active state supervision:

> (1) The supervisor (who could be a legislative board or other disinterested state official) must review the substance of the anticompetitive decision, not merely the procedures;
>
> (2) The supervisor must have the power to veto or modify decisions to accord with the clearly articulated policy of the State; and
>
> (3) The supervisor cannot be a market participant.

See North Carolina Dental, 135 S. Ct. at 1116.

Other than these requirements, active supervision is a circumstantial determination. The guiding principal is this: The state's review mechanism must provide a realistic assurance that the anticompetitive conduct that has been undertaken promotes state policy rather than private interests.

D. North Carolina Dental Should Not Cause Concern In Many Routine Situations

A few additional observations are warranted as regards to State Action Immunity. First, if the challenged conduct is the enactment of an Idaho statute or the adoption of a rule, both should be immune from challenge as a result of the Legislature's action of enacting the statute at question or, annually, expressly approving the rule at issue. This action by the Legislature is action by the sovereign and is immune from liability.

Second, if the antitrust challenge involves the literal application or interpretation of a rule or statute, the revocation of a license due to a materially false statement about one's qualifications in an application, for example, it is probably not necessary for there to be active supervision of such denial or revocation. The *F.T.C. Staff Guidance* provides the following example:

> A state statute requires that an applicant for a chauffeur's license submit to the regulatory board, among other things, a copy of the applicant's diploma and a certified check for $500. An applicant fails to submit the required materials. If for this reason the regulatory board declines to issue a chauffeur's license to the applicant, such action would not be considered an unreasonable restraint. In the circumstances described, the denial of a license is a ministerial or non-discretionary act of the regulatory board.

F.T.C. Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants, p. 6 (October 2015).

Third, the fact that State Action Immunity may not apply or cover a specific state agency or commission, or its members, does not mean that the entity will necessarily be liable under the antitrust laws. There are other immunities that may apply. For example, in general, a regulatory agency can initiate and prosecute a lawsuit. Such petitioning of the court, so long as it is not a sham, is conduct protected by a separate antitrust exemption. Prof'l Real Estate Investors v. Columbia Pictures Indus., 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993).

Further, even where there is no applicable exemption, not all restraints of trade violate the antitrust laws. For starters, the antitrust laws only prohibit unreasonable restraints of trade. Standard Oil Co. of N.J. v. U.S., 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911). Thus, for example, a regulatory board may prohibit members of the occupation from engaging in fraudulent business practices without creating antitrust liability; such action is not an unreasonable restraint of trade. Indeed, it is a reasonable one. Likewise, a regulatory board also may prohibit members of the occupation from engaging in untruthful or deceptive advertising. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999).

II.

NECESSARY STATE LAWS AND PRACTICES TO ENSURE APPLICATION OF STATE ACTION IMMUNITY TO ACTIONS OF MARKET-PARTICIPANT-CONTROLLED-STATE BOARDS AND COMMISSIONS AND THEIR MEMBERS

A. Current Makeup of Idaho Boards and Commissions

Fundamentally, qualification for State Action Immunity turns on the makeup and structure of Idaho's boards and commissions. This will be challenging, because Idaho's boards and commissions are structured in a variety of ways. The Department of Self-Governing Agencies has within it the Division of Building Safety, the Idaho Commission on Hispanic Affairs, the Idaho State Historical Society, the Idaho Commission for Libraries, the Idaho State Lottery, the State Appellate Public Defender, the Real Estate Commission and the Division of Veterans Services. While most of these agencies do not

license occupations and are not populated by market participants, there are a few that do—health related boards, the Real Estate Commission, and the Division of Building Safety contain boards that are so populated.

Also within the Department of Self Governing Agencies is the statutorily-created Bureau of Occupational Licensing. *See* Idaho Code § 67-2601, *et seq.* The Bureau is authorized to provide "administrative or other services as provided by law," Idaho Code § 67-2602(1), to more than 30 agencies, many of which license and regulate various professions and whose boards or commissions are populated by a controlling number of market participants.[4]

Where an Idaho board or commission is located, or how their members are appointed, however, is irrelevant for purposes of State Action Immunity, because in no instance, except the Idaho State Bar and (as noted above) the Legislature's review and oversight over agency rulemakings, is any Idaho market-participant-controlled board or commission at present overseen by an independent state official with the authority to approve, veto, or modify decisions of the respective board or commission, as consistent with state policies.[5]

The Department of Self Governing Agencies is a department in name only; there is presently no director to oversee the boards and commissions within the Department and there is no state official with the authority to approve, veto or modify their decisions, again to ensure that state policies are being upheld. For those entities located within the Bureau of Occupational Licensing, there is, again, no statutory authority granted the Chief of the Bureau authority to approve, veto, or modify decisions of the Bureau's respective boards or commissions.

This present lack of active state supervision of the state's market-participant-controlled boards and commissions is fatal to the application of State Action Immunity for such state entities. There are a couple of ways to address this, however, should the Legislature wish to obtain State Action Immunity for its boards and commissions.[6] These options are discussed below.

B. Potential Solutions for Increasing State Supervision of Market-Participant-Controlled State Boards and Commissions

1. Increase Non-Market Participant (Public) Membership on Boards

The first course of action would be to provide that for market-participant-controlled boards and commissions there be an increase in public (non-market participant) members serving thereon, such that the market participants do not control the board. Equally available would be a provision decreasing the number of market participants such that there is no longer a market participant control issue. This alternative must strike an appropriate balance between the need for subject area expertise within the board with a check on the ability of the board to control market access. Many no doubt share the view expressed by Justice Breyer during oral argument in the North Carolina Dental case: "[W]hat the State says is: We would like this group of brain surgeons to decide who can practice brain surgery in this State. I don't want a group of bureaucrats deciding that. I would like brain surgeons to decide that." North Carolina Dental, transcript of oral argument, Tr. p. 31 (Oct. 14, 2014), available online at http://www.supremecourt.gov/oral_arguments/argument_ transcripts/13-534_16hl.pdf. This means that care will need to be taken to preserve a balance of expertise with a balance of active engaged non-market participant board members.

2. Assign an Independent State Official the Authority to Approve, Reject, or Modify Market-Participant-Controlled Board Decisions

The second option would be to provide that the decisions of market-participant-controlled boards and commissions shall be subject to review by an independent state official with the authority to approve, veto or modify their decisions, as consistent with state policies. This could be done in a variety of ways, but the requirements would be straightforward: for each market-participant-controlled Idaho board and commission, decisions regarding licensees would be advisory in nature and, before becoming effectual,

must be reviewed by an independent state official with authority to approve, veto or modify such decisions. The F.T.C. has endorsed this approach:

> Suppose that, acting in its adjudicatory capacity, a regulatory board controlled by active market participants determines that a licensee has violated a lawful and valid standard of ethics, competency, conduct, or performance, and for this reason, the regulatory board proposes that the licensee's license to practice in the state be revoked or suspended. In order to invoke the state action defense, the regulatory board would need to show both clear articulation and active supervision.
>
> In this context, active supervision may be provided by the administrator who oversees the regulatory board (*e.g.,* the secretary of health), the state attorney general, or another state official who is not an active market participant. The active supervision requirement of the state action defense will be satisfied if the supervisor: (i) reviews the evidentiary record created by the regulatory board; (ii) supplements this evidentiary record if and as appropriate; (iii) undertakes a de novo review of the substantive merits of the proposed disciplinary action, assessing whether the proposed disciplinary action comports with the policies and standards established by the state legislature; and (iv) issues a written decision that approves, modifies, or disapproves the disciplinary action proposed by the regulatory board.

F.T.C. Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants, p. 12 (October 2015).

3. <u>The Necessity of Boards and Commissions Should Be Evaluated</u>

North Carolina Dental provides the Legislature with the opportunity to evaluate the propagation of its boards and commissions to determine their necessity. This office takes no position on any board or commission, but recognizes that with the antitrust issues related to market participant controlled boards, it may make more legal sense to limit such boards and commissions to only those that the Governor and Legislature find absolutely necessary in order to carry out state policies.

CONCLUSION

North Carolina Dental has forced states to evaluate anew their various board and commission makeup and oversight, to the degree they wish for State Action Immunity to continue to apply to the actions and decisions of such boards and commissions. Specifically, the case requires states to consider the makeup of those boards and commissions that are controlled by market participants and how to actively supervise them. Active state supervision will be satisfied when a non-market-participant state official has and exercises power to substantively review such entities' decisions and determine whether the action at issue effectuates the state's regulatory policies. Where the action does effectuate state policies, the state official will need to have the authority to, and in fact, approve the action. Where the action does not effectuate state policies, the state official will need to have the authority, and in fact, utilize it to modify or veto such actions.

AUTHORITIES CONSIDERED

1. Idaho Code:

§ 3-408.
§ 48-102(1).
§ 48-102(3).
§ 48-107(1)(a).
§ 67-2601, et seq.
§ 67-2602(1).

2. Session Laws:

2001 Idaho Sess. Laws 1.

3. United States Supreme Court Cases:

Cal. Dental Ass'n v. FTC, 526 U.S. 756, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999).

Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980).

City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991).

F.T.C. v. Phoebe Putney Health Sys., Inc., — U.S. —, 133 S. Ct. 1003, 185 L. Ed. 2d 43 (2013).

F.T.C. v. Ticor Title Ins. Co., 504 U.S. 621, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992).

Hoover v. Ronwin, 466 U.S. 558, 104 S. Ct. 1989, 80 L. Ed. 2d 590 (1984).

North Carolina Dental Exam'rs v. F.T.C., — U.S. —, 135 S. Ct. 1101, 191 L. Ed. 2d 35 (2015).

Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943).

Patrick v. Burget, 486 U.S. 94, 108 S. Ct. 1658, 100 L. Ed. 2d 83 (1988).

Prof'l Real Estate Investors v. Columbia Pictures Indus., 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993).

S. Motor Carriers Rate Conference, Inc. v. U.S., 471 U.S. 48, 105 S. Ct. 1721, 85 L. Ed. 2d 36 (1985).

Standard Oil Co. of N.J. v. U.S., 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911).

Town of Hallie v. City of Eau Claire, 471 U.S. 34, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985).

4. Other Cases:

Mun. Utilities Bd. v. Ala. Power Co., 934 F.2d 1493 (11th Cir. 1991).

Saint Alphonsus Med. Ctr.-Nampa, Inc. v. St. Luke's Health System, Ltd., 778 F.3d 775 (9th Cir. 2015).

Snake River Valley Elec. Ass'n v. PacifiCorp, 238 F.3d 1189 (9th Cir. 2001).

Snake River Valley Elec. Ass'n v. PacifiCorp, 357 F.3d 1042 (9th Cir. 2004).

5. Other Authorities:

F.T.C. Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants (October 2015).

Dated this 13th day of January, 2016.

LAWRENCE G. WASDEN
Attorney General

Analysis by:

BRETT T. DELANGE
Deputy Attorney General

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[1] Because the Idaho Competition Act is to be interpreted in harmony with interpretations of federal antitrust law, Idaho Code § 48-102(3), and the Act provides that activities exempt under federal antitrust laws are also exempt under Idaho's Act, Idaho Code § 48-107(1)(a), the analysis herein regarding the State Action Doctrine is the same under both federal and state antitrust law. *Accord* Saint Alphonsus Med. Ctr.-Nampa, Inc. v. St. Luke's Health System, Ltd., 778 F.3d 775, 782 n.5 (9th Cir 2015).

[2] The F.T.C. and the U.S. Department of Justice are the two federal agencies with authority to enforce federal antitrust laws.

[3] The F.T.C.'s language suggests that a person who has retired and does not plan to return to his or her occupation will not be considered a market participant, but the F.T.C. did not explicitly state this and there is no further guidance at this time on this point.

[4] Under Idaho Code § 67-2602(1), agencies serviced by the Bureau of Occupational Licensing include: Board of Acupuncture, Board of Architectural Examiners, Athletic Commission, Board of Barber Examiners, Certified Shorthand Reporters Board, Board of Chiropractic Physicians, Idaho Contractors Board, Board of Cosmetology, Licensing Board of Professional Counselors and Marriage and Family Therapists, State Board of Denturitry, Drinking Water and Wastewater Professionals, State Driving Businesses Licensure Board, Idaho Board of Massage Therapy, Idaho Board of Registration for Professional Geologists, Speech and Hearing Services Licensure Board, Physical Therapy Licensure Board, Board of Landscape Architects, Liquefied Petroleum Gas Safety Board, Board of Morticians, Board of Naturopathic Medical Examiners, Board of Examiners of Nursing Home Administrators, Occupational Therapy Licensure Board, Board of Optometry, Board of Podiatry, Board of Psychologist Examiners, Real Estate Appraiser Board, Board of Examiners of Residential Care Facility Administrators, Board of Social Work Examiners, Board of Midwifery, and "such other professional and occupational licensing boards or commodity commissions as may request such services."

[5] The Idaho State Bar is a market-participant-controlled board. However, the rule making authority of the Board is subject to the approval of the Idaho Supreme Court. Idaho Code § 3-408. Likewise, the Board investigates and recommends disciplinary action it believes warranted to the Idaho Supreme Court, which then enters judgments in the matter "as it deems proper." *Id.* Such licensing decisions by the Court should be deemed decisions of the sovereign and thus entitled to blanket State Action Immunity. *Compare* Hoover, 466 U.S. at 567-68 (State Supreme Court acts in a legislative capacity in adopting rules and as such is undertaking action of the State and thus exempt from the antitrust laws).

[6] This would not be the first time the Legislature has enacted legislation to ensure State Action Immunity for Idaho governmental entities.

In Snake River Valley Elec. Ass'n v. PacifiCorp, 238 F.3d 1189, 1191 (9th Cir. 2001) (Snake River I) the plaintiff sued an electric utility over how it was providing electric transmission services. The utility, joined by the State of Idaho, argued that the utility's actions, under state law, were protected by State Action Immunity. The district court agreed, but that decision was reversed by the Ninth Circuit Court of Appeals in Snake River I. The Ninth Circuit agreed that the State of Idaho had clearly articulated and affirmatively expressed a state policy of restraining competition in electric transmission services. *Id.* at 1193. The Ninth Circuit held, however, that the State of Idaho did not actively supervise these policies. *Id.* at 1195. The Court stated, however, the following: "It should be clear that Idaho's situation . . . could be addressed by legislative action providing for supervision." *Id.*

The Legislature responded to the Ninth Circuit's invitation. On December 8, 2000, just two months after the Ninth Circuit's initial decision, the Governor convened the Legislature in an Extraordinary Session to deal exclusively with this issue and as a result enacted House Bill No. 1. 2001 Idaho Sess. Laws 1. Back in court, the district court ruled that the changes enacted established active state supervision such that State Action Immunity would now be applicable under the facts of the case. That decision was again appealed and the Ninth Circuit, this time, ruled in support of State Action Immunity. *See* Snake River Valley Elec. Ass'n v. PacifiCorp, 357 F.3d 1042, 1050 (9th Cir. 2004).

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ATTORNEY GENERAL'S CERTIFICATES OF REVIEW FOR THE YEAR 2016

LAWRENCE G. WASDEN

ATTORNEY GENERAL
STATE OF IDAHO

March 14, 2016

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

RE: Certificate of Review
Proposed Initiative Amending the Idaho Sunshine Law to Limit Campaign Contributions by Persons Doing Public Business, to Amend Statutes Related to Bribery, and to Add a New Statute for Post-Employment Restrictions on Public Officials

Dear Secretary of State Denney:

An initiative petition was filed with your office on February 16, 2016. 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." 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, nor the potential revenue impact to the state budget.

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 was submitted by a former member of the Idaho Legislature. Unsurprisingly, it is in proper legislative format for showing amendments to statute by striking out deleted words and underlining added words, with the exception of Section 8. It is not necessary to underline Section 8's newly proposed Idaho Code section because it is not amending an existing section of the Idaho Code. The Proposed Initiative's capitalization conventions may differ from those used by Legislative Services Office, but in the end that is of little consequence.

SUMMARY OF INITIATIVE AND MATTERS OF SUBSTANTIVE IMPORT

The Proposed Initiative does the following:

Section 1 amends Idaho Code § 67-6002, the definitional section of the Sunshine Law, to add two new definitions — "Person doing public business" and "Principal of a person doing public business" — that contain specific reference to a statutory definition of "Contractor" in the Department of Administration's statutes for procurement or purchasing.

Section 2 amends Idaho Code § 67-6610A of the Sunshine Law to reduce the cap on campaign contributions to a candidate for State Legislature from $1,000 to $500 and the cap on campaign contributions to a candidate for statewide office from $5,000 to $2,000 and to prohibit persons doing public business from contributing to candidates or political committees.

Section 3 amends Idaho Code § 67-6612 of the Sunshine Law to require that Sunshine Law reports filed by political treasurers for candidates and political committees must list the full name and address of the employer and the occupation of each person who contributed more than $50 to the candidate or political treasurer.

Section 4 amends Idaho Code § 67-6623 of the Sunshine Law to require Sunshine Law reports to be submitted in electronic, machine-readable form, to require the Secretary of State to provide necessary software for such filings upon request, and to require the Secretary of State to post such reports within 24 hours of receipt.

Section 5 amends Idaho Code § 67-6625 of the Sunshine Law:

(a) to increase the maximum fine for various violations of the Sunshine Law for individuals from $250 to $2,500 or up to twice the amount of the contribution or expenditure involved, and for persons other than individuals from $2,500 to $10,000 or twice the amount of the contribution or expenditure involved;

(b) to add a new provision for fines for willful or knowing violations of the Sunshine Law for individuals up to a maximum of $5,000 or three times the amount of the contribution or expenditure involved, and for persons other than individuals of up to $20,000 or three times the amount of the contribution or expenditure involved; and

(c) to add a subsection (c) to make knowing or willful violation of certain Sunshine Law requirements regarding receiving, giving or reporting of contributions or expenditures aggregating $25,000 or more in a calendar year a felony.

Section 6 amends Idaho Code § 18-1351, the definitional section of the Bribery and Corrupt Practices Act, to add definitions of "Gift" and "Lobbyist."

Section 7 amends Idaho Code § 18-1356 of the Bribery and Corrupt Practices Act to prohibit any lobbyist from giving to and any legislator or employee of the Legislature soliciting, accepting or agreeing to accept from any one lobbyist any gifts

aggregating more than $50 in value in a calendar year and makes other changes.

Section 8 enacts a new Idaho Code § 74-407 to be added to the Ethics in Government Act that makes it a felony for any public official of the state to receive compensation for lobbying within a year after leaving office.

This office has no comments on Section 1, which adds two straightforward definitions to the Sunshine Law; Section 4, which requires electronic Sunshine Law reporting to the Secretary of State; or to Section 6, which adds two straightforward definitions to the Bribery and Corrupt Practices Act. This office comments upon the remaining sections as follows.

Section 2

Section 2 reduces the maximum campaign contribution limit by an individual, corporation, political committee, or other recognized entity to a legislative candidate or to the candidate's committee for a primary election and for a general election from $1,000 to $500. It likewise reduces contribution limits for candidates for statewide office from $5,000 to $2,500. It prohibits all contributions from a person doing public business or the principal of a person doing public business or who did public business in the preceding two years. Section 1's amendments defined those doing public business as those with a contract that could exceed $250,000 in payments to the contractor.

Section 2's limits on campaign contributions are likely to be constitutional, but may be in a gray area in which recent case law has not addressed the exact contributions limits. Unlike independent expenditures, which cannot be limited, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010), contributions to a candidate can be limited in order to prevent the actuality of or appearance of corruption, 558 U.S. at 345-346, *citing* Buckley v. Valeo, 424 U.S. 1, 23-25, 96 S. Ct. 612, 636-38, 46 L. Ed. 2d 659 (1976). The issue left open by Buckley is how low a campaign contribution limit may go before it is unconstitutionally low. The United States Supreme Court has not directly addressed that

question and one is left to fill in the gaps by analyzing decisions of the lower courts. This is how several lower courts have drawn the line:

In Foster v. Dilger, 2010 WL 3620238 (E.D. Ky. 2010), the Federal District Court of Kentucky entered a preliminary injunction against enforcing a statute that limited contributions to candidates for school board election to $100. In Frank v. City of Akron, 290 F.3d 813, 817 (6th Cir. 2002), *cert. denied*, 537 U.S. 1160, 123 S. Ct. 968, 154 L. Ed. 2d 894 (2003), the Sixth Circuit upheld a $300 contribution limit to candidates for citywide office and $100 to candidates running for city office, but not citywide. In Citizens for Responsible Gov't State Political Action Comm. v. Buckley, 60 F. Supp. 2d 1066, 1086-87 (D. Colo. 1999), *reversed in part on other grounds*, 236 F.3d 1174 (10th Cir. 2000), the Federal District Court of Colorado struck down $500 limits on contributions to candidates for statewide office and $100 limits on contributions for candidates for state legislature. In Florida Right to Life, Inc. v. Mortham, 1998 WL 1735137 (M.D. Fla. 1998), the Federal District Court of Florida upheld $500 limits to candidates (which on its face seemed to apply to candidates for legislative and statewide office) for the primary election and $500 for the general election. Given these and other decisions, none of which were reviewed by the United States Supreme Court, Section 2's limits are probably constitutional, but they are nevertheless in a gray zone of some uncertainty as inflation erodes the value of limits that were once held to be constitutional.

Section 2's complete ban on contributions by people doing public business requires a separate analysis. The District of Columbia Court of Appeals recently upheld against First Amendment challenges federal law prohibitions against U.S. Government contractors contributing to candidates for federal office. Wagner v. Fed. Election Comm'n, 793 F.3d 1, 22-26 (D.C. Cir. 2015), *cert. denied* — U.S. —, 136 S. Ct. 895, 193 L. Ed. 2d 789 (2016). The Ninth Circuit recently upheld a similar prohibition under Hawai'ian law. Yamada v. Snipes, 786 F.3d 1182, 1205-207 (9th Cir. 2015). These decisions do not address the eight definitions of "principals" of persons doing public business found in Section 1,[1] so they do not stand for the proposition that there is case law upholding the prohibition of each of these categories of "principal" contributing to a candidate, but they would almost certainly stand for the proposition

that the prohibition could be applied to some of these statutorily defined principals. It may take individual case determinations to decide which of the eight definitions of "principal or a person doing public business" may be constitutionally prohibited from donating to a candidate. For example, a court might conclude that the adult son or daughter of an individual who works ten hours a week in the office of a lobbyist for the person doing public business, but whose mother or father lobbies exclusively on issues unrelated to public business during those ten hours a week, while literally falling within the scope of subsections (6)'s and (7)'s reach, is too far attenuated from the person doing public business that the First Amendment would prohibit applying this section to that person.

Section 3

Section 3 requires reporting the occupation of each campaign contributor who gives $50 or more and the contributor's employer's full name. Family PAC v. McKenna, 685 F.3d 800, 803, 805-11 (9th Cir. 2012), upheld a Washington statute that required "a political committee to report the name and address of each person contributing more than $25 to the committee" and "the occupation and employer of each person contributing more than $100 to the committee." Frank, 290 F.3d at 818-819, upheld a $25 reporting requirement for contributors to municipal campaigns and $50 requirement for reporting contributors' principal employer. Minn. State Ethical Practices Bd. v. Nat'l Rifle Ass'n of Am., 761 F.2d 509, 512 (8th Cir. 1985), upheld employer reporting requirements for those contributing $50 or more for a legislative race and $100 or more for a statewide race. Thus, Section 3's reporting requirements are probably constitutional, although there are no recent reported decisions on whether $50 is too low to trigger an employer reporting obligation.

Section 5

Section 5 increases the maximum penalty for Sunshine Law reporting requirements tenfold or more and allows "treble damages" as measured by the amount of the unreported contribution or expenditure. This section implicates the Eighth Amendment (excessive fines) as well as the First Amendment. In Combat

Veterans for Cong. Political Action Comm. v. Fed. Election Comm'n, 983 F. Supp. 2d 1, 8, 18-20 (D.D.C. 2013), *aff'd* 795 F.3d 151 (D.C. Cir. 2015), the District Court for the District of Columbia affirmed against Eighth Amendment and First Amendment challenges to administrative penalties of $4,400 for a tardy election sensitive report with $75,000–$99,999.99 of activity, $3,300 for another tardy election sensitive report with $50,000–$74,999.99 of activity, and $990 for a third tardy non-election sensitive report with $25,000–$49,999.99 of activity. "Denial of Combat Veteran's claims requires no explanation beyond what the district court provided." Combat Veterans for Cong. Political Action Comm. v. Fed. Election Comm'n, 795 F.3d 151, 159 (D.C. Cir. 2015). Thus, some level of fines or penalties may be constitutionally imposed for failing to report or untimely reporting of campaign contributions or expenditures.

I did not find case law regarding the facial constitutionality of maximum fines of $2,500 for individuals' violations, $10,000 for others' violations, $5,000 for individuals' knowing violations, and $20,000 for others' knowing violations, or "treble damages" for all of these categories as measured by "the amount of contribution or expenditure involved in such violation." I suspect that Idaho courts would hold that a fine in these ranges would be unconstitutional as applied to relatively small unreported contributions or expenditures and could find "treble damages" also to be unconstitutional as applied or per se. However, the possibility of a successful as-applied challenge to imposition of the maximum fines for a relatively minor reporting violation does not make the statute unconstitutional per se; on the contrary, given the case law cited in the previous paragraph, this section should withstand a facial constitutional challenge. On the other hand, imposition of the maximum fine for tardy reporting of a $50 contribution would likely be an excessive fine.

Section 7

This section does not amend the Sunshine Law; it amends the Bribery and Corruption Chapter of the Criminal Code. It prohibits lobbyists from giving and legislators and employees of the Legislature from accepting gifts of more than $50 in aggregate value from any one lobbyist in any one calendar year. Section 6 in turn defines "gifts" to include "any item, good or service having monetary value including

without limitation any loan, hospitality, discount, forbearance, services, training, transportation, food and beverage, [or] lodging and meals."

There is abundant case regarding reporting of gifts to public officials, but much less concerning criminalizing gifts to public officials, perhaps because laws on the former are more widespread than laws on the latter. In Scaccia v. State Ethics Comm'n, 727 N.E.2d 824 (Mass. 2000), the Supreme Judicial Court of Massachusetts reviewed the imposition of an administrative fine for a legislator accused, among other things, of accepting and not reporting gifts from lobbyists exceeding the Massachusetts statute's $100 maximum. Scaccia affirmed the findings and civil fine under the gift statute, noting that the legislator involved had invoked his Fifth Amendment right not to testify in the administrative proceeding. From this I glean that there does not seem to be case law prohibiting a legislator from accepting gifts from lobbyists above a certain amount; otherwise, the Court or a party would have found that case law. I could not find any such case law either. I therefore conclude that it is very likely that Section 7's prohibition on a legislator's or legislative employee from accepting gifts from a lobbyist exceeding $50 in a calendar year is constitutional, even if there are criminal sanctions rather than civil.

Section 8

As for the constitutionality of prohibiting former public officials from lobbying for compensation for a year after leaving office, there is abundant case law that this prohibition is generally constitutional. Statutes like this proposed new section are often known as "revolving door" statutes because they seek to prevent public officials from immediately "cashing in" on their knowledge and influence as a public official by going through the "revolving door" from regulator to regulated without a "cooling off" period in between.

In Brinkman v. Budish, 692 F. Supp. 2d 855, 862-63, 864 (S.D. Ohio 2010), the Federal District Court for Ohio recognized, in its post-Citizens United analysis, that preventing corruption or the appearance of corruption served a compelling state interest and justified Ohio's one-year, anti-revolving door prohibition against lobbying for compensation after leaving the Ohio Legislature ("Defendants have

established compelling interests justifying O.R.C. § 102.03(A)(4) as applied to compensated lobbying"), although the Court invalidated a ban on uncompensated lobbying under the First Amendment. In Ortiz v. Taxation & Revenue Dep't, Motor Vehicle Div., 954 P.2d 109, 111-114 (N.M. Ct. App. 1998), the New Mexico Court of Appeals upheld New Mexico's revolving door statute and cited cases from Florida, Louisiana, New York, and Rhode Island that had upheld similar measures. *But see* Shaulis v. Pennsylvania State Ethics Com'n, 833 A.2d 123, 130-32 (Pa. 2003) (revolving door statute was unconstitutional to the extent that it infringed on Pennsylvania Supreme Court's authority to regulate practice of law).[2]

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 Holli Woodings, 1148 Santa Maria Dr., Boise, Idaho 83712.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

Michael S. Gilmore
Deputy Attorney General

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[1] Section 1's amendment to Idaho Code § 67-6002 defines eight categories of principals of a person doing public business that persons take corporate or other form other than an individual:

(1) any individual who is a corporate officer or member of the board of directors;

(2) any person who has an ownership interest of five percent or more;

(3) any person with a voting interest of five percent or more;

(4) any individual who is an employee with managerial or discretionary responsibilities with respect to the receipt of [or] expenditure of State funds;
(5) any lobbyist employed by such corporation, firm, partnership or limited liability company;
(6) any employee or contractor of such lobbyist engaged in lobbying on behalf of or for the benefit of the same employer;
(7) the spouse or child of an individual described in any of the preceding subparagraphs of this paragraph; and
(8) a political committee established, maintained or controlled by any person or individual described in any other subparagraph of this paragraph.

Subsection (4) quoted above may contain an error in form indicated by the bracketed substitution of "or" for "of."

[2] If the proposed revolving door statute were held not to apply to Idaho attorneys in the practice of law, the attorneys would still be subject to the Idaho Rules of Professional Conduct, which include Rule 1.11: Special Conflicts of Interest for Former and Current Government Officers and Employees.

September 2, 2016

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

Re: Certificate of Review
Proposed Initiative Related to Legalization of Medical Use of Marijuana

Dear Secretary of State Denney:

An initiative petition was filed with your office on August 8, 2016. 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." 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 TITLE

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 Initiative

The initiative, which is self-titled the "Idaho Medical Marijuana Act" (hereafter "Act") declares that persons engaged in the use, possession, manufacture, sale, and/or distribution of marijuana to persons suffering from qualifying medical conditions, as authorized by the procedures established in the Act, are protected from arrest, prosecution, property forfeiture, and criminal and other penalties under Idaho law. A summary of the Act's provisions, tentatively and more accurately[1] denominated as Idaho Code § 39-9300, *et seq.*, begins with its purpose, which is:

> THEREFORE the purpose of this chapter is to protect from arrest, prosecution, property forfeiture, and criminal and all other penalties, those patients who use marijuana to alleviate suffering from qualifying medical conditions, as well as their physicians, primary caregivers, and those who are authorized to produce marijuana for medical purposes and to facilitate the availability in Idaho for legal medical use.

Prop. I.C. § 39-9302.[2]

In general, the Act authorizes the Idaho Department of Health and 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 qualifying medical condition. Prop. I.C. § 39-9305. The Act directs the Department to approve or deny applications for "registry identification cards" presented by "qualifying patients," their "designated caregivers," "agents" of "medical marijuana organizations," and "growers." Prop. I.C. §§ 39-9303(3), 9303(18), 9307-9312. The Department is required to issue "registration certificates" to qualifying "medical marijuana organizations," defined as "medical marijuana production facilities," "medical marijuana dispensaries," and "safety compliance facilities." Prop. I.C. §§ 39-9303(12), 9303(17), 9307, 9312, 9314. 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 and growers 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.

The Act provides that: (1) qualifying patients ("patients") may possess up to twenty-four (24) ounces of usable 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 twelve (12) marijuana plants in an enclosed locked facility, etc., and any marijuana produced from those plants, (2) designated caregivers ("caregivers") may assist up to three (3) patients' medical use of marijuana, and may independently possess, for each patient assisted, the same amounts of marijuana described above, but not exceeding a total of thirty-six (36) marijuana plants (assuming the caregiver's registry identification card bears a "cultivator" exemption). Prop. I.C. § 39-9303(2). Additionally, a "grower" "can grow for up to four (4) patients, including themselves." Prop. I.C. § 39-9315.

In order to become a patient, a person must have a "practitioner" (defined as a person authorized to prescribe drugs pursuant to the Medical Practice Act (I.C. § 18-5400, *et seq.*)) provide a "written recommendation" stating 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 qualifying medical condition or symptoms associated with the qualifying medical condition." Prop. I.C. §§ 39-9303(15), 9303(23). The "recommendation" must specify the patient's qualifying 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." Prop. I.C. § 39-9303(23). Minors are also entitled to be issued registry identification cards as patients under certain criteria. Prop. I.C. § 39-9309(2).

A "qualifying medical condition" includes, but is not limited to, those "chronic [3] diseases and conditions" specifically listed (such as cancer, glaucoma, HIV, AIDS, "agitation of Alzheimer's disease," post-

traumatic stress syndrome, etc.), but also any treatment of those conditions "that produces cachexia or wasting syndrome and chronic pain, nausea, seizures, including those characteristic of epilepsy, or 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." Prop. I.C. § 39-9303(4). The Act also has what appears to be a "catch-all" provision, which states that "[a]ny condition deemed necessary by a licensed practitioner; or acute conditions" are also qualifying medical conditions. Prop. I.C. § 39-9303(4)(d).

"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 as defined." Prop. I.C. § 39-9303(1). A "felony offense" means a felony which is either a "violent crime" or a violation of a state or federal controlled substance law. Prop. I.C. § 39-9303(9). Caregivers are required to be at least twenty-one (21) years old, "agree to assist no more than three (3) qualifying patients at the same time, and cannot have been convicted of a felony as defined herein. Prop. I.C. § 39-9303(7). A "grower" "means a person who has been designated by a patient to be their medical marijuana grower, to be registered with the Department of Health and Welfare; must be at least 18 years of age; must have a valid US or federally issued photo I.D.; must not have been convicted of any class A or B felony[4] for manufacture or delivery of a controlled substance in the previous two (2) years; not growing for more than four (4) patients including him or herself." Prop. § 39-9303(5) (verbatim).

Patients, caregivers, growers, and agents may apply for registry identification cards. Prop. I.C. §§ 39-9307 (agents); 9308 (patients, caregivers, and growers). To obtain a registry identification card, a patient[5] must submit a written commendation issued by a practitioner within the last ninety (90) days, application and fee, with identifying information pertaining to the patient, the patient's practitioner, and the patient's caregiver. Prop. I.C. § 39-9308(1).[6] The Department is obligated to verify the information in an application (or renewal request) for a registry identification card within ten (10) days after receiving it, and must issue a card within five (5) more days thereafter. Prop. I.C. § 39-9309(1). A registry identification card must

include a "random twenty (20) digit alphanumeric identification number that is unique to the cardholder." Prop. I.C. § 39-9310(1)(d). Registry identification cards issued to agents of medical marijuana organizations must include a "statement that the cardholder is an agent of a medical marijuana dispensary, a medical marijuana production facility, or a safety compliance facility." Prop. I.C. § 39-9310(2)(b). 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. § 39-9311. Registry identification cards expire after one (1) year, and may be renewed for a fee. Prop. I.C. § 39-9312.

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. § 39-9314. Medical marijuana production facilities must restrict marijuana cultivation, harvesting, etc., within an enclosed, locked facility only accessible to registered agents. Prop. I.C. § 39-9314(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. § 39-9314(4).

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. § 39-9316(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. § 39-9317(1), (4). If the patient changes the caregiver, the Department must notify the former caregiver that "his duties and rights . . . for the qualifying patient expire fifteen (15) days after the department sends notification." Prop. I.C. § 39-9317(6).

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. § 39-9319(1), (2).

The "Limitations" provision, Prop. I.C. § 39-9304, states that, when any civil, criminal, or other penalty is sought to be imposed on a patient (or visiting patient) for operating a motor vehicle (or boat, etc.) while under the influence of marijuana, the patient "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." Prop. I.C. § 39-9304(4). This provision presents the following legal concerns: (1) Idaho's driving under the influence laws already address the need for prosecutors to prove "impairment" regardless of what substances (including legally prescribed drugs) caused such impairment; (2) the provision is based on what may be an incorrect assumption that persons are currently "considered to be under the influence of marijuana *solely* because of the presence of metabolites or components of marijuana"; and (3) requiring the state to prove impairment of patients by showing *both* slurred speech *and* lethargic movements will increase the State's burden in driving under the influence cases by specifically defining how the offense must be proved, and may preclude successful prosecution of defendants who choose not to speak at all.

Prop. I.C. § 39-9306(4) states, "No county, city, or legislature may enact a moratorium in any city, county, or state[.]" Not only is the provision vague about what type of moratorium it precludes, but such a provision appears to be an unlawful attempt to bind future legislatures. As explained by the Idaho Supreme Court in Gibbons v. Cenarrusa, 140 Idaho 316, 320, 92 P.3d 1063, 1067 (2002):

> The legislature cannot violate the reserved right of the people to propose laws and enact them at the polls. That process is, in the language of Article III, Section 1 of the Constitution, "independent of the legislature." However, as determined in *Luker [v. Curtis, 64 Idaho*

> *703, 136 P.2d 978 (1943)], once* a law is enacted in the initiative process it is like any other law. It may be amended or repealed by the legislature or subsequent initiative. . . . Initiatives and laws passed by the legislature are on equal footing. The legislature may change the effective date of any law it passes. This legislative right includes repeal of an initiative, which once enacted, is treated as "other ordinary legislative measures."

Prop. I.C. § 39-9320 creates a rebuttable presumption that patients, caregivers, and growers are deemed to be lawfully engaged in the medical use of marijuana if their conduct complies with the Act. Significantly, the proposed statute provides that patients, caregivers, growers, and practitioners 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. *See generally* Prop. I.C. § 39-9320. Practitioners are protected from sanctions for conduct "based solely on providing written recommendations" (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. § 39-9320(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 medical use of marijuana," or assisting a patient as authorized by the Act. Prop. I.C. § 39-9320(5).

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. § 39-9320(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. § 39-9320(10). Based upon the discussion that follows regarding the relationship between the Act and federal law, such a provision would have no impact upon a

probable cause determination made in compliance with the Fourth Amendment of the United States Constitution.

Prop. I.C. § 39-9320(11) states that "[n]o school, landlord, or employer may be penalized or denied any benefit under state law for enrolling, leasing to, or employing a cardholder," or leasing to a registered medical marijuana organization. However, the Act "does not prevent the imposition of any civil, criminal, or other penalties" for possession or engaging in the medical use of marijuana on a school bus, pre-school, primary, or secondary school grounds or in any correctional facility, nor does it allow smoking marijuana on any other form of public transportation or in any public place. Prop. I.C. § 39-9304.

Prop. I.C. § 39-9320(13) reads:

> A qualifying patient, designated caregiver, or grower may not be subject to criminal penalty, or have his or her parental rights and/or residential time with a child restricted due to his or her medical use of marijuana, or his or her child's medical use of marijuana, in compliance with the terms of this chapter, absent written finding supported by substantial evidence that such use has resulted in a long-term impairment that interferes with the performance of parenting functions.

In short, Prop. I.C. § 39-9320(13) precludes criminal penalties and other parental-related sanctions based on a patient's medical use of marijuana in situations lacking substantial evidence of "long-term impairment" that interferes with parenting functions. More precisely, if a patient's "short-term" marijuana impairment resulted in harm or endangerment to the patient's child, the patient could "not be subject to criminal penalty" or parental-related sanction. For example, a patient could not be convicted of child endangerment based on driving under the influence of marijuana (with a child in the vehicle) if the patient was impaired by marijuana for only the "short-term." Idaho law currently recognizes no "short-term impairment" exception to its criminal or parental-related laws for any other substance, whether legally prescribed or not.

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, 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. § 39-9305. 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. § 39-9305(1)(e)(i). The same self-funding requirement is repeated in Prop. I.C. § 39-9305(1)(e)(iii). A "medical marijuana fund" is established by Prop. I.C. § 39-9326, consisting of "fees collected, civil penalties imposed, and private donations received under this chapter," and is to be administered by the Department.

Under the heading "Affirmative Defense," the Act provides that patients, visiting patients, growers, 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. § 39-9321(1). If evidence shows that the listed criteria are met, the defense "must be presumed valid." *Id.* Further, Prop. I.C. § 39-9321(2) allows a person to assert the "medical purpose for using marijuana 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)." The provision gives defendants the unprecedented opportunity of having an affirmative defense be the basis not only of acquittal at trial, but dismissal prior to trial. Finally, if the patient, grower, 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. § 39-9321(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 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. § 39-9322(1). Prop. I.C. § 39-9322(5) further states:

> 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.

Under Prop. I.C. § 39-9322(5), before evidence of medical marijuana use could be admitted in a court proceeding, the court would have to determine whether, by clear and convincing evidence, the neglect or endangerment of a child was directly caused by a patient's or caregiver's medical use of marijuana. Only once such a high evidentiary standard has been met could a court allow evidence that the patient or caregiver used medical marijuana. Requiring a court to make such a written finding during an ongoing court proceeding would constitute, in effect, a trial within a trial. Such an admissibility finding would necessarily include one of the ultimate determinations -- that the child has been neglected or endangered. Additionally, the "clear and convincing" threshold for the admission of evidence runs counter to the "relevance" standard Idaho courts generally apply. *See* I.R.E. 401 ("All relevant evidence is admissible except as otherwise provided by these rules or by other rules applicable in the courts of this state.").

Prop. I.C. § 39-9303 (emphasis added), entitled "Acts Not Required – Acts Not Prohibited" states in part:

> (1) Nothing in this chapter requires:
>
> > (c) An employer to allow the ingestion of marijuana in any workplace or any employee to

> work while under the influence of marijuana, *except* a registered qualifying patient may not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana without written findings of substantial impairment.

The language of Prop. I.C. § 39-9303(1)(c) lacks specificity about the type of proceedings it applies to, whether criminal, civil, or administrative. As an "exception to an exception" within the Idaho Medical Marijuana Act, the provision may conflict with existing Idaho employment law and/or contractual agreements in regard to employees' use of controlled substances in, or affecting, the workplace.

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. §§ 39-9324, 9325. Under Prop. I.C. § 39-9324(7), it is a "misdemeanor for any person, including an employee or official of the Department or another state agency or local government, to breach the confidentiality of information obtained pursuant to this chapter." Subsection (8) of Prop. I.C. § 39-9324 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 very 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.

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. § 39-9327(1)-(2). 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. § 39-9327(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. § 39-9327(4). The Department must submit an annual public report to the legislature with information set out in Prop. I.C. § 39-9318.

Notably, the Act does not contain a "Severability Clause" stating that if any of its provisions are declared invalid for any reason, such a declaration would not affect the validity of the remaining portions of the Act.

In sum:

1. The Act generally decriminalizes under state law the possession of up to twenty-four (24) ounces of marijuana and (if authorized as a "cultivator") twelve (12) marijuana plants for patients, and the same amounts (up to three (3)) per patient for caregivers and growers. For comparison, possession of twenty-four (24) ounces of marijuana qualifies as "trafficking in marijuana" and is punishable by up to fifteen (15) years in prison with a mandatory minimum sentence of one (1) year imprisonment. I.C. § 37-2732B(a)(1)(A).

2. The Act 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. Notably, the Act grants extensive protections from civil liability, criminal punishment, or child protect protective actions not granted to users of prescription drugs or alcohol.

3. Patients certified by practitioners as having qualifying medical conditions may obtain marijuana for medicinal use from their (or their caregiver's) cultivation of marijuana (if authorized on the registry identification card), a grower, or a medical marijuana dispensary.

4. Patients, caregivers, growers, 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.

5. 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, and oversight, maintaining and enforcing confidentiality of records, and providing an annual report to the Idaho Legislature.

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, 316-17, 98 S. Ct. 1079, 1082-83, 55 L. Ed. 2d 303 (1978) (*superseded by statute*) (*quoting* Moore v. Illinois, 14 How. 13, 19-20, 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' Cooperative, 532 U.S. 483, 486, 121 S. Ct. 1711, 1715, 149 L. Ed. 2d 722 (2001), the United States 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 Buyers' 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 Buyers' 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.[7]

The same holds true in regard to federal regulations pertaining to housing and employment. In Assenberg v. Anacortes Housing Authority, 268 Fed. Appx. 643, 2008 WL 598310 at 1 (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 recently 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 and Industries, 230 P.3d 518, 520 (Or. 2010). Therefore, none of the provisions of the initiative can interfere or otherwise have an effect on federal laws, criminal or civil, which rely, in whole or part, on marijuana being illegal under the federal Controlled Substances Act.

C. Recommended Revisions or Alterations

The initiative contains "findings" in Prop. I.C. § 39-9302 that have not been verified for the purposes of this review due to time constraints. The Office of the Attorney General takes no position on those findings. In addition to the legal and non-legal problems previously discussed, the initiative has several other aspects that merit consideration, described as follows:

1. The first "WHEREAS" clause ("25 States," etc.) and the "THEREFORE" clause on the first page should be deleted. They are repeated after Prop. I.C. § 39-9301, where they should be located.

2. The second "WHEREAS" clause on the first page ("citizens of Idaho," etc.) should be moved to the second page under "Findings" (Prop. I.C. § 39-9302).

3. Prop. I.C. § 39-9315, "Growing and Dispensing for Medical Marijuana Use" lacks standards. It reads only that, "(1) Grower can grow for up to four (4) patients, including themselves." *Id.* The provision fails to state where and under what conditions medical marijuana may be grown, and how it is to be dispensed.

4. Prop. I.C. § 39-9303(4)(a) reads in part, "agitation of Alzheimer's disease," which would be more correctly phrased "agitation of Alzheimer's patients."

5. In Prop. I.C. § 39-9303(11), a "medical marijuana dispensary or collective" is defined. However, the word "collective" does not appear elsewhere in the Act, and should be deleted as unnecessary.

6. Prop. I.C. § 39-9303(23)(a) states that the practitioner must "[s]pecify the qualifying patient's qualifying medical condition in the written recommendation; *and HIPAA compliant*." The italicized portion of the provision should presumably read, "and must be HIPAA compliant."

7. Prop. I.C. § 39-9303(24), defining "Ombudsman," states:

> 'Ombudsman' means an official appointed to investigate individuals' complaints against maladministration, especially that of public authorities.
>
> (a) licensed practitioner
>
> (b) that they mediate between the Dept. of Welfare and Idaho Medical Marijuana Program

Prop. I.C. § 39-9303(24) does not state how an Ombudsman is appointed (or by whom), or what powers an Ombudsman has. Also, it is unclear what is intended by the reference to "licensed practitioner[s]," as they will unlikely be administrative "public authorities" made "especially" subject to investigation. Lastly, the reference to "Dept. of Welfare" should read "Department of Health and Welfare."

8. Prop. I.C. § 39-9305(3), under the "Rulemaking" heading, states, "Ombudsman must be a licensed practitioner." This provision should be moved to Prop. I.C. § 39-9303(24), which defines "Ombudsman."

9. Prop. I.C. § 39-9308(1)(c) has a subsection numbered (iiii), which should be changed to (iv).

10. Prop. I.C. § 39-9318(8), does not give specific requirements for the Department to meet in submitting "financial information regarding the implementation and/or maintenance of the Act's provisions" in its Annual Report to the legislature.

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 Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Tesla Heidi Gillespie, 4948 W. Kootenai St. #203, Boise, Idaho 83705.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

John C. McKinney
Deputy Attorney General

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[1] The Act incorrectly designates its tentative statutory provisions as I.C. § 39-9200, *et seq*. In 2015, the Idaho Legislature enacted the "Idaho Direct Primary Care Act" under I.C. § 39-9200, *et seq*. Therefore, the Act's statutory citations to I.C. § 39-9200, *et seq*. will be modified without further explanation to reflect that the Act proposes a new chapter 93 of title 39.

[2] References to "proposed" I.C. § 39-9300, *et seq*., will read, "Prop. I.C. § 39-9300," etc.

[3] Merriam-Webster's Learner's Dictionary defines "chronic" as:
medical
: continuing or occurring again and again for a long time
: happening or existing frequently or most of the time
: always or often doing something specified
Merriam Webster's Learner's Dictionary, http://www.merriam-webster.com/dictionary/chronic (Aug. 30, 2016).

[4] Idaho does not classify its felony crimes as class A or B; therefore, that aspect of the felony condition should be deleted.

[5] Even though Prop. I.C. § 39-9308 is entitled "Registration of Qualifying Patients, Designated Caregivers, and Growers," the requirements for submitting an application for a registry identification card appear to relate solely to patients. *See* Prop. I.C. § 39-9308(1).

[6] The Act also allows "visiting qualifying patients" from other states to possess medical marijuana while in Idaho. Prop. I.C. § 39-9303(22).

[7] According to the Federal Register's Daily Journal of the United States Government, "[b]y letter dated July 19, 2016 the Drug Enforcement Administration (DEA) denied a petition to initiate rulemaking proceedings to reschedule marijuana." Federal Register, https://federalregister.gov/a/2016-17954 (Aug. 30, 2016); *See* 81 Fed. Reg. 53687-53766 (Aug. 12, 2016).

September 22, 2016

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

RE: Certificate of Review
Proposed Initiative Repealing Title 18, Chapters 5 and 6, and Section 18-4016, Idaho Code; Amending Title 18, Chapter 40, Idaho Code, to Prohibit Performance of Abortions as Murder

Dear Secretary of State Denney:

An initiative petition was filed with your office on September 12, 2016. 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 is in proper legislative format for showing repealed and new statutory provisions. Its numbering of subsections in the new statutory provision, however, requires attention.

As explained below, the proposed Idaho Code § 18-6018 includes three definitions and two substantive provisions making abortions unlawful as murder. The definitions are designated as subsections (1) through (3), and the substantive provisions are designated as paragraphs (a) and (b) of subsection (3). The office recommends that, for purposes of clarity and compliance with ordinary statutory drafting conventions, consideration be given to including, in alphabetical order, the three definitions in subsection (1) as paragraphs (a) through (c) following the introductory phrase, "For purposes of this chapter:". It further recommends that the two substantive provisions be included as subsections (2) and (3).

MATTERS OF SUBSTANTIVE IMPORT

A. Summary of Proposed Initiative

The proposed initiative repeals existing Idaho Code provisions in title 18, chapters 5 and 6, Idaho Code, that impose criminal and/or civil liability and professional licensure sanctions on the performance of some, but not all, abortions. It also repeals Idaho Code § 18-4016 that, in relevant part, precludes under three circumstances prosecution for murder for the killing of an embryo or fetus. It adds a new section, Idaho Code § 18-6018, that makes it "unlawful for any person to perform, procure, or attempt to perform an abortion" and deems any person guilty of murder "who performs or procures an abortion." *Id.* § 18-6018(3)(a) and (b).

Proposed § 18-6018(1) to (3) also defines several terms: "unborn human being," "conception," and "abortion." Abortion means "the use or prescription of any instrument, medicine, drug, or any other substance or device to intentionally kill an unborn human being." Unborn human being is defined in part to mean "the offspring of human beings from the moment of conception," with conception

defined as "the fertilization of the ovum of a female individual by the sperm of a male individual." These definitions, with the substantive prohibitions in § 18-6018(3)(a) and (b), would prohibit all elective abortions, including termination of ectopic pregnancies.

Two issues warrant noting for clarification purposes. *First*, the proposed initiative is silent as to, and therefore does not affect, Idaho Code § 18-907(3) and (4). Those subsections contain an exception similarly worded to Idaho Code § 18-4016 for aggravated battery prosecutions when the battery is committed "[u]pon the person of a pregnant female, causes great bodily harm, permanent disability or permanent disfigurement to an embryo or fetus." However, prosecutions for attempted murder would be possible in some instances even if an aggravated assault prosecution would be foreclosed under § 18-907(3) and (4). *See, e.g.*, State v. Buckley, 131 Idaho 164, 953 P.2d 604 (1998) (identifying level of intent required to prove attempted murder in the second degree). The proposed initiative's proponents may wish to consider addressing this arguable inconsistency. *Second*, the proposed § 18-4018 does not specify the degree of murder that accompanies performing an abortion. Idaho Code § 18-4003 provides that "[a]ny murder committed in the perpetration of, or attempt to perpetrate, aggravated battery on a child under twelve (12) years of age" constitutes murder in the first degree. Assuming that these circumstances otherwise exist, it is unclear whether the term "child" would be construed to include an embryo or fetus. The proposed initiative's proponents may wish to consider specifying the murder degree attendant to performing an abortion.

B. Substantive Analysis

No dispute exists that the proposed initiative is unconstitutional under current United States Supreme Court precedent and has been so since issuance of the decision in Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). The Supreme Court invalidated there a Texas statute that made "it a crime to 'procure an abortion,' as therein defined, or to attempt one, except with respect to 'an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.'" *Id.* at 117-18. As the Court then added, a majority of other States, including Idaho, had statutes with a like prohibition.

Id. at 118, n.2 (citing Idaho Code § 18-601 (1948)). The Idaho Legislature responded less than two months after Roe by replacing the abortion prohibition with a law aimed at complying with the decision. 1973 Idaho Sess. Laws 442 (S.B. No. 1184, as amended). In so doing, the Legislature recognized that, absent the new statutory regime, "there is an immediate danger of widespread and undesirable abortion practices within the state . . . ." *Id.* at Section 1.

The Supreme Court announced a more nuanced abortion-regulation standard, commonly referred to as the undue burden test, in Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). Nevertheless, it reaffirmed the fundamental proposition first announced in Roe that a woman has the right "to choose to have an abortion before viability and to obtain it without undue interference from the State." *Id.* at 846.

No more direct burden exists on access to abortion than its outright prohibition. Indeed, the proposed initiative would preclude abortion even when medically necessary to save a woman's life or to avoid significant, permanent harm to her. The Ninth Circuit Court of Appeals thus invalidated Idaho Code § 18-505, the enforcement provision in the Pain-Capable Unborn Child Protection Act, because the statute embodied "a categorical ban on *all* abortions between twenty weeks gestational age and viability." McCormack v. Herzog, 788 F.3d 1017, 1029 (9th Cir. 2015). Consequently, if the proposed initiative were approved by Idaho voters, it would be unenforceable and indefensible.[1]

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 Scott Herndon, 246 Otts Road, Sagle, Idaho 83860.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

Clay R. Smith
Cynthia L. Yee-Wallace
Deputy Attorneys General

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[1] Invalidation of proposed initiative, after voter approval, would likely restore the repealed title 18, chapters 5 and 6, and section 18-4016, Idaho Code. *See* Am. Indep. Party in Idaho, Inc. v. Cenarrusa, 92 Idaho 356, 359, 442 P.2d 766, 769 (1968) ("When a statute by express language repeals a former statute and attempts to provide a substitute therefor, which substitute is found to be unconstitutional, the repeal of the former statute is of no effect, unless it clearly appears that the legislature intended the repeal to be effective even though the substitute statute were found invalid."). Nevertheless, the proposed initiative's proponent should recognize that, absent restoration of the repealed statutes, the legislative concern expressed at the time of the 1973 amendments to title 18, chapter 6, in the wake of Roe would become relevant.

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ATTORNEY GENERAL'S SELECTED ADVISORY LETTERS FOR THE YEAR 2016

LAWRENCE G. WASDEN

ATTORNEY GENERAL
STATE OF IDAHO

January 26, 2016

The Honorable Ronald Nate
Idaho State Representative
Statehouse
VIA HAND DELIVERY

Re: Our File No. 16-53619 - Bill Draft DRMPN187—Dismemberment Abortion

Dear Representative Nate:

You have asked the Attorney General's Office to review the referenced bill draft. The draft would amend Idaho Code § 18-604 to add definitions for "Dismemberment abortion," "Serious health risk to the unborn child's mother" and "Woman." It would further add a new section, Idaho Code § 18-622, that prohibits dismemberment abortion, subject to certain exceptions. We believe that a substantial likelihood exists that the dismemberment abortion prohibition is susceptible to a successful challenge under the Due Process Clause of the Fourteenth Amendment as an undue burden of the right to pre-viability abortion.

I. THE DRAFT LEGISLATION

The draft legislation defines "dismemberment abortion" as follows:

> [A]bortion by dismembering an unborn child by piece or part from the uterus through use of clamps, grasping forceps, tongs, scissors or similar instruments. The term 'dismemberment abortion' does not include an abortion which uses suction to dismember the body of the unborn child by sucking fetal parts into a collective container, although it does include an abortion in which a dismemberment abortion, as defined in this subsection, is used to cause the abortion but such is subsequently used to extract fetal parts after the abortion.

It excludes from the prohibition dismemberment abortions when necessary to prevent a serious health risk to the unborn child's mother.

II. LEGAL ANALYSIS

"Dismemberment abortion" appears directed at what is more commonly known as dilation and evacuation ("D & E") abortion. *See* Gonzales v. Carhart, 550 U.S. 124, 135-36, 127 S. Ct. 1610, 1620-21, 167 L. Ed. 2d 480 (2007); Stenberg v. Carhart, 530 U.S. 914, 924-27, 120 S. Ct. 2597, 2606-07, 147 L. Ed. 2d 743 (2000). Nationally, D & E "is the usual abortion method in the second trimester." Gonzales, 550 U.S. at 135. The draft bill is similar to a Kansas statute addressed recently in Hodes & Nauser, MDs, P.A. v. Schmidt, 368 P.3d 667 (Kan. Ct. App. 2016) (en banc) (affirming by equally divided vote preliminary injunction against enforcement of K.S.A. §§ 65-6742, -6743).

The Supreme Court described the ordinary D & E protocols in Gonzales:

> A doctor must first dilate the cervix at least to the extent needed to insert surgical instruments into the uterus and to maneuver them to evacuate the fetus. . . . The steps taken to cause dilation differ by physician and gestational age of the fetus. . . . A doctor often begins the dilation process by inserting osmotic dilators, such as laminaria (sticks of seaweed), into the cervix. . . . In general the longer dilators remain in the cervix, the more it will dilate. Yet the length of time doctors employ osmotic dilators varies. Some may keep dilators in the cervix for two days, while others use dilators for a day or less. . . .
>
> After sufficient dilation the surgical operation can commence. The woman is placed under general anesthesia or conscious sedation. The doctor, often guided by ultrasound, inserts grasping forceps through the woman's cervix and into the uterus to grab the fetus. The doctor grips a fetal part with the forceps and pulls it back through the cervix and vagina, continuing

> to pull even after meeting resistance from the cervix. The friction causes the fetus to tear apart. . . . A doctor may make 10 to 15 passes with the forceps to evacuate the fetus in its entirety, though sometimes removal is completed with fewer passes. Once the fetus has been evacuated, the placenta and any remaining fetal material are suctioned or scraped out of the uterus.

Gonzales, 550 U.S. at 135-36 (citations omitted). A variant of D & E is intact D & E abortion—i.e., partial birth abortion—now prohibited under Idaho Code § 18-613. "In an intact D & E procedure the doctor extracts the fetus in a way conducive to pulling out its entire body, instead of ripping it apart[,]" pierces the fetus's skull with scissors, evacuates the skull contents by suction catheter, and then removes the fetus without dismemberment. Gonzales, 550 U.S. at 137-39.

Under Idaho law, partial birth abortions, including intact D & E abortions are already banned per Idaho Code § 18-613. Intact D & E abortions are also banned on the federal level per 18 U.S.C. § 1531 (2003). Notably in Stenberg, the United States Supreme Court invalidated as unconstitutional Nebraska's partial birth abortion statute (almost identical to Idaho's) in 2000 because it prohibited both D & E abortions and D & X abortions (which is an intact D & E abortion where the fetuses feet present first). Stenberg, 530 U.S. at 938-46. The Court found that prohibiting both types of D & E abortions was an undue burden on a woman's right to choose an abortion. *Id.* at 946.

Here, the draft bill's effect would remove the ability of Idaho physicians to use an important second trimester abortion procedure and when read together with Idaho Code § 18-613, would have the effect of banning both D & E abortions and intact D & E abortions. Such prohibitions were found unconstitutional in Stenberg. Although only a small number of abortions likely would be affected, the fact remains that the D & E procedure is the preferred method for induced abortion after the fifteenth week of gestation in this state.[1] Other procedures may be available, but the alternatives carry with them various disadvantages not found with D & E. *See* Hodes & Nauser, 368 P.3d at 669 (discussing the alternative procedures identified by the state—"labor-induced abortion, inducing fetal demise with digoxin

injection, and inducing fetal demise by cutting the umbilical cord"—and their relative shortcomings).

We therefore believe that the draft bill would almost certainly be invalidated as unconstitutional if challenged for the reasons set forth above. And, for those Idaho women seeking mid-second trimester abortions, it impedes access to the most commonly employed surgical procedure. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 894, 112 S. Ct. 2791, 2829, 120 L. Ed. 2d 674 (1992) (Undue burden "analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects."). We note, in this regard, that no reason exists to conclude that D & E procedures are unsafe generally or less safe than other alternatives. There appears, in other words, no maternal medical justification for the prohibition. The absence of such justification is a critical factor in the Ninth Circuit. *E.g.*, Planned Parenthood Ariz., Inc. v. Humble, 753 F.3d 905, 914 (9th Cir. 2014) ("[w]e adhere to the approach [in earlier decisions], which requires us to weigh the extent of the burden against the strength of the state's justification in the context of each individual statute or regulation"), *cert. denied*, 135 S. Ct. 870 (2014).

If adopted, therefore, the draft legislation faces the prospect of federal court challenge. Little or no likelihood exists that the law would be upheld under current United States Supreme Court case law. The state would incur attorney's fees for both its own representation and the plaintiff's representation. Given our conclusion with respect to the likelihood of a challenge under the undue burden test, we do not consider in this letter the question whether the definition of "dismemberment abortion" is sufficient to avoid a due process challenge based on impermissible vagueness; i.e., whether the definition "provides doctors 'of ordinary intelligence a reasonable opportunity to know what is prohibited.'" Gonzales, 550 U.S. at 149.

We hope that this letter responds adequately to your inquiry. Please contact me with any questions.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

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[1] The Department of Health and Welfare reports that eight D & E abortions occurred in Idaho during 2013, seven of which were in the second trimester. Division of Public Health, Idaho Department of Health and Welfare, 2013 Idaho Vital Statistics, available at http://healthandwelfare.idaho.gov/Portals/0/Users/074/54/1354/2013_web_02.03.16.pdf. Those D & E abortions accounted for 9.2% of all second trimester 2013 abortions but for 40% of abortions after the fifteenth week of gestation. A high percentage of second trimester abortions (84.2%) occurred in weeks 13 through 15 of gestation, with another abortion surgical procedure, suction curettage, used. Essentially all (99.5%) first trimester surgical abortions are performed through suction curettage.

January 26, 2016

The Honorable Ronald Nate
Idaho State Representative
Statehouse
VIA HAND DELIVERY

Re: Our File No. 16-53618 - Bill Draft DRMPN036—Amendments to Idaho Code § 18-609

Dear Representative Nate:

You have asked the Attorney General's Office to review the referenced bill draft. The draft would amend Idaho Code § 18-609 to two paragraphs to subsection (2) and a new subsection (5). The current provisions of section 18-609 would remain unchanged. We believe that the amendments to subsection (2) do not present a significant constitutional issue. The new subsection (5), however, likely would be challenged under the Due Process Clause of the Fourteenth Amendment as an undue burden on the right to pre-viability abortion with respect to the 48-hour waiting period that it imposes. It is also possible that the draft subsection (5) might be challenged under the Free Speech Clause of the First Amendment insofar as it requires abortion providers to give certain advisements concerning ultrasound availability.

I. THE DRAFT LEGISLATION

The bill draft amends subsection (2) of Idaho Code section 18-609 by adding a new paragraph (d) that requires the Director of the Department of Health and Welfare ("Department") to include within its printed material those health care providers, facilities and clinics that offer to perform ultrasounds free of charge and have contracted with the Department to be listed. The draft also adds a new paragraph (e) that requires, in part, the printed material include "[a] statement that the patient has a right to view an ultrasound image and to hear the heart tone monitoring of her unborn child and that she may obtain an ultrasound free of charge."

In the new subsection (5), the bill draft prohibits, except in medical emergencies, performance of an abortion

> unless, prior to an initial consultation or any testing, and not less than forty-eight (48) hours prior to the performance of abortion, the woman is informed by telephone or in person, by the physician who is to perform the abortion or by an agent of the physician, that ultrasound imaging and heart tone monitoring are available to the woman enabling the pregnant woman to view her unborn child or listen to the heartbeat of the unborn child.

The new subsection further requires physician or physician agent advisement that the Department's website and the written material described in subsection (2)(d) and (e) "contain telephone numbers, addresses and e-mail addresses of facilities that offer [ultrasound] services at no cost." If the woman contacts the abortion facility by email, the facility must respond with this information "in a larger font than the rest of the e-mail." No fee may be collected for the abortion prior to this advisement.

II. LEGAL ANALYSIS

A. Subsection (2) Amendment

The printed material mandated under Idaho Code section 18-609(2) embodies government speech that is not subject to First Amendment scrutiny. *E.g.*, Walker v. Tex. Div., Sons of Confederate Veterans, Inc., — U.S. —, 135 S. Ct. 2239, 2245-46, 192 L. Ed. 2d (2015) ("government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas"). We note that subsection (3)(c) requires physicians or their agents to advise a woman of the material's availability and its website address "[w]hen [she] contacts a physician by telephone or visit and inquires about obtaining an abortion." The Legislature adopted that subsection eight years ago (2008 Idaho Sess. Laws 959), and it has not been challenged under either the First Amendment or the Due Process Clause in the Fourteenth Amendment. Any future challenge to

subsection (3)(a), however, would not affect the validity of subsection (2) in its present or amended form.

We do not believe that a plausible undue burden claim under the Due Process Clause exists as to the subsection (2) amendment. The Seventh Circuit Court of Appeals upheld an analogous requirement in Karlin v. Foust, 188 F.3d 466, *reh'g denied*, 198 F.3d 620 (7th Cir. 1999) and found that such a provision was not an "undue burden" on a woman's right to choose an abortion. There, part of Wisconsin's informed consent statute required physicians to inform their patients that "'fetal ultrasound imaging and auscultation of fetal heart tone services are available that enable a pregnant woman to view the image or hear the heartbeat of her unborn child. In so informing the woman and describing these services, the physician shall advise the woman as to how she may obtain these services if she desires to do so.'" *Id.* at 491 (*citing* Wis. Stat. § 253.10(3)(c)1.g). Plaintiffs successfully convinced the trial court that this provision was "false and misleading" and therefore placed an undue burden on a woman's right to choose to an abortion because the earliest that a fetal heartbeat could be heard was around ten to twelve weeks gestation. *Id.* The Seventh Circuit disagreed and found that

> the information required to be conveyed under the fetal heartbeat provision is neither false nor misleading because the services are available to all women; it is simply a question of when such services would render useful results. Furthermore, the language of the provision is not so narrow as to preclude a physician from being able to fully explain the availability of the identified services. Indeed, we see no reason why the provision would not also necessitate a physician to fully explain these services at issue. This interpretation is consistent with our earlier holding that the information requirements are topical in nature and simply identify certain categories of information that need to be discussed with a woman seeking an abortion, leaving the exact content of the discussion to the discretion of the physician. Like the informed consent provision that requires a physician to discuss the risk of psychological trauma, a physician is required to inform the woman

> that fetal heartbeat services are generally available, but consistent with our interpretation of the former provision, if the physician believes that such services are not specifically available to a patient because her fetus has not reached a particular gestational age, then that is what the physician must disclose.

Id. at 492. The Seventh Circuit thus held that the oral advisement was not an undue burden. *Id.* at 493. We have no reason to believe that the Ninth Circuit would conclude otherwise as to the largely similar new printed material requirement.

B. Subsection (5) Amendment

This amendment contains several requirements, two of which present possible grounds for constitutional challenge.

First, the draft subsection (5) prohibits an abortion (except in medical emergencies) until at least 48 hours have elapsed between the mandated telephonic or in-person advisement and "the initial consultation or any testing" by the abortion provider. This 48-hour waiting period is separate from the 24-hour waiting period on performance of an abortion triggered under Idaho Code section 18-609(4) by the physician's giving the subsection (2) printed material to the patient. Subsection (5) consequently doubles the waiting period for abortions.

The Supreme Court upheld the facial validity of a 24-hour waiting period statute in Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), in the absence of a showing that any "increased costs and potential delays amount[ed] to substantial obstacles" to abortion or that, in light of the provision's medical emergency exception, that "the waiting period impose[d] a real health risk." *Id.* at 886. Although it also rejected a challenge to a 48-hour waiting period in the context of a parental notification statute, it observed that the period could "run concurrently with the time necessary to make an appointment [in the judicial bypass proceeding] for the procedure, thus resulting in little or no delay." Hodgson v. Minn., 497 U.S. 417, 449, 110 S. Ct. 2926, 2944, 111 L. Ed. 2d 344 (1990). We are unaware of any decisions

addressing the validity of a 48-hour waiting period for mature patient informed consent purposes but believe that they raise a significant undue burden issue under Casey as construed generally by the Ninth Circuit Court of Appeals. *See* Planned Parenthood of Az., Inc. v. Humble, 753 F.3d 905, 914 (9th Cir. 2014) (Casey "requires us to weigh the extent of the burden against the strength of the state's justification in the context of each individual statute or regulation"), *cert. denied*, 135 S. Ct. 870 (2014). Here, the Ninth Circuit standard would balance any justification for the expanded notice period against the potential effects of the delay. That inquiry is fact-based and outside the scope of this letter. Nevertheless, if the 48-hour waiting period has as its purpose ensuring adequate time to review the Department's printed material and/or to obtain an ultrasound, you may wish to consider why the existing 24-hour period is inadequate. A substantial likelihood exists that the expanded waiting period will be challenged.

Second, subsection (5) compels the physician or her/his agent convey a government message concerning, among other things, ultrasound imagining and heart tone monitoring. The existing subsection (5), which would be renumbered subsection (6) under the draft bill, requires the physician who performs an ultrasound in connection with an abortion to "inform the patient that she has the right to view the ultrasound image of her unborn child before the abortion is performed" and "offer to provide the patient with a physical picture of the ultrasound image of her unborn child prior to the performance of the abortion." The draft subsection (5) raises potential Free Speech Clause issues under the First Amendment.

The Fourth Circuit Court of Appeals recently struck down a North Carolina statute that imposed on physicians the duty not only to perform ultrasounds in connection with abortions but also to describe the fetus in detail and to offer the patient an opportunity to hear fetal heart tone. Stuart v. Camnitz, 774 F.3d 238, 243 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 2838 (2015). The Court found that these requirements amounted to unconstitutional compelled speech. *Id.* The Court applied an "intermediate standard of scrutiny" under which "the state bears the burden of demonstrating 'at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest.'" *Id.* at 250. Other federal

circuits have found no First Amendment concerns in arguably comparable situations because physicians are subject to reasonable state licensing and regulation. *Id.* at 248; *see* Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 576-77 (5th Cir. 2012); Planned Parenthood Minn., N.D, S.D. v. Rounds, 686 F.3d 889, 893 (8th Cir. 2012) (en banc). The Ninth Circuit has not addressed the question of compelled speech in the ultrasound and other advisement situations. A Woman's Friend Pregnancy Resource Clinic v. Harris, 153 F. Supp. 3d 1168 (E.D. Cal. 2015) (denying a preliminary injunction, noting circuit conflict, and applying intermediate scrutiny standard in denying to enjoin preliminarily a statute that required notice of free or low-cost comprehensive family planning services by pregnancy-related facilities).[1]

If the Fourth Circuit approach was followed, the compelled advisement under the draft subsection (5) theoretically could be challenged given the abortion provider's duty to inform the patient of the material's availability on the departmental website and the obligation under subsection (4) to provide a copy of those materials. The materials themselves, under the proposed subsection (2) amendments, would inform the patient of her right to view the child and listen to fetal heart tone. Balanced against this arguable duplication is the relatively limited advisement and the fact that the existing subsection (5) has not been challenged over the almost nine years that it has been in place. As noted above, the Fifth and Eighth Circuits have not found First Amendment concerns in arguably comparable situations.[2]

In summary, it is likely that these amendments will face a legal challenge. First, based upon this Office's understanding of current case law, the enlarged waiting period may be difficult to defend absent some fact-based justification for a legislative determination that the current 24-hour waiting period is inadequate. Second, the requirement that certain materials be offered to patients may not be an undue burden on a woman's right to choose an abortion, but may be vulnerable to attack as unconstitutional "compelled speech." Recognizing the split within the Circuits and the absence of Ninth Circuit precedent makes it difficult to predict the likelihood such an attack would succeed. But it should be noted that historically Idaho's

forays into this area have been met with skepticism at the district and circuit court levels.

We hope that this response adequately addresses your request. Please contact me with any questions.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

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[1] The Foust district court did invalidate on First Amendment grounds a requirement under the Wisconsin statute that abortion providers pay for state-created documents containing "politically charged information." Karlin v. Foust, 975 F. Supp. 1177, 1225 (W.D. Wis. 1997), *aff'd in part & rev'd in part*, 188 F.3d 446, *reh'g denied*, 198 F.3d 620 (7th Cir. 1999). Nothing in subsection (5) obligates a physician to distribute the Department's printed material, while nothing in the remainder of section 18-609 forces a physician to pay for the material.

[2] The existing subsection (5) differs from the statute invalidated in Stuart because of the substantially broader scope of the speech compelled there. Stuart, 774 F.3d at 243 ("The physician must display the sonogram so that the woman can see it . . . and describe the fetus in detail, 'includ[ing] the presence, location, and dimensions of the unborn child within the uterus and the number of unborn children depicted,' . . . as well as 'the presence of external members and internal organs, if present and viewable[.] . . . The physician also must offer to allow the woman to hear the fetal heart tone.") (citations omitted). It accordingly seems unlikely that, with or without adoption of the draft bill, the current subsection (5) would be challenged.

February 9, 2016

The Honorable Sheryl L. Nuxoll
Idaho State Senator
Statehouse
VIA HAND DELIVERY

Re: Our File No. 16-53818 - DRMPN297—Use of the Bible in Public Schools

Dear Senator Nuxoll:

You have requested this office's review of the referenced draft bill. If introduced and enacted, the bill would repeal the current Idaho Code § 33-1604 and replace it with the following:

> USE OF THE BIBLE IN PUBLIC SCHOOLS. The Bible is expressly permitted to be used in Idaho public schools for reference purposes to further the study of literature, comparative religion, English and foreign languages, United States and world history, comparative government, law, philosophy, ethics, astronomy, biology, geology, world geography, archaeology, music, sociology, and other topics where an understanding of the Bible may be useful or relevant. No student will be required to use any religious texts for reference purposes is the student or parents of the student object.

The draft bill, as a facial matter, likely presents no significant constitutional issue under the Establishment Clause of the First Amendment to the United States Constitution. However, it may raise a religious preference issue under art. I, sec. 4, but, in any event, is specifically prohibited by art. IX, sec. 6 of the Idaho Constitution.

I. UNITED STATES CONSTITUTION: ESTABLISHMENT CLAUSE ANALYSIS

The United States Supreme Court held in Stone v. Graham, 449 U.S. 39, 101 S. Ct. 192, 66 L. Ed. 2d 199 (1980) (per curiam),

that "the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." *Id.* at 42 (*citing* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 225, 83 S. Ct. 1560, 1573, 10 L. Ed. 2d 844 (1963)); *accord* Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528, 1534 (9th Cir. 1985). This result flows from application of Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2125, 29 L. Ed. 2d 745 (1971), that prescribed a three-factor test for determining Establishment Clause consistency: "[A] statute or practice which touches upon religion must (1) have a secular purpose; (2) must neither advance nor inhibit religion in its principal or primary effect; and (3) must not foster an excessive entanglement with religion." Cal. Parents for Equalization of Educ. Materials v. Noonan, 600 F. Supp. 2d 1088, 1115 (E.D. Cal. 2009). On its face, the draft bill satisfies these criteria.

II. IDAHO CONSTITUTION: ART. I, SEC. 4 AND ART. IX, SEC. 6 ANALYSIS

Art. I, sec. 4 of the Idaho Constitution provides in part that no "preference be given by law to any religious denomination or mode of worship." The Idaho Supreme Court has held that the Idaho constitutional provision "is an even greater guardian of religious liberty" than the First Amendment (Osterass v. Osterass, 124 Idaho 350, 355, 859 P.2d 948, 953 (1993)), but it has not held that art. I, sec. 4 creates an Establishment Clause-like barrier more stringent than that imposed under the Lemon test. Nevertheless, insofar as the draft bill carves out the Bible from other religious texts for special statutory treatment, it may raise the question whether Judeo-Christian values are being given preference. This potential issue need not be resolved in view of the specific prohibition in art. IX, sec. 6 discussed immediately below.

Art. IX, sec. 6 of the Idaho Constitution provides:

> No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state, either as teacher or student; and no teacher or student of any such institution shall ever be required to attend or participate in any religious service whatever. No

> sectarian or religious tenets or doctrines shall ever be taught in the public schools, nor shall any distinction or classification of pupils be made on account of race or color. *No books, papers, tracts or documents of a political, sectarian or denominational character shall be used or introduced in any schools established under the provisions of this article*, nor shall any teacher or any district receive any of the public school moneys in which the schools have not been taught in accordance with the provisions of this article.

(Emphasis added.) The italicized prohibition is unambiguous. *See* Nampa Classical Academy v. Goesling, 714 F. Supp. 2d 1079, 1084 (D. Idaho 2010) (upholding Idaho Public Charter School Commission's adoption of the Attorney General's position that "the use of religious documents or text in public school curriculum" would violate art. IX, sec. 6), *aff'd per mem.*, 47 Fed. Appx. 776 (9th Cir. 2011). As the analysis by this Office referred to in Nampa Classical Academy reasoned, the Idaho Supreme Court "would conclude that the Bible cannot be used in a public school classroom" if it "relie[d] on the literal meaning of the language of the Idaho Constitution." *See* Memorandum from Jennifer Swartz, Deputy Attorney General, to Bill Goesling, Chairman, Public Charter School Commission (Aug. 13, 2009) (attached hereto). Under settled principles of constitutional and statutory construction, the Supreme Court will give art. IX, sec. 6 its plain meaning. Verska v. St. Alphonsus Reg'l Med. Ctr., 151 Idaho 889, 893, 265 P.3d 502, 506 (2011) ("[i]f the statute is not ambiguous, this Court does not construe it, but simply follows the law as written"); *see* Higer v. Hansen, 67 Idaho 45, 52, 170 P.2d 411, 415 (1946) ("[t]he same rules apply to the construction of provisions of the Constitution as apply to construction of statutes") (internal quotation marks omitted). Art. IX, sec. 6 therefore would invalidate the draft bill if enacted.

Please contact me with any questions.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

February 12, 2016

The Honorable Ilana Rubel
Idaho State Representative
Statehouse
VIA HAND DELIVERY

Re: Our File No. 16-53782 - HB 394

Dear Representative Rubel:

You contacted our office with three questions regarding House Bill 394, dealing with inspections by Idaho Department of Fish and Game officials and other "authorized officers" as defined in Idaho Code section 36-1301(1). This letter constitutes our response.

QUESTIONS PRESENTED

1. Would H394 limit officers (as defined by Idaho Code Section 36-1301(1)) from relying on judicially recognized grounds for warrantless searches in the investigation of Idaho wildlife crimes?

2. Would H394 create a separate/different standard for investigation of wildlife crimes from the investigation of other crimes in Idaho? Is there other state policy that directs implementation of a different standard for wildlife crimes?

3. Would H394 apply to Idaho law enforcement entities besides the Idaho Department of Fish and Game given the definition of "authorized officers" in Idaho Code Section 36-1301(1)?

BRIEF ANSWERS

1. Yes. The amendment would prohibit officers authorized to investigate fish and game law violations from relying on grounds

other than a warrant or consent to conduct searches, including prohibiting them from relying on judicially-recognized exceptions to these requirements.

2. Yes, and no. Yes, H394 would create a different standard for the investigation of fish and game law violations than for other crimes in Idaho. No, there is no state policy requiring a different standard.

3. Yes. The requirements of Idaho Code § 36-1303 would appear to apply to all law enforcement officers authorized to investigate fish and game law violations pursuant to Idaho Code § 36-1301(1), and not just employees of the Idaho Department of Fish and Game.

ANALYSIS

H394 seeks to amend Idaho Code § 36-1303. Subsection (1) of the latter currently states that fish and game officers, and other "authorized officers" as that term is defined in Idaho Code § 36-1301(1),[1] have the authority and duty to perform an "inspection" of various locations they have probable cause to believe contain evidence of a violation of fish and game laws. These include "depots, cars, warehouses, cold storage rooms, warerooms, restaurants, hotels, motels, markets, air terminals and all baggage, packages, and packs held either for sale, shipment or storage . . . ." The same statute, in subsection (2), authorizes the same officers to "search, with or without a warrant" all vehicles, tents, camps, containers, and persons upon probable cause. The amendment proposed by H394 would limit the inspection and searching to situations where fish and game officers have a "warrant, or consent."

The Fourth Amendment prohibits searches that are not "reasonable." Generally, a search conducted pursuant to a search warrant will be deemed constitutionally reasonable, but a search conducted without a warrant is presumed to be unreasonable. Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). A search without a warrant is reasonable if conducted according to a recognized warrant exception, such as consent; State v. Diaz, 144 Idaho 300, 302-03, 160 P.3d 739, 741-42 (2007); the

automobile exception, Colorado v. Bannister, 449 U.S. 1, 3, 101 S. Ct. 42, 43, 66 L. Ed. 2d 1 (1980); search incident to arrest, Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969); or exigency, Kentucky v. King, 563 U.S. 452, 131 S. Ct. 1849, 179 L. Ed. 2d 865 (2011); to name a few.

Police actions in discovering evidence are a "search" and therefore impinge on the scope of a person's constitutional protections if they intrude on a reasonable privacy right. Rawlings v. Kentucky, 448 U.S. 98, 104, 100 S. Ct. 2556, 2561, 65 L. Ed. 2d 633 (1980). Thus, objects seen in "plain view" (or open fields) are not discovered by a "search." Horton v. California, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990). Tents, however, enjoy a privacy expectation, such that opening them and looking within constitutes a search. State v. Pruss, 145 Idaho 623, 181 P.3d 1231 (2008). Routine fish and game checkpoints on roads are allowed, but have to meet constitutional certain criteria. State v. Medley, 127 Idaho 182, 898 P.2d 1093 (1995); State v. Thurman, 134 Idaho 90, 996 P.2d 309 (1999).

Application of these constitutional standards shows that most of the "inspections" and all of the "searches" contemplated in the current Idaho Code § 36-1301(1) and (2) require a search warrant or an applicable warrant exception. Amending the statute to clarify that officers acting pursuant to its authority must comply with constitutional standards would reflect state court precedent.

However, the amendments proposed in H394 could result in the courts interpreting the amendments as change in the existing constitutional law restricting officers from conducting searches and inspections they are currently allowed to do, because the proposed amendments do not include all of the constitutional bases for conducting searches. Plain reading of the legislation would limit officers to conduct searches only when they had a search warrant or consent, even though constitutionally reasonable searches could be had under different warrant exceptions (such as exigent circumstances or the automobile exception).

Of course, this may be the purpose of the statute. But if the goal is to confirm that all searches under the statute must be

constititional, and no more, perhaps that goal can be met by amending the current statute with wording simlar to the following: "Nothing in this statute shall be construed as excusing officers from complying with federal and state constitutional search and seizure requirements."

CONCLUSION

Amending Idaho Code § 36-1303 as proposed in H394 would limit "authorized officers" as defined in Idaho Code § 36-1301(1) to performing inspections or searches regarding fish and game law violations only where they have a search warrant or consent. It excludes by omission judicially-recognized exceptions to these requirements that could be relied on in searches in other law enforcement contexts. There is no state policy which requires the imposition of a stricter standard for searches and seizures regarding suspected violations of fish and game law than that which exists regarding other suspected crimes. If the goal of H394 is to ensure that all searches under Idaho Code § 36-1303 are constitutional, it may be possible to reach that goal with an amendment that states that the statute shall not be construed as excusing officers from complying with federal and state constitutional standards governing searches and seizures.

I hope this letter addresses your concerns. If you have any further questions, please feel free to contact our office.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

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[1] Idaho Code § 36-1301(1) defines "Authorized Officers" to include both certain Department of Fish and Game employees and "all sheriffs, deputy sheriffs, forest supervisors, marshals, police officers, state forest department officers, and national forest rangers." This subsection gives these authorized officers statewide jurisdiction and imposes the "duty to enforce the provisions of the Idaho fish and game code."

February 16, 2016

The Honorable Bart Davis
Idaho State Senator
Statehouse
VIA HAND DELIVERY

Re: Our File No. 16-53820 - RS24447—Gambling Amendments

Dear Senator Davis:

This letter responds to your request for this office's review of the referenced draft bill. Substantively, the draft adds a definition of "video gaming machine" to Idaho Code § 67-7404; adds certain express limitations on the State Lottery Commission's authority in Idaho Code § 67-7408; modifies Idaho Code § 67-429A(3) to invalidate any tribal-state compact provision that authorizes play of "video gaming machines," to impose on the Governor certain reporting duties with respect to non-compliant "video gaming machines," and to provide "standing" to the Governor or any member of the Constitutional Defense Council "to pursue any administrative or judicial action necessary to enforce the prohibitions" against "video gaming machines." The bill repeals Idaho Code §§ 67-429B and -429C. Nonsubstantively, the amendments add references to art. III, sec. 20 of the Idaho Constitution to various provisions.

The following analysis will focus on the repeal of §§ 67-429B and -429C. This office's overall conclusion is that, if introduced and enacted, the bill will result in immediate arbitration or federal court litigation where the controlling question will be whether repeal of §§ 67-429B and -429C violates the Contracts Clause in the United States Constitution. U.S. Const. art. I, § 10, cl. 1. The issues here are largely novel. However, applying generally applicable principles, I conclude that a plausible reserved powers defense exists but that, if the merits of a Contracts Clause claim are reached, the repeal of §§ 67-429B and -429C would likely be invalidated.

I. RELEVANT BACKGROUND

A. Applicable Federal and State Law

1. Federal Law. The Indian Gaming Regulatory Act ("IGRA") governs the legality of gaming on "Indian lands" as defined in 25 U.S.C. § 2703(4). That definition encompasses "all lands within the limits of any Indian reservation." It separates gaming activities into three categories—Class I, Class II and Class III.

- Class I gaming includes only "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations" (25 U.S.C. § 2703(6)) and is subject to exclusive tribal jurisdiction (*id.* § 2710(a)(1)).

- Class II gaming covers a greater amount of gaming but expressly excludes any banking card games (*e.g.*, baccarat or blackjack) and "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." 25 U.S.C. § 2703(7)(B)(ii).

- Class III gaming is a residual category for all gambling that is not Class I or II. 25 U.S.C. § 2703(8). It can be lawfully undertaken only if authorized by an approved tribal ordinance or resolution (*id.* § 2710(d)(1)(A)) and the gaming activities are "located in a State that permits such gaming for any purpose by any person, organization, or entity" (*id.* § 2710(d)(1)(B)). However, unlike Class II gaming, Class III gaming also must be "conducted in conformance with a Tribal-State compact" approved by the Secretary of the Interior ("Secretary") and in effect. *Id.* § 2710(d)(1)(C). Consequently, "video gaming machines" as defined in the draft bill constitute Class III gaming. So, too, do the tribal video gaming machines authorized under Idaho Code § 67-429B.

2. Idaho Law. Article III, section 20 of the Idaho Constitution, as approved in November 1992, identifies the only forms of gambling permissible in this State. In part, it provides:

> (1) Gambling is contrary to public policy and is strictly prohibited except for the following:
> a. A state lottery which is authorized by the state if conducted in conformity with enabling legislation; and
> b. Pari-mutuel betting if conducted in conformity with enabling legislation; and
> c. Bingo and raffle games that are operated by qualified charitable organizations in the pursuit of charitable purposes if conducted in conformity with enabling legislation.
> (2) No activities permitted by subsection (1) shall employ any form of casino gambling including, but not limited to, blackjack, craps, roulette, poker, bacarrat, keno and slot machines, or employ any electronic or electromechanical imitation or simulation of any form of casino gambling.
> (3) The legislature shall provide by law penalties for violations of this section.

The Idaho Legislature anticipated article III, section 20's adoption by enactment of Idaho Code §§ 18-3801 and -3802 effective August 15, 1992. 1992 Idaho Sess. Laws (1st Ex. Sess.) 4.

Section 18-3801 defines "gambling" to mean "risking any money, credit, deposit or other thing of value for gain contingent in whole or in part upon lot, chance, the operation of a gambling device or the happening or outcome of an event, including a sporting event, the operation of casino gambling including, but not limited to, blackjack, craps, roulette, poker, bacarrat [baccarat] or keno." Excluded from that definition are:

> (1) Bona fide contests of skill, speed, strength or endurance in which awards are made only to entrants or the owners of entrants; or
> (2) Bona fide business transactions which are valid under the law of contracts; or
> (3) Games that award only additional play; or
> (4) Merchant promotional contests and drawings conducted incidentally to bona fide nongaming

> business operations, if prizes are awarded without consideration being charged to participants; or
> (5) Other acts or transactions now or hereafter expressly authorized by law.

Idaho Code § 18-3801(1)-(5). Section 18-3802 imposes criminal liability on individuals engaging in gambling. The Idaho federal district court and the Ninth Circuit have held that the only forms of gambling authorized under article III, section 20 are "the state lottery, pari-mutuel betting if conducted in conformity with enabling legislation, and bingo and raffle games that are operated by qualified charitable organizations in the pursuit of charitable purposes." Coeur d'Alene Tribe v. Idaho, 842 F. Supp. 1268, 1280 (D. Idaho 1994), *aff'd*, 51 F.3d 876 (9th Cir. 1995); *see also* Idaho v. Coeur d'Alene Tribe, 794 F.3d 1039, 1041 (9th Cir. 2015) (*citing* the 1994 Coeur d'Alene Tribe decision for the conclusion "that Idaho law only allowed 'a lottery and parimutuel betting' and that 'Idaho law and public policy clearly prohibit all other forms of Class III gaming, including the casino gambling activities which the Tribes have sought to include in compact negotiations with the State'").

Neither article III, section 20 nor section 18-3801 has been amended since their original adoption. Slot machines and "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind" thus remain unlawful. Idaho tribes, however, were given the option to commence another form of Class III gaming—tribal video gaming machines—through passage of Proposition One in 2002. Upon passage, the initiative was codified as Idaho Code §§ 67-429B and -429C. *See* Idaho v. Shoshone-Bannock Tribes, 465 F.3d 1095, 1097-98 (9th Cir. 2006) (summarizing proposition).

B. Idaho Tribal-State Compacts

Four Idaho tribes—the Coeur d'Alene Tribe (1993), the Kootenai Tribe of Idaho (1993), the Nez Perce Tribe (1995), and the Shoshone-Bannock Tribes (2000)—have tribal-state compacts approved by the Secretary under IGRA. The first three of these tribes amended their compacts immediately following passage of Proposition One to include tribal video machines as an authorized

form of gaming.[1] The Secretary approved the amendments in January 2003. The Shoshone-Bannock Tribes declined to exercise its right to include that form of gaming explicitly in its compact; they instead relied on a most-favored-nation provision unique to their compact. Shoshone-Bannock Tribes, 465 F.3d at 1098-99.

The consistency of those machines, to the extent compliant with Idaho Code § 67-429B, has never been determined on the merits. However, two individuals, who alleged that they were addicted to machine gaming (and to no other form of gambling), unsuccessfully raised that challenge in Idaho state court. Knox v. State ex rel. Otter, 148 Idaho 324, 223 P.3d 266 (2009) (dismissing case on jurisdictional grounds). The same individuals sued the Secretary to invalidate the 2003 approvals, but that case was voluntarily dismissed in April 2012. Knox v. USDOI, No. 4:09-cv-00162-BLW (D. Idaho).

None of the compacts contains a termination provision. They provide in common that "[t]he State or the Tribe may, by appropriate and lawful means, request negotiations to amend or replace this Compact" but leaves the compact "in effect until renegotiated or replaced."[2] The Shoshone-Bannock compact does contemplate the effect of a change in federal law, stipulating that "any provision of this Compact which may be inconsistent with such change shall be void only to the extent necessary to conform to that change." However, neither that compact nor the others address the effect of a change in state law.

II. LEGAL ANALYSIS

The draft bill has as a major purpose invalidating the use of tribal video gaming machines now authorized under the four Idaho tribal-state compacts. This invalidation raises a significant issue under the Contracts Clause, Article I, Section 10, Clause 1 of the United States Constitution. That clause, in relevant part, provides that "[n]o State shall . . . pass any . . . Law impairing the obligation of contracts."[3] It also raises a question under the reserved powers exception to the application of the Contracts Clause. I discuss the exception first.

A. Reserved Powers Doctrine Analysis

In U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 97 S. Ct. 15-5, 52 L. Ed. 2d 92 (1977), the United States Supreme Court explained that "[t]he States must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result." *Id.* at 22. The scope of that reserved power differs depending upon the nature of contract affected. As to purely private contracts, "laws intended to regulate existing contractual relationships must serve a legitimate public purpose"—i.e., "[l]egislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *Id.* As to a State's own contracts, the focus changes substantially:

> The initial inquiry concerns the ability of the State to enter into an agreement that limits its power to act in the future. As early as Fletcher v. Peck, the Court considered the argument that "one legislature cannot abridge the powers of a succeeding legislature." . . . It is often stated that "the legislature cannot bargain away the police power of a State." . . . This doctrine requires a determination of the State's power to create irrevocable contract rights in the first place, rather than an inquiry into the purpose or reasonableness of the subsequent impairment. In short, the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty. [¶] In deciding whether a State's contract was invalid ab initio under the reserved-powers doctrine, earlier decisions relied on distinctions among the various powers of the State. Thus, the police power and the power of eminent domain were among those that could not be "contracted away," but the State could bind itself in the future exercise of the taxing and spending powers.

Id. at 23-24 (citations and footnote omitted). The regulation of gambling falls squarely within the type of state action subject to the

reserved-powers doctrine. Stone v. Mississippi, 101 U.S. 814, 818, — S. Ct. —, 25 L. Ed. 1079 (1879) ("No one denies . . . that [the police power] extends to all matters affecting the public health or the public morals. . . . Neither can it be denied that lotteries are proper subjects for the exercise of this power.").

As U.S. Trust indicates, the reserved powers doctrine renders the contract itself void *ab initio*. *See* Matsuda v. City and County of Honolulu, 512 F.3d 1148, 1152 (9th Cir. 2008). Here, no dispute exists that the tribal-state compacts themselves are valid. The State entered into the compacts pursuant to IGRA, and the Secretary approved them and the amendments submitted after passage of Proposition One. *See also* 1993 Idaho Sess. Laws 1500 (codified at Idaho Code § 67-429A) (authorizing Governor to represent state and enter into tribal-state compacts); 2000 Idaho Sess. Laws 613 (ratifying Shoshone-Bannock compact). The doctrine nevertheless also appears to capture situations where *particular* contract rights are impaired legislatively. *E.g.*, N. Pac. Ry. Co. v. Minnesota, 208 U.S. 583, 591, 38 S. Ct. 341, 343, 52 L. Ed. 630 (1908) ("[t]he legislation which deprives one of the benefit of a contract, or adds new duties or obligations thereto, necessarily impairs the obligation of the contract, and when the state court gives effect to subsequent state or municipal legislation which has the effect to impair contract rights by depriving the parties of their benefit, and make requirements which the contract did not theretofore impose upon them, a case is presented for the jurisdiction of this court"). That is the situation presently. It raises two questions.

The threshold question is therefore whether the State has surrendered its right to reopen the northern tribes' compacts (which, again, were amended to authorize tribal video machine gaming) to conform their scope of gaming to amended Idaho law or otherwise to object to continued tribal video machine gaming. The three northern tribes' compacts address only the contingency of new state-authorized gaming (which is automatically authorized). *E.g.*, 1992 Coeur d'Alene Class III Gaming Compact Art. 6.2.3 (allowing "[a]ny additional type of gaming involving chance and/or skill, prize and consideration that may hereafter be authorized to be conducted in the State"). The Shoshone-Bannock compact simply provides that "the Tribes may operate in its gaming facilities located on Indian lands[]

any gaming activity that the State of Idaho 'permits for any purpose by any person, organization, or entity,' as the phrase is interpreted in the context of the Indian Gaming Regulatory Act" and "may not operate any other form of Class III gaming activity." 2000 Shoshone-Bannock Compact Art. 4.a. Under traditional reserved-power principles, the answer to this would be "no" given gambling regulation as within the traditional scope of state police powers. *See* Dairyland Greyhound Park, Inc. v. Doyle, 719 N.W.2d 408, 492 (Wis. 2006) (Roggensack, J., concurring in part and dissenting in part) ("it has *never* been interpreted by the United States Supreme Court to preclude a state from legislating to protect the public health or morals, regardless of what terms a contract with a state contains").[4]

The next question is whether IGRA changes that result. The answer also appears "no." IGRA § 2710(d)(1) imposes three independent conditions precedent to lawful Class III gaming: authorized under an approved ordinance or resolution; permitted under state law; and conducted in conformance with an approved compact. Inclusion in a compact, absent the State's "permit[ting] such gaming," is insufficient to establish the legality of Class III gaming. Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712, 720 (9th Cir. 2003) ("we are mindful of cases that characterize as 'patent bootstrapping' the notion that a Tribal–State compact can satisfy both the 'permits such gaming' requirement under § 2710(d)(1)(B) and the compact requirement under § 2710(d)(1)(C)"). Although the Ninth Circuit adopted a broad construction of the term "permits such gaming" in Artichoke Joe's, even that reading of § 2710(d)(1)(B) does not remove state authority to pare back previously "permit[ted]" gaming for policy or constitutional compliance reasons. 353 F.3d at 722 ("[T]he word 'permit' in this statute does not necessarily require an affirmative act of legal authority in order to 'permit' conduct. California may 'permit' class III gaming within the meaning of IGRA even if it 'acquiesces, by failure to prevent' class III gaming.").

That said, whether the State's reserved powers encompass repeal of the tribal video machine gaming authorization in Idaho Code § 67-429B requires the doctrine's application in a unique statutory context.[5] Precisely how IGRA will be held to affect the common law rule cannot be predicted with any measure of a certainty. A plausible reserved powers defense to a Contracts Clause claim does exist.

B. Contracts Clause Analysis

> Under the Contracts Clause, courts first ask whether the change in state law has "operated as a substantial impairment of a contractual relationship." . . . This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial.

Gen. Motors Corp. v. Romein, 503 U.S. 181, 186, 112 S. Ct. 1105, 1109, 117 L. Ed. 2d 328 (1992) (citations omitted). If each of these factors exists with respect a contract to which the allegedly impairing governmental entity is a party, that entity "has the burden of establishing that the [impairing law] is both reasonable and necessary to an important public purpose." S. Cal. Gas Co. v. City of Santa Ana, 336 F.3d 885, 894 (9th Cir. 2003). Two considerations are important on this score. First, "[a]n impairment may not be considered necessary if there is 'an evident and more moderate course' of action that would serve Defendants' 'purposes equally well.'" Univ. of Hawai'i Prof'l Assembly v. Cayetano, 183 F.3d 1096, 1107 (9th Cir. 1999). Second, an impairment is also not reasonable "if the problem sought to be resolved by an impairment of the contract existed at the time the contractual obligation was incurred.'" *Id.*

No doubt exists here that the draft bill, insofar as it repeals §§ 67-429B and -429C, operates to impair substantially the northern tribes' express compact rights and, by virtue of the Shoshone-Bannock compact's most-favored-nation provision, that tribe's rights. It removes from the compacts a lucrative, indeed likely the most lucrative, form of gaming. The controlling issue is therefore whether the State could carry its burden of showing that this impairment is reasonable and necessary. The answer to this question is more likely than not "no" because of the second "reasonable and necessary" consideration.

It appears that the first "reasonable and necessary" consideration—the absence of "evident and more moderate course of action"—would be satisfied. As an ordinary matter, the alternative "course of action" would be statutory, and a more tailored legislative

response does not appear to exist. Tribal video machines are either lawful or not. This is, however, the unusual case because the amendments are aimed at conforming tribal gaming to art. III, sec. 20 of the Idaho Constitution. The State, in theory, could achieve that objective through litigation that would allow a neutral decision maker to determine the constitutionality of § 67-429B. The issue accordingly is whether a litigation alternative exists. One controlled by the State may be present, but it requires repeal of § 67-429B.

The Secretary's 2003 approval of Proposition One conforming amendments cannot be challenged by the Governor because the six-year limitation period in 28 U.S.C. § 2401(a) that applies to actions under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. Wind River Mining Corp. v. United States, 946 F.2d 710, 712 (9th Cir. 1991).[6] Non-APA litigation by the Governor (or the State more generally) over whether § 67-429B authorizes a form of gaming that violates article III, section 20 also does not appear possible. Any court challenge against the statute would either name the tribes as parties or affect their interests so as to require their joinder as parties. *See* I.R.C.P. 19; Fed. R. Civ. P. 19. In either instance, the tribes' immunity from suit would preclude the case from going forward. *E.g.*, Michigan v. Bay Mills Indian Cmty., — U.S. —, 134 S. Ct. 2024, 2030-31, 188 L. Ed. 2d 1071 (2014) (tribes possess common law immunity from suit absent waiver or congressional abrogation); Am. Greyhound Racing, Inc. v. Hull, 305 F.3d 1015, 1024-25 (9th Cir. 2002) (tribes indispensable parties in suit challenging governor's authority to enter into new gaming compacts). Finally, the compacts contain a dispute resolution procedure when, to quote representative language, a "party believes that the other party has failed to comply with any requirement of this Compact." 1992 Coeur d'Alene Class III Gaming Compact Art. 21.1. But, no apparent dispute exists over whether the tribal video machine games comply with § 67-429B; the dispute is over whether the statute complies with the constitution. Simply put, the tribes do not violate the compacts as currently approved by offering video machine gaming. Enactment of the draft bill, however, arguably will negate the reference to "Section 67-429B, Idaho Code" in the Proposition One compact amendments approved by the Secretary in 2003, thereby providing a basis for the State to initiate the dispute resolution process. In other words, repeal of § 67-429B may be the

only means of creating a dispute that can be resolved arbitrally or judicially.

The difficulty with defending against a Contracts Clause claim under Ninth Circuit precedent stems from second "reasonable and necessary" consideration: whether the "problem sought to be resolved" by the impairment was present when the contractual obligation initially arose. The constitutionality of §§ 67-429B and -429C is not a new issue. It was raised before and after Proposition One's passage. Noh v. Cenarrusa, 137 Idaho 798, 800-01, 53 P.3d 1217, 1219-20 (2002) (plaintiffs lacked standing and further failed to establish ripe controversy in pre-election challenge); Bell v. Cenarrusa, No. 29226 (Idaho Sup. Ct. June 2, 2003) (dismissing post-election challenge for lack of original jurisdiction). The Legislature also had the opportunity to repeal Proposition One. *E.g.*, Gibbons v. Cenarrusa, 140 Idaho 316, 319-20, 92 P.3d 1063, 1066-67 (2002). The question thus becomes whether the Legislature's ability to repeal Proposition One has expired.

It thus seems probable that the second consideration would weigh against the reasonableness and necessity of the proposed legislation. The tribes have engaged in video machine gaming under the compacts for over 13 years without state interference, invested substantially in their casinos and governmental initiatives more generally based in part on revenue from that gaming, and (with the exception of the Shoshone-Bannock Tribes) made the contributions required under § 67-429C(1)(c). Removing this source of tribal funding would have significant impact not only on new tribal governmental activities but also on their ability to discharge liabilities previously undertaken on the assumption that tribal video machine revenue would continue to flow into the tribes' coffers. Nothing to this Office's knowledge has changed in the interim to warrant the proposed repeal or these quite severe consequences. *See* Dairyland Greyhound Park, 719 N.W.2d at 436-37 ("[t]o determine the reasonableness of a constitutional amendment, we evaluate whether the social concerns that prompted the changes were foreseeable when the State entered into the compact, and whether the conditions have changed sufficiently since the State entered the contract"). In this regard, a court may well be troubled by the Legislature's failure to exercise its power to repeal the Proposition One provisions during the

13-year period despite the fact that its constitutionality was challenged both immediately before and after the 2002 general election and in the Knox litigation. This Office does not suggest that an arbitration panel or court should resolve the second consideration against the repeal's validity, but a substantial possibility exists that will result.

III. CONCLUSION

This Office understands that the underlying rationale for the draft legislation is to reflect the Legislature's view that the gaming permitted under § 67-429B violates art. III, sec. 20. However, repealing that provision will prompt arbitral or federal court litigation over the Contracts Clause issue. The outcome of that litigation is uncertain because, with the exception of Dairyland Greyhound Park, that issue has not been decided in even a roughly comparable factual or legal context. Notwithstanding the differences between the Wisconsin and Idaho controversies, it is not unreasonable to assume that much of the analysis by the Wisconsin Supreme Court majority will be given substantial weight by the federal district court and, on appeal, by the Ninth Circuit. Consequently, as discussed above, the reserved powers doctrine may provide the best defense for the bill if introduced and adopted. The Legislature should recognize that litigation almost certainly will end only with the United States Supreme Court's denying certiorari or issuing an opinion on the merits.

Please contact me with any questions.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

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[1] The north Idaho tribes' compact contains virtually identical provisions related to the tribal video machine gaming. 2002 Coeur d'Alene Class III Gaming Compact Amendment Art. 6.8.1 ("[n]otwithstanding any other provision of this compact, the tribe is permitted to conduct gaming using tribal video gaming machines as described in Section 67-429B, Idaho Code"); 2002 Kootenai Tribe Class III Gaming Compact Amendment Art. 6.8.1 ("[n]otwithstanding any other provision of this compact and as clarified by this compact amendment, the tribe is permitted to conduct gaming using

tribal video gaming machines as described in Section 67-429B, Idaho Code"); 2002 Nez Perce Tribe Class III Gaming Compact Amendment Art. 6.4.1 (same).

[2] One potential topic of renegotiation is the allowable number of tribal video gaming machines. Section 67-429C(1)(b) provides:

> In the 10 years following incorporation of this term into its compact, the number of tribal video gaming machines the tribe may possess is limited to the number of tribal video gaming machines possessed by the tribe as of January 1, 2002, plus 25% of that number; provided, however, that no increase in any single year shall exceed 5% of the number possessed as of January 1, 2002. Thereafter, the tribe may operate such additional tribal video gaming machines as are agreed to pursuant to good faith negotiations between the state and the tribe under a prudent business standard.

To this Office's knowledge, none of the tribes has requested renegotiation under subsection (1)(b).

[3] The Idaho Constitution has a corresponding provision. Idaho Const. art. I, § 16. The Idaho Supreme Court construes it as coterminous with its federal counterpart. CDA Dairy Queen, Inc. v. State Ins. Fund, 154 Idaho 379, 387, 299 P.3d 186, 194 (2013). Consequently, the Idaho provision is not discussed separately.

[4] In Dairyland Greyhound Park, a closely divided Wisconsin Supreme Court upheld a Contracts Clause claim directed, in relevant part, to whether a state constitutional amendment removed the governor's authority to *renew* compacts that authorized gaming prohibited under the amendment. 719 N.W.2d at 428-39. In so doing, the majority did not address substantively the reserved powers doctrine. One of the two dissents did and observed that "[t]he majority opinion puts the cart before the horse" because the cases relied upon by the majority, "with the exception of a portion of *U.S. Trust Co.* that the majority opinion chooses to ignore, have no application to the initial contract question presented here." *Id.* at 496 (Roggensack, J., concurring in part and dissenting in part) (footnote omitted).

[5] The 1994 Coeur d'Alene Tribe decision did reject the tribes' contention "that the State could not change its gaming laws after compact negotiations were requested because to do so would deprive them of vested rights." 842 F. Supp. at 1276. It reasoned that "IGRA makes it clear that the Tribes have no right, vested or inchoate, to conduct Class III games until a compact has been negotiated with the state." *Id.* Only after secretarial approval of a compact could a tribe "arguably claim a vested right to conduct a particular form of Class III gaming." *Id.* The facts here, of course, differ because compact rights are involved, thereby bringing into play the "arguabl[e] claim" not at issue in the earlier case.

[6] It is theoretically possible that a non-State party with standing can satisfy § 2401(a) to the extent the right of action accrued six years or less before the lawsuit commenced. *Id.* at 715 ("If . . . a challenger contests the substance of an agency decision as exceeding constitutional or statutory authority, the challenger may do so later than six years following the decision by filing a complaint for review of the adverse application of the decision to the particular challenger. Such challenges, by their nature, will often require a more 'interested' person than generally will be found in the public at large."). The federal court Knox challenge to the Secretary's 2003 approval of the northern tribes' compact amendments represents such a suit. The State, however, has no control over the filing of a Knox-like case.

March 10, 2016

The Honorable John McCrostie
Idaho State Representative
Statehouse
VIA HAND DELIVERY

Re: Our File No. 16-54085 - Idaho Lottery Touch Tab Machines

Dear Representative McCrostie:

You have asked for my opinion on the following question: Do the Touch Tab machines of the Idaho Lottery (http://www.idaholottery.com/games/touchtab/) violate the Idaho Constitution under article III, section 20, and/or Idaho Code title 67, chapter 74?

As an initial note, analysis was undertaken in 2009 on the question of constitutionality and provided to Lottery Director Jeff Anderson. Although labeled an attorney-client privileged document, the analysis is no longer subject to privilege because it has been provided to multiple legislators and others by Director Anderson; the privilege is waived. It is attached for your review. The machine was not yet called a Touch Tab Machine, but, instead, an Electronic Instant Ticket Vending Machine ("EITVM"). I am informed that while the actual cabinet/shell appearance of the machine has changed since the analysis, the description and manner of operation in selling pull-tab tickets has not.

Statutory Authority

You have also asked whether the Lottery's operation of the Touch Tab Machines violates title 67, chapter 74, Idaho Code. The Lottery has broad authority stemming from Idaho Code § 67-7408(1)(e), which provides that:

> . . . . The commission shall adopt, upon recommendation of the director, such rules and regulations governing the establishment and operation of the lottery as it considers necessary under this

> chapter to ensure the integrity of the lottery and its games and to maximize the net income of the lottery for the benefit of the state. Such rules and regulations shall generally address, but not be limited to:
>
> . . .
>
> (e) The methods to be utilized in selling and distributing lottery tickets or shares, including the use of machines, terminals, telecommunications systems and data processing systems. Customer operated machines, terminals or other devices for selling lottery tickets or shares shall only be operated by the use of currency or coin;"

Therefore, the Lottery looks to its administrative rules at IDAPA 52.01.03 (Rules Governing Operations of the Idaho State Lottery) for authority for operation of machines for sale and distribution of lottery tickets, including pull-tab tickets.

With respect to the Touch Tab Machines, IDAPA 52.01.03.205.01.a. (Lottery Rule 205.01.a.) provides that "[t]he Commission hereby authorizes the Director to select and operate breakopen instant ticket games" (pull-tab tickets) meeting criteria set forth in the rules, and provides for selling and dispensing pull-tab tickets via authorized dispensing devices. Further, "Authorized dispensing device" is defined as "any machine, or mechanism designed for use of vending or dispensing of breakopen instant tickets," and that such devices may include mechanical, electrical, electro-mechanical or other devices approved by the Director of the Lottery.

It appears the Touch Tab Machine fits within that broad definition as an authorized dispensing device.

Again, the constitutional analysis is attached. I hope you find this helpful.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

March 22, 2016

Honorable Bert Brackett
Idaho State Senate
P. O. Box 83720
Boise, Idaho 83720-0081
Delivered by E-Mail

Re: REAL ID and Driver's License Retention

Senator Brackett:

QUESTION PRESENTED

You have asked whether the authority granted to the Idaho Transportation Department ("ITD") in Idaho Code section 49-306 and section 49-321 are sufficient to allow the Department to retain and store information provided as part of a driver's license application for the time periods prescribed by the REAL ID Act.

SHORT ANSWER

Yes, it appears that there is sufficient statutory authority to allow ITD to retain and store documentation provided as part of an individual's application for an Idaho driver's license.

ANALYSIS

Idaho Code section 49-306 requires the presentation of certain documentation in support of an application for an Idaho driver's license. Such documents include, "proof of identity acceptable to the examiner or the department and date of birth as set forth in a certified copy of his birth certificate," as well as "the applicant's social security number as verified by the social security administration," and "such [other] proof as the department may require that the applicant is lawfully present in the United States." This documentation is required as part of the driver's license application process.

Once this information is provided as part of the driver's license application, Idaho Code section 49-321 requires the Department to keep on "file every application for a driver's license received by it and shall maintain suitable indices" of "all applications granted . . . ." I.C. § 49-321(1)(b). This section appears to require the Department to maintain on file the driver's license application, as well as indices of the documentation supporting the granting of the application.

The term "file" is not defined in title 49 of the Idaho Code. According to the rules of statutory construction, absent a statutory definition, words in statutes are to be given their plain and ordinary meaning. "The interpretation of a statute 'must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole.'" Verska v. Saint Alphonsus Reg'l Med. Ctr., 151 Idaho 889, 893, 265 P.3d 502, 506 (2011). Black's Law Dictionary defines the word "file" as "to record or deposit something in an organized retention system or container for preservation and future reference." Black's Law Dictionary (9th ed. 2009). Likewise, Webster's Dictionary defines the word "file" as "to arrange (as paper, cards, or letters) in a particular order for preservation and reference." Webster's Third New International Dictionary (3rd ed. 2002).

The preservation of the documentation submitted as part of a driver's license application also seems consistent with other sections of the Code relating to driver's licenses. For example, Idaho Code section 49-322 requires the Department to cancel a driver's license if it determines that the licensee gave incorrect information in the application process. It provides: "The department shall cancel any driver's license, restricted school attendance driving permit, or instruction permit upon determining that the licensee or permittee was not entitled to the issuance of the driver's license or instruction permit, or that the licensee or permittee failed to give the required or correct information in his application, or committed fraud in making the application." I.C. § 49-322(1) (emphasis added). Without retaining copies of the documents supporting the application, the Department would only have one opportunity to fulfil this statutory requirement if the documents were not available for review following the issuance of the license.

Similarly, Idaho Code section 49-331 makes it a crime to do certain things with a driver's license, including fictitiously or fraudulently altering it or using a false birth certificate to obtain a driver's license. Having the records kept as part of the application serves to protect the integrity of the system by keeping supporting documents tied to a single/specific driver's license.

Section 49-331 provides:

> It is a misdemeanor for any person:
> (1) To display or cause or permit to be displayed or have in his possession any mutilated or illegible, cancelled, revoked, suspended, disqualified, fictitious or fraudulently altered driver's license;
> . . .
> (5) To use a false or fictitious name in any application for a driver's license, or to knowingly make a false statement, or to knowingly conceal a material fact or otherwise commit a fraud in any application;
> . . .
> (7) To manufacture, produce, sell, offer for sale or transfer to another person any document purporting to be a certificate of birth or driver's license.

I.C. § 49-331 (emphasis added).

Documentation provided in support of a driver's license application is therefore necessary not only to issue the license, but to defend the issuance of that license if need be. It protects the Transportation Department from future challenges that the license was erroneously issued, as well as protecting the driver from fraud by allowing the DMV to review potentially fraudulent documents against the originals in the driver's files.

REAL ID Source Document Retention

Much like the current provisions of the Idaho Code, the federal regulations implementing the REAL ID Act require that certain documentation be required by states issuing REAL ID compliant driver's licenses. The regulations require such things as proof of

identity such as a passport (6 C.F.R. § 37.11(c)(i) (2008)), a photograph of the applicant (6 C.F.R. § 37.11(a) (2008)), social security documentation (6 C.F.R. § 37.11(e) (2008)), two documents with the applicant's name and current address (6 C.F.R. § 37.11(f) (2008)), and a combination of documents to establish lawful status in the United States (6 C.F.R. § 37.11(g) (2008)).

The regulations further require that "States must retain copies of the application, declaration and source documents presented under [section 6 CFR] 37.11 of this Part, including documents used to establish all names recorded by the DMV under § 37.11(c)(2)." 6 C.F.R. § 37.31 (2008). The time period for retention of these documents is seven years for paper copies (6 C.F.R. § 37.31(a)(1) (2008)) and 10 years for electronic/digital copies of documents (6 C.F.R. § 37.31(a)(3) (2008)). This record retention requirement appears to be similar to that found in Idaho Code section 49-321, although the Idaho Code section retention period appears to be indefinite. Although the Department does not have a record retention policy specifically for "driver's license applications," it does have a retention policy for driver's records, part of which contains the application materials. At this time, the Department's record retention policy for non-commercial driver's records is 10 years.

Safeguards

The Idaho Code does provide certain safeguards for the protection of personal information maintained in the State's DMV database. For example, "Personal Information" contained in records of the DMV is not subject to disclosure to third parties except under specific conditions set forth in the Idaho Code. I. C. § 49-203(4). This is also a specific exemption from the Public Records Act. I.C. § 74-102(5)(c). Thus, unless a requester can satisfy one of the statutory exceptions, personal information in the DMV database may not be disclosed.

Additionally, in the event of a breach or inadvertent disclosure of personal information, the Transportation Department DMV is required to comply with the state's protocols for "breach of security of computerized personal information by an agency . . . ." I.C. § 28-51-105. This section requires, amongst other things, that any breach of

personal information be immediately disclosed to the individual whose personal information may have been compromised.

Sincerely,

J. TIM THOMAS
Deputy Attorney General
Idaho Transportation Department

March 25, 2016

Honorable Bert Brackett
Idaho State Senate
P. O. Box 83720
Boise, ID 83720-0081
Delivered by E-Mail

Re: REAL ID and Driver's License Retention

Senator Brackett:

QUESTION PRESENTED

You have asked the follow up question does Idaho Code section 49-321 allow the Department to take and store a copy of the verification/supporting documents as well as the application without the overlay of REAL ID.

ANALYSIS

The Idaho Code requires the Idaho Transportation Department DMV to collect and retain evidence obtained in association with a driver's license application. This section provides:

> **Records to be kept by the department.** (1) The department shall file every application for a driver's license received by it and shall maintain suitable indices containing:
>
> (a) All applications denied and on each note the reason for denial;
>
> (b) All applications granted . . . .

I.C. § 49-321.

The question then becomes what is the definition of an "application." The term is not defined in Code. Based upon the information required in Idaho Code section 49-306, it seems that the "application" for a driver's license is more than a single sheet of paper.

As set forth in my previous memorandum, section 49-306 requires several documents be produced in connection with an Idaho driver's license application.

Idaho Code section 49-306 provides, in pertinent part:

> (1) Every application for any instruction permit, restricted school attendance driving permit, or for a driver's license shall be made upon a form furnished by the department and shall be verified by the applicant before a person authorized to administer oaths. . . .
>
> (2) Every application shall state the true and full name, date of birth, sex, declaration of Idaho residency, Idaho residence address and mailing address, if different, of the applicant, height, weight, hair color, and eye color, and the applicant's social security number as verified by the social security administration. . . .
>
> (a) The requirement that an applicant provide a social security number as verified by the social security administration shall apply only to applicants who have been assigned a social security number.
>
> (b) An applicant who has not been assigned a social security number shall:
>
> (i) Present written verification from the social security administration that the applicant has not been assigned a social security number; and
>
> (ii) <u>Submit a birth certificate, passport or other documentary evidence</u> issued by an entity other than a state or the United States; and
>
> (iii) <u>Submit such proof as the department may require</u> that the applicant is lawfully present in the United States.
>
> . . .
>
> d) <u>The applicant must submit proof</u> of identity acceptable to the examiner or the department

> and date of birth as set forth in a certified copy of his birth certificate. . . .

I.C. § 49-306 (emphasis added).

Because the documentary evidence set forth above is all required by statute as part of the application process, it appears that they are part of the "application" for a driver's license as that term is used in section 49-321.

Sincerely,

J. TIM THOMAS
Deputy Attorney General
Idaho Transportation Department

August 26, 2016

The Honorable Bert Brackett
Idaho State Senator
48331 Three Creek Highway
Rogerson, ID 83302

Re: Our File No. 16-55538 - Western Elmore County Recreation District Board

Dear Senator Brackett:

This letter is a response regarding Western Elmore County Recreation District (Western Elmore District) and Idaho recreation district law, Idaho Code § 31-4301, *et seq.* I have attempted to respond to your inquiry in form of answering the following questions below.

1. Does Idaho recreation district law permit a district to provide grants to other governmental entities for the purpose of purchasing sports uniforms or equipment?

Under Idaho recreation district law, a district may only provide funds to other governmental entities for the purpose of providing public recreational ***facilities***. Our analysis of this question focuses on the text of the statutes governing recreation districts.

There is no case law directly interpreting the recreational district statutes. However, a decision from the Idaho Supreme Court regarding the scope and authority of an auditorium district is analogous and instructive.[1] In that case, the Court examined the literal words of the applicable statutory sections in a way that gives effect to all the words of the statute (but not more) in order to determine the scope of an auditorium district's authority. The Court made clear that a taxing district cannot use tax revenues to engage in activities outside the express authority granted to it under Idaho law. It is reasonable to adopt the same analytical approach used by the Idaho Supreme Court in reviewing this matter here,

since the essence of this inquiry is determining the scope of Western Elmore District's authority.

The recreation law gives recreation districts a limited authority to provide funds or joint facilities to another governmental entity. Idaho Code § 31-4317 sets forth the powers of a district. One of the powers conferred by the statute is:

> (h) to cooperate with and to contract with the state and federal governments or any bureau or agency thereof and with any county, city, school district, other recreation districts, other political subdivisions or municipal corporations to provide funds for district facilities or to provide joint ***facilities***.

Idaho Code § 3l-43l7(h) (emphasis added). Under this statute, only public, governmental entities are eligible to receive funds from a recreation district.[2] Thus, a recreation district may lawfully provide funds for the purpose of providing recreational ***facilities***, but only to other governmental entities.[3] The further implication of this language is that the statutes do not authorize districts to use funds for non-facility related purposes, regardless of the recipient of the funds.

The materials you provided us indicate that the Western Elmore District has acted beyond the legal authority granted to it by the Idaho Code. Importantly, Idaho Code § 31-4302 declares that the purpose of a recreation district is to provide a public benefit and that the ***provision of adequate recreation facilities for public use is a public benefit***. To fulfill that public benefit, Idaho Code § 31-4316 directs that the purpose of a recreational district is:

> . . . for the uses and purposes of acquiring, providing, maintaining and operating public recreation centers, swimming facilities, pools, picnic areas, camping facilities, ball parks, handball courts, tennis courts, marine and snowmobile facilities, recreational pathways, ski areas, and golf courses and public transportation systems and facilities serving the district together with all related grounds, buildings, equipment

> and apparatus ***for the use of the residents of the district and the public generally***.

(Emphasis added). Consistent with this purpose, the relevant portion of Idaho Code § 31-4317 indicates:

> (g) to construct or erect all buildings or structures which are necessary or convenient;
>
> (h) to cooperate with and to contract with the state and federal governments or any bureau or agency thereof and with any county, city, school district, other recreation districts, other political subdivisions or municipal corporations to provide funds for district facilities or to provide joint facilities;
>
> (i) to operate and provide all concessions necessary or convenient;
>
> (j) to provide classes in water safety and swimming to the public;
>
> (k) to hire and to dismiss all necessary agents, attorneys and other employees and to fix and pay their compensation and expenses out of the district funds; . . .

Idaho Code § 4317(g)-(k).

The directives in these statutory provisions are clear. A recreation district is created to construct recreational facilities or join with another governmental entity to provide funds for a facility or joint facility, which will be open to residents of the district and the general public. The expenditures placed before this office, however, do not meet with these statutory requirements.

For example, the materials show that the Western Elmore District has provided funds for sports uniform and equipment purchases for athletics at Mountain Home High School. Sports uniforms are not facilities, nor are these uniforms available for use by the residents of the district and the general public. These expenditures are not authorized by any of the enabling statutes for a recreation district. Similarly, the materials show other expenditures to various non-profit entities, such as the Special Olympics and Elmore County Youth Baseball. Not only are these expenditures for non-

facilities, and are not available for use by the residents and general public, they are for use by private non-governmental entities. The applicable law does not authorize such expenditures.

In sum, the expenditures we have reviewed do not comply with the statutory mandates of Idaho Code §§ 31-4316 and 4317. The Western Elmore District has used its tax levy to funnel tax dollars in ways that are not authorized by any provision of law and this office recommends that such use of those funds cease immediately. If the District does not want to construct and maintain a facility as directed by Idaho Code §§ 31-4316 and 4317, then it should be dissolved under Idaho Code § 31-4320.[4]

> *2. If a recreation district provides funding to a group or for a purpose that is contrary to the provisions of the recreation district law, what are the potential consequences to the recreation district and the entity receiving funds? Who may enforce those provisions and by what means?*

This is a difficult question to answer in the abstract given the amount of hypothetical variables that could alter the analysis. In general, if funding is provided to a group or for a purpose that is contrary to the recreational law, the primary consequence would be a return of the funds which have been provided to the recreation district. Moreover, there is a possibility that a court would order ownership of any property (real or personal) illicitly transferred be returned to the district along with an injunction prohibiting such action in the future. Title 18, chapter 57, Idaho Code, criminalizes certain activities and could be applicable depending on the particular circumstances. Similarly, article VII, section 10 of the Idaho Constitution makes it a felony for certain misuses of funds. Enforcement of these provisions and any other criminal statutes would rest with the County Sheriff and Prosecutor under Idaho Code § 31-2227. A county prosecuting attorney also has a duty to prosecute civil actions in which the people, or the state, or the county, are interested (Idaho Code § 31-2604). A resident of a recreation district or some other interested party may have standing to seek an injunction court order directing a district to follow the recreation district law's prohibition on funding or providing joint

facilities to non-government entities. Finally, there is a petition process to hold an election to dissolve a recreation district provided in Idaho Code § 31-4320.

> *3. Are there any constitutional provisions prohibiting a district from donating proceeds to private non-profit entities?*

Yes. Art. XII, sec. 4 of the Idaho Constitution prohibits a municipal corporation, such as a recreation district, from loaning or raising money in any amount to aid a private interest, even if its citizens vote in favor of such an action. Art. XII, sec. 4 provides that, "[n]o county, town, city or other municipal corporation, by vote of its citizens or otherwise, shall ever become a stockholder in any joint stock company, corporation or association whatever, ***or raise money for, or make donation*** or loan its credit to, or in aid of, any such company or association" (emphasis added) with certain exemptions inapplicable here.

In Boise Redevelopment Agency v. Yick Kong Corp., the Idaho Supreme Court acknowledged the rationale of the framers in adopting article XII, section 4:

> The purpose of such a prohibition [against lending credit and raising money for private interests] is clear. ***Favored status should not be given any private enterprise or individual in the application of public funds.*** The proceedings and debates of the Idaho Constitutional Convention indicate a consistent theme running through the consideration of the constitutional sections in question. ***It was feared that private interests would gain advantages at the expense of the taxpayers.*** This fear appeared to relate particularly to railroads and a few other large businesses who had succeeded in gaining the ability to impose taxes, at least indirectly, upon municipal residents in western states at the time of the drafting of our constitution.

94 Idaho 876, 883-84, 499 P.2d 575, 582-83 (1972) (emphases added). *See* Idaho Falls Consol. Hospitals, Inc. v. Bingham Cty. Bd.

of Cty. Comm'rs, 102 Idaho 838, 841, 642 P.2d 553, 556 (1982) ("[I]t is apparent that the framers of the Idaho Constitution were primarily concerned about private interests gaining advantage at the expense of the taxpayer.")

As noted above, the materials provided to us indicate various amounts of money provided to private entities, including St. Vincent de Paul, Healing Hearts and Special Olympics. By donating some of its tax dollars, the District is essentially raising money for these entities by obviating their need to raise and expend their own funds to pursue their charitable endeavors, commendable and creditable as they are. Such expenditures are prohibited by article XII, section 4.

I hope that the content of this letter is helpful. If you would like to discuss this letter further, please feel free to contact me at 208-334-4114.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

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[1] The case is Ameritel Inns, Inc. v. Pocatello-Chubbuck Auditorium or Cmty. Ctr. Dist., 146 Idaho 202, 192 P.3d 1026 (2008). In Ameritel, the auditorium district used tax revenues exclusively to market facilities in the area for use, and did not acquire its own facility. The Court cited the literal language of the auditorium district's enabling statute (Idaho Code § 67-4902) as allowing the district to use tax revenues to build, operate, maintain, market and manage some sort of physical facility. The Court said the statute does not provide for, and does not authorize, merely marketing already existing facilities and therefore barred future expenditures of tax revenues to promote facilities the district does not own. *Id.* at 204-05.

[2] There is no inverse restriction. A district may accept gifts and donations of real and personal property without restriction.

[3] This harmonizes with the Idaho Constitution's prohibition on public entities raising money for private interests. As discussed further below, art. XII, sec. 4 of the Idaho Constitution prohibits a municipal corporation from raising money for or making a donation to a privately owned company or association, even if the electors of the county approve of such an action.

[4] Similarly, the District could seek expansion of its authority under its statutory structure. Whether such expansion would survive constitutional scrutiny is beyond the scope of this analysis. Such analysis would depend on the precise language of any amendment.

August 30, 2016

Jan Frew, Administrator
Division of Public Works
STATEHOUSE MAIL

Re: Analysis of Permanent Building Funds Use for Certain Public Works

Dear Administrator Frew:

This letter is in response to your request of August 18, 2016 for an opinion on the question presented herein.

QUESTION PRESENTED

Does Idaho Statute 67-5711A, B, C, and D, and any other related statutes, restrict the use of Permanent Building Funds for structures of operational use for departments identified within those statutes?

ANALYSIS

Idaho Code sections 67-5711A, B, C and D do not restrict the use of permanent building funds or distinguish between administrative or operational facilities for the matters addressed therein. Section 67-5711A allows the Department of Administration (Department) or a designee to employ the use of design-build as a delivery method in the letting of public works projects. Section 67-5711B provides authority for the Department and the Division of Public Works (DPW) or a designee to make emergency contracts when necessary. Section 67-5711C sets forth competitive bidding requirements and procedures applicable to DPW and any state entity authorized to engage in their own public works bidding activities, but without any regard to the source of funding. Section 67-5711D authorizes DPW or a "public entity" (political subdivision) to enter into energy savings performance contracts. Other than providing express authority for the Department or DPW to engage in several types of public works

construction delivery methods, no other state entities are specifically identified in those statutes.

More pertinent to the question presented are the provisions of Idaho Code section 67-5711. In relevant part, that statute states the following:

> The director of the department of administration, or his designee, of the state of Idaho, is authorized and empowered, subject to the approval of the permanent building fund advisory council, to provide or secure all plans and specifications for, to let all contracts for, and to have charge of and supervision of the construction, alteration, equipping and furnishing, repair, maintenance other than preventive maintenance of any and all buildings, improvements of public works of the state of Idaho, the cost of which construction, alteration, equipping and furnishing, repair, maintenance other than preventive maintenance exceeds the sum of one hundred thousand dollars ($100,000) for labor, materials and equipment, which sum shall exclude design costs, bid advertising and related bidding expenses, provided, that the director or his designee, and permanent building fund advisory council shall, in the letting of contracts under this section, comply with the procedure for the calling of bids provided in section 67-5711C, Idaho Code . . . ."

This provision within the statute essentially authorizes the Department to administer all public works projects in excess of $100,000 subject to the approval of the Permanent Building Fund Advisory Council (PBFAC), provided the competitive bidding procedures in section 67-5711C are complied with. This is consistent with Idaho Code section 67-5710A(1)(a), which similarly provides that the location, design, plans and specifications of an existing public works project of any state entity be approved by the PBFAC, and the project supervised by DPW or its designee without regard to source of funding for the project. Accordingly, both statutes authorize DPW, with approval from the PBFAC, to supervise and have charge of public works projects of all state entities.

Idaho Code section 67-5711 provides an exemption to these general requirements for certain enumerated state entities (which exemption is also recognized in Idaho Code section 67-5710A(1)(a)). In relevant part, section 67-5711 states:

> . . . provided further, that public works for the Idaho transportation department, the department of fish and game, the department of parks and recreation, the department of lands, and the department of water resources and water resource board, *except for administrative office buildings and all associated improvements*, are exempt from the provisions of this section that relate to the administration and review of such projects by the director of the department of administration or his designee and by the permanent building fund advisory council.

(Emphasis added.) Accordingly, the above statutory provision indicates only that the identified state entities are exempt from having DPW administer public works projects that do not involve the construction, alteration, improvement, etc., of administrative office buildings and associated improvements thereupon, or from requiring the PBFAC to approve such. There is no indication that the statute restricts the use of permanent building funds on public works projects of such exempt state entities whether supervised by the involved state entity or DPW. Idaho Code section 67-5710 indicates that DPW and the heads of the agencies for which appropriations for construction, renovations, remodelings or repairs are made pursuant to title 57, chapter 11, Idaho Code, shall consult, confer and advise with the Permanent Building Fund Advisory Council in connection with all decisions concerning the administration of these appropriations and the planning and construction or execution of work or works pursuant thereto. While this section requires the approval of the PBFAC prior to planning or construction of a project for which an appropriation has been made from the permanent building funds (PBF), it does not necessarily restrict the use of the PBF to any state agency or particular type of facility. This is consistent with the PBFAC policy which recognizes that projects for certain exempted state entities which may be funded by the PBF do not require administration by

DPW. *See* Permanent Building Fund Advisory Council Guide, at 7-9 (Feb. 2016).

This is also consistent with Idaho Code section 57-1108 which provides that, "All moneys now or hereafter in the permanent building fund are hereby dedicated for the purpose of building needed structures, renovations, repairs to and remodeling of existing structures at the several state institutions and for the several agencies of state government." Furthermore, Idaho Code section 57-1107 states that "[u]pon legislative appropriation from the permanent building account, it shall be the duty of the permanent building fund advisory council to cause the approved construction, acquisition or improvement to be promptly completed in accordance with the terms of the approving legislation . . ." No distinction appears to be made in these statutes between administrative or other kinds of facilities for which an appropriation may be made. While section 67-5711 exempts certain state agencies from the authorization provided to the Department to administer certain public works projects thereof, it does not appear to prohibit it if that may be desired by both parties.

Idaho Code section 67-5711 does not provide a definition of "administrative office buildings," nor is there a definition of the term contained in title 67, chapter 57, Idaho Code. Idaho Code section 67-5709A does define "state administrative facility" in the context of the disposition of surplus real property as follows:

> . . . any real property and improvements, including administrative office buildings, structures and parking lots, used by any state agency to assist it in its operation as a state agency. State administrative facilities shall not include the real property or improvements owned or occupied by a state agency where such ownership, operation or occupying is a function of the agency's purpose, such as real property and improvements, other than the administrative office buildings, structures and parking lots described above, under the jurisdiction and control of the Idaho transportation department, the department of fish and game, the department of parks and recreation and the department of lands.

While not directly applicable, the definition may be instructive in determining whether a facility may qualify as an "administrative office building" for the exception set forth in Idaho Code section 67-5711. If the facility is primarily constructed or improved to *assist* the state entity in its operation as such, and where operation or occupation of the facility is not a *function* of the agency's statutory purpose, then it may fairly be characterized as an administrative office building. Idaho Code section 67-5708B provides a similar definition of "facility needs" in the context of requiring state agencies to maintain a facilities needs plan over a five year timeframe.

Beyond what is contained in title 67, chapter 57, Idaho Code, it may be helpful to consider that when determining what may qualify as an "administrative office building," at a minimum it may be reasonable to require the facility to contain "office" space in which administrative functions of the state agency are performed. Administrative functions may reasonably include those functions that may be common to other state agencies, or those tasks that are performed directly in support of the primary statutory purpose(s) of the agency. Administrative functions may also include the delivery of services and support primarily to those within the agency, rather than its customers. Additionally, the mere fact that some administrative functions occur in a facility which may be incidental to serving a different primary purpose of the facility may not by itself necessarily characterize the facility as an "administrative office building."

Additionally, the language contained in Idaho Code section 67-5711 providing for an exemption of certain agencies to DPW supervision of public works projects was included in the statute by the Legislature in 1988 in House Bill 774 (as amended), 1988 Idaho Sess. Laws 1089. The Statement of Purpose for that legislation indicates the following:

> . . . [the Departments of Parks and Recreation and Fish and Game, and the Idaho Transportation Department] have ongoing specialized construction programs that should not fall under the oversight of Public Works. However, this exemption should not apply to administrative office buildings where the experience and expertise of the Division of Public Works could

> prove beneficial. State office building space needs should be coordinated and reviewed by one supervising agency.

This may reasonably be construed to reflect that the intent of the Legislature was that where the facility to be constructed does not require specialized construction expertise, but rather is a project over which the DPW may have prior experience in supervising, or is a facility DPW commonly constructs for other state agencies who have a similar need therefore, then DPW would retain supervision over such projects.

Sincerely,

PATRICK J. GRACE
Deputy Attorney General
Contracts and Administrative Law Division

August 31, 2016

Senator Jim Guthrie
State Capitol
Via email: jguthrie@senate.idaho.gov

Re: Idaho County Fair Boards

Senator Guthrie:

You recently contacted our office with two questions involving Idaho county fair boards: (1) Can a board of county commissioners dissolve the fair board for their county?; and (2) Can a board of county commissioners limit the authority of the fair board for their county so that the fair board can exercise that authority only during the time a county fair is actually taking place?

I enclose a copy of a letter our office sent to you on March 7, 2014, from Deputy Attorney General Tim A. Davis, which appears to deal with the same or very similar issues. The independent analyses of Mr. Davis and I reached the same conclusions as to the authority of a board of county commissioners to reorganize a fair board or assume its duties and responsibilities. Briefly, in response to your questions, a board of county commissioners cannot dissolve a fair board, at least as long as a county fair is taking place in that county. In counties with more than 200,000 residents, a board of county commissioners could, by ordinance, limit a fair board's authority to that of an advisory board, and delegate full authority to the fair board only during the time a fair is taking place. In counties of 200,000 residents or less, such a limitation is not possible.

The creation, appointment, powers and duties of fair boards and their members is set forth in the County Fair Board Act, title 22, chapter 2, Idaho Code. A fair board is a creation of a county's commissioners, who vote to create the board, either following a petition by citizens of the county or where the county already had a fair board for at least two years prior to the enactment of the County Fair Board Act. Idaho Code § 22-201. In either case, after a hearing, the board of county commissioners "shall, if it deems it for the best

interests of the county that a county fair be conducted by the county, create a county fair board . . ." Idaho Code § 22-202. It thus appears that it is mandatory for a county to have a fair board if it wishes to conduct a county fair.

Where a county has 200,000 residents or less, Idaho Code § 22-202(A) sets forth the number of members of a fair board (either five or seven) and the terms they serve (four years if seven members, three years if five members). Where a county has more than 200,000 residents, Idaho Code § 22-202(B) sets forth the number of members of a fair board (five or seven) and the terms they are to serve (three years in either case).

In counties with more than 200,000 residents, Idaho Code § 20-202A provides that a board of county commissioners may provide, by ordinance, that the fair board will function as an advisory board to the commissioners. In such a case, the commissioners retain and exercise the powers, duties and responsibilities otherwise charged to the fair board. A county ordinance adopted under this provision must set forth the powers, duties and responsibilities of the fair board and provide such other rules and regulations under which the board is to advise the commissioners and conduct its operations. Such an ordinance is subject to repeal by the commissioners at any time, and, if repealed, the provisions of the Fair Board Act apply as if the ordinance had never been adopted.

The powers and duties of county fair boards are set forth in Idaho Code §§ 22-204 to 22-207. These include, among other things, the care and custody of county property used for fair purposes and responsibility for all moneys received by the fair board via taxes, levies or fair proceeds. Fair boards may hire employees, award prizes, make exhibition contracts, fix and charge admission and entrance fees, and let contracts for concessions or services. Fair boards are deemed to be taxing districts, and must set a yearly budget for fair purposes, which is to be submitted for approval to the county commissioners. Idaho Code § 22-206. Pursuant to Idaho Code § 22-207, a fair board must retain funds remaining after a fair for use in conducting fairs in subsequent years.

Notably, for this inquiry, there is no provision in title 22, chapter 2 that allows a board of county commissioners to dismiss fair board members before the expiration of their term, or to dissolve a fair board, at least as long as the county is actually holding a fair. And, as to counties with 200,000 residents or less, there is no provision by which a board of county commissioners may limit a fair board's authority to only that period of time during which a fair is being held.

As to counties with more than 200,000 residents, pursuant to Idaho Code § 22-202A, the board of county commissioners can, by ordinance, provide that the fair board serve as an advisory board. In such a case, it would appear that the commissioners could exercise the duties of a fair board throughout the year, and delegate those duties to the fair board only during the time the fair is actually taking place.

In summary, a board of county commissioners cannot dissolve a fair board as long as the county is having a county fair, or dismiss fair board members before their terms expire. In counties with 200,000 residents or less, a board of county commissioners cannot place limitations on the statutory authority of a fair board. In counties with more than 200,000 residents, the commissioners could, by ordinance, require that the fair board act as an advisory board. In such a case, it appears that the county commissioners could place limitations on the authority of a fair board, including granting the fair board full statutory authority only during the time a fair is taking place.

Thank you for contacting our office. Please feel free to call me if you have any questions.

Sincerely,

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

August 31, 2016

The Honorable Dan Johnson
Idaho State Senate
Statehouse
VIA HAND DELIVERY

Re: Faith Healing in Idaho

Dear Senator Johnson:

This letter is in response to your inquiry to the Attorney General's Office regarding the statutes addressing faith healing in Idaho.

Question No. 1:

You have asked whether a child receiving prayer treatment would fall within the reach of the statutory definitions (Titles 16 and/or 18) if the provision of such treatment, coupled with a grave medical condition, combine to pose a serious threat to the physical well-being of the child.

Under title 16, Idaho Code, the Idaho Legislature has authorized law enforcement and the courts to respond to instances where children are neglected, abandoned, abused, homeless, or whose parents fail to provide a stable home environment through the Idaho Child Protective Act, Idaho Code § 16-1601, *et seq.* The policy of the Idaho Child Protective Act is to protect a child's life, health or welfare, and to seek to reunify the family while taking actions necessary to provide children with permanency. The Idaho Child Protective Act defines "neglected" as follows:

> (31) "Neglected" means a child:
> (a) Who is without proper parental care and control, or subsistence, *medical or other care* or control necessary for his well-being because of the conduct or omission of his parents, guardian or other custodian or their neglect or refusal to provide them; however, *no*

> *child whose parent or guardian chooses for such child treatment by prayers through spiritual means alone in lieu of medical treatment shall be deemed for that reason alone to be neglected* or lack parental care necessary for his health and well-being, but this subsection shall not prevent the court from acting pursuant to section 16-1627, Idaho Code;

Idaho Code 16-1602(31)(a) (emphasis added).

Under this definition, a child with a medical condition who has been treated with prayer alone in lieu of medical treatment cannot be found "neglected" due to the parent(s) failure to seek medical care because the definition of neglect *specifically* excludes that conduct from being considered neglect. There is no qualifier which makes the spiritual exemption unavailable if the physical well-being of the child is seriously threatened.

Other states have drafted spiritual exemption statutes separately from statutes defining child neglect or endangerment, which have allowed courts in those states to determine that a child's grave medical condition may be combined with the child's threat to the physical well-being to find jurisdiction under child dependency or criminal statutes. For example, People in Interest of D.L.E., 645 P.2d 271, 274-275 (Colo. 1982), the Colorado Supreme Court affirmed a child had been neglected after concluding the phrase, "for that reason alone," in Colorado's spiritual exemption statute allowed a child being deprived medical care necessary to prevent a life-endangering condition to be an separate 'reason' apart from treatment by prayer. Similarly, in Walker v. Superior Court, 763 P.2d 852 (Cal. 1988), the California Supreme Court held the state's spiritual exemption to a criminal child neglect statute did not create a parallel defense to involuntary manslaughter and felony child endangerment charges where those statutes did not contain the spiritual exemption language. Since Idaho's spiritual exemptions are drafted into the child neglect statute directly, then the reasoning of the Colorado and California courts would not apply to Idaho's statutory provisions.

Although the spiritual exemption in Idaho Code § 16-1602(31) provides a defense to child neglect, Idaho Code § 16-1627 allows

state courts to authorize emergency medical treatment to children suffering from medical neglect, as long as certain conditions are met;

> (1) At any time whether or not a child is under the authority of the court, the court may authorize medical or surgical care for a child when:
>
> ...
>
> (b) *A physician informs the court* orally or in writing that in his professional opinion, *the life of the child would be greatly endangered without certain treatment and the parent, guardian or other custodian refuses or fails to consent.*
>
> ...
>
> (3) In making its order under subsection (1) of this section, *the court shall take into consideration any treatment being given the child by prayer through spiritual means alone, if the child or his parent, guardian or legal custodian are adherents of a bona fide religious denomination that relies exclusively on this form of treatment in lieu of medical treatment.*

Idaho Code 16-1627(1) and (3) (emphasis added.) However, the ability of authorities to utilize Idaho Code § 16-1627 is limited by the lack of reporting requirements for parents who choose to seek treatment for their children through spiritual means in lieu of medical treatment. Whenever a person, except a duly ordained minister, has reason to believe or observe conditions which would reasonably result in child medical (or other) neglect, Idaho Code § 16-1605 requires them to report the neglect to police or the Department of Health and Welfare. However, since treatment through prayer is specifically excluded from being neglect, there is no duty to report a child's lack of medical care so long as the child is being treated by prayers through spiritual means alone. Without a report authorities may not know about the situation, and therefore would be unable to investigate, seek an opinion from a physician as to whether a child's life is greatly endangered without treatment, or seek emergency medical consent for such treatment through the courts.

Question No. 2:

You also asked if the spiritual exemption language violates the Establishment Clause and Equal Protection Clause under the U. S. Constitution.

The Establishment Clause provides that, "Congress shall make no law respecting an establishment of religion. . .". U.S. Const. amend. I. The United States Supreme Court has held that the First Amendment applies to the states as well. Cantwell v Connecticut, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940). Under the Establishment Clause any law respecting religion must afford a uniform benefit and not discriminate among religions. Larson v. Valente 456 U.S. 228, 102 S. Ct. 1673, 72 L. Ed. 2d 33 (1982).

Some states have limited spiritual exemptions to a "recognized church or religious denomination" and faith healing must be accomplished, "by a duly accredited practitioner." These limitations have been held by one court to discriminate among religions and violate the Establishment and Equal Protection clauses of the U. S. Constitution. State v. Miskimens, 490 N.E.2d 931 (Ohio C.P. Coshocton Cty. 1984). Other courts have expressed similar analysis in dicta. *See, e.g.*, Walker, 763 P.2d at 874-879 (*Mosk, J., concurring*); State v. Crank, 468 S.W.3d 15 n.8 (Tenn. 2015). Since the spiritual exemption found in Idaho Code § 16-1602(31) does not contain these limitations, then it would be doubtful that the Establishment Clause could be used to strike down this provision. However, since these limitations are found in Idaho Code § 16-1627(3), that statutory provision is susceptible to Establishment Clause arguments.

Section 1 of the Fourteenth Amendment of the U.S. Constitution prohibits states from denying, "to any person within its jurisdiction the equal protection of the laws." Some parents have argued in court that they are denied equal protection of the laws because they cannot claim the spiritual exemption offered to other parents; either because they are not religious or because their religion doesn't fit into the type of religion specified by the spiritual exemption statute. *See, e.g.*, Crank, 468 S.W.3d 15. Equal protection arguments have generally been unsuccessful in court so long as the

spiritual exemption language does not limit its application to "recognized" churches or denominations, or only to faiths with 'accredited' practitioners. *See, e.g.*, Miskimens, 490 N.E.2d 931; Commonwealth v. Twitchell, 617 N.E.2d 609 (Mass. 1993). Again, because Idaho Code § 16-1602(31) does not contain these limitations, it is doubtful the Equal Protection Clause could be used to strike down Idaho's spiritual exemption. However, since these limitations are found in Idaho Code § 16-1627(3), that statutory provision is susceptible to Equal Protection arguments.

In a similar vein, some authors have argued that certain children are denied equal protection because they do not have protection under child neglect, abuse, or endangerment statutes if their parent(s) choose treatment by spiritual means. *See* Gregory Engle, *Towards a New Lens of Analysis: The History and Future of Religious Exemptions to Child Neglect Statutes*, 14 RICH. J. L. & PUB. INT. 375, 384-93, 395-98 (2010); Elizabeth A. Lingle, *Treating Children by Faith Colliding Constitutional Issues*, 17 J. LEG. MED. 301, 324-28 (1996). While these authors offer legal analysis and authority to support their arguments these theories have not been tested in court and it is unknown how they would fare in balance with a parent's constitutional right to the free exercise of religion.

The Idaho Legislature has passed the Free Exercise of Religion Protected Act (FERPA), Idaho Code §§ 73-401-04. Under this Act, the government may substantially burden a person's exercise of religion only if it demonstrates, by clear and convincing evidence, that application of the burden to the person is both essential to further a compelling governmental interest and the least restrictive means of furthering that compelling governmental interest. Any person who feels their exercise of religion is substantially burdened may assert FERPA as a defense in any judicial proceeding against the government, and recover attorney fees and costs if they prevail. However, the burden to their exercise of religion is not triggered by trivial, technical, or de minimus infractions. Idaho Code § 73-402. Courts have long held that protection of children is a compelling governmental interest. Prince v. Massachusetts, 321 U.S. 158, 166-67, 64 S. Ct. 438, 442-443, 88 L. Ed. 645, *reh'g denied*, 321 U.S. 804, 64 S. Ct. 784, 88 L. Ed. 1090 (1944). Any proposed legislation should be structured in conformance with FERPA so as to be the least

restrictive means necessary to accomplish the purpose of preventing medical neglect when the life of the child would be greatly endangered.

This letter is provided to assist you. The response is an informal and unofficial expression of the views of this Office based upon the research of the author.

Best Regards,

BRENT R. KING
Deputy Attorney General
Health and Human Services Division

September 15, 2016

Susan Miller, Executive Director
Idaho Board of Dentistry
STATEHOUSE MAIL

Re: Authority of the Idaho Board of Dentistry to Issue Emergency Suspension Orders

Dear Ms. Miller:

The Board of Dentistry ("Board") asks whether Idaho Code section 67-5247, standing alone, constitutes a sufficient grant of legislative authority to allow it to conduct emergency suspension proceedings against a dentist licensed and regulated by the Board. Based on our review of this matter, it appears that the provisions of section 67-5247, standing alone, are procedural in nature and do not constitute a specific delegation of legislative authority to take summary action against the dentist. While we realize that the Board's disciplinary authority includes suspension of licenses, suspension orders entered in emergency or summary proceedings are, as explained below, a different issue and require a specific legislative delegation of authority to the individual board.

In arriving at this conclusion, we have reviewed the statutory language, as well as the Board's specific powers and duties, Idaho case law, and supporting authorities. A review of the powers and duties of other boards and agencies lends support for the position that when the legislature intends to grant the power to conduct emergency proceedings it does so specifically, within the statute of the agency. Our conclusion that the APA does not constitute a grant of authority to conduct emergency proceedings is also supported by the rules of the Board itself, which specifically recognize that the Board has the ability to conduct emergency proceedings in matters involving anesthesia licensing.

I.
EMERGENCY SUSPENSION OF PROFESSIONAL LICENSES

A. Idaho Code Section 67-5247

Codified with the Administrative Procedures Act, section 67-5247 reads as follows:

> Emergency proceedings. – (1) An agency may act through an emergency proceeding in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate agency action. The agency shall take only such actions as are necessary to prevent or avoid the immediate danger that justifies the use of emergency contested cases.
>
> (2) The agency shall issue an order, including a brief, reasoned statement to justify both the decision that an immediate danger exists and the decision to take the specific action. When appropriate, the order shall include findings of fact and conclusions of law.
>
> (3) The agency shall give such notice as is reasonable to persons who are required to comply with the order. The order is effective when issued.
>
> (4) After issuing an order pursuant to this section, the agency shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.
>
> (5) Unless otherwise required by a provision of law, the agency record need not constitute the exclusive basis for agency action in emergency contested cases or for judicial review thereof.

Despite what might appear, this provision does not constitute a legislative delegation of authority intended to empower a board or agency to conduct emergency proceedings. On the contrary, this provision delineates the due process prerequisites which a duly authorized or empowered board or agency must include as part of its emergency proceedings. It details the procedural steps which must be taken to protect property rights of an individual against whom

emergency action will be taken: it does not act as a separate authorization of power by which to take emergency actions.

B. Public Policy and Procedure Reflected in the APA

Idaho Code section 67-5247 is a statute found within the Idaho Administrative Procedures Act (APA). The APA is codified at title 67, chapter 52, Idaho Code. The APA is a comprehensive compilation of statutes enacted and amended by the Idaho Legislature in 1992 and 1993, respectively, to provide a uniform set of procedural laws, incorporating essential concepts of due process and fair play found in the federal and state constitutions and case law, to govern and guide the administrative decision-making processes applicable to most state agency interaction with licensees, involved stakeholders, the general public and others.

In enacting the APA, one of the legislative goals was to strike an appropriate balance between the competing interests of public protection and rights or privileges granted individuals who have been issued professional licensees by state agencies. To that end, approximately half of the APA contains provisions regarding contested case proceedings and judicial review thereof. As used in the APA, "A proceeding by an agency, other than the public utilities commission or the industrial commission, that may result in the issuance of an order is a contested case and is governed by the provisions of [the APA], except as provided by other provisions of law."[1] As you know, the provisions of the APA and the Idaho Rules of Administrative Procedure of the Attorney General ("IRAP") apply to contested case disciplinary proceedings conducted by the Board.[2]

While due process may be a somewhat flexible principle mandating different requirements depending on the unique circumstances of a particular case, at the very essence or heart of due process are the concepts of notice and opportunity to be heard. In an ordinary or "typical" contested case proceeding against a licensee, the subject of the proceeding is entitled to receive clear notice of (1) the charges, (2) the authority of the agency to commence and prosecute the action, (3) the date and place of an evidentiary hearing on the violations, (4) the right to legal representation, and (5) other essential rights.[3] In addition, and significantly, Idaho Code

section 67-5254 states that "[a]n agency shall not revoke, suspend, modify, annul, withdraw or amend a license, or refuse to renew a license of a continuing nature . . ., unless the agency first gives notice and opportunity for an appropriate contested case in accordance with the provisions [of the APA] or other statue."[4] In other words, notice and opportunity for hearing is the norm or general rule and must ordinarily precede agency adverse action against a license.

The reason for these protections is obvious. Absent notice and pre-deprivation opportunity to be heard, the licensee is deprived of a substantial right or privilege without any process. Without an opportunity to contest the allegations and put on evidence refuting the need for an emergency suspension, the livelihood of the licensee will be taken away; as well as the livelihood of employees or others whose paycheck directly depends on the continued viability of the licensee's ability to practice his or her profession. The risk of irreparable harm to the licensee's reputation and financial interest is simply too great to warrant departure from the norm except in the most extreme of cases.

While pre-suspension notice and hearing is the general rule, section 67-5254 continues by saying: "This section does not preclude an agency from: (a) taking immediate action to protect the public interest in accordance with section 67-5247, Idaho Code . . . ."[5] Thus, the APA recognizes the need for deviation from the normal procedure requiring pre-deprivation notice when the test for emergency action is met. But these provisions don't necessarily answer the question of authority raised in your correspondence.

C. Idaho Case Law Discussing Emergency Suspensions

Because emergency action is so unusual and is reserved for the rarest of cases where public health, safety or welfare is in imminent danger and ordinary due process protections are insufficient to prevent the immediate injury, there is a dearth of reported Idaho case law on the subject. Indeed, only two reported cases were located in the author's research.

In Van Orden v. State, Dep't of Health & Welfare, 102 Idaho 663, 637 P.2d 1159 (1981), the Department of Health and Welfare ("Department") had issued a provisional license to the Van Ordens authorizing them to operate a shelter home, pending review of the Van Ordens' application for a full license. When concerns arose regarding the Van Ordens' qualifications for a full license, the Department first notified the Van Ordens that the provisional license would be extended through the completion of a hearing on the allegations, but then on October 12, 1977 and prior to the scheduled hearing, notified the Van Ordens that the provisional license was suspended effective October 17 and that a post suspension hearing was scheduled for October 21.[6] Following a November 1997 hearing, the Department adopted the hearing officer's written opinion that, among other things, the summary suspension of the provisional license was based upon an emergency endangering the safety of residents of the facility and that under these circumstances the prehearing suspension satisfied due process requirements. On appeal, the district court reversed the Department's order.[7] Upon further appeal, the Idaho Supreme Court reversed the district court and reinstated the Department's order.

In ruling for the Department, the Supreme Court commented:

> Following an abortive judicial proceeding, the provisional license was in effect revived since the parties stipulated that the center would continue to operate pending a hearing on a suspension of the provisional license and action on the full license.
>
> * * *
>
> The interest involved here is the pursuit of a business enterprise dependent upon state licensure and the stability of that business would obviously be harmed if the facility were closed pending a review. In the case at bar, however, there could be no such effect since the provisional license was extended through the date set for the application hearing. Thus, there was no actual deprivation on September 14 and thus, no value in additional or substitute safeguards.[8]

These comments from the Court indicate that no actual emergency suspension had taken place; therefore it was not directly at issue. Notwithstanding this fact, the Court went on to say that assuming for argument's sake that there had been an actual emergency suspension there would be no constitutional violation given the substantial health and safety factors at issue. In so ruling, the Court cited the summary suspension provisions of the APA and the following language found in Section 2-4003-12, a Department administrative rule applicable to shelter homes:

> Emergency Action by Director. In the event of an emergency endangering the life or safety of a resident, the Director may summarily suspend or revoke any shelter home license. As soon thereafter as practicable, the Director shall provide an opportunity for a hearing.[9]

Because there had been no actual emergency suspension in effect in Van Orden and because the Department of Health and Welfare had a separate rule authorizing it to take summary action against a license, the Van Orden case is of little if any help in resolving the question of whether Idaho Code section 67-5247, standing alone, grants an administrative agency the authority to initiate an emergency suspension proceeding.

Turning then to the second and final Idaho reported case discussing section 67-5247, in Kuna Boxing Club, Inc. v. Idaho Lottery Com'n, 149 Idaho 94, 233 P.2d 25 (2009), the Idaho Lottery Commission ("Commission") did indeed summarily suspend Kuna Boxing's bingo license without a hearing pursuant to the emergency provisions of section 67-5247.

In reviewing the suspension, the Idaho Supreme Court stated: "Idaho Code § 67-5247(1) governs an agency's power to act through an emergency proceeding . . . ." 149 Idaho at 98, 233 P.2d at 29. While it might be argued that this judicial comment might be dispositive of the issue presented, a careful review of the case reveals that whether or not section 67-5247 granted an agency authority to enter an emergency suspension order was not at issue and was not raised by Kuna Boxing. As to the emergency suspension, Kuna

Boxing raised only two issues on appeal: "(1) whether the Commission complied with statutory requirements under the APA when it suspended Kuna Boxing's bingo license; and (2) whether the Commission violated Kuna Boxing's right to procedural due process when it suspended Kuna Boxing's bingo license."[10] Kuna Boxing argued that there was no danger to the public health, safety or welfare justifying an emergency suspension and that the Commission failed to follow statutory procedures following the suspension. Kuna Boxing did not challenge the Commission's authority to take emergency action under section 67-5247 and, lacking a direct challenge to the statute, the Idaho Supreme Court merely assumed, without deciding, that the statute "governs an agency's power to act through an emergency proceeding." 149 Idaho at 98, 233 P.2d at 29. In effect, this was dicta by the Court.

Unfortunately, neither Kuna Boxing nor Van Orden answer the question presented in your letter.

D. Comments from Recognized Experts in Administrative Law and Procedure

As mentioned earlier, the APA was enacted effective July 1, 1993. Two of the main participants on the Attorney General's task force that prepared a draft of the APA for use by the legislative interim committee and the full legislature were Professor Dale D. Goble of the University of Idaho College of Law and Deputy Attorney General Michael S. Gilmore. It is fair to say that Professor Goble and DAG Gilmore are recognized and respected experts in administrative law and procedure and were in no small part instrumental in the enactment of the APA and the interpretation and application of its various provisions.

Professor Goble and DAG Gilmore jointly authored an article entitled *The Idaho Administrative Procedure Act: A Primer For The Practitioner*, which was published at 30 Idaho L. Rev. 273 (1993/1994, Idaho Administrative Procedure Act Special Edition). In their introductory remarks to this comprehensive work, the authors set the stage for the proper interpretation and application of the APA by noting:

> While an administrative procedure act functions like a constitution in limiting agency discretion, it differs from a constitution because it confers no substantive authority. The new Idaho Administrative Procedure Act (APA) merely prescribes limits on the exercise of authority delegated to an agency by another statute.[11]

Later in their work Professor Goble and DAG Gilmore make specific comments regarding the emergency action provisions codified at Idaho Code section 67-5247. The authors stated:

> [T]he APA specifies procedures to be employed in emergency proceedings when the agency may issue an order to address a "situation involving an immediate danger to the public health, safety, or welfare requiring immediate agency action."
>
> * * *
>
> It has long been recognized that the government possesses the power to act summarily when there is an immediate danger to the public health, safety, or welfare. For example, the director of the Department of Water Resources is empowered to issue an order requiring a cessation of activities that "involve an unreasonable risk of ... damage to life or property or subsurface, surface, or atmospheric resources" from the construction or operation of a geothermal or injection well. Quarantines and seizures of adulterated foods are other common examples of this power. The APA provides the procedures that an agency is to employ when it exercises emergency powers over an individual or an individual's property.
>
> * * *
>
> The protections accorded licensees are subject to two explicit limitations. First an agency may take immediate action against a licensee if the agency is authorized to exercise emergency powers...."[12]

These remarks by Professor Goble and DAG Gilmore make it clear that the APA merely provides the procedure for agency action. The APA "confers no substantive authority." The substantive authority must be found in other provisions of law, such as specific agency statutes or rules. This includes authority to involve emergency suspension proceedings. To emphasize the point, the authors state: "[A]n agency may take immediate action against a licensee if the agency is authorized to exercise emergency powers." *Id.* at 331 (emphasis added). Obviously, if the APA itself granted or authorized the power for emergency suspensions, there would be no need for this qualifying statement. The only purpose for the statement must be to emphasize that the authority must come from another source.

Finally, to assist deputy attorney generals, and by extension clients, in interpreting and applying the newly enacted APA and the "Idaho Attorney General's Model Rules of Practice and Procedure," codified at IDAPA 04.11.01, then Attorney General Larry Echohawk commissioned the publication of a booklet containing the APA and rule provisions, along with accompanying comments.[13] The comments regarding the APA statutes were written by Professor Goble. In discussing the emergency proceedings provisions of the APA, Professor Goble wrote:

> The Administrative Procedure Act does not authorize an agency to exercise emergency powers; the power to take such actions must be based upon another statute. . . . Section 67-5248 [now 67-5247] merely specifies the procedures that an agency must follow to exercise such power.[14]

Taken together, these comments from recognized experts in Idaho administrative law and procedure leave little doubt that state agencies, including the Board of Dentistry, cannot rely solely upon the APA as the source of authority for issuing emergency suspension orders. The source must come from Board statutes or rules. A review of some state agencies that have enacted just such authority is instructive.

E. Examples of Idaho Professional Licensing Board Statutes and Rules Expressly Authorizing Emergency Proceedings[15]

Clearly not all Idaho state agencies even have the need to issue emergency proceedings. Most agencies, even most licensing agencies, would not encounter a situation where imminent danger to the public exists, necessitating immediate agency action to avoid or mitigate the danger.

The Board of Dentistry is clearly within anyone's list of agencies that should have the authority to commence emergency proceedings. Several other agencies on the list have apparently recognized that the APA is not the source of such authority, and, therefore, have seen fit to have legislation or rules enacted to expressly grant them authority to commence such proceedings. A cursory review of Idaho statutory and regulatory law yields the following:

--Board of Pharmacy: "The board may suspend, without an order to show cause, any [controlled substances] registration simultaneously with the institution of proceedings under section 37-2718, Idaho Code, or where renewal of registration is refused, if it finds that there is an imminent danger to the public health or safety which warrants this action."[16]

--Board of Veterinary Medicine: "Whenever it appears that grounds for discipline exist under this chapter and the board finds that there is an immediate danger to the public health, safety or welfare, the board is authorized to commence emergency proceedings for revocation or other action. Such proceedings shall be promptly instituted and processed under the applicable provisions of chapter 52, title 67, Idaho Code."[17]

--Board of Nursing: "If the Board finds that public health, safety, and welfare requires emergency action and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. Such proceedings shall be promptly instituted and determined as authorized in Title 67, Chapter 52, Idaho Code."[18]

--Department of Environmental Quality: "If the Director finds the public health, safety or welfare requires emergency action, the Director shall incorporate findings in support of such action in a written notice of emergency revocation issued to the permittee. Emergency revocation shall be effective upon receipt by the permittee . . . ."[19]

--Department of Health and Welfare (Home Health Agencies): "If the Department finds the public health, safety, or welfare imperatively requires emergency action, a license may be summarily suspended pending proceedings for revocation or other action."[20]

--Department of Health and Welfare (Residential Habitation Agencies): "When the Department finds the public health, safety, or welfare imperatively requires emergency action, a certificate may be summarily suspended pending proceedings for revocation or other action."[21]

--Department of Health and Welfare (Radiation Control Rules): "If the Radiation Control Program Director finds the public health, safety or welfare requires emergency action, the Director will incorporate findings in support of such action in a written notice of emergency revocation issued to the licensee . . . ."[22]

Of perhaps most particular interest and applicability to the Board of Dentistry and thus the question being analyzed is one of the Board's own rules codified at IDAPA 19.01.01.064. This rule states:

> The Board may, at any time and for just cause, institute proceedings to revoke, suspend, or otherwise restrict an anesthesia a [sic] permit issued pursuant to Sections 060 and 061 of these rules. If the Board determines that emergency action is necessary to protect the public, summary suspension may be ordered pending further proceedings, ...

While I can only speculate as to the reason the Board enacted this emergency suspension authorization for anesthesia permits but did not do likewise for general licenses, the rule supports the conclusion that the Board recognizes that something more than Idaho

Code section 67-5247 is needed to authorize emergency suspension proceedings.

II.
INTERPRETATION AND CONCLUSION

The provisions of the Idaho Administrative Procedures Act are applicable to the Board of Dentistry. The APA establishes the general procedural framework within which contested case proceedings must be conducted. This framework specifies that agency action must ordinarily be preceded by notice and an opportunity to be heard. Under Idaho Code section 67-5247 there is, however, a very narrow exception to this general rule when the statutory test for emergency proceedings is met and the agency has been granted specific emergency action authority under its Practice Act or administrative rules.

Although the Board has seen fit to promulgate a rule authorizing it to take emergency action against an anesthesia permit, it has not done so as to licenses in general. Interpreting and applying the pertinent APA provisions in light of the authorities discussed in this letter leads to the conclusion that section 67-5247, standing alone, is insufficient for the Board to summarily suspend a dentist's license. Since the Board's statutes and rules do not independently provide that authority, the conclusion must be that the authority does not currently exist and the Board is not empowered to enter an emergency suspension order against a dentist's license.

Thank you for contacting the Attorney General's Office with this important issue. If you have any further questions or concerns that you wish to discuss, please do not hesitate to contact me at 334-4111.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

[1] Idaho Code § 67-5240. *Cf.* definition of "contested case" found at Idaho Code § 67-5201(6).

[2] Idaho Code § 54-912(6) and (7); IDAPA 19.01.01.003 (Board of Dentistry administrative rules).

[3] *See generally*, Idaho Code § 67-5242.

[4] Idaho Code § 67-5254(1).

[5] Idaho Code § 67-5254(3)(a).

[6] 102 Idaho at 664, 637 P.2d at 1160.

[7] *Id.* at 665, 637 P.2d at 1161.

[8] 102 Idaho at 665-66, 637 P.2d at 1161-62.

[9] *Id.* at 666, 627 P.2d at 1162.

[10] 149 Idaho at 98, 233 P.2d at 29.

[11] 30 Idaho L. Rev. at 277.

[12] *Id.* at 331-32. Footnotes by Professor Goble and DAG Gilmore that include citations to Idaho Code have been omitted here.

[13] LARRY ECHOHAWK, IDAHO ADMINISTRATIVE PROCEDURE ACT WITH COMMENTS AND IDAHO ATTORNEY GENERAL'S MODEL RULES OF PRACTICE AND PROCEDURE 32 (1993).

[14] *Id.* at 32.

[15] The examples given do not purport to be an exhaustive list. There may be other state agencies with particular statutes or rules regarding emergency proceedings.

[16] Idaho Code § 37-2719(b).

[17] Idaho Code § 54-2105(8)(c).

[18] IDAPA 23.01.01.134.

[19] IDAPA 58.01.17.920.03.

[20] IDAPA 16.03.07.003.06.e.

[21] IDAPA 16.04.17.100.04.g.

[22] IDAPA 16.02.27.053.08.

November 14, 2016

The Honorable Lance W. Clow
Idaho State Representative
Statehouse
VIA EMAIL: LClow@house.idaho.gov

Re: Our File No 16-56067 - Constitutional Issues Related to Spiritual Treatment of Children in the Medical or Surgical Care Context

Dear Representative Clow:

You have requested the Attorney General's views concerning the extent of constitutional protection afforded spiritual treatment decision-making by parents with respect to medical treatment for their children. This letter first discusses whether the First Amendment applies to the States. It does. The letter then discusses existing statutes that address medical treatment to children and whether those statutes are either required or prohibited by the First Amendment and article I, section 4 of the Idaho Constitution. We believe that they are not clearly required and that their validity is unresolved. The letter concludes with a brief analysis of the Legislature's protection of religious activity generally in the Free Exercise of Religion Protected Act.

I. The First Amendment applies to the States, but Idaho retains the right to expand protection of religious practices as long as the federal Establishment Clause or the Idaho Constitution's religion clauses are not violated and to impose more stringent restrictions on assisting religions than that Clause does.

The United States Supreme Court "has decisively settled that the First Amendment's mandate that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof' has been made wholly applicable to the States by the Fourteenth Amendment." Sch. Dist. of Abington Tp. Pa. v. Schempp, 374 U.S. 203, 216, 83 S. Ct. 1560, 1568, 10 L. Ed. 2d 844 (1963)

(*citing* Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S. Ct. 900, 903, 84 L. Ed. 1213 (1940)). The Idaho Supreme Court has held similarly. State v. Fluewelling, 150 Idaho 576, 578, 249 P.3d 375, 377 (2011); *see also* State v. Manzanares, 152 Idaho 410, 424, 272 P.3d 382, 396 (2012) ("The First Amendment of the United States Constitution, which guarantees the right to free expression, peaceable assembly and seeking redress with our government, applies to the states through the Fourteenth Amendment.").

States do retain the ability to provide greater protection of religious activity than the Free Exercise Clause so long as they do not violate the Establishment Clause. Article I, section 4 of the Idaho Constitution thus has been deemed to be "an even greater guardian of religious liberty" than the First Amendment. Osteraas v. Osteraas, 124 Idaho 350, 355, 859 P.2d 948, 953 (1993). Under both provisions, however, a law of general application that "does not proscribe any conduct because it is engaged in for religious reasons or because of the religious belief it portrays" will be upheld. Fluewelling, 150 Idaho at 580, 249 P.3d at 379 (rejecting Free Exercise Clause challenge to statute that prohibited marijuana possession with intent to deliver). The same is true as to the Establishment Clause; *e.g.*, Idaho is free to prohibit through its constitution or statutes payments or other benefits that may assist religious groups under standards that may be more stringent than those imposed under the First Amendment. Epeldi v. Engelking, 94 Idaho 390, 488 P.2d 860 (1971) (art. IX, sec. 5 of the Idaho Constitution prohibited State from providing bus transportation to parochial school students notwithstanding, *inter alia*, Everson v. Bd. of Educ., 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947), that found no Establishment Clause violation in providing such transportation).

These general principles mean that Idaho's current spiritual treatment-related child medical treatment laws must be judged against *both* federal and state constitutional provisions.

II. Idaho law currently provides explicit spiritual treatment exceptions in child neglect proceedings and for two criminal offenses.

Title 16, chapter 16 of the Idaho Code contains the Child Protective Act. It establishes "a legal framework conducive to the judicial processing including periodic review of child abuse, abandonment and neglect cases, and the protection of any child whose life, health or welfare is endangered." Idaho Code § 16-1601. The statute identifies as its primary concern the child's health and safety. *Id.* A central element of the statute's operation is embedded its definition of the term "neglected" in section 16-1602(31) that reads in part:

> "Neglected" means a child:
>
> (a) Who is without proper parental care and control, or subsistence, medical or other care or control necessary for his well-being because of the conduct or omission of his parents, guardian or other custodian or their neglect or refusal to provide them; *however, no child whose parent or guardian chooses for such child treatment by prayers through spiritual means alone in lieu of medical treatment shall be deemed for that reason alone to be neglected or lack parental care necessary for his health and well-being, but this subsection shall not prevent the court from acting pursuant to section 16-1627, Idaho Code.*

(Emphasis added.) The referenced section 16-1627 grants a district court or magistrate division under subsection (1) the power to "authorize medical or surgical care for a child when:

> (a) A parent, legal guardian or custodian is not immediately available and cannot be found after reasonable effort in the circumstances of the case; or
> (b) A physician informs the court orally or in writing that in his professional opinion, the life of the child would be greatly endangered without certain treatment and the

> parent, guardian or other custodian refuses or fails to consent.

Subsection (3) sets out an additional requirement in exercising that authority:

> In making its order under subsection (1) of this section, the court shall take into consideration any treatment being given the child by prayer through spiritual means alone, if the child or his parent, guardian or legal custodian are adherents of a bona fide religious denomination that relies exclusively on this form of treatment in lieu of medical treatment.

The Legislature enacted these provisions in 1976, and they have not been modified substantively. The exceptions in the Child Protective Act responded to a condition for receipt of federal funding imposed by the (then) Department of Health, Education and Welfare under a regulation issued in 1975 but rescinded in 1983. *See generally* Doriane Lambelet Coleman, *Religiously-Motivated Medical Neglect: A Response to Professors Levin, Jacobs, and Arora*, 73 Wash. & Lee L. Rev. Online 359, 378 n.76 (2016).

These exceptions have parallels in Idaho's criminal statutes. *See* Idaho Code § 18-401(2) (imposing felony liability on any person who "[w]illfully omits, without lawful excuse, to furnish necessary food, clothing, shelter, or medical attendance for his or her child or children, or ward or wards; provided however, that the practice of a parent or guardian who chooses for his child treatment by prayer or spiritual means alone shall not for that reason alone be construed to be a violation of the duty of care to such child"); *id.* § 18-1501(4) (excepting from injury-to-children statute "[t]he practice of a parent or guardian who chooses for his child treatment by prayer or spiritual means alone shall not for that reason alone be construed to have violated the duty of care to such child"). The exception in section 18-401(2) was added in 1972 (1972 Idaho Sess. Laws 1102); the exception in section 18-1501(4) was added in 1977 (1977 Idaho Sess. Laws 852).

III. Neither the federal nor the Idaho constitutions require a spiritual treatment exception, and whether such a

provision violates the Establishment Clause is an open question.

The Child Protective Act and the two criminal laws with religion-based exceptions are neutral statutes of general applicability. The Free Exercise Clause accordingly does not prevent their application. *E.g.*, Emp't Div. v. Smith, 494 U.S. 872, 878-79, 110 S. Ct. 1595, 1600, 108 L. Ed. 2d 876 (1990) ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition."). In the specific context of medical treatment for children, the United States Supreme Court explained over 70 years ago that although parents "are free to become martyrs themselves[,]" they are not "free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves." Prince v. Massachusetts, 321 U.S. 158, 170, 64 S. Ct. 438, 444, 88 L. Ed. 645 (1944). As explained above, the Idaho Supreme Court applies article I, section 4 of this State's constitution similarly. Osteraas, 124 Idaho at 355, 859 P.2d at 953. The Attorney General, moreover, previously determined that article I, section 4 does not limit the State's power in this regard. 1993 Idaho Att'y Gen. Rpt. 103, 108 ("Neither the express language of Idaho's religious exemption, nor traditional constitutional principles of religious freedom limit administrative or judicial authority to provide medical services to children.").[1]

Provisions comparable to Idaho's exceptions are common. *See generally* Rita Swan, *On Statutes Depriving a Class of Children of Rights to Medical Care: Can This Discrimination Be Litigated?*, 2 Quinnipiac Health L.J. 73, 80-81 nn.46, 47 (1998) (citing statutes). One state trial court judge has found that Ohio's child endangerment statute's exception (Ohio Rev. Code Ann. § 2919.22(A) (2011)) violates the Establishment Clause. State v. Miskimens, 490 N.E.2d 931, 933-35 (Ohio C.P. Coshocton Cty. 1984). The Delaware Supreme Court expressed similar concerns, observing that its state child protection law's exception (since repealed) "possibly forces us impermissibly to determine the validity of an individual's own religious beliefs." Newmark v. Williams, 588 A.2d 1108, 1112-13 (Del. 1991);

cf. Walker v. Superior Court, 763 P.2d 852, 870 (Cal. 1988) (discussing the "severity of the religious imposition" as a component of the Free Exercise Clause analysis in an involuntary manslaughter prosecution against a Christian Scientist, and deeming Christian Science dogma as unsupportive of defendant's claimed reliance). Other courts have noted the Establishment Clause issue but declined to address it on the merits for jurisdictional or other reasons. *See* Children's Healthcare Is a Legal Duty, Inc. v. Deters, 92 F.3d 1412, 1416 (6th Cir. 1996) (declining to address challenge to exceptions in Ohio child neglect and criminal endangerment statutes on jurisdictional grounds where no threat of enforcement by the defendant state attorney general existed); State v. Crank, 468 S.W.3d 15, 28-29 (Tenn. 2015) (declining to resolve claim that exception limited to a "recognized denomination" in criminal child neglect statute violated both the Establishment Clause and the Fourteenth Amendment's Equal Protection Clause because accepting the defendant's claim would require the *entire* exception to be elided—a result that would leave her conviction intact); Commonwealth v. Twitchell, 617 N.E.2d 609, 614 (Mass. 1993) (declining to address prosecution's argument that spiritual treatment exception in involuntary manslaughter statute violates Establishment Clause because the exception did not foreclose the prosecution).

The paucity of judicial attention to the Establishment Clause issue is not surprising. As a practical matter, the likely aggrieved party will be a parent who has unsuccessfully invoked a spiritual treatment exception or (as in Crank) believed that it discriminated against certain religious groups. On the latter score, such a challenge is perhaps possible with respect to Idaho Code section 16-1627(3) insofar as it limits the exception to "adherents of a bona fide religious denomination that relies *exclusively* on this form of treatment in lieu of medical treatment." (Emphasis added.) The limitation carries with it the arguable vice of discriminating between religions. *See, e.g.*, Osteraas, 124 Idaho at 355 n.3, 869 P.2d at 953 n.3 ("Neither a state nor the federal government is empowered to establish a church. Neither may pass laws which aid one religion, aid all religions, or prefer one religion over another.") (internal quotation marks omitted); Walker, 763 P.2d at 874 (involuntary manslaughter statute exception applicable to "treatment by spiritual means through prayer alone in accordance with the tenets and practices of a recognized church or

religious denomination, by a duly accredited practitioner thereof" impermissibly "allocates its religious benefit on a selective basis). How such a challenge would be resolved is unclear and would depend, among other things, on the precise nature of the parent's claim, the extent to which the claim could be addressed through statutory severability rules without the need to address the challenge's merits (also as in Crank), and the application of Establishment Clause principles if the merits are addressed.

IV. The Free Exercise of Religion Protected Act statutorily expands upon rights recognized under the First Amendment and article I, section 4 but does not affect operation of the Establishment Clause or its counterparts in the Idaho Constitution.

Idaho has a statute of general applicability, the Free Exercise of Religion Protected Act ("FERPA"), Idaho Code §§ 73-401-04, that expands upon rights recognized under the First Amendment and article I, section 4. FERPA provides that "[f]ree exercise of religion is a fundamental right that applies in this state, even if laws, rules or other government actions are facially neutral" (*id.* § 73-402(1)), thereby effectively removing the limitation on the constitutional protection of free exercise rights found by United States Supreme Court in Smith as to the First Amendment and followed by the Idaho Supreme Court in Osteraas as to article I, section 4. The statute provides further that this right cannot be "substantially burden[ed]" unless the burden is both "[e]ssential to further a compelling government interest" and "[t]he least restrictive means of furthering that compelling government interest." *Id.* § 73-402(3). FERPA "applies to all state laws . . . and the implementation of those laws. . . whether enacted . . . before, on or after" its effective date—March 31, 2000. *Id.* § 73-403(1).

It is therefore possible that a parent might rely on FERPA to advance a spiritual treatment claim broader than the existing express exceptions. However, it also appears probable that a court would deem those exceptions satisfy both requirements; i.e., preserving the health of a child from serious impairment furthers a compelling state interest, and the judicial processes constitute the least restrictive means insofar as they afford a parent the opportunity to advance her

or his spiritual treatment claim. FERPA, in sum, likely adds nothing to present statutorily-prescribed spiritual treatment exceptions.

Finally, FERPA does not affect operation of the Establishment Clause or the limitations on state action in the Idaho Constitution's religion clauses (art. I, sec. 4 and art. IX, secs. 5 and 6). The same potential challenges to operation of the existing spiritual treatment exception statutes discussed above thus could arise should a parent attempt to rely on FERPA to preclude enforcement of statutes directed at ensuring that children receive otherwise necessary medical or surgical services.

We hope that this letter responds adequately to your inquiry. Please contact me with any questions.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

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[1] This conclusion is true even if the claim of parental right is assessed against substantive due process prong of the Fourteenth Amendment. *See* In re Guardianship of L.S. and H.S., 87 P.3d 521, 527 (Nev. 2004) (rejecting parents' substantive due process challenge because "the child's interest in self-preservation and the State's interests in protecting the welfare of children and the integrity of medical care outweigh the parents' interests in the care, custody and management of their children, and their religious freedom").

November 15, 2016

John Chatburn, Administrator
Idaho Office of Energy Resources
P. O. Box 83720
Boise, ID 83720-0199
VIA Email: john.chatburn@oer.idaho.gov

RE: Request for Informal Opinion – Performance Contracts Provided by Idaho Code § 67-5711D

Dear Administrator Chatburn:

On October 17, 2016, you inquired whether:

> . . . IC § 67-5711D is constitutional with regard to Article VIII, section 3 of the Constitution, and in light of the recent Idaho Supreme Court decision in *Greater Boise Auditorium Dist. v. Frazier*. If so, [you ask if] public entities [may] enter into contracts as allowed by IC 67-5711D, without a super-majority vote of two-thirds of qualifying voters?

Article VIII, section 3 of the Idaho Constitution applies to counties and municipalities. As a result, this letter is written in the context of local public entities and not state entities.

Public entities may enter performance contracts under Idaho Code § 67-5711D, without prior voter approval, so long as the performance contract, and any contracts affecting the performance contract, does not obligate the public entity to a present liability exceeding the funds available to the public entity in the year in which the performance contract is entered. However, a dispositive determination regarding the extent of a public entity's obligated present liabilities can likely only be made by a reviewing court.

1. Public indebtedness and liabilities are limited by the Constitution.

Article VIII, section 3 of the Idaho Constitution provides in relevant part as follows:

> No county, city, board of education, or school district, or other subdivision of the state, shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds (2/3) of the qualified electors thereof . . . .

Idaho's constitutional provisions regarding public entity indebtedness and liabilities is among the strictest in the nation, especially with regard to incurring liabilities without prior voter approval. Greater Boise Auditorium Dist. v. Frazier, 159 Idaho 266, 271, 360 P.3d 275, 280 (2015) (*citing* Feil v. City of Coeur d'Alene, 23 Idaho 32, 49, 129 P. 643, 649 (1912)).

2. Performance contracts under Idaho Code § 67-5711D.

Idaho public entities "may enter into a performance contract with a qualified provider or qualified energy service company to reduce energy consumption or energy operating costs" through "evaluation, recommendation and implementation of one (1) or more costs-savings measures." Idaho Code § 67-5711D(1)(e) and (2). Cost-savings measures are "any facility improvement, repair or alteration to an existing facility, or any equipment, fixture or furnishing to be added or used in any existing facility that is designed to reduce energy consumption and energy operating costs or increase the energy efficiency of facilities for their appointed functions that are cost effective." Idaho Code § 67-5711D(1)(a). For purposes of this letter any reference to a performance contract refers to the performance contracts allowed under Idaho Code § 67-5711D.

Performance contracts can be structured as either guaranteed energy savings contracts or shared savings contracts. Idaho Code § 67-5711D(1)(e). Payments under a performance contract are made

by the public entity and may be "financed as installment payment contracts or lease-purchase agreements for the purchase and installation of cost-savings measures." Idaho Code § 67-5711D(7). The user agency or public entity may obtain financing through a source other than the qualified provider or qualified energy service company. *Id.* Performance contracts "may extend beyond the fiscal year in which the performance contract becomes effective, subject to appropriation by the legislature or by the public entity, for costs incurred in future fiscal years . . . . [and] may extend for a term not to exceed twenty five (25) years." Idaho Code § 67-5711D(8)(b).

3. Greater Boise Auditorium District v. Frazier.

The Idaho Supreme Court recently addressed public entity contract liabilities in the context of article VIII, section 3. *See* Greater Boise Auditorium Dist. v. Frazier, 159 Idaho 266, 360 P.3d 275 (2015). Greater Boise involved the construction of a facility and the subsequent lease-purchase of the facility by the Greater Boise Auditorium District ("District") from the Capital City Development Corporation ("Agency") without any prior voter approval. While this situation differs from the purchase and installation of cost-savings measures under a performance contract, there are several aspects of Greater Boise concerning public entity contract liabilities applicable to performance contracts.

In Greater Boise, both the District and the Agency were governmental entities subject to article VIII, section 3. *See* Greater Boise, 159 Idaho at 267, 360 P.3d at 276. However, Greater Boise focused on the liabilities incurred by the District in its lease-purchase of the facility from the Agency. The overall contractual situation was summarized by the district court as follows:

> The District and [the developer] will enter [an agreement] for the construction and sale of the new facilities. The District will immediately (or very shortly) thereafter, assign all of its interest in the new facilities to [a third party] who has the power to obtain financing through Wells Fargo, a commercial lender, and issue a promissory note and deed of trust to secure financing. **Once the new facilities are completed, the [third**

> **party] will then lease the new facilities back to the District, utilizing the annual lease payments to pay the principal and interest due on the promissory note.**

Greater Boise, 159 Idaho at 268, 360 P.3d at 277 (emphasis added). The Agency is the "third party" referred to in the district court's summary above.

Government entities may seek a judicial determination regarding the constitutionality of a contract, which was the case in Greater Boise. *See* Greater Boise, 159 Idaho at 266; 360 P.3d at 275; *see also* Idaho Code § 7-1304. Upon petition for a judicial determination, courts are required to "examine into and determine all matters and things affecting each question submitted," which includes the overall contractual situation and not merely one contract that could be part of a larger contract situation. Greater Boise, Idaho 159 at 275, 360 P.3d at 284; *see also* Idaho Code § 7-1308.

In the absence of prior voter approval, the relevant "determination under Article VIII, section 3 is whether the governmental subdivision presently bound itself to a liability greater than it has funds to pay for in the year in which it bound itself." Greater Boise, Idaho 159 at 273, 360 P.3d at 282. A liability is defined as "responsibility; the state of one who is bound in law and justice to do something which may be enforced by action. This liability may arise from contracts, either express or implied. . . ." Greater Boise, 159 Idaho at 272, 360 P.3d at 281 (*citing* Feil, 23 Idaho at 50, 129 P. at 649). Further, a "present liability" consists of "presently obligating oneself to future payments." Greater Boise, 159 Idaho at 272, 360 P.3d at 281 (*citing* Boise Dev. Co. v. Boise, 26 Idaho 347, 360-61, 143 P. 531, 535 (1914)).

Significantly, public entities "are liable for 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, 159 Idaho at 272, 360 P.3d at 281 (*citing* Boise Dev. Co., 26 Idaho at 363, 143 P. at 535). This aggregation principle extends to leases where the public entity has bound itself for multiple years. *See* Greater Boise, 159 Idaho at 272, 360 P.3d at 281 (*citing* Williams v.

City of Emmett, 51 Idaho 500, 506, 6 P.2d 475, 477 (1931)). Thus, the aggregated lease payments to which a government entity is bound is the measure of liability the government entity must be able to pay at the time in which it entered the lease. Greater Boise, 159 Idaho at 272, 360 P.3d at 281 (*citing* Williams, 51 Idaho at 506-07, 6 P.2d at 477-78). Notably, the liability under a one-year lease with properly drafted options to renew would not be aggregated to include all the potential renewal terms and would be limited to one year terms. *Id.*

With regard to the lease between the District and the Agency, the Court determined that the "Centre Lease does not incur long-term liability because the District has properly limited its liability" to renewable one-year lease terms, which were at the District's discretion and contingent upon sufficient future appropriations, and the District also had sufficient funds to pay the initial one-year term when it entered the lease. Greater Boise, Idaho 159 at 271, 360 P.3d at 280.

After considering other contracts affecting the lease, the court in Greater Boise determined that the District also obligated itself to the purchase of the facility in light of the District's initial agreement with the facility developer. Greater Boise, 159 Idaho at 277, 360 P.3d at 284. However, the Court similarly found that the District had sufficient funds set aside to satisfy the purchase obligation at the time it initially contracted with the developer. *Id.* Thus, the Court held "the overall agreement entered into by the District does not subject it to long-term liability greater than it had the funds to pay for in the year in which it was entered." Greater Boise 159 Idaho at 276, 360 P.3d at 285.

4. Limitations of performance contracts.

Public entities entering performance contracts are subject to the limitations of article VIII, section 3. In the absence of prior voter approval, a public entity's present liabilities must not exceed the income and revenue available to the public entity at the time it incurs such liabilities.

A public entity's payment obligations under a performance contract are present liabilities, and those liabilities will likely be measured in the context of both the performance contract and any

contracts affecting the performance contract.[1] Also, if a public entity enters a performance contract with a multi-year term, the aggregate payment obligation represents the public entity's present liability.

While performance contracts may be structured as guaranteed energy savings or shared savings contracts, under either structure the public entity's payment obligation represents a present liability. Also, regardless of whether a performance contract is financed with installment payments or as a lease-purchase agreement, the public entity is ultimately purchasing a cost-savings measure, the total cost of which represents a present liability. Notably, the statute does not describe the lease-purchase agreement as including an optional purchase. A public entity might limit its present liabilities by structuring the lease-purchase agreement as a one-year term with optional renewals and a purchase option that could be exercised in the discretion of the public entity.

Because public entity purchases under a performance contact represent a present liability, the public entity must have sufficient funds to pay the entire obligation at the time it enters the performance agreement, unless the public entity obtains prior voter approval. While public entities may certainly extend payments over multiple fiscal years, the public entity's present liability is not limited to the first year payment. Thus, sufficient appropriation clauses only work to limit a public entity's present liability if the performance contract is structured with annual renewal terms contingent upon sufficient appropriations.

Ultimately, in the absence of prior voter approval, a performance contract that creates a present liability, which may be measured with other contracts affecting the performance contract, exceeding the funds available to the contracting public entity in the year it enters the performance contract, violates article VIII, section 3. However, as is evident from the foregoing analysis, many variables are involved in determining a public entity's present liability. Whether a proposed agreement might violate article VIII, section 3 would need to be considered on a case-by-case basis and is a determination best left to a reviewing court, which can be sought pursuant to Idaho Code § 7-1304.

This letter is intended for the informational purposes of the Idaho Office of Energy Resources and is limited to the question presented. As with any contracting situation, many factors must be considered and evaluated on a case-by-case basis. This letter should not be considered as legal advice by any public entity considering a performance contract, or any other form of contractual indebtedness or liability. Such public entities are encouraged to consult with their own private legal counsel and business managers to consider such matters in the context of their own needs and circumstances.

I hope you find this analysis helpful.

Sincerely,

ANDREW J. SNOOK
Deputy Attorney General
Contracts and Administrative Law Division

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[1] While a performance contract may not necessarily come before a court on petition for a judicial determination, a conservative application of Greater Boise would likely require a reviewing court to measure the public entity's present liabilities under both the performance contract and any contracts affecting the performance contract.

December 2, 2016

The Honorable Lynn Luker
Idaho House of Representatives
P. O. Box 83720-0038
Boise, ID 83720
Via email: lluker@house.idaho.gov

Re: Idaho Right To Try Act, Title 39, Chapter 94, Idaho Code

Dear Representative Luker:

You contacted our office with a question regarding the Idaho Right To Try Act, enacted during the 2016 Legislative Session as House Bill 481, codified at title 39, chapter 94, Idaho Code, and effective July 1, 2016. Your question was based upon information provided by Elisha Figueroa, Administrator of the Office of Drug Policy. Ms. Figueroa indicated that there are 37 Idaho children now receiving Epidiolex, a plant based CBD[1] oil through Idaho's Expanded Access Program.[2] Your question to our office was:

> Does HB 481 protect a person from prosecution under Idaho law for possession or use of CBD oil if the prerequisite requirements for possession and use under HB 481 have been met?

An answer to this question requires a brief explanation of the Idaho Right to Try Act ("Act"). The following discussion will not address all aspects of the Act, but will focus on those immediately relevant to this discussion.

The legislature's purpose in enacting the Act was "to provide the opportunity for terminally ill patients to have access to certain investigational treatments. . . " without requiring some other party to provide or pay for such treatments. Idaho Code § 39-9402. The legislature expressly intended "only to permit these treatments to terminally ill patients in Idaho." *Id.* Further, and important for your questions,

> Due to the experimental nature of these treatments, it is further the intent of the legislature to protect physicians and other parties from civil, criminal or professional liability relating to the treatments.

Id. Consistent with this stated intention, the Act provides at Idaho Code § 39-9404(1) that:

> An eligible patient may request, and a manufacturer may make available to an eligible patient under the supervision of the patient's treating physician, the manufacturer's investigational drug . . . which drug . . . shall be clearly labeled as investigational; provided however, that this chapter does not require that a manufacturer make available an investigational drug...to an eligible patient.

Idaho Code § 39-9403(1)(a) defines an "eligible patient" as follows:

> (1) "Eligible patient" or "patient" means an individual who has a terminal illness and has:
>
> (a) Considered all other treatment options currently approved by the United States food and drug administration;
>
> (b) Received a recommendation from the patient's treating physician for an investigational drug, biological product or device for purposes related to the terminal illness;
>
> (c) Given written, informed consent for the use of the recommended investigational drug, biological product or device; and
>
> (d) Received documentation from the eligible patient's treating physician that the eligible patient meets the requirements of this subsection.

Idaho Code § 39-9403(3) defines "terminal illness" as follows:

> (3) "Terminal illness" means a progressive disease or medical or surgical condition that:
>
> (a) Entails functional impairment that significantly impacts the patient's activities of daily living;
>
> (b) Is not considered by a treating physician to be reversible even with administration of current United States food and drug administration-approved and available treatments; and
>
> (c) Without life-sustaining procedures, will soon result in death.

Idaho Code § 39-9403(2) defines "investigational drug" as follows:

> (2) "Investigational drug, biological product or device" means a drug, biological product or device that has successfully completed phase 1 of a clinical trial but has not yet been approved for general use by the United States food and drug administration and remains under investigation in a United States food and drug administration-approved clinical trial.

Finally, for purposes of this brief discussion, Idaho Code § 39-9407 contains a series of prohibitions which, in short, seek to prevent the state from barring access to the types of experimental treatments the Act allows. Thus Idaho Code § 39-9407(1) and (2) bar any state licensing board, disciplinary board or entity responsible for Medicare certification from taking any action against a health care provider's license or Medicare certification based solely on the provider's recommendations to a patient regarding access to, or treatment with, such an experimental treatment, including an investigational drug. Idaho Code 39-9407(3) also includes a kind of catch-all, providing that "[a]n official, employee or agent of this state shall not block or attempt to block an eligible patient's access to an investigational drug. . . ."

In summary, the Act's purpose was to allow terminally ill patients access to certain experimental treatments, including

experimental drugs, without fear of civil, criminal or professional liability on the part of those patients or their treatment providers. Thus, the Act provides that "eligible patients," that is, those patients with a "terminal illness" as defined in the Act, may, under a treating physician's supervision, use an "investigational drug" which has not been approved by the FDA, but which is under investigation by that body and which has passed phase 1 of clinical trials. The Act also provides that health care providers participating in such treatments shall not be subject to license revocation, professional discipline or disqualification from a Medicare certificate, and that no state official, employee or agent shall prevent an eligible patient's access to an investigational drug as allowed under the Act.

Based on the foregoing, and assuming that Epidiolex is an "investigational drug" as defined in the Act, that it is being used by "eligible patients" as defined in the Act, and that it is being used in the manner set forth in the Act, no criminal liability should attach to such an eligible patient who uses that drug under those circumstances.

Two other very important points must be noted.

First, Idaho law vests the primary authority for enforcing the penal laws of this state, including those governing controlled substances, in the county sheriff and the county prosecutor. Idaho Code § 31-2227. In any individual case, the county sheriff and county prosecutor are vested with discretion as to whether to arrest, charge or prosecute an individual. This office has no authority to supervise or overrule these officials in the exercise of their discretion.

Second, CBD oil remains a controlled substance under federal and state law. Its possession and use, even for the treatment of a medical condition, outside the requirements of title 39, chapter 94, Idaho Code, would remain illegal under current Idaho law.

I hope you find this brief explanation helpful. If you have any further questions, please feel free to contact me.

Sincerely,

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

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[1] "CBD" is an abbreviation for cannabidiol, a chemical compound found in cannabis. CBD contains tetrahydrocannabinol, the psychoactive ingredient in marijuana, and it is a Schedule I controlled substance under both federal law and Idaho state law. *See* https://www.dea.gov/divisions/hq/2015/hq122315.shtml; 21 C.F.R. § 1308.11(d)(31) (2017); Idaho Code § 37-2705(d)(27).

[2] The U.S. Food and Drug Administration's Expanded Access Program "provides a pathway for patients to gain access to investigational drugs, biologics and medical devices for serious diseases or conditions," by allowing the use of investigational drugs of devices that are not yet FDA-approved in circumstances where patients face serious or life-threatening diseases. http://www.fda.gov/ForPatients/Other/ExpandedAccess/ucm20041768.htm; 21 C.F.R. § 312.300-20 (2009).

December 22, 2016

The Honorable Chuck Winder
Idaho State Senate
5528 N. Ebbetts Ave.
Boise, ID 83713

Re: The Idaho Unfair Sales Act

Dear Senator Winder:

The Attorney General has asked that I respond to claims made by a constituent to you regarding the Idaho Unfair Sales Act, Idaho Code § 48-401, *et seq.* (the "Act"). The constituent's claim is that the Act is unconstitutional under the Idaho Constitution. He also asserts that the Act is "absurd" on its face and will prohibit or, in fact, criminally punish a business from selling items below cost, pursuant to a "Black Friday" type of sale. He urges its repeal.

A. Background of the Unfair Sales Act.

Prior to addressing these claims, a brief overview of the Act is appropriate. The Act makes illegal the advertising, offer to sell, or retail sale of any merchandise below a statutory definition of cost[1] in the State of Idaho. Idaho Code § 48-404. Rebates found to violate the "spirit and intent" of the Act also violate the Act. Idaho Code § 48-413. Each violation of the Act is a misdemeanor criminal offense punishable by a $500 fine or six months imprisonment, or both. Idaho Code § 48-405. The state or private parties may seek civil remedies of an injunction and actual damages for violations of the Act. Idaho Code § 48-406. The governor, or a state department designated by the governor, is responsible for the supervision and administration of the Act. Idaho Code § 48-408.

1. Legislative History

The legislative history helps to understand the Act and its place in Idaho law. The Act was originally enacted in 1939. *See* 1939 Idaho Sess. Laws 427. The Legislature declared the practice of

selling "certain items of merchandise below cost in order to attract patronage" to be a deceptive form of advertising and an unfair method of competition in that it "tends to create a monopoly in commerce." *See id.* at § 2 and § 4.[2] The Act made it a misdemeanor to sell below cost and authorized civil actions for injunctive relief and damages against below-cost sellers. *See id.* at § 5 and § 6. The original Act placed the duty of prosecuting violators on each county's prosecuting attorney, but also authorized private causes of action for damages and injunctive relief.

The first amendments to the Act came during the 1941 legislative session. *See* 1941 Idaho Sess. Laws 230. These amendments expanded the Act's enforcement provisions and made it a duty of the Attorney General to assist the various prosecuting attorneys in the enforcement of the Act. *See id.* at § 4. Among the new sections which were added to the Act in 1941 were the following: (1) a new section 8, which directed the Attorney General to appoint and employ investigators, attorneys and legal assistants to aid in prosecuting and enjoining violations of the Act; and (2) new sections 10 and 11, which levied an excise tax on merchants to be collected for the use of the Attorney General in enforcing the Act, and which appropriated the sum of $20,000 to pay expenses incurred by the Attorney General prior to the effective date of the new taxes.

The amendments of 1945 removed the primary responsibility for investigating and enforcing the Act from the Attorney General and delegated it instead to the Commissioner of Finance. *See* 1945 Idaho Sess. Laws 387. The Act still provided for some involvement by the Attorney General, but this was limited to aiding and assisting in the prosecution of the Act when called upon to do so by the Commissioner. *See id.* at § 2, amending section 8 of the Act. Since these amendments went into effect in 1945, the role of the Attorney General under the Act has been limited to that of aiding and assisting other departments of state government in enforcing the Act.

The Act was again amended in 1955. *See* 1955 Idaho Sess. Laws 211. Section 8 of the Act, which had been codified as Idaho Code § 48-408, was repealed, and a new section 48-408 was enacted. The new section placed upon the governor the responsibility for supervising and administering the Act. It also granted the

governor the authority to designate any department of state government to carry out these duties. The language of this section has not been amended in subsequent legislative sessions, nor have there been any reported cases interpreting this (or for that matter, any) section of the Act.

Along with the amendment of Idaho Code § 48-408 in 1955, the Legislature amended the statutory section authorizing the levy and collection of taxes to pay for the enforcement of the Act. *See* 1955 Idaho Sess. Laws 211 at § 6, codified at Idaho Code § 48-410. This amendment increased the tax amount collectable from merchants and specifically provided that the funds were to be collected by the Governor's Office or the designated department for the enforcement of both the Act and the Fair Trade Act, title 48, chapter 3, Idaho Code.

Interestingly enough, at the same time the Legislature delegated the duty to supervise and enforce the Act to the Governor, or to a department of state government the Governor so designated, the Legislature also enacted legislation creating a state Department of Commerce and Development, and delegated to the new department the responsibility of "administer(ing) and supervis(ing) the provision of Chapters 3 and 4 [the Act], Title 48, Idaho Code, as amended." *See* 1955 Idaho Sess. Laws 521, § 3(5). The legislation also provided that "all monies collected pursuant to the tax levied and imposed by Section 48-410, Idaho Code, as amended, shall hereafter be deposited to the credit of the Idaho Development and Publicity Fund." *See id.* at § 7 and § 9.

This dual delegation of duties was noted in the 1977 legislative session. At that time, "to eliminate a statutory conflict," the Legislature struck the provision of the statute charging the (then) Division of Tourism and Industrial Development with the duty to administer and supervise the Act. *See* 1977 Idaho Sess. Laws 770. The legislature left the language of Idaho Code § 48-408 unchanged.

Finally, the tax which funded enforcement of the Act was repealed effective January 1, 1979. *See* 1978 Idaho Sess. Laws 412.

There have been no amendments or revisions to the Act since 1979. The Act continues to maintain a private cause of action, and I

am aware of several older lawsuits filed by private entities under the Act.

2. Enforcement History

As is evident by a review of the legislative history of the Act, enforcement of its provisions has rested with either the Governor's Office or a department of state government for all but approximately six of the Act's 70-plus year history. During those six years (from 1939 through 1945), enforcement responsibilities were delegated to either local county prosecutors or the Attorney General. The result, however, seems to have been the same no matter which division of state government was responsible for enforcing the Act -- that is, it does not appear that aggressive enforcement has ever been the rule. Despite the Act's 70-plus year history, there are no reported Idaho cases interpreting any provision of the Act.

There is, however, one district court memorandum decision denying a defendant's motion to dismiss a complaint filed by the state alleging violations of the Act. The decision came in an Ada County case decided in the late 60's, entitled State of Idaho, on relation of W. D. Searns, Director of Unfair Sales for the Department of Commerce and Development v. Rosauer's Super Markets, Inc., Albertson's, Inc., Safeway Stores Inc., and others, Civil Case No. 36021.

In this case, the state alleged that all of the defendants had violated the Act, and sought to enjoin future violations. Albertson's filed a motion to dismiss the complaint, alleging that the Act was unconstitutional in a number of respects. The district court denied Albertson's motion. It held that the Act did not require the plaintiff to prove "predatory intent" on behalf of the alleged violators, and this did not render the statute unconstitutional under the due process clause. The court reviewed the pertinent provision of the Act which provides, "Any retailer or direct seller who shall, in contravention of the policy of this act, advertise, offer to sell or sell . . . at less than cost . . . shall be guilty of a misdemeanor," Idaho Code § 48-405, (emphasis added), and found that in order to prove a violation of the Act, the plaintiff must show (1) that the defendant sold product at less than cost, and (2) that he did so in "contravention of the policy" of the Act. The court reviewed the statute which defined the public policy of the Act (Idaho

Code § 48-404), and found that a violation of the Act cannot be proven unless it can be shown that the sale of product below cost actually had an injurious effect on the defendant's competitors. This is a more difficult standard than just proving that a defendant has sold goods below cost. That said, the case is not an appellate decision and is therefore of limited precedential value.

With this background, I will proceed to respond to your constituent's claims.

B. Does the Unfair Sales Act Apply to Special Promotions and Sales Such as Black Friday or Clearance Sales?

Taking the last claim first, the issue raised is whether the Act's prohibition on selling merchandise below cost includes special promotions and sales such as Black Friday or clearance sales. The answer is yes, clearance sales and seasonal sales such as Black Friday sales promotions are subject to the Act, but such sales are not, in and of themselves, *per se* violations of the Act.

The Act applies generally to all advertisements, offers to sell, and sales of merchandise in retail sales, wholesales, and direct sales within Idaho. The Act covers and applies to the sale of merchandise below cost subject to the definitions and conditions set forth therein. Accordingly, special promotions and sales, including Black Friday sales, are subject to the prohibition against below costs sales established by the Act. Such special promotions are not, however, necessarily violations of the Act.

The Act sets forth specific criteria that must be satisfied in order for a sale to violate the Act, and exempts numerous other sales that would otherwise violate the Act. Determination of whether an individual advertisement, offer, or sale violates the Act, therefore, requires an application of the particular facts of that case to elements set forth in the Act. Because such a determination is fact specific, it is not possible to state that Black Friday sales or similar promotions categorically violate the Act. One must consider each of the elements set forth in the Act and whether each element has been satisfied

before a conclusion that a specific sale is unlawful can be reached. The Act states:

> . . . any advertising, offer to sell or sale of any merchandise,[3] either by retailers or wholesalers, at less than cost as defined in this act, with the intent, or effect, of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor, impairs and prevents fair competition, injures public welfare, and is unfair competition and contrary to public policy and the policy of this act, where the result of such advertising, offer or sale is to tend to deceive any purchaser or prospective purchaser, or to substantially lessen competition, or to unreasonably restrain trade, or to tend to create a monopoly in any line of commerce.

Idaho Code § 48-404.

Breaking the statutory provision above into its essential elements, the advertisement, offer, or sale of merchandise by a retailer or wholesaler[4] violates the Act only if all of elements 1-3 are satisfied:

1. The advertisement, offer, or sale is below "cost," as that term is statutorily defined;

2. The advertisement, offer, or sale is designed to induce purchase of other merchandise or unfairly divert trade from competitors; and

3. The advertisement, offer, or sale results in (a) a tendency to deceive purchasers; (b) substantially lower competition; (c) an unreasonable restraint of trade; or (d) a tendency to create a monopoly. [5]

Even if the above elements are met, section 48-407 of the Act exempts numerous types of sales.[6] Notably, the Act exempts a sale "where an endeavor is made in good faith to meet the prices of a competitor . . . selling substantially the same article or product in the

same locality or trade area in the ordinary channels of trade." Thus, a retailer or wholesaler will have an absolute defense if the retailer or wholesaler can establish that the otherwise below cost sale was a good faith response to a competitor's pricing. If a sale meets the above-listed elements and does not qualify for an exemption listed in section 48-407, then the sale is illegal pursuant to the Act.

C. Does the Unfair Sales Act Create the Possibility for a Merchant to Face a Large Financial Fine for Violations of the Act?

Your constituent also expresses concern regarding the application of the fine for each single violation of the Act set forth in Idaho Code section 48-405. Section 48-405 makes it a misdemeanor offense to violate the Act, punishable by a fine not to exceed $500 per violation, or imprisonment not to exceed six months or both. The court has discretion to determine the actual fine and imprisonment within those parameters. The Act does not authorize private parties to enforce section 48-405.[7] Enforcement of this section is reserved to the Governor or the Governor's appointed representative.

A large fine posed as the result of a hypothetical number of violations is, of course, always mathematically possible, depending on what a court interprets to be a single violation. However, it is highly improbable a court would actually order a large fine. To begin, a very large fine would in many cases be disproportionate to the underlying violation. Moreover, such a large fine goes beyond the purpose of the Act. The Act is intended to prevent certain below cost sales, not to bankrupt the offending merchant.[8] Thus, while a large fine is hypothetically possible, it is unlikely a prosecutor would seek, or that a court would order, such a large fine. Nevertheless, to be clear, it is certainly possible under the current Act for a business to face a criminal prosecution, although to our knowledge we are unaware of any such prosecutions having ever been made as noted above.

D. Is the Unfair Sales Act Unconstitutional?

Your constituent claims that the Act violates article I, section 1 of the Idaho Constitution. This provision declares that that one of the inalienable rights of man is the right of "acquiring, possessing and

protecting property." The claim of unconstitutionality is not well grounded. Article I, section 1 does not condemn all laws affecting property acquisition or ownership. Our Idaho Supreme Court has interpreted this section as not condemning "reasonable limitations and regulation by the state in the interests of the common welfare." Newland v. Child, 73 Idaho 530, 537, 254 P.2d 1066, 1069 (1953); *accord* Moon v. N. Idaho Farmers Ass'n, 140 Idaho 536, 545, 96 P.3d 637, 646 (2004).

Prohibiting below cost sales, and setting forth penalties for such sales, is a reasonable commercial limitation and can be represented to a court as in the common welfare. Thus, on constitutional grounds the Act's provisions should not be struck down by a court. That said, whether the Act today is good public policy for the state is a separate question subject to the Legislature's prerogative in enacting the laws for the state and on that issue this Office expresses no opinion.

Thank you for contacting the Attorney General's Office. If you have any further questions or concerns that you would like to discuss, please do not hesitate to contact me.

Very truly yours,

BRETT DELANGE
Deputy Attorney General
Consumer Protection Division

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[1] The statutory definition of "cost" depends on the type of seller. "Cost to the retailer" is the lower of the actual, bona fide cost of the merchandise to the retailer or the lowest prevailing replacement cost; less all trade discounts (other than cash discounts); plus a "cost of doing business" markup (6% of the cost of the merchandise to the seller) and freight costs (actual) and cartage costs (0.75% of merchandise cost). Idaho Code § 48-403(a)(1)-(3). "Cost to the wholesaler" is calculated in the same manner as "cost to the retailer," but the "cost of doing business" markup is 2% of the cost to the seller plus cartage and freight costs. Idaho Code § 48-403(b)(1)-(3). "Cost to the direct seller" is calculated in the same manner, but permits a cartage cost of 1.5% and a "cost of doing business" markup of 8% based on cost to the seller plus freight. Idaho Code § 48-403(b-aa)(1)-(3).

[2] Unfair Sales Act claims should be distinguished from monopolization and attempted monopolization claims, which the Attorney General does have authority to prosecute under Idaho's Competition Act. Idaho Code § 48-105 prohibits monopolies, attempts to monopolize, and conspiracies to monopolize. To establish a monopolization claim, two elements must be established: "(1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1703-04, 16 L. Ed. 2d 778 (1966). The Unfair Sales Act, on the other hand, does not require proof of monopoly power in the relevant market.

To establish an attempted monopolization claim, two elements must also be established: "A specific intent by the defendant to monopolize [citations omitted]; and (2) overt acts by the defendant which create a dangerous probability that the intended monopoly will be achieved." Pope v. Intermountain Gas Co., 103 Idaho 217, 224-25, 646 P.2d 988, 995-96 (1982). Establishing these elements requires proof of a relevant market, that the entity possesses monopoly power, and that this power has been employed so that an actual restraint on trade has occurred. *Id.* at 226-29, 646 P.2d at 997-1000. Again, the Unfair Sales Act does not require proof of monopoly power.

To establish liability for conspiracy to monopolize, three elements must be established: (1) concerted action; (2) overt acts in support of the conspiracy; and (3) specific intent to monopolize.

[3] The Act does not define "merchandise." The commonly understood meaning of the term is "[g]oods or commodities that may be bought or sold." Webster's II New College Dictionary.

[4] Section 48-403 of the Act defines numerous terms, including "retailer," "wholesaler," "direct seller."

[5] As noted, the old Ada County District Court case discussed above added a requirement that the plaintiff must also prove the sale had an actual injurious effect on competitors.

[6] Section 48-407 provides:

> Exempted sales. The provisions of this act shall not apply to sales at retail or sales at wholesale.
>
> (a) where perishable merchandise must be sold promptly in order to forestall loss;
>
> (b) where merchandise is imperfect or damaged or is being discontinued and is advertised, marked or sold as such;

(c) where merchandise is sold upon the final liquidation of any business;

(d) Where an endeavor is made in good faith to meet the prices of a competitor as herein defined selling substantially the same article or product in the same locality or trade area in the ordinary channels of trade.

(e) where merchandise is sold on contract to departments of the government or governmental agencies;

(f) where merchandise is sold by any officer acting under the order or direction of any court;

(g) where in closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing his trade in any such article or product if advertised, marked and sold as such. Provided, however, that any retailer or wholesaler claiming the benefits of any of the exceptions hereinabove provided, shall have the burden of proof of facts entitling such retailer or wholesaler to any of the benefits of such exceptions.

[7] This is unlike section 48-406, which allows any person to seek an injunction and actual damages.

[8] Review of the injunctive provisions of the Act, Idaho Code § 48-406(1)-(5), supports this position. The injunctions authorized by section 48-406 are limited to ceasing the sale of merchandise in violation of the Act and deterring future violations. There is no authority to enjoin a merchant from conducting business in the future, such as those contained in the Idaho Consumer Protection Act, Idaho Code § 48-607(6).

January 5, 2017

Elisha Figueroa, Administrator
Idaho Office of Drug Policy
Executive Office of the Governor

Re: Informal Review of Revised Initiative to Legalize Medical Marijuana

Ms. Figueroa:

This informal review letter is in response to your request that the Idaho Attorney General's Office conduct a review of the most recent draft of the Initiative to Legalize Medical Marijuana, which the Secretary of State's Office date-stamped September 12, 2016.

Preliminarily, because the revised Initiative appears to be mostly identical to the original Initiative previously reviewed, only the differences between the two versions will be addressed in this informal review. As before, this review will not be in-depth, but will attempt to summarize the changes made to the Initiative.[1] No attempt has been made to correct the spelling or grammatical errors in the revised Initiative. This review will follow the order of the proposed statutes of the Initiative.

Proposed Section 39-9301 – Short Title:

After stating that the Act may be cited as the "Idaho Medical Marijuana Act," the provision goes on to say that 25 states and the District of Columbia have legalized medical marijuana. That statement is not part of the short title of the Act, and should more appropriately follow the preamble sentence on page 1, "The People of Idaho find and declare the following."

Proposed Section 39-9302 – Findings:

This section contains several "Therefore" and "Whereas" clauses that do not belong in a statutory provision. Rather, they should follow the introductory sentence, "The People of Idaho find and declare the following," on page 1.

Proposed Section 39-9303 – Definitions:

-- sub-section (2)(b)(ii)1:

Sub-section (2)(b)(ii)1 allows designated caregivers to possess 12 marijuana plants, "provided that the total number of plants may not exceed thirty-six (36) per *patient*," instead of a total of 36 plants.[2] (Emphasis added.) Taken literally, a designated caregiver could legally possess up to 108 marijuana plants. This is an obvious mistake, as caregivers are allowed to possess 12 plants "for each" of three patients allowed to be assisted. *See* proposed I.C. § 39-9303(2)(b), (8).

-- sub-section (5) – Growers:

The original Initiative's requirements for age, photo I.D., criminal history, and limitation to four patients (inclusive) has been omitted from this section, and inserted in the first paragraph of proposed section 39-9315 regarding "Growing and Dispensing for Medical Marijuana Use." The revised sub-section (5) now simply reads, "'Grower' or patient growing for self. Means a person who has been designated by a patient to be their medical marijuana grower."

-- sub-section (6) – Distributors:

Sub-section (6) reads:

> (6) Dispensing DISTRIBUTORS REQUIRED: distributors are a new kind of entity that has been created to regulate the flow of products. ALL cultivation and manufacturing licensees are required to send their products to a Testing licensee for quality insurance [sic] and inspection before passing them to the next stage of manufacturing or retailing. The *testing licensee* in turn submits the product to a *laboratory* for batch testing and certification. Afterwards, the sample returns to the distributor for *final inspection* and execution of the contract between the cultivator and manufacturer or manufacturer and retailer. The distributor charges a fee that covers the testing plus any applicable taxes (the act doesn't

> impose any new taxes, but anticipates that could happen in the near future).

(Emphasis added.)

This sub-section is confusing. The statement that "distributors are a new kind of entity that has been created to regulate the flow of products" does not explain how distributors are to conduct such regulation. The provision ostensibly defines "distributor," but does so only by generally describing the procedure used in getting marijuana transported to a Testing licensee, then to a laboratory for testing and certification, prior to distribution. That is a procedure, not a "definition." Additionally, it is unclear how (and if) a "distributor" described in sub-section (6) differs from a "medical marijuana dispensary," which is defined in sub-section (11) as "an entity . . . that acquires marijuana plants . . . from medical marijuana production facilities and *distributes* [them] to registered qualifying patients or registered designated caregivers." (Emphasis added.)

Sub-section (19) defines "Testing facility" as "an entity registered under section 39-9306 by the Department to provide consumer protection services to the public by means of *laboratory sampling and testing* for potency and contaminants . . . ." (Emphasis added.) Sub-section (6) is inconsistent with sub-section (19) because it separates the task of the "testing licensee" from the function of a "laboratory" – sub-section (19) does not. Also, there is no explanation of how a distributor must make a "final inspection" of the tested/certified marijuana. Lastly, the parenthetical at the end of sub-section (6) is not appropriate; a statement that the act "anticipates" that new taxes could happen in the near future is not relevant.

-- sub-section (11): Medical Marijuana Dispensary:

The only change of this sub-section from the original Initiative is the deletion of "or collective" from the entity being defined – "Medical marijuana dispensary or collective." The review of the Initiative suggested the modification because the term "collective" was not found anywhere else in the Act.

-- sub-section (24): Creation of an Advisory Committee:

Sub-section (24) of the original Initiative set forth the definition of "Ombudsman," which has now been deleted and replaced with an entirely new matter. The new sub-section creates an 11-member Committee whose purpose is to advise the Director on the "administrative aspects" of the program, review current and proposed administrative rules of the program, and to provide input on its fee structure. The Committee will meet at least four times annually, and will be provided support staff by the Department. In sub-section (24)(f), all agencies of state government are "directed to assist the Committee in the performance of its duties. That provision may be subject to constitutional challenges for being overbroad, vague, and in violation of the separation of powers doctrine.

Proposed Section 39-9305 – Rulemaking:

-- sub-section (3): Ombudsman must be a licensed practitioner:

This is the only reference to an Ombudsman in the revised Initiative. The original Initiative contained a more detailed definition of "Ombudsman" at proposed section 39-9303(24), which was problematic. While the definition of "Ombudsman" has been simplified, the questions of how one is appointed and what authority he/she may have has not been addressed.

Proposed Section 39-9315 – Growing and Dispensing for Medical Marijuana Use:

Proposed section 39-9315 of the original Initiative stated only that a "Grower can grow for up to four (4) patients, including themselves." This language has now been incorporated into the opening paragraph's requirements for registration.

The first part of this statute sets out requirements for being registered with the Department as growers and dispensers of medical marijuana: 18 years of age, possess a valid U.S. or federally issued photo I.D., no convictions of "any class A or class B felony for manufacture or delivery of a controlled substance in the previous two

(2) years," and not grow for more than four patients (inclusive). As stated in the Initial review, Idaho does not have "class A" or "class B" felonies, so this is an illusory requirement.

The provisions that immediately follow the "registration" requirements growers and dispensers must meet, sub-sections (a) and (b), do not make sense. Without changing the subject from what growers and dispensers must do to be registered with the Department, sub-section (a) begins, "give the Dept. of Food and Agriculture responsibility for regulating cultivation," and continues the pattern in regard to four other state departments (Public Health, Pesticide Regulation, Fish and Wildlife, and Water Board) without specifying who gives them their respective responsibilities. Obviously, growers and dispensers cannot give a state department a general responsibility. If it is intended that the Initiative itself is assigning the responsibilities as described, it does not say that. The same is true of sub-section (b), which does not identify who or what is requiring the conduct described -- cultivating medical marijuana only in "secured, enclosed, and ventilated structures, so as not to be visible to the general public," and for the purposes listed (health, public safety and welfare, preventing negative impacts such as decreased property values, odor, crime, and illicit marketing). If these requirements upon the various departments are made by the Initiative, it should clearly say that.

Under proposed section 39-9315, the same provision previously discussed under proposed section 39-9303(6) -- "Dispensing DISTRIBUTORS REQUIRED" -- is repeated, even retaining the "(6)" designation. Although this paragraph more properly belongs in this section than the "Definitions" section, it should not be labeled as sub-section (6) because there are no sub-sections preceding it. The comments previously made about this paragraph (*see* page 2) need not be repeated here.

Proposed Section 39-9318 – Annual Report

This statute requires the Department to submit an annual report to the legislature, containing information listed in sub-sections (1) through (8). The only modification in this section occurs in sub-

section (8), which adds the following highlighted language to the original Initiative's wording:

> Financial information regarding the implementation and/or maintenance of the Act's provisions *provides an Annual Report to the legislature*.

Sub-section (8) could mean several things. It appears to literally say that if sub-section (8) is met, then the Annual Report requirement is automatically met. However, considering some of the dissimilarity between sub-section (8) (financial information) and the first seven sub-sections (numbers of relevant participants, facilities, applications (etc.); nature of patient's medical conditions), it seems more likely that sub-section (8) is worded incorrectly, and should be understood as requiring that the relevant financial information be "provided in the Annual Report to the legislature."

There are no other discernable differences between the original and the revised Initiatives. This point-by-point explanation of the modifications made by the revised Initiative should be viewed in conjunction with the review of the original Initiative. If you have any questions about the changes made by the revised Initiative, or my comments about them, please feel free to contact me.

DATED this 5th day of January, 2017.

JOHN C. McKINNEY
Deputy Attorney General
Criminal Law Division

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[1] Although the original review of the Initiative noted that its statutory designation of I.C. § 39-9200, *et seq*. was incorrect, the revised Initiative retains the same flaw. All references to both Initiatives will be corrected to the proper chapter of Title 39 – 9300, *et seq*. Additionally, citations to the proposed statutes of the Initiatives will not be prefaced with "Prop."

[2] Although the "per patient" language is in the original Initiative, it was not discussed in the initial review as being problematic.

January 12, 2017

Barry McHugh
Kootenai County Prosecutor
Box C-9000
Coeur d'Alene, ID 83814

Re: October 19, 2016 Letter and ACLU Proposed Legislation

Dear Mr. McHugh:

This letter is in response to your October 19, 2016 letter requesting an opinion regarding death penalty legislation allegedly being proposed by the ACLU during the upcoming legislative session. Specifically, you have requested "an opinion regarding the proposed legislation" and "the potential ramifications of that proposed legislation."

The primary aim of this legislation is to address situations in which the accused suffers from what the legislation refers to as "intellectual disability" and "severe mental illness." As I will explain more fully, Idaho Code § 19-2515A, in its current form, prohibits the imposition of a death sentence in a case where a court finds, by a preponderance of the evidence, that the defendant is "mentally retarded," and Idaho Code § 19-2515 allows the introduction of evidence regarding mental illness as a mitigating factor in imposing a sentence of death. Idaho's current statutes are constitutional and do not require significant changes.

While the proposed legislation involves only changes to I.C. § 19-2515A, it will result in two very different changes to Idaho's death penalty statutes which would have retroactive, as well as prospective, effect. The first change involves significant changes to Idaho's law regarding the execution of murderers with "intellectual disability," previously known as "mental retardation," that was enacted as a result of Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), where the Supreme Court concluded the execution of "mentally retarded" murderers violates the Eighth Amendment. The

second change would exclude from the death penalty any first-degree murderer who is determined to have "severe mental illness." To fully understand the significance of these two changes, it is first necessary to review modern-era death penalty jurisprudence.

Modern-Era Death Penalty Jurisprudence And The Advent Of *Atkins*

In 1977, as a result of Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), and Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976), the Idaho Legislature amended I.C. § 19-2515, which establishes when the death penalty may be imposed in Idaho. 1977 Idaho Sess. Laws 390. While I.C. § 19-2515 has been amended several times, the underlying principles have remained the same. This statute was designed to require that "sentencing discretion be directed and limited, so as to promote consistency and to prevent a death sentence from being 'wantonly' and 'freakishly' imposed and to provide a meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." State v. Creech, 105 Idaho 362, 368, 670 P.2d 463, 469 (1983) (quotes and citations omitted).

In Idaho, for the death penalty to be imposed, I.C. § 19-2515 now requires the following: (1) notice of intent to seek the death penalty as mandated by I.C. § 18-4004A; (2) a conviction for first-degree murder; (3) a finding by a jury (or judge if the defendant waives a jury), beyond a reasonable doubt, of at least one statutory aggravating factor as listed in I.C. § 19-2515(9); and (4) a determination by the jury that "all mitigating circumstances, when weighed against the aggravating circumstance, are [not] sufficiently compelling that the death penalty would be unjust." I.C. § 19-2515(8)(a)(ii).

In Lockett v. Ohio, 438 U.S. 586, 604, 98 S. Ct. 2954, 2964-65, 57 L. Ed. 2d 973 (1978) (footnote omitted) (emphasis in original), the Supreme Court discussed the concept of mitigation in capital cases, and concluded, "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the

offense that the defendant proffers as a basis for a sentence less than death." *See also* Hitchcock v. Dugger, 481 U.S. 393, 398-99, 107 S. Ct. 1821, 1824-25, 95 L. Ed. 2d 347 (1987) (capital defendants must be permitted to present non-statutory mitigating evidence). This fundamental tenet of capital jurisprudence is now embodied in I.C.J.I. 1717.

Irrespective of Lockett and its progeny, which requires the jury to consider all mitigation, the Supreme Court has also concluded that, under the Eighth Amendment and "evolving standards of decency," certain individuals cannot be sentenced to death, including: (1) rapists of adult women, Coker v. Georgia, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977); rapists and kidnappers of adult women, Eberheart v. Georgia, 433 U.S. 917, 97 S. Ct. 2994, 53 L. Ed. 2d 1104 (1977); someone who neither took life, attempted to take life, nor intended to take life, Enmund v. Florida, 458 U.S. 782, 789-93, 102 S. Ct. 3368, 3372-74, 73 L. Ed. 2d 1140 (1982); anyone under the age of 18, Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005); and child rapists, Kennedy v. Louisiana, 554 U.S. 407, 128 S. Ct. 2641, 171 L. Ed. 2d 525 (2008).

Although intellectual disability was classic mitigation that the fact-finder was required to consider, it did not bar imposition of the death penalty. Penry v. Lynaugh, 492 U.S. 302, 319-35, 109 S. Ct. 2934, 2947-56, 106 L. Ed. 2d 256 (1989). However, 13 years later, the Supreme Court revisited the issue in Atkins, with the Court concluding "[m]uch has changed since [*Penry*]," 536 U.S. at 314, and that the "consistency" of change in which state legislatures had enacted statutes prohibiting the execution of the mentally retarded and the "uncommon" practice of executing mentally retarded murderers, even in states where it was permitted, established a "national consensus has developed against it," *id.* at 314-16. After determining a national consensus had developed against executing mentally retarded murderers and concluding that consensus "reflects widespread judgment about the relative culpability of mentally retarded offenders, and the relationships between mental retardation and the penological purposes served by the death penalty," *id.* at 317, the Court held "that such punishment is excessive and that the Constitution places a substantive restriction on the State's power to take the life of a mentally retarded offender." *Id.* at 321 (internal

quotes and citation omitted). Addressing the existence of a "national consensus," the Court further explained:

> To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded. In this case, for instance, the Commonwealth of Virginia disputes that Atkins suffers from mental retardation. Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus. As was our approach in *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), with regard to insanity, "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restrictions upon [their] execution of sentences." *Id.*, at 405, 416-417, 106 S.Ct. 2595.

Id. at 317 (brackets in original) (footnote omitted).

The Court then noted, "The statutory definitions of mental retardation are not identical, but generally conform to the clinical definitions set forth" by The American Association on Mental Retardation ("AAMR") and The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (4th ed. 2000) ("DSM-IV"). Atkins at 317 n.22 (*citing* n.3). The Court recognized, "clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that become manifest before age 18." *Id.* at 318. However, the Court never adopted or "held" that the States must adopt any specific definition of mental retardation, particularly one derived from the mental health community. Rather, the Court held only that "such punishment is excessive and that the Constitution places a substantive restriction on the State's power to take the life of a mentally retarded offender." *Id.* at 321 (internal quotes and citation omitted).

Responding to Atkins, the Idaho Legislature embraced the three general prongs required for intellectual disability and established

specific criteria that must be followed and met to prove a viable intellectual disability claim. 2003 Idaho Sess. Laws 394. Although using the old phrase, "mentally retarded," I.C. § 19-2515A, which became effective on March 27, 2003, provides Idaho's definition for mental retardation:

> (a) "Mentally retarded" means significantly subaverage general intellectual functioning that is accompanied by significant limitations in adaptive functioning in at least two (2) of the following skill areas: communication, self-care, home living, social or interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety. The onset of significant subaverage general intelligence functioning and significant limitations in adaptive functioning must occur before age eighteen (18) years.
>
> (b) "Significantly subaverage general intellectual functioning" means an intelligence quotient of seventy (70) or below.

I.C. § 19-2515A(1). "If the court finds by a preponderance of the evidence that the defendant is mentally retarded, the death penalty shall not be imposed." I.C. § 19-2515A(3).

In Pizzuto v. State, 146 Idaho 720, 729, 202 P.3d 642, 651 (2008), the Idaho Supreme Court reviewed I.C. § 19-2515A, and concluded:

> [T]he statutory definition of "mentally retarded" requires proof of three elements: (1) an intelligence quotient (IQ) of 70 or below; (2) significant limitation in adaptive functioning in at least two of the ten areas listed; and (3) the onset of the offender's IQ of 70 or below and the onset of his or her significant limitation in adaptive functioning both must have occurred before the offender turned age eighteen. Significant limitations in adaptive functioning alone will not bring an offender within the protection of the statute.

In Bobby v. Bies, 556 U.S. 825, 831, 129 S. Ct. 2145, 2150, 173 L. Ed. 2d 1173 (2009), after the enactment of I.C. § 19-2515A, the Supreme Court again discussed the parameters of the holding in Atkins:

> [T]his Court held, in *Atkins v. Virginia*, 536 U.S. at 321, 122 S.Ct. 2242, that the Eighth Amendment prohibits execution of mentally retarded offenders. Our opinion did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation "will be so impaired as to fall [within *Atkins*' compass]." We "le[ft] to the States the task of developing appropriate ways to enforce the constitutional restriction." *Id.* at 317, 122 S.Ct. 2242 (internal quotation marks omitted).

Nevertheless, in Hall v. Florida, — U.S. —, 134 S. Ct. 1986, 1994, 188 L. Ed. 2d 1007 (2014) (*citing* Cherry v. State, 959 So.2d 702, 712-13 (Fla. 2007)) (per curium)), the Supreme Court examined Florida's statutory criteria for determining intellectual disability, which the Florida Supreme Court had interpreted narrowly by concluding, "a person whose test score is above 70, including a score within the margin for measurement error, does not have an intellectual disability and is barred from presenting other evidence that would show his faculties are limited." The strict IQ test score cutoff of 70 was the focus of the case. The Supreme Court recognized that all IQ tests have a "standard error of measurement" (SEM) that is a "statistical fact" and "reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score." *Id.* at 1995. As explained by the Court, "A score of 71, for instance, is generally considered to reflect a range between 66 and 76 with 95% confidence and a range of 68.5 and 73.5 with a 68% confidence." *Id.* Reviewing state statutes, the Court determined that a "significant majority of States implement the protections of *Atkins* by taking the SEM into account, thus acknowledging the error inherent in using a test score without necessary adjustments" which "provides objective indicia of society's standards in the context of the Eighth Amendment." *Id.* at 1996 (quotes and citation omitted). Importantly, the Supreme Court expressly recognized that I.C. § 19-2515A allows "present[ation of] additional evidence of intellectual disability even when an IQ test

score is above 70." *Id.* at 1997-98 (citing Pizzuto, 146 Idaho at 729, 202 P.3d at 651 ("The alleged error in IQ testing is plus or minus five points. The district court was entitled to draw reasonable inferences from the undisputed facts."). Therefore, based upon other state statutes, the Supreme Court concluded there was "strong evidence of consensus that our society does not regard this strict cutoff as proper or humane," *id.* at 1998, which resulted in the Court holding, "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits," *id.* at 2001.

Changes To Idaho's Definition Of Intellectual Disability

Idaho's current statute defining intellectual disability and the procedures utilized are constitutional; there is no need for the significant changes to those definitions envisioned by the proposed legislation. While the proposed legislation still requires three prongs to establish intellectual disability, the first two prongs are drastically changed and may result in new constitutional challenges.

Specifically, the first prong has been changed from "significantly subaverage general intellectual functioning" that is currently defined as "an intelligence quotient of seventy (70) or below," to "intellectual functioning" that "includes but is not limited to deficits in reasoning, problem-solving, planning, abstract thinking, judgment, academic learning and learning from experience, and practical understanding confirmed by both clinical assessment and individualized, standard intelligence testing. Deficits in intellectual functioning must be significantly below normal limits." Idaho's current definition of significantly subaverage general intellectual functioning involves an objective element by requiring "an intelligence quotient of seventy (70) or below." The proposed change imposes a subjective standard without any objective criteria. For example, there is no definition for the level of "deficits" in the various areas; the proposed change merely states, "This includes . . . deficits" in eight different areas. While the deficits must be "confirmed by both clinical assessment and individualized, standard intelligence testing," there is no indication how that will take place or how IQ testing can confirm those "deficits" in the particular areas listed. Additionally, the areas

listed – "reasoning, problem-solving, planning, abstract thinking, judgment, academic learning and learning from experience" – are "not limited," which results in any "expert" being permitted to state that an area outside of those listed are included in the first prong. Importantly, there is no definition or criteria for "significantly below normal limits" in establishing "deficits in intellectual functioning." Neither "normal limits" nor "significantly" are defined, which could result in a constitutional vagueness challenge. Because this proposed change eliminates the objective criteria established by Idaho's current law, more murderers will have an ability to challenge imposition of the death penalty, which will obviously increase the costs by requiring the respective parties to retain experts who may be required to review volumes of the defendant's prior history, conduct additional testing, and base their respective opinions upon subjective criteria.

The second prong also contains no definitions, but is built upon subjective criteria that provide little guidance to the courts. There is no definition or other criteria for determining the "developmental and sociocultural standards for personal independence and social responsibility." While the phrase actually refers to "standards," there is no indication what those "standards" entail. Additionally, are there different criteria based upon "sociocultural standards?" In other words, are the standards different for one culture as opposed to another? Further, what level of "personal independence" is actually required, and is it also tied to the culture in which the individual was raised? It is unclear how much "functioning" must be limited "in one or more activities of daily life." The proposed statute also utilizes the vague term, "such as," and then lists various "activities of daily life" in which the "deficits limit functioning." There is no way to ascertain what additional "activities of daily life" might be included, which results in another vagueness problem. The same is true with regard to what other areas might be included under the phrase "such as home, schoolwork and community." Compare the second prong of the proposed legislation with the clear criteria discussed in I.C. § 19-2515A(1)(a), which requires "significant limitations in adaptive functioning in at least two (2) of the following skill areas" which are then listed.

Even the new third prong interjects ambiguity into the statute. While the current statute requires onset "before age eighteen (18) years," I.C. § 19-2515A(1)(a), the proposed third prong includes the language "during the developmental period before age eighteen (18) years." It is unknown if the "developmental period" includes the entire time prior to age 18 or some other distinct "developmental period" that occurs and ends sometime prior to age 18 based upon the specific individual.

Finally, there is a question regarding the impact this proposed change would have on individuals already sentenced to death. While there is no retroactivity clause, it could certainly be argued that these changes should be retroactively applied to those already sentenced to death, including Gerald Pizzuto, who has an active Atkins case pending in federal court. Irrespective of any decision the courts may make regarding retroactivity, there will be additional costs and delay associated with that decision that are unwarranted since the Idaho Supreme Court has already determined I.C. § 19-2515A is constitutional and the United States Supreme Court has determined it does not suffer from the same problem in Hall.

You should know that on November 28, 2016, the Honorable B. Lynn Winmill concluded that, while I.C. § 19-2515A is constitutional on its face, the Idaho Supreme Court's interpretation of the statute makes it unconstitutional because it fails to consider the SEM. Pizzuto v. Blades, 2016 WL 6963030, *7 (D. Idaho 2016). Addressing I.C. § 19-2515A(1), Judge Winmill reasoned, "The Idaho statute does not explicitly prohibit consideration of the SEM, nor does it explicitly state that the only way to prove an IQ is with evidence of an IQ test score. Therefore, on its face, the Idaho statute could have been interpreted to be consistent with *Atkins* and *Hall*." *Id.* However, relying upon a sentence from Pizzuto v. State, 146 Idaho at 729, 202 P.3d at 651 ("the legislature did not require that the IQ score be within five points of 70 or below. It required that it be 70 or below"), Judge Winmill opined that "the Idaho Supreme Court appears to have interpreted the statute as prohibiting consideration of the SEM–that is, the Idaho statute established a hard IQ score cutoff of 70." Pizzuto, 2016 WL 6963030, at *7.

While the state ultimately won, Pizzuto has filed an appeal with the Ninth Circuit, and the issue of whether Judge Winmill erred in his conclusion regarding the Idaho Supreme Court's discussion of SEM will be addressed by the respective parties.

Death Penalty Eligibility For Murderers With "Severe Mental Illness"

Under I.C. § 19-2515, Lockett, 438 U.S. at 604, and its progeny, capital defendants are permitted to present all evidence regarding their mental health as mitigation that can be used with all other mitigation evidence to argue that the collective mitigation evidence is sufficiently compelling to make imposition of the death penalty unjust. However, the goal of the new legislation is to **bar** imposition of the death penalty in all cases where it can be established the murderer had a "severe mental illness" at the time the victim was murdered.

As explained above, this type of prohibition would be a marked departure from the capital sentencing schemes currently utilized by every jurisdiction that allows the death penalty. As recently explained in State v. Kleypas, 2016 WL 6137507, at *66 (Kansas 2016), only one state – Connecticut – "has ever passed legislation expressly prohibiting the death penalty for individuals who were mentally ill at the time of the crime. . . . However, Connecticut abolished the death penalty altogether for future offenses in 2012." *Id.* While such legislation has been attempted in other states, each has failed. *Id.* As recognized in Kleypas, 2016 WL 6137507, at *66 (citing cases), "Legal commentators have acknowledged the absence of any legislative trend toward abolishing the death penalty for this category of offenders," which has "led courts who have considered the issue to decline to extend the *Atkins* and *Roper* rationale to the mentally ill." *See also* Underwood v. Duckworth, 2016 WL 4059162, *32 (W.D. Okla. 2016) ("[T]here are no relevant state trends. This Court has only located one state that bars the execution of the mentally ill, and that state has ended the death penalty for all future offenses."). Likewise, the Idaho Supreme Court has recognized "that every court that has considered this issue [has] refused to extend *Atkins* and hold that the Eighth Amendment categorically prohibits execution of the

mentally ill," and joined those jurisdictions. State v. Dunlap, 155 Idaho 345, 380, 313 P.3d 1, 36 (2013) (citing cases).

In Strong v. Griffith, 462 S.W.3d 732, 738 (Mo. 2015), the court recognized that Missouri provided sufficient safeguards at both the guilt and penalty phases "to ensure that those with severe mental illness are not sentenced to the death penalty." Specifically, the court recognized that "[n]o person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures." *Id.* Idaho also protects those defendants determined to be incompetent. *See* State v. Lovelace, 140 Idaho 53, 62, 90 P.3d 278, 287 (2003) (*citing* I.C. § 18-210).

In Strong, 462 S.W.3d at 738, the court also recognized that "[a] person is not responsible for criminal conduct if, at the time of such conduct, as a result of mental disease or defect such person was incapable of knowing and appreciating the nature, quality, or wrongfulness of such person's conduct." This has often been referred to as the "insanity defense." *See* State v. White, 93 Idaho 153, 155-56, 456 P.2d 797, 799-800 (1969). In 1982, the Idaho Legislature abolished the insanity defense and "shifted to a model that focused on whether a defendant could form the criminal intent necessary to be guilty of the crime to which they stand accused." State v. Delling, 152 Idaho 122, 125, 267 P.3d 709, 712 (2011). Specifically, the Legislature enacted I.C. § 18-207, which was carefully examined by the Idaho Supreme Court and found to be constitutional:

> Idaho Code § 18–207 does not remove the element of criminal responsibility for the crime. The prosecution is still required to prove beyond a reasonable doubt that a defendant had the mental capacity to form the necessary intent. Idaho Code § 18–207 merely disallows mental condition from providing a complete defense to the crime and may allow the conviction of persons who may be insane by some former insanity test or medical standard, but who nevertheless have the ability to form intent and to control their actions. The statute expressly allows admission of expert

> evidence on the issues of mens rea or any state of mind which is an element of the crime. *See* I.C. § 18–207(b). In addition, the statutes require the sentencing judge to consider and receive evidence of the mental condition of the defendant at the time of sentencing. I.C. § 19–2523. This statutory process provides the necessary safeguards and does not offend the principles of due process as required by the Fourteenth Amendment to the United States Constitution.

Id. at 125-26, 267 P.3d at 712-13 (*quoting* State v. Card, 121 Idaho 425, 430, 825 P.2d 1081, 1086 (1991)).

Therefore, as recognized in Delling v. Idaho, — U.S. —, 133 S. Ct. 504, 505, 184 L. Ed. 2d 480 (2012) (J., Breyer, dissenting from denial of certiorari), "in Idaho, insanity remains relevant to criminal liability" even if it is only with respect to criminal intent. In other words, if a murderer has a "severe mental illness" such that criminal intent cannot be formed, not only can the death penalty not be imposed, but that individual will not even be convicted of first-degree murder.

In Strong, 462 S.W.3d at 738, the court also focused upon the ability of the defendant "to present evidence to the jury of mitigating circumstances that would justify a sentence of life without parole instead of a sentence of death," including evidence that the defendant "was under the influence of extreme mental or emotional disturbance" or that the "capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." As explained above, Idaho law and the Constitution require that Idaho murderers be permitted to present the same type of evidence.

The proposed legislation appears to be based upon recommendations from the American Bar Association ("ABA") and various mental health entities, which are allegedly based upon the degree of culpability of mentally ill murderers and deterrence. *See* Kleypas, 2016 WL 6137507, at *64. However, in Kleypas, the court examined the various recommendations and recognized, "the ABA report itself recognizes that diagnosis alone is not a sensible basis for

the exemption and, consequently, a case-by-case determination will be required." *Id.* at *67. As explained by the court:

> Mental illnesses present less discernable common characteristics than age or mental retardation. Caselaw . . . illustrates the difficulty in defining a discernable standard relating to mental illness. As the ABA standard recognizes, case-by-case evaluations would be necessary; it follows that the level of culpability will vary on a case-by-case basis. While we recognize that some mental illness may make a defendant less culpable and less likely to be deterred by the death penalty, often such illnesses can be treated and may not manifest in criminal behavior.

Id. at *68 (citations omitted).

The difficulty associated with defining appropriate standards relating to those who should not be eligible for the death penalty is illustrated by the proposed legislation. Severe mental illness is initially defined as someone who "had active symptoms of a psychiatric disorder . . . that significantly impaired the person's adaptive functioning." The proposed legislation then states, "Impaired adaptive functioning could result in the inability to appreciate the nature, consequences, or wrongfulness of the person's conduct; exercise rational judgment in relation to the person's conduct; or conform the person's conduct to the requirements of the law." This "definition" constitutes a version of the "insanity defense" that the legislature eliminated in 1982.

The proposed legislation next defines "active symptoms of a disorder" as "symptoms of the disorders in Section 1(b)(iii), below, as specified in the American Psychiatric Association's Diagnostic and Statistical Manual of mental Disorders (DSM)." The "symptoms" "include delusions (fixed, false beliefs), hallucinations (erroneous perceptions of reality), disorganized thinking, mania, or disruptions of consciousness, memory, and perception of the environment." The disorders apparently "include[] but [are] not limited to . . . : Schizophrenia; Schizoaffective Disorder; Bipolar Disorder; Major Depressive Disorder; or Delusional Disorder." As explained above,

the use of the phrase, "included but is not limited to" provides no boundaries or limitations.

The proposed legislation next defines "adaptive functioning," stating it "means for a significant portion of the time since the onset of the severe mental illness, the individual level of functioning is markedly below the level achieved prior to the onset in one or more major areas, such as work, interpersonal relations, or self-care." There are numerous vagueness issues associated with this definition. The "significant portion of the time since the onset of the severe mental illness" is obviously going to be defined differently based upon the outcome desired. There is no definition of what constitutes "significant." There is also no definition for what constitutes "markedly below the level achieved prior to the onset." "Markedly below" is also going to be defined differently based upon the outcome desired. It may also be very difficult to ascertain exactly when "onset in one or more of the major areas" occurred. Finally, "work, interpersonal relations or self-care" are not defined and undoubtedly will be defined differently based upon the outcome desired. In other words, what constitutes "work;" is that an individual's employment, volunteer activities, or something else? Additionally, if an individual's functioning was already low, does there need be a level of functioning that is even lower than the level achieved prior to onset? In short, there are significant challenges associated with the language of what constitutes a "severe mental illness."

Section 3 allows for the retroactivity of this proposed legislation. In other words, every capital murderer in Idaho will be permitted to file a new post-conviction petition raising the claim that they cannot be sentenced to death because of "severe mental illness." Not only will this significantly increase the costs associated with Idaho's current death-sentenced murderers, it will significantly delay the execution of every person currently sentenced to death by many years, even though their mental health was presented to the fact-finder at the time of sentencing, post-conviction, and federal habeas, and it was determined that evidence did not make imposition of the death penalty unjust.

Section 4 will also increase the costs in capital cases and significantly delay the trial because it requires that the determination

of whether a murderer suffers from "severe mental illness" at the time of the murder be made by the district judge prior to trial. If the judge determines the murderer has not met the burden (preponderance of the evidence) of establishing a "severe mental illness" at the time of the murder, that same evidence can still be presented to the jury at sentencing, which means the defendant is provided two opportunities to avoid imposition of the death penalty based upon "severe mental illness," once before trial, and later at the capital sentencing before a jury.

As explained above, and as recognized in Kleypas, 2016 WL 6137507, at *68, there are sufficient protections in place for those defendants with a mental illness that brutally murder others. While there are distinctions between disqualification and mitigation, "presenting mental illness as a mitigator allows the jury to consider culpability." *Id.*

I appreciate your interest in this complex area and the opportunity to review this proposed legislation. If you have any additional questions or concerns, feel free to contact me at your convenience.

Sincerely,

L. LaMONT ANDERSON
Deputy Attorney General
Chief, Capital Litigation Unit

January 12, 2017

Elisha Figueroa, Administrator
Idaho Office of Drug Policy
Executive Office of the Governor
Via email: elisha.figueroa@odp.idaho.gov

Re: Legality of CBD Products and he Impact on Idaho Law of the DEA's Recent Clarification that CBD Is a Schedule I Drug

Dear Ms. Figueroa:

In correspondence to this office, you posed two questions you have presented in regard to Idaho law concerning CBD products. This letter, which embodies my own review of this and the analysis of Deputy Attorney General John McKinney, will address those questions.

QUESTIONS PRESENTED

1. If a product contains only cannabidiol ("CBD")[1] and, reportedly, no tetrahydrocannibol ("THC"),[2] and the product is made from the 'mature stalks' of a marijuana plant, would that product be illegal under Idaho law?

2. How does the recent action by the U.S. Drug Enforcement Administration ("DEA") which clarified CBD as a Schedule I drug and the new federal definition of CBD interplay with the Idaho definition of marijuana?

BRIEF ANSWERS

1. No, assuming that the CBD product is made only from the "mature stalks" of the marijuana plant, and that it in fact contains no THC. *See* I.C. §§ 37-2701(t), 37-

2705(d)(19) and (27). However, such a product may be illegal under federal law.

2. Under the "separate sovereigns" principle, the recent DEA clarification that CBD is a Schedule I controlled substance, and its new federal definition, have no direct impact on Idaho's definition of marijuana or application of Idaho criminal statutes.

ANALYSIS

I. If a product contains only cannabidiol ("CBD") and, reportedly, no tetrahydrocannibol ("THC"), and the product is made from the 'mature stalks' of a marijuana plant, would that product be illegal under Idaho law?"

This question assumes that the CBD product contains "no" THC and that it is actually made from the "mature stalks" of the marijuana plant. This analysis will be based upon these two assumptions.

There are two criteria that must be met in order for a marijuana product to be considered legal under Idaho law. 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 . . . 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 I.C. §§ 37-2705(a) and (d)(19) and (27), if a substance contains *any* quantity of *either* marijuana or THC (etc.), it is a Schedule I controlled substance. The question of what constitutes "marijuana" (or "marihuana") is defined by statute 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. . . .

I.C. § 37-2701(t) (emphasis added).

Because the question presented assumes that the CBD product contains *no* THC and that it is made only "from the 'mature stalks'" of the marijuana plant, that product would be legal under Idaho law. However, even if the CBD product contains no THC, if it contains "the resin extracted" from the mature stalks of the marijuana plant (or any other prohibited part or variant of the plant), it would be illegal under Idaho law as a Schedule I controlled substance.

II. How does the recent action by the U.S. Drug Enforcement Administration ("DEA") which clarified CBD as a Schedule I drug" and the new federal definition of CBD interplay with the Idaho definition of marijuana?"

A. Background of DEA's New Rule on "Marijuana Extract"

On December 14, 2016, the DEA published a final rule in the Federal Register entitled "Establishment of a New Drug Code for Marihuana Extract," effective January 13, 2017. 81 Fed. Reg. 90194-01 (Dec. 14, 2016). The final rule initially explains, "[t]he United Nations Conventions on international drug control treats extracts from the cannabis plant somewhat differently than marihuana or tetrahydrocannabinols" (THC). *Id.* at 90195. To conform with the

international conventions, the DEA has made a separate code number for "marihuana extract," which means "an extract containing one or more cannabinoids that has been derived from any plant of the genus Cannabis, other than the separated resin (whether crude or purified) obtained from the plant."

The final rule establishes that marijuana extracts such as CBD continue to be Schedule I controlled substances under federal law. *Id.* ("Extracts of cannabis are controlled only under Schedule I of the Convention, which is a lower level of control than 'cannabis resin.'"). Of note in the publication of the DEA's new rule is a comment seeking clarification of "whether the new drug code will be applicable to cannabidiol (CBD), if it is not combined with cannabinols." *Id.* The DEA's response reads:

> For practical purposes, all extracts that contain CBD will also contain at least small amounts of other cannabinoids.[3] However, if it were possible to produce from the cannabis plant an extract that contained only CBD and no other cannabinoids, *such an extract would fall within the new drug code 7350.* In view of this comment, the regulatory text accompanying new drug code 7350 has been modified slightly to make clear that it includes cannabis extracts that contain only one cannabinoid.

Id. (footnote omitted; emphasis added).

In sum, based on the DEA's response in the publication of its new rule, even if CBD contains no "other" cannabinoids, because it is a cannabinoid itself, it is a "marijuana extract;" therefore, it is an illegal Schedule I controlled substance under federal law.

B. Impact of DEA's New Rule on Idaho Law

As discussed, the new DEA rule clarifies that CBD products are always illegal under federal law regardless of whether they contain any "other" cannabinoids. Therefore, in the event a CBD product is produced that contains *no* THC (*see* footnote 2) and is not

made from *any* prohibited parts of the marijuana plant; it would be legal under Idaho law, but illegal under federal law.

Under the principle of "separate sovereigns," the federal government is free to enforce its own laws, and could do so without regard to Idaho's marijuana laws. The United States Supreme Court has explained:

> 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, 1083, 55 L. Ed. 2d 303 (1978) (*superseded by statute*) (*quoting* Moore v. Illinois, 14 How. 13, 19-20, 14 L. Ed. 306 (1852)) (footnote omitted; emphasis added); *see* United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 486, 121 S. Ct. 1711, 1715, 149 L. Ed. 2d 722 (2001) (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).

Under the concept of "separate sovereigns," the federal government is free to make all CBD products illegal under federal law – and has done so. The fact that it is not illegal in Idaho to possess CBD products if they (1) have no THC, and (2) are not made from any of the prohibited parts of the marijuana plant, does not impact federal law in any way. By the same measure, even though federal law on CBD products is more restrictive than Idaho's marijuana laws, it has no impact on Idaho law. In short, if any CBD product is possessed (or sold, manufactured, etc.) in Idaho, it is *always* a violation of federal law; however, CBD products violate Idaho law *only* if one or both of the above criteria have not been met.

CONCLUSION

If a CBD product is in fact made only from the "mature stalks" of the marijuana plant, and if in fact it contains no THC, it would be legal under Idaho law. *See* I.C. §§ 37-2701(t), 37-2705(d)(19) and (27). However, such a product may be illegal under federal law. Under the "separate sovereigns" principle, the federal government can make CBD illegal, but it can remain legal under Idaho law. Thus, the recent DEA clarification that CBD is a Schedule I controlled substance, and its new federal definition, have no direct impact on Idaho's definition of marijuana or on the application of Idaho criminal statutes.

I hope you find this response 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

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[1] CBD ("cannabidiol") is a cannabinoid, which is defined as "[a]ny of a group of closely related compounds which include cannabinol and the active constituents of cannabis." Oxford English Dictionary (online): search "cannabinoid" at https://en.oxforddictionaries.com; *see* 81 Fed. Reg. at 90195 ("The comment further clarified that the broader term 'cannabinoid' includes both cannabinol-type compounds and cannabidiol-type compounds").

[2] THC is also a cannabinoid. *See* Merriam-Webster at http://ww1.merriam-webster.com; search "cannabinoid" (defining "cannabinoid" as "any of various chemical constituents (as THC or cannabinol) of cannabis or marijuana").

[3] In footnote 1, the DEA explained, "[a]lthough it might be theoretically possible to produce a CBD extract that contains absolutely no amounts of other cannabinoids, the DEA is not aware of any industrially-utilized methods that have achieved this result." 81 Fed. Reg. at 90195 n.1.

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