



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

March 10, 2015

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

Re: Certificate of Review
Proposed Initiative Related to (1) Legalization of Medical Use of Marijuana; (2) Decriminalization of Possession of Three Ounces or Less of Marijuana; (3) Decriminalization of Possession of Marijuana-Related Drug Paraphernalia and Exclusion From Prosecution for Participants in Idaho's Medical Marijuana Program and (4) Establishment of Idaho Industrial Hemp Program

Dear Secretary of State Denney:

An initiative petition was filed with your office on February 20, 2015. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only." The petitioners are free to "accept or reject them in whole or in part." 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 submitted for review is comprised of Sections 1 through 5, and each but Section 5 (re: Severability) contains a separate title, findings, and substantive provisions. As a preliminary matter, the divergent types of laws proposed by the initiative may run counter to the “single subject rule” set forth in art. III, sec. 16 of the Idaho Constitution, which states:

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

The Idaho Court of Appeals has stated that the “critical task” in analyzing whether an act “embraces one subject and matters properly connected to it” is to identify the “general subject” matter of the bill:

The critical task is to identify the “general subject” of the bill. In our view, the “general subject” of the bill here in question is the award of attorney fees in civil actions. The text of the statute . . . plainly falls within this subject. Its provisions are germane to, and are not incongruous with, the subject. To define the subject more narrowly, by limiting it to enumerated civil actions mentioned in the title, would be to treat the title as a catalog or index to the act. The Supreme Court rejected this approach in *Kerner [v. Johnson]*, 99 Idaho 433, 452, 583 P.2d 360, 379 (1978)] and, accordingly, we reject it here.

Cheney v. Smith, 108 Idaho 209, 210, 697 P.2d 1223, 1224 (Ct. App. 1985). See also Cox v. City of Sandpoint, 140 Idaho 127, 131, 90 P.3d 352, 356 (Ct. App. 2003) (an act providing a comprehensive recodification and revision of the laws relating to municipal corporations satisfied art. III, sec. 16).

A cursory review of the initiative’s Sections shows it combines the decriminalization of medical marijuana (Section 1) and possession of three ounces (or less) of marijuana (Section 2) with the establishment of an “Idaho Industrial Hemp Program” (Section 4), the latter of which focuses on agricultural farming of industrial hemp. The combination of such diverse subjects may not conform with art. III, sec. 16.

Sections 1 through 5 of the initiative are summarized as follows.

1. Section 1: Idaho Medical Marijuana Program

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 debilitating 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 denominated as Idaho Code § 39-9200, *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 other penalties, those patients who use marijuana to alleviate suffering from debilitating 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 of marijuana in Idaho for legal medical use.

Prop. I.C. § 39-9202.¹

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 debilitating medical condition. Prop. I.C. § 39-9206. The Act directs the Department to approve or deny applications for "registry identification cards" presented by "qualifying patients," their "designated caregivers," and "agents" of "medical marijuana organizations." Prop. I.C. §§ 39-9203(3); 39-9203(17) (corrected);² 39-9208 to 39-9213. The Department is required to issue "registration certificates" to qualifying "medical marijuana organizations," defined as "medical marijuana production facilities," "medical marijuana dispensaries," and "safety compliance facilities." Prop. I.C. §§ 39-9203(10)-(12), (16), (18) (corrected); 39-9207; 39-9213; 39-9215. The Act permits, without state civil or criminal sanctions, marijuana to be produced by medical marijuana production facilities throughout the state (and qualified patients and/or designated caregivers whose registry identification cards allow them to "cultivate" marijuana), tested for potency and contaminants at safety compliance facilities, and transported to medical marijuana dispensaries for sale to qualifying patients and/or their designated caregivers.

The Act provides that: (1) qualifying patients ("patients") may possess up to three ounces of marijuana, and, if a patient's registry identification card states that the patient "is exempt from criminal penalties for cultivating marijuana," the patient may also possess up to 12 marijuana plants in an enclosed locked facility, etc., and any marijuana produced from those plants; and (2) designated caregivers ("caregivers") to assist up to three patients' medical use of marijuana,³ and to independently possess, for each patient assisted, the same amounts of marijuana described above, but not exceeding a total of 36 marijuana plants (assuming the caregiver's registry identification card bears a "cultivator" exemption), and any marijuana produced from those plants. Prop. I.C. §§ 39-9203(2)(b).

In order to become a qualified 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 certification that, in the practitioner's professional opinion, the patient "is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the patient's debilitating medical condition or symptoms associated with the debilitating medical condition." Prop. I.C. §§ 39-9203(15), (22) (corrected). The certification must specify the patient's debilitating medical condition and may only be signed (and dated) in the course of a "practitioner-patient relationship after the practitioner has completed a full assessment of the

¹ References to "proposed" statutes are preceded with "Prop."

² The initiative misnumbered the definitions in Prop. I.C. §§ 39-9203 after subsection (8) by listing the subsequent subsection again as (8), and continuing the count from that point. The reference to I.C. § 39-9203(17) reflects a correct sequential numbering of the subsection of that proposed statute, and other misnumbered subsections will be indicated as "corrected."

³ The registration requirements for designated caregivers inconsistently state that such caregivers will not provide services "for more than five (5) registered qualifying patients[.]" Prop. I.C. 39 § 9209(1)(c)(iv).

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

A "debilitating medical condition" means not only the conditions listed (such as cancer, glaucoma, HIV, AIDS, "agitation of Alzheimer's disease," post-traumatic stress disorder, etc.), but also any treatment of those conditions "that produces cachexia or wasting syndrome, severe and chronic pain, severe nausea, seizures, including those characteristic of epilepsy, or severe and persistent muscle spasms, including those characteristic of multiple sclerosis," any terminal illness with life expectancy of less than 12 months, or "[a]ny other medical condition or its treatment added by the department pursuant to section 39-9204." Prop. I.C. § 39-9203(4). The Act provides two methods in which to add new debilitating medical conditions or treatments to the list: (1) the public may petition the Department, and (2) "upon receipt by the department of a petition signed by at least fifty (50) practitioners requesting the debilitating medical condition or treatment be added." Prop. I.C. § 39-9204.

"Agents" are defined as principal officers, board members, employees, or volunteers of a medical marijuana organization who are at least 21 years old and who have "not been convicted of a felony offense." Prop. I.C. § 39-9203(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. § 39-9203(8). Caregivers, in contrast, do not have the "felony offense" restriction, but are required to be at least 21 years old and agree "to assist no more than three (3) qualifying patients with the medical use of marijuana." Prop. I.C. § 39-9203(6); see n. 3, supra.

Patients may apply for registry identification cards for themselves and their caregivers by submitting a written certification issued by a practitioner within the last 90 days, application and fee, and a "designation as to who will be allowed to cultivate marijuana plants for the qualifying patient's medical use if a medical marijuana dispensary is not operating within fifteen (15) miles of the qualifying patient's home and the address where the marijuana plants will be cultivated." Prop. I.C. § 39-9209(1).⁴ The Department is obligated to verify the information in an application (or renewal request) for a registry identification card, and approve or deny the application within ten days after receiving it, and must issue a card within five more days thereafter. Prop. I.C. § 39-9210(1). If a registry identification card "does not state that the cardholder is authorized to cultivate marijuana plants, the department must give written notice to the registered qualifying patient . . . of the names and addresses of all registered medical marijuana dispensaries." Prop. I.C. § 39-9210(3). The registry identification cards must include a "random twenty (20) digit alphanumeric identification number that is unique to the cardholder," and a "clear indication of whether the cardholder has been authorized by this chapter to cultivate marijuana plants for the qualifying patient's medical use." Prop. I.C. § 39-9211(1)(d), (g). The Department may deny an application or renewal request for a registry identification card for failing to meet the requirements of the Act, and must provide written notice of its reasons for doing so. Prop. I.C. § 39-9212. Registry identification cards expire after one year, and may be renewed for a fee. Prop. I.C. § 39-9213.

Medical marijuana organizations must have operating documents that include procedures for the oversight of the organization and accurate recordkeeping, and are required to implement security measures to deter theft of marijuana and unauthorized entrance into

⁴ The Act also allows "visiting qualifying patients" from other states to possess medical marijuana while in Idaho. Prop. I.C. § 39-9203(21) (corrected).

areas containing marijuana. Prop. I.C. § 39-9215. Medical marijuana production facilities must restrict marijuana cultivation, harvesting, etc., within an enclosed, locked facility only accessible to registered agents. Prop. I.C. § 39-9215(3). Medical marijuana production facilities and dispensaries “may acquire usable marijuana or marijuana plants from a registered qualifying patient or registered designated caregiver only if the . . . patient or . . . caregiver receives no compensation for the marijuana.” Prop. I.C. § 39-9215(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. § 39-9218. Patients are required to notify the Department within ten 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 days to issue a new registry identification card. Prop. I.C. § 39-9219(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. § 39-9219(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. § 39-9221(1), (2). Department employees may notify state or local law enforcement about suspected fraud or criminal violations if the employee who suspects the fraud or criminality “has conferred with his supervisor and both agree the circumstances warrant reporting.” Prop. I.C. § 39-9221(6)(a), (6)(b). Department employees may notify the board of medical examiners “if they have reason to believe that a practitioner provided a written certification without completing a full assessment of the qualifying patient’s medical history and current medical condition, or if the department has reason to believe the practitioner violated the standard of care, or for other suspected violations of this chapter.” Prop. I.C. § 39-9221(6)(c).

Prop. I.C. § 39-9222 creates a rebuttable presumption that patients and caregivers are deemed to be lawfully engaged in the medical use of marijuana if their conduct complies with the Act. However, the provision does not specify the types of cases (criminal, civil or administrative) to which the presumption applies. Next – and most significantly – it provides that patients, caregivers 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. Practitioners are protected from sanctions for conduct “based solely on providing written certifications” (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 of care for evaluating medical conditions.” Prop. I.C. § 39-9222(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. § 39-9222(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. § 39-9222(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. § 39-9222(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. § 39-9222(11) states that no school, landlord or employer may be penalized or denied any benefit under state law for enrolling, leasing to, or employing a cardholder or (leasing to) a 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, preschool, 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. § 39-9205.

Subsection (13) of Prop. I.C. § 39-9222 warrants brief discussion; it states:

A qualifying patient or designated caregiver 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/ren’s medical use of marijuana, in compliance with the terms of this chapter, absent written findings 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. § 39-9222(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 recognizes no “short-term impairment” exception to its criminal or parental-related laws for any other substance, whether legally prescribed or not.

The “Limitations” provision, Prop. I.C. § 39-9205, 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. § 39-9205(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 may impermissibly invade the state’s ability to choose how to prove a criminal offense with admissible and relevant evidence; additionally, the plain language of the provision appears to preclude successful prosecution of patient-defendants who choose not to speak at all.

The Department is given the task of making extensive rules, pursuant to the Idaho Administrative Procedure Act (“IDAPA”) for implementing the Act’s measures, including rules

for: the form and content of applications and renewals; a system to “numerically score competing medical marijuana dispensary applicants;” the prevention of theft of marijuana and security at facilities; oversight; recordkeeping; safety; dispensing of medical marijuana “by use of an automated machine;” and safe and accurate packaging and labeling of medical marijuana. Prop. I.C. § 39-9206. Notably, the provision requires that, in establishing application and renewal fees for registry identification cards and registration certificates, “[t]he total amount of all fees must generate revenues sufficient to implement and administer this chapter, except fee revenue may be offset or supplemented by private donations.” Prop. I.C. § 39-9206(1)(g)(i). The same self-funding requirement is repeated in Prop. I.C. § 39-9206(1)(g)(iii). A “medical marijuana fund” is established by Prop. I.C. § 39-9228, consisting of “fees collected, civil penalties imposed, and private donations,” and is to be administered by the Department.

Under the heading “Affirmative defense,” the Act provides that patients, visiting patients, and caregivers “may assert the medical purpose for using marijuana as a defense to any prosecution of an offense involving marijuana intended for a qualifying patient’s or visiting qualifying patient’s medical use, and this defense must be presumed valid if” several criteria are met. Prop. I.C. § 39-9223(1). If evidence shows that the listed criteria are met, the defense “must be presumed valid.” *Id.* Further, Prop. I.C. § 39-9223(2) allows a person to assert the “medical use” affirmative defense “in a motion to dismiss, and the charges must be dismissed following an evidentiary hearing if the person shows the elements listed in subsection (1).” Prop. I.C. § 39-9223 clearly creates a conclusive presumption, which is not only disfavored in law, but is also completely inconsistent with the way affirmative defenses operate – *i.e.*, by requiring the defense to present prima facie evidence at trial to support an affirmative defense before a jury instruction on the affirmative defense is deemed warranted. Moreover, the provision gives defendants the 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 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. § 39-9223(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. § 39-9224(1). Subsection (5) of Prop. I.C. § 39-9224 presents several legal difficulties; it reads:

There is no presumption of neglect or child endangerment by a qualified patient or qualified caregiver for conduct allowed under this chapter, unless the person’s behavior creates an unreasonable danger to the safety or 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.

Concerns about Subsection (5) include, but are not limited to: (1) the provision precludes a “presumption” of neglect or child endangerment that does not currently exist; (2) it does not specify the types of proceedings to which it applies, although “neglect or child endangerment” implies criminal, child protection and family law proceedings; (3) by its exclusionary language (*i.e.*, beginning with “unless”), the provision could be construed as *creating* a presumption of neglect or child endangerment in certain situations, and (4) the provision does not explain how

such a presumption would impact the ultimate burden of proof in a proceeding. As a practical matter, it seems unlikely that a party would try to show “clear and convincing” proof (one of the highest standards in law) that “neglect or child endangerment” is a “direct outcome” of a patient’s or caregiver’s medical use or cultivation of marijuana merely to employ a “presumption” of neglect or child endangerment. To prevail in most (if not all) proceedings, a party must meet a standard of proof less rigorous than the clear and convincing standard – it makes no sense to prove more to gain less.

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. §§ 39-9226, 39-9227. Under Prop. I.C. § 39-9227(7), it is a misdemeanor for an employee or official of the Department to breach the confidentiality of information. Subsection (8) of Prop. I.C. § 39-9227 reads, “[a] person who intentionally makes a false statement to a law enforcement official about any fact or circumstance related 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. The Act contains a “Severability” clause which states that if any of its provisions are “declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this act.” The Act, Section 5.

If the Department fails to adopt rules to implement the Act within 120 days of the Act’s enactment, any citizen may commence a mandamus action to compel compliance. Prop. I.C. § 39-9229(1), (2). If the Department fails to issue or deny an application or renewal for a registry identification card within 45 days after submission of such application, a copy of the application is deemed a valid registry identification card. Prop. I.C. § 39-9229(3). Further, if the Department is not accepting applications or has not adopted rules for applications within 140 days after enactment of the Act, a “notarized statement” by a patient containing the information required in an application, with a written certification issued by a practitioner, etc., will be deemed a valid registry identification card. Prop. I.C. § 39-9229(4). The Department must submit an annual public report to the Legislature with information set out in Prop. I.C. § 39-9220.

In sum, the Act generally decriminalizes under state law the possession of up to three ounces of marijuana and (if authorized as a “cultivator”) 12 marijuana plants for patients and up to 36 plants for caregivers (up to 12 for each of a maximum of three patients cared for). The Act also protects agents of medical marijuana production facilities, medical marijuana dispensaries and safety compliance facilities from civil forfeitures and penalties under state law, and makes it illegal under state law to discriminate against all such participants in regard to education, housing and employment. Patients certified by practitioners as having debilitating medical conditions may obtain marijuana for medicinal use from his (or his caregiver’s) cultivation of marijuana (if authorized on the registry identification card), the patient’s caregiver or a medical marijuana dispensary. Patients, caregivers and agents of medical marijuana organizations must obtain registry identification cards, and medical marijuana organizations must obtain registry certificates from the Department, and continuously update relevant information. The Department is tasked with an extensive list of duties, including, *inter alia*: formulating rules and regulations to implement and maintain the Act’s numerous and far-reaching measures; verifying information and timely approving applications and renewal requests submitted for registry identification cards and registration certificates; establishing and maintaining a law enforcement verification system; providing rules for security; recordkeeping; oversight; maintaining and enforcing confidentiality of records and providing an annual report to the Idaho Legislature.

2. Section 2: Decriminalization of Possession of Three Ounces or Less of Marijuana

Section 2 of the initiative, entitled “Small Amount Marijuana Decriminalization,” seeks to amend I.C. § 37-2732(c) by adding subsection (4), which states in relevant part:

Any person who is found to possess marijuana, which for the purposes of this subsection shall be restricted to all parts of the plants of the genus Cannabis, including the extract or any preparation of cannabis which contains tetrahydrocannabinol (THC), in an amount of three (3) ounces net weight or less, it shall be an infraction, and upon conviction may be fined not more than one hundred dollars (\$100) for the first offense, not more than five hundred dollars (\$500) for the second offense, and not more than one thousand dollars (\$1,000) for the third and any subsequent offense.

First, the proposed amendment to I.C. § 37-2732(c) leaves intact subsection (3), which makes the possession of up to three ounces of marijuana a misdemeanor. See I.C. §§ 37-2732(c)(3), (e). For clarity and consistency, the addition of subsection (4) to make possession of three ounces or less of marijuana an infraction should be accompanied by an amendment to subsection (3) excluding such possession as a misdemeanor. Second, I.C. § 18-113A makes the maximum punishment for an infraction \$300. Therefore, the fines established by Prop. I.C. § 37-2732(c)(4) are not legal, and must be revised accordingly. Third, the definition of “marijuana” is inconsistent with the definition set out in I.C. § 37-2701(t), which excludes from the definition:

. . . the mature stalks of the plant . . . , 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

As a result of defining marijuana more broadly (i.e., with no exclusions) than I.C. § 37-2701(t), Prop. I.C. § 37-2732(c)(4) theoretically punishes, as an infraction, the possession of parts or products of marijuana plants that has previously been legal.

The last paragraph of proposed I.C. § 37-2732(c)(4) provides that 50% of all funds generated by marijuana possession tickets will go to the Idaho Department of Education, and the remainder will be placed into the state’s general fund. Local courts collect and distribute funds from infraction tickets pursuant to legally prescribed methods and procedures. Therefore, this provision may be in conflict with laws pertaining to such methods of disbursement.

3. Section 3: Decriminalization of Possession of Marijuana-Related Drug Paraphernalia and Exclusion From Prosecution for Participants in Idaho’s Medical Marijuana Program

Section 3 of the initiative seeks to amend I.C. § 37-2734A by adding subsection (4), which would (1) decriminalize the possession of marijuana paraphernalia by any person, and (2)

exclude participants in the Idaho Medical Marijuana Program from infraction penalties for such possession. The proposed statute reads:

Any person who is found to possess marijuana-related drug paraphernalia is guilty of an infraction and upon conviction may be fined not more than five hundred dollars (\$500) per infraction, with the exception - any person who provides adequate recommendation to show their qualification and participation in the Idaho Medical Marijuana Program, or another State's medical marijuana program, is excluded from prosecution under this law.

Prop. I.C. § 37-2734A(4). As noted above, I.C. § 18-113A makes the maximum punishment for an infraction \$300. Therefore, the \$500 fine proposed by the addition of subsection (4) is inconsistent with this statute. Next, subsection (1) of I.C. § 37-2734A makes it unlawful to possess (etc.) drug paraphernalia.⁵ That subsection should be amended to exclude possession of marijuana-related drug paraphernalia as described in subsection (4) of Prop. I.C. § 37-2734A.

As with Section 2 of the initiative (decriminalization of possession of three ounces or less of marijuana), Prop. I.C. § 37-2734A(4) provides that 50% of all funds generated by marijuana-related paraphernalia tickets will go to the Idaho Department of Education, and the remainder will be placed into the state's general fund. Because local courts collect and distribute funds from infraction tickets in accordance with legally prescribed methods, this provision may conflict with such laws.

4. Section 4: Establishment of Idaho Industrial Hemp Program

Section 4 of the initiative proposes to add the "Idaho Industrial Hemp Act" as chapter 54 of title 22 of the Idaho Code, under the Idaho Department of Agriculture's supervision. Prop. I.C. § 22-5400, *et seq.* The Industrial Hemp Act's intent is "to establish policy and procedures for growing industrial hemp in Idaho so that farmers and other businesses in the Idaho agricultural industry can take advantage of this market opportunity." Prop. I.C. § 22-5403. "Industrial hemp" is defined as "varieties of the plant *cannabis sativa* having no more than 0.3 percent tetrahydrocannabinol (THC), whether growing or not, that are cultivated or possessed by a licensed grower in compliance with this chapter."

Several points of clarification and/or correction are initially warranted. The Act sets up a licensing process overseen by the "Director," who is further described as the "Director of agriculture, food and markets." Prop. I.C. §§ 22-5404(4), 22-5406(a). Such an official position does not exist in Idaho, and it is presumed that this provision should be corrected to identify "Director" as the Director of the Department of Agriculture for the State of Idaho. Similarly, the Act describes a "secretary" as having a role in the licensing process, but it is unclear who that reference pertains to. See Prop. I.C. §§ 22-5406(c)(1), 22-5406(d)(3). Also, in order to obtain a license, an applicant must give written permission to have a criminal conviction record procured by the "Idaho criminal information center," an agency that does not exist in Idaho. See Prop. I.C. §§ 22-5406(c)(1), 22-5406(d)(1).

The basic requirements for obtaining a hemp grower's license, valid for two years and renewable, are that the person or business entity may not have any felony convictions in any

⁵ Subsection (3) of I.C. § 37-2734A makes a violation of subsection (1) a misdemeanor, punishable by not more than one year in imprisonment and a \$1,000 fine, or both.

state; they must authorize a check of their criminal history; provide sufficient information to show the intent and capability to grow industrial hemp; file documentation with the Director "certifying that the seeds obtained for planting are of a type and variety compliant with the maximum concentration of tetrahydrocannabinol (THC)" (i.e., .3% or less); maintain records of sales and production and records showing compliance with the laws. Prop. I.C. §§ 22-5406(a)-(f). A unique requirement is that the grower must also ensure "that all parts of the industrial hemp plant that do not enter the stream of commerce as hemp products are destroyed, incorporated into the soil, or otherwise properly disposed of." Prop. I.C. §§ 22-5406(e)(1). A grower must also allow the Director (or designee) to inspect, at their discretion, the hemp growing process at each point of sowing, growing, harvesting, storage and processing. Prop. I.C. §§ 22-5406(g).

The Director must adopt rules for regulating the Industrial Hemp Act, including rules for testing industrial hemp during growth for THC levels and for supervising "the industrial hemp during sowing, growing season, harvest, storage and processing." Prop. I.C. §§ 22-5408. The Director is given authority to revoke industrial hemp grower licenses for false statements or misrepresentations on an application for a license (or renewal), and failure to comply with the provisions of the Idaho Hemp Act and rules promulgated under it. Prop. I.C. §§ 22-5407. The Department of Agriculture is tasked with submitting an annual report to the legislature, without any identifying information about licensed growers, containing the number of industrial hemp licenses and renewals, the number of revocations and suspensions of licenses, and the number of industrial hemp producers and earnings in fees. Prop. I.C. §§ 22-5409.

If the Department fails to adopt rules to implement the Idaho Industrial Hemp Act within 120 days of the Act's enactment, any citizen may commence a mandamus action to compel compliance. Prop. I.C. § 22-5412(1), (2). If the Department fails to issue an industrial hemp license (or renewal) or notice of denial within 45 days of submission of such application, a copy of the application is deemed a valid industrial hemp license. Prop. I.C. § 22-5412(3). If the Department is not accepting applications or has not adopted rules allowing Idaho farmers to submit applications within 140 days after enactment of the Idaho Industrial Hemp Act, a "notarized statement" by an applicant containing the information required in an application pursuant to Prop. I.C. § 22-5406 "is deemed an industrial hemp license." Prop. I.C. § 22-5412(4).

For consistency and clarity, the Idaho Industrial Hemp Act should be accompanied with exclusionary provisions allowing licensed growers to possess industrial hemp and growing materials without committing infractions as provided in Section 2 (possession of three ounces of marijuana or less) and Section 3 (possession of marijuana paraphernalia).

5. Section 5: Severability

Section 5 of the initiative, entitled "Severability," states, if any provision of this Act "is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this act."

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

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

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

“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*, 55 U.S. 13, 19-20, 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.

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

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

AHA did not violate the Department of Housing and Urban Development's ("HUD") policy by automatically terminating the Plaintiffs' lease based on Assenberg's drug use without considering factors HUD listed in its September 24, 1999 memo. . . .

Because the Plaintiffs' eviction is substantiated by Assenberg's illegal drug use, we need not address his claim . . . whether AHA offered a reasonable accommodation.

The district court properly dismissed Assenberg's state law claims. Washington law requires only "reasonable" accommodation. [Citation omitted.] Requiring public housing authorities to violate federal law would not be reasonable.

Similarly, the Oregon Supreme Court 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 many "findings" throughout its provisions. The findings 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, Section 1 of the initiative, regarding the proposed Idaho Medical Marijuana Program, has several other aspects that merit consideration, described as follows:

1. Prop. I.C. § 39-9203(4)(a) reads in part, "agitation of Alzheimer's disease," which would be more correctly phrased "agitation of Alzheimer's patients."

2. Under Prop. I.C. § 39-9203(1), medical marijuana organization agents cannot have been convicted of a felony offense (as defined), but there is no such requirement for caregivers under Prop. I.C. § 39-9203(6), which may be intentional or an oversight.

3. Prop. I.C. § 39-9203(4)(a) defines "debilitating medical condition" as including a list of conditions "or the treatment of these conditions." However, Prop. I.C. § 39-9203(4)(b) more accurately explains that "debilitating medical condition" means "a chronic or debilitating disease or medical condition *or its treatment that produces cachexia or wasting syndrome, severe and chronic pain, (etc.)*." It is recommended that the phrase "or the treatment of these conditions" be excised from Prop. I.C. § 39-9203(4)(a) as surplusage.

4. In Prop. I.C. § 39-9203(4)(c), there is no indication of who decides whether a patient has a terminal illness "with life expectancy of less than twelve (12) months" in order to qualify as having a debilitating medical condition. It is recommended that the provision state who is given that responsibility.

5. Prop. I.C. § 39-9203(5) should appropriately capitalize the reference to the Department of Health and Welfare, which capitalization should be consistent throughout the initiative. Likewise, "Department" should be capitalized throughout the initiative.

6. Prop. I.C. § 39-9203(7) is preceded by "Qatar," which should be omitted.

7. Prop. I.C. § 39-9206(1)(a) misidentifies a proposed provision as 39-9104, instead of 39-9204.

8. The provision that allows a new debilitating medical condition or treatment to be added to such list if 50 or more practitioners sign a petition making a request does not have any public hearing, notice or public comment provisions. These omissions may violate due process and/or equal protection constitutional requirements. See Prop. I.C. § 39-9204(2); *cf.* Prop. I.C. § 39-9206(1)(a). It is recommended that the provision be modified to allow for public hearing, notice and public comment.

9. Prop. I.C. § 39-9207(e) appears to allow only one medical marijuana dispensary in counties of over 20,000, which is inconsistent with Prop. I.C. § 39-9207(4), which allows the Department to "register additional medical marijuana organizations at its discretion."

10. The registration requirements of patients, caregivers and agents do not require the applicants to include their social security numbers – only their names and dates of birth. This less-than-certain method of identification could present identification issues at hearings or trials of cardholders for non-compliance with the Act or violations of criminal law. See Prop. I.C. §§ 39-9208(2), 39-9209(1). It is recommended that social security numbers, identifying numbers such as driver's licenses, or other state-issued identification of persons applying (and proposed caregivers) for registry identification cards be required in the applications for such cards.

11. There are no criteria for a registry identification card to have the "cultivator" authorization on it. See Prop. I.C. §§ 39-9203(2)(a)(ii) and (b)(ii), 39-9209(1)(c)(v), 39-9210(3). If it is intended that the Department create rules for such qualifications, it is recommended that such responsibility be included in the "Rulemaking" provisions of Prop. I.C. § 39-9206.

12. The provision authorizing the Department to conduct a "background check" of any "prospective medical marijuana organization agent" does not indicate whether those checks are for criminal history under the N.C.I.C. system or some other format, and does not explain who qualifies as a "prospective" medical marijuana organization agent. See Prop. I.C. § 39-9210(4). It is recommended that such details be provided in the proposed provision.

13. The Department is not required to prepare or present any financial information regarding the implementation and/or maintenance of the Act's provisions in its annual report to the Idaho Legislature. See Prop. I.C. § 39-9220. If an oversight, it is recommended that additional criteria concerning finances be included in the provision.

CERTIFICATION

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

The Honorable Lawrence Denney

March 10, 2015

Page 16 of 16

to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Dana Wilson, 901 Sapphire Ct., Nampa, Idaho 83686.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Lawrence G. Wasden', with a stylized, flowing script.

LAWRENCE G. WASDEN
Attorney General

Analysis by:

JOHN C. McKINNEY

Deputy Attorney General