IDAHO ATTORNEY GENERAL'S ANNUAL REPORT

CERTIFICATES OF REVIEW

AND

SELECTED ADVISORY LETTERS

FOR THE YEAR

2022

Lawrence G. Wasden
Attorney General

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2022 Idaho Att'y Gen. Ann. Rpt. 31

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Lawrence G. Wasden

Attorney General

INTRODUCTION

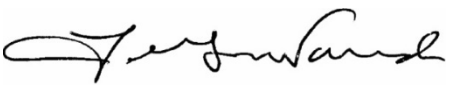
My Fellow Idahoans:

Thank you for your interest in Idaho's legal matters. I am honored once again to share with you highlights of my office's work in 2022.

Since my first election as Idaho's attorney general in 2002, my goal has been to establish and maintain an office that provides accurate and objective legal advice that defends Idaho's laws and sovereignty while adhering to the Rule of Law. This has been my commitment to Idaho citizens over my five terms and remains my guiding principle.

I encourage everyone to visit our website at http://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 again for your interest in our work.



LAWRENCE G. WASDEN
Attorney General

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LAWRENCE G. WASDEN
ATTORNEY GENERAL
2022
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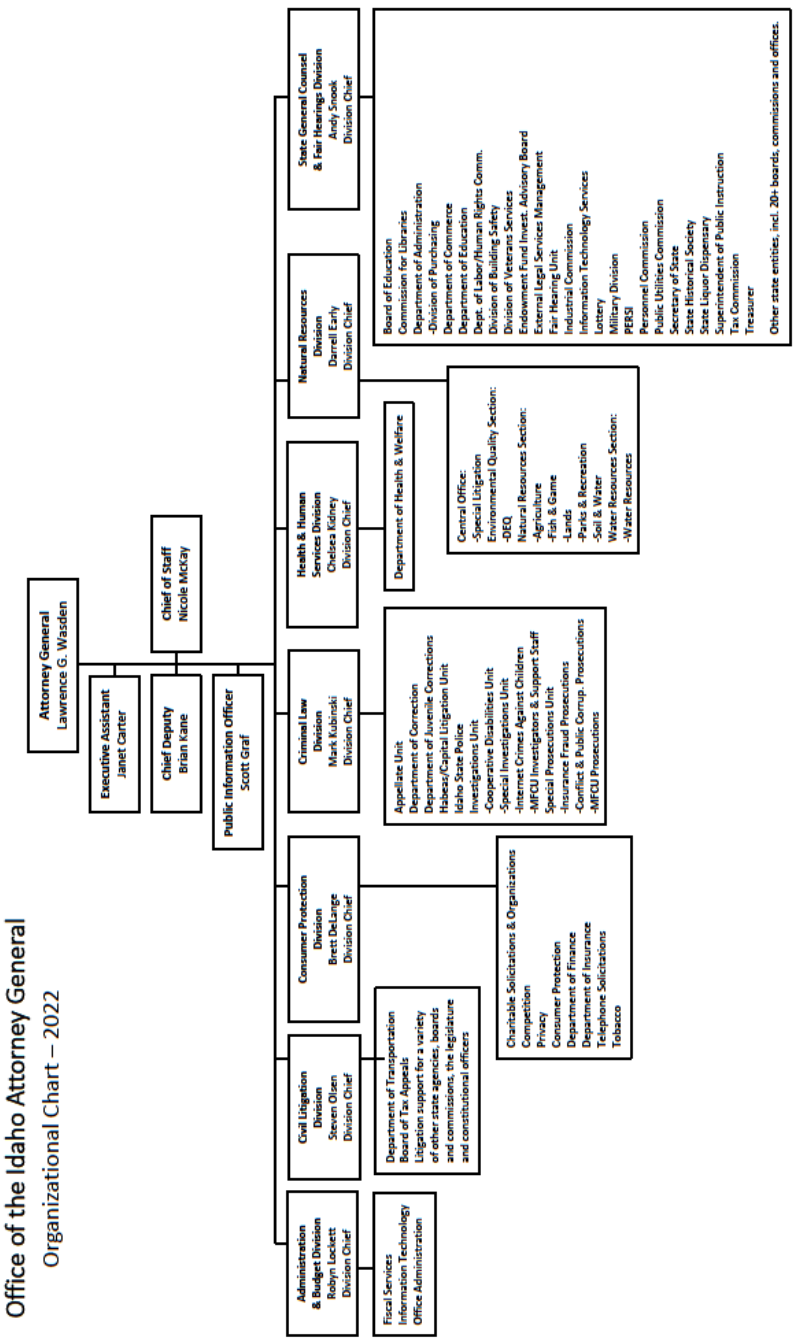
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Personnel Commission
Public Utilities Commission
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State Historical Society
State Liquor Dispensary
Superintendent of Public Instruction
Tax Commission
Treasurer
Other state entities, incl. 20+ boards, commissions and offices.

ATTORNEY GENERAL'S CERTIFICATES OF REVIEW FOR THE YEAR 2022

LAWRENCE G. WASDEN

ATTORNEY GENERAL
STATE OF IDAHO

September 12, 2022

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

Re: Certificate of Review
Proposed Initiative Creating New Medical Marijuana Act by Adding Chapter 97 to Title 39, Idaho Code, to Legalize the Use of Medical Marijuana

Dear Secretary of State Denney:

An initiative petition was filed with your office on August 16, 2022. Pursuant to Idaho Code section 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 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 TITLES

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.

MATTERS OF SUBSTANTIVE IMPORT

A. Summary of the Initiative

The initiative is self-titled the "Idaho Medical Marijuana Act" (hereafter "Act") and is denominated as Idaho Code sections 39-9701 et seq.[1] Primarily, the initiative seeks to amend title 39, Idaho Code, by adding a new chapter 97, which 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 Act, are protected from arrest, prosecution, property forfeiture, and criminal and other penalties under Idaho law.

In general, the Act authorizes the Idaho Department of Health & Welfare ("Department") to adopt regulations necessary for the implementation of a registration-based system for instituting and maintaining the production and dispensing of marijuana for use by persons diagnosed with a debilitating medical condition. Prop. I.C. § 39-9705. The Act directs the Department to approve or deny applications for "registry identification cards" presented by "qualifying patients" and their "designated caregivers."[2] Prop. I.C. §§ 39-9702(6) and (15), -9707 to -9711. The Department is required to issue a "registration certificate" to a qualifying "medical marijuana organization," defined as a "medical marijuana dispensary, a medical marijuana production facility, or a safety compliance facility." Prop. I.C. §§ 39-9702(10) and (16), -9705 to -9706, -9711, -9713. The Act permits, without state civil or criminal sanctions, marijuana to be produced by medical marijuana production facilities throughout the state, 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.

Section 1 of the Act insulates from arrest, prosecution, and property forfeiture, "qualifying patients" ("patients") diagnosed with having a "debilitating medical condition" who use marijuana for medicinal purposes, as well as their "designated caregivers" ("caregivers"). The Act establishes a complex regulatory system whereby medical marijuana production facilities, medical marijuana dispensaries, and safety compliance facilities are insulated from civil forfeitures and penalties under state law. Discrimination against

participants in the Act is prohibited in regard to education, housing, and employment. The Department is required to formulate rules and regulations to implement and maintain the Act's measures. Section 1 also excludes from arrest, fine, or prosecution, any persons who possess marijuana paraphernalia who are participants in the Act's medical marijuana program. Section 2 states that any measures "concerning the legalization, control, regulation, or taxation of marijuana for medical use" that are on the same ballot "shall be deemed to be in conflict with this measure," and that this measure prevails over other measures if it "receives a greater number of affirmative votes[.]" Section 3 is a "severability" provision, which declares that if any provision of the Act is declared invalid, the remaining portions of the Act remain valid. This review discusses the more notable provisions of the proposed Act in roughly the same sequence in which they occur.

Many of the "Definitions" in Prop. I.C. § 39-9702 are also substantive requirements under the Act. In short, they provide that: (1) patients may possess up to four ounces of marijuana and, if a patient's registry identification card states that the patient has a "hardship cultivation designation," the patient may also possess up to six marijuana plants in an enclosed locked facility, etc., and any marijuana produced from the plants grown at the premises or at the patient's residence;[3] and (2) caregivers may assist up to three patients' medical use of marijuana, and possess, for each patient assisted, the same amounts of marijuana described above. Prop. I.C. §§ 39-9702(2), (6), and (15). Apart from indicating that patients and caregivers are "not subject to arrest, prosecution, or penalty in any manner, [etc.]," Prop. I.C. §39-9721(1), there is no provision for any other person or entity to cultivate marijuana—except a marijuana production facility.

In order to become a "qualifying patient," a person must have a "practitioner" (defined as a person authorized to prescribe drugs pursuant to the Medical Practice Act (Idaho Code §§ 54-1800 et. seq.)) provide a written recommendation 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. §§ 39-9702(14), (15), and (19). The recommendation must specify the patient's debilitating medical condition and may only be signed (and dated) in the course of

a "bona fide practitioner- patient [sic] relationship after the practitioner has completed a full assessment of the patient's medical history and current medical condition[.]" Prop. I.C. § 39-9702(19). Minors are also entitled to be issued registry identification cards as patients under certain criteria. Prop. I.C. § 39-9707(3).

A "debilitating medical condition" means not only the conditions listed (i.e., cancer, glaucoma, positive status for HIV, AIDS, hepatitis C, A.L.S, Crohn's disease, Alzheimer's disease, post-traumatic stress disorder, inflammatory bowel disease, Huntington's disease, and Tourette syndrome), but also "[a] chronic or debilitating disease or medical condition or its treatment that produces cachexia or wasting syndrome, severe pain, chronic pain, severe nausea, seizures, including those characteristic of epilepsy, or severe and persistent muscle spasms, including those characteristic of multiple sclerosis;" "[a]ny terminal illness with life expectancy of less than twelve (12) months as determined by a licensed medical physician;" or "[a]ny other serious medical condition or its treatment added by the Department pursuant to section 39-9716." Prop. I.C. § 39-9702(4). The Act provides that the public may petition the Department to add debilitating medical conditions or treatments to the list of those established in Prop. I.C. § 39-9702(4). Prop. I.C. § 39-9716.

"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 "meet[] the qualifications of this act." Prop. I.C. § 39-9702(1). Agents of medical marijuana organizations—marijuana dispensaries, marijuana production facilities, and marijuana safety compliance facilities—are exempt from "prosecution, search, or inspection, except by the Department pursuant to 39-9713(6), seizure, or penalty in any manner, and may not be denied any right or privilege, including civil penalty or disciplinary action by a court or business licensing board or entity, for acting pursuant to [the Act.]" Prop. I.C. § 39-9721(6)-(8).

Prop. I.C. § 39-9703, titled "Limitations," states that the Act's provisions do not "prevent the imposition of any civil, criminal, or other penalties" for:

> (1) Undertaking any task under the influence of marijuana that would constitute negligence or professional malpractice[;]
> (2) Possessing or engaging in the medical use of marijuana:
> (a) On a school bus; or
> (b) In any correctional facility[;]
> (3) Smoking marijuana:
> (a) On any form of public transportation;
> (b) On the grounds of any licensed daycare, preschool, primary or secondary school; or
> (c) In any public place[;]
> (4) Operating, [etc.] any motor vehicle, aircraft, train, motorboat, or other motorized form of transport while under the influence of marijuana[.]

Under Prop. I.C. § 39-9703(4), cardholders and nonresident cardholders "may not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment."

Prop. I.C. § 39-9703(5) states that the Act does not "prevent the imposition of any civil, criminal or other penalties" for persons engaging in "[s]olvent-based extractions on marijuana using solvents *other than water, glycerin, propylene glycol, vegetable oil, or food grade ethanol* by a person not licensed for this activity by the Department." (Emphasis added.) This implies that persons engaged in solvent-based extractions on marijuana using solvents consisting of "water, glycerin, propylene glycol, vegetable oil, or food grade ethanol" are not subject to such penalties. Whether such a provision is based upon accepted and reasonable scientific, health, and safety considerations is beyond the scope of this review.

Prop. I.C. § 39-9704(1), titled "Facility Restrictions," allows any "nursing facility, intermediate care facility, hospice house, hospital, or other type of residential care or assisted living facility" to adopt "reasonable restrictions" on the medical use of marijuana. Those facilities do *not* have to store a qualifying patient's supply of marijuana or provide marijuana to qualifying patients. Prop. I.C. § 39-9704(1)(a),

(b). The facilities may require that "marijuana is consumed by a method other than smoking," and may specify the place where marijuana may be consumed. Prop. I.C. § 39-9704(1)(c), (d).

The Department is given the task of making extensive rules, pursuant to the Idaho Administrative Procedure Act for implementing the Act's measures, including rules for: the form and content of applications and renewals; a system to "score numerically competing medical marijuana dispensary applicants"; 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. § 39-9705. 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. § 39-9705(1)(k)(i).

Upon satisfactory application by a medical marijuana organization, the Department must approve a registration certificate within 90 days. Prop. I.C. § 39-9706. Medical marijuana organizations must have operating documents that include procedures for the oversight of the organization and accurate recordkeeping, and are required to implement adequate security measures. Id. Medical marijuana production facilities must restrict marijuana cultivation, harvesting, etc., within a secure, locked facility only accessible to registered agents.[4] Prop. I.C. § 39-9713(2). Medical marijuana production facilities and dispensaries "may acquire 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. § 39-9713(3).

Patients may apply for registry identification cards for themselves and their caregivers by submitting a written recommendation issued by a practitioner within the last 90 days, application, fee, and a designation "as to whether the qualifying patient or the designated caregiver will be allowed to cultivate marijuana plants for the qualifying patient's medical use if the qualifying patient qualifies for a hardship cultivation designation." Prop. I.C. § 39-9707(1).[5] This provision suggests that, if a patient has such a designation, *either* the

patient or the caregiver may cultivate 6 marijuana plants and retain the marijuana from those plants—not both (which would allow a total of 12 marijuana plants). 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 20 days after receiving it, and must issue a card within 10 more days thereafter. Prop. I.C. § 39-9707(2). If a registry identification card "of either a qualifying patient or the qualifying patient's designated caregiver does not state that the cardholder is permitted to cultivate marijuana plants,[6] 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. § 39-9707(4). 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. § 39-9710. Registry identification cards expire after 1 year and may be renewed for a $25 fee. Prop. I.C. § 39-9711. A registry identification card must contain the cardholder's identifying information, and clearly indicate "whether the cardholder is permitted to cultivate marijuana plants for the qualifying patient's medical use" (i.e., whether the patient has a "hardship cultivation designation"). Prop. I.C. § 39-9708.

The Department is required to "establish and maintain a verification system for use by law enforcement personnel to verify registry identification cards." Prop. I.C. § 39-9712(1). Patients are required to notify the Department within 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 10 days to issue a new registry identification card. Prop. I.C. § 39-9718(1)-(3). If the patient changes the caregiver, the Department must notify the former caregiver that his/her "duties and rights under this Chapter for the qualifying patient expire fifteen (15) days after the Department sends notification." Prop. I.C. § 39-9718(5).

Cities and counties "may enact reasonable zoning ordinances and regulations not in conflict with the Chapter . . . governing the time, place, and manner of medical marijuana organization operations." Prop. I.C. §39-9714(1). A medical marijuana dispensary cannot be located within 1,000 feet of a public or private school, but its renewal

cannot be denied "if a school opens or moves within" that distance of the dispensary after it is licensed. Prop. I.C. § 39-9714(2).

Prop. I.C. § 39-9715 states that before dispensing marijuana to a patient or caregiver, a "medical marijuana dispensary agent *must not believe* that the amount dispensed would cause the cardholder to possess more than the allowable amount of marijuana." (Emphasis added.) The italicized portion of the provision is subject to a constitutional challenge based on vagueness. See State v. Cook, 165 Idaho 305, 309-10, 444 P.3d 877, 881-82 (2019) (addressing "void-for-vagueness" doctrine premised on the Fourteenth Amendment due process clause).

The Act adopts an excise tax of 4% "upon the gross receipts of all marijuana sold by a medical marijuana dispensary to a qualifying patient or a designated caregiver." Prop. I.C. § 39-9717(1). After disbursing tax revenue "to the Department to cover reasonable costs incurred by the Department in carrying out its duties" under the Act, the remaining amount of tax revenue is to be equally distributed with 50% to the Idaho Division of Veterans Services (in additional to any funds regularly dispersed to it) and the other 50% to the General Fund. Prop. I.C. § 39-9717(2).

The Department must submit an annual public report to the Legislature with information set out in Prop. I.C. § 39-9719. 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. § 39-9720(1)-(2).

Information and records kept by the Department are confidential, and may only be disclosed as authorized by the Act. Prop. I.C. § 39-9720(1). Department employees may notify state or local law enforcement about falsified or fraudulent information submitted to the Department, and "about apparent criminal violations" of the Act. Prop. I.C. § 39-9720(4)(a), (b). In addition, under Prop. I.C. § 39-9720(4)(c),

> Department employees may notify the board of medical examiners if they have reason to believe that a practitioner provided a written recommendation 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.

The heart of the Act is Prop. I.C. § 39-9721, titled "Protections for the Medical Use of Marijuana." Subsection (1) sets the pattern by stating, "[a] cardholder who possesses a valid registry identification card is 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[.][7] Subsections (1)(b) (nonresident cardholders), (3) (practitioners), (6) (medical marijuana dispensaries and their agents), (7) (medical marijuana production facilities and their agents), and (8) (safety compliance facilities and their agents), are given the same criminal, civil, and administrative protections in regard to their various functions under the Act.

Prop. I.C. § 39-9721(2) creates a rebuttable presumption in criminal, civil, and administrative court proceedings that cardholders are deemed to be "engaged in the medical use of marijuana pursuant to this Chapter if the person is in possession of a registry identification card and an amount of marijuana that does not exceed the allowable amount." The presumption may be rebutted with evidence that the conduct "was not for the purpose of treating or alleviating the qualifying patient's debilitating medical condition or symptoms associated with the qualifying patient's debilitating medical condition pursuant to this Chapter." Id.

Practitioners are protected from sanctions for conduct "based solely on providing written recommendations or for otherwise stating that, in the practitioner's professional opinion, a patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana . . ., but nothing . . . prevents a professional licensing board from sanctioning a practitioner for failing to properly evaluate a patient's

medical condition or otherwise violating the standard of care for evaluating medical conditions." Prop. I.C. § 39-9721(3).

Under Prop. I.C. § 39-9721(5)(a) through (c), no person is subject to arrest, prosecution, other penalty, or denial of right or privilege, for providing or selling marijuana paraphernalia to a cardholder, nonresident cardholder, or medical marijuana organization, or for being in the presence or vicinity of, or assisting in, the authorized medical use of marijuana.

Prop. I.C. § 39-9721(9) reads:

> Property, including all interests in the property, otherwise subject to forfeiture under state or local law that is possessed, owned, or used in any activity permitted under this Chapter is not subject to seizure or forfeiture. This subsection does not prevent civil or criminal forfeiture if the basis for the forfeiture is *unrelated* to the medical use of marijuana.

(Emphasis added.) Whether a civil or criminal forfeiture is "unrelated" to the medical use of marijuana under Prop. I.C. § 39-9721(9) is potentially subject to a constitutional challenge due to vagueness.

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. § 39-9721(10).

Under the heading, "Discrimination Prohibited," Prop. I.C. § 39-9722 makes it illegal for schools, landlords, nursing facilities, intermediate care facilities, hospice houses, hospitals, etc., to penalize a person "for engaging in conduct allowed under this Chapter, unless doing so would violate federal law or regulations or cause" the entity "to lose a monetary or licensing-related benefit under federal law."[8] Prop. I.C. § 39-9722(1). Subsection (2) gives patients the same rights, privileges, and protections under state and local law as persons prescribed medications with regard to interactions with employers, drug testing by an employer, and drug testing required by state or other

governmental authorities. Subsection (4) states that "[n]o employer is required to allow the ingestion of marijuana in any workplace, or to allow any employee to work while under the influence of marijuana." The subsection repeats that a patient "shall not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of cannabis that appear in insufficient concentration to cause impairment." Id. See Prop. I.C. § 39-9703(4). Subsections (5) through (7) preclude discrimination in regard to organ and tissue transplants, child custody and visitation rights, and firearm possession or ownership. Under subsection (8), "[n]o school, landlord, or employer may be penalized or denied any benefit under state law for enrolling, leasing to, or employing a cardholder."

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 so long as the evidence shows" that (essentially), the requirements of the Act were complied with. Prop. I.C. § 39-9723(1).

The Act allows the Department, "after investigation and opportunity at a hearing at which the medical marijuana organization has an opportunity to be heard," to fine, suspend, or revoke a registration certificate for violations of the Act. Prop. I.C. § 39-9724(1). Also, "[t]he Department may revoke the registry identification card of any cardholder who knowingly violates this Chapter." Prop. I.C. § 39-9724(3). Revocation is subject to review under chapter 52, title 67, Idaho Code. Prop. I.C. § 39-9724(4).

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. § 39-9725.

In sum, Section 1 of the Act generally decriminalizes under state law the possession of up to four ounces of marijuana and (if given a "hardship cultivator" designation), six marijuana plants for patients or caregivers. 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 receiving a written recommendation by a practitioner stating that they have a debilitating medical condition may obtain marijuana for medicinal use from their (or their caregiver's) cultivation of marijuana or a medical marijuana dispensary. Patients and caregivers must obtain registration identification cards, and medical marijuana organizations must obtain registration 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.

As noted as the beginning of this review, Section 2 states that any measures "concerning the legalization, control, regulation, or taxation of marijuana for medical use" that are on the same ballot "shall be deemed to be in conflict with this measure," and that this measure prevails over other measures if it "receives a greater number of affirmative votes[.]"

Section 3, titled "Severability," provides that if any provision of the Act is declared invalid, the remaining portions of the Act remain valid.

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 [sic] 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. People of State of Illinois, 55 U.S. 13, 19-20, — S. Ct. —, 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 (citation omitted). 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 determined 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," [21 U.S.C. § 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." [United States v. Oakland Cannabis Buyer's Coop., 190 F.3d. 1109, 1114 (9th Cir. 1999)]. 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 (footnotes omitted).

The Oakland Cannabis Buyer's 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 Buyer's 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. App'x 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 has 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 & Indus., 230 P.3d 518, 520 (Or. 2010). Therefore, the provisions of the initiative, Prop. I.C. §§ 39-9701 et seq., cannot interfere or otherwise have an effect on federal laws, criminal or civil, which rely, in whole or in part, on marijuana being illegal under the federal Controlled Substances Act.

C. Other Recommended Revisions or Alterations

In addition to the legal and non-legal problems previously discussed, the initiative has one other aspect that merits consideration. Chapters 97 through 99 of title 39 are currently assigned to other recently passed legislative acts: chapter 97 ("Idaho Energy Conservation Code"), chapter 98 ("Essential Caregivers"), and chapter 99 ("Down Syndrome Diagnosis Information Act"). Therefore, every reference or citation to chapter 97 (§§ 39-9700 et seq.) in the initiative should be changed to read chapter 100 (§§ 39-10000 et seq.). For example, the initiative's references and citations to section 39-9705 should be changed to read section 39-10705 throughout the initiative.

Lastly, in regard to Prop. I.C. § 39-9720 ("Confidentiality"), Idaho Code section 74-122 states that after January 1, 2016, "any statute which is added to the Idaho Code and provides for confidentiality or closure of any public record or class of public records shall be placed in this chapter." It further states that any statute that "is located at a place other than this chapter shall be null, void and of no force and effect regarding the confidentiality or closure of the public record and such public record shall be open and available to the public for inspection as provided in this chapter." Id. Because of this, proposed section 39-9720, addressing confidentiality, may not take effect if passed. It is therefore recommended that the initiative include a separate provision amending section 74-106, Idaho Code (records exempt from disclosure), with a new subsection (35), with the following or similar language:

> Information and records maintained by the Department of Health and Welfare for purposes of administering chapter 97 of title 39, the Idaho Medical Marijuana Act., as provided in section 39-9720, Idaho Code.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Kind Idaho, 154 E. Gettysburg Street, Boise, Idaho 83706.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

John C. McKinney
Deputy Attorney General

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[1] References to "proposed" I.C. §§ 39-9701 et seq., will read, "Prop. I.C. § 39-9701," etc.

[2] A "designated caregiver" can be a natural person at least 21 years of age or "an entity licensed in Idaho to provide healthcare services that agrees to assist with qualifying patients' medical use of marijuana[.]" Prop. I.C. § 39-9702(6).

[3] If a qualifying patient's access to a marijuana dispensary is limited by proximity, financial hardship, or physical incapacity, the Department shall issue a "hardship cultivation designation," allowing the patient and the patient's caregiver to "cultivate up to six (6) marijuana plants" and keep the marijuana produced from those plants on the premises. Prop. I.C. §§ 39-9702(2)(a)(ii) and (b)(ii), -9702(6) and (15), and -9709. Although the "hardship cultivation designation" requires the six marijuana plants to be "contained in an enclosed, locked facility" (unless being transported), there is no parallel provision in regard to "marijuana produced from the plants." See Prop. I.C. §§ 39-9702(2)(a)(ii) and (b)(ii).

[4] Although patients and caregivers must be given registry identification cards, there is no similar provision for identifying "agents" as authorized participants in the Act.

[5] The Act also allows a "nonresident cardholder" from another state to possess medical marijuana while in Idaho. Prop. I.C. § 39-9702(13).

[6] The "cultivator" notation refers to the Act's "hardship cultivation designation." See Prop. I.C. § 39-9709.

[7] The proposed statute specifically protects cardholders for: (a) the medical use of marijuana pursuant to the Act, (b) payment by patients and caregivers for goods or services for the patient's medical use of marijuana, (c) transferring marijuana to a safety compliance facility for testing, (d) compensating a medical marijuana dispensary or safety compliance facility for goods or services, (e) offering or providing marijuana to a cardholder for a patient's medical use, or to a medical marijuana dispensary if nothing of value is transferred in return. Prop. I.C. § 39-9721(1)(a)-(e).

[8] The Act "does not prevent the imposition of any civil, criminal, or other penalties" for possessing or engaging in the medical use of marijuana on a school bus; on the "grounds of any licensed daycare, preschool, primary or secondary school;" in a correctional facility; or on any public transportation or in any public place. Prop. I.C. § 39-9703(1)-(3).

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ATTORNEY GENERAL'S SELECTED ADVISORY LETTERS FOR THE YEAR 2022

LAWRENCE G. WASDEN

ATTORNEY GENERAL
STATE OF IDAHO

January 10, 2022

The Honorable Grant Burgoyne
Idaho State Senate
Idaho State Capitol
700 W. Jefferson Street
Boise, Idaho 83702
VIA EMAIL: gburgoyne@senate.idaho.gov

Re: Behavioral Health (DRTJA038)

Dear Senator Burgoyne:

You asked for a legal analysis of draft legislation that would remove the bar against civil commitments for substance abuse in Idaho law. Specifically you asked:

- Is it constitutional under the United States and Idaho constitutions?
- Are there any technical problems with the draft that should be corrected?
- Are there any substantive/policy issues that I should consider?
- Is there anything else that I should take into account?

In brief, the bill's proposed amendment permitting temporary involuntary protective custody for intoxicated persons does not raise constitutional issues. As drafted, the qualifying circumstances for the on-going involuntarily commitment of someone suffering from a substance-related disorder do raise constitutional concerns. Further, the amendments raise a number of practical and policy considerations as to implementation and a few technical problems that are described below.

Constitutionality of temporary involuntary protective custody

Section 39-307A(a), in the proposed bill removes the phrase "if he consents to the proffered help," to permit taking an intoxicated person out of a public place without his consent. There is no Idaho

case law directly addressing the constitutionality of involuntary temporary custody for intoxication.

However, the amended Section 39-307A(a) is similar to a provision in an Oregon statute, permitting involuntary confinement to a sobering or treatment facility for being intoxicated or under the influence of a controlled substance in a public place. Or.Rev.Stat § 430.399(1). That provision was considered by the Ninth Circuit Court of Appeals in Halvorsen v. Baird, 146 F.3d 680, 687 (9th Cir. 1998). The Halvorsen Court held, "Detaining a person intoxicated in a public place and confining him overnight until sober enough to be safe does not deprive the person of a constitutional right." Id. at 687 (citing Powell v. Texas, 392 U.S. 514 (1968)).

In a case out of Colorado, the Tenth Circuit Court of Appeals examined the constitutionality of involuntary detainment for detoxification.

> The Fourth Amendment is not limited to criminal cases, but applies whenever the government takes a person into custody against her will. … In the criminal arrest context, a Fourth Amendment seizure is reasonable if it is based on 'probable cause.'

Anaya v. Crossroads Managed Care Sys., Inc., 195 F.3d 584, 590 (10th Cir. 1999) (quoting Pino v. Higgs, 75 F.3d 1461, 1467 (10th Cir. 1996)(internal quotations removed)). Further, "As the state has an interest protecting the public from the mentally ill and the mentally ill from themselves, so the state also has an interest in protecting the public from the intoxicated and the intoxicated from themselves." Anaya, 195 F.3d at 591 (other citations omitted).

Because the purpose of the bill's amended Section 39-307A(a) is to assist "a person who appears to be intoxicated in a public place" by placing them in "protective custody," the proposed bill invokes a legitimate state interest. The courts have affirmed that detainment in this context falls within constitutional limits.

Constitutionality of ongoing involuntary commitment for substance-related disorders

Under current civil commitment law "detention or involuntary admission to a hospital or other facility" is not authorized for a person who "is impaired by chronic alcoholism or drug abuse." Idaho Code § 66-329(13)(a). This draft removes the prohibition on involuntary commitment for substance-related disorders, and expands the law to allow for commitment of individuals who are determined to have a "mental disorder" or a "substance-related disorder" and who meet "qualifying circumstances" defined in the proposed legislation.

Several states permit involuntary commitment of individuals with substance-related disorders. Such state legislation is becoming increasingly more common in light of the opioid crisis. As recently as 2017[1], the National Judicial Opioid Task Force (NJOTF) issued a report titled Involuntary Commitment and Guardianship Laws for Persons with a Substance Use Disorder. The report summarizes the laws of 35 states and the District of Columbia that, at the time of its publication, had enacted involuntary civil commitment laws for those suffering substance-related disorders. The Atlas Law Project, Policy Surveillance Program has developed a site that shows each state's laws regarding civil commitment for substance-related disorders and provides another helpful resource.[2]

Appellate court cases analyzing the constitutionality of involuntary civil commitments, engage a similar analysis, regardless of whether the basis for commitment is a mental disorder or a substance-related disorder. The United States Supreme Court has stated, "even if [the detainee's] involuntary confinement was initially permissible, it could not constitutionally continue after that basis no longer existed." O'Connor v. Donaldson, 422 U.S. 563, 575 (1975) (other citation omitted); see also State v. Chilton, 112 Idaho 823, 828, 736 P.2d 1277, 1282 (1987) (Idaho Supreme Court relying upon O'Connor). The Court continued, "In short, a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends." O'Connor, 422 US at 576. As noted in a Substance Abuse and Mental Health Services Administration (SAMHSA) report describing development of civil commitment laws

over time, nearly every state now provides grounds for commitment in addition to dangerousness, including some form of serious deterioration or "grave disability." SAMHSA Report at 9-10.[3] However, as with Idaho's law, the criteria for grave disability typically includes that the person will become dangerous if he is not treated. Many maintain that, even though decided in 1975, the O'Connor requirement of dangerousness for civil commitment remains valid law. SAMHSA Report at 10. However, a finding of dangerousness must be accompanied by proof of an additional factor, like mental illness, to justify involuntary commitment. Kansas v. Hendricks, 521 US 346, 358 (1997).

Additionally, most states, including Idaho, require that individuals who are involuntarily committed must receive treatment in the least restrictive available facility, including outpatient treatment options when appropriate. SAMHSA Report at 12; see Idaho Code § 66-329(11), (12).

Recognizing the significance of the liberty interests at issue, the courts have approved as appropriate, a clear and convincing standard of proof for civil commitments – higher than the preponderance of evidence typical of civil cases, but less stringent than the beyond a reasonable doubt standard of criminal cases. Addington v. Texas, 441 U.S. 418, 432-33 (1979) (remanding as a matter of state law for the state court to determine); see also Bradshaw v. Idaho, 120 Idaho 429, 816 P.2d 986 (1991) (highlighting the required clear and convincing standard for commitment and applying the same standard to involuntary treatment). Existing Idaho law includes a clear and convincing standard for involuntary civil commitment, Idaho Code section 66-329(11); the proposed amendments maintain this standard.

As with mental health disorders, state laws providing for involuntary civil commitment of individuals with substance-related disorders must ensure substantive and procedural due process protections, including ongoing assessments of the danger that the detained person presents to himself and others, and the person's ability (or not) to meet his basic needs. See NJOTF Report (citing varied criteria on which states' laws rely for involuntary commitments). The US Supreme Court has held that the nature of the commitment must bear some reasonable relation to the purpose for the commitment.

Foucha v. Louisiana, 504 U.S. 71, 79 (1992). Other guaranteed constitutional protections in this arena include the right to counsel, notice of the allegations and hearing date, presence at a hearing, the ability to present and cross examine witnesses, and patient rights upon commitment to a facility. Current Idaho law permitting involuntary civil commitment for mental illness requires a finding, by clear and convincing evidence, that the individual is mentally ill and, as a result of the mental illness, is likely to injure himself or others or is gravely disabled. Idaho Code § 66-329(11). The terms "likely to injure himself or others" and "gravely disabled" are defined in Idaho Code section 66-317. The circumstances that qualify an individual to be civilly committed under current Idaho law thus satisfy constitutional due process standards.

The draft legislation applies most of the same due process protections embedded in the existing law for individuals with mental health disorders, to individuals with substance-related disorders. And the new definition of "qualifying circumstances" definition set forth in the proposed bill at Section 66-317(18)(a) retains the current criteria for commitment for a mental disorder. However, the definition of "qualifying circumstances" for commitment for a substance-related disorder, at Section 66-317(18)(b), may raise constitutional concerns. The provisions within proposed Section 66-317(b)(i)-(ii) pose no constitutional problems as those subsections include "is gravely disabled" and "is likely to injure himself or others," as qualifying circumstances for someone with a substance-related disorder. However, Section 66-317(18)(b) also includes several other criteria that could be used to justify commitment of a person with a substance-related disorder and the list is not cumulative. Rather, the criteria are listed with the disjunctive "or," meaning that *any one of the criteria* satisfy as a qualifying circumstance under which the individual could be subject to involuntarily commitment. Criteria (iii) through (x) appear far easier to satisfy:

(iii) Is intoxicated due to substance use;
(iv) Is experiencing withdrawal due to substance use;
(v) Lacks capacity to make informed decisions about treatment;
(vi) Poses a substantial risk of inflicting significant property damage, as evidenced by acts or threats;

(vii) Has lost self-control, demonstrated by a repeated pattern of failure to meet social, financial, or occupational responsibilities;
(viii) Is pregnant and is committing substance use;
(ix) Received treatment for substance use in the past and has failed to maintain sobriety; or
(x) Is in need of substance use treatment, in that:
1. Treatment is necessary for the person to stop substance use;
2. The person is expected to benefit from treatment; or
3. Treatment is expected to prevent negative outcomes.

Allowing commitment under any of these circumstances alone, or (iii)-(x) combined, raises concern that the law would fail to ensure against confinement of a "nondangerous individual capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends." See O'Connor, 422 U.S. at 575. Notably, the individual factors listed in subsections (v) and (x) could contribute to a finding that a person is "gravely disabled," but the criteria listed in subsections (v) and (x) would be deemed sufficient to justify commitment as stand-alone criteria, without the additional required showing of grave disability.

While the criteria may identify circumstances in which some wish to have authority to confine individuals suffering from substance-related disorders, it is uncertain whether they would satisfy constitutional requirements for such commitment. As the Court wrote in O'Connor, "Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty." Id. Even if the criteria are intended, not out of intolerance or animosity, but to aid persons suffering from substance-related disorders, they would invite challenge for infringing upon constitutional liberty interests. Under the heightened clear and convincing standard, such challenge may succeed.

One additional concern with the definition of "qualifying circumstances" in the proposed legislation is that the definition itself does not include a requirement that the qualifying circumstances be *a*

result of the mental disorder or the substance-related disorder unless the circumstance relied upon is the individual's grave disability. The definition of "grave disability" in Idaho Code section 66-317(13) and retained in the proposed legislation includes a finding that the grave disability is "the result of" the illness or disorder. That nexus should be provided for all criteria that constitute "qualifying circumstances." The term "[b]ecause of such condition" is retained in the proposed revision to Idaho Code section 66-329(11) – the provision that addresses court findings to mandate commitment; however, the draft removes causal connection language from Idaho Code sections 66-326(4) (describing criteria a designated examiner (DE) must consider when examining the patient – this first DE certificate is used to determine whether it is appropriate for a petition for commitment to be filed; if a petition is filed, the person will remain in temporary custody prior to a commitment hearing addressing the petition; if no petition is filed the person will be released); 66-329(2) (describing statement that must be included in a petition for commitment); and 66-329(5) (describing criteria for a DE examination that will determine whether the person can continue to be detained while awaiting the commitment hearing).

Constitutionality of Guardianship/Treatment Decision-Making Authority for Persons with Substance-Related Disorders

The proposed legislation explicitly adds persons with substance-related disorders to the category of persons who may be appointed a guardian who can consent to their treatment. Section 6, proposed amendments to Idaho Code § 66-322. Under current law, a guardian who can consent to treatment can be appointed for a person with mental illness, in lieu of involuntary commitment under this provision. In addition, within the probate code, Idaho law allows a guardian to be appointed for an incapacitated person. Idaho Code § 15-5-304. In this context, "incapacity" relates to a legal, not a medical disability and must be assessed in terms of the person's functional impairments. Idaho Code § 15-5-101. Though a court could potentially determine that a person is incapacitated as a result of a substance-related disorder, under the probate code, incapacity due to a substance-related disorder is not explicitly recognized.

The language in proposed amendments to Idaho Code section 66-322(i) retains a narrowly defined set of circumstances that would

justify infringement upon the person's ability to make his own treatment decisions, without going so far as involuntarily committing the person to a state institution or treatment authority. The standard of proof is clear and convincing, the showing required is significant and reasonably related to the relief sought, and the person is entitled to be represented by counsel. Given the due process requirements included, these amendments likely do not pose a constitutional issue. The NJOTF report referenced above also identifies state statutes that establish paths to guardianship for those with substance-related disorders.

Practical, substantive and policy considerations.

Broadly speaking, the bill expands the scope of individuals subject to voluntary and involuntary treatment under existing law to include those with substance-related disorders. The bill accomplishes this expansion by replacing "mental illness" with "mental disorder or substance-related disorder," throughout the statute, defining "substance-related disorder," and removing "chronic alcoholism or drug abuse" from list of conditions excluded from involuntary commitments. The bill also replaces "mental health" with "behavioral health," and defines "behavioral health" consistent with section 39-3122(1), Idaho Code. Additionally, Section 3 of the bill expands the definitions of "facility" and "inpatient treatment facility" to include public or private hospitals, sanatoriums, institutions, or behavioral health centers that provide care to persons with substance-related disorders.

The practical, and thus perhaps substantive and policy impacts of the bill are significant. Although public and private facilities that are dedicated to psychiatric treatment of the mentally ill currently treat individuals with co-occurring substance-related disorders, the primary purpose of the facilities is to treat individuals with mental illness. The proposed statutory changes would greatly expand the purpose and duty of such facilities. Such changes, to be successful in meeting the statutory purpose, would likely need additional infrastructure and resources. In addition, the expansion of behavioral health holds under section 66-326 and behavioral health commitments under section 66-329, to include substance-related disorders would have a fiscal impact on the courts, and on the costs of care and treatment for substance-

related disorders. Currently the Department of Health and Welfare contracts with several substance use disorder (SUD) treatment facilities to provide voluntary services. The Department of Health and Welfare's existing facilities and contracts do not currently provide involuntary treatment services for substance-related disorders, aside from coordinating with the Idaho Department of Corrections to provide services through diversion programs offered by treatment courts throughout the state.

Furthermore, the proposed legislation does not address ongoing treatment for persons with substance-related disorders following involuntary commitment nor does it address requirements for the treatment provided under the law to be effective, evidence-based treatment including, for example, a requirement that opioid treatment facilities receive medicated assisted treatment (MAT). See NJOTF report.

Additionally, the Idaho Behavioral Health Council (IBHC) plans to address legislation for involuntary treatment of persons with substance-related disorders in the coming years as part of broader improvements to the state's behavioral health system. In 2020, the Idaho Legislature endorsed and supported the Governor in creating the IBHC, and the Idaho Supreme Court entered an order supporting the Council and appointing members to the Council. See Senate Concurrent Resolution No. 126, 65th Legislature, 2nd Regular Session (Idaho 2020) ("S.C.R. 126"); Executive Order No. 2020-04-A; *In re: Idaho Behavioral Health Council* Supreme Court Order and Proclamation (2020).[4] The Idaho Behavioral Health Council was created to "encourage collaboration among all three branches of the state government, local governments, and community partners to develop and implement a statewide strategic plan to inventory, assess, and materially improve the Idaho behavioral health system to the benefit of all Idahoans." S.C.R. 126 (2020). The Council approved a Strategic Action Plan on June 29, 2021 and through a Project Management Team, has developed multiple Implementation Teams to carry out the plan.[5]

One of the initiatives in the strategic action plan includes improving Idaho's civil commitment process. An implementation team consisting of stakeholders throughout the state has begun work, including draft legislation that is expected to be proposed this session. The IBHC has identified the need for the civil commitment implementation team to address SUD holds and the group has identified it as a priority that it plans to address in 2023. The IBHC is also developing a workforce development strategy to improve the availability of behavioral health providers in the state. Given the broad policy and practical implications involved in developing an involuntary treatment model for individuals with substance-related disorders, it may be appropriate to involve additional stakeholders, using the model articulated by the IBHC, in developing and identifying necessary infrastructure and resources to support such legislation.

Technical Concerns:

There are a few technical concerns noted with the bill as drafted:

- Section 6 of the draft legislation amends Section 66-322(k) addresses the ability of an appointed guardian to petition for continued authority and lengthens the period of continued authority from "seven (7) weeks" to "ninety (90) days." Notably, the "seven (7) weeks" in Section 66-322(j) was – perhaps inadvertently – left unchanged, and is therefore inconsistent with the proposed change to Section 66-322(k); this should be amended to match Section 66-322(k).

- Section 10 of the draft legislation amends Section 66-329(4) related to designated examiners (DEs) as follows:

> the court shall appoint two (2) designated examiners to make individual personal examinations of the proposed patient and may order the proposed patient to submit to an immediate examination. If neither designated examiner is a physician, the court shall order a physical examination of the proposed patient. ~~**At least one (1) designated**~~ **The** examiner shall be

> a psychiatrist, licensed physician**,** ~~**or**~~ licensed psychologist**, or a substance-related disorder specialist.**

This change gives rise to the following technical issues:

- It may inadvertently change the current requirement that only one of the DEs must be an examiner with an advanced skill or license.
- The term "designated examiner" is a defined term that includes persons designated by the department who, among other things, are specially qualified by training provided by the department. Idaho Code § 66-317(5). Removing the term "designated" here broadens the term "examiner" and is inconsistent with how the term is used throughout the rest of the chapter.
- This change adds a new term, "substance-related disorder specialist" without defining the term.

- Section 14 of the proposed legislation amends Section 66-348 which addresses appropriate disclosure of information. Federal law restricts the use and disclosure of substance use treatment records. 42 USC § 290dd-2. Unlike the federal HIPAA law and regulations – which allow disclosures of protected health information if required by state law in some instances – regulations related to 42 USC § 290dd-2, provide that "no state law may either authorize or compel any disclosure prohibited by [42 CFR Part 2]." 42 CFR § 2.20. To avoid a challenge to this provision of the law, it would be beneficial for Section 66-348 to authorize disclosure of substance use treatment records only as allowed by subsections 66-348(1) and (3) and to add that any such disclosures must be consistent with 42 CFR Part 2. The regulations in 42 CFR Part 2 allow release of records with proper consent, 42 CFR §§ 2.31 to 2.36, or pursuant to a court order accompanied by a subpoena, 42 CFR §§ 2.61, 2.63, 2.64.

- The replacement of "person" with "him" in the bill could raise a hyper-technical challenge based on a lack of gender-neutrality, but this is unlikely. Further, the consistent use of "him" as a

gender-neutral pronoun arguably makes the statute more readable and thus more easily understood.

Conclusion

The draft bill presents constitutional concerns in the newly defined "qualifying circumstances" for substance-related disorders. Also, the expansion of the existing statute to include substance-related disorders with mental health disorders for voluntary and involuntary treatment and commitments raises significant implementational and fiscal concerns for the public facilities that would be statutorily obligated to provide services, and possibly on the courts from added oversight.

I hope you find this helpful. If you have further questions, please do not hesitate to contact me.

Sincerely,

BRIAN KANE
Chief Deputy

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[1] The report has no clear publication date, but cites source articles including one dated as recently as July 2017. The report can be found at: https://www.ncsc.org/__data/assets/pdf_file/0028/18478/inv-comm-and-guard-laws-for-sud-final.pdf.

[2] Resource available at: https://lawatlas.org/datasets/civil-commitment-for-substance-users.

[3] Substance Abuse and Mental Health Services Administration: Civil Commitment and the Mental Health Care Continuum: Historical Trends and Principles for Law and Practice. Rockville, MD: Office of the Chief Medical Officer, Substance Abuse and Mental Health Services Administration, 2019 (referred to herein as "SAMHSA Report") (available at https://www.samhsa.gov/resource/ebp/civil-commitment-mental-health-care-continuum-historical-trends-principles-law).

[4] Official documentation of the creation of the Idaho Behavioral Health Council is available at: https://publicdocuments.dhw.idaho.gov/WebLink/Browse.aspx?id=14336&dbid=0&repo=PUBLIC-DOCUMENTS.

[5] The approved IBHC Strategic Action Plan is available online at: https://publicdocuments.dhw.idaho.gov/WebLink/DocView.aspx?id=18953&dbid=0&repo=PUBLIC-DOCUMENTS.

January 11, 2022

The Honorable Chuck Winder
Idaho State Senate
Idaho State Capitol
700 W. Jefferson Street
Boise, Idaho 83702
VIA EMAIL: cwinder@senate.idaho.gov

Re: Request for AG analysis

Dear Pro Tem Winder:

This letter is in response to your recent inquiry with regard to the duties of the Lieutenant Governor as President of the Idaho Senate. Idaho Constitution, article IV, section 13 indicates:

> LIEUTENANT GOVERNOR IS PRESIDENT OF SENATE. The lieutenant governor shall be president of the senate, but shall vote only when the senate is equally divided. In case of the absence or disqualification of the lieutenant governor from any cause which applies to the governor, or when he shall hold the office of governor, then the president pro tempore of the senate shall perform the duties of the lieutenant governor until the vacancy is filled or the disability removed.

This provision provides for three functions of the Lieutenant Governor: (1) serve as President of the Senate; (2) vote within the Senate in the case of a tie; and (3) act as Governor upon devolution of the Office. This constitutional provision is silent as to the scope of the duties of the Lieutenant Governor when functioning as the President of the Senate. The Idaho Constitution, however, does provide the Senate with the authority to craft its own rules of procedure and to choose its officers. Article III, section 9 provides:

> POWERS OF EACH HOUSE. **Each house when assembled shall choose its own officers**; judge of the

> election, qualifications and returns of its own members, **determine its own rules of proceeding,** and sit upon its own adjournments; but neither house shall, without the concurrence of the other, adjourn for more than three days, nor to any other place than that in which it may be sitting.

(Emphasis added.)

This provision clearly permits the Senate to determine its own officers and rules of procedure. Although the Idaho Constitution installs the Lieutenant Governor as President of the Senate, the Constitution defers to the body of the Senate ("Each house when assembled") to outline the precise scope of authority of its officers through its rules of procedure.[1] As observed within Mason's Manual of Legislative Procedure (2020 ed.):

> Under ordinary conditions, the authority of the presiding officer is derived wholly from the body itself. The presiding officer is the servant of the body to declare its will and to obey its commands.

Mason's § 578 ¶ 1.

It is essential to note that, although the body has the ability to prescribe the duties of its officers and rules of procedure[2] for the presiding officer, it does not have the ability to remove the Lieutenant Governor as the President of the Senate. Mason's has observed:

> Under the constitutions of all the states, each house has the right to choose its own presiding officer, except in those cases where the presiding officer of the Senate acts *ex officio*.

Mason's § 579 ¶ 1.

Ex officio is a Latin term, which means "by virtue of the position." Under Idaho Constitution article IV, section 13, the Lieutenant Governor is installed as the President of the Senate by virtue of her election and position as the Lieutenant Governor.

Although the Senate can prescribe the duties of its officers as explained above, care should be taken that such prescription does not result in the Lieutenant Governor no longer being the President of the Senate as provided for in article IV, section 13. For example, Idaho Constitution article III, section 21 requires the signature of the presiding officer of all bills or resolutions passed. A rule that removes this responsibility from the President of the Senate may create a constitutional inconsistency.

I hope you find this analysis helpful.

Sincerely,

BRIAN KANE
Chief Deputy

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[1] In Sweeney v. Otter, 119 Idaho 135, 145 (1990) the Idaho Supreme Court specifically declined to review the rules of the Idaho Senate. The Court quoted Bietelspacher v. Risch, 105 Idaho 605, 606 (1983), which held: "Article III, § 9 of our Constitution gives each house of the legislature the power to determine its own rules of proceeding. Thus, this power is specifically reserved to the legislative branch by the Constitution, and we cannot interfere with that power. **The interpretation of internal procedural rules of the Senate is for the Senate.** Its leadership has spoken, and the Senate as a whole has not overruled it." (Emphasis added.)

[2] Mason's outlines the duties of a presiding officer in § 575. But the text identifies them as general in nature. Under Idaho Constitution article III, section 9, the Idaho Senate has the ability to establish its own rules of procedure and to prescribe the duties of its officers.

January 12, 2022

The Honorable Sage G. Dixon
Idaho House of Representatives
Idaho State Capitol
P.O. Box 83720
Boise, ID 83720-0081
VIA EMAIL: SDixon@house.idaho.gov

Re: Correspondence Request Regarding American Rescue Plan Act of 2021 Funds

Dear Representative Dixon:

This letter is in response to your recent request for a legal analysis of what conditions must the State comply with in order to use the federal funds under the American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4 (codified in scattered sections of U.S.C.) ("ARPA"). Specifically, you inquired about whether the State would be required to be responsible for complying with current federal executive orders, and whether the State would be required to comply with any subsequent presidential executive order issued after receiving the funds.

The President's power to issue an executive order stems from an act of Congress or the Constitution itself.[1] Executive orders do not create laws or provide the President with new powers. Accordingly, federal executive orders may not change the requirements of a federal law or create new requirements of a federal law. Often executive orders appropriately direct federal executive branch employees on how to enforce existing laws and legal requirements therein. If an executive order overextends or is not based in federal law, then it can be challenged under judicial review.[2] For example, the State of Idaho is currently challenging presidential executive orders related to vaccine mandates. This applies to existing or subsequent presidential executive orders. To the extent that the federal executive order provides the process by which compliance with the law is achieved, the executive order would control.

I hope you find this analysis helpful. Please let me know if you have any additional questions or if I can provide further assistance.

Sincerely,

ALI BRESHEARS
Deputy Attorney General

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[1] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585, 72 S. Ct. 863, 866, 96 L. Ed. 1153 (1952). The United States Constitution states that "all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const. art. I, § 1. The Constitution also states that the "executive power shall be vested in a President of the United States" and the President shall "take care that the laws be faithfully executed[.]" U.S. Const. art. II, §§ 1, 3.

[2] See Marbury v. Madison, 5 U.S. 137, 2 L. Ed. 60 (1803).

January 20, 2022

The Honorable Wendy Horman
Idaho House of Representatives
Idaho State Capitol
&00 W. Jefferson Street
Boise, Idaho 83702
VIA EMAIL: WendyHorman@house.idaho.gov

Re: Draft Bill and Federal Education Funding

Dear Representative Horman:

You have requested our Office analyze the impact on federal education funding if a draft bill titled, "Protecting the Privacy and Safety of Students in Public Schools," was adopted.

Research thus far has identified that the U.S. Department of Education and U.S. Department of Justice have interpreted Title IX to prohibit discrimination on the basis of gender identity and sexual orientation. It is likely that the U.S. Department of Education and U.S. Department of Justice would view the draft bill, if adopted, as discriminating on the basis of sex, based upon each agency's recently announced interpretation of Title IX. The U.S. Department of Education has multiple avenues to assure compliance with Title IX, investigate possible noncompliance with Title IX, and take actions to enforce compliance with Title IX, including referring the matter to the U.S. Department of Justice. While such action can lead to the refusal to grant, refusal to continue, suspension, or termination of federal financial assistance, such action is limited to "the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found."

Because of a multitude of questions that pertain to how the U.S. Department of Education and, if applicable, the U.S. Department of Justice would respond if the draft bill were adopted, the timing of such response, and the scope of such response, it is unclear what impact there would be on federal financial assistance Idaho receives for

education. Although this analysis focuses on the U.S. Department of Education, other federal agencies have similar regulations implementing Title IX, including the U.S. Department of Agriculture, U.S. Department of Energy, and the U.S. Department of Health and Human Services. These agencies, and others, may have similar enforcement mechanisms and processes regarding federal financial assistance and Title IX compliance. Finally, there is also a private right of action available to individuals under Title IX who are victims of discrimination.

DESCRIPTION OF THE PROPOSED BILL

The "Protecting the Privacy and Safety of Students in Public Schools" draft bill that was provided to our Office contains eight sections: (1) legislative findings, (2) definitions, (3) a section with substantive provisions, (4) a section concerning reasonable accommodations, (5) preemption, (6) severability, (7) effective date, and (8) an unnumbered civil action section.

The bill begins with legislative findings. It then provides two definitions. The first says that "'Sex' means the immutable biological and physiological characteristics, specifically the chromosomes and internal and external reproductive anatomy, genetically determined at conception and generally recognizable at birth, that define an individual as male or female."[1] The second definition is for "changing facility." The bill does not define public school, and as will be noted in the analysis, this complicates the determination of the impact on federal education funding if the bill is adopted. Specifically, it is unclear whether this bill reaches Idaho's public community colleges and universities.

With regard to the substantive provisions, there are four subsections setting forth requirements:

- Subsection 3(a) requires that every public school restroom or changing facility that is accessible by multiple persons at the same time meet two requirements: (i) it must be designated for use by male persons only or female persons only; *and* (ii) it must be used only by members of that sex, as defined above.

- Subsection 3(b) forbids a person from entering a multi-occupancy restroom or changing facility that is designated for one sex unless the person is a member of that sex. It also imposes on the public school with authority over the building a requirement to "ensure that all restrooms and changing facilities provide its users with privacy from members of the opposite sex."

- Subsection 3(c)[2] requires that in "any other public school setting where a person may be in a state of undress in the presence of others" that school personnel "must provide separate, private areas designated for use by persons based on their sex." It then provides that "no person may enter these private areas unless he or she is a member of the designated sex."

- Subsection 3(d) requires that during "any school authorized activity or event where persons share overnight lodging, school personnel must provide separate sleeping quarters for members of each sex." It then provides that no person "shall share a sleeping quarter, restroom, or changing facility with a person of the opposite sex, unless the persons are members of the same family."

There is a fifth subsection, 3(e), that discusses exemptions. The exemptions are: (i) single-occupancy facilities or facilities conspicuously designated for unisex or family use; (ii) temporarily designated facilities for use by that person's "biological sex"; (iii) a person who uses a facility designated for the opposite sex if at that time the "single-sex facility is the only facility reasonably available"; (iv) persons who clean, maintain, or inspect single-sex facilities; (v) persons who enter a facility to render medical assistance; (vi) persons who need assistance and are accompanied by a family member, legal guardian, or designee who is a member of the facility's designated sex; and (vii) where there is an ongoing natural disaster, emergency, or when necessary to prevent a serious threat to good order or student safety.

Subsection 4(a) requires a public school to provide a reasonable accommodation to a student who: (i) for any reason, is unwilling or unable to use a multi-occupancy restroom or changing

facility designated for the person's sex and located within a public school building, or multi-occupancy sleeping quarters while attending a public school-sponsored activity; *and* (ii) provides a written request for reasonable accommodation to the public school. Subsection 4(b) of the bill provides that a reasonable accommodation "does not include access to a restroom, changing facility, or sleeping quarter that is designated for use by members of the opposite sex while persons of the opposite sex are present or could be present."

Sections 5, 6, and 7, set forth a preemption clause, a severability clause, and a clause announcing an emergency so that the law would take effect upon its passage and approval. Finally, an unnumbered section allows a student to maintain a private right of action against a school if the student encounters a person of the opposite sex while the student is accessing the public school restroom, changing facility, or sleeping quarters designated for use by the student's sex under one of two circumstances: (i) where the school gave the person permission to use the facilities of the opposite sex; *or* (ii) where the school failed to take reasonable steps to prohibit the person from using facilities of the opposite sex.

ANALYSIS

This letter focuses on whether the draft bill, if adopted, would have an impact on federal education funding, and therefore it is federal law that this letter must consider. Because the bill concerns one's sex and concerns "public schools," the starting point is Title IX.

A. Title IX and *Bostock*

Commonly referred to as Title IX, 20 U.S.C. § 1681(a) provides, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance" subject to certain exceptions that are inapplicable here. Title IX is one of several federal laws that prohibit discrimination on the basis of, because of, or on account of sex. One such statute with prohibitions pertaining to employment, commonly referred to as Title VII, is 42 U.S.C. § 2000e-2. That statute was the subject of the U.S. Supreme Court's recent decision in Bostock v.

Clayton County, Georgia, 140 S. Ct. 1731 (2020).

There, in a majority opinion authored by Justice Gorsuch, the U.S. Supreme Court interpreted Title VII's prohibition against taking certain actions because of sex and concluded: "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." Bostock, 140 S. Ct. at 1741. The Court noted that, to discriminate on the grounds of someone being homosexual or transgender, an employer would "intentionally treat individual employees differently because of their sex." Id. at 1742. "That has always been prohibited by Title VII's plain terms." Id. at 1743.

In one of two dissents in Bostock, authored by Justice Alito and joined by Justice Thomas, Justice Alito noted first in the context of Title VII that the decision meant "transgender persons will be able to argue that they are entitled to use a bathroom or locker room that is reserved for persons of the sex with which they identify." Id. at 1779. He also pointed out that "[a] similar issue has arisen under Title IX" and referred to a 2016 U.S. Department of Justice advisory and lawsuits among the circuit and district courts. Id. Justice Alito also referred to 20 U.S.C. § 1686, which allows schools to maintain "separate living facilities for different sexes," remarking that "it may be argued that a student's 'sex' is the gender with which the student identifies." Id. at 1780. But Justice Gorsuch in writing the majority opinion specifically limited the sweep of the holding to Title VII. Id. at 1753. ("Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual 'because of such individual's sex.'").

B. Federal Interpretation of Title IX Since 2021

In March 2021, the U.S. Department of Justice Civil Rights Division issued a memorandum explaining it concluded that Title IX's prohibition against discrimination on the basis of sex extended to discrimination on the basis of gender identity and sexual orientation.[3] The U.S. Department of Justice coordinates the implementation and enforcement of Title IX by federal executive agencies.[4] In June 2021,

the U.S. Department of Education's Office of Civil Rights issued a notice of interpretation, which "will guide the Department in processing complaints and conducting investigations."[5] The U.S. Department of Education concluded that Title IX discrimination on the basis of sex includes discrimination on the basis of gender identity and sexual orientation, and that the U.S. Department of Education "will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the Department."

With respect to the "Protecting the Privacy and Safety of Students in Public Schools" draft bill, it generally disallows a person whose gender identity or gender does not accord with that person's "sex" from entering a multi-occupancy restroom or changing facility designated for one sex. Likewise it generally disallows a person whose gender identity or gender does not accord with that person's "sex" from entering "private areas" established under subsection 3(c). And it generally disallows a person whose gender identity or gender does not accord with that person's "sex" from sharing a sleeping quarter, restroom, or changing facility with a person of the opposite sex unless they are members of the same family. Based upon the statements of the U.S. Department of Justice Civil Rights Division and the U.S. Department of Education Office of Civil Rights, to the extent those entities applied their understanding of Title IX to the bill, it is likely that those agencies would consider the "Protecting the Privacy and Safety of Students in Public Schools" draft bill to discriminate on the basis of sex.

Of course, the implementing regulations for Title IX authorize a funding recipient to "provide separate toilet, locker room, and shower facilities on the basis of sex," so long as they are comparable. 34 C.F.R. § 106.33.[6] A federal agency, however, may contend that to the extent it is reviewing the policy set forth in the draft bill, it is not reviewing a challenge to sex-separated restrooms but the policy itself. Cf. Grimm v. Gloucester County School Board, 972 F.3d 586, 618 (4th Cir. 2020) ("But Grimm does not challenge sex-separated restrooms; he challenges the Board's discriminatory exclusion of himself from the sex-separated restroom matching his gender identity."), *cert. denied*, 141 S. Ct. 2878 (2021).

C. Federal funding and compliance

There are multiple ways in which the U.S. Department of Education, or the U.S. Department of Justice, can require, examine, or take action to ensure, compliance with Title IX. First, as part of the process of applying for federal financial assistance, an assurance must be provided by the applicant or recipient that the education program or activity operated by the applicant or recipient will be operated in compliance with 34 C.F.R. part 106.[7] 34 C.F.R. § 106.4(a). Failure to provide an assurance with respect to Title IX can result in federal funding (even indirect funding from federal grants awarded to students) being terminated or withheld. See Grove City College v. Bell, 465 U.S. 555 (1984).

Second, the U.S. Department of Education can act on a complaint that alleges sex discrimination, including conducting an investigation into the allegation. See 34 C.F.R. § 100.7(b), (c). It can also conduct compliance reviews or directed investigations based upon other information of sex discrimination. 34 C.F.R. § 100.7(a), (c). If an investigation indicates a failure to comply, the U.S. Department of Education can seek to reach an informal resolution with the federal financial assistance recipient.

Third, the U.S. Department of Education can suspend, terminate, refuse to continue, or refuse to grant, financial assistance where Title IX noncompliance "cannot be corrected by informal means." See 34 C.F.R. § 100.8. Additionally, the U.S. Department of Education can refer the matter to the U.S. Department of Justice "with a recommendation that appropriate proceedings be brought…." Id. Where the agency seeks to terminate, suspend, or refuse to provide or continue assistance, there are certain procedural requirements that apply to the proceeding. See 20 U.S.C. § 1682 and 34 C.F.R §§ 100.8-100.10. Note that no mechanism for recoupment or return of funds is expressly provided for.

One limitation that should be noted is that the suspension, termination, or refusal to grant or continue assistance "shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance

has been so found." 20 U.S.C. § 1682; see also 34 C.F.R. § 100.8(c)(3). This is known as a pinpoint provision.

D. How federal funding may be impacted

Assuming the draft bill were adopted, and assuming the U.S. Department of Education viewed the bill as discriminating on the basis of sex in violation of Title IX, there are a multitude of questions that cannot be answered at this time if either agency were to take steps to enforce Title IX. Those questions include: Would the U.S. Department of Education view this as a matter requiring attention with respect to the current assurance? Would Idaho's State Department of Education be able to offer an assurance when it next applies for federal financial assistance? Even if an assurance were offered after the adoption of the draft bill, would the U.S. Department of Education refuse to grant funds? Would the U.S. Department of Education receive a complaint or otherwise conduct a compliance review or directed investigation? Would the U.S. Department of Education view the adoption of the draft bill with statewide applicability as foreclosing it from reaching an informal resolution? Would the U.S. Department of Education seek to suspend, terminate, refuse to grant, or refuse to continue federal financial assistance? What would the U.S. Department of Education see as the "particular political entity, or part thereof" and "the particular program, or part thereof," and what portion of federal funding would be at issue? Would the U.S. Department of Education decide to refer the matter to the U.S. Department of Justice? Would the U.S. Department of Justice exercise its discretion and seek legal action? Would that legal action be successful?

Regarding the pinpoint provision and identifying the particular political entity and particular program, the draft bill itself raises some questions. The draft bill refers to "public school," but it does not define that term. Does public school include just the K-12 system? Or does it include community colleges, public universities, or both?[8]

In sum, the U.S. Department of Education and the U.S. Department of Justice have authority regarding federal education funding to require assurance of compliance, to investigate potential violations of Title IX, and to seek to enforce compliance with Title IX. What is unclear is how such authority would be applied by the U.S.

Department of Education and the U.S. Department of Justice, over what time period, and concerning which entities and programs.

E. Other agencies with Title IX regulations

This letter has focused on Title IX and the U.S. Department of Education. However, there are other federal agencies that maintain Title IX regulations and enforcement programs. The U.S. Department of Agriculture has Title IX regulations at 7 C.F.R. part 15a, subpart d. Such regulations are subject to enforcement procedures found at 7 C.F.R. §§ 15.5-15.11, 15.60-15.143. See 7 C.F.R. § 15a.605. The U.S. Department of Energy has Title IX regulations at 10 C.F.R. parts 1040 and 1042. Likewise the U.S. Department of Health and Human Services maintains Title IX regulations at 45 C.F.R. part 86. These agencies may have similar enforcement mechanisms available to the U.S. Department of Education. And there may be other agencies that have similar rules and that Idaho's public schools receive federal financial assistance from.

F. Private enforcement

In addition to federal agency enforcement, there is also a private right of action available to a victim of discrimination, which may include damages and attorney fees. See Cannon v. University of Chicago, 441 U.S. 677 (1979); Grimm v. Gloucester County School Board, 972 F.3d 586 (4th Cir. 2020).

I hope that you find this analysis helpful. If you would like to discuss any part of this letter in more detail, please contact Chief Deputy Brian Kane.

Sincerely,

BRIAN V. CHURCH
Deputy Attorney General

[1] This definition matches the definition enacted at Idaho Code section 39-245A; see also House Bill 509 (2020).

[2] The scope of section 3(c) is not entirely clear. It applies to "any other public school setting where a person may be in a state of undress in the presence of others." But does that extend to areas such as a school nurse's office, or to the extent public school encompasses college or university, a college or university's medical clinic, or a college or university's multi-occupancy dorm room?

[3] Memorandum, "Application of *Bostock v. Clayton County* to Title IX of the Education Amendment of 1972" https://www.justice.gov/crt/page/file/1383026/download.

[4] Executive Order 12250, § 1-2, 45 Fed. Reg. 72,995 (Nov. 4, 1980).

[5] 86 Fed. Reg. 32637

[6] A similar provision exists with respect to housing. 34 C.F.R. § 106.32.

[7] The assurance is required if the program or activity must comply with 34 C.F.R. part 106.

[8] For instance, the Idaho State Board of Education exercises the "general supervision, governance and control of the public school system, including public community colleges." Idaho Code § 33-101.

January 20, 2022

The Honorable Mark Nye
Idaho State Senate
Idaho State Capitol
700 W. Jefferson Street
Boise, Idaho 83702
VIA EMAIL: mnye@senate.idaho.gov

Re: Request or AG analysis

Dear Senator Nye:

This letter is in response to your inquiry of this office regarding House Bill 436 (H. 436), referred to in the statement of purpose as the "2022 Tax Relief bill." Specifically, you ask whether H. 436 meets the "one subject" requirement of Idaho Constitution, art. III, sec. 16, particularly concerning the tax relief fund provision. It is impossible to predict for sure how an Idaho appellate court would rule on this issue, but a reasonable defense can be advanced that it meets the one-subject requirement.

The relevant part of art. III, sec. 16, provides: "§ 16. Unity of subject and title. --- Every act shall embrace but one subject and matters properly connected therewith, … ." An act is in harmony with art. III, sec. 16, if it has but "one general subject, object, or purpose" and all of its provisions are "germane" to that general subject, and have "a necessary connection therewith." Cole v. Fruitland Canning Ass'n, 64 Idaho 505, 134 P.2d 603, 606 (1943). Similarly, where all the provisions of an act are "related to and have a natural connection with the same subject, they may be united in one statute." Lyons v. Bottolfsen, 61 Idaho 281, 101 P.2d 1, 4 (1940). The provisions of an act do not need to relate directly to the same subject. Rather, if the provisions relate "directly *or indirectly*" to the same subject, have a "natural connection" therewith, and are "not foreign to the subject expressed in the title," they may be united. Utah Power & Light Co. v. Pfost, 286 U.S. 165, 188, 52 S. Ct. 548, 554, 76 L. Ed. 1038 (1932) (emphasis added).

The purpose behind the "one-subject" requirement is "to prevent the inclusion in title and act of two or more subjects diverse in their nature and having no necessary connection." Utah Power & Light Co., 286 U.S. at 188. Courts disregard "mere verbal inaccuracies, resolve doubts in favor of validity, and hold that, in order to warrant the setting aside of enactments for failure to comply with the rule, the violation must be substantial and plain." Id., at 187 (internal citations omitted). A review of Idaho case law reveals that the great majority of cases examining legislation and the one-subject requirement have upheld the enactment.

H. 436

Statutory interpretation begins with an examination of the language, giving a statute's words their plain and ordinary meaning. State v. Hart, 135 Idaho 827, 829, 25 P.3d 850, 852 (2001). H. 436 is described in its title as an act "RELATING TO INCOME TAX," and contains the following main provisions:

> Section 1: updates the tax rate imposed on income for individuals, estates, and trusts.
> Section 2: makes the Idaho tax rebate fund permanent instead of only for 2021.
> Section 3: decreases the Idaho tax rate on corporate income from 6.5% to 6%.
> Section 4: provides for a one-time transfer of $110 million from the tax relief fund to the tax rebate fund. And provides for a yearly transfer of $204 million from the tax relief fund to the general fund.
> Section 5: declares an emergency and states that Sections 1, 2, and 3 will be retroactively put into effect on January 1, 2022, once the act has passed and been approved and Section 4 will be in full force and effect on and after passage and approval.

"But One Subject"

Art. III, sec. 16 requires "but one subject," but allows for "matters properly connected therewith." Here, each section of the Act deal directly with one core subject: *tax relief*. The draft updates income tax

rates, creates a permanent tax rebate fund, decreases tax rates for corporate income, and provides new instruction on use of the tax relief fund money. An act is in harmony with art. III, sec. 16, if it has but "one general subject, object, or purpose" and all of its provisions are "germane" to that general subject and have "a necessary connection therewith." Cole, 64 Idaho 505, 508, 134 P.2d at 606.

Am. Fed'n of Labor v. Langley and the "Unity of Purpose" Standard

There does exist an issue whether the main subject of H. 436—tax relief—is sufficiently specific and precise to withstand judicial review. The question becomes whether "tax relief" is distinct enough of a "subject" to fit within the meaning of the one-subject provision of art. III, sec. 16. It appears that the cases that appellate courts have upheld have involved legislation with fairly specific and distinctive subject matters. The following list is an example of the specific subject matters upheld:

Type of legislation	Citation
▪ Licensing tax and exemptions relating to electrical energy production	Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932)
▪ Sales tax act providing for licensing of retailers	Johnson v. Diefendorf, 56 Idaho 620, 57 P.2d 1068 (1936)
▪ Corporate taxation and bank stock	First Sec. Bank of Idaho v. Fremont Cnty., 55 Idaho 76, 37 P.2d 1101 (1934)
▪ Awards of attorney fees in civil actions	Cheney v. Smith, 108 Idaho 209, 210, 697 P.2d 1223 (Ct. App. 1985) (abrogated on other grounds)

▪ Bingo licensing and procedure	Sons & Daughters of Idaho, Inc. v. Idaho Lottery Comm'n, 144 Idaho 23, 156 P.3d 524 (2007)
▪ Forestry law and forest preservation	Chambers v. McCollum, 47 Idaho 74, 272 P. 707 (1928)

And while Idaho courts do not seem inclined to take an overly wooden approach to the one-subject requirement, the Idaho Supreme Court has indicated that an act cannot merely have *something to do with* a particular topic; the act must have a common or unified "purpose" to be accomplished. Am. Fed'n of Labor v. Langley, 66 Idaho 763, 769, 168 P.2d 831, 834 (1946). Moreover, that "unity of purpose" must be "disclosed" directly or indirectly. Langley, 66 Idaho at 769, 168 P.2d at 834.

In Am. Fed'n of Labor v. Langley, the Idaho Supreme Court struck down an act dealing entirely with one subject: labor unions. At first blush, the act would seem to fit the "one-subject" requirement as all the provisions pertained to labor unions. However, even though the provisions of the act all dealt with one general topic, the court held that the act failed constitutional analysis as the act did not indicate "what the *core* is, about which the legislative structure was designed to form a perfect accordant edifice." Id. (emphasis added).

Instead, each provision of the labor union act "revolve[d] in its own orbit, and whether gravitating about a central theme or pole star," the Court could not say, "because the statue does not disclose any *clear and unified scheme*." Langley, 66 Idaho at 769 (emphasis added). In other words, it is probably not good enough for an act to merely pertain to one topic; the statute must disclose some sort of unified purpose or theme.

In the case at hand, it is arguable that the sections of the draft all fall under one single obvious "unity of purpose" or theme. The purpose or theme being "tax relief." The draft lowers income tax rates and makes adjustments to the tax relief fund and tax rebate fund in order to rebate a portion of income tax paid back to Idaho taxpayers.

In the end, there seems to be a reasonable argument that the provisions of H. 436 are sufficiently related.

It is important to note that the Langley case may be somewhat of an aberration in the Idaho Supreme Court's jurisprudence. The Langley decision was issued in 1946; in the more than 70 years since then, the Idaho Supreme Court has never once cited to Langley or its particular standards regarding a "central theme" or "pole star" or a "clear and unified scheme." Langley, 66 Idaho at 769. Instead, the cases since then have continued to follow the more flexible standard requiring merely that an act's provisions be sufficiently "related" or "germane" to its subject. See e.g., Sons & Daughters of Idaho, Inc. v. Idaho Lottery Comm'n, 144 Idaho 23, 32, 156 P.3d 524, 533 (2007). And several cases merely dismiss the constitutional concern without any detailed analysis at all. See e.g., Kinsela v. State, Dep't of Fin., 117 Idaho 632, 633, 790 P.2d 1388, 1389 (1990).

Conclusion

It does not seem that draft tax bill obviously violates the "one-subject" requirement of art. III, sec. 16, Idaho Constitution. The provisions of draft are all directly or indirectly related to the one subject of tax relief. The stated subject, "tax relief," allows a variety of tax provisions to come together in one bill, creating some concern that H. 436 might not satisfy the "clear and unified scheme" requirement applied in Langley. But as shown above, Langley has not been relied upon by the Court in recent challenges under art. III, sec. 16. Instead, the Court has adopted a more flexible standard to uphold legislation under art. III, sec. 16. Although a challenge could be mounted to H. 436, this office can provide a reasonable defense under art. III, sec. 16.

I hope that you find this analysis helpful.

Sincerely,

BRIAN KANE
Chief Deputy

January 25, 2022

Representative Jim Addis
Idaho House of Representatives
P.O. Box 83720
Boise, ID 83720-0038
VIA EMAIL: jaddis@house.idaho.gov

Re: Oregon Corporate Activities Tax

Representative Addis:

I reviewed the draft bill that you forwarded to the Attorney General's Office. As I understand the intent of the bill, it is to declare the Oregon Corporate Activities Tax unconstitutional as applied to Idaho based businesses selling wholly within Idaho and to limit Oregon's ability to apply this tax to Idaho businesses. I reviewed this bill for its fit with Idaho's statutory scheme, its constitutionality, and its administrability and I have some notes on each of these topics below for your review. As the bill deals with a complex constitutional issue, it may not have much immediate effect and may not be able to prevent Oregon from imposing a tax upon Idaho's residents. Its best use may be as a litigation tool for Idaho residents wronged by Oregon's Corporate Activities Tax. The litigation that will arise under this statute in Idaho courts (at the point in time the Oregon Department of Revenue seeks to enforce their tax judgment in Idaho pursuant to Idaho Code § 10-1302) will likely end up focused on the Full Faith and Credit Clause of the United States Constitution. U.S. Const. art. IV, § 1.

State Sovereignty

The bill addresses a tax imposed by Idaho's sister state, Oregon. The sovereignty of each state limits the ability of Idaho's statutes from modifying or nullifying Oregon's tax law. *See* Pink v. A.A.A. Highway Exp., 314 U.S. 201, 209 (1941). This means that the limits this bill places on the application of the Corporate Activities Tax does not reach across the border into Oregon. Practically this means that Idaho cannot, by legislation alone, stop Oregon from imposing and collecting the tax from Idaho residents that also have property in

Oregon. As an example, a furniture store in Idaho that owns property in both Oregon and Idaho would not be protected by the language of this statute as Oregon could go after the Oregon based property to collect the tax. While this bill alone would not protect an Idaho taxpayer in this scenario, the taxpayer may be successful in challenging the constitutionality of the Corporate Activities Tax in court.

Commerce Clause

Oregon's Commercial Activities Tax is in a constitutional gray area and its attempt to tax an Idaho resident may be unconstitutional. The tax is based in part on the idea of "economic nexus," the concept that a taxpayer without a physical presence in the state can still have sufficient contacts (or "nexus") with the state to be taxable in the state. "Nexus" and "economic nexus" are concepts developed by the Supreme Court of the United States as it has wrestled with the limits the Commerce and Due Process Clauses of the Constitution place on a state's right to tax.

A state may only tax a business with "a substantial nexus with the taxing State" and the activity taxed must "be fairly related to services provided by the State." Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). "This nexus requirement is 'closely related' to the due process requirement that there be some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax. . . ." S. Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2093 (2018) (internal citations omitted). In short, "nexus" is the principle that a business must have a minimum level of contact with the state before the state can impose a tax upon it.

"Economic nexus" is the idea that this minimum level of contact does not need to be physical and may only be based upon economic activity within the state. While physical presence is not required, there must still be a sufficient connection with the taxing state to permit the state to tax the business. Id. In Wayfair, the Supreme Court recognized that an attempt to tax under an economic nexus theory must still meet the old Commerce Clause test for nexus described in Complete Auto. Id. at 2099. "[S]uch a nexus is established when the taxpayer [or collector] 'avails itself of the substantial privilege of carrying on business' in that jurisdiction." Id. In that decision, the Court indicated

that a taxpayer with just economic nexus could be subject to the sales tax of a state, so long as the Complete Auto standards were met.

It should be noted that Wayfair was specifically a sales tax case. The Court did not clarify whether the economic nexus standards it expressed in Wayfair could be extended to other tax types. It also did not speak to whether scenarios such as the one addressed by this bill (in-state seller selling goods in-state to an out-of-state resident) would trigger economic nexus. These are open constitutional questions that are not immediately answerable and will likely require additional litigation to resolve. This bill includes an unambiguous policy statement about the constitutionality of the Oregon tax and provides a path forward for litigants interested in contesting the constitutionality of the Oregon tax.

In considering the scenario addressed by the bill—an Idaho business that has no business activities in Oregon—there is good reason to think that substantial nexus does not exist and that Oregon is violating the Due Process Clause and Commerce Clause by taxing the Idaho business. An Idaho business selling and delivering goods in Idaho to an Oregon customer seems to be an insubstantial connection to Oregon. If the Idaho business completed the transaction by delivering the item purchased to the Oregon customer at an Oregon location, then Oregon would be on more solid ground to claim substantial nexus existed. Oregon would also have a better argument if the Idaho business owned property in or had business activities in Oregon such as billboards, mailers, television commercials, or other such activities that showed the Idaho business was reaching into Oregon and targeting Oregon customers.

If the roles were reversed, Idaho would not consider such a transaction to be an Idaho sale for purposes of Idaho's corporate income tax. Under Idaho Code section 63-3027(q) and IDAPA 35.01.01.540 the sale of tangible personal property is treated as an Idaho sale if the property is "delivered" or "shipped" to a purchaser within this state. My colleague reached out to the head of the Tax Commission's corporate income tax audit division and inquired about the example of an out of state resident purchasing a car from an in-state dealership and then driving the car back to their home state, he confirmed that Idaho would not treat it as an Idaho sale if an Idaho

resident went to Oregon and bought a car there and then drove it home to Idaho. In that scenario the Oregon dealership did not "deliver" or "ship" the car to a purchaser in Idaho; the car was "delivered" to the customer at the dealership in Oregon once the transaction was complete.

In summary, Oregon's Corporate Activities Tax—as applied by Oregon—could violate both the Commerce Clause and Due Process Clause. This is an evolving area of Constitutional Law and Oregon's tax—being based on an economic nexus theory—is not clearly, facially unconstitutional. The statute certainly could be applied by Oregon against Idaho taxpayers in an unconstitutional way. Resolving whether the statute, as applied, is unconstitutional will likely require a case-by-case fact-intensive inquiry by a court. The proposed bill would play a role in any litigation concerning this issue.

Full Faith and Credit Clause

This bill creates a significant Full Faith and Credit Clause conflict with Oregon. Under the Full Faith and Credit Clause, Idaho is expected to respect the "public acts, records, and judicial proceedings of every other state." U.S. Const. art. IV, § 1. In the context of Oregon's Corporate Activities Tax, Idaho would be expected to respect and enforce an Oregon court's judgment in favor of Oregon and against an Idaho resident. The United States Supreme Court has acknowledged that there are some exceptions to the Full Faith and Credit Clause where a state does not have to follow another states statute. Franchise Tax Bd. of California v. Hyatt, 578 U.S. 171, 176, 136 S. Ct. 1277, 1281, 194 L. Ed. 2d 431 (2016). There is some room to disagree with another states policy, however that latitude does not appear to extend to judgments. The United States Supreme Court has stated, "As to judgments, the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land." Baker by Thomas v. Gen. Motors Corp., 522 U.S. 222, 223, 118 S. Ct. 657, 659, 139 L. Ed. 2d 580 (1998).

The statement from Baker regarding judgments suggests that an Idaho taxpayer should first challenge Oregon in the Oregon Tax

Court. The taxpayer would want to argue, in Oregon's court, that the Commercial Activity Tax is unconstitutional as applied to them rather than waiting to try and prevail in Idaho courts at the time Oregon seeks to enforce its Oregon court judgment. The kinds of constitutional issues raised by the Oregon Corporate Activities Tax are the kind best resolved on a case-by-case basis before a court and are not easily resolved through legislation.

If one of these cases came before an Idaho court, there are very limited exceptions to the Full Faith and Credit Clause that would allow Idaho to follow this new law and refuse to enforce Oregon's judgment. The United States Supreme Court did provide in a 1912 case that the Full Faith and Credit Clause "does not prevent an inquiry into the jurisdiction of the court in which the original judgment was given to pronounce it. . . ." Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 135, 32 S. Ct. 641, 645, 56 L. Ed. 1009 (1912). Even the statement in Baker regarding the exacting nature of judgments, acknowledges that the Oregon court must have had jurisdiction over the persons governed by the judgment in the first place. This would mean that the taxpayer may be able to argue, in the Idaho Court, that Oregon lacked jurisdiction (i.e., nexus) to subject them to the Oregon Corporate Activity Tax in the first place. This would be similar to the argument they would make if they protested their asserted tax liability in the Oregon Tax Court to begin with. This kind of challenge would be difficult for the taxpayer; not only would they be arguing the underlying constitutionality of the Oregon Corporate Activity Tax and the lack of jurisdiction to tax (i.e., nexus) under their particular set of facts, but they would also have to convince the Idaho court that a Full Faith and Credit Clause exception existed.

Fit with Idaho's Statutory Scheme

The bill does not address how it interacts with Idaho's Uniform Enforcement of Foreign Judgments Act. Idaho Code title 10, chapter 13. That law effectively codifies the expectation under the Full Faith and Credit Clause that Idaho will respect sister-state judgments. While vulnerable to a Full Faith and Credit Clause challenge (as discussed above), if the intent of the bill is to prevent Idaho's courts from recognizing judgments related to the Corporate Activities Tax, the bill may want to specifically address an exception to Idaho's Uniform

Enforcement of Foreign Judgments Act beyond the "null and void" language presently found in the bill.

Administrability of the Statute

Most of the costs related to this statute will effectively fall upon the judiciary. As discussed above, this bill raises some difficult constitutional questions that will likely result in litigation and absorb judicial resources. Such litigation is likely to be borne by individual taxpayers, not the state of Idaho. As the bill is direct in its purpose, there will be little need for rule making. I do not see any substantial administrability concerns.

Clerical Errors

We noticed two unintentional errors. First, Page 1, line 27, of the draft bill provides “504 U.S. 298” as the citation of the Wayfair case. 504 U.S. 298 is the cite for the 1992 Quill case (which was overturned by Wayfair). The correct cite for Wayfair is 138 S. Ct. 2080. Second, the draft bill refers to Oregon’s “commercial activity tax.” Oregon itself calls this tax the “corporate activity tax.”

I hope that this summary of issues is helpful to you. I would be happy to answer any follow up questions or speak with you about this bill.

Sincerely,

NATHAN H. NIELSON
Deputy Attorney General

January 28, 2022

The Honorable Ron Mendive
Idaho House of Representatives
Idaho State Capitol
700 W. Jefferson Street
Boise, ID 83702
VIA EMAIL: rmendive@house.idaho.gov

Re: Request for AG analysis

Dear Representative Mendive:

You've asked for a general analysis on a new code provision in chapter 9, title 44, Idaho Code, which would prohibit an employer from inquiring whether an individual is vaccinated for COVID-19 as a condition or continuation of employment. In your statement of purpose, you state that this is a "don't ask, don't tell" policy on an individual's choice to receive the COVID-19 vaccine.

Idaho does not regulate vaccinations in adults, and therefore, this legislation would only present legal hurdles to the extent that it conflicts with other provisions of Idaho law and federal law.

Federal law requires certain CMS providers to both require COVID-19 vaccines and maintain certain records on vaccination status. This statute would likely be preempted by those federal regulations, which while challenged in court, the implementation was not stayed by the United States Supreme Court. *See* Biden v. Missouri, 595 U.S. ___ (January 13, 2022). This preemption issue may be remedied by the following language: "unless provided by Federal Law . . .".

This proposed statute may also conflict with Idaho's Constitution. Article I, section 16 states "No . . . law impairing the obligation of contracts shall ever by passed." While this provision has never been used to challenge statutes related to employment, it could be challenging to defend as it applies to employers that currently have a policy on COVID-19 vaccination status.

Finally, as a practical consideration, while you state that this is a “don’t ask, don’t tell” policy, this statute would not prevent an employer from inquiring into vaccination status as a way to determine quarantine standards after an employee is exposed or tests positive for COVID-19. This is because the proposed language only prohibits the inquiry as a condition of or continuation of employment.

I hope you find this analysis helpful. Please let me know if you have any additional questions.

Sincerely,

BRIAN KANE
Chief Deputy

February 2, 2022

The Honorable Todd Lakey
Idaho State Senate
Idaho State Capitol
700 W. Jefferson Street
Boise, ID 83702
VIA EMAIL: TLakey@senate.idaho.gov

Re: Draft Amendment to Article 1, section 17

Dear Senator Lakey:

This letter is in response to your January 28, 2022, email to Brian Kane concerning a draft amendment to Idaho Constitution article 1, section 17, that would undo the result of State v. Clarke, 165 Idaho 393, 446 P.3d 451 (2019), in which the Idaho Supreme Court concluded that an arrest for a misdemeanor not committed in the officer's presence violated article 1, section 17's prohibition on unreasonable seizures. Specifically, you have requested thoughts and input on the proposed amendment.

BRIEF ANSWER

The proposed amendment would undo the results of Clarke and allow the Legislature to designate misdemeanors for which an arrest is permissible based on probable cause despite being committed outside an officer's presence.

ANALYSIS

The Idaho Supreme Court concluded "the framers of the Idaho Constitution understood that article I, section 17 prohibited warrantless arrests for completed misdemeanors." Clarke, 165 Idaho at 399, 446 P.3d at 457. It found statutes authorizing a warrantless arrest on certain completed misdemeanors unconstitutional.

The proposed amendment provides:

> A warrantless arrest based on probable cause to believe the person committed a misdemeanor offense outside the presence of a law enforcement officer shall not be deemed an unreasonable seizure if the arrest is for the commission of a misdemeanor offense that the legislature has found is likely to constitute an imminent and continuing threat to public safety and has specifically designated by statute as one where arrest is permissible when committed outside the presence of a law enforcement officer.

The proposed amendment would undo the Clarke holding and reestablish the Legislature's ability to designate misdemeanors subject to arrest if committed outside the presence of an officer.

ADDITIONAL CONSIDERATIONS

First, it should be noted that Clarke is limited to analysis of the Idaho Constitution. It is still possible that the Idaho Supreme Court could interpret the Fourth Amendment to the federal constitution identically to how it interpreted article I, section 17. Although it seems unlikely that the Supreme Court of the United States would agree, there would be no current prohibition on the Idaho Supreme Court re-establishing the holding of Clarke as the law if it interprets the Fourth Amendment as it has interpreted article I, section 17.

Second, the amendment may not exactly restore the status of the law prior to Clarke. Before Clarke, the only established constitutional requirement for a valid arrest was probable cause. Moreover, if the officer violated a statute in conducting an arrest suppression of evidence found as a result of the arrest was not required for the statutory (as opposed to constitutional) violation. Under the proposed amendment the statutes and the Constitution would in effect be the same thing because, the way the language is worded, it elevates the legislative pronouncements on reasonableness of misdemeanor arrests to constitutional significance. For example, if one day a crime is not designated as subject to warrantless arrest if not committed in the officer's presence but the next day the applicable statute is

amended to allow the arrest, the amendment to the statute is in effect an amendment of the Constitution. Although I know of no prohibition on this, it is noteworthy, primarily because it has the effect of causing suppression of evidence for any violation of a statute governing misdemeanor arrests.

I hope you find this analysis useful. Should you have any additional questions, please feel free to contact our office.

Sincerely,

MARK A. KUBINSKI
Deputy Attorney General
Chief, Criminal Law Division

February 2, 2022

The Honorable Mark Harris
Idaho State Senate
Idaho State Capitol
700 W. Jefferson Street
Boise, Idaho 83702
VIA EMAIL: Mharris@Senate.idaho.gov

Re: Request for AG Analysis

Dear Senator Harris:

This letter is written in response to our discussion on January 27, 2022, where you asked the following questions to our office:

1. Can a soil and water district's board conduct new business with only two supervisors?
2. What is the process to designate additional supervisors to a district's board?
3. Can the State Soil and Water Conservation Commission ("Commission") appoint supervisors to govern until elections can be held?

Short Answers

1. A soil and water district's board cannot conduct new business with only two supervisors.
2. When three supervisors have resigned from a district's board and only two supervisors remain, the governor must designate an additional supervisor.
3. No, the Commission does not have the authority to appoint successor supervisors.

Analysis

1. Can a soil and water district's board conduct new business with only two supervisors?

A soil and water conservation district's supervisors cannot take any new actions on behalf of the district's board with only two supervisors. This is because two supervisors do not make up a quorum. A quorum is required for the board to make any new decisions.

Idaho Code section 22-2721(1) provides that a district's governing body "shall consist of five (5) supervisors, elected or appointed as provided in this chapter."[1] A "majority of the supervisors shall constitute a quorum and the concurrence of a majority in any matter within their duties shall be required for its determination." Idaho Code § 22-2721(6). The Open Meeting Law requires that a governing body, which includes a district's board, make its decisions at a meeting where a quorum is present. Idaho Code § 74-202(1); Safe Air for Everyone v. Idaho State Dep't of Agric., 145 Idaho 164, 165, 177 P.3d 378, 379 (2008).

Three supervisors is a majority of the five supervisors that make up a district's board and thus, three is a quorum.[2] Therefore, three supervisors must be present at a meeting to make a decision. Because two supervisors do not create a quorum, the board cannot make a new decision without another member.

That said, the board can still implement and administer old business if the business does not require any new decision. The board may have previously approved certain projects or actions, and current supervisors and staff may continue to implement those. Similarly, the board may have previously authorized staff or an individual supervisor to exercise certain powers without the board's approval. See Idaho Code § 22-2721(8) ("The supervisors may delegate to their chairman, to one (1) or more supervisors, or to one (1) or more agents, or employees, such powers and duties as they may deem proper."). Thus, certain individuals may already be authorized to make certain new decisions without board approval. However, two supervisors cannot take any new action on behalf of the board that results in a new decision.

2. What is the process to designate additional supervisors to a district's board?

When a supervisor resigns and leaves a vacancy on the board, the process to select a successor to fill an unexpired term is "a vote of *the majority* of the supervisors *duly qualified and acting* at the time the vacancy shall arise." Idaho Code § 22-2721(5) (emphasis added).

If only two supervisors are on the board and the other three have resigned, only two supervisors can be "duly qualified and acting." A vote of the majority of the remaining supervisors would result in only two votes. However, as explained above, if there are only two supervisors, the board cannot make a decision in a meeting under the Open Meeting Law because there would not be a quorum. Without a quorum, the appointment process outlined in Idaho Code section 22-2721(5) cannot be used to fill vacancies on a district's board. This obviously leaves the soil district in a conundrum which can be resolved by resort to another more general provision in Idaho law.

Idaho Code section 59-905 provides that the Governor will fill vacancies "in the membership of any board or commission created by the state, where no other method is specifically provided." Each soil and water district and its board appear to be created by the state as "a governmental subdivision of this state and a public body corporate and politic." Idaho Code § 22-2719(6); see also Idaho Code § 59-912 (provides that when any office becomes vacant, and no mode is provided by law for filling such vacancy, the Governor must fill such vacancy by appointment). Thus, the Governor could appoint at least one new supervisor to a district's board when there is not a quorum of supervisors.

Following that appointment, a quorum of the board's supervisors could act by a majority vote, pursuant to Idaho Code section 22-2721(5), and appoint the remaining two supervisors. After the vacancies are filled and a supervisor's term expires, then "[e]lections shall be conducted pursuant to the provisions of this section and the uniform district election law, chapter 14, title 34, Idaho Code."

3. Can the state Soil and Water Conservation Commission appoint supervisors to govern until such time as elections can be held?

No. The Commission does not have authority to appoint supervisors as successors to previously appointed supervisors. The

Commission's only statutory involvement in appointing successor supervisors to an established board of five supervisors is clerical – it receives the certification of the name of the appointed supervisor from the district. Idaho Code § 22-2721(5).

The Commission only appoints supervisors when districts are first created. Idaho Code § 22-2719(6). In creating a district, the Commission first determines that the operation of the proposed district is administratively practicable and feasible. Id. Then the Commission appoints two supervisors who follow certain procedures required by law to establish the district. Id. The remaining three supervisors on a newly created board are elected. Id.

Conclusion

1. A soil and water district's board cannot conduct new business with only two supervisors. However, a district can continue to implement existing business that does not require new decisions.
2. When three or more supervisors are on a district's board, they select a successor to fill an unexpired term with "a vote of *the majority* of the supervisors *duly qualified and acting* at the time the vacancy shall arise." Idaho Code § 22-2721(5). However, when only two supervisors remain on a district's board, the Governor designates an additional supervisor under Idaho Code section 59-905.
3. The Commission does not have the authority to appoint successor supervisors. The Commission only appoints supervisors when districts are first created.

I hope that you find this analysis helpful to you and your constituents. Please do not hesitate to call me if you have additional questions.

Sincerely,

DARRELL EARLY
Deputy Attorney General
Chief of Natural Resources

[1] A supervisor is "one (1) of the members of the governing body of a district elected or appointed in accordance with the provisions of this chapter." Idaho Code § 22-2717(25). A district can request approval from the state soil and water conservation commission to increase the number of supervisors to seven (7). Idaho Code § 22-2721(1).

[2] Based on the facts discussed during our meeting it was unclear whether the district in question has a board of five supervisors, or whether it has received authority for more. If the board consists of more than five, then the number for a quorum would change and consequently the number of vacancies that would need to be filled to create a quorum.

February 8, 2022

The Honorable Patti Anne Lodge
Idaho State Senate
Idaho State Capitol
700 W. Jefferson Street
Boise, Idaho 83702
VIA EMAIL: PALodge@senate.gov

Re: Request for legislation review

Dear Senator Lodge:

You have requested an analysis of draft legislation DRRCB071, which would ban all abortions in the state of Idaho after a fetal heartbeat is detected with very limited exceptions for medical emergencies, rape, and incest. Starting 30 days after enactment, the ban would be enforced by a civil enforcement action that would give the mother and certain relatives of the preborn baby the ability to sue the medical provider who performed the abortion in violation of the ban for actual damages, statutory damages of at least $20,000, and attorney's fees and costs.

There are significant constitutional concerns with DRRCB071. It could be found to violate existing constitutional rights, the Equal Protection Clause and the Due Process Clause of the U.S. Constitution and it could be subject to challenge as violating certain provisions of the Idaho Constitution as well. While this bill appears to be modeled on Texas's similar law which has, thus far, withstood pre-enforcement efforts to enjoin it, DRRCB071 appears susceptible to a pre-enforcement suit in state court, particularly given the potential Idaho Constitution issues. It is essential to note that certain provisions address uncertain areas of law or presuppose an overturning of existing case law. This analysis is bound by the law as it exists as of the date of this letter.

OVERVIEW OF THE DRAFT LEGISLATION

If enacted, DRRCB071 contains sections that would become effective 30 days after passage and approval according to your handwritten edit to the bill draft and a section that would become effective only upon the occurrence of a future happening (i.e., a trigger law).

Sections 1, 2, 4, 5 and 6 of DRRCB071 would become effective 30 days after passage and approval of the bill. See Section 4 of DRRCB071 (repealing current Idaho Code section 18-8806[1], which provides the effective date for current Idaho Code sections 18-8801 *et seq.* that this draft bill would amend); Section 7 of DRRCB071 (setting the effective dates for the Sections contained in this bill draft). I refer to these sections as the immediately effective portions of the bill draft.

Section 1 would change the word "unborn" in current Idaho Code section 18-8802 to "preborn." This proposed change appears to be made in the interest of consistency in terminology throughout chapter 88, title 18, and is unlikely to be of noteworthy significance.

Section 2 would amend current Idaho Code section 18-8804 to, effective immediately, prohibit the performance of an abortion on a pregnant woman when a fetal heartbeat has been detected, except in the case of a medical emergency,[2] rape as defined in Idaho Code section 18-6101, or incest as described in Idaho Code section 18-6602.[3]

Section 4 repeals the current effective date provision in title 18, chapter 88, Idaho Code. See Section 4 of DRRCB071. It appears that the intent of this change is to make all of the current provisions of title 18, chapter 88, Idaho Code immediately effective, including the provisions that are not expressly included in this draft legislation, specifically Idaho Code sections 18-8801 (definitions), -8802 (legislative findings and intent), -8803 (determination of fetal heartbeat).[4]

Current Idaho Code section 18-8803 is important to this statutory scheme because it requires that any person who intends to perform an abortion check for the presence of a fetal heartbeat, except

in the case of a medical emergency, prior to performing the abortion. Idaho Code § 18-8803. Because a fetal heartbeat can be detected as early as six weeks gestational age, DRRCB071 would effectively ban most abortions in the state.

The current Idaho Code section 18-8804 contains the same prohibition on performing an abortion after a fetal heartbeat is detected, but it is a trigger law, which will only become effective 30 days after a judgment in any United States appellate court case upholding a ban or restriction on abortion based on the presence of a fetal heartbeat on the grounds that such a restriction does not violate the U.S. Constitution. See Idaho Code § 18-8804. The only change in DRRCB071 to the express language of Idaho Code section 18-8804 is the addition of the caveat that nothing in the section recognizes a right to an abortion before a fetal heartbeat is detected. See Section 2. That change simply clarifies legislative intent.

Section 5 of DRRCB071 would create a civil cause of action that could be brought against "the medical professionals[5] who knowingly or recklessly attempted, performed or induced" an abortion. Section 5 ls. 24-26; Section 2. Such a civil action could be brought by the "female"[6] upon whom the abortion was attempted or performed, or the father (unless he impregnated the mother through rape or incest), grandparent, sibling, or aunt or uncle of the preborn child. Section 5 ls. 20-23. The plaintiff in such an action could obtain "all damages," additional statutory damages "in an amount not less than twenty thousand dollars," and "costs and attorney's fees" from the "medical professionals." Section 5, ls. 24-31. It would be an affirmative defense to such a lawsuit—to be proved by a preponderance of the evidence—that the defendant "reasonably believed, after conducting a reasonable investigation, that the physician performing or inducing the abortion had complied or would comply with the provisions of this chapter." Section 5, ls. 41-46.

The section would create a statute of limitations for such a civil action of four years from the date the cause of action accrues. Section 5, ls. 32-34. Defendants would be unable to recover costs or attorney's fees in such an action, despite other general attorney fee recovery provisions in Idaho Code that would otherwise allow an award of fees. Section 5, ls. 38-40.

Section 5 provides for exclusive enforcement of the chapter "through the private civil causes of action described" "notwithstanding any other provisions of law, including chapters 14, 17 and 18, title 54, Idaho Code." Section 5, ls. 5-8. "No enforcement of this section may be taken or threatened against any person by this state, a political subdivision of this state, a prosecuting attorney, or an executive or administrative officer or employee of this state or a political subdivision of this state." Section 5 ls. 8-11. The state, state officials, and prosecuting attorneys are also prohibited from intervening in action brought under this section. Section 5 ls. 12-15.

Section 6 is a severability clause that would sustain the remaining provisions of the chapter if any provision in the chapter were found invalid.

Section 3 of DRRCB071 is the one section that would not become effective within 30 days of enactment. It would become effective 30 days after the issuance of the judgment in any U.S. appellate court case in which the appellate court upholds a restriction or ban on abortion on the basis of a detectable heartbeat on the grounds that such restriction or ban does not violate the U.S. Constitution. See Section 7 and Section 3, ls. 36-41. Section 3 would make the knowing or reckless performance of an abortion in violation of title 18, chapter 88 the crime of "criminal abortion," a felony punishable by imprisonment of between two and five years in prison. Section 3, ls. 42-46. It would also provide that the professional license of any health care professional who performs or induces or who assists in the performance or induction of an abortion in violation of the chapter must be suspended by the appropriate licensing board for a minimum of six months and permanently revoked upon a subsequent offense. Section 3, ls. 1-5.

Section 3 also clarifies that, in the event Idaho Code section 18-622 is also enforceable, Idaho Code section 18-622 supersedes this section. Idaho Code section 18-622 is a trigger law that will become effective upon a decision by the U.S. Supreme Court or an amendment to the U.S. Constitution that restores to the States their authority to prohibit abortions. Once effective, it will criminalize the performance of abortions that violate title 18, chapter 88, i.e., almost all abortions that are performed after a fetal heartbeat is detected.

DRRCB071 appears to be modeled after Texas's Senate Bill 8 (now Texas Health & Safety Code §§ 171.201, *et seq*. and referred to herein as Texas's S.B. 8), which has effectively halted most abortions in the state of Texas since its passage by requiring physicians determine whether a fetal heartbeat is present before performing an abortion, banning almost all abortions after a fetal heartbeat is detected, and creating a civil enforcement action whereby the ban is enforced by civil lawsuits brought by private citizens against anyone who performs, aids and abets, or intends to participate in a prohibited abortion. A successful plaintiff can be awarded injunctions, statutory damages awards, and fees and costs against defendants. The civil enforcement action created by S.B. 8 contains numerous procedural provisions that make defending against such an action extremely difficult. Abortion providers and advocates challenging S.B. 8 have faced difficulty with pre-enforcement challenges to the law. In the meantime, the threat of civil suit under S.B. 8 has caused virtually all abortion providers in Texas to stop performing abortions after a fetal heartbeat is detected.

ANALYSIS

A. The immediately effective sections of the draft legislation could invite constitutional challenges under the U.S. and Idaho Constitutions.

Various portions of the immediately effective sections of DRRCB071 are susceptible to constitutional challenge. As discussed below, the effective ban on almost all abortions after about six weeks gestational age would likely be found to violate the currently existing right to an abortion under U.S. Supreme Court's current understanding of the substantive due process guarantee in the U.S. Constitution. The civil enforcement mechanism would likely draw additional constitutional challenges, including challenges under the equal protection guarantees of the U.S. and Idaho Constitutions, under the Idaho Constitution as violating the constitutional authority of the Executive branch and the separation of powers and as violating the limits on the courts' authority to adjudicate challenges, and under the Due Process Clause of the U.S. Constitution.

1. The draft legislation would likely be found to violate recognized constitutional rights under the U.S. Supreme Court's current understanding the U.S. Constitution.

DRRCB071 would effectively prohibit almost all abortions in the State of Idaho beginning at about six weeks gestational age thirty days after enactment. Should a court adjudicate a challenge to the law on the merits of the restriction on abortions, it would likely be found unconstitutional. This is because, under the U.S. Supreme Court's governing jurisprudence, the State may not unduly burden a woman's right to obtain a pre-viability abortion. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2320 (2016) (quoting Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 878 (1992)). DRRCB071 would likely be found to effectively ban virtually all abortions after a fetal heartbeat is detected (i.e., almost all pre-viability abortions) and thus would likely be found unconstitutional under the Court's current jurisprudence. See Jackson Women's Health Org. v. Dobbs, 379 F. Supp. 3d 549, 553 (S.D. Miss. 2019), *aff'd*, 951 F.3d 246 (5th Cir. 2020) (granting a preliminary injunction against a very similar ban on abortions after a fetal heartbeat is detected).

The U.S. Supreme Court is expected to soon issue an opinion revisiting its understanding of the right to abortion contained in the U.S. Constitution. The U.S. Supreme Court granted certiorari in the case of Dobbs, et al. v. Jackson Women's Health Organization, et al., Supreme Court Dkt. No. 19-1392 ("Dobbs")—a challenge to a Mississippi law banning most abortions after 15 weeks gestational age--on the question of "whether all pre-viability prohibitions on elective abortions are unconstitutional." Dobbs, 141 S. Ct. 2619 (2021). The Court heard oral argument on December 1, 2021, and a decision is widely expected to be released by the end of June 2022. Among other arguments, the Dobbs petitioners have asked the Court to overrule Roe v. Wade and Casey and conclude that there is no constitutional right to an abortion. The arguments have also focused on the appropriateness of the viability line for state law restrictions on abortion. There is a possibility that, in just five months, the Court could change the viability line or even overrule Roe and Casey.

Under either outcome, the Court's decision in Dobbs could result in the proposed law being found to not violate the constitutional

right to an abortion. Alternatively, the Court's decision could illuminate a path for a different law that would be found constitutional. As a practical matter, it may be valuable to wait to see what the Court decides with Dobbs to evaluate the possibility for a path for legislation that will not violate the right to abortion, if one continues to exist after Dobbs is decided.

2. The draft legislation could be found to violate the Equal Protection Clause of the U.S. Constitution and the Idaho Constitution.

There is a risk that a reviewing court could conclude that the proposed civil enforcement action violates the U.S. and/or the Idaho Constitutions by treating abortion providers differently than other medical providers who violate other state laws. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution requires that all similarly situated people be treated alike. U.S. CONST. amend. XIV; City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). The Idaho Constitution similarly guarantees equal protection under the law. See Idaho Const. art. I, § 1 and § 2; Alpine Vill. Co. v. City of McCall, 154 Idaho 930, 937, 303 P.3d 617, 624 (2013) ("The principle underlying the equal protection clauses of both the Idaho and U.S. Constitutions is that all persons in like circumstances should receive the same benefits and burdens of the law.").

The Ninth Circuit has held that laws that unequally burden abortion providers are reviewed under the Equal Protection Clause for whether the law is reasonably related to a rational state interest and whether there is a "stigmatizing or animus based purpose to the law." Tucson Women's Clinic v. Eden, 379 F.3d 531, 545-46 (9th Cir. 2004). The Ninth Circuit explained in Animal Legal Defense Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018) that, even when animus is present, a law is invalid only if the law serves no legitimate governmental purpose when the politically unpopular group is not a traditionally suspect class. Id. at 1200-01 (quotation omitted).

Idaho courts would likely employ a similar analysis to determine whether Idaho's equal protection guarantees were violated by the civil enforcement mechanism, although a court could employ a stricter

"means-focus" test if the court determined that law distinguished between different groups "either odiously or on some other basis calculated to excite animosity or ill will." See State v. Hart, 135 Idaho 827, 830, 25 P. 3d 850, 853 (2001) (quotation omitted). This standard is similar to federal intermediate scrutiny and scrutinizes the "means by which the challenged legislation is said to affect its articulated and otherwise legitimate purpose." Jones v. State Bd. of Med., 97 Idaho 859, 871, 555 P.2d 399, 411 (1976).

DRRCB071 would create a novel civil enforcement action that authorizes lawsuits against medical providers who knowingly or recklessly attempt, perform, or induce an abortion after a fetal heartbeat is detected. There are significant differences between this civil enforcement action and procedures for other actions that can be brought against medical providers for violation of the other state laws in the provision of care. For example, the proposed law would purport to grant standing to individuals who could not bring a claim for wrongful death of the fetus. See Idaho Code § 5-310 (allowing parents and guardians of minor children to bring an action for injury to the child). It would allow actual damages, statutory damages, and costs and attorneys fees to the plaintiff, and override statutory fee shifting mechanisms such as Idaho Code sections 12-120 and -121 that apply to general civil actions to disallow an award of fees and costs to the defendant. It would authorize both an award of actual damages plus statutory damages of at least $20,000 against the defendant. In contrast, for example, Idaho Code section 16-1607 only allows an award of actual damages or a statutory award of damages of $2,500, whichever is greater, for bad faith reporting of child abuse, abandonment or neglect. See *also, e.g.*, Idaho Code § 48-608 (awarding actual damages or statutory damages). And it would create a four-year statute of limitations, when the general statute of limitations for personal injuries and wrongful death in Idaho is two years. See Idaho Code § 5-219. Indeed, enforcement of state laws governing medical professionals solely through the civil enforcement action is itself novel. Medical professionals are required to comply with state laws governing their practice in large part through the discretionary prosecutorial actions of their licensing boards. See chapters 14, 17, and 18, title 54, Idaho Code. But licensing boards are precluded from enforcing the ban on abortions after a fetal heartbeat is detected. Section 5, ls. 5-11.

Based on the significant difference in treatment between other state laws governing the provision of medical care and the enforcement mechanism in DRRCB071, a reviewing court could conclude that the enforcement mechanism violates the equal protection guarantees of the U.S. and/or Idaho Constitutions. The risk of constitutional invalidity would increase if legislators made statements in support of the bill suggesting that the bill was intended to target abortion providers as a disfavored class.

Notably, an Equal Protection Clause argument against Texas's S.B. 8 has been raised in a complaint for interpleader and declaratory judgment filed by Alan Braid, M.D. in the United States District Court for the Northern District of Illinois against three individuals who sued him under S.B. 8's civil enforcement scheme for performing an abortion after a fetal heartbeat was detected. Complaint for Interpleader & Declaratory Judgment, Braid v. Stilley, No. 1:21-cv-05283 (N.D. Ill. Oct. 5, 2021). We would have a better sense of the legal merits of the civil enforcement action if this case is allowed to play out before passing draft litigation that tracks S.B. 8.

3. The proposed legislation may be an unconstitutional delegation of the Governor's enforcement power to private citizens and violate the separation of powers under the Idaho Constitution.

The Idaho Constitution vests the "supreme executive power of the state" in the Governor and assigns him the duty of "see[ing] that the laws are faithfully executed." Idaho Const. art. IV, § 4. But the proposed legislation expressly precludes any executive branch officer or employee from enforcing the requirements of the proposed chapter, including licensing agencies. Section 5, ls. 5-11. This reallocation of the executive branch's constitutional duty to private citizens could be found to violate article IV, section 4 of the Idaho Constitution.

The delegation of the Governor's enforcement power to private citizens could also be found to violate article II, section 1, which expressly states:

> DEPARTMENTS OF GOVERNMENT. The powers of the government of this state are divided into three

> distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

This separation allows the legislative department the lawmaking and policy functions of government, while the executive is charged with enforcing and executing the legal enactments of the legislative branch. Under the proposed legislation, the legislature arguably would be stripping the executive branch of its constitutional charge in violation of the constitutional separation of powers.

Finally, while it does not appear that the doctrine has been developed in Idaho, a court could follow the analysis of the Texas state court in Van Stean v. Texas Right to Life and find that the delegation of enforcement power to private citizens works as an unconstitutional delegation because there are insufficient standards to guide the delegation of authority to private citizens. Order Declaring Certain Civ. Procs. Unconst. & Issuing Declaratory Judgment ("Order"), Van Stean v. Texas Right to Life, No. D-1-GN-21-004179, at 45-46 (98th Jud. Dist. Ct., Travis Cnty, Tex. Dec. 9, 2021), on appeal. In Van Stean, the Texas district court applied eight factors used by Texas courts in assessing delegations of executive authority and concluded that the civil enforcement action available under Texas's S.B. 8 failed this test. Id. For example, there is no supervision or meaningful review by the government, no one is represented in the claimant's decision-making process, the claimant applies and enforces the law, the claimant has a monetary incentive, the claimant would be imposing punishment on the defendant, and there is no assurance the claimant would possess special qualifications or training for the task delegated. Id. If a reviewing court were to adopt this test to determine whether there was a delegation consistent with the Idaho Constitution, it would likely similarly conclude that DRRCB071's civil enforcement mechanism fails to constitutionally delegate authority to private citizens for similar reasons.

4. The grants of standing to bring a civil enforcement action may be unconstitutional under the Idaho Constitution.

DRRCB071 would allow the woman on whom the abortion was performed, the father of the preborn child unless the mother was impregnated through an act of rape or incest, or a grandparent, aunt, uncle, or sibling of the preborn child to bring a civil enforcement action against the abortion provider. A reviewing court could find this statutory grant of standing unconstitutional.

The Idaho Constitution provides "Courts of justice shall be open to every person, and a speedy remedy afforded for *every injury* of person, property or character, and right and justice shall be administered without sale, denial, delay or prejudice." Idaho Const. art. I, § 18 (emphasis added). Concepts of justiciability, including standing, ensure that cases brought before the court fall within the court's constitutional authority to adjudicate them. Coeur d'Alene Tribe v. Denney, 161 Idaho 508, 513, 387 P.3d 761, 766 (2015). "Standing determines whether an injury is adequate to invoke the protection of a judicial decision." Reclaim Idaho v. Denney, 169 Idaho 406, —, 497 P.3d 160, 172 (2021).

In order to establish standing, a plaintiff must have an (1) injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision. Id. at 173. Standing is rooted in the party challenging the law having suffered a distinct and palpable injury because of the law, not just being opposed to a law or action on principle. Id. at 175.

Here, it is difficult to see how a competent, adult woman who consented to have an abortion performed upon her can be said to have suffered an injury. Such a suit would likely invite equitable doctrines, such as the doctrine of unclean hands, to bar it. It also could be difficult for fathers, grandparents, aunts, uncles, and siblings to legally establish an injury based on the loss of the possibility of a future relation as speculative injuries cannot confer standing. According to one study, once a pregnancy gets to about 6- or 7-weeks gestational age and a heartbeat is detected, the risk of miscarriage is still about 10%. The risk of miscarriage also varies based on circumstances specific to the individual woman and the specific pregnancy. In other words, the detection of a fetal heartbeat does not guarantee that the future relation will be born alive, rendering any injury stemming from the abortion

arguably speculative. Further, the statute does not require the plaintiff relatives to have suffered any mental distress at the loss of the pregnancy to bring the civil action, yet they still would be awarded at least $20,000.00 in statutory damages. This would be true even if the claimant was personally in favor of the abortion.

The related facts that DRRCB071 would grant standing to individuals who may have no injury resulting from the abortion and that they would be entitled to a large statutory award of damages without any proof of harm could cause a reviewing court to conclude that the civil enforcement mechanism is either facially unconstitutional or unconstitutional as applied to specific enforcement actions brought under DRRCB071. This outcome would follow the decision of the Texas district court in Van Stean, which declared S.B. 8's grant of standing to any person and award of damages without any proof of harm unconstitutional. Order, Van Stean, No. D-1-GN-21-004179, at 47.

5. The statutory damages available under DRRCB071 may violate the U.S. Constitution's Due Process Clause.

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution "prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor[.]" State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416, 123 S. Ct. 1513, 1519, 155 L. Ed. 2d 585 (2003). A statutory penalty violates due process where it is "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." United States v. Citrin, 972 F.2d 1044, 1051 (9th Cir. 1992) (quoting St. Louis, Iron Mt. & S. Ry. Co. v. Williams, 251 U.S. 63, 66, 40 S.Ct. 71, 64 L.Ed. 139 (1919)). The constitutionality of a statutory damages award should be evaluated "with due regard for the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to" the law. Williams, 251 U.S. at 67. Statutory penalties serve as a mechanism for compensating victims when actual loss is difficult to prove and as a punishment and deterrent. Planned Parenthood of Columbia/ Willamette, Inc. v. American Coalition of Life Activists, 422 F.3d 949, 963 n.7 (9th Cir. 2005); Capitol Records, Inc. v. Thomas-Rasset, 692 F.3d 899, 909–10 (8th Cir. 2012)

In analyzing whether Texas's S.B. 8's statutory penalty violated the Due Process Clause, the Texas district court analogized to the constitutional limits the U.S. Supreme Court has found for punitive damages awards. Order, Van Stean, No. D-1-GN-21-004179, at 36-40; *but* see Capitol Records, Inc., 692 F.3d at 907–08 (concluding that the guideposts for constitutional punitive damages do not apply to statutory damages). The court held that the $10,000 minimum statutory penalty authorized by Texas' S.B. 8 in civil enforcement actions violated the Due Process Clause. Order, Van Stean, No. D-1-GN-21-004179, at 36–40. A reviewing court could similarly conclude that the statutory damages of a minimum of $20,000 available under DRRCB071 violates due process either under the due process analysis specific to statutory damages or by analogy to the analysis for punitive damages because the sizeable statutory damages award can be awarded even when the plaintiff suffers no harm.

The fact that the statutory damages available under the civil enforcement mechanism start at $20,000, but are not capped at a maximum, is of greater concern. There does not appear to be any guidance as to what actual statutory damages awarded should be, other than that they cannot go below $20,000. This alone could be found to violate the Due Process Clause because there is arguably no fair notice of the severity of the penalty that may be imposed and the lack of a cap facilitates the imposition of an arbitrary penalty. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574, 116 S. Ct. 1589, 1598, 134 L. Ed. 2d 809 (1996) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.")

For these reasons, statutory damages available under the civil enforcement mechanism could draw constitutional question under the Due Process Clause.

6. DRRCB071 would likely be subject to judicial scrutiny.

Texas's experience with S.B. 8 offers limited guidance as to what Idaho could expect if the Legislature were to enact DRRCB071. Soon after S.B. 8 was enacted, abortion providers in Texas brought pre-enforcement suit in federal court against a state court judge, a state

court clerk, the Texas attorney general, the executive director of the Texas Medical Board, the executive director of the Texas Board of Nursing, the executive director of the Texas Board of Pharmacy, the executive commissioner of the Texas Health and Human Services Commission, and a private individual under 42 U.S.C. § 1983 arguing that S.B. 8 violated the U.S. Constitution's guarantee of a right to pre-viability abortions and seeking an injunction barring the defendants from taking any action to enforce the law. Whole Woman's Health v. Jackson, 142 S.Ct. 522, 530 (2021). The U.S. Supreme Court ruled that only the suits against the executive licensing officials could proceed past the motion to dismiss stage, holding that the other defendants were either protected by the doctrine of sovereign immunity (the state court judge and clerk) or lacked enforcement authority (the Texas Attorney General). Jackson, 142 S.Ct. at 532-537, 544.[7]

If DRRCB071 were challenged in a similar pre-enforcement suit in Idaho, the question would likely arise of whether any Idaho official has the authority to enforce the ban on abortions after a fetal heartbeat is detected under the law. DRRCB071 states:

> (7) Notwithstanding any other provision of law, including chapters 14, 17, and 18, title 54, Idaho Code, the requirements of this section shall be enforced exclusively through the private civil causes of action described. No enforcement of this section may be taken or threatened against any person by this state, a political subdivision of this state, a prosecuting attorney, or an executive or administrative officer or employee of this state or a political subdivision of this state.

Section 5, ls. 5-11.

This language is similar to that in Texas' S.B. 8.[8] However, unlike the key language in S.B. 8, DRRCB071 specifically calls out the occupational licensing chapters of Idaho Code for nurses, pharmacists, and physicians as provisions that cannot be used to enforce the ban on abortions after a fetal heartbeat is detected. A court could conclude that DRRCB071's language is sufficiently specific to preclude enforcement by state licensing officials, including enforcement via Idaho Code section 54-1814(6), which identifies "performing . . . an

unlawful abortion or aiding or abetting the performance or procuring of an unlawful abortion" as grounds for medical discipline.

While this difference between Texas's S.B. 8 and DRRCB071 could help immunize DRRCB071 from pre-enforcement scrutiny in a suit brought under a 42 U.S.C. § 1983 for violations of the U.S. Constitution, DRRCB071 would likely still be vulnerable to a pre-enforcement suit. The State of Idaho can be directly sued for violations of the Idaho Constitution. Tucker v. State, 162 Idaho 11, 18, 394 P.3d 54, 61 (2017). An abortion provider could bring an action for a declaratory judgment and injunctive relief in state court under Idaho's Uniform Declaratory Judgment Act in a pre-enforcement suit raising all of the constitutional issues discussed above except for the infringement on the right to abortion. See Idaho Code § 10-1202. Notably, the Texas district court in Van Stean has already declared multiple provisions of Texas's S.B. 8 unconstitutional and stated that they should not be enforced or applied in Texas courts, although it declined to issue a permanent injunction prior to trial on the merits. Order, Van Stean, No. D-1-GN-21-004179, at 47.

The issues with DRRCB071 could also be raised as a defense to a civil enforcement action under DRRCB071. Abortion providers in Idaho may be less hesitant to test DRRCB071 in a post-enforcement action in court because it more clearly prohibits discipline by licensing authorities and it has greater limitations on the civil enforcement actions compared to Texas's S.B. 8.

There is also a possibility that the Department of Justice would file a pre-enforcement suit seeking to enjoin DRRCB071. The Department of Justice filed such a suit challenging Texas' S.B. 8 on the grounds that the law violated the U.S. Constitution, and the federal district court granted a preliminary injunction enjoining S.B. 8 at the United States' request. United States v. Texas, No. 1:21-CV-796-RP, 2021 WL 4593319, at *35 (W.D. Tex. Oct. 6, 2021), *cert. granted before judgment*, 142 S. Ct. 14, 211 L. Ed. 2d 225 (2021). While the Fifth Circuit stayed the injunction on an emergency basis and the U.S. Supreme Court granted certiorari, the Supreme Court dismissed the grant of certiorari as improvidently granted. United States v. Texas, 142 S.Ct. 522 (2021). It remains an open question whether the Department of Justice can bring such suits.

In short, it is unlikely that DRRCB071 would escape pre-enforcement judicial scrutiny, and it could also be subject to post-enforcement scrutiny.

7. The criminal enforcement mechanism is unlikely to be able to be challenged at this time because it is a trigger law.

With regard to the trigger law in Section 3 of DRRCB071, while multiple states have trigger laws, it appears that very few have been challenged in court. The trigger provisions of the Illinois Abortion Act of 1975, which has now been repealed, have been reviewed. See 720 Ill. Comp. Stat. 510/1 (2016). The relevant portion of the Act posited that if the U.S. Supreme Court decisions prohibiting the states from banning abortion were ever "reversed or modified," or if the "Constitution [was] amended to allow protection of the unborn," then Illinois's prior policy, prohibiting abortion with an exception only to preserve a woman's life, "shall be reinstated." The Act was challenged on multiple grounds in Wynn v. Scott, 449 F. Supp. 1302, 1314 n.9 (N.D. Ill. 1978), *aff'd sub nom.* Wynn v. Carey, 599 F.2d 193 (7th Cir. 1979). There, the court declined to rule on the constitutionality of the trigger language of the Act as it was of no practical effect. 449 F. Supp. at 1314 n.9.

Based on the decision in the Wynn case, it is likely that any challenge to Section 3 of the bill draft would only be found viable after it became effective.

Once the proposed Section 3 became effective, it could be subject to challenge under the doctrine commonly called entrenchment. To the extent the proposed legislation seeks to prohibit future legislatures from taking contrary action, it may run afoul of this principle of constitutional law providing "one legislature may not bind the legislative authority of its successors." United States v. Winstar Corp., 518 U.S. 839, 872, 116 S. Ct. 2432, 2453, 135 L. Ed. 2d 964 (1996) (plurality) (citing 1 William Blackstone, Commentaries on the Laws of England 90 (1765)). In other words, the principle provides, legislatures may not enact statutes or rules that bind the exercise of legislative power by a subsequent legislature over a specific subject matter. Id.

The proposed Section 3 could also be subject to challenge under the doctrine of desuetude, by which "a legislative enactment is judicially abrogated following a long period of nonenforcement." Desuetude, 119 Harv. L. Rev. 2209 (2006). While it appears that this doctrine has not yet been applied in Idaho, it is possible that a reviewing court could apply it, particularly if a long period of time passes between its enactment and effective date.

It is difficult to predict the outcome of such challenges as their success would likely depend on the length of time that passed between the enactment of the proposed legislation and its effective date. The greater the passage of time between those two events, the more vulnerable to the proposed section would be to these challenges.

Ultimately, while the trigger law provisions of DRRCB071 do not give significant cause of concern, DRRCB071's immediately effective Sections are at risk of constitutional challenge and it is unlikely that they will be immune from pre-enforcement judicial scrutiny. It may be wise to allow the current challenges to Texas's S.B. 8 to play out in the courts to better understand the legal landscape before passing a similar bill.

I hope this answers your question. Please reach out to me with any further questions or concerns.

Sincerely,

BRIAN KANE
Chief Deputy

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[1] Idaho Code sections 18-8801, et seq. appears in "Chapter 87 [88]." I will refer to it as chapter 88 throughout this letter for ease of reference

[2] Medical emergency is defined in current Idaho Code section 18-8801.

[3] This Section requires additional conditions be met to allow an abortion in the event of rape or incest beyond the statutory definitions invoked in the Section—the woman must also have previously reported the rape or incest to law enforcement or child protective services and have provided a copy of the report to the physician who is to perform the abortion. If the woman is a minor or subject to a guardianship, her parents or guardian may report the event and provide the report to the physician to invoke this exemption.

[4] I recommend including all of the current provisions of title 18, chapter 88, Idaho Code, that are not already in the draft in the draft legislation, with the exception of Idaho Code section 18-1806, to affirmatively establish that they also take effect 30 days after passage and approval. The repeal of the effective date provision in Idaho Code section 18-8806 only establishes that these provisions are no longer trigger laws. It does not give them an effective date, which could create ambiguity about whether they are effective or not.

[5] The use of "medical professionals" as opposed to "physicians" could engender confusion as only physicians are allowed to cause or perform abortions in the State of Idaho. See Idaho Code § 18-608A. If a non-physician performed an abortion, they would be subject to Idaho Code section 18-608A's prohibition and the statutory mechanisms for enforcement that pertain to that statute.

[6] This terminology may result in confusion given that transgender women can become pregnant and undergo abortions. You may wish to change "female" to "mother" to track with how Section 5 describes other individuals by their relationship to the preborn child.

[7] The Fifth Circuit for the Court of Appeals has certified the question to the Texas Supreme Court of whether Texas law authorizes the Attorney General, Texas Medical Board, Texas Board of Nursing, the Texas Board of Pharmacy, or the Texas Health and Human Services Commission to take enforcement action against individuals who violate S.B. 8. Whole Woman's Health v. Jackson, —F.4th—, 2022 WL 142193, at *6 (5th Cir. 2022).

[8] Texas Health & Safety Code § 171.207(a) provides "Notwithstanding Section 171.005 or any other law, the requirements in this subchapter shall be enforced exclusively through the private civil actions described in Section 171.208. No enforcement of this subchapter, and no enforcement of Chapters 19 and 22, Penal Code, in response to violations of this subchapter, may be taken or threatened by this state, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of this state or a political subdivision against any person, except as provided [in the civil enforcement mechanism]." The Justices cited a separate provision of the Texas's Occupations Code that required the board to take disciplinary action for physicians who perform abortions in violation of Chapter 171, Health and Safety Code. See Jackson, 142 S.Ct. at 535 (citing Tex. Occ. Code Ann. § 164.055(a) (Gorsuch, Kavanagh, Alito and Barrett, JJ.); Whole Woman's Health v. Jackson, 142 S.Ct. 522, 544 (citing Tex. Occ. Code Ann. § 164.055(a) (Roberts, C.J., Breyer, Sotomayor, Kagan, JJ.).

February 16, 2022

The Honorable Joe A. Palmer
Idaho House of Representatives
Idaho State Capitol
P.O. Box 83720
Boise, ID 83720-0081
VIA EMAIL: jpalmer@house.idaho.gov

Re: Constitutionality of Idaho Code section 46-802

Dear Representative Palmer:

You presented a question as to whether Idaho Code section 46-802 is constitutional. As the below analysis demonstrates, Idaho Code section 46-802 is likely facially constitutional. Additionally, there is a highly fact specific scenario where this statute could be constitutionally vulnerable.[1]

Idaho Code section 46-802 does not facially violate the U.S. Constitution

The first and second amendment of the U.S. Constitution provide, among other freedoms, the freedom of speech, the right to peaceably assemble, and the right of the people to keep and bear arms.

In the U.S. Supreme court case, Presser v. People of the State of Illinois, a man named Herman Presser paraded and drilled with "an unauthorized body of men with arms, who had associated themselves together as a military company and organization, without having a license from the governor, and not being a part of, or belonging to, 'the regular organized volunteer militia' of the state of Illinois, or the troops of the United States." Presser v. People of State of Ill., 116 U.S. 252, 254, 6 S. Ct. 580, 581, 29 L. Ed. 615 (1886). The state of Illinois had a statute stating:

> It shall not be lawful for any body of men whatever, other than the regular organized volunteer militia of this state, and the troops of the United States, to associate

> themselves together as a military company or organization, or to drill or parade with arms in any city or town of this state, without the license of the governor thereof, which license may at any time be revoked.

Presser v. People of State of Ill., 116 U.S. 252, 253, 6 S. Ct. 580, 580, 29 L. Ed. 615 (1886).

Presser argued that the Illinois statute was invalid because it was unconstitutional. Id. The court, however, held that the statute did not "infringe on the right of the people to keep and bear arms." Id. at 265, 584. It further held that states have "power to control and regulate the organization, drilling, and parading of military bodies and associations, except when such bodies or associations, are authorized by the militia laws of the United States" because "[t]he exercise of this power by the states is necessary to the public peace, safety, and good order." Id. at 267–68 and 585.

A similar Texas statute was upheld in the U.S. District Court case, Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan. In that case, armed Klansmen practiced military tactics at secret paramilitary camps and made attempts to intimidate Vietnamese fishermen whom the Klansmen felt were poaching on their fishing area. *See generally,* Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 543 F. Supp. 198 (S.D. Tex. 1982). Texas's statute read, "no body of men, other than the regularly organized state military forces of this State and the troops of the United States, shall associate themselves together as a military company or organization or parade in public with firearms in any city or town of this state." Id. at 211. The court in Vietnamese Fishermen's Ass'n upheld the statute and found that the state of Texas had a vital government interest "protecting citizens from the threat of violence posed by private military organizations." Id. at 216.

In another case, Com v. Murphy, the court addressed the "parade with firearm" exclusion, stating that "[i]t is within the power of the legislature to determine, in reference to such independent organizations, which of them may, and which of them may not, associate together and organize for drill and parade with firearms." Com. v. Murphy, 166 Mass. 171, 173, 44 N.E. 138, 138 (1896).

The language in Idaho Code section 46-802 is similar to that of the statutes upheld in Presser and Vietnamese Fishermen's Ass'n, in that it prohibits any body of men—with the exception of the organized national guard and the unorganized militia called into active duty—from associating themselves together as a military group or parading in public with firearms. Specifically, it states:

> No body of men, other than the regularly organized national guard, the unorganized militia when called into service of the state, or of the United States, and except such as are regularly recognized and provided for by the laws of the state of Idaho and of the United States, shall associate themselves together as a military company or organization, or parade[2] in public with firearms in any city or town of this state.
>
> No city or town shall raise or appropriate any money toward arming or equipping, uniforming, or in any other way supporting, sustaining or providing drill rooms or armories for any such body of men; but associations wholly composed of soldiers honorably discharged from the service of the United States or members of the orders of Sons of Veterans, or of the Boy Scouts, may parade in public with firearms on Memorial Day or upon the reception of any regiment or companies of soldiers returning from such service, and for the purpose of escort duty at the burial of deceased soldiers; and students in educational institutions where military science is taught as a prescribed part of the course of instruction, may with the consent of the governor, drill and parade with firearms in public, under the superintendence of their teachers. This section shall not be construed to prevent any other organization authorized by law parading with firearms, nor to prevent parades by the national guard of any other state or territory.

Idaho Code § 46-802.

Since Idaho Code section 46-802 is similar to the statutes in Presser and Vietnamese Fishermen's Ass'n.—both of which were upheld by the court—it can be assumed the court would likewise deem Idaho to have a vital government interest in the control and regulation of its military bodies and in protecting its citizens from paramilitary groups. Thus, a court would likely determine Idaho Code section 46-802 to be in line with the U.S. Constitution.

It is possible that a reviewing court could find that application of Idaho Code section 46-802 violates the constitution. The prohibition reads in operative part, "No body of men. . . shall associate themselves together as a military company or organization, or parade in public with firearms in any city or town of this state." Clearly the government has the ability and interest in regulating unauthorized militia activity and limiting it. But the provision contains an "or," which can be read as follows: "No body of men shall . . .parade in public with firearms in any city of town of this state." If this provision were enforced to prohibit a march by a group of 2nd Amendment advocates or protestors with firearms, then it could be found to be an unconstitutional application of this provision.[3] The lynchpin seems to be the purpose of the organization. If it is a non-government authorized organization of a military group, then it likely can be regulated. If it is applied to a gathering of like-minded individuals with no military leanings, then it may be constitutionally prone.

Idaho Code section 48-802 does not likely violate the Idaho Constitution

Sections 9, 10, and 11 of article I of the Idaho Constitution grant Idaho citizens freedom of speech, the right of assembly, and the right to keep and bear arms. As discussed above, Idaho Code section 46-802 would not likely be found to violate these rights due to the state's vital interests in maintaining military order and protecting its citizens from paramilitary groups. Therefore, Idaho Code section 46-802 does not likely violate the Idaho Constitution.

I hope you find this analysis helpful. Please let me know if you have any additional questions or if I can provide further assistance.

Sincerely,

BRIAN KANE
Chief Deputy

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[1] The legislature does not need a statute to be unconstitutional to repeal it. The legislature's authority to enact, repeal and amend statutes is plenary.

[2] It is important to note that the use of the term parade within this text likely carries with it the definition of parade that means: "an assembly of troops for formal inspection or formal occasion." In essence, the parade is calling attention to the military formality of the assembly as opposed to a parade of floats and marching bands.

[3] As noted above, the term parade in this statute carries with it the military definition of parade, therefore the statute should only be applied under those circumstances.

February 22, 2022

The Honorable Melissa Wintrow
Idaho State Senate
Idaho State Capitol
700 W. Jefferson Street
Boise, Idaho 83720
VIA EMAIL: mwintrow@senate.idaho.gov

Re: Request for Analysis of House Bill 547

Dear Senator Wintrow:

You requested an analysis addressing whether House Bill 547—legislation that would make it a crime for anyone other than election officials, mail or parcel delivery workers, certain family members, and household members to collect or convey a ballot on behalf of a third party—violates the Voting Rights Act or the Americans with Disabilities Act. House Bill 547 likely does not violate either law.

Starting with the Voting Rights Act, in Brnovich v. Democratic National Committee the Supreme Court held that an Arizona law permitting only an election official, mail carrier, family member, household member, or caregiver to collect a mail-in ballot did not violate the Voting Rights Act. 141 S. Ct. 2321 (2021). House Bill 547 is much like the Arizona law at issue in Brnovich, so a reviewing court likely would be bound by Brnovich to uphold House Bill 547. That said, the inquiry even after Brnovich is highly fact dependent. If a challenger had solid evidence of intentional discrimination or that House Bill 547 imposes a highly disparate burden on voters because of their race, then perhaps the challenger could distinguish Brnovich. See Fla. State Conf. of NAACP v. Lee, 2021 WL 4818913 (N.D. Fla. Oct. 8, 2021). But based on my current knowledge of House Bill 547 and voting in Idaho, I believe Brnovich very likely controls.

Moving to the ADA, that law requires Idaho to provide "meaningful access" to voting, including absentee voting. Disabled in Action v. Bd. of Elections in City of New York, 752 F.3d 189, 197 (2d Cir. 2014); Nat'l Fed'n of the Blind v. Lamone, 813 F.3d 494, 505 (4th

Cir. 2016). House Bill 547 does not appear to deny meaningful access to voting in Idaho.

For in-person voting, Idaho law provides that if a registered elector cannot enter a polling place due to a disability, then an election clerk may bring the elector a ballot outside the polling place and the elector may return the completed ballot to an election officer. Idaho Code § 34-1108(1). House Bill 547 allows election officials to collect or convey ballots, so a disabled elector's access to in-person voting would not change.

House Bill 547 also does not appear to meaningfully affect absentee voting. An absentee ballot may be delivered to the elector in the office of the county clerk, by mail, or by other appropriate means. Idaho Code § 34-1003(3). House Bill 547 would not affect how an absentee ballot is delivered because election officials could still deliver the ballot in person and postal workers could still deliver the ballot through the mail.

Once delivered, House Bill 547 does not affect completion of the ballot itself. Idaho law permits a disabled person to receive assistance from a third party to complete a ballot. Idaho Code § 34-1003(7); Idaho Code § 34-1108(2). House Bill 547 governs only how a ballot is collected or conveyed, thus it would not affect the assistance available to complete a ballot.

Once the ballot is completed and ready to be returned, Idaho law requires the ballot to be mailed or delivered to the officer that issued the ballot. Idaho Code § 34-1005(1). Again, House Bill 547 does not apply to postal workers, so a disabled elector unable to deliver the ballot in person could still deliver the ballot through the mail. For disabled electors unable to access a mailbox, they could schedule a mail pickup or have a family member or household member place the ballot in the mailbox. If those options are unavailable, nothing in Idaho law appears to prevent an election official from picking up an absentee ballot much like an official can deliver a ballot under Idaho Code section 34-1003(3).

I hope you find this analysis helpful. Please let me know if you have any additional questions.

Sincerely,

BRIAN KANE
Chief Deputy

February 25, 2022

Keith Reynolds, Director
Idaho Department of Administration
P.O. Box 83720
Boise, ID 83720-0075
VIA EMAIL: keith.reynolds@adm.idaho.gov

Re: Legal Analysis of Proposed Legislation on Control of Adjoining Roadways

Dear Director Reynolds:

I am responding to your request for a legal analysis concerning proposed legislation granting certain authority to the Director of the Department of Administration ("Director") related to the roadways surrounding the Idaho Statehouse that will allow the Director to control the use of the roadways surrounding the Capitol Building to meet the State's needs.

The proposed legislation consists of a new section within Idaho Code title 67, chapter 16, which governs the Idaho State Capitol Building and its grounds. Idaho Code section 67-1601 expresses the findings and purposes of the chapter:

> (1) The legislature and governor of the state of Idaho find that:
> (a) The Idaho state capitol building, hereafter referred to as the capitol building, located at the seat of government, in Boise City, Ada County, is a public monument representing the spirit of Idaho's citizens, a symbol of Idaho's sovereignty and one of Idaho's most renowned landmarks.
> (b) The capitol building is also one of the most vital and preeminent public buildings in Idaho, wherein the legislative department and a majority of the elected executive department officers maintain their offices and perform their constitutionally prescribed duties.

> (c) The maintenance and preservation of the capitol building and its grounds, including its historical character and architectural uniqueness, is of vital public interest and concern.
> (d) The existing statutes do not fully and completely address the use, control, security, operation, maintenance, historical character and architectural uniqueness of the capitol building and its grounds.
> (2) It is declared that the purposes of this chapter are:
> (a) To establish a statute to comprehensively govern all aspects of the use, control, security, operation, and maintenance of the capitol building and its grounds.
> (b) To ensure that the historical character and architectural integrity of the capitol building and its grounds be preserved and promoted.
> (c) To promote cooperation between the public and private sectors to fund necessary enhancements to and the preservation of the capitol building and its grounds in all respects and particularly its historical character and architectural integrity.

Codifying the proposed legislation within Idaho Code title 67, chapter 16 indicates that the proposal to grant the Director authority over the use and closure of the roadways surrounding the Capitol Building is based on the same findings as set forth in Idaho Code section 67-1601. Further, codifying this proposed legislation within Idaho Code title 67, chapter 16 indicates that the needs of the State concerning the operation, security, and maintenance of the Capitol Building extend to the use and closure of the roadways adjoining the Capitol Building.

The roadways surrounding the Capitol Building are within the jurisdiction of the Ada County Highway District. Idaho Code sections 40-1310 and 50-1330 provide exclusive jurisdiction and authority over such roadways to the highway district. The proposed legislation is drafted to supersede these sections and any similar provisions.

The highway district is a body corporate and politic and was granted its authority by the Legislature. Idaho Code § 40-1307. The Legislature can modify the authority of highway districts by statute. As

drafted, the proposed legislation grants authority to the Director to control use of the roadways notwithstanding the exclusive authority over the roadways given to the highway district by other provisions in Idaho Code.

The authority granted to the Director may be limited for a particular circumstance by existing contracts, including easements applying to the roadways. *See* U.S. Const. art. I, § 10; Idaho Const. art. I, § 16. This limitation is not a flaw in the legislation and should not prevent its enactment because the limitation is fact dependent and not easily addressed in statute. Whether an existing contract is impacted by the Director's authority must be addressed on a case-by-case basis.

I hope this information is helpful to you.

Sincerely,

BRIAN KANE
Chief Deputy

March 7, 2022

The Honorable Lauren Necochea
Idaho House of Representatives
Idaho State Capitol
700 W. Jefferson Street
Boise, ID 83702
VIA EMAIL: lnecochea@house.idaho.gov

Re: House Bill No. 675

Dear Representative Necochea,

This letter is in response to your inquiry concerning House Bill No. 675, amending Idaho Code section 18-1506B to make certain procedures to "change or affirm" a child's perception of his or her sex a felony.

BRIEF ANSWER

If passed into law, the section is likely to be challenged in court on equal protection and due process grounds. The outcome of such litigation cannot be accurately predicted.

ANALYSIS

The proposed amendment provides that it will be a felony to engage in certain medical procedures or treatments "for the purpose of attempting to change or affirm the child's perception of the child's sex if that perception is inconsistent with the child's biological sex." The legislation includes a general exception for medical necessity (but excludes "attempting to change or affirm the child's perception of the child's sex if that perception is inconsistent with the child's biological sex" as a medical necessity), and a specific exception for treatment of "medically verifiable genetic disorder[s] of sex development."

The likely challenge to the statute would be an assertion of the constitutional rights regarding parental autonomy and equal protection. The Fourteenth Amendment protects the right to "marry, establish a

home and bring up children." Obergefell v. Hodges, 576 U.S. 644, 668 (2015). "Parents have an interest in controlling the education and upbringing of their children" to whom they have demonstrated commitment "through the assumption of personal, financial, or custodial responsibility" sufficient to "give the natural parent a stake in the relationship with the child rising to the level of a liberty interest." Hodgson v. Minnesota, 497 U.S. 417, 445–46 (1990). In addition, "the family has a privacy interest in the upbringing and education of children and the intimacies of the marital relationship which is protected by the Constitution against undue state interference." Id. at 446.

However, these rights are not always beyond the state to control or regulate, so long as the state has a sufficient interest. "Protecting the best interests of children is a compelling state interest sufficient to warrant certain limits on their parents' fundamental constitutional rights when those limits are necessary to protect the children's best interests." Firmage v. Snow, 158 Idaho 343, 350–51, 347 P.3d 191, 198–99 (2015). See also Hodgson, 497 U.S. at 444 ("The State has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely."). Furthermore, states have "wide discretion to pass legislation in areas where there is medical and scientific uncertainty." Gonzales v. Carhart, 550 U.S. 124, 163 (2007).

If challenged under the Equal Protection Clause, the proposed legislation will be subjected to heightened scrutiny from the court because the statute treats transgender individuals differently than others who have "medically verifiable genetic disorder[s]." "While not specifically stating that transgender individuals constitute a quasi-suspect class, the Ninth Circuit has also held that heightened scrutiny applies if a law or policy treats transgender persons in a less favorable way than all others. Karnoski v. Trump, 926 F.3d 1180, 1201 (9th Cir. 2019)." Hecox v. Little, 479 F. Supp. 3d 930, 973–74 (D. Idaho 2020). The effect of this heightened scrutiny is that a reviewing court will not give the normal deference to the state's goals and means of accomplishing them but will require the state to prove that "the policy 'significantly furthers' the government's important interests, and that is not a trivial burden." Karnoski, 926 F.3d at 1202.

Given the lack of application of these general principles to the specific issue at hand, it is not clear whether a legal challenge to this statute, if enacted, would succeed. Heightened scrutiny would increase the difficulty of defending the proposed statute. Litigation at the trial court level (Federal district court) has succeeded in enjoining enforcement of legislation on related issues. It will be for the courts to weigh the evidence and determine whether, in light of contrary expert opinion, the state can meet its burden of heightened scrutiny.

ADDITIONAL CONSIDERATIONS

The proposed legislation includes a severability clause, meaning that if the State may not establish a sufficient interest as to *all* of the banned procedures, it may be able to establish such an interest as to *some* of the procedures.

You also note that the United States Department of Health and Human Services, Office for Civil Rights, has issued a notice and guidance to provide "additional information on federal civil rights protections and federal health privacy laws that apply to gender affirming care." The guidance states that "federally-funded covered entities restricting an individual's ability to receive medically necessary care, including gender-affirming care, from their health care provider solely on the basis of their sex assigned at birth or gender identity likely violates Section 1557" of the Affordable Care Act. 42 U.S.C. 18116. It also states that "[g]ender dysphoria may, in some cases, qualify as a disability" under the Americans with Disabilities Act such that "[r]estrictions that prevent otherwise qualified individuals from receiving medically necessary care on the basis of their gender dysphoria, gender dysphoria diagnosis, or perception of gender dysphoria may" violate that Act. The guidance's use of the terms "likely" and "may," as well as the disclaimer that the guidance lacks any force or effect of law, suggests uncertainty in the outcome of litigation over these issues, but also demonstrates that litigation is almost certain. If these federal statutes indeed require that sex change or affirmation procedures and therapy are required under federal statutes, it is likely that such preempts any state law to the contrary. Kansas v. Garcia, 140 S. Ct. 791, 801 (2020) ("it has long been established that preemption may also occur by virtue of restrictions or rights that are inferred from statutory law").

I hope you find this analysis useful. Should you have any additional questions, please feel free to contact our office.

Sincerely,

MARK A. KUBINSKI
Deputy Attorney General
Chief, Criminal Law Division

March 28, 2022

The Honorable Wendy Horman
Idaho House of Representatives
Idaho State Capitol
P.O. Box 83720
Boise, Idaho 83720
VIA EMAIL: wendyhorman@house.idaho.gov

Re: Senate Bill No. 1309

Dear Representative Horman:

You asked whether Senate Bill No. 1309 ("S.B. 1309") would allow certain family members of a rapist who impregnated a woman to bring a civil cause of action against an abortion provider who performed an abortion after a fetal heartbeat was detected. To answer this question, I will assume that the civil enforcement mechanism would not be barred by any constitutional doctrine.

In short, if a woman or her parent or guardian did not report the rape to law enforcement and provide a copy of the report to the physician and the physician performed an abortion after a fetal heartbeat was detected and there was no medical emergency, a rapist's family members could likely bring a civil cause of action against the provider for performing the abortion based on the text of S.B. 1309.

Section 6 of S.B. 1309 would generally allow "the father of the preborn child, a grandparent of the preborn child, a sibling of the preborn child, or an aunt or uncle of the preborn child" to bring a civil action for actual and statutory damages and attorney's fees and costs against "the medical professionals who knowingly or recklessly attempted, performed, or induced the abortion in violation of this chapter."

While proposed section 18-8807(3) would provide "[n]otwithstanding any other provision of law, a civil cause of action under this section may not be brought by a person who impregnated the mother through an act of rape or incest," it says nothing about the

rapist's family members. Thus, it is likely that a court would conclude that proposed section 18-8807(3)'s exclusion is limited to the "person who impregnated the mother through an act of rape" and turn to asking whether the abortion was "in violation of this chapter" to determine whether a rapist's family members could bring suit under S.B. 1309's civil enforcement mechanism.

Under S.B. 1309, amended chapter 88, title 18, Idaho Code, would prohibit the performance of an abortion "when a fetal heartbeat has been detected, except in the case of a medical emergency, in the case of rape as defined in section 18-6101, Idaho Code, or in the case of incest as described in section 18-6602, Idaho Code." Section 3, S.B. 1309.[1] Idaho Code section 18-6101 is the criminal definition of rape in the State of Idaho.[2] If only this statutory definition were to apply, a rapist's family members could not recover if the man were to impregnate a woman in the case of rape because such an abortion would not be prohibited under S.B. 1309. However, S.B. 1309 places the following additional limitations on the exemption for an abortion performed in the case of rape:

> In the case of rape or incest
>
> (a) If the woman is not a minor or subject to guardianship, then, prior to the performance of the abortion, the woman has reported the act of rape or incest to a law enforcement agency and provided a copy of such report to the physician who is to perform the abortion; or
> (b) If the woman is a minor or subject to guardianship, then, prior to the performance of the abortion, the woman or her parent or guardian has reported the act of rape or incest to a law enforcement agency or child protective services and a copy of such report have been provided to the physician who is to perform the abortion.

Section 3, S.B. 1309. Thus, if either the woman, her parent, or guardian did not report the rape to law enforcement (or child protective services where applicable) or did not provide the report to the physician, the abortion would not fall within the exception for rape created by S.B.

1309. Under those circumstances, the rapist's family members could likely bring a civil cause of action against the provider based on the text of S.B. 1309.

I hope this answers your question.

Sincerely,

BRIAN KANE
Chief Deputy

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[1] Existing Idaho Code section 18-8703 [18-8803] requires any person who intends to perform an abortion to test for a fetal heartbeat. While Idaho Code section 18-8706 [18-8806] provides that this provision will only become effective 30 days after the issuance of the judgment of in a U.S. appellate court case in which the court upholds a ban on abortion where a fetal heartbeat is detected on the grounds that the ban does not violate the U.S. Constitution, S.B. 1309 would repeal this section. Section 5, S.B. 1309. This would likely cause a court to conclude that Idaho Code section 18-8703 [18-8803] became effective with the rest of S.B. 1309.

[2] 18-6101. RAPE DEFINED. Rape is defined as the penetration, however slight, of the oral, anal or vaginal opening with a penis accomplished under any one (1) of the following circumstances:

(1) Where the victim is under the age of sixteen (16) years, the perpetrator is eighteen (18) years of age or older, and the victim is not lawfully married to the perpetrator.

(2) Where the victim is sixteen (16) or seventeen (17) years of age, the perpetrator is three (3) years or more older than the victim, and the victim is not lawfully married to the perpetrator.

(3) Where the victim is incapable, through any unsoundness of mind, due to any cause including, but not limited to, mental illness, mental disability or developmental disability, whether temporary or permanent, of giving legal consent.

(4) Where the victim resists but the resistance is overcome by force or violence.

(5) Where the victim is prevented from resistance by the infliction, attempted infliction, or threatened infliction of bodily harm, accompanied by apparent power of execution; or is unable to resist due to any intoxicating, narcotic, or anesthetic substance.

(6) Where the victim is prevented from resistance due to an objectively reasonable belief that resistance would be futile or that

resistance would result in force or violence beyond that necessary to accomplish the prohibited contact.

(7) Where the victim is at the time unconscious of the nature of the act. As used in this section, "unconscious of the nature of the act" means incapable of resisting because the victim meets one (1) of the following conditions:

(a) Was unconscious or asleep;

(b) Was not aware, knowing, perceiving, or cognizant that the act occurred.

(8) Where the victim submits under the belief that the person committing the act is the victim's spouse, and the belief is induced by artifice, pretense or concealment practiced by the accused, with intent to induce such belief.

(9) Where the victim submits under the belief that the person committing the act is someone other than the accused, and the belief is induced by artifice, pretense or concealment practiced by the accused, with the intent to induce such belief.

(10) Where the victim submits under the belief, instilled by the actor, that if the victim does not submit, the actor will cause physical harm to some person in the future; or cause damage to property; or engage in other conduct constituting a crime; or accuse any person of a crime or cause criminal charges to be instituted against the victim; or expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt or ridicule.

The provisions of subsections (1) and (2) of this section shall not affect the age requirements in any other provision of law, unless otherwise provided in any such law. Further, for the purposes of subsection (2) of this section, in determining whether the perpetrator is three (3) years or more older than the victim, the difference in age shall be measured from the date of birth of the perpetrator to the date of birth of the victim.

Males and females are both capable of committing the crime of rape as defined in this section.

June 10, 2022

The Honorable Ben Adams
Idaho House of Representatives
Idaho State Capitol
P.O. Box 83720
Boise, ID 83720-0081
VIA EMAIL: BAdams@house.idaho.gov

Re: Requested Analysis Regarding Invasion

Dear Representative Adams:

This letter is in response to your recent email in which you ask whether the situation on the southern border of the U.S. meets the constitutional definition of "invasion" as defined in article IV, section 4 of the U.S. Constitution and, if so, whether the federal government has failed to uphold its obligations to protect our state from such an invasion.

The invasion clause of the U.S. constitution states:

> The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

U.S. Const. art. IV, § 4. Within your inquiry, article I, section 8 of the United States Constitution is also referenced. Article I sets forth the powers and duties of Congress, with article I, section 8 granting Congress the power to: "[t]o provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions." Congress exercises this discretion in tandem with the President of the United States (article II, section 2 (commander in chief)). Similarly, under Idaho's Constitution, article IV, section 4 authorizes that:

> The governor shall be commander-in-chief of the military forces of the state, except when they shall be called into actual service of the United States. He shall have power to call the militia to execute the laws, to suppress insurrection, or to repel invasion.

These provisions provide specific authority and discretion to Congress, the President, and the Governor with regard to "invasion." This office is unaware of any legal authority to override the constitutional authority of these entities through a legal definition of "invasion." As outlined below, generally courts have narrowly interpreted the definition of invasion to include "hostilities," and deferred to federal discretion and authority.

At various times, suit has been brought against the federal government for a state's perceived failure of the federal government to protect the state from invasion—specifically the invasion of illegal immigrants. Thus far, no such case has been successful. Below is a brief summary of some of the relevant cases and their findings.

Padavan v. United States, 82 F.3d 23 (2d Cir. 1996):

Seven New York State Senators and two counties brought action against United States seeking compensation for costs associated with education, confinement, health, and welfare of legal and illegal aliens. The state claimed that the federal government violated the invasion clause by failing to provide protection from influx of legal and illegal aliens. The court found this claim to be nonjusticiable. Padavan at 28. Specifically, the court stated:

> In order for a state to be afforded the protections of the Invasion Clause, it must be exposed to armed hostility from another political entity, such as another state or foreign country that is intending to overthrow the state's government. *See The Federalist* No. 43 (James Madison) (stating that the reason for the Invasion Clause is to protect the states from "foreign hostility" and from "ambitious or vindictive enterprises" on the part of other states or foreign nations).

Id. The court further stated that even if the claim were justiciable, it "must be dismissed for failure to state a claim upon which relief can be granted." Id.

People of Colo. ex rel. Suthers v. Gonzales, 558 F. Supp. 2d 1158 (D. Colo. 2007)

The Colorado state attorney general brought action against the United States, United States Attorney General, and Secretary of Department of Homeland Security (DHS) to demand enforcement of federal immigration laws by the federal government. The court echoed Padavan and held the invasion claim to be nonjusticiable under the political question doctrine. Suthers at 1162. The court further held that, under the circumstances, the state lacked standing to bring suit against the federal government because the injury was not particularized, there was no proof of causation, and that the claim was non-redressable.

Chiles v. United States, 69 F.3d 1094 (11th Cir. 1995)

State and local Florida officials filed suit against United States and federal officials alleging that United States had improperly failed to enforce immigration policies, thereby causing the state to incur disproportionate and unfair expenses in educating and providing other public services to aliens. The Court again held the invasion claim to be nonjusticiable under the political question doctrine. Chiles at 1097.

Conclusion

While the courts have not specifically answered the question as to whether illegal immigration amounts to an invasion under the invasion clause of the U.S. Constitution, the courts have made clear that a state's attempt to bring suit against the federal government for its failure to quell illegal immigration will most likely be struck down due to the nonjusticiable nature of the issue.

I hope you find this analysis helpful.

Sincerely,

BRIAN KANE
Chief Deputy

June 28, 2022

The Honorable Doug Okuniewicz
Idaho House of Representatives
Idaho State Capitol
700 W. Jefferson Street
Boise, ID 83702
VIA EMAIL: DougO@house.idaho.gov

Re: Amendment to Article III, Section 1 of Idaho's Constitution

Dear Representative Okuniewicz:

The proposed Joint Resolution (DRKMF469) would propose an amendment to article III, section 1 of Idaho's Constitution. It would number the existing paragraphs in that section and add a new subsection at the end of the existing text that would require initiative proponents to collect signatures from at least 6% of the registered voters in each legislative district before the initiative petition could be placed on the ballot.

The new text, which would be designated subsection (4), would read as follows:

> Before any initiative petition may be submitted to the vote of the people, there must be affixed thereto the signatures of legal voters from each legislative district equal in number to no less than six percent of the qualified voters at the time of the last general election.

DRKMF469, Section 1, ll. 29-33. Should both parts of the Legislature concur in the proposed Joint Resolution, it would need to be submitted to and ratified by the electors of the state at the next general election to amend Idaho's Constitution. *See* Idaho Const. art. XX, § 1.

In determining the validity of constitutional amendments, a "court will presume that the Legislature acted regularly in submitting the same to the voters of the state and will uphold and sustain the validity

of such amendment, unless it appears that the same has not been submitted and adopted in accordance with the provisions of the Constitution of this state which regulates and controls the method and manner of amending such Constitution." Keenan v. Price, 68 Idaho 423, 433, 195 P.2d 662, 667 (1948).

After a constitutional amendment is adopted by the people, every presumption is construed in its favor: "[t]he question is not whether it is possible to condemn the amendment, but whether it is possible to uphold it, and we shall not condemn it unless in our judgment its nullity is manifest beyond a reasonable doubt." Id. Put differently, "every reasonable presumption, both of law and fact, is to be indulged in favor of the validity of an amendment to the Constitution when it is attacked *after its ratification by the people*." Id. at 434, 195 P.2d at 667 (emphasis in original). "The two important vital elements in any constitutional amendment, are, the assent of two-thirds of the legislature, and a majority of the popular vote." Id.

Should the proposed amendment be adopted by the people, there does not appear to be significant legal concern with a constitutional requirement that initiative proponents collect signatures from 6% of the registered voters in each legislative district in order to qualify for an initiative for the ballot.

The analysis that struck down Senate Bill 1110, which would have required initiative proponents to collect signatures from qualified electors in all legislative districts, is not applicable here. Senate Bill 1110 created a statute that, the Court concluded, failed to achieve the required compelling state interest and narrow tailoring to comply with Idaho's Constitution. Reclaim Idaho v. Denney, 169 Idaho 406, 497 P.3d 160, 184-191 (2021). The proposed Joint Resolution, if adopted, would amend the Constitution itself, making this analysis inapplicable.

If an argument were raised that the proposed Joint Resolution conflicts with a different provision of the Idaho Constitution, similar to the arguments made by Petitioner Gilmore in his challenge to SB 1110 that requiring signatures from 6% of voters in all legislative districts violates the Idaho Constitution's equal protection and suffrage guarantee clauses, a reviewing court would likely have to determine whether there is actually a conflict between the provisions, and if so,

how to reconcile the conflict in the interests of effectuating the people's intent. It is difficult to opine on such a hypothetical argument, but it seems likely that a court could either find that no conflict exists or that people's recently clearly expressed intent in adopting the proposed constitutional amendment justifies upholding it.

It is also unlikely that amending the Idaho Constitution to include the stated geographic distribution requirement would be found to violate the U.S. Constitution. The Ninth Circuit upheld a Nevada law requiring initiative and referendum petition proponents to obtain signatures from a number of registered voters equal to 10% of the votes cast in the previous general election in each of the State's congressional districts against an equal protection challenge. Angle v. Miller, 673 F.3d 1122, 1126, 1128–32 (9th Cir. 2012). The Tenth Circuit has similarly upheld a requirement that initiative proponents collect signatures from 2% of registered voters in each of Colorado's 35 senate districts. Semple v. Griswold, 934 F.3d 1134, 1141–42 (10th Cir. 2019).

While it does not appear that there are grounds for significant legal concern with the proposed Joint Resolution, it must be noted that the proposed text does appear to contain some potential for confusion with its use of both "legal voters" and "qualified voters." DRKMF469, Section 1, ll. 29-33. Neither "legal voters" nor "qualified voters" is defined, but it appears that they are intended to have the same meaning. The existing text of article III, section 1, which would remain unchanged, uses the term "legal voters." A court could conclude that the two terms were intended to have different meanings if asked to interpret the provision because two different terms were used. Kirk v. Wescott, 160 Idaho 893, 902, 382 P.3d 342, 351 (2016) ("The difference in wording indicates a difference in meaning.") If the intent is for "qualified voters" to have the same meaning as "legal voters," I would suggest changing "qualified voters" to "legal voters" to avoid any potential for ambiguity.

I hope you find this analysis helpful.

Sincerely,

BRIAN KANE
Chief Deputy

July 15, 2022

The Honorable Steve Berch
Idaho House of Representatives
Idaho State Capitol
700 W. Jefferson
Boise, Idaho 83702
VIA EMAIL: sberch@house.idaho.gov

Re: Statutory Fee Limits

Dear Representative Berch:

You requested information about state statutes that limit the amount of fees a private individual may charge another person in a transaction. It is my understanding that your request is based, at least in part, on House Bill 442 ("H.B. 442"), which restricts cities and counties from enacting ordinances that limit the amount of fees, deposits, or rents a landlord may charge a tenant or prospective tenant.

Numerous Idaho statutes limit the amount *the state or other governmental agency* may charge a private party for application, admission, filing, processing, licensing, or other fees. Statutes restricting the amount a *private party* may charge *another private party* in connection with a transaction, however, are scarcer. In fact, statutes that speak to this issue do not usually specify a fee limit. Rather, the statutes limit the amount of fees to what is "reasonable and customary" for the type of fee charged.

For example, Idaho Code section 26-31-210 governs the costs associated with mortgage loan modifications. The law prohibits persons from charging application, rate-lock, commitment, cancellation, or other fees unless such fees are "reasonable and customary as to the type and amount of the fee charged."

Under Idaho Code section 15-5-314, guardians may charge estates reasonable fees and costs incurred in protection proceedings. Trustees, pursuant to Idaho Code section 45-1507, may recover from estates the trustees' reasonable fees incurred during foreclosures.

Idaho Code section 54-2027 concerns the duties and requirements of certified course providers who provide educational opportunities for real estate licensees and others. Course providers may charge a "reasonable course fee to nonaffiliated or nonmember licensees or unlicensed persons."

In the area of landlord-tenant law, Idaho Code section 55-2304 allows storage facilities to impose "a reasonable late [payment] fee" on renters who fail to pay rent or other charges due under their rental agreements. The statute specifies that $20.00 or 20% of the monthly rent, whichever is greater, is reasonable.

Finally, an example where the state prohibits a private party from charging certain fees is found in Idaho's Manufactured Home Residency Act. Idaho Code section 55-2007 prohibits landlords of manufactured home communities from charging their tenants entrance or exit fees. These are fees that landlords attempt to charge tenants when they place or remove their manufactured homes from leased lots.

This letter does not include an exhaustive list of statutes where Idaho has limited the amount of fees that private parties may charge others. Rather, it provides a sampling of such laws to give you a general idea of Idaho's regulation of fees.

If you have questions about this letter or need additional information, please call me at 208-334-4135 or email me at stephanie.guyon@ag.idaho.gov.

Sincerely,

STEPHANIE N. GUYON
Deputy Attorney General

July 15, 2022

The Honorable Colin Nash
Idaho State Representative
Idaho State Capitol
700 W. Jefferson Street
Boise, Idaho 83702
VIA EMAIL: cnash@house.idaho.gov

Re: Retroactive Application of Proposed ADU Legislation

Dear Representative Nash:

The Attorney General's Office received your request for an opinion as to whether legislation may retroactively prevent homeowner associations (HOAs) from enforcing existing covenants, conditions, or restrictions (CC&Rs) or restricted covenants that limit or prohibit accessory dwelling units (ADUs) on owner-occupied homesteads. Generally, CC&Rs and restricted covenants are considered contracts, and legislation that substantially impairs an existing contractual relationship may violate article I, section 16 of the Idaho Constitution.

The Legislature may adopt this limitation prospectively as to all *future* CC&Rs or restricted covenants. It is important to note, however, that this may cause confusion within subdivisions if some homes remain subject to previously existing CC&Rs or restricted covenants that prohibit ADUs while homes sold after the legislation's effective date are not subject to such restrictions.

Courts use "the federal framework and rules" to evaluate whether a legislative act violates article I, section 16. CDA Dairy Queen, Inc. v. State Ins. Fund, 154 Idaho 379, 387, 299 P.3d 186, 194 (2012). This determination requires an analysis of the following three factors: (1) whether the challenged legislative act operates "as a substantial impairment of a contractual relationship," (2) whether the challenged legislative act "serves an important public purpose," and (3) whether the challenged legislative act "is reasonable and necessary to advance that purpose." Id.

1. The proposed legislation operates as a substantial impairment of the existing contractual relationship between homeowners and their subdivision.

The proposed legislation operates as a substantial impairment of a contractual relationship if: (1) a contractual agreement regarding the specific terms at issue exist, (2) the challenged legislative action impairs that relationship, and (3) the impairment is substantial. Id. at 387-88, 299 P.3d at 194-95.

a. CC&Rs constitute a contractual agreement that implicate the specific term at issue in this matter.

CC&Rs are contracts that define the rights and obligations of the parties. See generally Fletcher v. Lone Mountain Road Ass'n, 165 Idaho 780, 784, 452 P.3d 802, 806 (2019) (explaining that the Idaho Supreme Court recognizes CC&Rs as contracts and applies contract principles when interpreting them). CC&Rs govern how property owners may use their property, including whether they may erect ADUs—the term at issue under the proposed legislation.

b. The proposed legislation impairs the parties' contractual relationship under their current CC&Rs.

To impair a contract is to diminish its value. See CDA Dairy Queen, Inc., 154 Idaho at 388, 299 P.3d at 195. The proposed legislation prevents HOAs from restricting property owners' erection of ADUs on their property. Accordingly, the proposed legislation impairs the parties' contractual relationship.

c. The impairment the proposed legislation places on the parties' contractual relationship under their current CC&Rs is substantial.

In determining whether a legislation action constitutes a substantial impairment to a contract, courts consider multiple factors, including "whether the impairment eliminates an important contractual right, defeats an expectation of the parties, or creates a significant financial hardship for one party." Id. at 389, 299 P.3d at 196. The proposed legislation completely eliminates a HOAs ability to regulate

ADUs. Also, allowing an unfettered construction and placement of ADUs may negatively impact other homeowners' property values. The presence of these two factors likely renders the proposed legislation as imposing a substantial impairment on the parties' existing contractual relationship.

2. The proposed legislation may serve an important public purpose.

To survive a challenge under article I, section 16, of the Idaho Constitution, a legislative action that substantially impairs a contract must have a "'significant and legitimate public purpose'" to ensure that it is an exercise of the state's police power and not merely "'providing a benefit to special interests.'" Id. at 390, 299 P.3d at 197 (quoting RUI One Corp. v. Berkley, 371 F.3d 1137, 1147 (9th Cir. 2004)). ADUs may promote a number of important public purposes, including, but not limited to: (a) providing communities with more affordable housing options, (b) providing seniors with additional rental income or living quarters for caregivers, (c) enabling homeowners to provide affordable and independent housing for their elderly parents or grown children, (d) encouraging neighborhood infill and reducing urban sprawl, and (e) providing office space for remote workers. Similarly, such legislation could also serve the important public purpose of protecting private property rights as guaranteed by the Idaho and United States Constitutions.

3. The proposed legislation may be reasonable or necessary to advance an important public purpose.

Prohibiting CC&Rs or restrictive covenants that forbid ADUs promotes the public purposes identified in the preceding paragraph. Completely disallowing HOA oversight as to the placement and design of ADUs, however, may make the proposed legislation appear less reasonable.

Idaho Code section 55-115(4), for example, prohibits HOAs from enforcing CC&Rs that prevent property owners from installing solar panels. Unlike the proposed legislation, however, the statute allows HOAs to determine the location of the panels' placement and ensure the panels are installed safely and securely. Including similar location and safe construction provisions in your proposed legislation

may help mitigate HOAs' and neighbors' anxieties about property owners potentially building unsafe ADUs or designing ADUs that fail to consider a community's overall character.

I hope this information is helpful to you. If you have additional questions or wish to discuss this issue further, please call me at 208-334-4135 or email me at stephanie.guyon@ag.idaho.gov.

Sincerely,

STEPHANIE N. GUYON
Deputy Attorney General

July 25, 2022

The Honorable Colin Nash
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Idaho State Capitol
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Boise, Idaho 83720
VIA EMAIL: cnash@house.idaho.gov

Re: Constitutionality of Senate Bill 1230

Dear Representative Nash:

You requested an analysis addressing the constitutionality of Senate Bill 1230. This legislation would establish an open non-partisan primary for county, legislative, state and federal offices, other than president. It would replace the current political party primaries for these offices. The top four vote getters in the nonpartisan primary would be nominated for each respective office and placed the general election ballot.

In brief, while ranked voting is constitutionally permissible, Senate Bill 1230 would likely be found to violate a party's right to freedom of association under the First Amendment.

A. Ranked Choice Voting is Constitutional.

Ranked-choice voting systems are constitutional. Dudum v. Arntz, 640 F.3d 1098 (9th Cir. 2011). The Ninth Circuit Court of Appeals has noted that ranked-choice voting systems have been used in the United States and elsewhere since the 1870s. Id. at 1103. Under this background, the Ninth Circuit recognizes that "States retain the power to regulate their own elections." Id. at 1106 (citing Burdick v. Takushi, 504 U.S. 428, 433, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992). Ranked-choice system voting has not been found to severely burden voters' constitutional rights such that it would trigger strict scrutiny. Id. at 1107-1111; Hagopian v. Dunlap, 480 F. Supp. 3dd 288, 297 (D. Maine 2020). The state's important regulatory interests in conducting elections has been found to be "more than substantial enough to justify the minimal

at best burdens imposed" in a ranked-choice system. Dudum, 640 F.3d at 1114.

The Court in Dudum, however, was not addressing the issue as to whether a state-mandated open non-partisan primary violated the First Amendment. Instead, the Plaintiff in Dudum was asking the court to choose between electoral systems (i.e., between restricted IRV, plurality voting, or two round voting systems). Id. at 1115. Accordingly, the Court in Dudum determined that in the absence of truly serious burdens on voting rights, "it is the job of democratically-elected representatives to weigh the pros and cons of various election systems." Id. The United States District Court for the District of Idaho has already addressed this issue and determined that an open non-partisan primary violates the First Amendment.

B. A state-mandated open non-partisan primary likely violates the First Amendment.

Idaho previously used an open primary to select candidates for the general election. This practice was held to violate the Idaho Republican Party's right to freedom of association. Idaho Republican Party v. Ysursa, 765 F. Supp. 2d 1266 (D. Idaho 2011).

The First Amendment protects the freedom of association, which protects the freedom to join together in furtherance of common political beliefs. Id. at 1269. "This political freedom of association (and right to exclude) is most critically manifested in the political party's process of selecting its nominees." Id. (citing California Democratic Party v. Jones, 530 U.S. 567, 573–74, 120 S.Ct. 2402, 147 L.Ed.2d 502 (2000)).

In June of 2007, the Idaho Republican Party State Central Committee adopted a closed Republican party primary rule and asserted that Idaho's then open-primary statutes violated its freedom of association. Id. at 1270. The Court noted that the open primary system would force the Idaho Republican Party to open-up its candidate-selection process to persons wholly unaffiliated with the Party, which, the court found, imposed a severe burden on the Idaho Republican Party and was not narrowly tailored to serve a compelling

state interest, making the state-mandated open primary unconstitutional. Id. at 1276.

The open primary changes contained within Senate Bill 1230 run squarely counter to Ysursa and would likely be found to violate the First Amendment, since political parties would no longer be able to control their candidates.

I hope you find this analysis helpful.

Sincerely,

BRIAN KANE
Chief Deputy

September 2, 2022

The Honorable Christy Zito
Idaho State Senate
Idaho State Capitol
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VIA EMAIL: czito@senate.idaho.gov

Re: Emergency Protection Orders and Article 1, Section 11 of the Idaho Constitution

Dear Senator Zito:

This letter is in response to your August 11, 2022 email to the Attorney General's Office.

QUESTIONS PRESENTED

Article I, section 11 of the Idaho Constitution provides that, "Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony." (Hereinafter "Article I.") Your questions[1] are:

1. Does Idaho law define what firearm "confiscation" is? Do the Idaho courts define confiscation, and/or confiscation of firearms?

2. Who has the power to confiscate firearms?

3. Would "Emergency Protection Orders," more commonly called "Red Flag Laws," as they are typically structured, be unconstitutional in the state of Idaho?

4. If the Idaho Legislature passed a law which said the police could not confiscate firearms other than those used in the commission of a felony, and that police could order the homeowner to give the firearms to someone outside the home, such as a family member, would that still be considered "confiscation?"

ANSWERS IN BRIEF

1. The Idaho Code and Idaho caselaw do not directly define firearm "confiscation." However, the commonly understood meaning of "confiscation" is when a private citizen's property is seized, forfeited, or deprived by court order or authority of law.

2. The government's power to confiscate firearms is firmly limited by Article I, with a few exceptions. Under Article I and its enabling statute, a court may order law enforcement to confiscate firearms that are actually used in the commission of a felony. Additionally, law enforcement may seize weapons pursuant to exceptions that existed at the time Article I was amended to include the "confiscation" language. (For example, firearms may be seized as part of an investigatory search and seizure pursuant to a warrant.)

3. A typical Red Flag Law would contravene Article I and not fall within any exception to that provision. As such, it is likely that a court would find such a law to be unconstitutional.

4. A modified Red Flag Law, creating a confiscatory system where firearms are surrendered to third parties, would also likely be found to be unconstitutional by a court. Article I broadly prohibits "*any* law permit[ting] the confiscation of firearms," regardless of who ultimately receives the weapon. Idaho Const. art. I, § 11 (emphasis added). Moreover, Idaho courts disfavor legislative attempts to indirectly accomplish what would be unconstitutional if done directly. Because a modified Red Flag Law would appear to be an attempt to evade Article I's prohibition on firearm confiscation, it would likely be found unconstitutional by a court.

ANALYSIS

Article I, section 11 of the Idaho Constitution, as it was originally adopted, read as follows:

> § 11. Right to bear arms. —The people have the right to bear arms for their security and defense; but the legislature shall regulate the exercise of this right by law.

In 1978, Idaho's citizens voted to amend this text to state the following:

> SECTION 11. RIGHT TO KEEP AND BEAR ARMS. The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. *Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony.*

Idaho Const. art. I, § 11(emphasis added). Your questions pertain to the last sentence and firearm "confiscation"—what it is, who can do it, and how its prohibition would interact with two hypothetical Red Flag Laws. In particular, you have asked whether a typical Red Flag Law (where police confiscate firearms), or a modified Red Flag Law (in which firearms are ordered to be turned over to third-party citizens), would pass constitutional muster. Those questions will be addressed in turn.

1. The Definition of Firearm "Confiscation"

The Idaho Code does not expressly define "confiscation." Nor do any Idaho cases appear to define it. When Idaho's courts attempt to determine a word's meaning, they start "with the literal language" of the text, giving words their plain, usual, and ordinary meanings." State v. Clark, 168 Idaho 503, 508, 484 P.3d 187, 192 (2021). To do so, courts "begin[] with the dictionary definition of disputed words or phrases" at issue. Id.

There is no doubt that "the term 'confiscation' is a word capable of being used in many senses." Gulf Land Co. v. Atl. Ref. Co., 134 Tex. 59, 70, 131 S.W.2d 73, 80 (1939). However, a review of its dictionary definitions shows it has a generally-understood, plain, and ordinary meaning. Black's Law Dictionary defines "confiscation" as a "Seizure of property for the public treasury" or a "Seizure of property by actual or supposed authority." CONFISCATION, Black's Law Dictionary (11th ed. 2019). Per Merriam-Webster's dictionary, "Confiscated" as an adjective refers to property "appropriated by the government" or forfeited; or when one is "deprived of property by confiscation." CONFISCATED, Merriam-Webster (available at https://www.merriam-webster.com/dictionary/confiscate, last accessed August 17, 2022). "Confiscate," used as a verb, means "to seize as forfeited to the public treasury" or "to seize by or as if by authority." Id.

While no Idaho court has addressed the meaning of "confiscation" in the context of firearm confiscation, at least one other court has. The case most on point is Dudek v. Nassau Cnty. Sheriff's Dep't, 991 F. Supp. 2d 402 (E.D.N.Y. 2013). There, a federal district court in New York noted that it "perceive[d] no difference between a temporary order of protection that confiscates firearms *and one that directs their surrender.*" Id. at 406, n.4 (emphasis added). The court thus concluded that, "*[t]o direct the surrender of property is to confiscate,* or 'seize (property) by authority of law.'" Id. (emphasis added) (quoting Black's Law Dictionary 340 (9th ed. 2009)).

Other courts addressing "confiscation" have defined it in roughly similar terms. See, e.g., Gulf Land Co. v. Atl. Ref. Co., 134 Tex. at 70, 131 S.W.2d at 80 (defining "confiscation" broadly, finding it "impossible to give a general definition that can be given in all instances," but concluding that there it referred "to depriving the owner or lessee of a fair chance to recover the oil and gas in or under his land"); French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 59-60, 242 N.E.2d 704 (1968) (remarking that a "true, outright confiscation" would be "an actual divesting of ownership of a contract right," and citing legislative history equating "'confiscation' and 'taking'" with "'expropriation and nationalization'"); Texaco, Inc. v. R.R. Comm'n of Texas, 716 S.W.2d 138, 140 (Tex. App. 1986) (approvingly citing a definition of "confiscation" as "depriving the owner or lessee of a fair chance to recover the oil and gas in or under his land, or their equivalents in kind").

From all of these definitions, and the foregoing cases, "confiscation" has a plain, usual, and ordinary meaning: it broadly refers to when a private citizen's property is seized, forfeited, or deprived by court order or authority of law. That definition comports with the text of Article I, section 11, and harmonizes with how "confiscation" is used throughout the Idaho Code. See, e.g., Idaho Code §§ 36-1304 (allowing magistrates to order unlawfully taken wildlife "confiscated or sold by the director and the proceeds deposited in the fish and game account" or "order such confiscated wildlife given to a designated tax-supported, nonprofit or charitable institution or indigent person); 37-118 (allowing courts to order adulterated or misbranded products to be "confiscated and disposed of by destruction or sale"); 63-2513 (allowing the State Tax Commission to direct its employees or peace officers to confiscate vehicles used in violation of cigarette and tobaccos products tax laws).

2. The Power to Confiscate Firearms and Who May Use that Power

Your second question concerns the power to confiscate firearms and who may do so in Idaho. As noted above, Idaho's Constitution constrains the government's ability to confiscate firearms. That follows from the plain text of Article I, section 11, which prohibits "any law permit[ting] the confiscation of firearms." Idaho Const. art. I, § 11.

There is one explicit exception to this general rule. Per Article I, courts may order law enforcement to confiscate firearms that are actually used in the commission of a felony. In addition, firearms may be seized by law enforcement under doctrines that existed before the 1978 amendment to Article I. These exceptions are as follows.

a. Firearms Actually Used in the Commission of a Felony

Article I itself lays out the primary exception to its general rule. It provides that, "Nor shall any law permit the confiscation of firearms, *except those actually used in the commission of a felony*." Idaho Const. art. I, § 11 (emphasis added).

Pursuant to this exception, whenever "any person is convicted of a felony" in Idaho, courts may order the confiscation of firearms that are found in the felon's "possession or under his control at the time of arrest." Idaho Code § 19-3807(2). There are "confiscation proceedings" for doing so; those can be found in section 19-3807, the enabling statute for Article I. See State v. Money, 109 Idaho 757, 759, 710 P.2d 667, 669 (Ct. App. 1985) (describing a confiscation proceeding).

Following a confiscation proceeding, which may or may not include an evidentiary hearing, courts that conclude the firearm "was in the defendant's possession and control at the time of arrest … may direct the delivery" of the firearm "to the enforcement agency" that arrested the individual. Idaho Code § 19-3807(6). At that point, law enforcement may use the firearm "for official … duty use," sell it, convert it to public agency ownership for law enforcement purposes, or it "may be scrapped by melting or other method[s] of destruction." Idaho Code § 55-403(4).

In sum, if the "threshold requirement" of Article I and section 19-3807 is met, and a firearm is used in the commission of a felony, then a court may order it confiscated by law enforcement. State v. Peterson, 148 Idaho 593, 597, 226 P.3d 535, 539 (2010) (vacating a confiscation order where that requirement was not met, because "Peterson was therefore not properly convicted of a felony").

b. Preexisting Exceptions Allowing Firearm Seizure

Absent the explicit exception in Article I, law enforcement have had the ability to seize weapons during criminal investigations under legal doctrines that preceded Article I's 1978 amendment. This Office addressed the issue in a 1979 opinion letter responding to Gordon W. Petrie's questions in the wake of the Article I amendment. 1979 Idaho Op. Att'y Gen. 31 (1979) (hereinafter "1979 Opinion"). Mr. Petrie asked "[w]hat effect, if any, will the November, 1978 constitutional amendment to [Article I] (the right to keep and bear arms amendment) have on state laws prohibiting the carrying of concealed weapons and the confiscation of weapons which may or may not be used during a crime but which are seized by police pursuant to an arrest?" Id. at * 1.

In brief, this Office responded that the adoption of the 1978 amendment would essentially not affect either existing concealed-carry laws or law enforcement searches. With respect to concealed-carry laws, amended Article I did not prohibit "specifically approved laws governing the carrying of concealed weapons," and it was reasonable to conclude that legislators and voters intended preexisting concealed-carry laws to remain in effect. Id. at **1-2. With respect to law enforcement searches, this Office drew a distinction between "'seizure' by police officers of firearms when the defendant is arrested and the 'confiscation' of those firearms upon court order after a felony conviction has been entered." Id. at *2. And since Article I "as amended, refers exclusively to *confiscation*, it is reasonable to assume that the legislators did not intend to alter any statute or court decision pertinent to the law of *seizure* of firearms during a search incident to an arrest." Id. (emphasis added).

Notwithstanding Article I's broad prohibition on firearm confiscation, there are two bases to conclude that law enforcement maintains authority to seize firearms while investigating a crime, pursuant to established Fourth Amendment law. *First*, the voters and the Legislature are presumed to have had the existing law in mind at the time of the 1978 amendment. See Idaho Mut. Ben. Ass'n v. Robison, 65 Idaho 793, 800, 154 P.2d 156, 159 (1944) (holding the "state of the law at the time [the people] vote upon the proposed constitutional amendment is that which is controlling and must be considered as that which the people had in mind," and "[c]onstitutional provisions must be read in the light of the law existing at the time of the adoption of the constitution (amendment)"). The law that existed in 1978 allowed officers to seize firearms for a variety of reasons under the Fourth Amendment—for example, if the firearms were found during a search incident to an arrest. See, e.g., State v. Polson, 81 Idaho 147, 153, 339 P.2d 510, 513 (1959). Preexisting law also included Idaho's civil forfeiture laws, which were enacted in 1974. Idaho Code § 37-2744(a)(9). There is no reason to think the voters or the Legislature intended to disrupt either of these doctrines, or any other existing bodies of law, without explicitly saying so.

Second, as the 1979 Opinion noted, while there may be (and often is) some overlap between "seizures" and "confiscations," the two terms still carry distinct meanings. A confiscation order may or may not

encompass a prior investigative seizure. See 1979 Idaho Op. Att'y Gen. 31 at *2. Beyond that, "seizure" is a term of art under the Fourth Amendment—as an almost universal rule, courts refer to "search and *seizure*," not "search and *confiscation*." Accordingly, because Article I "refers exclusively to confiscation, it is reasonable to assume that the legislators did not intend to alter any statute or court decision pertinent to the law of seizure of firearms during a search incident to an arrest." Idaho Op. Att'y Gen. 31 at *2.

For these reasons, law enforcement may continue to seize weapons pursuant to a legal justification that existed at the time of the 1978 amendment, such as a search incident to arrest.[2]

3. Typical Red Flag Laws

You asked whether a Red Flag Law (also known as an "Emergency Protection Order") would run afoul of Article I. You described such laws as follows (paraphrased):

> A loved one, neighbor, doctor, principal, or another individual as defined by law has a concern about another individual they know. Their concern is that the person could be a threat to themselves or others.
>
> The individual who is concerned goes to the court and petitions to have the firearms taken away from the person they are concerned about.
>
> The judge looks at whatever "evidence" is presented and then gives the order if he/she chooses to do so.
>
> The police then go to the person's home and confiscate their firearms.
>
> The individual who has had their firearms taken away has *not* committed a felony and has *not* been charged with or convicted of a crime.

This fact pattern represents Red Flag Laws as they are typically structured. See Coleman Gay, *"Red Flag" Laws: How Law*

Enforcement's Controversial New Tool to Reduce Mass Shootings Fits Within Current Second Amendment Jurisprudence, 61 B.C. L. REV. 1491, 1494 (2020).

Based on your description of a typical Red Flag Law, a court would likely find such a law to be unconstitutional in the State of Idaho. The "primary object" of Idaho's courts in construing the constitution "is to determine the intent of the framers." Idaho Press Club, Inc. v. State Legislature of the State, 142 Idaho 640, 642, 132 P.3d 397, 399 (2006). "[The framers'] intent comes from the words approved by the drafters and later adopted by the people." Id. As it is with statutes, "[t]he presumption is that words used in a constitution are to be given the natural and popular meaning in which they are usually understood by the people who adopted them." Id. (quoting Taylor v. State, 62 Idaho 212, 217, 109 P.2d 879, 880 (1941)). Moreover, "[i]t must be kept in mind that the Constitution of the State of Idaho is not a delegation of power to the legislature but is a limitation on the power it may exercise, and that the legislature has plenary power in all matters for legislation except those prohibited by the constitution." Id. (quoting Idaho Tel. Co. v. Baird, 91 Idaho 425, 428, 423 P.2d 337, 340 (1967)).

At the same time, it is true that Idaho's appellate courts are "obligated to seek an interpretation of a statute that upholds its constitutionality," and accordingly, statutes "should not be held void for uncertainty if any practical interpretation can be given it." State v. Cobb, 132 Idaho 195, 197, 969 P.2d 244, 246 (1998) (citing State v. Newman, 108 Idaho 5, 13 n. 12, 696 P.2d 856, 864 n.12 (1985)). Nevertheless, courts will not and "cannot use policy arguments to give a constitutional provision a meaning that is not consistent with its wording," and cannot construe a constitutional provision "to vary [its] plain meaning." Idaho Press Club, Inc., 142 Idaho at 645, 132 P.3d at 402 (2006).

Article I is clear and provides that, "Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony." Idaho Const. art. I, § 11. A typical Red Flag Law, as described in your request, would conflict with this limitation. Such a law would allow police to confiscate firearms, including those not used in the commission of a felony, upon a judicial determination that the citizen posed a high risk.

Moreover, any future Red Flag Law would necessarily be enacted after the 1978 amendment. Thus, such a law would not fit into any previously established exception to the rule. In short, a Red Flag Law is the kind of law prohibited by Article I and would likely be determined to be unconstitutional by a court. See In re Brickey, 8 Idaho 597, 70 P. 609, 609 (1902) (concluding a statute that contravened Article I, section 11, as it then existed, was "void").

4. Modified Red Flag Laws

Your final question pertains to modified Red Flag Laws. As you describe it, a legislature might craft a statute providing that "police could order the homeowner to give the firearms to someone outside the home, such as a family member," as opposed to law enforcement. You asked whether that would still be a prohibited "confiscation" under Article I.

Some states already have such laws. For example, California's Red Flag Law provides that persons subject to a "gun violence restraining order" may comply with the order "by surrendering all firearms and ammunition" to law enforcement, but also by surrendering their firearms and ammunition to third parties—by directly "selling" them "to a licensed firearms dealer," or "transferring" them "to a licensed firearms dealer" for storage. Cal. Penal Code § 18120; see also Form GV-800, *Proof of Firearms, Ammunition, and Magazines Turned In, Sold, or Stored* (available at https://www.courts.ca.gov/documents/gv800.pdf) (making clear a subject of a gun violence restraining order in California may comply with that order by directly "selling" firearms to, or "storing them with," "a licensed gun dealer").[3]

While this issue is somewhat more complicated, a court could reasonably find that a modified Red Flag Law would also be unconstitutional. There are several reasons why.

First, the plain language of Article I broadly forbids "any law permit[ting] the confiscation of firearms." This is a prohibition on confiscatory laws without regard to *who* is receiving the confiscated item. In other words, Article I does not distinguish between surrendering the firearm to a private citizen or to law enforcement. Nor

does it simply forbid laws "permit[ing] the confiscation of firearms *to law enforcement*." Because Article I disallows *any* law permitting the confiscation of firearms, and because a modified Red Flag Law would ultimately be permitting the confiscation of firearms—through a court-compelled transfer to family members, firearms dealers, or some other non-government actor—such a law would likely be found to be unconstitutional.

The counterargument to this would be that "confiscation" implies government agents themselves must physically take a firearm to trigger Article I. On that view, because no officer has physically taken the gun, or because some third party has kept it, it would not have been "confiscated" within the meaning of Article I.

That counterargument is colorable but would still probably fail. As noted above, "confiscation" is a broad term, which would include an order directing a citizen to surrender their weapons. Dudek, 991 F. Supp. 2d at 406 n.4. A court's order to surrender and forfeit a weapon would be exactly that.

It is unclear why the absence or presence of law enforcement during the surrender would change this analysis. Even in a traditional Red Flag Law paradigm, officers are not appearing out of the blue to seize firearms—they are there enforcing a court order. See Idaho Code § 31-2202(4). So, cutting out the middleman, as it were, and compelling the citizen to directly surrender firearms to some third party, does not change the predicate fact: that it is the *court's* order, pursuant to law, doing the work of confiscating the firearm by ordering it surrendered in the first place.

Thus, a modified Red Flag Law would still likely be found to contravene Article I. If a statute empowered courts to compel firearms surrendered to family members, sold to a firearms dealer, or melted down at a foundry, such a law would still be permitting a court-ordered confiscation. And once the citizen complies with the order, the firearm is forfeited. In short, a Legislatively-enacted, court-ordered firearm surrender is likely still a prohibited Article I confiscation—regardless of whom the weapon has been ultimately confiscated to.

Idaho courts would likely adopt this view. In fact, the Idaho Supreme Court has previously disfavored legislative attempts to indirectly achieve what could not be directly done under the Idaho Constitution. Vill. of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 347, 353 P.2d 767, 773 (1960); see also Atkinson v. Board of Commissioners, 18 Idaho 282, 108 P. 1046, 1048 (1910) (finding a similar statute "violative of the spirit and intent of the Constitution"); Macallen Co. v. Com. of Mass., 279 U.S. 620, 629, 49 S. Ct. 432, 435, 73 L. Ed. 874 (1929) (noting "the well-established rule that what cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result," because "Constitutional provisions, whether operating by way of grant or limitation, are to be enforced according to their letter and spirit, and cannot be evaded by any legislation which, though not in terms trespassing on the letter, yet in substance and effect destroy the grant or limitation").

On these standards, a modified Red Flag Law—which could arguably appear to be an attempt to accomplish through an indirect third-party transaction, what would be forbidden if directly done by the government—would likely fail.

Analogous Fourth Amendment principles are also helpful here. It is well-established that police cannot lawfully seize items by simply asking a third-party private citizen to do the seizing for them. For example, an officer could not get around the Fourth Amendment by deputizing a UPS employee to search and seize a citizen's package. Nominally private seizures, done at the government's behest, are de facto government seizures. Skinner v. Ry. Lab. Executives' Ass'n, 489 U.S. 602, 614 (1989) (holding "the [Fourth] Amendment protects against such intrusions if the private party acted as an instrument or agent of the Government"); State v. Kopsa, 126 Idaho 512, 517, 887 P.2d 57, 62 (Ct. App. 1994) (same). By that same token, it seems unlikely that government officials could transmute a court-ordered property confiscation into a purely private transaction, simply by designating a third party as the end-line recipient of the goods.

In sum, a statutory scheme providing for court-ordered firearm deprivation, where a private citizen's weapon is surrendered through a compelled transfer to some third party, is still likely a "law permit[ting]

the confiscation of firearms"—which Article I strictly prohibits. A law like that, in the form of a modified Red Flag Law would likely be found to be unconstitutional by Idaho courts.

I hope you find this helpful.

Sincerely,

MARK A. KUBINSKI
Deputy Attorney General
Chief, Criminal Law Division

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[1] For ease of reference, I have combined your first and second questions and paraphrased your third and fourth questions.

[2] The Legislature also recently made clear, in the "Idaho Federal Firearm and Firearm Accessories and Components Protection Act," that "Nothing in this section shall be construed to affect the law of search and seizure as set forth in section 17, article I of the constitution of the state of Idaho or as set forth in the fourth, fifth, and fourteenth amendments to the United States constitution." Idaho Code § 18-3315B(2).

[3] The existence of a modified Red Flag Law in California has no bearing on this analysis because, unlike Idaho (and many other states), California does not have a right to bear arms in its state constitution. See CAL. CONST. 1849 art. I, §§ 1-22.

September 23, 2022

The Honorable Ilana Rubel
Assistant Minority Leader
Idaho House of Representatives
700 W. Jefferson Street
Boise, Idaho 83702
VIA EMAL: irubel@house.idaho.gov

Re: Request for AG Analysis

Dear Representative Rubel:

You asked how same-sex couples would be impacted under Idaho law if the reasoning contained in Justice Thomas' concurrence in Dobbs v. Jackson Women's Health suggesting that the U.S. Supreme Court's decision in Obergefell should be overturned were to be adopted by a majority of the Court in a future decision. More specifically, you asked "Would our constitutional definition of marriage mean that all same-sex couples in Idaho would instantly find themselves unmarried? Could I get an overview of what other legal rights would be implicated by such an outcome (inheritance, visitation, custody, property rights etc.)?

In short, it is impossible to predict the impact on same-sex marriages in Idaho if a majority U.S. Supreme Court decision were to adopt the reasoning contained in Justice Thomas' concurrence to overrule Obergefell. There are many variables that could impact whether and to what extent Idaho could or would prohibit same-sex marriage if the substantive due process grounds of Obergefell were overruled, perhaps most important being the fact that the Equal Protection Clause could still protect same sex marriages. However, even if Obergefell were overruled in full and Idaho could refuse to recognize same sex marriages, such a decision would not have immediate impact. Idaho would first have to go to court for an order lifting the permanent injunction issued in Latta v. Otter, 19 F.Supp.3d 1054 (2014) before it could enforce the applicable laws currently on the books.

ANALYSIS

The Fifth Amendment provides that no one shall be "deprived of life, liberty or property without due process of law" by the federal government. The Fourteenth Amendment extends this obligation to the states. The guarantee that no one shall be deprived of the right to life, liberty or property is commonly referred to as "substantive due process." Well-known substantive due process cases setting forth rights not enumerated in the constitution include Loving v. Virginia, 388 U.S. 1 (1967) (the right to interracial marriage); Griswold v. Connecticut, 381 U.S.479 (1965) (the right to contraception); Moore v. East Cleveland, 431 U.S. 494 (1977) (the right to live with one's relatives); Pierce v. Society v. Society of Sisters, 268 U.S. 510 (1925) (the right to make educational decisions for one's children); Lawrence v. Texas, 539 U.S. 558 (2003) (the right to engage in consensual and private sexual behavior); and Obergefell v. Hodges, 576 U.S. 644 (2015).

The U.S. Supreme Court decided Obergefell in 2015. There, the Court held that the right to marry is a fundamental right inherent in the liberty of the person. 576 U.S. at 675-676. Under the U.S. Constitution's substantive due process protections and under the Equal Protection Clause contained in the Fourteenth Amendment, couples of same sex marriages may not be deprived of that right and liberty. Id. at 681. The Court also held that States must recognize lawful same-sex marriages performed in other states because of the fundamental nature of the right.

Previously, Roe v. Wade, 410 U.S. 113 (1973), as interpreted by the U.S. Supreme Court by its decision in Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) was among the cases where the substantive due process clause protected a constitutional right—in that case, a right to abortion. However, on June 24, 2022, the U.S. Supreme Court overruled Roe and the line of precedent that flowed from Roe's recognition of a constitutional right to abortion with its decision in Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022). In Dobbs, the Court concluded that there were no constitutional protections for abortion, meaning that abortion regulations need only survive rational basis review, which requires a

challenged statute to reasonably achieve a legitimate state interest. Id. at 2283.

The Dobbs Court limited its decision to the issue of abortion, stating that other rights were not at issue. Id. at 2257-58, 2261. However, in his concurring opinion, Justice Thomas argued that the Court should revisit other cases where the Court found substantive rights not articulated in the Constitution—including cases involving contraception, private sexual conduct, and gay marriage. Id. at 2300-2304. He reasoned that "substantive due process is an oxymoron that lacks any basis in the Constitution." Id. at 2301 (internal quotation marks omitted). Justice Thomas went on to explain his long-held position that there should be no recognition of any substantive due process rights not explicitly set forth in the constitution at all—a departure from the majority opinion, the two other concurrences, and the dissents—and he advocated for reconsidering Obergefell. Id.

If the Supreme Court were to adopt Justice Thomas's approach to substantive due process and conclude that there are no substantive due process protections for marriage, then any state constitutional provision or statute regulating same sex marriage might be subject to scrutiny for compliance with the U.S. Constitution only under rational basis review, meaning that the statute would be found constitutional if the statute were rationally related to a legitimate state interest. However, there is no guarantee that a state law directly or indirectly preventing the recognition of same-sex marriages would survive rational basis review. De Leon v. Perry, 975 F. Supp.2d 632, 653 (2014) (finding no rational basis for a state law prohibiting recognition of same sex marriages).

Moreover, if Obergefell were overruled on substantive due process grounds, a court could still conclude that a heightened level of scrutiny applies by virtue of the protections of the Equal Protection Clause. U.S. v. Windsor, 570 U.S. 744, 769-770 (2013) (concluding that the Defense of Marriage Act violates the Equal Protection Clause because it is the product of animus directed toward same-sex couples). In short, it is impossible to predict what impact a U.S. Supreme Court decision rejecting the concept of substantive due process might have on the enforceability of state laws related to same-sex marriages.

It is also possible that a federal law requiring that all states recognize same sex marriage performed in another state could be passed before any action taken related to Obergefell, even if the U.S. Supreme Court were to grant certiorari on a case that could allow it to overrule Obergefell. The Respect for Marriage Act (FRMA) was introduced in the U.S. House of Representatives on July 18, 2022. Under the RFMA, a state must give full faith and credit to any marriage performed in another state, regardless of the gender of the parties. *See* H.R. 8404, available at https://www.congress.gov/bill/117th-congress/house-bill/8404/text. The FRMA has passed with bipartisan support in the House of Representatives and is awaiting a vote in the Senate.

If RFMA does not pass, the federal Defense of Marriage Act ("DOMA"), which was enacted in 1996, would likely spring back into effect if Obergefell were overruled in full. DOMA contained an exception to the Full Faith and Credit Clause allowing states not to give full faith and credit to same sex marriages performed outside their jurisdictions. This carve-out was rendered unenforceable by the Court's decision in Obergefell concluding that the Fourteenth Amendment requires all U.S. state laws to recognize same-sex marriages. However, this law did not technically "go away" after being declared unconstitutional. This portion of the Defense of Marriage Act could spring back into life if Obergefell were overturned in full. For a helpful discussion on this concept, see *The Writ of Erasure Fallacy* by Jonathan Mitchell, 104 Va. L. Rev. 933 (2018). However, if *Obergefell* were only overturned on substantive due process grounds and its ultimate protections for same sex marriages were preserved on equal protection grounds, this provision of DOMA may not become enforceable.

Thus, federal law could impact Idaho's ability to refuse to recognize same sex marriages performed in other states if Obergefell were overruled. There is uncertainty as to what the applicable federal law might be in the future.

Specific to Idaho's laws restricting same-sex marriage, Idaho's Constitution contains an amendment providing that "A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state." Idaho Const. art. III, § 28. Idaho

Code also defines marriage as a "relation arising out of a civil contract between a man and a woman," Idaho Code § 32-201, and provides that only a man and a woman are capable of consenting to and consummating marriage, Idaho Code § 32-202. Idaho Code section 32-209 provides that Idaho does not recognize same-sex marriages from other states. The enforcement of these laws "and any other laws or regulations to the extent they do not recognize same sex marriages validly contracted outside Idaho or prohibit otherwise qualified same-sex couples from marrying in Idaho" was permanently enjoined in Latta v. Otter, 19 F.Supp.3d 1054, 1087 (D.Idaho 2014). That decision was affirmed on appeal and the constitutional amendment was declared unconstitutional as violative of the Equal Protection Clause by the Ninth Circuit in Latta v. Otter, 771 F.3d 456 (2014). If Obergefell were overruled, at the very least, the State would have to first have a court lift the injunction before it could enforce these laws. However, overruling Obergefell on substantive due process grounds does not appear to necessarily invalidate the Ninth Circuits' reasoning underpinning its affirmance of the injunction issued in Latta.

Given the number of contingencies that could take any future legal path in a variety of different directions, it is impossible to provide a list of hypothetical outcomes of future court decisions, federal legislation, and/or state legislature. However, examples of state-law areas that could be affected are state benefits afforded to spouses, such as state retirement accounts, healthcare and insurance benefits for dependents, filing tax returns, divorces, custody determinations, property divisions, and other legal areas where marital status impacts outcomes.

Please feel free to reach out if you have any further questions.

Sincerely,

STEVE L. OLSEN
Deputy Attorney General

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