



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
RAÚL R. LABRADOR

October 18, 2024

The Honorable Phil McGrane
Idaho Secretary of State
Statehouse
VIA HAND DELIVERY

Re: Certificate of Review
Proposed Initiative

Dear Secretary of State McGrane:

An initiative petition was filed with your office on September 19, 2024. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only." The petitioners are free to "accept 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. The advisory comments below address the proposed titles included in the initiative petition. This does not mean, however, that our office agrees with the substance of the proposed titles or that this office will ultimately use the proposed titles if the proposed initiative is filed.

MATTERS OF SUBSTANTIVE IMPORT

A. Summary of the Initiative

The Initiative is self-titled “Initiative Decriminalizing Cannabis, Called ‘Marijuana’ Or ‘Marihuana’ As Defined In Title 37-2701(U), For Personal Use, Home Cultivation, And Limited Personal Production.”¹ Primarily, the Initiative seeks to amend title 37, Idaho Code, by adding a new sub-section to Chapter 27, Prop. I.C. § 37-2752A,² which declares that persons who are engaged in the possession, production or cultivation of marijuana and marijuana-infused products are exempt from the penalties prescribed by Chapter 27. The Initiative also seeks to amend Chapter 27 with a new sub-section, Prop. I.C. § 37-2734A(4), which apparently seeks to exclude conduct described in Prop. I.C. § 37-2752A from being deemed illegal under the drug paraphernalia statutes.

B. Legal and Practical Concerns

This review will involve, among other matters, the “single-subject rule” of the Idaho Constitution. It states: “Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title[.]” Idaho Const. art. III, § 16. The constitutional provision continues, “but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title.” Id. In short, a title must accurately summarize what is contained in the body of the Initiative, and the body of the Initiative must reflect what is in the title.

1. Requested Title

The “Requested Title” reads in full: “Decriminalize Cannabis Now.” Although “cannabis” also appears in the Requested Short Ballot Title and the Requested Long Ballot Title, it is not mentioned anywhere in the body of the Initiative. Instead, “marijuana” is employed in the body of the Initiative. Also, cannabis is not exactly the same as Idaho’s statutorily defined “marijuana,” which excludes various parts of the “plant genus Cannabis.” See I.C. § 37-2701(u)(1)&(2). Therefore, it is recommended that “cannabis” be replaced with “marijuana” throughout the Initiative.

¹ Quotations of wholly capitalized parts of the Initiative will be modified to capitalize only the first letter of each word.

² References to “proposed” I.C. § 37-2752A and “proposed” I.C. § 37-2734A(4) will be prefaced with “Prop.”

2. Requested Short Ballot Title

The “Requested Short Ballot Title” of the Initiative states:

Initiative Decriminalizing Cannabis, Called “Marijuana” Or “Marihuana” As Defined In Title 37-2701(U), For Personal Use, Home Cultivation, And Limited Personal Production.

The word “marijuana” should be used instead of “cannabis” since “marijuana” is the word used in the body of the Initiative. It is suggested that the first part of the Short Ballot Title read: “Initiative Decriminalizing Marijuana (or “Marihuana”) as Defined in”

Although the Requested Short Ballot Title states that one of the Initiative’s purposes is to allow for “*home* cultivation,” the body of the Initiative only refers to “cultivation.” If the Initiative is intended to provide for home cultivation, it should say that in its body. If not, the Short Ballot Title should have the word “home” excised.

The reference to “limited personal production” in the Short Ballot Title is confusing because it suggests there would be a limit placed on the *quantity* of marijuana that can be personally produced. The body of the Initiative does not provide for any limits on the quantity of such production; therefore, the word “limited” should be excised from the Short Ballot Title, or, alternatively, the body of the Initiative should set out the quantity of marijuana that can be personally produced.

3. Requested Long Ballot Title

For the same reasons discussed above, the “Requested Long Ballot Title” should replace “cannabis” with “marijuana.” Next, either the Long Ballot Title should excise the word “home” before “cultivation, or add the word “home” before “cultivation” in the body of the Initiative. As stated above, article III, § 16, of the Idaho Constitution states, “if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title.” Therefore, it is important that the body of the Initiative include what is stated in the Title, and that the Title accurately describe the main aspects of the body of the Initiative.

The Requested Long Ballot Title concludes with the following sentence:

This Initiative Does Not Support Private Or Commercial Sale Or Resale Of Cannabis Or Cannabis Derived Products, Nor Does It Support Transportation Of Cannabis Or Cannabis Derived Products That Exceed One Ounce Of Plant Or 1000MG Of THC.

While the above statement appears to roughly summarize Prop. I.C. § 37-2752A(2), there is a slight difference in meaning between its comment that the Initiative does *not support* certain conduct, and the body of the Initiative’s statement that “[n]othing in this section *shall be construed to allow*” such conduct. The “support” phrases in the Requested Long Ballot Title give no clue as to how the Initiative does not support the conduct described – it could be saying that it is neutral about the conduct, or it could indicate opposition to such conduct. The statement in the body of the Initiative – “[n]othing in this section shall be construed to allow” – is more definitive. Therefore, it is recommended that the language used in Prop. I.C. § 37-2752A(2) be used in the Requested Long Ballot Title.

4. Section 1 Heading

The heading for “Section 1” of the Initiative states that it is amending Title 37, Chapter 27, of the Idaho Code with a new section “to be known and designated as Section 37-2752,” later citing the new section as Section 37-2752A. Both statutory designations are incorrect. I.C. § 37-2748 through I.C. § 37-2751 fall within Article VI of Chapter 27, which relates to pending proceedings, continuation of rules, uniformity of interpretation, and naming a “Short title” for Chapter 27 as the “Uniform Controlled Substances Act.” The Prop. I.C. §§ 37-2752 and 37-2752A do not logically fall within those provisions. Instead, it is recommended that the Initiative designate its proposed new statute under Article IV as Prop. I.C. § 37-2732E,³ which would place it in line with statutes relating to penalties and prohibited acts involving controlled substances.

5. Sub-Section (1) of Section 1

Sub-section (1) of Section 1 states in full:

Possession, production, or cultivation of Marijuana or Marijuana-infused products are exempted from penalties imposed by this Chapter if: (a) such Marijuana is for personal use and not for sale or resale; (b) is not consumed in any public or open setting; (c) is in the possession of a person who is at least 21 years old.

The above sub-section exempts “from penalties” under the Uniform Controlled Substances Act (i.e., Chapter 27) the use, possession, production, or cultivation of marijuana and marijuana-infused products. There are only three limitations. Such substances must be “for personal use and not for sale or resale,” and must be possessed by a person at least 21 years of age.

³ I.C. § 37-2732D (trafficking in fentanyl) was added to the Uniform Controlled Substances Act, effective July 1, 2024. Therefore, the next addition to I.C. § 37-2732 should be I.C. § 37-2732E.

Most significantly, there is no limitation on the amount of marijuana (weight or number of plants) that may be possessed, produced, or cultivated -- as long as it is possessed by a person at least 21 years of age, and is for personal use, not sale or resale.

Because there is no quantity limitation on how much marijuana can be possessed, produced, or cultivated under Prop. I.C. § 37-2752A, that proposed statute would directly conflict with the following controlled substances felony laws:

Delivery of a controlled substance – I.C. § 37-2732(a)(1) which makes it a felony to deliver any amount of marijuana, whether for sale or not.

Trafficking in marijuana -- I.C. § 37-2732B(a)(1) – by knowingly being in actual or constructive possession of marijuana in the following quantities:

- (A) One pound or more, but less than five pounds, or 25 to 49 plants;
 - one year mandatory minimum fixed sentence;
- (B) Five pounds or more but less than 25 pounds, or 50 to 99 plants;
 - three-year mandatory minimum fixed sentence;
- (C) 25 pounds or more, or 100 or more plants;
 - five- year mandatory minimum fixed sentence.

In order to accommodate the new laws created by the Initiative, statutory exceptions to the above delivery and trafficking laws would have to be enacted. That task involves more than this Review can accommodate.

Sub-section 1 does not address whether children or adults under 21 years of age may be in proximity to, or contact with, marijuana that is possessed, produced, or cultivated by a person 21 years of age or older. Such proximity or contact could negatively impact those under 21, especially children.

Next, there are no restrictions on where marijuana can be cultivated or produced – it is only the consumption of marijuana that cannot be done in “any public or open setting.” Although the Requested Short Ballot Title mentions “home cultivation,” there is no such limitation in the body of the Initiative. Therefore, the cultivation and production of marijuana can be done apart and away from a person’s home – as long as it is for personal use and not for sale or re-sale.

6. Sub-Section (2) of Section 1

In sub-section (2) of Section 1, the Initiative states:

Nothing in this section shall be construed to allow private or commercial sale or resale of any controlled substance nor transportation in quantities that exceed one ounce of plant or 1,000 mg of THC in other Marijuana derived or infused products.

The first part of the above sentence states that private and commercial sales and resales of controlled substances are prohibited. Since the Initiative relates to marijuana, it merely reiterates that the Initiative does not allow for the sale or resale of marijuana or other marijuana derived or infused products. The second part of the above-quoted provision appears to allow for the transportation of up to one ounce of marijuana and up to 1,000 mg of THC in other marijuana derived or infused products. The thrust of this would be to allow persons to transport, or carry with them, a relatively small amount of marijuana (etc.) for personal use.

Although the “one ounce” and “1,000 mg” limits seem to apply to “personal use” as well as transportation, they do not appear in sub-section (1) of Section 1 in regard to “personal use,” making it unclear if they do. Such a lack of clarity could subject the provision to a constitutional challenge based on the “void for vagueness” principle. That principle is that “a statute which either forbids or requires the doing of an act in terms so vague that people of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.” Walsh v. Swapp L., PLLC, 166 Idaho 629, 641, 462 P.3d 607, 619 (2020) (quoting Haw v. Idaho State Bd. of Med., 140 Idaho 152, 157, 90 P.3d 902, 907 (2004)). It is recommended that the Initiative clarify whether the two limitations apply to the “personal use” of marijuana (etc.).

7. Section 2

Section 2 of the Initiative seeks to add a new sub-section, sub-section (4), to I.C. 37-2734. The entirety of the proposed new sub-section reads, “Except as provided for in I.C. 37-2752A.”

Sub-sections (1) through (3) of I.C. § 37-2734 pertain to drug paraphernalia. Adding a new sub-section (4) would not make any sense, as the statute would read in full:

(1) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance.

(2) It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia.

(3) Any person who is in violation of the provisions of subsections (1) and/or (2) of this section is guilty of a misdemeanor and upon conviction may be imprisoned for not more than one (1) year, fined not more than one thousand dollars (\$1,000), or both.

(4) Except as provided for in I.C. 37-2752A.

The proposed sub-section is a dead-end which explains nothing. If the intent of the Initiative is to exclude those who are in legal possession of marijuana (etc.) under Prop. I.C. § 37-2752A from being punished for possessing or using drug paraphernalia, it does not accomplish that task. Assuming such intent, the proposed sub-section (4) to I.C. § 37-2734A should clearly state that persons whose conduct falls within the scope of Prop. I.C. § 37-2752A cannot be punished for possessing, with the intent to use, drug paraphernalia under subsection (1).

8. Severability

The severability clause reads:

The provisions of this initiative hereby declared to be severable if any provision of this initiative the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this initiative.

The Severability clause appears to be appropriately worded and legally proper.

C. 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. See United States v. Wheeler, 435 U.S. 313, 317 (1978) (superseded by statute); State v. Marek, 112 Idaho 860, 865, 736 P.2d 1314, 1319 (1987). Under the concept of “separate sovereigns,” the State of Idaho can 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. See United States v. Oakland Cannabis Buyers’ Coop., 532 U.S. 483, 493-95 (2001). Therefore,

passage of the Initiative would not affect the ability of the federal government to prosecute marijuana related crimes under federal laws.

The fact that marijuana use remains illegal under federal law may continue to impact Idaho's citizens in additional ways as well. For example, a person's marijuana use might affect the extent to which federal or state housing or employment laws protect that individual. See Assenberg v. Anacortes Housing Authority, 268 Fed. Appx. 643, 644 (9th Cir. 2008) (housing); Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industries, 230 P.3d 518, 520 (Or. 2010) (employment). Thus, the provisions of the Initiative, Prop. I.C. § 37-2752 (or I.C. § 37-2752A), 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.

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 Jackee Winters, 154 E. Gettysburg St., Boise, ID 83706.

Sincerely,



RAÚL R. LABRADOR
Attorney General

Analysis by:

John C. McKinney
Deputy Attorney General