IDAHO ATTORNEY GENERAL'S ANNUAL REPORT

OPINIONS

CERTIFICATES OF REVIEW

AND

SELECTED ADVISORY LETTERS

FOR THE YEAR

2024

Raúl R. Labrador
Attorney General

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2024 Idaho Att'y Gen. Ann. Rpt.

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2024 Idaho Att'y Gen. Ann. Rpt. 7

Similarly, the Certificate of Review of September 16, 2024 is found at:

2024 Idaho Att'y Gen. Ann. Rpt. 35

The Advisory Letter of January 9, 2024 is found at:

2024 Idaho Att'y Gen. Ann. Rpt. 93

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Raúl R. Labrador

Attorney General

INTRODUCTION

As Idaho's Attorney General, I am honored to present the second volume of our Annual Report, encompassing Opinions, Certificates of Review, and Advisory Letters. My administration remains committed to vigorously defending the liberties of Idahoans, upholding laws passed by our elected representatives, and protecting our state's sovereignty. I am proud of the exceptional legal representation provided by our office for the people of Idaho.

This volume reflects countless hours of dedicated research, writing, and service by my talented staff. Below are key highlights of the accomplishments achieved by the attorneys and staff of the Idaho Attorney General's Office in 2024.

The Internet Crimes Against Children (ICAC) Unit, part of our Criminal Law Division, has made remarkable strides this year. Upon taking office, I prioritized revitalizing this unit by nearly doubling its resources and strengthening partnerships with local and federal law enforcement to combat the growing threat of child exploitation. The ICAC Unit received 3,528 tips in 2024, a significant increase from 2,446 in 2023. Despite this rise, the unit has efficiently triaged cyber tips, forged stronger inter-agency collaborations, and expanded community outreach and education efforts. Arrests surged from 19 in 2023 to 55 in 2024.

Our Solicitor General's Office had a landmark year, successfully defending Idaho's laws protecting girls' and women's sports, bathrooms, and locker rooms. We urged the Ninth Circuit and the U.S. Supreme Court to safeguard women's privacy and athletic opportunities from the impacts of radical gender ideology. The office also defended Idaho's ban on gender-affirming procedures for minors, our abortion laws, and the rights of cities and states to address homelessness through public camping bans. A pivotal achievement came in April 2024 with the Supreme Court's ruling in *Labrador v. Poe*, granting our emergency stay application and prohibiting federal district courts from issuing

universal injunctions. This landmark decision curbed judicial overreach, protected Idaho, set a precedent limiting rogue judges from interfering with federal policies, and has been cited numerous times by judges, including the Supreme Court.

In 2024, attorneys assigned to the Department of Health and Welfare recovered $13,839,089 in Medicaid estate recoveries. The Consumer Protection Division achieved an impressive $109,835,787.26 in consumer restitution, civil penalties, settlements, costs, and fees, including $74,185,334 from tobacco companies. Additionally, our efforts secured $23,906,624 in opioid settlement payments for Idaho, with further payments scheduled in the coming years. Consumer restitution alone exceeded $380,000. These accomplishments reflect our unwavering dedication to protecting Idahoans and upholding the rule of law.

I invite you to visit my website at http://ag.idaho.gov if you would like to learn more about my office, the consumer protection resources available, and legal matters affecting Idaho. If you want to receive updates about the work we are doing for the citizens of Idaho, feel free to sign up to our weekly newsletter that can be found at https://www.ag.idaho.gov/newsroom/category/newsletter/.

Sincerely,

RAÚL R. LABRADOR
Attorney General

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RAÚL R. LABRADOR
ATTORNEY GENERAL
2024
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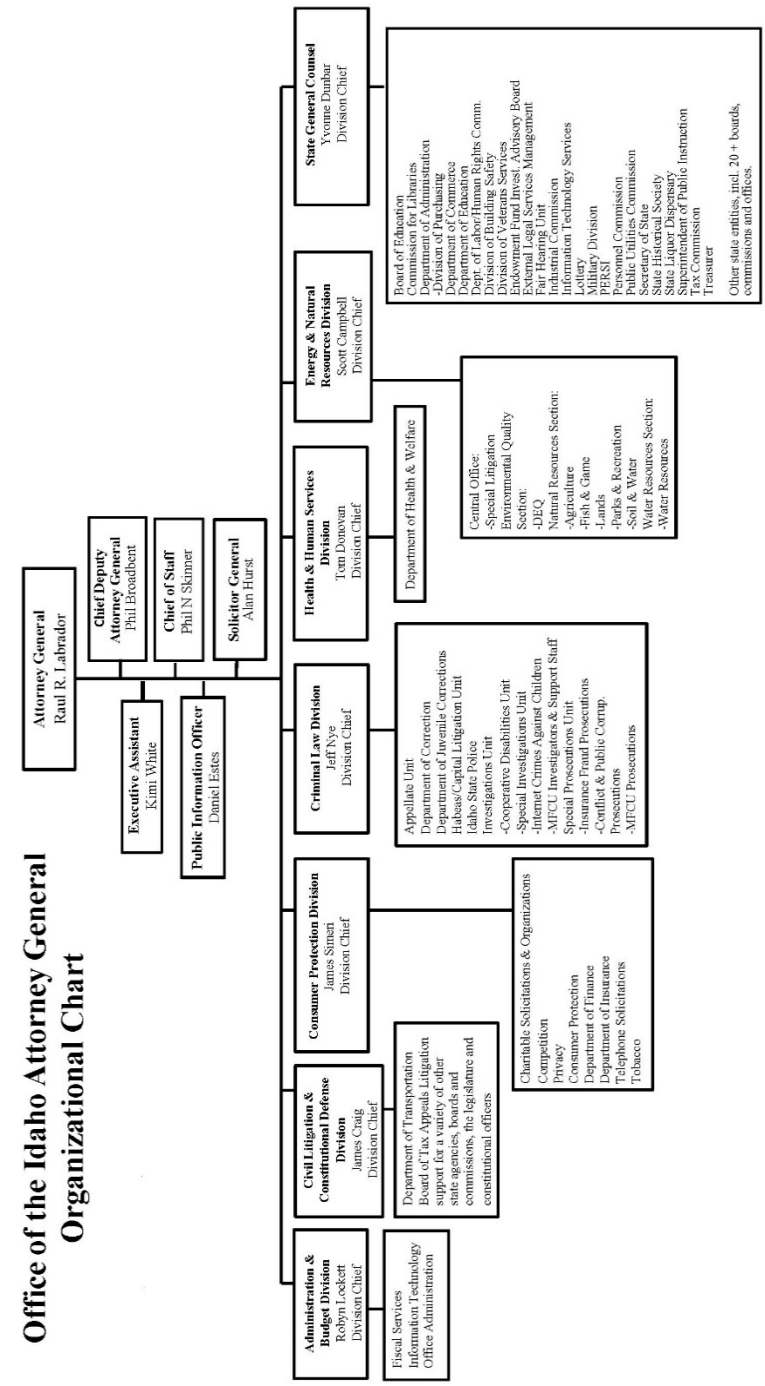
Office of the Idaho Attorney General
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-Cooperative Disabilities Unit
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-MFCU Investigators & Support Staff
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-Insurance Fraud Prosecutions
-Conflict & Public Corrup. Prosecutions
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Fair Hearing Unit
Industrial Commission
Information Technology Services
Lottery
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PERSI
Personnel Commission
Public Utilities Commission
Secretary of State
State Historical Society
State Liquor Dispensary
Superintendent of Public Instruction
Tax Commission
Treasurer
Other state entities, incl. 20 + boards, commissions and offices.

OFFICIAL OPINIONS
OF
THE ATTORNEY GENERAL
FOR THE YEAR 2024

RAÚL R. LABRADOR

ATTORNEY GENERAL
STATE OF IDAHO

ATTORNEY GENERAL OPINION NO. 24-1

TO: The Honorable Mike Moyle
Idaho House of Representatives
P.O. Box 83720
Boise, Idaho 83843

Per Request for Attorney General's Opinion

On March 4, 2024, we received your letter dated March 1 requesting a written opinion from the Attorney General regarding the scope of the authority of the University of Idaho Board of Regents and whether it may acquire, own, or operate a private institution of higher education by creating or authorizing the creation of a corporation. You have also asked whether a *quo warranto* action by the Attorney General would be appropriate if the Board has exceeded its constitutional authority. Your request raises important questions about Idaho law, and therefore this opinion is published as an official opinion of the Idaho Office of the Attorney General.

QUESTIONS PRESENTED

1. What is the scope of authority of the Board of Regents of the University of Idaho under Article IX, Section 10 of the Idaho Constitution?

2. What limitations, if any, are there to the scope of authority of the Board of Regents of the University of Idaho under Article IX, Section 10 of the Idaho Constitution?

3. Does the State Board of Education, in its capacity as the Board of Regents of the University of Idaho or in any other capacity, have constitutional or statutory authority to:

a. Acquire a private institution of higher education?
b. Own a private institution of higher education?
c. Operate a private institution of higher education?
d. Create a corporation?
e. Authorize the creation of a corporation?

4. If the Board of Regents of the University of Idaho, in its corporate capacity, has exceeded its constitutional authority, would an action in the nature of *quo warranto* filed by you pursuant to Idaho Code § 6-602 be appropriate?

BRIEF ANSWER

The Board of Regents' scope of authority under the Idaho Constitution is limited to supervising and governing the University of Idaho. It may exercise "all powers necessary or convenient to accomplish" that object. IDAHO CONST. ART. IX, § 10; 15th Territorial Sess. Laws (1888–89), pp. 17–21 ("Territorial Act").[1] But there are three limits on the Board's power that are relevant here: (1) the Board may not govern or supervise any institution other than the University of Idaho; (2) the Board may not exercise power that belongs to another branch of government; and (3) the Board cannot engage in activities that have a primarily private purpose. The Board's current effort to acquire, own, and operate the University of Phoenix through a private non-profit corporation that would be separate and distinct from the University of Idaho exceeds all three limits. And for the same reasons, the Board may not create, or authorize the creation of, a non-profit corporation to acquire, own, and operate a private institution of higher education.[2] The Board's actions may be challenged by the Attorney General through a direct claim under Idaho Code § 6-602, which is an action in the nature of *quo warranto*, a declaratory judgment action, or by seeking a writ of prohibition, all of which are appropriate vehicles to challenge the impermissible corporate charter.

BACKGROUND

To properly analyze your questions, certain relevant background information is necessary to provide context. We begin with a brief overview of the Board of Regent's actions related to the formation of Four Three Education, Inc., and the planned acquisition of the University of Phoenix.

On May 15, 2023, counsel for the University of Idaho, Kent Nelson, incorporated NewU, Inc. (later renamed Four Three Education, Inc.). He did so before the Board of Regents considered the action in an open meeting and before the Board authorized creation of NewU. That approval came later, on May 18, 2023, when the Board "authoriz[ed] creation of NewU, Inc."[3] Nevertheless, NewU's existence began on May 15 and, as described below, the Board of Regents purported to serve as its sole member.

The Articles of Incorporation that Mr. Nelson signed and filed made "the University of Idaho" the sole member of NewU, which again, is now Four Three.[4] Somewhat differently, Four Three's Bylaws identify the sole member as "the Regents of the University of Idaho."[5] The discrepancy is likely a result of imprecise drafting, and the Board of Regents appears to be the only legal entity serving as Four Three's member. But when it comes to operating Four Three, the Articles of Incorporation invest all governing authority in a Board of Directors composed of no fewer than three persons. The Bylaws make clear that "all corporate powers shall be exercised by or under the direction of, and the business and affairs of the Corporation shall be managed under the direction of the Board of Directors."[6] Four Three is also required to have a President, Secretary, and Treasurer as corporate officers, and the President is required to be a member of the Board of Directors.[7] The President is the "principal executive officer" of Four Three and "shall, in general, supervise and control all of the business and affairs of the Corporation."[8]

Four Three's stated purpose is to acquire and "operate the business of [the University of Phoenix] separately from, but in affiliation with" the University of Idaho.[9] At the same time that the Board of Regents authorized creation of Four Three, it also authorized Four Three to execute an asset purchase agreement to acquire substantially all of the assets and assume certain liabilities of the University of Phoenix. Regarding liabilities, the Board of Regents has agreed to "co-sign University of Phoenix's Program Participation Agreement and be financially responsible for their Title IV liability related to pre- and post-closing matters."[10]

The base purchase price under the asset purchase agreement is $550 million. But the Board of Regents has said that the transaction will require Four Three to obtain $685 million in bond debt to finance the transaction. Although Four Three has not obtained financing commitments yet, it has said that the Board of Regents will obligate itself up to $10 million per year for five years to secure the contemplated financing.[11] Without secured financing, it is uncertain whether Four Three will actually be able to sell bonds without additional backing from the Board of Regents.

The Board has stated repeatedly that the transaction will maintain a distinction between the University of Idaho and the University of Phoenix. During a June 2023 Joint Finance-Appropriations Committee oversight hearing, Board Member Dr. David Hill testified that Four Three will be "a separate affiliate entity that is not being merged into the University of Idaho" and that the two will be "separate and distinct."[12] University of Idaho President C. Scott Green also told the House State Affairs Committee that "[t]he University of Phoenix is going to continue to operate as the University of Phoenix."[13] "They're going to have their own management team, they will be moved into [Four Three] and continue to do business as the University of Phoenix. They will have their own independent board."[14] One reason President Green gave for the "independent" operation of the University of Phoenix as a private institution was "risk mitigation."[15]

ANALYSIS

A proper analysis of your questions must start first with setting out several fundamental principles of law. This is particularly called for because the legal analysis provided by the Board to date has thus far leapfrogged, or simply ignored, the important rules of law on which Idaho's constitutional scheme is premised.[16] Each of the below principles provides a framework for analyzing the Board of Regent's actions in forming Four Three and pursuing the University of Phoenix. And keeping them in mind focuses the analysis and demonstrates why the Board of Regents has acted beyond its constitutional authority.

1. The People's Delegation of Constitutional Power is Limited.

In our political order, the people are sovereign, and the government may only exercise power that the people have delegated to it.[17] That is why the Idaho Constitution explicitly provides that "[a]ll political power is inherent in the people." IDAHO CONST. ART. I, § 2. The Idaho Constitution is the instrument by which the people of Idaho have "instituted the government to do their will," animating constitutional officers with "delegated power" to execute limited political functions. *Reclaim Idaho v. Denney*, 169 Idaho 406, 426, 497 P.3d 160, 180 (2021). In other words, because the original source of any governmental power is the people's inherent power, and because the Idaho Constitution is the sole source of the delegation of that inherent power from the people to the government, the government may only exercise the power which has been expressly delegated by the Idaho Constitution.

As is plain from the provisions of the Idaho Constitution, the people have not made an unlimited grant of power. Indeed, the people have "retained" all rights not granted, IDAHO CONST. ART. I, § 21, and "the essential nature of all free governments" requires that governments possess only "limited and defined powers" to respect the people's retained rights. *Citizens' Savs. & Loan Ass'n v. City of Topeka*, 87 U.S. 655, 662-63 (1874). Those entrusted with constitutional power therefore may not act "beyond [the] constitutional authority" that has been

expressly conveyed to them. *Reclaim Idaho*, 169 Idaho at 426, 497 P.3d at 180. The Idaho Supreme Court has described this limitation as a "fundamental principle." *Id.*

2. The Idaho Constitution's Separation of Power's Provision Further Limits the Exercise of Governmental Power.

The Idaho Constitution provides another check on governmental power by "prohibit[ing] any branch of government from exercising powers that properly belong to another branch, unless expressly directed or permitted by the Idaho Constitution." *State v. Moore*, 161 Idaho 166, 169, 384 P.3d 413, 416 (Ct. App. 2016). It is well known that the founders of the United States government feared the accumulation of powers in any one branch of government and believed the "preservation of liberty requires that the three great departments of power should be separate and distinct."[18] The resulting separation is "designed to preserve the liberty of all the people" by diffusing power and creating a "safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Collins v. Yellen*, 141 S. Ct. 1761, 1780 (2021) (first quote); *Mistretta v. United States*, 488 U.S. 361, 382 (1989) (second quote).

That "separation of powers" principle is implicit in the United States Constitution, but it has been made explicit in Article II, Section 1 of the Idaho Constitution, which provides:

> 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.

Simply put, powers that the Idaho Constitution has given to one constitutional actor "cannot be delegated to another," period. *Emps. Res. Mgmt. Co. v. Kealey*, 166 Idaho 449, 452, 461 P.3d 731, 734 (2020).

3. The Public Purpose Doctrine Requires Government Activity to Advance Public Rather Than Private Ends.

The Idaho Constitution also forbids any state body from exercising its powers for primarily private rather than public ends. The "public purpose doctrine" provides that "no entity created by the state can engage in activities that do not have primarily a public, rather than a private purpose, nor can it finance or aid any such activity." *Bd. of Cnty. Comm'rs of Twin Falls Cnty. v. Idaho Health Facilities Auth.*, 96 Idaho 498, 502, 531 P.2d 588, 592 (1974) (citation omitted). The Supreme Court has held that the public purpose restriction is "inherent throughout state government" and operates as "a fundamental limitation upon the power of state government under the Idaho Constitution." *Id.* "A public purpose is an activity that serves to benefit the community as a whole and which is directly related to the functions of government." *Idaho Water Res. Bd. v. Kramer*, 97 Idaho 535, 559, 548 P.2d 35, 59 (1976). "[A]n incidental or indirect benefit to the public" cannot "transform a private industrial enterprise into a public one, or imbue it with a public purpose." *Vill. of Moyie Springs v. Aurora Mfg. Co.*, 82 Idaho 337, 346, 353 P.2d 767, 773 (1960).

A previous Attorney General opinion has summarized the reasons for the public purpose doctrine:

> There are several justifications for this inferred constitutional principle. First, it prevents the public's money from passing into the control of private associations or parties. *Fluharty v. Board of County Comr's of Nez Perce County*, 29 Idaho 203, 158 P. 320 (1916). Likewise, it prevents the state or one of its subdivisions from aiding or promoting a particular commercial or industrial enterprise to the detriment of others in the field, *Village of Moyie Springs v. Aurora Mfg. Co.*, 82 Idaho 337, 353 P.2d 767 (1960), or conferring favored status on any private enterprise or individual in the application of public funds, *Boise Redevelopment Agency v. Yick Kong Corp.*, 94 Idaho 876, 499 P.2d 575 (1972). Finally, and perhaps most

> importantly, this limitation on government power precludes state action which principally aims to aid private schemes. *Idaho Water Resource Board v. Kramer*, 97 Idaho 535, 548 P.2d 35 (1976).

Idaho Att'y Gen. Opinion 95-7, 1995 WL 646503 at *2 (1995).

Questions 1 & 2: What is the scope of, and what are the limits on, the Board of Regents' authority under Article IX, Section 10.

The Board of Regents is a public entity with a limited charter granting it only those powers that are "necessary or convenient to accomplish the objects and perform the duties prescribed by law." 15th Territorial Sess. Laws (1888-89), pp. 17-21; *see also Dreps v. Board of Regents of University of Idaho*, 65 Idaho 88, 139 P.2d 467, 468 (1943). That grant of power provides it latitude to govern the University of Idaho without material interference but at the same time limits it from undertaking separate and distinct endeavors, such as forming a non-profit to acquire, own, and operate a private institution of higher education.

In article IX, section 10, the Idaho Constitution did three general things related to the Board of Regents. It fixed the location of the University of Idaho; it incorporated the act of the territorial legislature that established the University of Idaho; and it confirmed that the Board of Regents would retain general supervision of the University. As relevant here, that section provides:

> The location of the University of Idaho, as established by existing laws, is hereby confirmed. All the rights, immunities, franchises, and endowments, heretofore granted thereto by the territory of Idaho are hereby perpetuated unto the said university. The regents shall have the general supervision of the university, and the control and direction of all the funds of, and appropriations to, the university, under such regulations as may be prescribed by law.

Article IX, section 10 of the Idaho Constitution limits the Board's authority to the "rights, immunities, franchises, and endowments, heretofore granted thereto by the territory of Idaho." IDAHO CONST. ART. IX, § 10. The Idaho Constitution further grants to the Board the "general supervision of the university, and the control and direction of all funds of, and appropriations to, the university under such regulations as may be prescribed by law." *Id.* The Idaho Supreme Court has stated that the "regulations as may be prescribed by law" referred to in article IX, section 10 "refer to methods and rules for the conduct of its business and accounting to authorized officers," but "must not be of a character to interfere essentially with the constitutional discretion of the board, under the authority granted by the Constitution." *State ex rel. Black v. State Bd. of Educ.*, 33 Idaho 415, 196 P. 201, 204 (1921). In other words, the legislature may regulate matters that touch on the University of Idaho as long as its regulations do not frustrate or substantially interfere with the Board's exercise of its constitutional powers.

Beyond the limited text in the Constitution, the Supreme Court explained in *Dreps v. Board of Regents of University of Idaho* that article IX, section 10 incorporated the Territorial Act ("Act") creating the University of Idaho "as fully as if it had been set out at length in the constitution." 65 Idaho, 95, 139 P.2d, 470. Section 3 of the Territorial Act provides that the "government of the University shall vest in a Board of Regents," which the Act constituted as "a body corporate" with "all the powers necessary or convenient to accomplish the objects and perform the duties prescribed by law." The Act also mandates that the Board of Regents "shall have the custody of the books, records, buildings and other property of said University." Section 5 of the Act provides that the "Board of Regents shall enact laws for the government of the University in all its branches." And Section 9 of the Act provides that the "object of the University of Idaho, shall be to provide the means of acquiring a thorough knowledge of the various branches of learning."

The Territorial Act places several important limitations on the Board's authority. For example, Section 3 permits the Board to take only such actions as are "necessary or convenient to accomplish the

objects and perform the duties prescribed by law," but does not allow the Board to assume for itself new objects and new duties. Section 5 of the Territorial Act cabins the Board's authority to "enact laws for the government of the University in all its branches," but it has no authority to do so for other entities. And Section 9 defines the "object of the University of Idaho" as "providing the means of acquiring a thorough knowledge of the various branches of learning" through a public education, but it has no grant to engage or invest in private education.

The Idaho Supreme Court has had several occasions to examine the authority of the Board. On the one hand, the Court has stated that the "legislature has no power to impair, dissolve or destroy [the Board]." *Dreps*, 65 Idaho at 96, 139 P.2d at 471. Because the Board "received its charter and authority from the people at the same time and in the same manner the legislature was created," each is "independent and exclusive of the other in the sphere of its own purpose and objects." *Id.* But on the other hand, the Court has made equally clear that the Board of Regents may only exercise "granted powers," and it lawfully exercises power only "within the scope of its authority." *Black*, 33 Idaho at 429, 196 P. at 205 (emphasis added).[19]

In 1944, then-University of Idaho President Harrison Dale published a book entitled "Statutes and Decisions Relating to the University of Idaho" analyzing the legal foundations of the University of Idaho and its Board of Regents.[20] President Dale recorded some analysis from Pendleton Howard, then Dean of the University's College of Law, about whether the legislature could move the College of Agriculture outside of Moscow.[21] After exhausting Idaho authorities, Dean Howard drew from Minnesota authority given Minnesota's identical constitutional provision.[22] His analysis quotes from *Fanning v. University of Minnesota*, which explains that respect for the authority of the University's Board of Regents "does not mean that the people created a corporation or institution which is above the law" and that "[t]he board must keep within the limits of its grant."[23] He further explains that the Board of Regents "is charged with the duty of maintaining a university for the purpose of higher education," but "[t]here are many things which the board may not do," and because "the

property of the university is the property of the state which through its taxpayers is its chief supporter, . . . [t]he board cannot divert it to other than university purposes."[24] The Board "must govern a university which the territorial statute and the Constitution established and perpetuated."[25]

So, while the Board has been given the discretion to manage the affairs of the University of Idaho without material interference from another branch of government, that discretion is durable only so long as the Board is "functioning within the scope of its authority." *Black*, 33 Idaho at 429, 196 P. at 205. Thus, the Board is no different from any other government actor—it has "granted power" and it must exercise that power "within the scope of its authority." *See id*. And, perhaps most importantly, the Board "must govern a university which the territorial statute and the Constitution established and perpetuated," not any other institution. Its charter is limited to the University of Idaho itself.

Question 3: May the Board of Regents acquire, own, and operate a private institution of higher learning and may it create, or authorize the creation of, a corporation to do so.

Idaho law does not allow the Board of Regents to acquire, own, and operate the University of Phoenix through Four Three Education, Inc. The Idaho Constitution grants the Board the power to "supervise" and "govern[]" the University of Idaho, a state institution of higher education. IDAHO CONST. ART. IX, § 10; Territorial Act § 2. The Board has powers "necessary or convenient" to "accomplish" the "objects" of the University of Idaho, but it does not have authority to take actions with an object other than supervising or governing the University of Idaho. Because the acquisition of the University of Phoenix is aimed at supervising and governing a private entity separate and distinct from the University of Idaho, it falls outside the scope of the Board's constitutional power. *Reclaim Idaho*, 169 Idaho at 426, 497 P.3d at 180 (government actors cannot act "beyond [their] constitutional authority").[26]

In a related context, the United States Supreme Court has construed Congress's "necessary and proper" clause to require that the Congress use means that are "plainly adapted" to an end it is empowered to pursue. *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819). By attempting to acquire and operate a private educational institution, the Board is exceeding both the subject—supervising the University of Idaho—and the object—public education—of its constitutional powers. *See id*. The Board's exercise of power is not lawful simply because it claims that that the transaction furthers an educational mission. A closer connection is required, otherwise the Board could pursue any number of endeavors nationwide with merely an asserted connection to the University of Idaho. But the people did not empower the Board to acquire, own, or operate private enterprises—they entrusted the governance and supervision of their land-grant university to the Board.

That conclusion is facially plain from the text of the Constitution and structure of the transaction. But it can also be seen from the effects of the transaction. The Board's attempt to operate a nationwide educational institution distinct from the University of Idaho exceeds its granted authority and encroaches on the Legislature's authority to make decisions about higher education policy outside of the University of Idaho. *E.g.*, chap. 21, title 33, Idaho Code (governing the creation of community colleges in Idaho); Idaho Code § 33-4001 (creating Boise State University). The Board's overreach assumes for itself a power that the people have given to the legislature alone—and that power is the determination of educational directives in Idaho.[27]

The Board's proposed course of action would also violate the Idaho Constitution's public purpose doctrine. Creating a non-profit, authorizing the non-profit to acquire a private institution of higher learning by taking on $685 million in bond debt, operating that private institution through a private Board of Directors that will have complete control over the functions and monies generated by the private institution, assuming the past and future liabilities of the private institution—which could measure in the hundreds of millions—and using that non-profit to educate students in dozens of foreign countries and nearly every sister state is not a primarily public purpose for an

Idaho state body. Indeed, 99% of the University of Phoenix's enrollment does not even reside in Idaho, and there has been no mention of providing services that specifically focus on Idahoans or offering in-state tuition for Idahoans.[28]

To be sure, promoting education as a general matter has a public purpose. But the "how" matters. And here, the "how" is overwhelmingly imbued with a private character. Again, the University of Idaho has made clear that the University of Phoenix will continue to operate as a private entity, whose employees "will not be state employees" and whose monies will be at the disposal and under the control of a private corporation. In addition, the new entity will be governed by a private Board of Directors.[29] The only "public" connection is the state's credit and obligation to secure financing for the private endeavor.[30] But all of that underscores the private nature of the University of Phoenix and Four Three and runs headlong into the Idaho Constitution's prohibition on using state power to finance and aid private enterprises.[31] Under the public purpose doctrine, the Board of Regents, therefore, may not engage in operating the University of Phoenix as a private higher education institution nor may it fund the acquisition, as it is slated to do.[32] *Bd. of Cnty. Comm'rs of Twin Falls Cnty.*, 96 Idaho at 502, 531 P.2d at 592. Incidental benefits to the University of Idaho, whether monetary or other, do not change that conclusion. *Moyie Springs*, 82 Idaho at 346, 353 P.2d at 773.

Requiring public entities to act for public purposes preserves the ability of the people from whom the Board "gets its authority" to oversee the use of that authority. *Dreps*, 65 Idaho at 97, 139 P.2d at 471. If the Board could conduct a portion of its operations through a self-created private division, those operations would likely be insulated from the oversight and limitations that the people have placed on the exercise of government power, potentially including the Open Meeting Law, Public Record Act, and audits by the Legislative Services Office. Idaho Code § 74-203 (requiring the "governing body of a public agency" to hold open meetings); Idaho Code § 74-102 (requiring "public records" to be made available to the public); Idaho Code § 67-702(2) (permitting the legislative services office to audit any institution that receives an

appropriation).[33] Whereas the Board is required to comply with these laws, nothing will require Four Three to comply with them.

Even assuming that acquiring and operating the University of Phoenix as a private institution of higher learning were within the scope of the Board's authority (*i.e.,* necessary and convenient to accomplishing its public education objective), it would be improperly delegating the "ultimate responsibility for fulfilling [its] constitutional duty" to Four Three's officers and Board of Directors. *See Osmunson v. State*, 135 Idaho 292, 296, 17 P.3d 236, 240 (2000). Maintaining a removal power over those private parties by virtue of being the sole member of Four Three is not enough where those private parties are authorized to "supervise and control all of the business and affairs of the Corporation."[34] Four Three's Board of Directors would not need to receive approval from the Board of Regents on *any* decision. Additionally, the Territorial Act requires the Board of Regents to maintain "custody" over all "property" of the University of Idaho. It has no power to authorize a transaction that ultimately vests ownership of the property with a separate entity, as will be the case with Four Three and the University of Phoenix.

Ironically, the Board's argument that it is merely exercising its constitutionally delegated powers by using a non-profit to carry out its essential functions makes the structure of the University of Phoenix transaction unconstitutional because it affords the legislature impermissible power over the Board. The two government bodies are to be "independent and exclusive of the other in the sphere of its own purpose and objects," *Dreps*, 65 Idaho at 96, 139 P.2d at 471, so if acquiring, owning, and operating the University of Phoenix were a proper object of the Board (and, for the reasons described, it is not), the Board cannot make itself "subject to the control or supervision" of the Legislature in carrying out that function. *Black*, 33 Idaho at 429, 196 P. at 205. But a non-profit corporation is a "creature of statute" whose powers and limitations are proscribed by the Legislature. *State v. Adjustment Dep't Credit Bureau, Inc.*, 94 Idaho 156, 158, 483 P.2d 687, 689 (1971); IDAHO CONST. ART. XI, § 2 ("the legislature shall provide by general law for the organization of corporations hereafter to be

created: provided, that any such general law shall be subject to future repeal or alteration by the legislature"). The Board's operation of Four Three would therefore improperly subject the Board to legislative control, entangling two bodies whose spheres of authority must be kept separate.

The Board is a constitutional entity with one constitutionally assigned role: to govern and supervise the University of Idaho. It may not unilaterally expand its role beyond what the people have authorized. And the Board's chimerical self-transformation into a quasi-public and quasi-private body is particularly concerning. Its hybrid status would allow it to accept the benefits of governmental status and funds while simultaneously insulating itself from public oversight laws. Accordingly, the acquisition of the University of Phoenix (or the concomitant transformation it would effect) is inconsistent with Idaho's constitutional limitations on the Board's authority.

Question 4: Whether an Attorney General action in the nature of quo warranto, Idaho Code § 6-602, is appropriate in the event the Board of Regents has exceeded its authority by forming Four Three to acquire and operate the University of Phoenix.

Idaho Code § 6-602 provides for an action in the nature of *quo warranto* to "be brought in the name of the people of the state against any person who usurps . . . or exercises any office or franchise . . . without authority of law." *See also People ex rel. Neilson v. Wilkins*, 101 Idaho 394, 396, 614 P.2d 417, 419 (1980) (Section 6-602 "is a quo warranto proceeding"). The Attorney General is charged by the statute with "the duty" to prosecute the action "when the office or franchise relates to the state." *Id.* Historically, an action in the nature of *quo warranto* has been used as a vehicle to challenge the validity of a corporate charter. *See Clemens v. Pinehurst Water Dist.*, 81 Idaho 213, 219–20, 339 P.2d 665, 669–70 (1959).[35] Thus, a direct action under section 6-602 is appropriate to challenge the Board of Regents' creation of Four Three.[36]

There are also other vehicles to challenge the Board of Regents' action, including a declaratory judgment action and a writ of prohibition. The Attorney General would have standing to bring both based on Idaho Code § 6-602's mandatory language giving the Attorney General the duty of enforcing the statute as well as on his "unique position . . . as counsel for the State of Idaho." *Wasden v. St. Bd. of Land Comm'rs*, 153 Idaho 190, 195–96, 280 P.3d 693, 698–99 (2012) ("[I]t seems axiomatic that the Attorney General must step forward to defend the constitution"). Regarding a writ of prohibition, the Idaho Supreme Court has noted that early cases examining the issuance of the writ "conspicuously failed to closely examine the question of a 'plain, speedy, and adequate alternative'" to the writ. *Wasden ex rel. State v. Idaho St. Bd. of Land Comm'rs*, 150 Idaho 547, 553, 249 P.3d 346, 352 (2010) (rejecting application for writ of prohibition); Idaho Code § 7-402. Because the Declaratory Judgment Act and Idaho Code § 6-602 likely provide an adequate remedy at law in many circumstances where the Attorney General could challenge the validity of a corporate charter, the writ of prohibition may be unavailable. *See* Idaho Code § 10-1201.[37]

To the extent it is unclear which vehicle would be proper, nothing prevents the Attorney General from pursuing an action in the nature of *quo warranto* and seeking a declaratory judgment and writ of prohibition in the alternative. *See* I.R.C.P. 8(d)(3) ("A party may state as many separate claims or defenses as it has, regardless of consistency").[38]

For the reasons above, the Board lacks the authority to acquire, own, and operate the University of Phoenix through a non-profit corporation. While the Board has broad authority to take actions necessary to accomplish the objects of the University of Idaho, its authority is limited by the Constitution to governing the University of Idaho. The Board has not been granted the authority by the Constitution to govern a separate private university through a distinct non-profit corporation—that authority rests with the legislature. Finally, given the University of Idaho's intention to operate the University of Phoenix as a separate and distinct private university, the proposed transaction violates the public purpose doctrine.

AUTHORITIES CONSIDERED

1. Idaho Constitution:

Article I, § 2
Article I, § 21
Article VIII, § 2
Article IX, § 10
Article XI, § 2

2. Idaho Code:

§ 6-602
§ 7-402
§ 10-1201
§ 33-3717A
§ 33-4001
§ 67-702
§ 74-102
§ 74-203

3. Idaho Cases:

Bd. of Cnty. Comm'rs of Twin Falls Cnty. v. Idaho Health Facilities Auth., 96 Idaho 498, 531 P.2d 588 (1974)
Clemens v. Pinehurst Water Dist., 81 Idaho 213, 339 P.2d 665 (1959)
Dreps v. Board of Regents of University of Idaho, 65 Idaho 88, 139 P.2d 467 (1943)
Emps. Res. Mgmt. Co. v. Kealey, 166 Idaho 449, 452, 461 P.3d 731, 734 (2020)
Idaho State Athletic Comm'n ex rel. Stoddard v. Off. of the Admin. Rules Coordinator, 542 P.3d 718 (Idaho 2024)
Idaho Water Res. Bd. v. Kramer, 97 Idaho 535, 548 P.2d 35 (1976)
Osmunson v. State, 135 Idaho 292, 17 P.3d 236 (2000)

People ex rel. Neilson v. Wilkins, 101 Idaho 394, 614 P.2d 417 (1980)
Reclaim Idaho v. Denney, 169 Idaho 406, 497 P.3d 160 (2021)
State ex rel. Black v. State Bd. of Educ., 33 Idaho 415, 196 P. 201 (1921)
State v. Adjustment Dep't Credit Bureau, Inc., 94 Idaho 156, 483 P.2d 687 (1971)
State v. Moore, 161 Idaho 166, 384 P.3d 413 (Ct. App. 2016)
The Associated Press v. Second Jud. Dist., 172 Idaho 113, 529 P.3d 1259 (2023)
Vill. of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 353 P.2d 767 (1960)
Wasden ex rel. State v. Idaho St. Bd. of Land Comm'rs, 150 Idaho 547, 249 P.3d 346 (2010)
Wasden v. St. Bd. of Land Comm'rs, 153 Idaho 190, 280 P.3d 693 (2012)

4. Other Cases

Citizens' Savs. & Loan Ass'n v. City of Topeka, 87 U.S. 655 (1874)
Collins v. Yellen, 141 S. Ct. 1761 (2021)
McCulloch v. Maryland, 17 U.S. 316 (1819)
Mistretta v. United States, 488 U.S. 361 (1989)

5. Other Authorities:

15th Territorial Sess. Laws (1888–89)
Bart W. Harwood, Law of Quo Warranto in Idaho, 4 Idaho L. Rev. 26 (1967)
The Declaration of Independence (U.S. 1776)
The Federalist No. 47 (James Madison)
Harrison C. Dale, Statutes and Decisions Relating to the University of Idaho (1944)
Idaho Att'y Gen. Opinion 95-7, 1995 WL 646503 (1995)
I.R.C.P. 8

Dated this 11th day of March, 2024.

RAÚL R. LABRADOR
Attorney General

[1] The territorial act is set forth in its entirety in *Dreps v. Board of Regents of University of Idaho*, 65 Idaho 88, 139 P.2d 467, 468 n.1 (1943).
[2] This opinion does not address the more general question of whether the Board of Regents may ever form a corporation under any circumstances and for any purposes whatsoever.
[3] May 18, 2023 Board of Education Meeting Minutes at 8, *available at* May 18, 2023 Special Board meeting minutes (idaho.gov).
[4] NEWU, Inc. Articles of Incorporation, art. VII.
[5] Bylaws § 2.1, *available at* 01 Agenda-Material Complete.pdf (idaho.gov).
[6] *Id.* § 3.1
[7] *Id.* § 4.5.
[8] *Id.*
[9] May 18, 2023 Resolution; *see also* NewU, Inc. Articles of Incorporation, art. V § 1 ("To establish, operate, conduct, and administer a[n] . . . institution of higher education affiliated with The Regents of the University of Idaho").
[10] May 18, 2023, Board of Education Meeting Minutes at 5.
[11] *See* Testimony of C. Scott Green, JFAC Committee Hearing, June 16, 2023 (01:23:00–01:25:10).
[12] *Id.* (33:59–34:36).
[13] Testimony of C. Scott Green, House State Affairs Committee, Feb. 29, 2024 (01:10:21–01:10:25).
[14] *Id.* (01:10:33–01:10:36).
[15] *Id.* (58:42–58:51).
[16] Memorandum (Feb. 28, 2024), *available at* Hawley-Troxell-2.28.24.pdf (idahoednews.org).
[17] *See* The Declaration of Independence para. 2 (U.S. 1776) ("Governments are instituted among Men, deriving their just powers from the consent of the governed").
[18] The Federalist No. 47 (James Madison).
[19] The Board has relied on *Black* as authority for its actions related to Four Three. But *Black* stands for the simple proposition that neither the legislature, nor any other constitutional actor, may prevent the Board from exercising its duly granted constitutional powers. The question at issue here is antecedent to the question the Supreme Court addressed in *Black*, namely whether the Constitution grants the Board authority in the first place to form a non-profit corporation to acquire, own, and operate a private institution of higher education. And on that question, the answer under the Idaho Constitution is "no." Indeed, *Black*'s only relevance to the questions posed is its emphasis that the Board must exercise powers within the scope of its authority.

[20] Harrison C. Dale, Statutes and Decisions Relating to the University of Idaho (1944).
[21] *See id.* at 24.
[22] *See id.* at 29.
[23] *Id.* at 29–30 (quoting *Fanning v. University of Minnesota,* 236 N.W. 217, 219 (1931)).
[24] *Id.*
[25] *Id.*
[26] The analysis may be different if the University of Idaho were to acquire the assets of the University of Phoenix directly and use those assets in furtherance of the objects of the University of Idaho, but the University of Idaho has made clear that will not be the case. University of Idaho Office of the President, University of Phoenix FAQ, *available at* University of Phoenix Affiliation FAQ | University of Idaho (uidaho.edu) (last visited Mar. 7, 2024).
[27] Apparently, the University of Idaho was previously collaborating with other state universities regarding an online education initiative, but those efforts have likely been materially impacted now that the Board of Regents is pursuing the University of Phoenix. That is just one small example of the Board of Regent's decision impacting broader Idaho educational policies. *See generally* House State Affairs Committee, Feb. 29, 2024 (01:25:25–01:27:59)
[28] *See* House State Affairs Committee, Feb. 29, 2024 (01:35:09–01:35:19).
[29] According to Four Three's Bylaws, the University of Phoenix will be governed by a private Board of Directors, with its own president who does not report to the Board of Regents. In fact, President Green told the State Affairs Committee that current University of Phoenix president, Chris Lynn, would continue to serve as president upon Four Three's acquisition of the University of Phoenix.
[30] University of Idaho Office of the President, University of Phoenix FAQ, *available at* University of Phoenix Affiliation FAQ | University of Idaho (uidaho.edu) (last visited Mar. 7, 2024).
[31] *Cf.* IDAHO CONST. art. VIII, § 2(1) ("The credit of the state shall not, in any manner, be given, or loaned to, or in aid of any individual, association, municipality or corporation; nor shall the state directly or indirectly, become a stockholder in any association or corporation").
[32] University of Idaho Office of the President, University of Phoenix FAQ, *available at* University of Phoenix Affiliation FAQ | University of Idaho (uidaho.edu) (last visited Mar. 7, 2024) ("Should the not-for-profit corporation miss payments on debt related to the acquisition, U of I is agreeing to guarantee up to $10 million annually to cover the payment").
[33] Similarly, no policy or law exists that would require Four Three to offer in-state tuition rates to Idaho residents. *Cf.* Idaho Code § 33-3717A.
[34] Bylaws § 4.5.
[35] *See also* Bart W. Harwood, Law of Quo Warranto in Idaho, 4 Idaho L. Rev. 26, 37–38 (1967).
[36] This opinion does not address who would be a proper defendant in such an action. Whether an action may be brought against Four Three, the Board of Regents, the

incorporator of Four Three, or some other person is beyond the scope of the opinion request.

[37] Moreover, because "[t]he writ of prohibition is not a remedy in the ordinary course of law, but is an extraordinary remedy," the Supreme Court will only issue it "with caution." *The Associated Press v. Second Jud. Dist*., 172 Idaho 113, 529 P.3d 1259, 1266 (2023).

[38] Whether a party could invoke the Supreme Court's original jurisdiction to seek these forms of relief depends on whether the declaratory judgment and *quo warranto* forms of relief are "necessary to resolve [his] writ claim." *Idaho State Athletic Comm'n ex rel. Stoddard v. Off. of the Admin. Rules Coordinator*, 542 P.3d 718, 727 (Idaho 2024).

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ATTORNEY GENERAL'S CERTIFICATES OF REVIEW FOR THE YEAR 2024

RAÚL R. LABRADOR

ATTORNEY GENERAL
STATE OF IDAHO

September 16, 2024

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

RE: Certificate of Review
Proposed Initiative for Adding a New Section to Title 39, Idaho Code, Providing for a Right to Reproductive Freedom and Privacy (20 weeks).[1]

Dear Secretary of State McGrane:

An initiative petition was filed on August 16, 2024, proposing to amend title 39 of the Idaho Code. Pursuant to Idaho Code section 34-1809, this office has reviewed the petition and prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each legal or constitutional issue that may present problems. This letter therefore addresses only those matters of substance that are "deemed necessary and appropriate" to address at this time and does not address or catalogue all problems of substance or of form that the proposed initiative may pose under federal or Idaho law. Idaho Code § 34-1809(1)(a). Further, under the review statute, the Attorney General's recommendations are "advisory only," and the petitioners are free to "accept or reject them in whole or in part." *Id.* § 34-1809(1)(b). This office offers no opinion with regard to the policy issues raised by the proposed initiative or the potential revenue impact to the state budget from likely litigation over the initiative's validity.

MATTERS OF SUBSTANTIVE IMPORT

I. Summary of the Proposed Initiative

The proposed initiative seeks to add to Idaho law, by statute, a right to "reproductive freedom and privacy." The initiative proposes a new statute, section 39-801, that would significantly change abortion law in Idaho, granting a right to abortion for any reason "prior to 20 weeks gestation." Additionally, the initiative would institute a right to "reproductive freedom and privacy." Broadly speaking, the initiative would: 1) remove any restrictions on abortion before twenty (20) weeks gestation; 2) exempt from criminal liability any abortions "necessary to protect or maintain the physical health or life of the pregnant person;" and 3) attempt to place restrictions broadly on future legislation or regulation regarding abortion and "reproductive freedom and privacy."

1. Removing Restrictions on Abortion Before 20 Weeks Gestation

The proposed initiative would alter Idaho law by providing for a right to abortion for any reason "prior to twenty (20) weeks gestation." Pet. § 39-801(2). The initiative proposes a right to "reproductive freedom and privacy," which includes the right to "abortion care."[2] *Id.* § 39-801(1)a. The initiative says, "the state shall not infringe, burden, or prohibit abortion care prior to 20 weeks gestation." *Id.* § 39-801(2)a.

2. Exemption for Abortions "Necessary to Protect or Maintain Health"

The proposed initiative would also change current Idaho law regarding abortion by providing for an exemption from criminal liability for abortions performed when "necessary to protect or maintain the physical health or life of the pregnant person." Pet. § 39-801(2)b. The initiative does not define what it means to "protect or maintain the physical health or life of the pregnant person." *Id.*

This exemption for abortions performed when "necessary to protect or maintain the physical health or life of the pregnant person" kicks in after "20 weeks gestation." In short, the proposed initiative would set up a framework wherein abortion 1) cannot be "prohibited" *before* "20 weeks gestation," 2) can be "regulated" *after* "20 weeks gestation," and 3) can *never* be "regulated" or prohibited in cases where abortion is "necessary to protect or maintain the physical health or life of the pregnant person." *Id.*

3. Restrictions on Future Regulation of Abortion and "Reproductive Freedom and Privacy"

In addition to the specific provisions that significantly change current abortion law in Idaho, the proposed initiative also provides for a "right to reproductive freedom and privacy." Pet. § 39-801(1)a. The initiative provides a non-exhaustive list of eight "reproductive decisions" included in the right to "reproductive freedom and privacy." The "reproductive decisions" the initiative lists out are decisions on:

i. Pregnancy;
ii. Contraception;
iii. Fertility Treatment;
iv. Prenatal and Postpartum care;
v. Childbirth;
vi. Continuing one's own pregnancy;
vii. Miscarriage care; and
viii. Abortion care.

Id. The initiative provides definitions for "Contraception," "Fertility Treatment," "Miscarriage care," and "Abortion care," but it does not define the other four listed "reproductive decisions." *Id.* § 39-801(5).

After setting forth this "right to reproductive freedom and privacy," the proposed initiative articulates limitations on the State's ability to regulate that right. The proposed initiative uses language commonly associated with fundamental constitutional rights when describing its proposed "right to reproductive freedom and privacy." *See Planned Parenthood Great Nw. v. State,* 171 Idaho 374, 413, 522

P.3d 1132, 1171 (2023) (citing *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (discussing Fifth Amendment right against Double Jeopardy)). For example, the proposed initiative states that "[t]he state shall not directly or indirectly infringe…the right to reproductive freedom…unless justified by a compelling state interest achieved by the least restrictive means." Pet. § 39-801(2). The proposed initiative defines the appropriate "compelling interest" as regulating this right for "the purpose of improving or maintaining the health of an individual seeking care." *Id.* § 39-801(3).

II. Analysis of the Proposed Initiative's Subsections

The matters of substantive import are addressed below, with each of the pertinent substantive subsections discussed in turn.

1. *Subsection (1)* – No Discussion of "Privacy"

In subsection (1) there is a lack of specificity regarding "privacy." The proposed initiative speaks of "reproductive freedom *and* privacy," but the non-exhaustive list of "reproductive decisions" covered by this right seems to deal entirely with freedom (freedom to make those decisions). There is nothing in subsection (1) that relates, on its face, to privacy. There is no explicit "right to privacy" contained within the Idaho Constitution, as there is in other states. Therefore, the drafters may want to include additional details as to what a "right to privacy" entails so as to avoid confusion and ambiguity.

2. *Subsections (2) and (3)* - Ordinary Legislation Cannot Bind Future Legislation or Regulation

The "right to reproductive freedom and privacy" set forth in the initiative would limit the State's authority to regulate abortion. Pet. § 39-801(2)-(3). However, this attempt to treat the "right to reproductive freedom and privacy" as a fundamental constitutional right and restrict future regulation of abortion violates the principle of legislative authority: ordinary statutes cannot bind or curtail the legislative authority of a future legislature. This principle was recently articulated

and re-affirmed in the Idaho Supreme Court's *Planned Parenthood* decision. *See Planned Parenthood*, 171 Idaho at 452-53.

In *Planned Parenthood*, plaintiffs/petitioners argued that the Defense of Life & Heartbeat Acts were invalid because they conflicted with the Idaho Human Rights Act. *See id.* at 452-53. The Idaho Supreme Court rejected that argument because "no present legislature can bind a future legislature through ordinary legislation." *Id.* at 453 (citing *State v. Gallet*, 36 Idaho 178, 179, 209 P. 723, 724 (1922)). The Court went on to note that the legislature, therefore, "may enact any law not expressly or inferentially prohibited by the state or federal constitutions." *Id.* (cleaned up). The Idaho Supreme Court concluded that because the Human Rights Act was enacted as "ordinary legislation," it cannot restrict a future legislature's ability to regulate abortion, even if the Human Rights Act purported to do so (something the Court did not decide and did not need to decide).

The proposed initiative here is a proposal to amend the Idaho Code. In other words, if passed through the ballot initiative process, it would constitute "ordinary legislation." As such, the initiative cannot bind future legislatures, or a future attempt to amend the law through a future initiative petition and cannot restrict the Idaho legislature's future regulation of abortion. This squarely conflicts with the initiative, which reads: "The state shall not directly or indirectly infringe, burden, or prohibit in any way any person's voluntary exercise of the right to reproductive freedom and privacy…unless justified by a compelling state interest achieved by the least restrictive means." Pet. § 39-801(2). Moreover, the initiative seeks to bind future legislation even further by dictating that the only compelling interest the state can consider when regulating abortion is "improving or maintaining the health of an individual seeking care." *Id.* § 39-801(3). Under clear Idaho Supreme Court precedent, such an attempt to restrict future legislation impermissible.

3. *Subsection (4)* – Does Not Specifically Address Existing Idaho Law

Subsection (4) provides that "[t]he provisions of this section are intended to control over any other section of Idaho Code and are to be liberally construed in favor of reproductive freedom and privacy." Pet. § 39-801(4). However, the initiative does not specifically address current laws in Idaho regulating abortion, which leaves open questions as to how the initiative would be incorporated into current law. For example, it is unclear what laws and definitions control when the proposed initiative is silent on an issue.

4. Potential Conflict with Right to Life

One issue that may be a concern is whether the initiative's proposed "right to reproductive freedom and privacy" conflicts with an unborn child's right to life. Within the initiative's proposed "right to reproductive freedom and privacy," there is a right to "abortion care." *Id.* § 39-801(1)a.viii. This right to abortion is inherently in conflict with the life of the unborn child (the "fetus"). This raises the further issue of whether the proposed right may conflict with the unborn child's right to life, and thus be declared unconstitutional.

The constitutional legal protections of an unborn child have not been expressly addressed in Idaho. But an unborn child's "inalienable right to life" was one of the earliest justifications for Idaho's early laws criminalizing abortions. *See Planned Parenthood*, 171 Idaho at 426 (quoting an address by Dr. J.H. Lyons from the year 1907 in which he discussed the "immorality of voluntary abortion…based on the unborn child's 'inalienable right' to life by the 'mere fact of its existence' as a 'human being'"). Further, Idaho law also currently recognizes that "preborn children have interests in life, health, and well-being." *See* Idaho Code § 18-8802(1).

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via copy of this Certificate of Review, deposited in the U.S. Mail to Melanie Folwell, P.O. Box 6902, Boise, ID 83702.

Sincerely

RAÚL R. LABRADOR
Attorney General

Analysis by:

James E. M. Craig, Division Chief
Civil Litigation and Constitutional Defense

[1] This proposed initiative petition was submitted at the same time as three other petitions, all submitted by the same petitioner. Because each proposed initiative is similar in subject matter and intent, they will be distinguished using the following naming convention: Right to Reproductive Freedom and Privacy (fetal viability); Right to Reproductive Freedom and Privacy (24 weeks); Right to Reproductive Freedom and Privacy (20 weeks); and Right to Abortion Under Certain Circumstances.
[2] The proposed initiative defines "abortion care" synonymously with "abortion." Pet. § 39-801(5)a.

September 16, 2024

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

RE: Certificate of Review
Proposed Initiative for Adding a New Section to Title 39, Idaho Code, Providing for a Right to Reproductive Freedom and Privacy (24 weeks).[1]

Dear Secretary of State McGrane:

An initiative petition was filed on August 16, 2024, proposing to amend title 39 of the Idaho Code. Pursuant to Idaho Code section 34-1809, this office has reviewed the petition and prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each legal or constitutional issue that may present problems. This letter therefore addresses only those matters of substance that are "deemed necessary and appropriate" to address at this time and does not address or catalogue all problems of substance or of form that the proposed initiative may pose under federal or Idaho law. Idaho Code § 34-1809(1)(a). Further, under the review statute, the Attorney General's recommendations are "advisory only," and the petitioners are free to "accept or reject them in whole or in part." *Id.* § 34-1809(1)(b). This office offers no opinion with regard to the policy issues raised by the proposed initiative or the potential revenue impact to the state budget from likely litigation over the initiative's validity.

MATTERS OF SUBSTANTIVE IMPORT

I. Summary of the Proposed Initiative

The proposed initiative seeks to add to Idaho law, by statute, a right to "reproductive freedom and privacy." The initiative proposes a new statute, section 39-801, that would significantly change abortion law in Idaho, granting a right to abortion for any reason "prior to 24 weeks gestation." Additionally, the initiative would institute a right to "reproductive freedom and privacy." Broadly speaking, the initiative would: 1) remove any restrictions on abortion before twenty-four (24) weeks gestation; 2) allow for unrestricted regulation of abortions after 24 weeks gestation; and 3) attempt to place restrictions broadly on future legislation or regulation regarding abortion and "reproductive freedom and privacy."

1. Removing Restrictions on Abortion Before 24 Weeks Gestation

The proposed initiative would alter Idaho laws by providing for a right to abortion for any reason "prior to twenty-four (24) weeks gestation." Pet. § 39-801(2). The initiative proposes a right to "reproductive freedom and privacy," which includes the right to "abortion care."[2] *Id.* § 39-801(1)a. The initiative says "the state shall not infringe, burden, or prohibit abortion care prior to 24 weeks gestation." *Id.* § 39-801(2)a.

2. Unrestricted Regulation of Abortion After 24 Weeks Gestation

The proposed initiative would not provide for any exemption for abortions performed after 24 weeks gestation. Rather, the initiative would permit the state to regulate abortion, without limitation, after 24 weeks gestation. Pet. § 39-801(2)b.

As noted above, prior to "24 weeks gestation," the proposed initiative would allow for abortion for any reason, stating that "the state shall not infringe, burden, or prohibit abortion care prior to 24 weeks gestation." Pet.§ 39-801(2)a. In the subsection immediately thereafter, the initiative states: "It shall not be a violation of the right to reproductive freedom and privacy for the state to regulate abortion care after 24 weeks gestation." *Id.* § 39-801(2)b. In other words, the proposed initiative sets up a framework wherein abortion 1) cannot be "prohibited" *before* "24 weeks gestation," 2) but can be "regulated," without restriction, *after* "24 weeks gestation." *Id.*

3. Restrictions on Future Regulation of Abortion and "Reproductive Freedom and Privacy"

In addition to the specific provisions that significantly change current abortion law in Idaho, the proposed initiative also provides for a broad "right to reproductive freedom and privacy." Pet. § 39-801(1)a. The initiative provides a non-exhaustive list of eight "reproductive decisions" included in the right to "reproductive freedom and privacy." The "reproductive decisions" the initiative lists out are decisions on:

i. Pregnancy;
ii. Contraception;
iii. Fertility Treatment;
iv. Prenatal and Postpartum care;
v. Childbirth;
vi. Continuing one's own pregnancy;
vii. Miscarriage care; and
viii. Abortion care.

Id. The initiative provides definitions for "Contraception," "Fertility Treatment," "Miscarriage care," and "Abortion care," but it does not define the other four listed "reproductive decisions." *Id.* § 39-801(5).

After setting forth this "right to reproductive freedom and privacy," the proposed initiative articulates limitations on the State's ability to regulate that right. The proposed initiative uses language

commonly associated with fundamental constitutional rights when describing its proposed "right to reproductive freedom and privacy." *See Planned Parenthood Great Nw. v. State*, 171 Idaho 374, 413, 522 P.3d 1132, 1171 (2023) (citing *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (discussing Fifth Amendment right against Double Jeopardy)). For example, the proposed initiative states that "[t]he state shall not directly or indirectly infringe…the right to reproductive freedom…unless justified by a compelling state interest achieved by the least restrictive means." Pet. § 39-801(2). The proposed initiative defines the appropriate "compelling interest" as regulating this right for "the purpose of improving or maintaining the health of an individual seeking care." Pet. § 39-801(3).

II. Analysis of the Proposed Initiative's Subsections

The matters of substantive import are addressed below, with each of the pertinent substantive subsections discussed in turn.

1. *Subsection (1)* – No Discussion of Privacy

In subsection (1) there is a lack of specificity regarding "privacy." The proposed initiative speaks of "reproductive freedom and privacy," but the non-exhaustive list of "reproductive decisions" covered by this right seems to deal entirely with freedom (freedom to make those decisions). There is nothing in subsection (1) that relates, on its face, to privacy. There is no explicit "right to privacy" contained within the Idaho Constitution, as there is in other states. Therefore, the drafters may want to include additional details as to what a "right to privacy" entails so as to avoid confusion and ambiguity.

2. *Subsections (2) and (3)* - Ordinary Legislation Cannot Bind Future Legislation or Regulation

The "right to reproductive freedom and privacy" set forth in the initiative would limit the State's authority to regulate abortion. Pet. § 39-801(2)-(3). However, this attempt to treat the "right to reproductive freedom and privacy" as a fundamental constitutional right and restrict

future regulation of abortion violates the principle of legislative authority: ordinary statutes cannot bind or curtail the legislative authority of a future legislature. This principle was recently articulated and re-affirmed in the Idaho Supreme Court's *Planned Parenthood* decision. *See Planned Parenthood*, 171 Idaho at 452-53.

In *Planned Parenthood*, plaintiffs/petitioners argued that the Defense of Life & Heartbeat Acts were invalid because they conflicted with the Idaho Human Rights Act. *See id.* at 452-53. The Idaho Supreme Court rejected that argument because "no present legislature can bind a future legislature through ordinary legislation." *Id.* at 453 (citing *State v. Gallet*, 36 Idaho 178, 179, 209 P. 723, 724 (1922)). The Court went on to note that the legislature, therefore, "may enact any law not expressly or inferentially prohibited by the state or federal constitutions." *Id.* (cleaned up). The Idaho Supreme Court concluded that because the Human Rights Act was enacted as "ordinary legislation," it cannot restrict a future legislature's ability to regulate abortion, even if the Human Rights Act purported to do so (something the Court did not decide and did not need to decide).

The proposed initiative here is a proposal to amend the Idaho Code. In other words, if passed through the ballot initiative process, it would constitute "ordinary legislation." As such, the initiative cannot bind future legislatures, or a future attempt to amend the law through a future initiative petition and cannot restrict the Idaho legislature's future regulation of abortion. This squarely conflicts with the initiative, which reads: "The state shall not directly or indirectly infringe, burden, or prohibit in any way any person's voluntary exercise of the right to reproductive freedom and privacy…unless justified by a compelling state interest achieved by the least restrictive means." Pet. § 39-801(2). Moreover, the initiative seeks to bind future legislation even further by dictating that the only compelling interest the state can consider when regulating abortion is "improving or maintaining the health of an individual seeking care." *Id.* § 39-801(3). Under clear Idaho Supreme Court precedent, such an attempt to restrict future legislation impermissible.

3. *Subsection (4)* – Does Not Specifically Address Existing Idaho Law

Subsection (4) provides that "[t]he provisions of this section are intended to control over any other section of Idaho Code and are to be liberally construed in favor of reproductive freedom and privacy." Pet. § 39-801(4). However, the initiative does not specifically address current laws in Idaho regulating abortion, which leaves open questions as to how the initiative would be incorporated into current law. For example, it is unclear what laws and definitions control when the proposed initiative is silent on an issue.

4. Potential Conflict with Right to Life

One issue that may be a concern is whether the initiative's proposed "right to reproductive freedom and privacy" conflicts with an unborn child's right to life. Within the initiative's proposed "right to reproductive freedom and privacy," there is a right to "abortion care." *Id.* § 39-801(1)a.viii. This right to abortion is inherently in conflict with the life of the unborn child (the "fetus"). This raises the further issue of whether the proposed right may conflict with the unborn child's right to life, and thus be declared unconstitutional.

The constitutional legal protections of an unborn child have not been expressly addressed in Idaho. But an unborn child's "inalienable right to life" was one of the earliest justifications for Idaho's early laws criminalizing abortions. *See Planned Parenthood*, 171 Idaho at 426 (quoting an address by Dr. J.H. Lyons from the year 1907 in which he discussed the "immorality of voluntary abortion…based on the unborn child's 'inalienable right' to life by the 'mere fact of its existence' as a 'human being'"). Further, Idaho law also currently recognizes that "preborn children have interests in life, health, and well-being." *See* Idaho Code § 18-8802(1).

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via copy of this Certificate of Review, deposited in the U.S. Mail to Melanie Folwell, P.O. Box 6902, Boise, ID 83702.

Sincerely,

RAÚL R. LABRADOR
Attorney General

Analysis by:

James E. M. Craig, Division Chief
Civil Litigation and Constitutional Defense

[1] This proposed initiative petition was submitted at the same time as three other petitions, all submitted by the same petitioner. Because each proposed initiative is similar in subject matter and intent, they will be distinguished using the following naming convention: Right to Reproductive Freedom and Privacy (fetal viability); Right to Reproductive Freedom and Privacy (24 weeks); Right to Reproductive Freedom and Privacy (20 weeks); and Right to Abortion Under Certain Circumstances.
[2] The proposed initiative defines "abortion care" synonymously with "abortion." Pet. § 39-801(5)a.

September 16, 2024

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

RE: Certificate of Review
Proposed Initiative for Adding a New Section to Title 39, Idaho Code, Providing for a Right to Reproductive Freedom and Privacy (fetal viability).[1]

Dear Secretary of State McGrane:

An initiative petition was filed on August 16, 2024, proposing to amend title 39 of the Idaho Code. Pursuant to Idaho Code section 34-1809, this office has reviewed the petition and prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each legal or constitutional issue that may present problems. This letter therefore addresses only those matters of substance that are "deemed necessary and appropriate" to address at this time and does not address or catalogue all problems of substance or of form that the proposed initiative may pose under federal or Idaho law. Idaho Code § 34-1809(1)(a). Further, under the review statute, the Attorney General's recommendations are "advisory only," and the petitioners are free to "accept or reject them in whole or in part." *Id.* § 34-1809(1)(b). This office offers no opinion with regard to the policy issues raised by the proposed initiative or the potential revenue impact to the state budget from likely litigation over the initiative's validity.

MATTERS OF SUBSTANTIVE IMPORT

I. Summary of the Proposed Initiative

The proposed initiative seeks to add to Idaho law, by statute, a right to "reproductive freedom and privacy." The initiative proposes a new statute, section 39-801, that would significantly change abortion law in Idaho, granting a right to abortion for any reason "prior to fetal viability." Additionally, the initiative would institute a right to "reproductive freedom and privacy." Broadly speaking, the initiative would: 1) remove any restrictions on abortion before the point of "fetal viability;" 2) exempt from criminal liability any abortion performed in the case of a "medical emergency;" and 3) attempt to place restrictions broadly on future legislation or regulation regarding abortion and "reproductive freedom and privacy."

1. Removing Restrictions on Abortion Before "Fetal Viability"

The proposed initiative would alter Idaho laws by providing a right to abortion for any reason "prior to fetal viability." Pet. § 39-801(2). The initiative defines "fetal viability" as "the point in a pregnancy when…the fetus has a significant likelihood of sustained survival outside of the uterus without the application of extraordinary medical measures." *Id.* § 39-801(5)c. Terms within this definition, such as "significant likelihood of sustained survival" or "extraordinary medical measures" are not defined.

The initiative proposes a right to "reproductive freedom and privacy," which includes the right to "abortion care."[2] *Id.* § 39-801(1)a. The initiative says, "the state shall not infringe, burden, or prohibit abortion care prior to fetal viability." *Id.* § 39-801(2)a.

2. Exemption for Abortions Performed for "Medical Emergencies"

The proposed initiative would also change current Idaho law regarding abortion by providing for an exemption from criminal liability for abortions performed "in cases of medical emergency." *Id.* § 39-801(2)b. The initiative defines a "medical emergency," as a physical medical condition warranting abortion to save the pregnant person's life,

avoid placing the pregnant person's health "in serious jeopardy;" avoid "serious impairment to a bodily function," or avoid serious dysfunction of any bodily organ or part." *Id*. § 39-801(5)(f). The proposed initiative notes that this definition of "medical emergency" is "intended to be interpreted consistent with the definition provided in title 42, U.S. code, chapter 7, section 1395dd(e)(1)." *Id*. This federal statute is commonly referred to as the Emergency Medical Treatment and Labor Act ("EMTALA").

This exemption for abortions performed "in cases of a medical emergency" kicks in after "fetal viability." In short, the proposed initiative sets up a framework wherein abortion 1) cannot be "prohibited" *before* "fetal viability," 2) can be "regulated" *after* "fetal viability," and 3) can *never* be "regulated" or prohibited in cases of "medical emergency," as defined by the initiative.

3. Restrictions on Future Regulation of Abortion and "Reproductive Freedom and Privacy"

In addition to the specific provisions that change current abortion law in Idaho, the proposed initiative also provides for a broad "right to reproductive freedom and privacy." Pet. § 39-801(1)a. The initiative provides a non-exhaustive list of eight "reproductive decisions" included in the right to "reproductive freedom and privacy." The "reproductive decisions" the initiative lists out are decisions on:

i. Pregnancy;
ii. Contraception;
iii. Fertility Treatment;
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Id. The initiative provides definitions for "Contraception," "Fertility Treatment," "Miscarriage care," and "Abortion care," but it does not define the other four listed "reproductive decisions." *Id.* § 39-801(5).

After setting forth this "right to reproductive freedom and privacy," the proposed initiative articulates limitations on the State's ability to regulate that right. The proposed initiative uses language commonly associated with fundamental constitutional rights when describing its proposed "right to reproductive freedom and privacy." *See Planned Parenthood Great Nw. v. State,* 171 Idaho 374, 413, 522 P.3d 1132, 1171 (2023) (citing *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (discussing Fifth Amendment right against Double Jeopardy)). For example, the proposed initiative states that "[t]he state shall not directly or indirectly infringe…the right to reproductive freedom…unless justified by a compelling state interest achieved by the least restrictive means." Pet. § 39-801(2). The proposed initiative defines the appropriate "compelling interest" as regulating this right for "the purpose of improving or maintaining the health of an individual seeking care." Pet. § 39-801(3).

II. Analysis of the Proposed Initiative's Subsections

The matters of substantive import are addressed below, with each of the pertinent substantive subsections discussed in turn.

1. *Subsection (1)* – No Discussion of "Privacy"

In subsection (1) there is a lack of specificity regarding "privacy." The proposed initiative speaks of "reproductive freedom *and* privacy," but the non-exhaustive list of "reproductive decisions" covered by this right seems to deal entirely with freedom (freedom to make those decisions). There is nothing in subsection (1) that relates, on its face, to privacy. There is no explicit "right to privacy" contained within the Idaho Constitution, as there is in other states. Therefore, the drafters may want to include additional details as to what a "right to privacy" entails so as to avoid confusion and ambiguity.

2. *Subsections (2) and (3)* - Ordinary Legislation Cannot Bind Future Legislation or Regulation

The "right to reproductive freedom and privacy" set forth in the initiative would limit the State's authority to regulate abortion. Pet. § 39-801(2)-(3). However, this attempt to treat the "right to reproductive freedom and privacy" as a fundamental constitutional right and restrict future regulation of abortion violates the principle of legislative authority: ordinary statutes cannot bind or curtail the legislative authority of a future legislature. This principle was recently articulated and re-affirmed in the Idaho Supreme Court's *Planned Parenthood* decision. *See Planned Parenthood*, 171 Idaho at 452-53.

In *Planned Parenthood*, plaintiffs/petitioners argued that the Defense of Life & Heartbeat Acts were invalid because they conflicted with the Idaho Human Rights Act. *See id.* at 452-53. The Idaho Supreme Court rejected that argument because "no present legislature can bind a future legislature through ordinary legislation." *Id.* at 453 (citing *State v. Gallet*, 36 Idaho 178, 179, 209 P. 723, 724 (1922)). The Court went on to note that the legislature, therefore, "may enact any law not expressly or inferentially prohibited by the state or federal constitutions." *Id.* (cleaned up). The Idaho Supreme Court concluded that because the Human Rights Act was enacted as "ordinary legislation," it cannot restrict a future legislature's ability to regulate abortion, even if the Human Rights Act purported to do so (something the Court did not decide and did not need to decide).

The proposed initiative here is a proposal to amend the Idaho Code. In other words, if passed through the ballot initiative process, it would constitute "ordinary legislation." As such, the initiative cannot bind future legislatures, or a future attempt to amend the law through a future initiative petition and cannot restrict the Idaho legislature's future regulation of abortion. This squarely conflicts with the initiative, which reads: "The state shall not directly or indirectly infringe, burden, or prohibit in any way any person's voluntary exercise of the right to reproductive freedom and privacy…unless justified by a compelling state interest achieved by the least restrictive means." Pet. § 39-801(2).

Moreover, the initiative seeks to bind future legislation even further by dictating that the only compelling interest the state can consider when regulating abortion is "improving or maintaining the health of an individual seeking care." *Id.* § 39-801(3). Under clear Idaho Supreme Court precedent, such an attempt to restrict future legislation impermissible.

3. *Subsection (4)* – Does Not Specifically Address Existing Idaho Law

Subsection (4) provides that "[t]he provisions of this section are intended to control over any other section of Idaho Code and are to be liberally construed in favor of reproductive freedom and privacy." Pet. § 39-801(4). However, the initiative does not specifically address current laws in Idaho regulating abortion, which leaves open questions as to how the initiative would be incorporated into current law. For example, it is unclear what laws and definitions control when the proposed initiative is silent on an issue.

4. *Subsection (5)* – Definitions

"Medical Emergency" - The proposed initiative contains inconsistent and potentially confusing language borrowed from federal law. As noted above, the initiative specifically references EMTALA in its definition of "medical emergency" and borrows much of its language from that law, noting that "medical emergency" should be interpreted consistent with the definition in EMTALA. Pet. § 39-801(6)d.

This is problematic for a couple reasons. First, EMTALA does not itself contain a definition of "medical emergency," nor does it mention abortion at all. Second, while the initiative borrows much of the language from EMTALA, there are places where the two significantly differ, leading to confusion.

EMTALA uses the term "emergency medical condition," and defines that term without reference to whether or when abortion is necessary or warranted. Indeed, EMTALA does not mention or even

allude to abortion. Rather it imposes a requirement for hospitals, regardless of a patient's ability to pay, to 1) stabilize and 2) treat or transfer patients who present to their emergency departments with an "emergency medical condition." 42 U.S.C. § 1395dd.

In contrast, within the proposed initiative, the definition of "medical emergency" specifically includes abortion. The definition itself sets forth a standard for when an abortion is "warrant[ed]." Pet. § 39-801(6)d. Under that standard, abortion is warranted "[t]o save the pregnant patient's life," or when a "delay may" cause various medical complications. *Id.*

Finally, the standard for classifying a medical condition as an "emergency" is different in EMTALA than the standard proposed by the initiative. EMTALA provides that a medical emergency is one that, in the absence of immediate medical attention, "*could reasonably be expected to result in"* various medical complications. *Id.* (emphasis added). In contrast, the proposed initiative defines a "medical emergency" as a situation where delay in medical care "*may"* lead to various medical complications. The contrast in standards—"could reasonably be expected to result in" versus "may" lead to—presents a situation that may result in confusion about which standard should apply. Again, this confusion could be avoided by simply removing the reference to EMTALA.

5. Potential Conflict with Right to Life

One issue that may be a concern is whether the initiative's proposed "right to reproductive freedom and privacy" conflicts with an unborn child's right to life. Within the initiative's proposed "right to reproductive freedom and privacy," there is a right to "abortion care." *Id.* § 39-801(1)a.viii. This right to abortion is inherently in conflict with the life of the unborn child (the "fetus"). This raises the further issue of whether the proposed right may conflict with the unborn child's right to life and thus be declared unconstitutional.

The constitutional legal protections of an unborn child have not been expressly addressed in Idaho. But an unborn child's "inalienable right to life" was one of the earliest justifications for Idaho's early laws criminalizing abortions. *See Planned Parenthood*, 171 Idaho at 426 (quoting an address by Dr. J.H. Lyons from the year 1907 in which he discussed the "immorality of voluntary abortion…based on the unborn child's 'inalienable right' to life by the 'mere fact of its existence' as a 'human being'"). Further, Idaho law also currently recognizes that "preborn children have interests in life, health, and well-being." *See* Idaho Code § 18-8802(1).

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via copy of this Certificate of Review, deposited in the U.S. Mail to Melanie Folwell, P.O. Box 6902, Boise, ID 83702.

Sincerely,

RAÚL R. LABRADOR
Attorney General

Analysis by:

James E. M. Craig, Division Chief
Civil Litigation and Constitutional Defense

[1] This proposed initiative petition was submitted at the same time as three other petitions, all submitted by the same petitioner. Because each proposed initiative is similar in subject matter and intent, they will be distinguished using the following naming convention: Right to Reproductive Freedom and Privacy (fetal viability); Right to Reproductive Freedom and Privacy (24 weeks); Right to Reproductive Freedom and Privacy (20 weeks); and Right to Abortion Under Certain Circumstances.
[2] The proposed initiative defines "abortion care" synonymously with "abortion." Pet. § 39-801(5)a.

September 16, 2024

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

RE: Certificate of Review
Proposed Initiative for Adding a New Section to Title 39, Idaho Code, Providing for a Right to Abortion Under Certain Circumstances. [1]

Dear Secretary of State McGrane:

An initiative petition was filed on August 16, 2024, proposing to amend title 39 of the Idaho Code. Pursuant to Idaho Code section 34-1809, this office has reviewed the petition and prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each legal or constitutional issue that may present problems. This letter therefore addresses only those matters of substance that are "deemed necessary and appropriate" to address at this time and does not address or catalogue all problems of substance or of form that the proposed initiative may pose under federal or Idaho law. Idaho Code § 34-1809(1)(a). Further, under the review statute, the Attorney General's recommendations are "advisory only," and the petitioners are free to "accept or reject them in whole or in part." *Id.* § 34-1809(1)(b). This office offers no opinion with regard to the policy issues raised by the proposed initiative or the potential revenue impact to the state budget from likely litigation over the initiative's validity.

MATTERS OF SUBSTANTIVE IMPORT

I. Summary of the Proposed Initiative

The proposed initiative seeks to add to Idaho law, by statute, a right to abortion that, except in certain circumstances, cannot be limited by the State. The initiative proposes a new statute, section 39-801, that would 1) create a statutory right to abortion and purport to limit the State's ability to "infringe, burden, or prohibit" that right to abortion; and 2) override the enforcement of current laws that criminalize abortion.

1. "Right to Abortion"

The initiative proposes to establish, by statute, a "person's…right to abortion." Pet. § 39-801(2). The initiative says: "The state shall not directly or indirectly infringe, burden, or prohibit in any way any person's voluntary exercise of the right to abortion as described in this section." *Id.* The initiative notes that its provisions are "intended to control over any other section of the Idaho Code and are to be liberally construed in favor of a right to abortion." *Id.* § 39-801(5).

2. Limiting State Regulation of Abortion

The proposed initiative seeks to limit the State's ability to regulate abortion. It uses language commonly associated with fundamental constitutional rights when describing its proposed "right to abortion." *Id.* § 39-801(2); *see Planned Parenthood Great Nw. v. State,* 171 Idaho 374, 413, 522 P.3d 1131, 1172 (2023) (citing *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (discussing Fifth Amendment right against Double Jeopardy)). For example, the proposed initiative states that "[t]he state shall not directly or indirectly infringe…the right to abortion…unless justified by a compelling state interest achieved by the least restrictive means." Pet. § 39-801(2). The proposed initiative defines the appropriate "compelling interest" as regulating abortion for "the purpose of improving or maintaining the health of an individual seeking care." *Id.* § 39-801(3).

3. Override Enforcement of Idaho's Current Abortion Laws

The proposed initiative would override the enforcement of Idaho's current abortion laws by exempting certain abortions from punishment under current Idaho law. The initiative notes: "Notwithstanding any other provision of law, abortion care[2] shall provide no basis for a violation of the provisions of title 18, Idaho Code, by any person in any of the following instances." Pet. § 39-801(1). The instances include circumstances where abortion is necessary to maintain the mother's physical health or life, as determined by the attending physician, *id.* § 39-801(1)a; cases where "the fetus is unlikely to survive outside the womb without extraordinary medical intervention," *id.* § 39-801(1)b; and cases of rape or incest, *id.* at § 39-801(1)c.

The exemptions for cases of rape or incest only apply while "the pregnancy has not achieved fetal viability," and not thereafter. *Id.* The proposed initiative defines "fetal viability" as "the point in a pregnancy when in the good faith judgment of an attending health care professional and based on the particular facts of the case known to the health care professional at the time, the fetus has a significant likelihood of sustained survival outside of the uterus, without the application of extraordinary medical measures." *Id.*

II. Analysis of the Proposed Initiative's Subsections

The matters of substantive import are addressed below, with each of the pertinent substantive subsections discussed in turn.

1. *Subsection (1)* - Does Not Specifically Address Existing Idaho Law

The proposed initiative does not specifically address current laws in Idaho regulating abortion, which leaves open questions as to how the initiative would be incorporated into current law. For example, many of the provisions in subsection (1) of the initiative overlap with

provisions in Idaho's current abortion laws (exceptions in cases of rape and incest, etc.).

Additionally, there is an apparent conflict between subsection (1) and subsections (2)—(5). Subsection (1) contains a handful of provisions exempting abortion from criminal liability under certain circumstances (in the case of a medical emergency, when pregnancy is unlikely to result in a live birth, etc.). In contrast, subsections (2)—(5) propose a "right to abortion." This right seems to override the more limited exemptions for abortion in subsection (1). In other words, given the right to abortion articulated in subsections (2)—(5), the more limited exemptions for abortion in subsection (1) would appear to be superfluous.

2. *Subsections (2) and (3)* - Ordinary Legislation Cannot Bind Future Legislation or Regulation

The "right to abortion" set forth in the initiative purports to limit the State's authority to regulate abortion. Pet. § 39-801(2)-(3). However, this attempt to treat the "right to abortion" as a fundamental constitutional right and restrict future regulation of abortion violates the principle of legislative authority: ordinary statutes cannot bind or curtail the legislative authority of a future legislature. This principle was recently articulated and re-affirmed in the Idaho Supreme Court's *Planned Parenthood* decision. *See Planned Parenthood*, 171 Idaho at 452-53.

In *Planned Parenthood*, plaintiffs/petitioners argued that the Defense of Life & Heartbeat Acts were invalid because they conflicted with the Idaho Human Rights Act. *See id.* at 452-53. The Idaho Supreme Court rejected that argument because "no present legislature can bind a future legislature through ordinary legislation." *Id.* at 453 (citing *State v. Gallet*, 36 Idaho 178, 179, 209 P. 723, 724 (1922)). The Court went on to note that the legislature, therefore, "may enact any law not expressly or inferentially prohibited by the state or federal constitutions." *Id.* (cleaned up). The Idaho Supreme Court concluded that because the Human Rights Act was enacted as "ordinary

legislation," it cannot restrict a future legislature's ability to regulate abortion, even if the Human Rights Act purported to do so (something the Court did not decide and did not need to decide).

The proposed initiative here is a proposal to amend the Idaho Code. In other words, if passed through the ballot initiative process, it would constitute "ordinary legislation." As such, the initiative cannot bind future legislatures, or a future attempt to amend the law through a future initiative petition and cannot restrict the Idaho legislature's future regulation of abortion. This squarely conflicts with the initiative, which reads: "The state shall not directly or indirectly infringe, burden, or prohibit in any way any person's voluntary exercise of the right to abortion…unless justified by a compelling state interest achieved by the least restrictive means." Pet. § 39-801(2). Moreover, the initiative seeks to bind future legislation even further by dictating that the only compelling interest the state can consider when regulating abortion is "improving or maintaining the health of an individual seeking care." *Id.* § 39-801(3). Under clear Idaho Supreme Court precedent, such an attempt to restrict future legislation is impermissible.

3. *Subsection (4)* – Typographical Error

There is a clear typographical error in subsection (4). In § 39-801(4)d, the initiative states: "A health care professional's of conscience pursuant to section 18-611, Idaho Code, shall be preserved." From context and from reference to Idaho Code section 18-611, it appears that the word "freedom" was unintentionally omitted. The above subsection should read: "A health care professional's *freedom* of conscience… ."

4. *Subsection (6)* – Definitions

"Medical Emergency" - The proposed initiative contains inconsistent and potentially confusing language borrowed from federal law. The initiative specifically references title 42, U.S. code, chapter 7, section 1395dd(e)(1), which is commonly known as the Emergency Medical Treatment and Active Labor Act (EMTALA). The initiative defines "medical emergency" by reference to EMTALA and borrows

much of its language from that law, noting that "medical emergency" should be interpreted consistent with the definition in EMTALA. Pet. § 39-801(6)d. This is problematic for a couple of reasons. First, EMTALA does not itself contain a definition of "medical emergency," nor does it mention abortion at all. Second, while the initiative borrows much of the language from EMTALA, there are places where the two significantly differ, leading to confusion.

EMTALA uses the term "emergency medical condition," and defines that term without reference to whether or when abortion is necessary or warranted. Indeed, EMTALA does not mention or even allude to abortion. Rather it imposes a requirement for hospitals, regardless of a patient's ability to pay, to 1) stabilize and 2) treat or transfer patients who present to their emergency departments with an "emergency medical condition." 42 U.S.C. § 1395dd.

In contrast, within the proposed initiative, the definition of "medical emergency" specifically includes abortion. The definition itself sets forth a standard for when an abortion is "warrant[ed]." Pet. § 39-801(6)d. Under that standard, abortion is warranted "[t]o save the pregnant patient's life," or when a "delay may" cause various medical complications. *Id.*

Finally, the standard for classifying a medical condition as an "emergency" is different in EMTALA than the standard proposed by the initiative. EMTALA provides that a medical emergency is one that, in the absence of immediate medical attention, "*could reasonably be expected to result in"* various medical complications. *Id.* (emphasis added). In contrast, the proposed initiative defines a "medical emergency" as a situation where delay in medical care "*may"* lead to various medical complications. The contrast in standards—"could reasonably be expected to result in" versus "may" lead to—presents a situation that may result in confusion about which standard should apply. Again, this confusion could be avoided by simply removing the reference to EMTALA.

5. Potential Conflict with Right to Life

One issue that may be a concern is whether the initiative's proposed "right to abortion" conflicts with an unborn child's right to life. In certain provisions, the proposed initiative utilizes the concept of "fetal viability," and therefore recognizes the inherent conflict between a "right to abortion" and the life of the unborn child (the "fetus"). This raises the further issues of whether the proposed "right to abortion," may conflict with the unborn child's right to life, and thus be declared unconstitutional.

The constitutional legal protections of an unborn child have not been expressly addressed in Idaho. But an unborn child's "inalienable right to life" was one of the earliest justifications for Idaho's early laws criminalizing abortions. *See Planned Parenthood*, 171 Idaho at 426 (quoting an address by Dr. J.H. Lyons from the year 1907 in which he discussed the "immorality of voluntary abortion…based on the unborn child's 'inalienable right' to life by the 'mere fact of its existence' as a 'human being'"). Further, Idaho law also currently recognizes that "preborn children have interests in life, health, and well-being." *See* Idaho Code § 18-8802(1).

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via copy of this Certificate of Review, deposited in the U.S. Mail to Melanie Folwell, P.O. Box 6902, Boise, ID 83702.

Sincerely,

RAÚL R. LABRADOR
Attorney General

Analysis by:

James E. M. Craig, Division Chief
Civil Litigation and Constitutional Defense

[1] This proposed initiative petition was submitted at the same time as three other petitions, all submitted by the same petitioner. Because each proposed initiative is similar in subject matter and intent, they will be distinguished using the following naming convention: Right to Reproductive Freedom and Privacy (fetal viability); Right to Reproductive Freedom and Privacy (24 weeks); Right to Reproductive Freedom and Privacy (20 weeks); and Right to Abortion Under Certain Circumstances.

[2] The proposed initiative defines "abortion" and "abortion care" synonymously. Pet. § 39-801(6)a.

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 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. 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* Idaho Code § 37-2701(u)(1)&(2). Therefore, it is recommended that "cannabis" be replaced with "marijuana" throughout the Initiative.

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, section 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 describes 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. Idaho Code section 37-2748 through Idaho Code section 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 possessed by a person at least 21 years of age.

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 – Idaho Code § 37-2732(a)(1) which makes it a felony to deliver any amount of marijuana, whether for sale or not.
>
> Trafficking in marijuana – Idaho Code § 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 that 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 Idaho Code section 37-2734. The entirety of the proposed new sub-section reads, "Except as provided for in Idaho Code § 37-2752A."

Sub-sections (1) through (3) of Idaho Code § 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 Idaho Code § 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 Idaho Code section 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 Prop. 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

[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."
[3] Idaho Code § 37-2732*D* (trafficking in fentanyl) was added to the Uniform Controlled Substances Act, effective July 1, 2024. Therefore, the next addition to Idaho Code § 37-2732 should be Idaho Code § 37-2732*E*.

December 20, 2024

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

RE: Certificate of Review
Re-submitted Proposed Initiative for Adding a New Section to Title 39, Idaho Code, Providing for a Right to Reproductive Freedom and Privacy.

Dear Secretary of State McGrane:

An initiative petition that was previously submitted on August 15, 2024, has been re-submitted on November 21, 2024, still proposing to amend title 39 of the Idaho Code, with some revisions to the original submission. Pursuant to Idaho Code section 34-1809, this office has reviewed the re-submitted petition and prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each legal or constitutional issue that may present problems. This letter therefore addresses only those matters of substance that are "deemed necessary and appropriate" to address at this time and does not address or catalogue all problems of substance or of form that the proposed initiative may pose under federal or Idaho law. Idaho Code § 34-1809(1)(a). Further, under the review statute, the Attorney General's recommendations are "advisory only," and the petitioners are free to "accept or reject them in whole or in part." *Id.* § 34-1809(1)(b). This office offers no opinion with regard to the policy issues raised by the proposed initiative or the potential revenue impact to the state budget from likely litigation over the initiative's validity.

MATTERS OF SUBSTANTIVE IMPORT

I. Summary and History of Re-submission of Proposed Initiative

As noted above, this proposed initiative is a re-submission of a previously submitted proposed initiative. This office reviewed the previously submitted initiative—identified as "Right to Reproductive Freedom and Privacy (fetal viability)"—and provided a certificate of review with advisory comments on September 16, 2024. Thereafter, the petitioners revised the proposed initiative and then submitted it and requested the assignment of ballot titles on October 7, 2024. This office responded on October 22, 2024, in accordance with Idaho Code section 34-1809 and provided a short and a long ballot title for the proposed initiative. Petitioners now submit the proposed initiative, effectively re-starting the process, beginning again with the certificate of review. A summary and section by section analysis of the new proposed initiative follows.

The proposed initiative seeks to add to Idaho law, by statute, a right to "reproductive freedom and privacy." Broadly speaking, the initiative would: 1) remove any restrictions on abortion before the point of "fetal viability;" 2) exempt from criminal liability any abortion performed in the case of a "medical emergency;" 3) create a "right of privacy in making personal decisions about reproductive health care in consultation with a health care provider;" and 4) attempt to place restrictions broadly on future legislation or regulation regarding abortion and "reproductive freedom and privacy."

1. "Statement of Purpose"

The proposed initiative's "statement of purpose" sets forth petitioners' general view of the proposed initiative: that it "recognizes that reproductive health care choices…are deeply private matters that should be decided by a person in consultation with their health care provider." Pet. § 39-802. And relatedly, that "[t]he act supports a person's right to reproductive freedom and privacy…and secures a

person's right to make their own health care decisions without government interference." *Id.*

2. Removing Restrictions on Abortion Before "Fetal Viability"

The proposed initiative would alter Idaho laws by providing a right to abortion for any reason "up to fetal viability." Pet. § 39-803(1). The initiative defines "fetal viability" as "the point in a pregnancy when…the fetus has a significant likelihood of sustained survival outside of the uterus without extraordinary medical measures." *Id.* § 39-803(5)d. Terms within this definition, such as "significant likelihood of sustained survival" or "extraordinary medical measures" are not defined.

3. Exemption for Abortions Performed for "Medical Emergencies"

The proposed initiative would also change current Idaho law regarding abortion by providing for an exemption from criminal liability for abortions performed "in medical emergencies." *Id.* § 39-803(1). The initiative defines a "medical emergency," as a physical medical condition warranting abortion to save the pregnant person's life, avoid placing the pregnant person's health "in serious jeopardy;" avoid "serious impairment to a bodily function," or avoid serious dysfunction of any bodily organ or part." *Id*. at § 39-803(5)(g).

This exemption for abortions performed "in medical emergencies" kicks in after "fetal viability." In short, the proposed initiative sets up a framework wherein abortion 1) cannot be "regulated" *before* "fetal viability," 2) can be "regulated" *after* "fetal viability," and 3) can *never* be "regulated" or prohibited in cases of "medical emergencies," as defined by the initiative, regardless of whether it is before or after fetal viability.

4. Restrictions on Future Regulation of Abortion and "Reproductive Freedom and Privacy"

In addition to the specific provisions that change current abortion law in Idaho, the proposed initiative also provides for a broad "right to reproductive freedom and privacy." Pet. § 39-803(2)a. The initiative provides a non-exhaustive list of six "reproductive decisions" included in the right to "reproductive freedom and privacy." The "reproductive decisions" the initiative lists out are decisions on:

i. Abortion;
ii. Childbirth care;
iii. Contraception;
iv. Fertility treatment;
v. Miscarriage care; and
vi. Prenatal, pregnancy, and postpartum care.

Id. The initiative provides definitions for all of the above-listed "reproductive decisions." *Id.* § 39-803(5).

After setting forth this "right to reproductive freedom and privacy," the proposed initiative articulates limitations on the State's ability to regulate that right. The proposed initiative uses language commonly associated with fundamental constitutional rights when describing its proposed "right to reproductive freedom and privacy." *See Planned Parenthood Great Nw. v. State,* 171 Idaho 374, 414, 522 P.3d 1132, 1172 (2023) (citing *Benton v. Maryland*, 395 U.S. 784, 794, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969) (discussing Fifth Amendment right against Double Jeopardy)). For example, the proposed initiative states that "[t]he right to reproductive freedom and privacy shall not be burdened, interfered with, discriminated against, deprived, or prohibited by the state…unless such state action is narrowly tailored to improve or maintain the health of the person seeking reproductive care through the least restrictive means." Pet. § 39-803(2)c.

The proposed initiative also creates a proposed "right to privacy in making personal decisions about reproductive health care in

consultation with a health care provider." *Id.* § 39-803(2)b. This "right of privacy" is not described any further.

5. "Financial Obligation" Statement

The proposed initiative includes a provision stating: "[t]his act does not create a financial obligation on the state, its agencies, or their programs to pay for, fund, or subsidize the reproductive health care protected by this act." *Id*. § 39-803(4)(b). In their letter included with the proposed initiative, the petitioners requested that an "official fiscal impact statement for the Initiative from the Division of Financial Management be issued to reflect the" information in the financial obligation statement.

II. Analysis of the Proposed Initiative's Subsections

The matters of substantive import are addressed below, with each of the pertinent substantive subsections discussed in turn.

1. *Subsection (2)b* – No Discussion of "Privacy" and Potential Conflict with Fundamental Rights Protected by the Idaho and U.S. Constitutions

In subsection (2)b there is a lack of specificity regarding "privacy." The proposed initiative speaks of "a right of privacy," but the non-exhaustive list of "reproductive decisions" in subsection (2)a seems to deal entirely with freedom (freedom to make those decisions).

Further, the "right of privacy in making personal decisions about reproductive health care in consultation with a health care provider" in subsection (2)b is vague and unclear in its meaning. Depending on how broadly it is interpreted, a right to privacy in making personal decisions about reproductive health care could conflict with fundamental rights recognized by the U.S. Supreme Court. For example, if this right of privacy in making personal decisions about reproductive health care is interpreted as including a right for minor children to make their own reproductive health care decisions without the involvement or consent

of their parents, it would likely conflict with the parents' fundamental right to make health care decisions for their children. *See, e.g, Troxel v. Granville*, 530 U.S. 57, 66 (2000) ("[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."); Idaho Code § 32-1015(2) ("Parents have the fundamental right and duty to make decisions concerning the furnishing of health care services to the minor child.") To the extent this "right to privacy in making personal health care decisions" conflicts with fundamental rights protected by the U.S. and Idaho Constitutions, it could be found to be unconstitutional.

Notably, there is no explicit "right to privacy" contained within the Idaho Constitution, as there is in other states, where the "right to privacy" is often interpreted expansively by their courts.

2. *Subsections (2) and (3)* - Ordinary Legislation Cannot Bind Future Legislation or Regulation

The "right to reproductive freedom and privacy" set forth in the initiative would attempt to limit the State's authority to regulate abortion and the other rights included within the right to reproductive freedom and privacy. Pet. § 39-803(2)-(3). However, this attempt to treat the "right to reproductive freedom and privacy" as a fundamental right and restrict future regulation of abortion violates the principle of legislative authority: ordinary statutes cannot bind or curtail the legislative authority of a future legislature. This principle was recently articulated and re-affirmed in the Idaho Supreme Court's *Planned Parenthood* decision. *See Planned Parenthood*, 171 Idaho at 452-53.

In *Planned Parenthood*, plaintiffs/petitioners argued that the Defense of Life & Heartbeat Acts were invalid because they conflicted with the Idaho Human Rights Act. *See id.* at 452-53. The Idaho Supreme Court rejected that argument because "no present legislature can bind a future legislature through ordinary legislation." *Planned Parenthood*, 171 Idaho at 453 (citing *State v. Gallet*, 36 Idaho 178, 179 (1922)). The court went on to note that the legislature, therefore, "may enact any law

not expressly or inferentially prohibited by the state or federal constitutions." *Id.* (cleaned up). The Idaho Supreme Court concluded that because the Human Rights Act was enacted as "ordinary legislation," it cannot restrict a future legislature's ability to regulate abortion, even if the Human Rights Act purported to do so (something the Court did not decide and did not need to decide).

The proposed initiative here is a proposal to amend the Idaho Code. In other words, if passed through the ballot initiative process, it would constitute "ordinary legislation." As such, the initiative cannot bind future legislatures, or a future attempt to amend the law through a future initiative petition and cannot restrict the Idaho legislature's future regulation of abortion. This squarely conflicts with the initiative, which reads: "the right to reproductive freedom and privacy shall not be burdened, interfered with, discriminated against, deprived, or prohibited by the state…unless such state action is narrowly tailored…through the least restrictive means." Pet. §39-803(2)c. Moreover, the initiative seeks to bind future legislation even further by dictating that state regulation is only permissible if it is "narrowly tailored to improve or maintain the health of the person seeking reproductive health care." *Id*. Under clear Idaho Supreme Court precedent, such an attempt to restrict future legislation is impermissible.

3. *Subsection (4)* – Does Not Specifically Address Existing Idaho Law

Subsection (4) provides that, "[t]he provisions of this act are to be liberally construed in favor of reproductive freedom and privacy and are intended to control over any other section of Idaho Code." Pet. § 39-803(4). However, the initiative does not specifically address current laws in Idaho regulating abortion, which leaves open questions as to how the initiative would be incorporated into current law. For example, it is unclear what laws and definitions control when the proposed initiative is silent on an issue.

4. Potential Conflict with Right to Life

One issue that may be a concern is whether the initiative's proposed "right to reproductive freedom and privacy" conflicts with an unborn child's right to life. Within the initiative's proposed "right to reproductive freedom and privacy," there is a right to "abortion." *Id.* § 39-803(1). This right to abortion is inherently in conflict with the life of the unborn child (the "fetus"). This raises the further issue of whether the proposed right may conflict with the unborn child's right to life, and thus, be declared unconstitutional.

The constitutional legal protections of an unborn child have not been expressly addressed in Idaho. But an unborn child's "inalienable right to life" was one of the earliest justifications for Idaho's early laws criminalizing abortions. *See Planned Parenthood*, 171 Idaho at 426 (quoting an address by Dr. J.H. Lyons from the year 1907 in which he discussed the "immorality of voluntary abortion … based on the unborn child's 'inalienable right' to life by the 'mere fact of its existence' as a 'human being'"). Further, Idaho law also currently recognizes that "preborn children have interests in life, health, and well-being." *See* Idaho Code § 18-8802(1).

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via copy of this Certificate of Review, deposited in the U.S. Mail to Melanie Folwell, P.O. Box 6902, Boise, ID 83702.

Sincerely,

RAÚL R. LABRADOR
Attorney General

Analysis by:

James E. M. Craig, Division Chief
Civil Litigation and Constitutional Defense

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ATTORNEY GENERAL'S SELECTED ADVISORY LETTERS FOR THE YEAR 2024

RAÚL R. LABRADOR

ATTORNEY GENERAL
STATE OF IDAHO

January 9, 2024

The Honorable Chuck Winder
President Pro Tempore
Idaho State Senate
700 W. Jefferson Street
Boise, Idaho 83702
VIA HAND DELIVERY

Re: Request for AG Analysis

Dear Pro Tem Winder:

This is in response to your letter of January 3, 2024, asking what the state legislature can do to correct state code regarding underground facilities damage prevention.

The relevant chapter in the Idaho Code for this issue is Idaho Code § 55-2201, et. seq. "[T]he intent of the legislature in enacting this chapter,…" was "…to create a system of stakeholder-driven education and enforcement addressing the prevention of damage to underground facilities." *Id*. Created in this chapter is the Idaho Damage Prevention Board (Board) which is a part of the Idaho Division of Occupational and Professional Licenses (DOPL), a self-governing executive agency. In addition to this code chapter, the Board has promulgated administrative rules. See IDAPA 24.39.90.

The best point of contact to assist with policy in this area is DOPL Bureau Chief Katie Stuart. Her contact information is phone (208) 577-2489 / katie.stuart@dopl.idaho.gov.

Regarding the specific example that you provided, while the aggrieved party may have run up against an administrative complaint filing deadline, the Board only has the authority to impose limited civil penalties paid to the Board when an excavator or facility owner violates the law. To recover damages, a wronged party may have to file a

lawsuit. *See* Idaho Code § 55-2211(4)-(5) and §55-2207. This would be handled by private attorneys hired by the parties.

Please contact me if you would like to discuss this further. This response is provided to assist you. It is an informal and unofficial expression of the views of this office based upon the research of the author.

Sincerely,

MITCHELL E. TORYANSKI
Associate Attorney General

January 11, 2024

The Honorable Chris Trakel
Idaho State Senate
P.O. Box 83720
Boise, Idaho 83720-0081
ctrakel@senate.idaho.gov
VIA EMAIL

Re: Request for AG Analysis

Dear Senator Trakel:

Mitch Toryanski in our office asked that I reach out to you on your request that our office review RS30854, which would immunize minors from prosecution for prostitution under Idaho Code § 18-5613. My understanding is that you would like us to provide feedback on the new subsection as written.

The Attorney General recently released a Human Trafficking Report that contains legislative recommendations. Like RS30854, one of the recommendations in the report would exclude minors from criminal liability under Idaho Code § 18-5613. I have attached the report. The relevant portion is found on page 45 in what would be the new subparagraph (4). I have also included the language immediately below. We recommend using this language.

Human Trafficking Report states that:

> (4) Notwithstanding subsections (1) and (2), this statute does not apply to a child who is alleged to have engaged in conduct that would, if committed by an adult, violate this statute. A commercially exploited child under this paragraph may be taken into shelter care by a peace officer pursuant to

section 16-1608, if the conditions allowing emergency removal are met.

It is my understanding that Rep. Jaron Crane is planning on running a bill that would include this language from our report. It may be worth having a conversation with him.

If you need any additional assistance, please let me know.

Sincerely,

JEFF NYE
Deputy Attorney General
Chief, Criminal Law Division

January 17, 2024

The Honorable Ron Mendive
Idaho House of Representatives
P.O. Box 83720
Boise, Idaho 83720-0038
rmendive@house.idaho.gov
VIA EMAIL

Re: Request for AG Analysis

Dear Representative Mendive:

We have reviewed DRKAG105, a joint memorial, and find no legal issues with it.

Please contact me or Chief Deputy Attorney General Phil Broadbent if you have questions or would like to discuss this draft memorial or any other legal matter relating to your legislative office. We can be reached at (208) 334-4155 / kimi.white@ag.idaho.gov.

Kindly,

MITCHELL E. TORYANSKI
Associate Attorney General

This response was originally provided to the recipient as an email and has been reformatted for the purpose of inclusion in the OAG Annual Report.

March 6, 2024

The Honorable Chuck Winder
President Pro Tempore
Idaho State Senate
700 W. Jefferson Street
Boise, Idaho 83702
cwinder@senate.idaho.gov
BY HAND DELIVERY

Re: House Bill 416

Dear Pro Tem Winder:

This is in response to your email of January 22, 2024, asking whether House Bill 416 (HB416) would prohibit the legislature from paying dues to the Pacific Northwest Economic Region (PNWER), National Conference of State Legislatures (NCSL), and Council of State Governments (CSG). While the bill may allow the payment of membership fees or dues to PNWER, the bill would prohibit the payment of membership fees or dues to NCSL and CSG.

According to its statement of purpose, HB416 seeks to prohibit state government from using tax dollars to fund "membership fees or dues to any organization unless required to maintain professional licensure for state employment." The applicable language of this bill provides that all state entities[1] "shall be prohibited from using public funds to pay membership fees or dues to any organization unless required to do so by law or unless required to maintain professional licensure or[2] for the purposes of fulfilling and maintaining state employment." The term "organization" is broadly defined to include, but not be limited to, "any council, conference, club, association, institute, society, commission, board, alliance, coalition, chamber, federation, or forum."

Based upon a plain reading of HB416, the default is a general prohibition to the payment of organization membership dues or fees. As written, the bill currently delineates three exceptions to this default or general prohibition. Pursuant to the rules of statutory construction, because the bill enumerates certain exceptions, no other exceptions apply.[3] Accordingly, for any state entity to appropriate or pay membership dues or fees with public funds, one of the following circumstances must exist:

(1) the state entity is "required to do so by law;"
(2) the membership fees or dues are "required to maintain professional licensure;" or
(3) the membership fees or dues are required "for the purposes of fulfilling and maintaining state employment."

Turning to your question, under a plain reading of HB416, the first exception is triggered if a law (constitution, statute, or IDAPA rule) mandates the payment of membership fees or dues. Notably, only PNWER is mentioned in Idaho law. *See* chapter 78, title 67, Idaho Code. While the statutory chapter does not mention membership fees, Idaho Code § 67-7802 enacts the PNWER into law and makes the State of Idaho a party to PNWER. Based upon this language, the legislature may arguably pay membership dues required for the State of Idaho to be a party to the organization including for the four (4) legislators and the governor or his designee comprising the delegate council. However, unlike PNWER, neither NCSL nor CSG are mentioned in Idaho law. Therefore, the first exception does not appear to allow the legislature to pay any fees or dues owed to those organizations.

Similarly, it does not appear that either the second or third exception apply. A review of the PNWER, NCSL, or CSG websites suggests these organizations do not issue professional licenses. Additionally, we are unaware of any requirement for a legislator to join these organizations in order to fulfill or maintain state employment.

For these reasons, it appears that HB416 would allow the legislature to pay membership fees or dues to PNWER but prohibit payment of membership fees or dues to NCSL or CSG.

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

We have reviewed DRKAG105, a joint memorial, and find no legal issues with it.

Please contact me or Chief Deputy Attorney General Phil Broadbent if you have questions or would like to discuss this draft memorial or any other legal matter relating to your legislative office. We can be reached at (208) 334-4155 / kimi.white@ag.idaho.gov.

Kindly,

MITCHELL E. TORYANSKI
Associate Attorney General

[1] The bill applies to "state executive, legislative, and judicial branches and any subdivision, public officer, or public employee," which are herein jointly referred to as "state entity/ies."

[2] Based upon the bill's statement of purpose, it appears the word "or" may have an unintentional consequence. While the statement of purpose suggests the intent is to allow payment of only those professional licensure fees which are required for state employment, the inclusion of the word "or" separates the payment of professional licensure fees from membership fees which are required for state employment. It thereby effectively allows a state entity to pay for professional licensure fees whether or not the licensure is required for state employment.

[3] *See, e.g., Idaho Press Club, Inc. v. State Legislature of the State*, 142 Idaho 640, 642 (2006) ("It is a universally recognized rule of construction that, where a constitution or statute specifies certain things, the designation of such things excludes all others.")

March 8, 2024

The Honorable Tammy Nichols
Idaho State Senate
P.O. Box 83720
Boise, Idaho 83720-0081
tnichols@senate.idaho.gov

Re: Request for AG Analysis

Dear Senator Nichols:

This letter is written in response to your request for a legal analysis of draft legislation R.S. 31130. Below are the questions identified and my analysis of this draft.

QUESTIONS PRESENTED

1. May the legislature extend the right to vote in city elections to individuals residing outside of city limits?

   Short Answer: Yes. The Idaho Constitution does not prohibit the legislature from extending the right to vote in city elections to individuals residing outside of city limits.

2. Does R.S. 31130 conflict with the usage of term "qualified elector" as used in the Idaho Constitution's section limiting county and municipal debt?

   Short Answer: No. R.S. 31130 is written so it does not apply to the kinds of elections contemplated in article VIII, section 3 of the Idaho Constitution (the section limiting county and municipal indebtedness).

3. Does R.S. 31130 violate the constitutional prohibition on a city enforcing ordinances beyond its limits as discussed in *Blaha v.*

Board of Ada County Commissioners, 134 Idaho 770, 777, 9 P.3d 1236, 1243 (2000)?

Short Answer: No. The limitation expressed in article XII, section 2 of the Idaho Constitution and discussed in *Blaha* only applies when a city tries to impose its municipal ordinances outside of city limits. R.S. 31130, if passed, would be a general law of Idaho and not a city ordinance. The statute is not subject to this limitation.

ANALYSIS

1. The Idaho Constitution Does Not Prohibit the Legislature from Extending the Right to Vote in City Elections to Individuals Outside of City Limits.

R.S. 31130 proposes to allow individuals living within a city's area of impact to vote in city council and mayoral elections. It also would provide for residents of an area of impact to be represented on the city council. The Idaho Constitution does not appear to prohibit the Legislature from extending the right to vote in city elections to individuals outside of the city limits.

The Idaho Constitution vests the legislature with authority to organize cities under general laws. "The legislature shall provide by general laws for the incorporation, organization and classification of the cities and towns[.]" IDAHO CONST. art. XII, § 1. The legislature also has authority to "prescribe qualifications, limitations, and conditions for the right of suffrage." IDAHO CONST. art VI, § 4. Taken together, these two constitutional provisions appear to give the Idaho Legislature authority to determine who may vote in city elections.

The Idaho Constitution does not appear to have any provision requiring mayoral or city council electors (or candidates) to live within the territorial limits of a city. The Constitution's only residency requirements for an "elector" relate to state and county residency, not to city residency. IDAHO CONST. art. VI, § 2. That section states, "Every

male or female citizen of the United States, eighteen years old, who has resided in this state, and in the county where he or she offers to vote for the period provided by law, if registered as provided by law, is a qualified elector." *Id*. This provision appears to only apply to state or county elections, not city elections.

2. R.S. 31130 Does Not Conflict with the Term "Qualified Elector" as Used in the Idaho Constitution's Section Limiting County and Municipal Debt.

Idaho's Constitution contains a clause limiting the ability of cities to incur debt. IDAHO CONST. art. VIII, § 3. The provision states that when a city looks to incur debt that would exceed "in that year, the income and revenue provided for it for such year" it must receive "the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose[.]" *Id*. It is colorable that the word "thereof" implies a requirement that the voter lives within the territorial limits of the city. However, R.S. 31130 is well drafted to avoid this potential conflict by only permitting individuals in areas of impact to vote in mayoral and city council elections, not in levy or bond elections. IDAHO CONST. art. VIII, § 3 and the term "qualified elector" used in that section only apply to levy or bond elections.

3. R.S. 31130 Does Not Violate the Constitutional Prohibition on a City Enforcing Ordinances Beyond its Limits.

Pursuant to Idaho's Constitution, cities are not able to enforce their "local police, sanitary and other regulations" beyond their territorial limits. IDAHO CONST. art. XII, § 2. The Idaho Supreme Court has examined that provision in *Blaha* and reaffirmed that cities may not enforce ordinances beyond their territorial limits. This restriction and the Supreme Court interpretation are inapplicable to R.S. 31130. If passed, R.S. 31130 would be a general law of Idaho and not a city ordinance. The constitutional limitation simply does not apply in this context.

I hope you find this analysis helpful. Please feel free to contact me if you have any questions.

Sincerely,

NATHAN NIELSON
Deputy Attorney General

March 8, 2024

The Honorable David M. Cannon
Idaho House of Representatives
Idaho State Legislature
P.O. Box 83720
Boise, Idaho 83720-0038
dcannon@house.idaho.gov
VIA EMAIL

Re: Request for AG Analysis

Dear Representative Cannon:

This correspondence is in response to an inquiry about the changes to Idaho Code proposed in RS31601C1 regarding: 1) the constitutionality of the proposed changes; and 2) the potential relevancy of *Idaho Power Company v. Idaho State Tax Commission*, 172 Idaho 125, 530 P.3d 372 (2023).

Summary of the Proposed Changes.

RS31601C1 proposes to add "rate regulated electric utility companies" to the existing exemption from property taxes for producers of electricity by means of wind, solar and geothermal energy in Idaho Code section 63-602JJ. It further creates a new kilowatt hour tax in section 63-3502B(3) to be levied on companies that qualify for this new property tax exemption. There are various other miscellaneous changes made to sections 63-402, 405, 3503C, and 3506, which makes these sections consistent with the proposed changes. In the case of section 63-402, it creates an exception to the exemption for "situs property," which it then also defines. Essentially, rate regulated electric utility companies will no longer be subject to property taxes and, instead, be subject to the kilowatt hour tax as described in section 63-3502B(3). However, the situs property of a rate regulated electric utility company will be subject to property tax and assessment by the county assessor.

The Proposed Changes Are Constitutional.

The proposed changes are constitutional under both the Idaho Constitution and the United States Constitution. The proposed exemption in RS31601C1 does not violate the Idaho Constitution's requirement that property tax be uniform and the United States Constitution's guarantee of equal protection. The legislature also has the authority to impose the proposed kilowatt hour tax. Further, the imposition of more than one kilowatt hour tax on the same taxpayer does not violate the Idaho Constitution's prohibition against duplicate taxation.

1. The Proposed Exemption Does Not Violate the Constitutional Uniformity Requirement

Article VII, section 5 of the Idaho Constitution states:

> All taxes shall be uniform upon the same class of subjects within the territorial limits, of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal*: provided, that the legislature may allow such exemptions from taxation from time to time as shall seem necessary and just*, and all existing exemptions provided by the laws of the territory, shall continue until changed by the legislature of the state.... (Emphasis added.)

Under the Uniformity Clause in Idaho's Constitution, exemptions created by the legislature are expressly permissible deviations from the requirement that property taxes be uniform. The Idaho Supreme Court has stated that "Section 5 of article 7 expressly leaves with the Legislature its plenary power with regard to exemptions." *Williams v. Baldridge*, 48 Idaho 618, 284 P. 203, 206 (1930). "The Constitution, explicitly directing and contemplating that the Legislature may grant exemptions, should not be construed to

prevent what it allows." *Id*. at 205. "[T]he legislature ha[s] broad discretion in making property tax exemptions." *Simmons v. Idaho State Tax Comm'n*, 111 Idaho 343, 348 (1986).

Since: 1) the Idaho Constitution expressly provides that the legislature may exempt property from taxation as the legislature deems "necessary and just"; and 2) there otherwise do not appear to be any express restrictions in the Idaho Constitution barring the implementation of exemptions, the proposed exemption does not violate Idaho Constitution's uniformity requirement.

2. The proposed exemption from property tax and shift to a kilowatt hour tax does not violate the Equal Protection Clause of the United States Constitution.

Under the U.S. Constitution, the United States Supreme Court has held that, "[w]here taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the states have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Sch. Dist. No. 25, Bannock Cnty. v. State Tax Comm'n*, 101 Idaho 283, 288, 612 P.2d 126, 131 (1980) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973)). The U.S. Supreme Court further clarified that, "[t]he Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals or entities differently from the others. The test is whether the difference in treatment is an invidious discrimination." *Id*. (quoting *Harper v. Virginia Board of Elections*, 383 U.S. 663, 666 (1966)).

In *School District No. 25*, the Idaho Supreme Court held that a statutory scheme requiring the State Tax Commission to classify the operating property of electric public utilities differently from the operating property of other utilities for tax apportionment purposes did not violate the Equal Protection Clause. The Idaho Supreme Court stated, "[b]ecause the legislative power in this area is plenary, this Court is without power to override the legislative mandate unless that mandate

offends the constitutional provisions relating to equal protection." *Id*. at 287. The court further noted that,

> (I)n taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, *the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is hostile and oppressive discrimination against particular persons and classes*. The burden is upon the one attacking the legislative arrangement to negative every conceivable basis which might support it.

Id. at 289 (emphasis added). Additionally, "When the constitutionality of a statute is challenged this Court has established certain presumptions and duties. The challenger must overcome the presumption in favor of constitutionality and clearly show the invalidity of the statute. . . *Every reasonable presumption must be indulged in favor of the constitutionality of an enactment*." *Id*. at 290 (internal citations omitted) (emphasis added).

Similar to the statutory changes analyzed in *School District No. 25*, the proposed RS31601C1 changes exempting some of the property owned by rate regulated electric utility companies from property tax and then making the companies subject to a kilowatt hour tax instead (while carving out situs property) does not violate the Equal Protection Clause. This classification does not constitute the type of invidious, hostile, and oppressive discrimination that the Equal Protection Clause is aimed at preventing in the context of taxation. While it does treat owners of some types of operating property differently than others, it simply substitutes one form of taxation for another, which is similar to the disparate treatment of classification methods discussed in *School District No. 25*, and which the Idaho Supreme Court has held does not implicate equal protection or uniformity of taxation.

3. The Legislature has the authority to implement a kilowatt hour tax.

The Supreme Court has said that the legislature's authority to tax is not limited to only property tax. "It is sometimes said that the constitutional methods of taxation are those mentioned in section 2, article VII, of the Constitution, but this is misleading, for the legislature is not limited by the Constitution to the methods mentioned." *Idaho Gold Dredging Co. v. Balderston*, 58 Idaho 692, 78 P.2d 105, 118 (1938). "Unlike the federal constitution, the state constitution is a limitation, not a grant, of power. We look to the state constitution not to determine what the legislature may do, but to determine what it may not do. If an act of the legislature is not forbidden by the state or federal constitutions, it must be held valid." *Leonardson v. Moon*, 92 Idaho 796, 806, 451 P.2d 542, 552 (1969). "The Idaho Constitution is a limitation upon, and not a grant of, legislative authority, and the legislature has *plenary power in all matters of taxation* except as prohibited or limited by the constitution. The legislature therefore may impose such taxes as it desires, in the absence of an express restriction in the constitution." *Greater Boise Auditorium Dist. v. Royal Inn of Boise*, 106 Idaho 884, 885–86, 684 P.2d 286, 287–88 (1984) (internal citations omitted) (emphasis added).

The proposal in RS31601C1 is to impose a kilowatt hour tax on the newly exempt property. Because the legislature has "plenary power" to tax and "may impose such taxes as it desires," it has the authority to impose this new kilowatt hour tax. In fact, this will not be the first kilowatt hour tax that the legislature has authorized. *See* title 63, chapter 27, Idaho Code.

4. Implementing a new kilowatt hour tax does not violate the Idaho Constitution's prohibition against duplicate taxation.

In addition to requiring uniformity in taxation, article VII, section 5, of the Constitution, further provides "that duplicate taxation of property for the same purpose during the same year, is hereby prohibited." Currently, some rate regulated electric utility companies

are required to pay a kilowatt hour tax under title 63, chapter 27, Idaho Code, which implements a tax on kilowatt hours on companies that generate electrical energy via waterpower. With the addition of the new kilowatt hour tax in RS31601C1, some rate regulated electric utility companies may be required to pay more than one kilowatt hour tax. However, the imposition of two different kilowatt hour taxes does not violate the constitution because they are not property taxes. Said the Supreme Court: "The constitutional provisions against duplicate taxation are concerned only with direct property taxes." *Idaho Gold Dredging Co. v. Balderston*, 58 Idaho 692, 699 (1938). Additionally, "Article 7, § 5, of the Constitution, does not prohibit dual taxation of property unless it relates to ad valorem taxes." *George B. Wallace, Inc. v. Pfost*, 57 Idaho 279, 283 (1937).

Therefore, since neither the kilowatt hour tax proposed in RS31601C1, nor the tax currently imposed under title 63, chapter 27, are ad valorem property taxes, i.e. a property tax based on the assessed value, the fact that some rate regulated electric utility companies may be required to pay both of these kilowatt hour taxes if the proposed changes become law does not violate Idaho's Constitutional prohibition against duplicate taxation.

Further, the imposition of two separate kilowatt hour taxes does not violate the prohibition against duplicate taxation because they are not "for the same purpose." Revenue generated by the kilowatt hour tax under title 63, chapter 27, shall be distributed to the state refund account with any leftover amounts to be distributed to the general account. Idaho Code § 63-2702. In contrast, the kilowatt hour tax proposed by RS31601C1 provides that revenue generated therefrom shall be apportioned to the counties and their tax code areas. Counties must then reduce the amount of property tax revenue to be levied by the full amount of the revenue received from this new kilowatt hour tax. RS31601C1 pg. 3, lines 14-27; pg. 4, lines 39-48; pg. 5, lines 1-2.

Since the proposed kilowatt hour tax is not an ad valorem property tax and because it has a distinct purpose from the existing

kilowatt hour tax, it does not violate the Idaho Constitution's prohibition against duplicate taxation.

The proposed RS31601C1 changes would make the holding in *Idaho Power* inapplicable for future tax years for the newly exempted operating property.

The proposed RS31601C1 changes directly impact the effect of the *Idaho Power Company v. Idaho State Tax Commission*, 172 Idaho 125, 530 P.3d 372 (2023). If these changes become law, the *Idaho Power* case would have no relevancy to future tax years as to the property being exempted under the changes to section 63-602JJ.

In *Idaho Power*, the Idaho Supreme Court held that the Uniformity Clause in the Idaho Constitution entitles owners of all operating property to request an adjustment of their assessed value when railroad companies receive a reduction under the Railroad Revitalization and Regulatory Reform Act ("4-R Act"). If RS31601C1 becomes law, some property—mainly transmission and distribution lines—owned by rate regulated electric utility companies will be exempt from property taxation while other property owned by rate regulated electric companies—*e.g.*, situs property—will be subject to property tax and assessment by the county assessor. The exempt "line mile" property will not be subject to any uniformity adjustment based on 4-R Act adjustments.

I hope you find this analysis helpful.

Sincerely,

PHIL N SKINNER
Chief of Staff
Deputy Attorney General

March 12, 2024

The Honorable Scott Herndon
Idaho State Senate
P.O. Box 83720
Boise, Idaho 83720-0081
sherndon@senate.idaho.gov
VIA EMAIL

Re: OAG Analysis of Senate Bill No. 1258

Dear Senator Herndon:

You asked for analysis by the Office of the Attorney General pertaining to Senate Bill No. 1258. This Bill would amend Idaho Code § 40-203 ("Abandonment and Vacation of County and Highway District System Highways or Public Rights-of-Way").

In conjunction with your request, you provided a letter from the Owyhee County Commissioners. Based on that letter, it appears that Owyhee County believes that Senate Bill No. 1258 would make it more difficult for the county to abandon or vacate county roads.

At your request, we looked at three issues related to Senate Bill No. 1258 raised by Owyhee County:

(i) Interaction with Revised Statute 2477 roads (federal statute described below);
(ii) Definition or description of "federal public lands" in Senate Bill No. 1258; and
(iii) Comparison of existing Idaho Code section 40-203 subsection (2) and new subsection (3) as provided via the draft Bill.

(i) Revised Statute 2477 Roads

The Idaho Federal District Court has described Revised Statute 2477 and related roads as follows:

> In 1866, Congress passed R.S. 2477, which provides: "The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted." 43 U.S.C. § 932, 14 Stat. 253 (1886). It was enacted to assist in the development of the West by granting "rights of way for construction of highways over public lands to miners, farmers, ranchers, and homesteaders." Harry R. Bader, *Potential Legal Standards for Resolving the R.S. 2477 Right of Way Crisis*, 11 Pace Envtl. L. Rev. 485, 485 (1993). R.S. 2477 was repealed 110 years later by the Federal Land Policy Management Act of 1976 (FLPMA), § 706(a), Pub. L. No. 94-579, 90 Stat. 2793. Thus, no new R.S. 2477 rights-of-way can be created after 1976. However, all rights-of-way existing at the time of R.S. 2477's repeal in 1976 remain valid.

Owyhee County, State of Idaho v. United States of America, No. 1:21-cv-00070-DKG, 2022 WL 60627, at *1 (D. Idaho Jan. 5, 2022). As reflected in the letter from the County Commissioners, Owyhee County has been pursuing judicial validation of the R.S. 2477 designation for certain county roads for quite some time. Although no new R.S. 2477 rights-of-way can be created after 1976, the county has been involved in litigation in which it asks the court to validate the R.S. 2477 status of certain county roads that existed prior to 1976. This process continues via the lawsuit overseen by the federal court.

The R.S. 2477 road concepts in-and-of-themselves do not seem to be a critical issue for the county, but the commissioners appear to be concerned that there could be a conflict with the requirements for vacating roads in the proposed bill and the ongoing R.S. 2477 process and litigation. From a practical point of view, it seems unlikely that counties would pursue R.S. 2477 designation and then in turn seek to vacate those same roads via Idaho Code § 40-203. Regardless, there does not seem to be a direct correlation between the pending litigation

of R.S. 2477 roads and § 40-203 as amended by Senate Bill No. 1258. Either process could operate separately and would proceed in separate forums (federal versus state procedures).

(ii) Definition/designation of "federal public lands"

Idaho Code § 40-203 already uses the term "federal public lands." And while that term is not defined in either existing section 40-203 or in the proposed Bill, there is a related definition in Idaho Code § 40-107(5) for "Federal land rights-of-way . . . rights-of-way on federal land within the context of revised statute 2477, codified as 43 U.S.C. 932, and other federal access grants and shall be considered to be any road, trail, access or way upon which construction has been carried out to the standard in which public rights-of-way were built within historic context. These rights-of-way may include, but not be limited to, horse paths, cattle trails, irrigation canals, waterways, ditches, pipelines or other means of water transmission and their attendant access for maintenance, wagon roads, jeep trails, logging roads, homestead roads, mine to market roads and all other ways." As suggested, this appears to be a broad, encompassing term that would pertain to rights-of-way accessing almost all federal lands.

The term "federal public lands" has been in Idaho Code § 40-203 since it was enacted nearly 40 years ago. Courts and counties have been applying § 40-203 without an explicit definition of "federal public lands" for many years. Based on the context of the phrase in the statute, and based on other definitions, such as "federal land rights-of-way" mentioned above, it appears that "federal public lands" has been construed to mean federal lands that are publicly accessible.

(iii) Existing subsection (2) and proposed subsection (3)

The draft bill provides broader language than existing subsection (2). Existing subsection (2) only applies if a property would be landlocked by a road abandonment. In other words, if a particular piece of public land had two rights-of-way for access, the county could abandon one of them as long as one right-of-way remained. Senate Bill

No. 1258's proposed subsection (3) would preclude abandonment regardless of prospective landlocked property status. Under proposed subsection (3), if a particular piece of public land had two rights-of-way for access, the county could not abandon one of them unless it found a replacement to maintain two rights-of-way to the land.

While existing subsection (2) applies to both public and privately owned real property, proposed subsection (3)'s requirement to maintain the existing number of rights-of-way only applies to maintain access to public lands (federal or state owned) and public bodies of water. Subsection (2) and proposed subsection (3) serve different purposes. It appears that both could operate individually or in conjunction with one another.

I hope you find this analysis helpful.

Sincerely,

GARY LUKE
Deputy Attorney General

March 26, 2024

The Honorable Lori Den Hartog
Idaho State Senate
P.O. Box 83720
Boise, Idaho 83720-0081
ldenhartog@senate.idaho.gov
VIA EMAIL

Re: Request for Attorney General Analysis

Dear Senator Den Hartog:

In response to your March 25, 2024, inquiry, this letter addresses whether Senate Bill 1450 would rectify the legal issues raised in Attorney General Opinion No. 24-01. This analysis is necessarily abbreviated and preliminary given your request for a swift response and the number of complex constitutional questions implicated, so this letter does not address whether S.B.1450 raises additional constitutional questions or creates a valid independent public body corporate and politic. There is simply not sufficient time to fully analyze every aspect of S.B.1450's legality.

S.B.1450 would amend chapter 28, of title 33, which pertains to the University of Idaho, by transforming the non-profit Four Three Education, Inc., into a purported "independent public body corporate and politic" known as Four Three Education. It purports to do so with the consent of Four Three Education, Inc., and it further purports to make all property, debts, obligations, and other liabilities of Four Three Education, Inc., the property, debts, obligations, and liabilities of Four Three Education. The new statutory entity is to be governed by an 11-member board of trustees: 6 are "independent trustees" appointed by the Board of Regents and the other 5 are "affiliated trustees" appointed by various government officials or based on a designated position held. No trustee is considered a public official. S.B.1450 also purports to permit the Board of Regents to (1) provide financial security to obtain bonds to

acquire the University of Phoenix and (2) assume past and future liabilities of the University of Phoenix by co-signing its participation agreements with the United States Department of Education.

Based on a preliminary review, S.B.1450 does not resolve many of the concerns identified in AG Opinion No. 24-01. Here are a few of the issues that remain:

- S.B.1450 is premised on the lawful existence of Four Three Education, Inc., but as explained in Opinion No. 24-01, the Board of Regents exceeded its constitutional authority when it authorized incorporation of that entity to acquire the University of Phoenix and execute the related asset purchase agreement. Those unconstitutional actions may very well be void *ab initio*, which means that S.B.1450 could not lawfully convert Four Three Education, Inc., into Four Three Education. The former does not lawfully exist and therefore could not provide the "consent" contemplated by S.B.1450.

- S.B.1450 also maintains the unconstitutional role for the Board of Regents as the "sole member" of—exercising "administrative supervision" over—an entity distinct from the University of Idaho, which is analyzed in detail in Opinion No. 24-01. Whether Four Three Education is a private corporation or an independent public body corporate and politic, it is still not the University of Idaho, and that is the only institution the people of Idaho have authorized the Board of Regents to govern or supervise. Defining "Board of Regents" as "the state board of education and board of regents of the university of Idaho pursuant to section 33-2802, Idaho Code" confirms the problem. S.B.1450 unambiguously attempts to expand the Board of Regents scope of powers to include operation of the University of Phoenix through Four Three Education, but that exceeds the Board of Regents authority under article IX, section 10 of the constitution.

- The Legislature likely cannot authorize the Board of Regents to govern and supervise Four Three Education. The Board of Regents is a constitutional actor with a fixed constitutional duty—namely, running the University of Idaho. Expanding the Board of Regents' authority likely requires a constitutional amendment, just as it would to expand the jurisdiction of the Supreme Court. *See Regan v. Denney*, 165 Idaho 15, 20, 437 P.3d 15, 20 (2019) ("[T]he Legislature [cannot] broaden this Court's jurisdiction in contravention of the separation of powers doctrine in the Idaho Constitution").

- S.B.1450 further would afford the legislature impermissible control over the Board of Regents, even though the two entities are intended to be "independent and exclusive of the other in the sphere of its own purpose and objects." *Dreps v. Board of Regents of University of Idaho*, 65 Idaho 88, 96, 139 P.2d 467, 471 (1943); *see* Opinion No. 24-01 at 12. It allows the legislature to direct the actions of a separate constitutional actor by requiring the Board of Regents to maintain administrative supervision of the newly created entity, appoint certain trustees meeting certain legislatively prescribed qualifications, and share excess funds with the state, as but three examples. As the Board of Regents itself has maintained, the Idaho Supreme Court has rejected such legislative control. *State ex rel. Black v. State Bd. of Educ.*, 33 Idaho 415, 196 P. 201, 204 (1921) ("while functioning within the scope of its authority [the Board] is not subject to the control or supervision of any other branch, board or department of the state government"). For the legislature to be able to exercise control over an independent public body corporate and politic functioning as an institution of higher education, the institution would need to be outside the sphere of the Board of Regents' authority—as in the case of Boise State or Idaho State University. *See*, *e.g.*, Idaho Code §§ 33-3001, 33-3003, 33-4001.

- S.B.1450 also requires the Board of Regents to unlawfully delegate its functions to non-governmental actors. *See* Op. No. 24-01 at 11–12. The proposed law is clear that no trustee is considered a public official. Yet, the non-public Board of Trustees is given the authority to control and manage Four Three Education. So, to the extent the Board of Regents could even undertake its role with Four Three Education, S.B.1450 unconstitutionally requires the Board of Regents to delegate its supposedly essential functions to other, private actors.

- S.B.1450 continues to implicate many of the same concerns explained in Opinion 24-01 regarding the public purpose doctrine. *See* Op. No. 24-01 at 10–11. That is, the primary purpose of the proposed legislation remains private, not public. S.B.1450 still permits Four Three Education to (1) acquire and operate the University of Phoenix as a private institution of higher learning; (2) obtain $685 million in bond debt to purchase the private assets; (3) assume the University of Phoenix's privately incurred debts and liabilities; and (4) educate mostly out-of-state students. Four Three Education will remain controlled by private, non-public actors, and Four Three Education's structure and revenues will still be used to support private education and pay private educators, administrators, and other personnel. And simply stating that Four Three Education serves a public purpose is not controlling. That legislative statement would be "entitled to the utmost consideration, but it is not binding and conclusive upon the question of public purpose." *Bd. of Cnty. Comm'rs of Twin Falls Cnty. v. Idaho Health Facilities Auth.*, 96 Idaho 498, 502, 531 P.2d 588, 592 (1974). Where the remainder of S.B.1450 does not in fact evince a primary public purpose, it may be unconstitutional notwithstanding the legislature's declaration.

- Establishing the Four Three Education Fund ("Fund") likely does not convert S.B.1450's primary purpose into a public one. *See* S.B.1450 § 6. Indeed, the Fund likely represents little substantive change from the transaction's prior structure given that University of Idaho officials represented that Four Three Education, Inc., would benefit the public by bringing in revenue for the University of Idaho to use.[1] Then as now, contributions to the Fund would still likely amount to an "incidental or indirect benefit to the public" since the remainder of Four Three Education's operations have a primarily private purpose. *Vill. of Moyie Springs v. Aurora Mfg. Co.*, 82 Idaho 337, 346, 353 P.2d 767, 773 (1960); *see* Opinion No. 24-01 at 11. In any event, SB 1450 does not contain any clear guidelines that would *require* the Board of Trustees to contribute to the Fund, so any public benefit is contingent on those private persons' good will.

- SB 1450 leaves concerning gaps in Four Three Education's transparency to the public. *See* Op. No. 24-01 at 11; S.B.1450 § 7. S.B.1450 expressly exempts Four Three Education from the Open Meetings Law. The result would be that meetings concerning public business that would otherwise be held in public may now be held in private.

Whether S.B.1450 has properly created Four Three Education as an independent public body corporate and politic is a complex question that would require substantial time and legal research to fully analyze and resolve. This letter does not attempt to do so but does note that one of the two "main distinction[s]" between an independent body corporate and politic and a corporation is "the absence of the private parties with the right to control the entity or to manage it." *Bd. of Cnty. Comm'rs of Twin Falls Cnty. v. Idaho Health Facilities Auth.*, 96 Idaho 498, 507, 531 P.2d 588, 597 (1974). S.B.1450, however, requires the newly created Four Three Education to be controlled and managed by private parties. The Board of Trustees "control[s]" Four Three, and each and every trustee "shall not be . . . [c]onsidered public officials, employees, or agents of the state of Idaho." S.B.1450 § 3. By comparison, Boise

State and Idaho State University are governed by the Idaho State Board of Education, whose members are public officials—they are either appointed by the governor or elected. Idaho Code §§ 33-3003, 33-4002; *compare Idaho Health Facilities Auth.*, 96 Idaho at 507, 531 P.2d at 597 (basing independent public body corporate and politic status on the absence of private party control or management). Thus, there appears to be a notable difference between what the Supreme Court has said marks an independent public body corporate and politic and Four Three Education.

* * *

For the above reasons, S.B.1450 does not resolve the concerns expressed in Opinion No. 24-01. It still permits the Board of Regents to exercise authority outside the scope of its constitutional charter, still raises serious separation of powers concerns, and still lacks a primarily public purpose.

Sincerely,

PHILLIP E. BROADBENT
Chief Deputy Attorney General

[1] *See* Testimony of C. Scott Green, JFAC Committee Hearing, June 16, 2023 (01:44:00–44) (mentioning "10 million dollars . . . that will be coming in every year" that "we'll be using for the benefit of the State of Idaho").

March 28, 2024

The Honorable Kevin Andrus
Idaho House of Representatives
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kandrus@house.idaho.gov
VIA EMAIL

Re: Request for AG Analysis

Dear Representative Andrus:

This letter was drafted in response to your request for a legal opinion regarding House Bill 712. Specifically, whether or not the proposed language in the bill could undermine the "open range" and "fence out" provisions that currently exist in statute. This letter addresses the narrow issue of how it could affect those specific provisions and does not address or analyze any other potential problems outside of the question presented.

QUESTION PRESENTED

Could the language in proposed House Bill 712 as amended undermine "open range" and "fence out" provisions that currently exist in Idaho Code?

SHORT ANSWER

No. The proposed section imposes penalties for the *act* of allowing strays and does not expand or narrow the definition of stray, which depends largely on the animal's location such as open range or herd district. The proposed bill is specific to "estray" cattle who "roam at large on public or private lands contrary to law or regulation or without permission." Idaho Code § 25-2301.

Not all stray cattle are considered "contrary to law or regulation and without permission" as defined in Idaho Code § 25-2301. Idaho is a "fence out" state, which means that for livestock roaming within open range, the adjacent landowner has a duty to fence out livestock. However, if an animal on open range breaks through a legal fence and causes damage, the livestock owner is liable for the damage. The animal in open range becomes a stray when it breaks through a legal fence. However, if a landowner has voluntarily undertaken a duty to fence animals out and has constructed a less-than-lawful fence, the livestock owner is not liable for damage caused by wandering animals. If the landowner is asserting damage against the livestock owner, the burden of proof rests with the landowner to show the fence was lawful.

If the cattle are within a herd district, the duty shifts to the livestock owner to fence the cattle in with a legal fence. The cattle become "estrays" when they break through their legal fence and leave the enclosure.

AUTHORITY AND ANALYSIS

The issue of trespassing livestock and adjacent neighbors has been a source of litigation for centuries. Most states have traditional "fence-in" legislation that holds livestock owners liable for damages caused to other property if cattle escape their legal confines. Idaho, however, is one of very few states with "open range" and "fence-out" laws and cattle owners enjoy absolute immunity in open range areas. Whether or not cattle are considered "estrays" who "roam at large contrary to law and without permission" depends entirely on the location of the animal. If the animal is in open range, it is not an "estray" as defined in Idaho Code § 25-2301 unless it enters an enclosed area surrounded by a legal fence or is unbranded. If the animal is in a herd district or within a city or village, the roaming animal is an "estray" if it roams beyond a legal fence erected to keep the animal in.

I. House Bill 712

As a threshold matter, the proposed bill contains language that specifically addresses Idaho's open range provision: "Nothing in this chapter shall be construed to impair or diminish any protections, privileges, or immunities established pursuant to section 25-2118, Idaho Code." A plain reading of the proposed language recognizes a livestock owner's right to allow cattle to roam in open range. "[S]tatutes which by their own terms are inapplicable to "open range" areas do not preempt the field of livestock control in such areas." *Benewah Cnty. Cattlemen's Ass'n, Inc. v. Bd. of Cnty. Comm'rs of Benewah Cnty*., 105 Idaho 209, 214, 668 P.2d 85, 90 (1983).

While open range does not completely absolve liability if livestock break through a lawful fence, the proposed language sufficiently addresses estray livestock, whether in open range or not, and would not abrogate any rights under the open range laws.

Regardless of whether in open range or herd district, the proposed bill reduces the number of days in which an owner must take possession of stray livestock from five to three, raises the dollar amount per day for feeding and care of strays, and imposes criminal penalties for "willfully and wantonly allowing estrays." A livestock owner willfully and wantonly allows strays if he refuses to take possession of the stray(s) within three days of being notified. This section imposes penalties for the *act* of allowing strays and does not expand or narrow the definition of stray, upon which the animal's location depends, such as open range or herd district.

II. Idaho's Open Range and Herd District Laws

Under English common law, a livestock owner traditionally bore the burden to fence in stock to keep them from causing damage ("fence in" rule). *Maguire v. Yanke*, 99 Idaho 829, 833, 590 P.2d 85, 89 (1978). However, Idaho and other western states rejected that concept for a rule allowing livestock to roam freely and instead imposing the duty on landowners to fence livestock out ("fence out" rule). *Id*. "Livestock

areas in Idaho fall into two categories outside cities and villages: open range areas and herd districts." *Moreland v. Adams*, 143 Idaho 687, 690, 152 P.3d 558, 561 (2007); Idaho Code § 25-2402.

Open range is defined as "all uninclosed lands outside of cities, villages and herd districts . . ." Idaho Code § 25-2118. In open range, a landowner is required to construct legal fences to keep livestock off their property – in other words, to fence out. A landowner in open range may not recover for damage caused by stray livestock unless their land is enclosed by a legal fence. *Maguire*, 99 Idaho 829, 835 (1978). Idaho Code provides the description and specifications for a lawful fence. Idaho Code § 35-102. In addition to wire, poles, boards and other described materials, a lawful fence can include "[a]ll fences in good repair, of suitable material and of every description, and all creeks, brooks, rivers, sloughs, ponds, bluffs, hills or mountains, that present a suitable obstruction are deemed lawful fences." Idaho Code § 35-102(6).

Landowners who have "fenced out" livestock may have a cause of action for damages against a livestock owner whose cattle have broken through a lawful fence, but the existence of the fence, who built it, the location of the fence, and whether or not the fence is "lawful" are questions of fact. In areas where no duty is owed, i.e., areas with open range immunity, the burden rests with the landowner to erect a lawful fence. *Strong v. Brown*, 26 Idaho 1, 140 P. 773, 775 (1914). See also, *Greer v. Ellsworth*, 113 Idaho 979, 982, 751 P.2d 675, 678 (Ct. App. 1988) (landowner's tract considered "uninclosed" when surrounded by single strand barbed wire); *Adamson v. Blanchard*, 133 Idaho 602, 607, 990 P.2d 1213, 1218 (1999) (Legislature intended to grant livestock owners absolute immunity from any liability for damages in open range).

In a herd district, city, or village, however, a livestock owner must "fence in" their cattle. Within a herd district, the livestock owner is responsible for damage caused by their animals regardless of whether or not the neighboring property is enclosed by a fence. Idaho Code § 25-2408. If an animal trespasses, any person may take the animals into

custody and retain the livestock until all reasonable charges for keeping said animals are paid. Idaho Code. § 25-2409. In herd districts, where the duty is on the livestock owner to fence cattle in, the burden to show lawful fence shifts to the livestock owner. *Corthell v. Pearson*, 88 Idaho 295, 298, 399 P.2d 266, 268 (1965).

Simply put, Idaho's open range laws support the general rule that livestock owners may range their cattle in all areas of the state that is not a city, village, or herd district with no duty to confine their cattle to his own land, and no liability attaches for damage caused by strays unless the damaged property was enclosed by a legal fence. If a landowner in open range does not want livestock on their land, it is their responsibility to construct a lawful fence to keep them out. The proposed bill does not change, alter, or affect Idaho's open range statute.

III. Idaho's Estray and Trespassing Statutes

Idaho's estray and trespassing statutes provide civil and criminal penalties for trespassing and stray cattle in addition to the proposed additional penalties for failure to retrieve estrays within three days in House Bill 712.

As currently enacted, when strays are located on property where they are not allowed by law or fence, the landowner must call the sheriff or brand inspector. The sheriff will contact the owner, who will be given 5 days to retrieve the livestock. If the owner does not retrieve the livestock or is unknown, the sheriff may sell the livestock at a public livestock auction to the highest bidder. Idaho Code § 25-2302.

In instances of cattle trespass where livestock break into the fence, the landowner has a special lien upon the livestock which includes the care and feeding of livestock and other charges. Idaho Code § 25-2201. These animals are considered "strays" or "estrays."

Of particular note, cattle trespass laws do not permit a livestock owner to enter another's property without permission to retrieve the livestock. Idaho has strict trespass laws, and a livestock owner may be

subject to trespass if he enters another's property without permission, even if to retrieve stray cattle. Idaho Code § 6-202.

If the animals are removed without payment in full of all charges or costs incurred, the livestock owner is subject to a misdemeanor. Idaho Code § 25-2210.

If a livestock owner violates a herd district order or allows animals to run at large within the herd district, the owner is guilty of a civil offense and penalties "the aggregate of which shall not exceed five hundred dollars plus restitution . . ." Idaho Code § 25-2407.

Finally, civil liability for owners of stray cattle within herd districts who commit damage, regardless of the existence of a fence is addressed in Idaho Code § 25-2408.

CONCLUSION

The proposed bill creates an additional penalty for the act of not collecting stray cattle within three days after being notified. The bill does not change the well-settled law of this state that with the exception of cities, villages, and herd districts, livestock may run at large and graze upon unenclosed lands in open range, nor the requirement that adjacent landowners fence livestock out.

I hope you find this analysis helpful.

Sincerely,

J.J. WINTERS
Deputy Attorney General

May 31, 2024

The Honorable Cindy Carlson
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VIA EMAIL

Re: Request for AG Analysis

Dear Senator Carlson:

This letter responds to your May 29, 2024, email inquiry regarding school district levies. This letter addresses your question by first providing a brief answer and then offering further analysis.

SUMMARY

1. Are school districts required to show, after the fact, that they spent supplemental levy money on the purposes for which it was advertised?

Short Answer: Yes. School districts are specifically required by statute to publicly report how they have used supplemental levy funds. Idaho Code § 33-802C. School districts would also report this information in their statutorily required audit reports. Idaho Code §§ 33-701(5) & (6), 67-450B.

2. What recourse is available to address instances where a school district spent money for some other purpose?

Short Answer: The most immediate recourse may be for school-district residents to file a suit in their respective county court asking for an injunction to prevent a school district from misusing funds. See *Idaho County Property Owners Association, Inc. v. Syringa*

General Hospital District, 119 Idaho 309 (1991). However, developments in Idaho's standing law may prevent school-district residents from succeeding in such an action. There are also less direct avenues for recourse. School districts are subject to the oversight of the State Board of Education that may be able to correct the misuse of funds. Additionally, the misuse of public money is a misdemeanor that can be investigated and prosecuted by county law enforcement and prosecutors. Idaho Code § 18-5701.

ANALYSIS

A. School Districts Must Report on How They Spent Supplement Levy Funds.

Idaho Code section 33-802C, added in 2022, requires school districts to publicly report how they have used supplemental levy funds. The statute states:

> A school district shall use supplemental levy revenues only for those purposes identified pursuant to section 33-802B(1)(b), Idaho Code. The school district board of trustees shall annually publish, prior to its regular July meeting, a summary of levy revenues and the items for which such revenues were used, alongside a copy of the disclosure included on the ballot pursuant to section 33-802B, Idaho Code.

Idaho Code § 33-802C. This requirement clearly and affirmatively answers the first question: school districts are required to publicly report how they have used money raised through a supplemental levy.

By statute, school districts also report financial information in their yearly budgets and in their audit reports. By statute, school districts are required to prepare a budget and make such budget publicly available. Idaho Code § 33-801. Likewise, school districts are required to prepare and publish an annual statement of financial condition and report of the school district at the end of each fiscal year. Idaho Code §

33-701(5). Additionally, school districts are required to make a full and complete audit of their financial statement following the methods described in Idaho Code section 67-450B. Idaho Code § 33-701(6). These documents contain information about the use of supplemental levy funds.

If school district officials are not satisfying the requirement to disclose how it has used supplemental levy funds, a school-district resident may be able to file a writ of mandate asking the court to compel disclosure. Please note that a school district may make this disclosure in a published annual budget, financial statement, or audit report. Additionally, a school district resident may make a complaint against the school district to the State Board of Education.

B. School-District Residents May Be Able to Sue a School District for Misusing Supplemental Levy Funds.

The most direct way of addressing a school district's misuse of funds would be through a lawsuit. If a school-district resident believes that the school district has been using supplemental levy funds inappropriately, he may be able to sue for injunctive relief to stop the school district from misusing the funds. In *Idaho County Property Owners Association, Inc. v. Syringa General Hospital District*, a collective of homeowners sued the Hospital District for misusing levy funds. The Supreme Court agreed that the hospital district was misusing funds. It ruled that the proper way to address the concerns of these homeowners was to enjoin the Hospital District, preventing them from using funds inappropriately. This case provides a template for how a school-district resident could proceed if they believe that a school district has misused supplemental levy funds.

As a caveat, while the *Idaho County Property Owners Association* case may provide a template, it is possible that Idaho's standing law would prevent a school-district resident from bringing a claim in court. "The bar for standing can vary with the circumstances of each individual case." *Reclaim Idaho v. Denney*, 169 Idaho 406, 419, 497 P.3d 160, 173 (2021). Idaho's standing law is "imprecise and

difficult to apply." *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002). Recently, a taxpayer was found unable to bring a lawsuit against the Secretary of State because he did not suffer a particular injury "not suffered by all citizens and taxpayers alike." *Reclaim Idaho*, 169 Idaho 406 at 421. This holding in *Reclaim Idaho* is consistent with prior cases which have not allowed plaintiffs to bring suit when challenging "a governmental enactment where the injury is one suffered by all citizens and taxpayers alike." *Miles v. Idaho Power Co.*, 116 Idaho 635, 641, 778 P.2d 757, 763 (1989). The Court in *Idaho County Property Owners Association* did not address standing, and it is possible that a school-district residents suing using that case as a template would not be able to proceed for lack of standing.

There are other means to address the improper use of funds. First and foremost, a school-district resident could report the suspected misuse of funds to the State Board of Education. The Board has oversight over the school districts and may be able to use this oversight to influence or correct a school district's use of funds.

Finally, it is illegal and a criminal offense to "use public moneys for any purpose not authorized by law." Idaho Code § 18-5701. Local county officials may evaluate suspected misuses of supplemental levy funds and, if they find a violation of Idaho Code section 18-5701, may prosecute public officers or employees who misused funds. Depending on the circumstances, the public officer or employee may be required to "[m]ake restitution of any public moneys misused." Idaho Code § 18-5701. I would anticipate that prosecutors and county law enforcement would be cautious in bringing such an action.

I hope you find this analysis helpful.

Sincerely,

NATHAN H. NIELSON
Deputy Attorney General

June 4, 2024

The Honorable Brian Lenney
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VIA EMAIL

Re: Request for AG Analysis

Dear Senator Lenney:

You have recently inquired about the legislature's constitutional powers to prescribe election laws. Specifically, you have asked whether laws adopted under the legislature's authority to prescribe the "manner" of elections can be adopted without signature of the Governor. You have also asked whether the initiative or referendum process can be used to change election law. Each answer will be discussed in turn.

Does the legislature's authority granted in the Elections Clause allow the legislature to adopt such election laws without signature from the Governor?

No. In adopting election laws, the legislature is still subject to governmental checks and balances.

Article I, section 4, clause 1 (Elections Clause) of the U.S. Constitution reads:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

While this constitutional provision appears to solely vest in the state legislature power to prescribe the time, place, and manner of elections within the state, this authority is not without its limits. If the legislature were granted sole authority over the elections process, it "may abuse [its] power, and regulate ... elections in such manner as would be highly inconvenient to the people."[1] Thus, in spite of the language in the Elections Clause, the state still retains autonomy to establish its own governmental processes.[2]

This is evident in the U.S. Supreme Court case *Moore v. Harper*, where the court determined that the Elections Clause did not insulate North Carolina's state legislatures from the ordinary exercise of state judicial review concerning a reapportionment map for congressional and state legislative districts following the 2020 decennial census.[3] In *Smily v. Holm*—an older case but even more on point—the court held that the Governor's veto power, pursuant to his authority under the state's constitution, did not violate the Elections Clause. [4] The *Smily* court also found the legislative authority granted in the Elections Clause must be exercised "in accordance with the method which the state has prescribed for legislative enactments."[5] In another recent Supreme Court case, the court determined that "the legislature," for purposes of the federal constitution "includes of both referendum and the Governor's veto in the context of regulating congressional elections."[6]

Article IV, section 10 of the Idaho Constitution provides that every bill passed by the legislature must be presented to the Governor, who can then approve the bill by signing it. The power granted the legislature through the Elections Clause does not override this method by which the State of Idaho—through its constitution—has prescribed legislative enactments.

Does the power granted the legislature through the Elections Clause withhold election law change through the initiative or referenda process?

No. This question is specifically answered in the *Arizona* case, wherein the United States Supreme Court found the definition of the

term "legislature," as it existed in the time of our founding fathers, meant "[t]he power that makes laws."[7] The court determined this power to include both the initiative and the referendum powers when such legislative avenues are available within a state.[8]

Article III, section 1 of the Idaho Constitution grants the people of the State of Idaho the ability to adopt laws through the initiative and referendum process. As established in the above-cited cases, the exercise of this state-granted authority by the people of Idaho is not a violation of the Elections Clause because the legislature, for the purposes of the federal constitution, is simply the powers that make laws, which includes initiatives and referendums.[9] Plus, any authority granted to the legislature through the Elections Clause must be exercised within the State's prescribed method for legislative enactments. [10] In Idaho, this includes initiatives and referendums.

Arizona was a 5-4 opinion; the four dissenting justices were very critical of the majority opinion's conclusion to interpret the constitutional term "the Legislature" to mean "the people." The dissent states:

> Just over a century ago, Arizona became the second State in the Union to ratify the Seventeenth Amendment. That Amendment transferred power to choose United States Senators from "the Legislature" of each State, Art. I, § 3, to "the people thereof." The Amendment resulted from an arduous, decades-long campaign in which reformers across the country worked hard to garner approval from Congress and three-quarters of the States.
>
> What chumps! Didn't they realize that all they had to do was interpret the constitutional term "the Legislature" to mean "the people"? The Court today performs just such a magic trick with the Elections Clause. Art. I, § 4. That Clause vests congressional redistricting authority in "the Legislature" of each State. An Arizona ballot initiative transferred that authority from "the Legislature" to an

> "Independent Redistricting Commission." The majority approves this deliberate constitutional evasion by doing what the proponents of the Seventeenth Amendment dared not: revising "the Legislature" to mean "the people."

Arizona State Legislature v. Arizona Indep. Redistricting Comm'n, 576 U.S. 787, 824–25, 135 S. Ct. 2652, 2677–78 (2015). Under the makeup of our current United States Supreme Court, the holding in this case might have been different. Nevertheless, the 2015 majority opinion in *Arizona* currently controls the interpretation of the Elections Clause and concludes that Elections Clause authority regarding the time, place, and manner of elections includes the people via the initiative and referenda process.

I hope this analysis has been helpful.

Sincerely,

ADAM WARR
Deputy Attorney General

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[1] *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 815–16, 135 S. Ct. 2652, 2672, 192 L. Ed. 2d 704 (2015).
[2] *Moore v. Harper*, 600 U.S. 1, 25, 143 S. Ct. 2065, 2083, 216 L. Ed. 2d 729 (2023).
[3] *Id.* at 22, 2081.
[4] *Smiley v. Holm*, 285 U.S. 355, 367, 52 S. Ct. 397, 399, 76 L. Ed. 795 (1932).
[5] *Id.*
[6] *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 808, 135 S. Ct. 2652, 2668, 192 L. Ed. 2d 704 (2015).
[7] *Id.* at 813 and 2671.
[8] *Id.* at 809 and 2669.
[9] *Id.*
[10] *Smiley v. Holm*, 285 U.S. 355, 367, 52 S. Ct. 397, 399, 76 L. Ed. 795 (1932).

July 10, 2024

The Honorable Glenneda Zuiderveld
Idaho State Senate
P.O. Box 83720
Boise, Idaho 83720-0081
gzuiderveld@senate.idaho.gov
VIA EMAIL

Re: Request for AG Analysis

Dear Senator Zuiderveld:

The Attorney General has received your email dated July 3, 2024, inquiring about Snake River Plain Aquifer and Lava Ridge. As a Deputy Attorney General for the Idaho Department of Environmental Quality with expertise in environmental law, I have been asked to respond to your email.

To answer your first question "could we declare the Snake River Plain Aquifer a "Sensitive Resource," the answer is yes, that is possible, but it is not certain it would qualify or be something that was supported across the entirety of the Snake River Aquifer. It could limit or threaten other activities unintentionally. The process for making a declaration is very involved and must meet specific criterias, which are outlined below.

As you mentioned, currently the Spokane Valley-Rathdrum Prairie Aquifer is the only aquifer designated as a sensitive resource aquifer in Idaho. The process to recategorize an aquifer is described in the Idaho Ground Quality Water Rules, IDAPA 58.01.11.350. The general purpose of the Ground Water Quality Rules is to protect the ground water when there is concern for contamination.

The process to seek recategorizing an aquifer is to file a petition with the DEQ Board to initiate rulemaking with opportunity for review and public comments. The petition must include the following:

a. Current category;
b. Proposed category and an explanation of how the proposed category and criteria in Subsection 350.01 are met;
c. An explanation of why the categorization or recategorization is being proposed;
d. Location, description and areal extent;
e. General location and description of existing and projected future ground water beneficial uses;
f. Documentation of the existing ground water quality;
g. Documentation of aquifer characteristics, where available, including, but not limited to:
    i. Depth to ground water;
    ii. Thickness of the water bearing section;
    iii. Direction and rate of ground water flow;
    iv. Known recharge and discharge areas; and
    v. Geology of the area;
h. Identification of any proposed standards, for specified constituents, which would be stricter or less strict than the ground water quality standards in Section 200, or any standards to be applied in addition to those in Section 200; and a rationale for the proposed standards.

The criteria for declaration of a Sensitive Resource Aquifer is:

i. The ground water in an aquifer or portion of an aquifer is of a better quality than the ground water quality standards in Section 200 and maintenance of this quality is needed to protect an identified beneficial use(s);
ii. The ground water in an aquifer or portion of an aquifer is considered highly vulnerable;
iii. The ground water in an aquifer or portion of an aquifer represents an irreplaceable source for the identified beneficial use(s);

iv. The ground water quality in an aquifer or portion of an aquifer has been degraded and there is a need for additional protection measures to maintain or improve the water quality or prevent impairment of a beneficial use;

v. The ground water within an aquifer or portion of an aquifer is shown to be hydrologically interconnected with surface water and additional protection is needed to maintain the quality of either surface or ground water. Hydrologic interconnections can include either natural or induced ground water recharge or discharge areas; or

vi. The ground water within an aquifer or portion of an aquifer demonstrates other criteria which justify the need for additional protection.

The answer to your second question "would this stop them from going forward with Lava Ridge" is much more difficult to answer with any certainty. If the aquifer were to be recategorized, it may be challenging to demonstrate that turbine installation would impact groundwater quality.

All of this said, this office is doing everything it can within its power to prevent this project from moving forward and will continue to explore this option and all others available to us.

Sincerely,

SUSAN HAMLIN NYGARD
Deputy Attorney General

July 18, 2024

The Honorable Wendy Horman
Idaho House of Representatives
P.O. Box 83720
Boise, Idaho 83720-0038
wendyhorman@house.idaho.gov
VIA EMAIL

Re: Request for AG Analysis

Dear Representative Horman:

Our office is familiar with this issue and has been discussing what to do about it. I discussed this inquiry with one of our Consumer Protection attorneys. He was familiar with the case. It turns out Mr. Davis recently reached out to our office. A couple of our Consumer Protection attorneys had a detailed conversation with him to gather information about this scenario.

If you would like to discuss further, I'd be happy to chat with you on the phone. Let me know.

Sincerely,

PHIL N SKINNER
Chief of Staff
Deputy Attorney General

This response was originally provided to the recipient as an email and has been reformatted for the purpose of inclusion in the OAG Annual Report.

July 25, 2024

The Honorable Chuck Winder
President Pro Tempore
Idaho State Senate
P.O. Box 83720
Boise, Idaho 83720-0081
cwinder@senate.idaho.gov
VIA EMAIL

Re: Request for AG Assistance

Dear Pro Tem Winder:

We have reviewed the sign-on request from Andi Petrovic from Public Citizen (https://www.citizen.org/) advocating for the removal of Investor-State Dispute Settlement (ISDS) in new and existing trade agreements. (Your original letter regarding the request is attached.)

First, I apologize for the delayed response. I noticed that the sign-on request asked for your response before July 15.

ISDS provides rules through which a nation can be sued by foreign private parties (often foreign investors) in a forum—typically international arbitration—other than that nation's own courts. Foreign investors obtain this right through international trade and other agreements between the investor's home country and another country when such agreements incorporate ISDS into the agreement.

Various groups and politicians have recently lobbied to exclude ISDS in new trade agreements and to remove ISDS from existing trade agreements. (See, for example, here, here, and here.)

We have not identified a legal issue that might determine whether you should join the sign-on letter. Rather, this appears to be a policy decision, *i.e.*, whether to support or oppose ISDS. (For example,

this is perhaps similar to the policy decision whether to support binding arbitration clauses in contracts instead of allowing parties to resolve their disputes in court.)

Please let us know if you have further questions.

Sincerely,

JOHN OLSON
Deputy Attorney General

August 16, 2024

The Honorable Kevin Cook
Idaho State Senate
P.O. Box 83720
Boise, Idaho 83720-0081
kcook@senate.idaho.gov
VIA EMAIL

Re: Request for AG Assistance

Dear Senator Cook:

I've had a couple of our attorneys digging into your questions. The short answers to your two questions follow:

Am I requesting something that I shouldn't?

Blue Cross is not a government agency, so public records laws don't apply to them. There probably isn't any law that requires them to provide the requested information.

Would they be breaking HIPAA laws and revealing any trade secrets?

It appears they probably would violate HIPAA laws if they provided this information. And possibly yes to the trade secrets question as well.

If there was/is any right to obtain this information, it would likely come from possible contractual arrangements between the Department of Administration and Blue Cross.

This response was originally provided to the recipient as an email and has been reformatted for the purpose of inclusion in the OAG Annual Report.

I'm happy to set up a phone call with you, me, and the attorneys I've had looking into this to discuss further.

Sincerely,

PHIL N SKINNER
Chief of Staff
Deputy Attorney General

August 27, 2024

The Honorable Glenneda Zuiderveld
Idaho State Senate
P.O. Box 83720
Boise, Idaho 83720-0081
gzuiderveld@senate.idaho.gov
VIA EMAIL

Re: Request for AG Assistance

Dear Senator Zuiderveld:

Regarding your inquiry below, we have jurisdiction over this issue. The statute, which was passed in 2023, is Idaho Code § 18-3326A. The relevant portion states, "Except for those records kept during the regular course of a criminal investigation and prosecution or as otherwise required by law, a state government entity or local government . . . may not knowingly and willfully keep or cause to be kept any list, record, or registry of privately owned firearms or any list, record, or registry of the owners of those firearms." Idaho Code § 18-3326A(2).

The statute also says that "[t]he attorney general may investigate alleged violations of this section . . . ." Idaho Code § 18-3326A(6). If we find a violation, we're supposed to provide written notice and an opportunity to correct it. *Id*. If it is not corrected, our office "shall pursue an injunction." Idaho Code § 18-3326A(8).

Because the Attorney General has a responsibility to investigate this matter, I am reluctant to provide a legal opinion addressing the specifics of this Twin Falls matter for you at this time.

This response was originally provided to the recipient as an email and has been reformatted for the purpose of inclusion in the OAG Annual Report.

Feel free to reach out if you would like to discuss further.

Sincerely,

PHIL N SKINNER
Chief of Staff
Deputy Attorney General

September 9, 2024

The Honorable Ben Towes
Idaho State Senate
P.O. Box 83720
Boise, Idaho 83720-0081
btoews@senate.idaho.gov
VIA EMAIL

Re: Request for AG Analysis

Dear Senator Towes:

Two questions have been raised concerning deductions for union dues. The first question is whether a school district violates Idaho Code § 44-2004 when it deducts union dues from a public-school teacher's pay and transmits the funds to another union if the other union is using those funds for political activities. The second question is whether a school district violates Idaho Code § 74-604 by using public resources to make such deductions. Each question is addressed in turn below.

Question 1: Does an Idaho school district violate Idaho Code § 44-2004 by deducting union dues from a public-school teacher's pay and transmitting a portion of those funds to another union if the other union is using a portion of those funds to advocate for political activities?

Idaho Code § 44-2004 states:

> (1) It shall be unlawful to deduct from the wages, earnings or compensation of an employee any union dues, fees, assessments, or other charges to be held for, transferred to, or paid over to a labor organization, unless the employee has first presented, and the employer has received, a signed written authorization of such deductions, which authorization may be revoked by the employee at any time

> by giving written notice of such revocation to the employer.
> (2) *Deductions for political activities as defined in chapter 26, title 44, Idaho Code, shall not be deducted from the wages, earnings or compensation of an employee.*

(emphasis added).

As stated in subsection (1), Idaho allows for union dues to be deducted from an employee's wages so long as the employer has been provided written authorization from the employee. However, subsection (2) states that deductions for political activities are prohibited. Political activities are defined in Idaho Code § 44-2602(1)(e) as:

> "[e]lectoral activities, independent expenditures, or expenditures made to any candidate, political party, political action committee or political issues committee or in support of or against any ballot measure."

The Idaho Education Association (IEA) is the state's largest professional employee organization. According to IEA's website, it does not use any of its dues to directly fund political activities.[1] IEA has a PAC—Political Action Committee for Education (PACE)— which is funded on a voluntary basis.[2] PACE fees are not payroll-deducted.[3]

While IEA does not directly fund political activities, one could argue that IEA indirectly funds political activities through its affiliation with the National Education Association (NEA).[4] There is no Idaho caselaw on this particular question. But caselaw from other states provides limited guidance.

In *Michigan Education Association v. Secretary of State*, the Michigan Education Association-PAC (MEA-PAC) had funds deducted from payroll.[5] The Michigan Supreme Court found that the state had violated MCL 408.477—a provision that reads much the same as Idaho Code § 44-2004—by funding the Michigan Education Association (MEA), which was both a union and a PAC. The Court found that

"[n]either MCL 408.477 nor any other statute provides *authority* for a 'public body' to administer a payroll deduction plan that contributes money to a *political action committee.*"[6]

Michigan Education Association differs from Idaho in that the MEA was a PAC directly participating in political activities. In Idaho, the IEA has a PAC, but is not itself a PAC. It appears that the IEA does not directly participate in political activities. If Idaho school districts were deducting payroll funds to contribute to PACE, the *Michigan Education Association* case would be much more analogous. But since that is not the case, *Michigan Education Association* provides limited guidance.

In *Alabama Superintendent of Education v. Alabama Education Ass'n,* the Alabama comptroller withheld contributions deducted for the benefit of the Alabama Education Association (AEA) when the comptroller learned that a portion of the deductions made to the AEA were contributed to A-VOTE, the AEA's political action committee. The court upheld the comptroller's decision.

The facts presented in *Alabama Superintendent of Education* are distinguishable from what is happening in Idaho. In *Alabama Superintendent of Education*, the AEA was transferring a portion of its deducted dues directly to its PAC, A-VOTE, whose sole purpose is to participate in political activities. If the IEA were contributing deducted dues to PACE, the facts of the *Alabama Superintendent of Education* case would be analogous. But, according to their website, the IEA does not transfer deducted funds to PACE. PACE is only funded through voluntary donations. The IEA does send a portion of its funds to the NEA. But the NEA is not a PAC. While the NEA participates in limited political activities, that is not the NEA's sole purpose. In fact, that appears to only be a small portion of what the NEA does.[7]

The law applied in *Alabama Superintendent of Education* is also different than Idaho law. Alabama law states that:

> No person in the employment of the State of Alabama, a county, a city, a local school board, or any other governmental agency may arrange by salary deduction or otherwise for any payments to a political action committee or arrange by salary deduction or otherwise for any payments for the dues of any person so employed to a membership organization *which uses any portion of the dues for political activity*....[8]

Idaho's law does not have language explicitly prohibiting "any portion of dues" to be used for political activities. In *Alabama Superintendent of Education,* a portion of AEA's deducted dues were being used to fund AEA's PAC, A-VOTE. The "any portion of dues" language provided in Alabama law gave the comptroller legal justification to discontinue deducting AEA dues because a portion of those dues were being contributed to A-VOTE. Idaho law has no such language. This coupled with the fact that IEA does not contribute deducted funds to a PAC makes the holding of *Alabama Superintendent of Education* of limited use in Idaho.

In *Bexar Cnty., Texas v. Deputy Sheriff's Ass'n of Bexar Cnty.*, Bexar County objected to deducting a voluntary $10 fee paid into the union general fund that was earmarked for the Association's PAC. The court ruled in favor of the Association.

> The county argues that the fifty dollar due at issue cannot be a membership due because a ten dollar portion is subsequently reported by the PAC in the individual member's name and therefore possesses the character of a PAC contribution, not a membership due. We disagree. The statute concerns only the character of a payment at the time of the payroll deduction, not at the time of some subsequent disposition. Here, the funds are membership dues at the time of the payroll deduction. The association then makes a PAC contribution from its account after membership dues are deposited there by the County. It is undisputed that a union has a right to make PAC contributions from funds derived from its membership dues. Whether or not state law also imposes a particular reporting requirement for that transaction is not

determinative of the character of a deduction for purposes of Section 155.001(a)(2). Moreover, no County resources are used to facilitate the Association's PAC contribution.[9]

In essence, the court in the *Bexar County* case held that after a union has collected its dues, the union can use those dues however it wants, even if it entails contributing to a PAC. If an Idaho court adopted the *Bexar County* rationale, there would be no problem with IEA sending a portion of its dues to the NEA, or even directly to a PAC.

As these cases demonstrate, the courts are all over the map on decisions concerning the use of payroll-deducted union dues. It is not surprising that the decisions vary given the different facts and different laws presented in different jurisdictions. Should this issue be raised in Idaho, the court would likely take certain variables into consideration such as what proportion of dues are used for political purposes and whether deducted union dues go directly to a PAC. Given Idaho's law, it is unclear whether an Idaho court would find it unlawful for a school district to transfer funds to the IEA via payroll deductions when a portion of those funds are contributed to the NEA.

Question 2: Does an Idaho school district violate Idaho Code § 74-604 by deducting union dues from a public-school teacher's pay and transmitting a portion of those funds to another union if the other union is using a portion of those funds to advocate for political activities?

Idaho Code section 74-604 states:

> Unless specifically required by law, and except as provided in this chapter:
>
> (1) Neither a public entity nor its employees shall make, nor shall a public official make or authorize, an expenditure from public funds to advocate for or against a candidate or a ballot measure.

> (2) *Neither a public entity nor any of its employees shall use, nor shall a public official authorize or use, public property or resources to advocate for or against a candidate or a ballot measure.* There shall be an exception to the provisions of this subsection for any elected and currently serving Idaho legislator personally making use of public property or resources for the sole purpose of advocating for or against an initiative or referendum. This exemption shall apply only to the legislator's use of public property or resources for communication with the public using electronic or traditional physical correspondence or the use of any portion of any media initially produced using public property or resources from recordings of the legislature or any legislative committees. This exception shall not apply to any travel-related expenses or any advocacy for or against a candidate.

(emphasis added).

As discussed earlier, it is unclear whether IEA's transfer of dues to the NEA would be considered a political activity. But if it was, the deduction of those dues from an employee's paycheck would involve public resources (state administrative services, payroll services, etc.) and would likely be considered a violation of Idaho Code § 74-604.

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

I hope you found this analysis helpful. Please contact me if you have any questions.

Sincerely,

ADAM WARR
Deputy Attorney General

[1] PACE FAQ's: Do dues dollars go to politics? IEA dues dollars cannot be given directly to candidates. Only volunteer contributions to PACE can be used to elect pro-public education candidates. Idaho Education Association, https://idahoea.org/take-action/pace/ (last visited Aug. 27, 2024).
[2] Idaho Education Association, https://idahoea.org/contribute/ (lasted visited Aug. 27, 2024).
[3] *Id.*
[4] According to page 3, paragraphs 2 and 3 of the information provided to the OAG from Mr. Nelsen, the NEA participates in political activities as defined in Idaho Code § 44-2004 and spends 10% to 20% of its yearly funds for political activities and lobbying.
[5] *Michigan Educ. Ass'n v. Sec'y of State*, 489 Mich. 194, 227, 801 N.W.2d 35, 53 (2011).
[6] *Id.* at 227 (emphasis added).
[7] As mentioned in footnote 4, only 10%-20% of the NEA's funds are spent on political activities.
[8] Alabama Code § 17-17-5(b)(1) (emphasis added).
[9] *Bexar Cnty., Texas v. Deputy Sheriff's Ass'n of Bexar Cnty.*, 429 S.W.3d 673, 677 (Tex. App. 2014).

September 11, 2024

The Honorable Kevin Cook
Idaho State Senate
P.O. Box 83720
Boise, Idaho 83720-0081
kcook@senate.idaho.gov
VIA EMAIL

Re: Request for AG Assistance

Dear Senator Cook:

Thank you for reaching out about your draft legislation. Phil asked me to review it. I do not see any major legal issues with the draft legislation. I do, however, have a few minor suggestions for clarity:

- The proposed Idaho Code section 48-2105(1) says "a manufacturer of a device shall be subject to civil and criminal liability if . . . ." But the draft legislation only contains civil penalties. I recommend striking "and criminal" to avoid confusion.

- The proposed Idaho Code section 48-2106(1) says "[w]henever the attorney general has reason to believe that a person violated or is violating the provisions of this chapter . . . ." Given that the rest of the proposed legislation is focused on manufacturers, I recommend changing "a person" to "a manufacturer" to avoid any misunderstanding that a nonmanufacturer could be held liable for violating the provisions of the chapter. If, however, your intent is to cover more than just manufacturers, we may want to discuss modifying the language in the proposed Idaho Code section 48-2105.

This response was originally provided to the recipient as an email and has been reformatted for the purpose of inclusion in the OAG Annual Report.

Please let me know if you have any questions.

Sincerely,

JEFF NYE
Deputy Attorney General
Chief, Criminal Law Division

September 24, 2024

The Honorable Mike Kingsley
Idaho House of Representatives
700 W. Jefferson Street
Boise, Idaho 83702
mkingsley@house.idaho.gov
VIA EMAIL

Re: Request for AG Assistance

Dear Representative Kingsley:

Article VII, section 5, of the Idaho Constitution requires uniformity in property taxation. However, that same section allows the legislature to grant property tax exemptions. Anytime the legislature decides to grant an exemption, that exemption becomes an exception to the general requirement for uniformity.

Your idea reminds me of Idaho Code section 63-602NN, which is a scenario where the legislature decided to authorize a property tax exemption but gave the authority to county commissioners to exercise the option to exempt new commercial or industrial property for up five years.

> 63.602NN. (3) The board of county commissioners may grant the property tax exemption for the defined project for a period of up to five (5) years. The agreement shall be considered a contract arrangement between the county and the taxpayer for the exemption time period granted by the board of county commissioners and the annual approval provision contained in subsection (3) of section 63-602, Idaho Code, shall not apply to the exemption provided in this section as long as the contract enumerated in this section is valid and in force and effect. If, within the project period, the use or nature of the defined project or

> investment in the new plant changes such that the project would no longer qualify for the tax exemption, the board of county commissioners may unilaterally terminate the agreement and withdraw the tax exemption.

The Idaho Code section 63-602NN exemption is discretionary, and county commissions do it all the time all over the state. To my knowledge, it's never been challenged as being unconstitutional.

Sincerely,

PHIL N SKINNER
Chief of Staff
Deputy Attorney General

October 11, 2024

The Honorable Ned Burns
Idaho House of Representatives
700 W. Jefferson Street
Boise, Idaho 83702
nburns@house.idaho.gov
VIA EMAIL

Re: Request for AG Assistance

Dear Representative Burns:

You expressed concerns to our office that the Public Integrity in Elections Act might have been violated when various legislators used a legislative committee room to record video clips advocating against the Prop 1 Initiative.

Idaho Code § 74-604(2) prohibits public officials from using "public property or resources to advocate for or against a candidate or a ballot measure." It appears that the use of a legislative committee room described above is not prohibited by the Act for a couple of reasons.

First, because of the definition of "ballot measure" provided in the Public Integrity in Elections Act, it appears that nothing in the Act prohibits advocating for or against an initiative. The Act prohibits the use of "public property or resources to advocate for or against a candidate or a ballot measure." *See* Idaho Code § 74-604(2). "Ballot measure" is defined as "constitutional amendments, bond measures, or levy measures," and does not include initiatives. *See* Idaho Code § 74-603(2).

In fact, the word "initiative" was first added to the Act last year and only in two parts of the Act explaining conduct that is exempt from the Act's prohibitions. *See* Idaho Code §§ 74-604(2) and 74-605(4). It seems the reference to initiatives as part of these exceptions was

unnecessary because the Act does not prohibit advocating for or against initiatives.

Second, even if the Act applied to initiatives, Idaho Code § 74-603(5) provides an exception for the use of "public property or resources that are available to the general public, at such times and in such manner as they are available to the general public...." It appears that members of the public can reserve and use the legislative committee rooms. *See* https://legislature.idaho.gov/capitol/guidelines/ and https://legislature.idaho.gov/capitol/capitol-room-reservation-request/. If that is the case, then this type of use of a committee room by legislators is likely exempt from the limitations of the Public Integrity in Elections Act.

If you have more information or believe I have overlooked anything of consequence, I'm happy to discuss further.

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

Sincerely,

PHIL N SKINNER
Chief of Staff
Deputy Attorney General

October 22, 2024

The Honorable Dale Hawkins
Idaho House of Representatives
700 W. Jefferson Street
Boise, Idaho 83702
dhawkins@house.idaho.gov
VIA EMAIL

Re: Request for AG Assistance

Dear Representative Hawkins:

Thanks for the conversation. As requested, I've attached here a copy of the statute we discussed, which is Idaho Code § 19-5306. I have also attached a copy of our office's manual on the Rights of Victims of Crime. I've copied/pasted the relevant Question & Answer from the manual below.

What can victims do if their rights are violated?

Question No. 17: Can civil action be taken against the prosecutor, court or police if the prosecutor, court or other authority fails to comply with the provisions of Idaho Code § 19-5306 or art. 1, sec. 22 of the Idaho Constitution?

Answer: No. The amendment does not provide for any money damages against these agencies. (Idaho Code § 19-5306(4)).

Question No. 18: If the courts do not comply with the victims' rights amendment, can the court's decision be overturned?

Answer: No. A violation of the victim's rights does not constitute a mistrial (Idaho Code § 19-5306(4)).

This response was originally provided to the recipient as an email and has been reformatted for the purpose of inclusion in the OAG Annual Report.

Question No. 19: What remedies are available to a victim for violation of rights outlined in art. 1, sec. 22 of the Idaho Constitution or Idaho Code § 19-5306?

Answer: Neither the statute nor the constitution outline any specific remedies for victims for violations of victims' rights. Both the statute and the constitution make it clear that violations of either may not serve as the basis of an action for monetary damages against the police, prosecutor or the courts. Similarly, failure to comply with art. 1, sec. 22, or § 19-5306 cannot serve as the basis for overturning any criminal judgment.

Although not yet determined by a court, it appears the constitutional provision and statute might serve as the basis for injunctive action by a crime victim seeking a court order against an officer or governmental entity who fails or refuses to give the notice required by the constitution or under § 19-5306. This issue, however, has yet to be resolved in court.

I'm happy to discuss more if you have any other questions.

Sincerely,

JEFF NYE
Deputy Attorney General
Chief, Criminal Law Division

November 7, 2024

The Honorable Tammy Nichols
Idaho State Senate
700 W. Jefferson Street
Boise, Idaho 83702
tnichols@senate.idaho.gov
VIA EMAIL

Re: Request for AG Assistance

Dear Senator Nichols:

Thank you for taking the time to visit with us on your proposed changes to Idaho's domestic violence laws. As requested, we've drafted changes that would make the three statutes we discussed more consistent in their application. As it currently stands, the attempted strangulation statute and the civil domestic violence statute governing protection orders apply to "dating relationships" while the criminal domestic violence statute does not. The edits in the attached would add "dating relationships" to the criminal domestic violence statute making all three statutes consistent on that point.

You also mentioned in our discussion that you may be interested in increasing the penalties of domestic battery and domestic assault. The current penalty for felony domestic battery in Idaho is a maximum of ten years (or more if repeatedly committed or committed in front of a child). The ten-year maximum matched what you had for felony domestic violence in your draft legislation, so we left that alone.

There are also a couple of misdemeanors in the current criminal domestic violence statute. After House Bill 387 passed last session, both misdemeanors were already increased from a maximum penalty of six months to a maximum penalty of one year in jail. One year in jail is the maximum penalty for a misdemeanor, so we left those alone too.

We were more than happy to help here but, as discussed, our office takes no position on this legislation. Please let me know if you have any questions.

Sincerely,

JEFF NYE
Deputy Attorney General
Chief, Criminal Law Division

November 19, 2024

The Honorable Jason Monks
Majority Leader
Idaho House of Representatives
P.O. Box 83720
Boise, Idaho 83720-0038
jmonks@house.idaho.gov
VIA EMAIL

Re: Request for AG Analysis

Dear Representative Monks:

You asked for an opinion on the Blaine Amendment in relation to school choice bills in Idaho. Specifically in relation to H.B. 447 from 2024.

QUESTION PRESENTED

What effect does article IX, section 5 of the Idaho Constitution (Idaho's Blaine Amendment) have on school choice legislation? More specifically, what effect would the Blaine Amendment have had on H.B. 447 (2024) if it would have become law?

SHORT ANSWER

Based on the recent United States Supreme Court rulings in *Espinoza* and *Carson*, in most school choice legislation cases, application of the Blaine Amendment would likely violate the Free Exercise Clause of the United States Constitution.[1] When application of a state Blaine Amendment violates the Free Exercise Clause, the Blaine Amendment is disregarded and given no effect.

If H.B. 447 (2024) would have been enacted, it would have provided a tax credit up to $5,000 for parents who paid tuition and fees

for kindergarten through grade 12. Any attempt to apply the Blaine Amendment to stop this tax credit from being allowed for tuition and fees paid to a sectarian school would most likely lead to the same result as *Espinoza* and *Carson*. In other words, the Free Exercise Clause of the United States constitution would govern, and the Blaine Amendment would be disregarded and given no effect to prevent parents from receiving the tax credit.

ANALYSIS

Idaho is one of 37 states that have constitutional no-aid provisions designed to deny government aid to sectarian schools, commonly referred to as "Blaine Amendments."[2] Idaho's provision states:

> Neither the legislature nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian or religious society, or for any sectarian or religious purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever…[3]

In 2020, the United States Supreme Court ruled in *Espinoza* that Montana's Blaine Amendment should be disregarded and not given effect.[4] The Montana legislature established a program to provide tax credits for people who donated to organizations that award scholarships for private school tuition. To reconcile this statute with Montana's Blaine Amendment, the Department of Revenue promulgated a rule prohibiting families from using the scholarships at religious schools. Parents of students attending a private Christian school filed a lawsuit that made its way to the United States Supreme Court.

In *Espinoza*, the Supreme Court of the United States reinforced its earlier decision in *Trinity Lutheran* that a public benefit that excludes

religious schools from the benefit solely because the schools are religious will be examined under strict scrutiny.[5] To satisfy strict scrutiny the government's action (in this case, the application of the Blaine Amendment) must advance an interest of the highest order and be narrowly tailored to those interests.[6] Montana argued that its Blaine Amendment served Montana's interest in separating church and state "more fiercely" than the Federal Constitution.[7] The United States Supreme Court instructed, "A State's interest 'in achieving greater separation of church and State than is already ensured under the Establishment Clause ... is limited by the Free Exercise Clause.'"[8] Montana's stated interest in more fiercely separating church and state did not pass the strict scrutiny standard. The Court held that Montana's Blaine amendment, as applied, violated the Free Exercise Clause and that the Blaine Amendment should be disregarded and given no effect in that scenario:

> The Supremacy Clause provides that "the Judges in every State shall be bound" by the Federal Constitution, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." "[T]his Clause creates a rule of decision" directing state courts that they "must not give effect to state laws that conflict with federal law[ ]." Given the conflict between the Free Exercise Clause and the application of the no-aid provision here, the Montana Supreme Court should have "disregard[ed]" the no-aid provision and decided this case "conformably to the [C]onstitution" of the United States. That "*supreme* law of the land" condemns discrimination against religious schools and the families whose children attend them. They are "member[s] of the community too," and their exclusion from the scholarship program here is "odious to our Constitution" and "cannot stand."[9]

The Idaho Office of Attorney General issued an advisory letter to Senator Lori Den Hartog in 2020. Senator Den Hartog asked the office to analyze the impact of the *Espinoza* opinion on Idaho's Blaine Amendment. The Office of Attorney General's letter acknowledged that

Idaho's Blaine Amendment would be subject to strict scrutiny review if applied to school choice legislation like Montana's. The letter stated:

> [T]he *Espinoza* opinion makes clear that there may be situations in which Idaho's no-aid provision, as applied to a particular government benefit, would be subject to strict scrutiny review. For example, if Idaho applies the no-aid provision to prohibit a religious entity from receiving a government benefit solely because the religious entity is a religious entity, then a court considering a Free Exercise Clause challenge to such action would be able to analogize the situation before it to that before the U.S. Supreme Court in *Trinity Lutheran* and *Espinoza*.[10]

Idaho parents could bring a lawsuit like the *Espinoza* case in Montana if they were prohibited from receiving tax credits under a law like H.B. 447(2024). For Idaho's Blaine Amendment to survive such a lawsuit, the Idaho court would have to find that application of the Idaho Blaine Amendment advanced a narrowly tailored, compelling government interest. Montana's Blaine Amendment was not able to satisfy that requirement. It would likewise be very challenging for Idaho's Blaine Amendment to pass this "strict scrutiny" hurdle.

Across the country, courts continue to trend in favor of school choice, citing *Trinity Lutheran*, *Espinoza*, and *Carson* as they rule against laws that prohibit generally available funds from being used at or for religious schools. Last month the Ninth Circuit United States Court of Appeals ruled in *Loffman v. California Department of Education* that strict scrutiny applied and that California had failed to show that its law was narrowly tailored to serve a compelling interest.[11] In *Loffman*, Orthodox Jewish schools and families brought an action alleging that California's law that prohibited the state from contracting with religious schools to provide education for students with disabilities violated their rights under the Free Exercise Clause.[12] California's law provided funding for special education and related services and allowed nonsectarian private schools to be certified to receive the funds and to provide the services needed to students. The court concluded that

California's requirement that a school be nonsectarian to receive the funds failed strict scrutiny and therefore violated the Free Exercise Clause.

In conclusion, the application of Idaho's Blaine Amendment to block parents of children attending sectarian schools from receiving tax credits, otherwise available for private school expenses, would be very similar to the scenario in *Espinoza* and related cases. That being the case, it is likely that courts would conclude such an application of Idaho's Blaine Amendment violates the Free Exercise Clause of the United States Constitution. When application of a state Blaine Amendment violates the Free Exercise Clause, the Blaine Amendment is disregarded and given no effect.

Sincerely,

PHIL N SKINNER
Chief of Staff
Deputy Attorney General

[1] *Espinoza v. Montana Dep't of Revenue*, 591 U.S. 464, 487, 140 S. Ct. 2246, 2261, 207 L. Ed. 2d 679 (2020) ("A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious"); *Carson as next friend of O. C. v. Makin*, 596 U.S. 767, 789, 142 S. Ct. 1987, 2002, 213 L. Ed. 2d 286 (2022) ("Maine's 'nonsectarian' requirement for its otherwise generally available tuition assistance payments violates the Free Exercise Clause of the First Amendment").
[2] *Espinoza* at 482–83.
[3] IDAHO CONST. art. IX, § 5.
[4] *Espinoza* at 488.
[5] *Id.* at 475; *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 450, 137 S. Ct. 2012, 2015, 198 L. Ed. 2d 551 (2017) (The exclusion of a religiously affiliated preschool from participation in a state program providing grants for the resurfacing of playgrounds, solely because of its religious status, violates the federal Free Exercise Clause.).
[6] *Espinoza* at 484.
[7] The Idaho Supreme Court has made the same observation about the purpose of Idaho's Blaine Amendment. *Epeldi v. Engelking*, 94 Idaho 390, 395, 488 P.2d 860, 865 (1971) ("it is our conclusion that the framers of our constitution intended to more

positively enunciate the separation between church and state than did the framers of the United States Constitution.")

[8] *Espinoza* at 484–85.

[9] *Espinoza* at 488.

[10] 2020 Idaho Att'y Gen. Ann. Rpt. 187.

[11] *Loffman v. California Dep't of Educ.*, No. 23-55714, 2024 WL 4586970, at *18 (9th Cir. Oct. 28, 2024).

[12] *Id.*

December 12, 2024

The Honorable Rob Beiswenger
Idaho House of Representatives
P.O. Box 83720
Boise, Idaho 83720-0038
Idaho4rob@gmail.com
VIA EMAIL

Re: Request for AG Analysis

Dear Representative Beiswenger:

Thank you for approaching our office to discuss a legal analysis of your contemplated legislation, and it was great to talk to you on Tuesday. As discussed, below is a brief analysis of the constitutional issues that might arise in connection with the bill. The analysis assesses the bill in two parts—one imposing safeguards on the prescription of drugs used in chemical abortions, and one imposing liability on abortion-drug manufacturers when those drugs are detected in the water supply.

Abortion Pill Restrictions

There appears to be little risk of the safeguards for prescribing abortion drugs being declared unconstitutional. On a survey of relevant case law, one argument that has been made is that the federal government has preempted states from imposing these safeguards because the FDA used to have similar safeguards—like an in-person visit requirement before prescribing the drug, an in-person administration requirement, and a follow-up visit requirement—but recently removed them under the Biden administration. The argument is that declining to impose these safeguards federally preempts states from imposing the safeguards themselves. See *GenBioPro, Inc. v. Sorsaia*, 2023 WL 5490179 (S.D.W. Va. Aug. 24, 2023). We believe that argument is wrong and misunderstands how preemption works. *See*

Satanic Temple v. Labrador, 716 F. Supp. 3d 989, 1001 (D. Idaho 2024) (deeming the argument "speculative at best").

The constitution also requires abortion regulations to be rationally related to a legitimate State interest, just "like other health and welfare laws." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 301 (2022). The fact that most (if not all) of the safeguards proposed here were imposed for many years by the FDA to protect maternal health is extremely strong evidence it furthers a legitimate government interest.

Abortion Drugs in Water Systems

The risk of preemption for the provisions related to abortion drugs found in the water supply is also low. The two federal statutes that might be relevant—CERCLA and the Clean Water Act—both contain provisions stating that States may impose requirements above and beyond those imposed federally. 42 U.S.C. § 9614(a); 33 U.S.C. § 1321(o)(2). Ninth Circuit law has relied on the CERCLA nonpreemption provision to hold that the statute does not preempt the field of environmental remediation, though its opinion did suggest that in certain circumstances there may be preemption if the statute poses an obstacle to some specific provision of CERCLA. *See Fireman's Fund Ins. Co. v. City of Lodi, California*, 302 F.3d 928 (9th Cir. 2002).

As explained above, this provision would also be subject to rational basis review, so it is "entitled to a strong presumption of validity" as long as it serves a legitimate government interest. *Dobbs*, 597 U.S. 215 at 301 (cleaned up).

Sincerely,

MICHAEL ZARIAN
Deputy Solicitor General

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