IDAHO ATTORNEY GENERAL'S ANNUAL REPORT

CERTIFICATES OF REVIEW

SELECTED ADVISORY LETTERS

AND

SELECTED AMICUS BRIEFS

FOR THE YEAR

2025

Raúl R. Labrador
Attorney General

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2025 Idaho Att'y Gen. Ann. Rpt.

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2025 Idaho Att'y Gen. Ann. Rpt. 49

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GRAYDON W. SMITH 1955-1958
FRANK L. BENSON 1959-1962
ALLAN B. SHEPARD 1963-1968
ROBERT M. ROBSON 1969-1970
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WAYNE L. KIDWELL 1975-1978
DAVID H. LEROY 1979-1982
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LARRY ECHOHAWK 1991-1994
ALAN G. LANCE 1995-2002
LAWRENCE G. WASDEN 2003-2022
RAÚL R. LABRADOR 2023-



Raúl R. Labrador

Attorney General

INTRODUCTION

As Idaho's 33rd Attorney General, I am honored to present the third Annual Report of my administration, highlighting our ongoing commitment to defend the rule of law, protect Idaho families, and serve the people of our great state. My office remains unwavering in its commitment to this work: protecting Idaho families, defending the unborn, ensuring fairness for women and girls in athletics and safeguarding their private spaces, protecting consumers, resisting federal overreach, upholding constitutional rights, and holding government accountable.

This volume stands as a testament to the time, effort, and expertise invested by my staff through meticulous research, writing, and heartfelt service. The following highlights capture our key accomplishments in the Attorney General's Office during 2025.

In my Criminal Law Division, the Special Prosecutions Unit (SPU) filed 102 cases—more than double the 41 cases filed in 2024. The Internet Crimes Against Children (ICAC) Unit reviewed 6,117 cyber tips and secured 62 arrests, reinforcing its critical role in protecting vulnerable children from online exploitation. The division addressed 181 public corruption complaints, with 17 rigorously investigated by the Special Investigations Unit (SIU), while the Medicaid Fraud Control Unit (MFCU) managed 127 cases and successfully prosecuted five. Our Appellate Unit filed an impressive 500 briefs. Under a formal cooperation agreement with Latah County, our office provided essential resources, including pre-trial litigation regarding law enforcement's use of Investigative Genetic Genealogy (IGG). This support contributed to the successful prosecution of Bryan Kohberger in one of the nation's most closely watched cases, demonstrating the division's commitment to collaborative, high-stakes justice.

My Solicitor General's Office secured a series of high-profile victories defending Idaho state authority, constitutional principles, and public safety. In the appellate courts, my office obtained unanimous Idaho Supreme Court and Ninth Circuit wins, including the dismissal of The Satanic Temple's federal challenge to the Defense of Life Act; affirmation of the Idaho Attorney General's power to investigate misuse of $72 million in tax paper dollars; and upholding the disqualification of a private company from a state behavioral-health contract due to a prior conflict of interest. Our office also successfully opposed an injunction that would have overridden Idaho's school bathroom and locker-room laws. Through influential amicus briefs led by our office, which is a newly featured section in this volume, we have effectively advanced critical constitutional protections. These outcomes reflect my office's consistent determination and success in protecting Idaho's families and core public-safety priorities across federal and state courts.

In 2025, attorneys in the Medicaid Estate Recovery Unit successfully recovered $12,876,619. Our Health and Human Services Division also advised on proposed changes to statutory and regulatory requirements, represented the Idaho Department of Health and Welfare in contested administrative hearings and court proceedings, and drafted a variety of contracts. In addition, our office prevailed in 26 of 27 Health and Welfare-related appeals, with one case vacated.

Our Consumer Protection Division recovered $36,384,441.16 in consumer restitution, civil penalties, settlements, costs, and fees. This total includes $19,245,933,47 obtained from tobacco companies and $13,432,155.69 in opioid settlement payments. Consumer mediation recovery efforts generated $1,097,597 in 2025 - an increase of $920,673 from the previous year. Our office processed 2,174 complaints, managed 49 CPD Enforcements, and had 22.3k visitors to our new Report Scams Idaho webpage.

It is an honor to serve as Idaho's Attorney General, and I am immensely proud of the exceptional legal representation and principled service our office delivers each day. I invite you to visit my website at http://ag.idaho.gov to learn more about our office. I also encourage you to sign up for my weekly Labrador Letter to stay informed about the important work we're doing on behalf of the citizens of Idaho: https://www.ag.idaho.gov/newsroom/category/newsletter/.

Sincerely,



RAÚL R. LABRADOR
Attorney General

OFFICE OF THE ATTORNEY GENERAL
RAÚL R. LABRADOR
ATTORNEY GENERAL
2025
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Phil N Skinner
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Kimi White
Executive Assistant

Damon Sidur
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Public Information Specialist

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Gader Wren, Assistant Solicitor General

Jack Corkery, Assistant Solicitor General
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Tom Donovan, Health & Human Services

James Simeri, Consumer Protection

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Joy Vega
Douglas Werth
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PARALEGALS

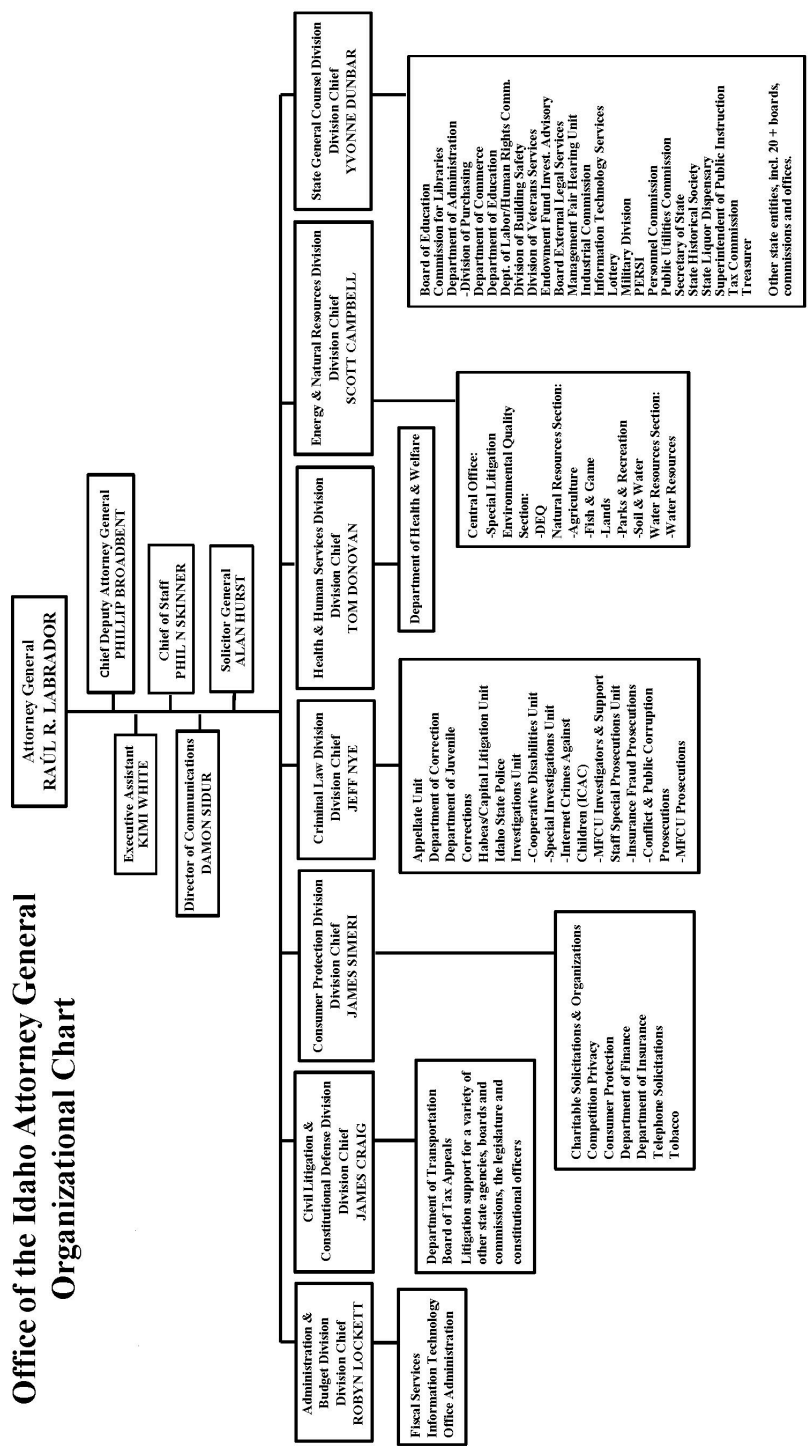
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Office of the Idaho Attorney General
Organizational Chart
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Chief of Staff
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Solicitor General
ALAN HURST
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Department of Transportation
Board of Tax Appeals
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Consumer Protection
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Telephone Solicitations
Tobacco
Criminal Law Division
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Department of Correction
Department of Juvenile Corrections
Habeas/Capital Litigation Unit
Idaho State Police
Investigations Unit
-Cooperative Disabilities Unit
-Special Investigations Unit
-Internet Crimes Against Children (ICAC)
-MFCU Investigators & Support Staff Special Prosecutions Unit
-Insurance Fraud Prosecutions
-Conflict & Public Corruption Prosecutions
-MFCU Prosecutions
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Division Chief
TOM DONOVAN
Department of Health & Welfare
Central Office:
-Special Litigation
Environmental Quality Section:
-DEQ
Natural Resources Section:
-Agriculture
-Fish & Game
-Lands
-Parks & Recreation
-Soil & Water
Water Resources Section:
-Water Resources
Energy & Natural Resources Division
Division Chief
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State General Counsel Division
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Department of Commerce
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Division of Veterans Services
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Board External Legal Services
Management Fair Hearing Unit
Industrial Commission
Information Technology Services
Lottery
Military Division
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.

ATTORNEY GENERAL'S CERTIFICATES OF REVIEW FOR THE YEAR 2025

RAÚL R. LABRADOR

ATTORNEY GENERAL
STATE OF IDAHO

April 14, 2025

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 63, Idaho Code, Providing for a Sales Tax Exemption for Food.

Dear Secretary of State McGrane:

An initiative petition was filed on March 18, 2025, proposing to amend title 63 of the Idaho Code. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each 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 a sales tax exemption for "food sold for human consumption" to chapter 36 (Sales Tax) of the Idaho Code. The proposed exemption is similar to a provision in a piece of legislation that was recently considered by the Idaho Legislature. *See* proposed House Bill No. 260; https://legislature.idaho.gov/sessioninfo/2025/legislation/H0260/. In both the proposed legislation and the proposed initiative, a new section (63-3622H) would add "food for human consumption" to the list of goods and services that are exempt from Idaho's sales and use taxes.

The proposed initiative does not further specify what type of "food" would qualify for this sales tax exemption beyond simply noting that the exemption is for "food sold for human consumption." Initiative Pet. § 1.

The proposed initiative includes a "severability provision" whereby if any portion of the initiative is "declared invalid for any reason, such declaration shall not affect the validity of the remaining portions" of the initiative. *Id*. at 2.

Finally, the proposed initiative includes a fiscal impact statement and "funding source statement." The impact statement notes the potential for lost state revenue as a result of no longer taxing food. The funding statement asserts that the initiative would not require the expenditure of funds and that the "state general fund and the Tax Commission may see cost savings due to a reduction in processing the Grocery Tax Refund." *Id*. at 3.

II. Analysis of the Proposed Initiative

1. No Definition of "Food for Human Consumption"

The most obvious potential problem with the initiative is that it fails to provide a definition of "food for human consumption." This creates ambiguity in interpreting and applying the statute and raises the possibility that the initiative's intent will not be fully realized. For example, does this definition include or exclude food purchased at a restaurant? Similarly, categories the petitioner may have intended to include, such as beverages (like milk), may not be covered by the proposed exemption.

For example, the second entry for "food" in Meriam-Webster's online dictionary is: "nutriment in solid form." https://www.merriam-webster.com/dictionary/food. This definition would exclude beverages from the definition of food, even common grocery staples like milk and orange juice.

Beyond the potential problem of possibly not capturing the petitioner's intent, the failure to define "food" within the initiative poses potential issues for courts interpreting the initiative, if it were enacted. Typically, Idaho courts strictly construe tax exemptions against the taxpayer and in favor of the state. *Idaho State Tax Comm'n v. Haener Bros., Inc.,* 121 Idaho 741, 744, 828 P.2d 304, 307 (1992) (citing *Hecla Mining Co. v. Idaho State Tax Comm'n*, 108 Idaho 147, 697 P.2d 1161 (1985)). And "a statute granting [an] exemption [will not] be extended by judicial construction so as to create an exemption not specifically authorized." *Id.* at 744 (citing *Canyon County v. Sunny Ridge Manor, Inc.*, 106 Idaho 98, 675 P.2d 813 (1984)).

The above principles notwithstanding, sometimes courts will view a tax exemption "in light of the legislative intent." *Id.* at 744 (citing *Richardson v. State Tax Comm'n*, 100 Idaho 705, 604 P.2d 719 (1979)).

But when legislation is enacted by ballot initiative, as is proposed here, there is no legislative history to discern legislative intent.

It is recommended, therefore, that the initiative include a thorough definition of "food sold for human consumption" to reflect the petitioner's intent as to the scope of the proposed sales tax exemption.

2. Uncertain Relationship to Other Food Tax Provisions

The proposed initiative mentions a possible "cost savings due to a reduction in processing the Grocery Tax Refund." Initiative Pet. at 3. However, the proposed initiative does not actually address Idaho's current "Grocery Tax Credit," which is not a true refund, but rather an income tax credit—set at $155 for most taxpayers and each dependent—that offsets Idahoans' income tax. Idaho Code § 63-3024A. Although the goal of the "Grocery Tax Credit" is the same as the proposed sales tax exemption for food—to alleviate the tax burden on food purchases—the two provisions are distinct methods of accomplishing that goal and could both be in effect.

If the petitioner's intent is to replace the "Grocery Tax Credit" with the proposed tax exemption, as seems to be the intent, that should be made clear in the initiative's provisions, likely by proposing an amendment to repeal Idaho Code section 63-3024A.

Finally, it is unclear what effect the proposed initiative would have on the various other sales tax exemptions involving food. For example, Idaho Code section 63-3622J provides for a sales tax exemption of "meals by public or private schools under the federal school lunch program or under programs that provide nutritional meals for the aging." And section 63-3622FF exempts "[p]urchases of food made with benefits provided under the federal supplemental nutrition assistance program (SNAP)."

The proposed initiative, with its broad exemption of "food sold for human consumption," would seem to overlap with the provisions noted above. But the failure to address these other provisions raises some uncertainty as to how the proposed initiative would affect the current laws. Again, a more thorough definition of "food sold for human consumption" could potentially address this issue, specifically by consulting other sources, including Idaho Department of Health & Welfare SNAP provisions. *See* https://healthandwelfare.idaho.gov/services-programs/food-assistance/about-snap.

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 Joseph Evans, P.O. Box 1904, Boise, ID 83701.

Sincerely,

RAÚL R. LABRADOR
Attorney General

Analysis by:

Matthew L. Maurer
Deputy Attorney General

June 17, 2025

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 63, Idaho Code, Providing for a Sales Tax Exemption for Food.

Dear Secretary of State McGrane:

An initiative petition was filed on May 22, 2025, proposing to amend title 63 of the Idaho Code. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each 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 a sales tax exemption for "food sold for human consumption" to chapter 36 (Sales Tax) of the Idaho Code. The proposed exemption is similar to a provision in a piece of legislation proposed during the most recent session of the Idaho Legislature. *See* proposed House Bill No. 260; https://legislature.idaho.gov/sessioninfo/2025/legislation/H0260/. In both the proposed legislation and the proposed initiative, a new section (63-3622H) would add "food for human consumption" to the list of goods and services that are exempt from Idaho's sales and use taxes.

The proposed initiative further specifies that "the types and kinds of food products eligible for exemption by this section shall be the same types and kinds of food products that are eligible for purchase with benefits provided under the federal supplemental nutrition assistance program (SNAP)." Initiative Pet. § 1. The proposed initiative goes on to state that the term "food," as used in the section, "shall have the same definition as provided in 7 U.S.C. § 2012 as that section existed on January 1, 2027.

Sections 2 – 7 of the proposed initiative go on to list various sections of the Idaho Code that would be repealed by the initiative, including § 63-3024A (Grocery Tax Credit); § 63-3077G (provision for information exchange between department of correction and state tax commission); § 63-3077H (provision for information exchange between department of health and welfare and state tax commission); § 32-706 (child support provision); § 63-3622J (church and senior citizen meals tax exemption); and § 63-3622FF (SNAP food purchases tax exemption). Most of the provisions to be repealed relate to the current Idaho Grocery Tax Credit or existing tax exemptions for food. Initiative Pet. §§ 2 – 7.

Finally, the proposed initiative includes a fiscal impact statement. The impact statement notes the potential for lost state

revenue as a result of no longer taxing "food for human consumption." The funding statement asserts that the initiative would not require the expenditure of "state or local funds beyond normal expenses associated with the initiative process" and that the State Tax Commission may see cost savings due to not having to process the Grocery Tax Credit. *Id*. at 2.

II. Analysis of the Proposed Initiative

1. The Proposed Initiative May Violate the Single-Subject Rule

The most problematic aspect of the proposed initiative is Section 5, where it calls for the wholesale repeal of Idaho Code § 32-706. Idaho Code § 32-706 is the provision in Idaho law that deals with child support in divorce cases, something completely unrelated to the proposed initiative. Although § 32-706 does reference the Grocery Tax Credit in passing,[1] the statute deals with child support, not sales tax exemptions or food tax credits. Therefore, the wholesale repeal of § 32-706 embraces a different subject, wholly separate from the proposed initiative's main purpose—taxation of food and related exemptions and credits.

In other words, the proposed initiative appears to violate the single subject rule—the initiative embraces more than one subject. Under Idaho Code § 34-1802A, "[a]n initiative petition shall embrace only one (1) subject and matters properly connected with it." Idaho's single subject rule applies also to constitutional amendments (IDAHO CONST. ART. XX, §2) and legislative acts (*id.* at article III, section 16). The single subject rule considers whether a proposed change can "be divided into subjects distinct and independent, ... any one of which be adopted without in any way being controlled, modified or qualified by the other." *Idaho Watersheds Project v. State Bd. of Land Comm'rs*, 133 Idaho 55, 60 (1999). This rule is intended to prevent initiatives from

addressing multiple subjects at the same time and "forcing the voter to approve or reject such amendment as a whole." *Id.* (citation omitted).

Because this proposed initiative relates to repealing the Idaho Grocery Tax Credit and replacing it with a sales tax exemption for food purchased for human consumption, to also call for the wholesale repeal of § 32-706 would seemingly venture into a new subject (child support). Given that the proposed initiative currently embraces these two distinct subjects, it likely runs afoul of Idaho Code § 34-1801A.

The straightforward remedy in this instance would be to, instead of calling for the wholesale repeal of § 32-706, simply amend the statute and remove the passing reference to the Grocery Tax Credit within § 32-706. Indeed, this may have been the petitioner's intent. If that is the petitioner's intent, it is recommended that Section 5 be edited to clarify that only the brief reference to the Grocery Tax Credit would be removed from § 32-706.[2]

2. Other Uncertain or Unintended Effects of Wholesale Repeal

The proposed initiative calls for the wholesale repeal of several sections of the Idaho Code. *See* Initiative Pet. §§ 2 – 7. In each case, the initiative lists out the section of the Idaho Code to be repealed, followed by the words "and the same is hereby repealed." *Id.* In this way, the proposed initiative calls for the complete repeal of each identified section of the Idaho Code. Each of these Idaho Code sections identified for repeal under the proposed initiative have to do with sales tax exemptions or the Idaho Grocery Tax Credit (aside from the anomaly noted above regarding Idaho's child support provision).

Repealing at least portions of some of the identified Idaho Code sections does make some sense. In principle, it is helpful for the petitioner to address the various Idaho laws that could potentially be affected by the initiative's proposed tax exemption on "food for human consumption." However, the wholesale repeal of each of the identified laws could have uncertain or unintended effects.

For example, Idaho Code §§ 63-3622J and 63-3622FF both reference, federal laws. Idaho Code § 63-3622J provides for a sales tax exemption on meals sold "under the federal school lunch program" or "meals for the aging," as articulated in the federal Older Americans Act. Similarly, § 63-3622FF provides for a sales tax exemption on food purchased "with benefits provided under the federal supplemental nutrition assistance program (SNAP)." In other words, each of these Idaho laws provides for Idaho tax exemptions based on federal programs and definitions. The wholesale repeal of these Idaho tax exemptions may adversely impact the federal programs they are linked to. Alternatively, the repeal of these Idaho tax exemptions could disqualify Idaho from receiving certain federal funds to the extent Idaho law is inconsistent with federal requirements. It is not uncommon for federal programs to require participating states' laws to meet federal requirements. *See* 7 U.S.C. § 2013 ("[A] State may not participate in the supplemental nutrition assistance program if the Secretary determines that State or local sales taxes are collected within that State on purchases of food made with benefits issued under this chapter.").

It is recommended, therefore, that the repeal provisions in the initiative petition more fully explain the intent behind repealing each of the identified Idaho laws. At a minimum, the petitioner should explain 1) how each Idaho law identified for repeal relates to the initiative, and 2) why the identified law should be repealed. Additionally, the initiative could leave in place those provisions that exempt from sales tax the purchase of items using funds from those federal programs.

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 Howard Rynearson, 2245 NE 19th Ave., Payette, ID 83661.

Sincerely,

RAÚL R. LABRADOR
Attorney General

Analysis by:

Matthew L. Maurer
Deputy Attorney General

[1] Idaho Code §32-706(6) notes that "the food tax credit under section 63-3024A" (formerly known as the grocery tax credit) is a tax benefit that may be awarded in a child support order, and the statute requires the tax commission to recognize such an award.

[2] The following clause would be removed from §32-706(6): "the food tax credit under section 63-3024A, Idaho Code."

September 29, 2025

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

Re: Certificate of Review
Proposed Initiative Creating New Medical Marijuana Act by Adding Chapter 35 to Title 37, Idaho Code, to Legalize the Use of Medical Marijuana

Dear Secretary of State McGrane:

An initiative petition was filed with your office on August 29, 2025. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only." Idaho Code § 34-1809(1)(b). The petitioners are free to "accept or reject them in whole or in part." *Id.* 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 about 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. Idaho Code § 34-1809(2)(a). 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. Idaho Code § 34-1809(2)(e). While our office

prepares titles for the initiative, petitioners may submit proposed titles for consideration. Idaho Code § 34-1809(2). 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 titled the "Idaho Medical Cannabis Act" ("Act") and is denominated as Idaho Code sections 37-3501 *et seq*.[1] Primarily, the initiative seeks to amend title 37, Idaho Code, by adding newly proposed chapter 35 to title 37 (Prop. I.C. § 37-3501 *et seq*.), which declares that persons authorized by the Act to grow, possess, distribute, transport, process, sell, and use medical cannabis, and conduct related activities, are protected from criminal, civil, and administrative penalties and sanctions.

In general, the Act would allow the Idaho Board of Pharmacy ("board") in cooperation with the Idaho Department of Health and Welfare ("department") to issue "medical cannabis production licenses" to various persons and entities to produce, transport, and distribute (etc.) medical marijuana to "medical cannabis cardholders" who have been diagnosed by a "practitioner" with having a "substantial health condition." The Act precludes criminal and civil liability and sanctions for persons acting within its authorization.

B. Legal and Practical Concerns

Given the length and complexity of the Act, this review will necessarily address only a select number of its more significant and noteworthy provisions. 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.

SECTION 1:

1. Heading

The heading for "Section 1" of the initiative states that it is amending title 37 of the Idaho Code by the addition of a new chapter, chapter 35, title 37. However, Prop. I.C. §§ 37-3501 *et seq*. should logically fall within chapter 27 of title 37, which would place it in line with other statutes relating to penalties and prohibited acts involving controlled substances. It is therefore recommended that the initiative designate its proposed new Act as Prop. I.C. § 37-2732E[2] *et. seq*.

2. Requested Short Title – Prop. I.C. § 37-3501

The requested Short Title"[3] reads in full as "Idaho Medical *Cannabis* Act." Prop. I.C. § 37-3501(1) (emphasis added). The term "cannabis" is used extensively throughout the Act. However, cannabis is defined in the Act as "marijuana as defined in section 37-2701, Idaho Code." Prop. I.C. § 37-3502(2). Therefore, it requires reference to two definitions for the reader to understand that the Act seeks to legalize the medical use of marijuana—not cannabis. Cannabis is not 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). To avoid misleading the public about the subject matter of the initiative, it is recommended that "cannabis" be replaced with "marijuana" throughout the Act.

The initiative does not request a general (or "long") title. As required by Idaho Code § 34-1809(2), within ten working days after receiving copies of the petition, the Attorney General shall prepare

ballot titles containing a short title (not exceeding 20 words) and a general title (not exceeding 200 words).

3. Intent of the Act - Prop. I.C. § 37-3501

Subsection (2) of Prop. I.C. § 37-3501 states that the intent of the Act is "to authorize the use of medical cannabis for persons diagnosed with a substantial health condition," and that persons acting in accordance with the Act will not "be held to violate chapter 27, title 37, Idaho Code, or any other provision of state law, local ordinance, or administrative rule."

4. Definitions - Prop. I.C. § 37-3502

Several of the definitions within Prop. I.C. § 37-3502 deserve consideration or comment. Subsection (4) defines "medical cannabis" as "a) inhalable cannabis; b) smokeable cannabis; and c) ingestible cannabis processed to a tablet, chewable, droplet, or pill containing up to ten (10) milligrams of [THC] per tablet, chewable, droplet, or pill."

Subsection (4) describes several forms of cannabis that would constitute "*medical* cannabis," which, read in isolation, implies that they would be legal regardless of authorization under the Act. (*See* section 2, above, regarding use of word "cannabis.")

Subsections (3) and (5) together provide that a "medical cannabis cardholder" or "cardholder" is "an individual with a diagnosed substantial health condition that has been approved by the department[4] for a medical cannabis card."

A "medical cannabis production license" or "license" is "a license issued by the board to grow, handle, process, manufacture, test, transport, distribute and sell medical cannabis" according to the Act. Prop. I.C. § 37-3506(1).

The Act defines a "Practitioner" as "a person that may diagnose a *substantial health condition* under chapter 18, title 54, Idaho Code," qualifying the diagnosed person to be a medical cannabis cardholder. Prop. I.C. § 37-3506(8) (emphasis added). Physicians and physician assistants clearly meet the "practitioner" criteria. *See* Idaho Code §§ 54-1803, 1807A. In addition, Idaho Code § 54-1804(1) provides a list of persons who, "though not holding a license to practice medicine in this state, may engage in activities included in the practice of medicine."[5] One of those listed is a person who "administers[] a family remedy to a member of the family." Idaho Code § 54-1804(1)(k). If the Act becomes law, attempts will likely be made to have cannabis be deemed a "family remedy" to allow a family member to "diagnose" other family members with a substantial health condition and obtain a medical cannabis card.

Subsection (9) defines "substantial health condition" as "a condition described in" Prop. I.C. § 37-3504. That proposed statute lists 20 conditions that qualify as substantial health conditions that would allow a person to obtain a medical cannabis card. The provision lists serious and verifiable diseases such as AIDS, Alzheimer's, ALS, and cancer, but also less verifiable conditions such as anxiety, insomnia, acute pain (longer than two weeks), and chronic and persistent pain (lasting longer than two weeks and not adequately managed). Prop. I.C. § 37-3504. The inability to verify that a person has a "substantial health condition" could lead to fraud or abuse by persons attempting to obtain a medical cannabis card.

Subsection (10) states that '"[t]etrahydrocannabinol' or 'THC' means a substance derived from cannabis and contained in a plant of the genus cannabis"; "synthetic equivalents" of cannabis substances; or "synthetic substances, derivatives, and their isomers with similar chemical structure as described in section 37-2707(i)." However, there is no sub-section (i) to Idaho Code § 37-2707, which lists Schedule II controlled substances. It appears likely that the Act should more accurately refer to Idaho Code § 37-2705(d)(27), which defines "Tetrahydrocannabinols or synthetic equivalents of the substances contained in the plant, or in the resinous extractives of Cannabis, [etc.]." It is recommended that Act be modified accordingly.[6]

5. Authorization - Prop. I.C. § 37-3503

The thrust of the Act is expressed in Prop. I.C. § 37-3503 as follows:

> Notwithstanding any provision of law to the contrary, the growth, possession, distribution, transportation, processing, sale and use of medical cannabis, *as well as activities related to* the growth, possession, distribution, transportation, processing, sale and use of medical cannabis, are authorized as provided in this chapter.

(Emphasis added.)

Whether an activity is "related to the growth, possession, distribution, transportation, processing, sale and use of medical cannabis," and thus, authorized by the Act, would be subject to uncertainty and likely lead 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 what "related activities" fall within the Act's authorization.

6. Substantial Health Conditions - Prop. I.C. § 37-3504

The most noteworthy "substantial health conditions" have been discussed in the above section 4 under Prop. I.C. § 37-3502(9) and need no further comment.

7. Medical Cannabis Card - Prop. I.C. § 37-3505

Subsection (1) of Prop. I.C. § 37-3505 states that, effective July 1, 2026, persons diagnosed with a substantial health condition can apply to the department "for a medical cannabis card for the purchase of

medical cannabis." There is no age limitation for becoming a medical cannabis cardholder. *See generally* Prop. I.C. § 37-3505.

Among other requirements, the applicant must provide personal identifying information and a medical health record "stating that the applicant has a diagnosis of a substantial health condition." Prop. I.C. § 37-3505(3). Medical cannabis cards are renewed annually and must be carried by the cardholder when engaging in activities authorized by the Act. Prop. I.C. § 37-3505(5)–(6).

The department, with the cooperation of the board, must provide medical cannabis card recipients with a list of risks, warnings, and safety information. Prop. I.C. § 37-3505(7). The department may "establish procedures by rule to implement the application and issuance provision of this section." Prop. I.C. § 37-3505(8).

Subsection (9) of Prop. I.C. § 37-3505 states that a medical cannabis card applicant "may designate one or more licensed caregivers to assist with obtaining and handling medical cannabis for a cardholder." Later in the Act, it states that "[a] licensed caregiver designated by the medical cannabis cardholder with the department may deliver medical cannabis to the medical cannabis cardholder." Prop. I.C. § 37-3516(3). The Act does not provide any restrictions on who may be a caregiver or how much medical cannabis a caregiver can possess—it merely states that the caregiver "may deliver" cannabis to the cardholder. Also, there is no restriction on how many caregivers a cardholder can designate.

The "caregiver" arrangement is fraught with the possibility that medical cannabis legally limited to being transferred to and ingested by a cardholder will be ingested or seized by one or more caregivers or be distributed to persons outside of the Act's authorization. The Act should be modified to include provisions ensuring that medical cannabis is transported to the intended cardholder without tampering by the caregiver.

8. Medical Cannabis Production License - Prop. I.C. § 37-3506

The Act establishes requirements for obtaining a medical cannabis production license in Prop. I.C. § 37-3506(2). A licensee is authorized to "grow, handle, process, manufacture, test, transport, distribute, deliver and sell to medical cannabis cardholders according to [the Act]." Prop. I.C. § 37-3506(1). An applicant must submit to the board: (a) the location of the production facility (or facilities); (b) a "consecutive hemp license in the person's name and in good standing since 2022" or the creation of "a new legal entity as the licensee"; (c) an operating plan; (d) letters of recommendation from the local community; (e) an initial license fee; (f) identifying information of persons with a voting or financial interest of five per-cent or more; and (g) the "name of a pharmacist that shall provide oversight as to the dispensing, storing, distributing and selling of medical cannabis."

As noted, subsection (2)(b) requires that an applicant initially have consecutive hemp licenses in the person's name and be in good standing since 2022. That requirement would limit licensees to those who have been previously granted "consecutive" industrial hemp licenses.[7] The exclusion of other applicants would likely invite constitutional challenges, such as the taking of property rights without due process and by denying equal protection. *See City of Lewiston v. Knieriem*, 107 Idaho 80, 85, 685 P.2d 821, 826 (1984); *Osborn Utilities Corporation of Osborn v. Public Utilities Commission of Idaho*, 52 Idaho 571, 17 P.2d 333, 334 (1932) ("Any regulation, therefore, which operates as a confiscation of private property or constitutes an arbitrary or unreasonable infringement of personal or property rights is void because repugnant to the constitutional guaranties of due process and equal protection of the laws.").

Subsection (3) provides that a medical cannabis growth and production facility can only be in an "agricultural zone, but not within half (1/2) a mile of an area that the relevant municipality or county has zoned as primarily residential" at the time the Act takes effect. Under subsection (4), processing fulfillment centers and warehousing and

distribution centers can be established outside the growth and production facility. Each production license holder may distribute and sell medical cannabis to cardholders "only through retail locations, the internet with in[-]person delivery, or pick up at retail locations or fulfillment centers, and in person delivery." *Id.*

According to subsection (5) of Prop. I.C. § 37-3506, medical cannabis production license holders "must engage" a board-licensed pharmacist to "provide oversight for dispensing, storing, distributing and selling of medical cannabis." The pharmacist and license holder must ensure (a) records of the cardholder's medical cannabis card and cardholder's identification are maintained, and (b) that the pharmacist provides oversight to employees and contractors "that sell, store, maintain, and transport medical cannabis under the same rules, policies, and conditions as pharmaceutical opioids." *Id.* Additionally, the license holder and pharmacist must provide warning labels about the effects of cannabis, stating "Keep Out of Reach of Children", and about the risks of overconsumption. Prop. I.C. § 37-3506(5)(c).

Subsection (6) of Prop. I.C. § 37-3506 requires the board to inform the Idaho State Police and local sheriff about the names of persons approved for medical cannabis production licenses. In subsection (7), the Act requires production licensees to be at least 21 years of age. It also precludes production licenses to persons convicted of a felony, or convicted, within five years of applying for a license, of a "misdemeanor for drug distribution." This last requirement does not make sense because, in Idaho, there is no misdemeanor for drug distribution -- it is always a felony. That provision should be deleted. Finally, subsection (8) requires the board to assist applicants for a medical cannabis production license "to the extent possible," and to "approve, deny or approve with conditions" within 30 days of receipt of the application.

9. Criminal Background Checks - Prop. I.C. § 37-3507

Prop. I.C. § 37-3507(1) requires applicants for a medical cannabis production license to consent to being fingerprinted for

criminal background checks by the Idaho State Police and F.B.I. The Idaho State Police are required to check the fingerprint records against state, regional, and national criminal record databases, and report the results to the board. Prop. I.C. § 37-3507(1).

10. Operating Plan - Prop. I.C. § 37-3508

Prop. I.C. § 37-3508 lists the information required to be the operating plan, or renewal plan, for a medical cannabis production license. It includes descriptions of the facilities, credentials of the officers, director, and license owner, training, inventory control, security, cultivation and extraction practices, equipment, sanitation, safety procedures, testing capability, equipment, methods, standards, and testing procedures. Prop. I.C. § 37-3508.

11. Number of Licenses & License Holder Operations - Prop. I.C. § 37-3509

Prop. I.C. § 37-3509(1) limits the initial number of medical cannabis production licenses to three. The board can expand the number of licenses issued based on population growth, but no more than a total of six licenses may be issued. The proposed statute sets out criteria for the board to evaluate applications for licenses if there are more qualified applicants than available licenses. Prop. I.C. § 37-3509(2)-(3).

Subsections (4) and (5) require license holders to operate according to the operating plans and notify the board of material changes in them. The board is required to establish rules for reviewing and complying with operating plans and is authorized to suspend or revoke a license if the license holder fails to cure a noncompliance. *Id.*, subsection (7)(a)-(d).

12. Inspections - Prop. I.C. § 37-3510

Prop. I.C. § 37-3510 allows the board, after giving reasonable notice, to inspect the records and facilities of a medical cannabis production license holder during business hours to determine

compliance with the Act. The proposed statute allows inspection of the site, their books, records, and other materials; the questioning of relevant persons; and the removal of cannabis specimens and products for testing. Prop. I.C. § 37-3510(2). Failure to provide reasonable access to records and facilities during business hours may lead to suspension of operations. Prop. I.C. § 37-3510(4).

13. Shipment of Medical Cannabis - Prop. I.C. § 37-3511

Prop. I.C. § 37-3511 states that "Any cannabis that a medical cannabis production license holder cultivates or otherwise produces and subsequently ships" must (1) be labeled with a unique batch number associated with the holder's "inventory control system," (2) be packaged in a tamper resistant container that is "not appealing to children" and (3) includes warnings consistent with Prop. I.C. § 37-3506(5)(c).

14. Civil Enforcement - Prop. I.C. § 37-3512

For "material violations" of the Act by a medical cannabis production licensee, Prop. I.C. § 37-3512 empowers the board to revoke, decline, or conditionally approve the license, and to impose an administrative fine up to $5,000. The provision allows the board to refer "potential criminal activity to law enforcement." Prop. I.C. § 37-3512(3).

15. Qualified Patient Enterprise Fund - Prop. I.C. § 37-3513

Prop. I.C. § 37-3513 would create a "qualified patient enterprise fund" to finance the board's responsibilities under the Act "and to fund peer-reviewed studies regarding the medical uses of cannabis." The fund would consist of fees and administrative fines, legislative appropriations, and earned interest from the fund.

16. No Insurance Requirement - Prop. I.C. § 37-3514

This provision states that nothing in the Act "requires an insurer, or an employer to pay for or reimburse for medical cannabis."

17. Effect on Use of Other Approved Drugs or Substances - Prop. I.C. § 37-3515

Prop. I.C. § 37-3515 provides that the Act does not "restrict[] or otherwise affect[] the prescription, distribution, or dispensing of a product that the United States food and drug administration has approved." It is unclear how the Act's provisions could restrict or affect a product approved by the United States Food and Drug Administration (USFDA.) This provision appears unnecessary because the Act does not provide any apparent restrictions or effects on USFDA approved products.

18. Criminal Enforcement - Prop. I.C. § 37-3516

Prop. I.C. § 37-3516 makes it a misdemeanor for persons to: (1) "[s]ell or otherwise give medical cannabis to another person" without authorization by the Act, (2) operate a variety of vehicles, aircraft, and heavy equipment (etc.) "while under the influence of medical cannabis," and (3) smoke, vape or inhale medical cannabis "in any public or commercial areas in the state of Idaho."

It is already illegal to operate a motor vehicle while "under the influence of alcohol, drugs or *any other intoxicating substances*, or any combination of alcohol, drugs and/or any other intoxicating substances[.]" Idaho Code § 18-8004(1)(a) (emphasis added). Subsection (2), while not strictly necessary, harmlessly reinforces the fact that it is illegal to operate a motor vehicle while under the influence any intoxicating substance—including medical cannabis.

Subsection (3) makes it a misdemeanor to ingest (in various ways) medical cannabis "in any public or *commercial areas* in the state of Idaho." (emphasis added). That subsection would likely be

challenged on constitutional "void for vagueness" grounds because the meaning of "commercial areas" is not defined and subject to differing opinions. *See Walsh*, 166 Idaho at 641, 462 P.3d at 619 (*quoting Haw*, 140 Idaho at 157, 90 P.3d at 907). It is recommended that the "commercial areas" be defined or this language be eliminated.

19. Prohibitions - Prop. I.C. § 37-3517

Prop. I.C. § 37-3517(1)(a) precludes peace officers, other than correctional officers, from expending "any state or local resources (including time) to make an arrest, seize cannabis, or "conduct any investigation on the sole basis of activity that the peace officer believes to constitute a violation of federal law if the peace officer has reason to believe that the activity is in compliance with this chapter." Subsection (1)(b) prohibits peace officers from enforcing laws that restrict a person's firearm rights if the enforcement is based on "the individual's possession or use of medical cannabis in accordance" with the Act. Peace officers may not "[p]rovide any information or logistical support related to an activity described in paragraph (a) … to any federal law enforcement authority or prosecuting entity. Prop. I.C. § 37-3517(1)(c). State agencies and political subdivisions "may not take adverse action against a person for providing professional services [under the Act] … on the sole basis that the service is a violation of federal law." Prop. I.C. § 37-3517(2).

Prop. I.C. § 37-3517 presents several issues. First, the determination of whether an officer "has reason to believe" that a suspect's conduct falls within the Act would be highly subjective and difficult to ascertain. Next, because the Act does not provide any quantity limits on medical cannabis, federal agencies investigating criminal enterprises involving large amounts of marijuana would be unable to obtain assistance from state, county, or municipal law enforcement officers—assuming the federal suspect is licensed or otherwise authorized to possess or use medical cannabis under the Act. Non-assistance by Idaho's law enforcement agencies with federal agencies could lead to the reduction or elimination of federal assistance (financial or investigatory) to Idaho in law enforcement matters.

Additionally, the "non-cooperation" provisions of the proposed statute would likely disrupt any existing cooperative arrangements between state and federal agencies "concerning traffic in controlled substances and in suppressing the abuse of controlled substances" as required by Idaho Code § 37-2743 ("Cooperative arrangements"). Finally, although the non-assistance by state agencies with their federal counterparts would not present a legal issue, *if* such non-cooperation escalated into actual interference, there could be civil or criminal repercussions for the state and local law enforcement agencies and officers involved.

20. Protections - Prop. I.C. § 37-3518

Practitioners and pharmacists who take any action "authorized by" the Act are protected from "arrest, prosecution, or penalty in any manner," and from being denied "any right or privilege, including without limitation a civil penalty or disciplinary action by a licensing board or bureau." Prop. I.C. § 37-3518(1). Subsection (2) precludes landlords, school districts, public charter schools, state institutions of higher education, and community colleges from (a) refusing to enroll, lease to, or penalize a person acting within the Act's authority (unless doing so would violate federal law or regulation); and (b) penalizing or denying any benefit under state law or local ordinance for leasing to, or employing a cardholder.

Subsection (3) prohibits employers from discriminating against persons whose conduct falls within the Act in "hiring, termination, or any term or condition of employment," with specific exceptions that do not warrant discussion here. The subsection also states that "[n]o employer is required to allow the use of cannabis in any workplace or to allow any employee to work while under the influence of cannabis." Prop. I.C. § 37-3518(3).

Subsection (4) protects the custody and visitation rights of parents from being denied "solely for conduct allowed under this chapter," nor may findings or presumptions of abuse or neglect be based on conduct authorized under the Act.

Subsection (5) grants users of cannabis under the Act the same rights that would be afforded under state law and local ordinance as "if the person were solely prescribed a pharmaceutical medication as it pertains to: any interaction with a person's employer; drug testing by a person's employer; or testing" required by state or local law, state agency, or local governmental official.

Subsection (6) states that, for the purposes of "medical care" (including an organ transplant), a patient's use of medical cannabis under the Act is considered "the equivalent of the authorized use of any other medication," and "[d]oes not constitute the use of an illicit substance to disqualify an individual from needed medical care." This subsection could be read to suggest that, because the use of medical cannabis is equivalent to the use of any other medication, it would be illegal for hospitals and other health facilities to preclude or limit such use while on their premises. This would likely be a step too far for such facilities, creating many practical problems. For instance, a hospital patient in a neighboring bed, as well as physicians, nurses, and other personnel, might take offense to the use and smell of cannabis in *their* workplace. Also, as noted above, Prop. I.C. § 37-3518(3) states in part, "[n]o employer is required to allow the use of cannabis in any workplace[.]" The initiative should be amended to make it clear that the Act does not allow for the ingestion of medical cannabis on-site.

Subsection (7) requires, to the extent possible, that the authorized use of medical cannabis be treated "the same way the state and political subdivision treat a person's use of prescribed opioids and opiates."

21. Controlling Authority - Prop. I.C. § 37-3520

This proposed statute is misnumbered; it should be Prop. I.C. § 37-35*19*, not 3520. It is self-explanatory, stating: "[n]otwithstanding any other provision of law, no municipality, county or other local entity may require a license for or pass an ordinance that specifically impacts medical cannabis cardholders or a medical cannabis production license that is inconsistent with this chapter."

SECTIONS 2 & 3:

Sections 2 and 3 of the initiative likely violate the single-subject rule set out in article III, § 16 of the Idaho Constitution. That provision states that Idaho requires that all acts "embrace but one subject and matters properly connected therewith." *Labrador v. Idahoans for Open Primaries*, 174 Idaho 1034, 554 P.3d 85, 96 (Idaho 2024), as amended (Aug. 14, 2024).

Marijuana and THC are currently schedule I controlled substances as "hallucinogenic substances" under Idaho Code § 37-2705(d)(19) (marihuana) and Idaho Code § 37-2705(d)(29) (tetrahydrocannabinols). Idaho Code § 37-2704 provides the following test for schedule I:

> The board shall place a substance in schedule I if it finds that the substance:
>
> (a) Has high potential for abuse; and
> (b) Has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision.

Section 2 of the initiative would remove all marijuana and all THC from schedule I of Idaho's Controlled Substance Act. (Prop. I.C. § 37-2705, *et seq*.)

Section 3 of the initiative would then add all marijuana and all THC to the list of less dangerous schedule II controlled substances set out in Idaho Code § 37-2707. (Prop. I.C. § 37-2707(h)-(i).) To be a schedule II controlled substance, the board must find:

> (a) The substance has high potential for abuse;
> (b) The substance has currently accepted medical use in treatment in the United States, or currently accepted medical use with severe restrictions; and

(c) The abuse of the substance may lead to severe psychic or physical dependence.

By attempting to remove *all* marijuana and *all* THC—not just medical cannabis—from schedule I and re-classify them as schedule II controlled substances, it appears that Sections 2 and 3 violate the single-subject rule.

The short title recommended by the initiative ("Idaho Medical Cannabis Act") gives no hint that *all* marijuana and *all* THC—not just medical cannabis—will be downgraded from schedule I to schedule II. Moreover, nothing in the body of the initiative prior to Sections 2 and 3 indicates that anything more than "medical cannabis" is the subject of the initiative. *See* IDAHO CONST. art. III, § 16 ("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."); *See also Idahoans for Open Primaries*, 174 Idaho at ___, 554 P.3d at 96 ("The purpose of this provision … is to "prevent the combining of incongruous matters and objects totally distinct and having no connection nor relation with each other; to guard against 'logrolling' legislation; and to prevent the perpetration of fraud upon the members of the [l]egislature or the citizens of the state in the enactment of laws.").

Because Sections 2 and 3 appear to violate the single-subject rule of article III, § 16 of the Idaho Constitution, it is recommended that they be deleted from the initiative.

SECTION 4:

Section 4 would amend Idaho Code § 37-2732 by excluding conduct authorized by the Act from being penalized for the manufacture, delivery, or possession with the intent to manufacture or deliver a controlled substance—here, marijuana.

SECTION 5:

Section 5 of the initiative would exclude conduct authorized by the Act from Idaho's trafficking in marijuana laws. Consistent with the Act's lack of any limitation on the *quantity* of medical cannabis that cardholders and caregivers must comply with, Section 5 would amend Idaho's marijuana trafficking laws to legalize all conduct authorized under the Act—regardless of the amount of marijuana involved. The following laws and mandatory minimum sentences would not apply to conduct falling within the Act's provisions:

> 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.

Without any quantity restrictions on medical cannabis production licensees, medical cannabis cardholders, and caregivers, the ability to keep medical cannabis outside the general public would be greatly compromised. It is recommended that the Act add limitations on the quantity of medical cannabis that can be possessed by those persons.

SECTION 6:

Section 6 contains a Severability clause, which reads:

> SEVERABILITY. The provisions of this act are hereby declared to be severable and if any provision of this act

> or 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 act.

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. § 37-3501 *et seq*. cannot interfere with or affect federal laws, criminal or civil, which rely, in whole or in part, on marijuana being illegal under the federal Controlled Substances Act.

D. Other Recommended Revisions or Alterations

Apart from requiring labels on shipments of medical cannabis to read "Keep Out of Reach of Children," and that shipments shall not be "appealing to children" (*see* Prop. I.C. § 37-3511), the initiative does not address whether children or adults under 21 years of age may be in proximity to, or contact with, cannabis 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. It is recommended that the initiative include reasonable restrictions for the storage and ingestion of medical cannabis when children are present in the home or elsewhere.

Finally, the initiative does not address the legality of paraphernalia used in conjunction with the storage or ingestion of medical cannabis. It is recommended that the initiative add a provision making the use of paraphernalia for the storage or ingestion of medical cannabis legal if done with within the Act's authorization.

E. Conclusion

The above review discusses considerations and proposed alterations for the initiative; for example, re-designating the proposed Act as Idaho Code § 37-2732E *et. seq.*, using the word "marijuana" instead of "cannabis," deleting Sections 2 and 3 for violating the single-subject rule, and possible constitutional violations for limiting initial medical cannabis production licenses to those with consecutive industrial hemp licenses. In reviewing the initiative's impact on Idaho in a more general sense, the following observations are offered.

Passage of the initiative would make marijuana possession and use much more prevalent in Idaho. The Act provides such broad and subjective definitions about what constitutes a "substantial health condition" that just about anyone could qualify to obtain a medical cannabis card. Conditions such as "anxiety, insomnia, acute pain … and chronic and persistent pain" would be easy to assert, but difficult to verify. *See* Prop. I.C. § 37-3502(9). Therefore, the number of people

using marijuana in their homes would greatly increase, as would the health risks to children present.

A serious flaw with the Act is that it fails to place any limits on how much marijuana can be produced, stored, transported, or possessed at any given point by anyone within the Act's authority. Without any way to monitor the quantity of marijuana possessed by persons authorized under the Act, marijuana could easily be illegally diverted to outsiders. For example, a cardholder could sell "medical cannabis" to outsiders without any way to track the marijuana to ensure it stays within the Act's purposes. The Act's failure to limit how much medical cannabis a cardholder or any other actor can possess would allow them to illegally sell and deliver marijuana, in any amount, to the general public.

In sum, the Act, if passed, would greatly increase the prevalence and use of marijuana in Idaho – almost to the point of it being entirely legalized under Idaho law.

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, sent to Jeremy C. Chou, Attorney at Law, Givens Pursley LLP, by e-mail to jcc@givenspursley.com, and by Unites States Postal Service to Jeremy C. Chou, Attorney at Law, Givens Pursley LLP, to 601 W. Bannock Street, P.O. Box 2720, Boise, ID 83701.

Sincerely,

RAÚL R. LABRADOR
Attorney General

Analysis by:

John C. McKinney
Deputy Attorney General

[1] References to "proposed" Idaho Code § 37-3501 *et seq.* and other proposed statutory changes will be prefaced with "Prop." References to "Act" and "initiative" are used interchangeably.

[2] Idaho Code § 37-2732D (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 § 37-2732E.

[3] Quotations of wholly capitalized parts of the initiative will be modified to capitalize only the first letter of each word.

[4] "Department" is defined in the Act as the Department of Health and Welfare. Prop. I.C. § 37-3502(3).

[5] Idaho Code § 54-1803(1) states that the "practice of medicine" includes the "diagnosis" of, or prescription for any human disease, ailment, injury, infirmity, deformity or other condition, physical or mental, by any means or instrumentality that involves the application of principles or techniques of medical science," etc.

[6] As will be discussed, Sections 2 and 3 of the initiative seek to remove marijuana and THC from schedule I and re-classify them as schedule II substances within Idaho's Controlled Substances Act. It will be recommended that Sections 2 and 3 of the initiative be deleted.

[7] Idaho Code § 37-2701(u)(1) excludes from the definition of marijuana "Industrial hemp or hemp possessed, grown, transported, farmed, produced, processed, or possessed by any other entity engaged in hauling, transporting, delivering, or otherwise moving hemp in interstate or intrastate commerce pursuant to a license granted under the provisions of the 2014 farm bill, the 2018 farm bill, 7 CFR 990.1 et seq., or the approved state plan for the state of Idaho."

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and

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2025

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ATTORNEY GENERAL'S SELECTED ADVISORY LETTERS FOR THE YEAR 2025

RAÚL R. LABRADOR

ATTORNEY GENERAL
STATE OF IDAHO

January 10, 2025

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

Re: Request for AG Analysis

Dear Senator Cook:

It was a pleasure speaking with you today. Phil asked me to forward my notes along to you.

You asked for a review of the Children's Device Protection bill. I've presented the question considered in this review and my responses to those questions below.

1. *Is there any language in the draft legislation that needs to be clearer?*

Answer: Yes, there are some areas where this bill could be clearer. Please see below:

• Page 2, l. 3-7: The phrase "Holds the patents for the device" could present a challenge to the administrability of this bill. The definite article "the" could indicate that the manufacturer holds all patents related to the device. The sophisticated hardware and software of modern smart phones can have dozens of patent holders associated with the device. As written, it is arguable that the phrase "holds the patents" indicates holding all of the patents related to the device, which almost certainly would not be the case for most mainstream smart phone or tablet manufacturers. You could consider dropping the word "the" to avoid this argument.

• Page 2, l. 18-20: The definition of tablet is broad. The term is defined such that other kinds of computing devices, such as laptops, could fit within the definition (as an example, a touch-screen enabled laptop could fit the other parts of the definition and be considered a "tablet").

• The definition of tablet is also narrow as it includes the phrase, "the ability to support access to a cellular network." As many tablets are sold without this functionality, the statute may be accidentally excluding devices that it otherwise meant to include in the definition of tablet. The drafter may want to remove the cellular-network phrase from the definition of tablet.

• As an aside, tablets and smartphones may be common enough devices to not need a statutory definition. If you were drafting a statute regulating other common place items, such as books, pants, or picture frames, you likely would not need to define these terms for the common person to understand their meaning. Idaho Code already has taken this approach with the phrase "computer tablet" as used in Idaho Code § 49-1401:

> (a) "Mobile electronic device" means a cellular telephone; broadband personal communication device; two-way messaging device; text messaging device; pager; personal digital assistant; laptop computer; computer tablet; stand-alone computer; portable computing device; mobile device with a touchscreen display that is designed to be worn; electronic games; equipment that is capable of playing a video or recording or transmitting video; or any similar electronic device that is used to initiate, receive, or display communication or information.

• Page 2, l. 47: Consider striking "acting in the public interest." Courts interpret every phrase in a statute as having meaning, there is a chance that this phrase would require that the AG make a showing in every case brought under this legislation that each enforcement action is in the public's interest.

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.

• Page 1, l. 28-32: "obscene material" is a defined term and the drafter probably does not need the statement "as defined by state law." Including that statement may make it ambiguous as to whether the phrase obscene material in this section is meant to relate to the defined term or meant to relate to some other definition of obscene material found in state law.

2. *Are there any aspects of the draft legislation that should be changed?*

Answer: Policy considerations are best left to the Idaho Legislature. As this bill would require the Attorney General to perform additional duties, please consider the following suggestions related to these duties:

• Page 2, l. 45 - 47; Page 3, l. 1-19: If the AG administers this statute, the drafter may want to include a reference to the typical enforcement authority that the AG has in other consumer actions. What follows is an example of how to do this taken from another consumer statute:

> 48-1106. AUTHORITY OF THE ATTORNEY GENERAL AND DISTRICT COURT. The attorney general and district court shall have the same authority in enforcing and carrying out the provisions of this chapter as is granted the attorney general and district court under the Idaho consumer protection act, chapter 6, title 48, Idaho Code.

• The bill does not presently contain a provision for a private right of action. A private right of action would allow for an Idaho resident to pursue a claim under this statute independently of the Attorney General's office.

3. *Will this legislation face any obstacles if it were to be passed?*

Answer: This bill could possibly face constitutional challenges as described below.

Constitutional challenges to this bill are not likely to succeed, however many of the constitutional challenges that could be raised require a weighing of the state's interests against the rights of its residents. Such reviews are subjective in nature and whether a statute survives a court's review is often most determined by the Judge's opinions and beliefs. That is to say, it is possible that this bill could be overturned on constitutional grounds, but it does not appear likely.

• This bill could possibly be challenged as being violative of the First Amendment, Commerce Clause, and Due Process Clause of the Constitution of the United States.

• The First Amendment is not likely violated by this policy. If someone were to bring a first amendment action, it would be to challenge the State's restrictions on speech.

• It would be difficult for the manufacturer to raise a First Amendment claim as the State is not imposing a speech restriction on the manufacturer.

• If a First Amendment claim is raised, it would likely be raised by a parent who has had a child that has been denied access to a phone or tablet because of this statute.

• First Amendment cases require the court to weigh the infringement on a person's right to speak against the state's interest in regulating conducting. As the state has a compelling interest to protect children in the state from exposure to obscene material, it is likely that the State's interests would outweigh the burden the state's law places on the right to free speech.

• The Commerce Clause also is not likely violated by this policy, however it is implicated. The Commerce Clause prevents states from impinging too much on interstate commerce. The Commerce Clause

prevents states from doing something like imposing a tariff on a good manufactured in another state. The purpose of the Commerce Clause is to encourage a free and unified national market by preventing individual states from enacting laws or regulations that would unduly restrict or burden interstate commerce. It grants the federal government the authority to regulate commerce between the states, thereby ensuring that trade flows smoothly across state lines without interference from local policies that could create trade barriers. By limiting state power in this way, the Commerce Clause aims to foster economic integration, promote competition, and avoid a fragmented economy where each state could impose its own trade restrictions.

• When analyzing a state statute affecting interstate commerce under the Commerce Clause, courts apply a balancing test to determine whether the law disproportionately burdens interstate commerce. The key consideration is whether the state's interest in enacting the statute outweighs the negative impact on interstate trade. In cases where the statute directly restricts interstate commerce, courts assess whether it serves a legitimate local purpose that cannot be adequately addressed by less restrictive means. If the statute is found to impose an undue burden, it is likely to be struck down. However, if the state can demonstrate that the statute is essential for addressing a significant local issue, it may be upheld despite its effects on interstate commerce. This approach aims to maintain the balance between state sovereignty and the need for a cohesive national economy.

• The two parts being weighed are (1) the impact on interstate commerce and (2) the state’s interest in enacting the statute.

• To address these two components the proposed legislation will have some impact on interstate commerce as it will require a manufacturer to change its product offerings in Idaho. This impact, however, is in line with the State’s broad police powers which allow it to regulate the kind and quality of materials sold in the state. It is not the kind of discriminatory impact on interstate commerce that are the hallmark of a Commerce Clause violation: such as imposing a tariff on an out-of-state good.

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• Furthermore, the state has a compelling interest in enacting the statute. The Supreme Court has long recognized that States have a compelling interest to regulate obscenity and especially to protect children from obscene content. Weighing these two considerations against each other, the state's compelling interest to protect children from obscene content appears to outweigh the burden on interstate commerce. It is likely that this legislation would survive a Commerce Clause challenge.

• Turning to the Due Process Clause, there is a risk that some elements of this statute could be found as void for vagueness. The Due Process Clause ensures that the government does not infringe on a right without first providing adequate means of challenging the infringement. One aspect of the Due Process Clause is that the States cannot arbitrarily and capriciously take action, any statute that imposes a burden on a person should clearly state the restrictions. A statute that is vague can be "voided" or made inoperable because of its vagueness.

• As the statute deals with the amorphous concept of obscene materials, the statute will likely draw a challenge for being vague. While obscenity is an inherently vague concept, the vagueness will not likely invalidate the statute. The Supreme Court of the United States has heard challenges on this matter before, and this draft legislation appears consistent with the Supreme Court's case law on this subject. See *Miller v. United States*, 507 F.2d 1100 (9th Cir. 1974).

Warm regards,

NATHAN NIELSON
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.

January 10, 2025

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

Re: Request for AG Analysis

Dear Senator Cook:

You asked a good question at the end of our meeting about legislation that would discourage people from moving into Idaho. As an example, you mentioned specifically making it more costly for a new resident from another state having to pay more for licensing a vehicle.

Generally speaking, in the United States, states cannot impose discriminatory barriers against residents of other states when it comes to moving or residing there. Any laws or policies that impose unfair or excessive burdens on out-of-state residents would face legal challenges for violating constitutional protections on interstate mobility. Specifically, the Privileges and Immunities Clause of the U.S. Constitution ensure that citizens have the right to move, live, and work freely across state lines without facing undue restrictions based on their state of origin. The Idaho Supreme Court has ruled that "the privilege of a citizen is defined to be 'the right to pursue and obtain happiness and safety' and 'to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others,' and that whatever rights a state grants to its own citizens are the measure within its jurisdiction of the rights of the citizens of other states." *Hankins v. Spaulding*, 78 Idaho 533, 537, 307 P.2d 222, 225 (1957). While states have some flexibility to implement taxes or fees, they cannot set higher rates or create regulations that specifically target or disadvantage out-of-state residents or new residents in the state.

Sincerely,

NATHAN NIELSON
Deputy Attorney General

January 23, 2025

The Honorable Cindy Carlson
Idaho State Senate
Idaho State Capitol
P.O. Box 83720
Boise, Idaho 83720-0081
VIA EMAIL: ccarlson@senate.idaho.gov

Re: Request for AG Analysis

Dear Senator Carlson:

You asked whether article 1, section 20, of the Idaho Constitution would allow a statute that limits the ability to vote on school bond levies to only people who own property.

SHORT ANSWER

Even though article 1, section 20, of the Idaho Constitution appears to allow a statute that would limit voting on school bond levies to only people who own property, courts have ruled it unconstitutional to do so. The United States Supreme Court and the Idaho Supreme Court have held that state constitutional provisions and statutes limiting the right to vote in bond elections to only those who own property violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

ANALYSIS

In *City of Phoenix, Ariz. v. Kolodziejski*, 399 U.S. 204, 206 (1970), the U.S. Supreme Court held that Arizona's constitutional and statutory provisions allowing only real property taxpayers to vote in city general obligation bond elections violated the Equal Protection Clause of the Fourteenth Amendment.

In *Muench v. Paine*, 94 Idaho 12, 14, 480 P.2d 196, 198 (1971), the Idaho Supreme Court extended the *City of Phoenix* decision to hold that the "property qualification exception" in article 1, section 20, conflicts with the Equal Protection Clause of the Fourteenth Amendment and is therefore invalid.

Muench is unique because the Court had already decided the case in January 1970. Then the U.S. Supreme Court decided *City of Phoenix* in June 1970. So, in January 1971, the Idaho Supreme Court agreed to reopen the *Muench* case but declined to retroactively apply the *City of Phoenix* holding to the *Muench* parties. But the Court still held that property ownership qualifications for voters are invalid under the Equal Protection Clause.

Muench was in the context of a general obligation bond for a school district, which covers two of the three exceptions in article 1, section 20. The third exception is for irrigation district elections, which the Idaho Supreme Court discussed in *Johnson v. Lewiston Orchards Irrigation Dist.*, 99 Idaho 501, 501, 584 P.2d 646, 646 (1978).

In *Johnson*, the Idaho Supreme Court was more nuanced. After reviewing several U.S. Supreme Court cases about the constitutionality of laws restricting the right to vote to landowners, the Idaho Supreme Court articulated this test:

> These cases hold that the right to vote is a fundamental political right and that restrictions, other than residence, age and citizenship, on the exercise of that right in an election of general interest must be "carefully and meticulously scrutinized" and must be "necessary to promote a compelling state interest" in order to survive constitutional attack.

Id. at 503. The Court held that article 1, section 20 and the statute permitting only landowners to vote in the election for the irrigation district board of directors did not pass this test and violated the Equal Protection Clause. But the Court tempered this ruling by saying it only

applied to the specific facts of this case—not to all irrigation districts within the state—and by not applying the holding retroactively.

Neither *Muench* nor *Johnson* have been overruled. The *Muench* Court seems to have facially invalidated article 1, section 20 (although the Court did not use the term "facial") while the *Johnson* Court only invalidated this provision as applied under those specific facts. But these two holdings are not in conflict with each other because *Muench* dealt with school district bonds while *Johnson* dealt with irrigation district elections.

Even though article 1, section 20 of the Idaho Constitution itself would allow a statute that limits the ability to vote on school bond levies to only people who own property, both the United States Supreme Court and the Idaho Supreme Court have ruled it unconstitutional to apply a property ownership requirement to vote in bond elections. The Idaho Supreme Court specifically ruled that the "property qualification exception" in article 1, section 20, conflicts with the Equal Protection Clause of the Fourteenth Amendment and is therefore invalid.

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,

BRETTON D. JARVIS
Deputy Attorney General

January 29, 2025

The Honorable Ted Hill
Idaho House of Representatives
Idaho State Capitol
P.O. Box 83720
Boise, Idaho 83720-0038
VIA EMAIL: thill@house.idaho.gov

Re: Request for AG Analysis

Dear Representative Hill:

Here are our recommended changes based on the conversation we had yesterday. We've modified the language in subsection (2) and completely replaced subsection (3) with new language that mirrors the language your bill has in Idaho Code § 55-103(6).

(2) A foreign principal that directly or indirectly controls any property covered by subsection (1) of this section must sell, transfer, or otherwise divest itself of control of the property within one hundred eighty (180) days of the effective date of this act.

(3) A foreign principal from a foreign adversary country who acquires direct or indirect control of property covered by subsection (1) of this section after the effective date of this act by devise, descent, through the enforcement of security interests, or the collection of debts must sell, transfer, otherwise divest itself of the property within one hundred eighty (180) days of acquiring control of the property.

Best regards,

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.

January 30, 2025

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

Re: Request for AG Analysis

Dear Senator Toews:

I just discussed your questions with one of our offices' foremost open meeting law experts. She and I agree that there isn't anything in open meeting law currently that forbids voting on multiple action items at once in the form of a consent agenda. Idaho Code § 74-204(4) has clear instructions about the requirement to mark any agenda item on which a vote might be taken as an "action item." But there doesn't seem to be anything that forbids listing all those action items on a consent agenda and voting on all of them at once.

I would be interested to hear the analysis of your friend that is counsel for a few cities who believes it is a violation. Perhaps there is something we are missing.

If you would like to discuss further, I'm happy to meet.

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.

February 4, 2025

The Honorable Clint Hofstetler
Idaho House of Representatives
Idaho State Capitol
P.O. Box 83720
Boise, Idaho 83720-0081
VIA EMAIL: chostetler@house.idaho.gov

Re: Request for Analysis of Proposed Changes to Idaho Constitution Article XXI, Section 19

Dear Representative Hofstetler:

QUESTION PRESENTED

You requested an opinion about what potential issues could arise from the proposed changes to IDAHO CONST. art. XXI, § 19?

SHORT ANSWER

The proposed amendment to IDAHO CONST. art. XXI, § 19 removes the "unappropriated public lands" language. The effect of the change is that Idaho would no longer disclaim right and title to the unappropriated public lands in the state. The amendment does not create any issues of interpretation or cause any significant ambiguity.

ANALYSIS

The General Allotment Act of 1887 authorized the federal government to divide Indian Reservations into individual plots of 40 to 160 acres to Indians within the reservations. After the land was allotted, title to the land was held by the federal government in trust for the Indians for 25 years, during which time the land could not be sold or transferred. At the expiration of the 25 years, the federal government granted a patent in fee simple, giving full ownership to the Indians.

Idaho's push for statehood was contemporaneous with the General Allotment Act. The Idaho territory drafted a constitution in 1889. The next year, the Idaho Admissions Act was signed on July 3, 1890. Part of Idaho's Constitution was article XXI, section 19 (which has not been amended since that time), titled "Religious freedom guaranteed-Disclaimer of title to Indian lands." IDAHO CONST. art. XXI, § 19. Because Idaho's admission to the Union was during the time period of the General Allotment Act, Indians "held" lands that would later become a vested interest after the 25 years. Indians were not treated as citizens of the United States or of the state of Idaho until the Indian Citizenship Act of 1924.

Article XXI, section 19 in relevant part states "the people of the state of Idaho do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indians or Indian tribes." IDAHO CONST. art. XXI, § 19. Stated simply, the State disclaimed all right and title to 1) unappropriated public lands within Idaho, and 2) all lands lying within the boundaries of the unappropriated lands that are owned or held by Indians or Tribes.

> The effect of the proposed amendment to article XXI, section 19, would read as follows:
>
> … that we, the people of Idaho, forever disclaim all right and title to all lands lying within the boundaries thereof [of the state of Idaho] owned or held by any Indians or Indian tribes; and until the title thereto [said Indian lands] shall have been extinguished by the United States, the same [Indian lands] shall be subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States; …

The purpose of the amendment to article XXI, section 19, is to remove the reference to the State's disclaimer of "unappropriated public lands" within Idaho. The only ambiguity that would remain is the "held

by" language because there are no current lands "held by" the Indians within the meaning "held by" was likely interpreted to mean during the Allotment era. However, the remaining changes would likely lead to an unambiguous interpretation that Idaho disclaims all right and title to lands owned by Indians or Indian tribes.

CONCLUSION

The proposed changes appear to accomplish the goal of removing the disclaimer to "unappropriated public lands" without any unintended consequences. The proposed changes must be passed as an amendment to the Idaho Constitution and be approved by Congress.

Please feel free to contact me if you have any questions.

Sincerely,

ROBERT FOLLETT
Lead Deputy Attorney General

February 24, 2025

The Honorable Ilana Rubel
Idaho House of Representatives
Idaho State Capitol
P.O. Box 83720
Boise, Idaho 83720-0038
VIA EMAIL: irubel@house.idaho.gov

Re: Request for AG Assistance

Dear Representative Rubel:

Thank you for reaching out with your request for legal analysis. Our office regularly collaborates with members of the legislature to provide guidance on their bills and to help navigate potential legal concerns. However, as a general practice, we refrain from issuing opinions on the constitutionality of pending legislation.

Historically, issuing such opinions has led to challenges in litigation and has, at times, undermined Idaho's ability to defend itself in court. Providing a publicly available legal opinion that outlines potential constitutional challenges to a bill—particularly one the State of Idaho may later be required to defend—raises ethical and legal concerns that Attorney General Labrador believes should be avoided.

It is important to note that declining to issue legal opinions on pending legislation is the standard approach in most state Attorney General offices. In fact, most Attorneys General follow policies explicitly discouraging opinions on matters likely to be litigated. For reference, similar policies are in place in the following states:

1. California – "For policy reasons, the Attorney General also declines to give opinions on legal questions under special circumstances… pending legislation… pending litigation…" *Legal Opinions of the Attorney General* -

Frequently Asked Questions|State of California - Department of Justice - Office of the Attorney General, http://www.oag.ca.gov/opinions/faqs#: (last visited Feb. 2025).

2. Florida – "The following are examples of the kinds of questions the Attorney General may decline to address… questions on matters that are addressed in proposed legislation currently before the Legislature… questions pending before a court or administrative forum…" *Requesting an Attorney General Opinion | My Florida Legal*, https://www.myfloridalegal.com/attorney-general-opinions/frequently-asked-questions-about-attorney-general-opinions (last visited Feb. 2025).

3. Montana – "Some requests may not be appropriate for a written opinion…constitutionality of a law… matters in litigation… interpretations of legislative bills…." *Attorney General Opinions–Montana Department of Justice*, https://dojmt.gov/attorney-generals-office/attorney-general-opinions/ (last visited Feb. 2025).

4. New York – "We do not issue opinions on matters in or likely to be involved in litigation." *Appeals & Opinions Resource Center|New York State Attorney General*, https://ag.ny.gov/libraries-documents/opinions/appeals-opinions-resource-center (last visited Feb. 2025).

We appreciate your request and remain available to assist you with any legal questions related to your bills or other matters where we can be of service. Please do not hesitate to reach out.

Best regards,

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.

February 24, 2025

The Honorable Lucas Cayler
Idaho House of Representatives
Idaho State Capitol
P.O. Box 83720
Boise, Idaho 83720-0038
VIA EMAIL: lcayler@house.idaho.gov

Re: Request for AG Analysis

Dear Representative Cayler:

Thank you for reaching out with your request for legal analysis. Our office regularly collaborates with members of the legislature to provide guidance on their bills and to help navigate potential legal concerns. However, as a general practice, we refrain from issuing opinions on the constitutionality of pending legislation.

Historically, issuing such opinions has led to challenges in litigation and has, at times, undermined Idaho's ability to defend itself in court. Providing a publicly available legal opinion that outlines potential constitutional challenges to a bill—particularly one the State of Idaho may later be required to defend—raises ethical and legal concerns that Attorney General Labrador believes should be avoided.

It is important to note that declining to issue legal opinions on pending legislation is the standard approach in most state Attorney General offices. In fact, most Attorneys General follow policies explicitly discouraging opinions on matters likely to be litigated. For reference, similar policies are in place in the following states:

1. California – "For policy reasons, the Attorney General also declines to give opinions on legal questions under special circumstances… pending legislation… pending litigation…" *Legal Opinions of the Attorney General* -

Frequently Asked Questions|State of California - Department of Justice - Office of the Attorney General, http://www.oag.ca.gov/opinions/faqs#: (last visited Feb. 2025).

2. Florida – "The following are examples of the kinds of questions the Attorney General may decline to address… questions on matters that are addressed in proposed legislation currently before the Legislature… questions pending before a court or administrative forum…" *Requesting an Attorney General Opinion | My Florida Legal*, https://www.myfloridalegal.com/attorney-general-opinions/frequently-asked-questions-about-attorney-general-opinions (last visited Feb. 2025).

3. Montana – "Some requests may not be appropriate for a written opinion…constitutionality of a law… matters in litigation… interpretations of legislative bills…." *Attorney General Opinions–Montana Department of Justice*, https://dojmt.gov/attorney-generals-office/attorney-general-opinions/ (last visited Feb. 2025).

4. New York – "We do not issue opinions on matters in or likely to be involved in litigation." *Appeals & Opinions Resource Center|New York State Attorney General*, https://ag.ny.gov/libraries-documents/opinions/appeals-opinions-resource-center (last visited Feb. 2025).

We appreciate your request and remain available to assist you with any legal questions related to your bills or other matters where we can be of service. Please do not hesitate to reach out.

Best regards,

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.

February 28, 2025

The Honorable Todd Achilles
Idaho House of Representatives
Idaho State Capitol
P.O. Box 83720
Boise, Idaho 83720-0038
VIA EMAIL: tachilles@house.idaho.gov

Re: Request for AG Analysis

Dear Representative Achilles:

Thank you for reaching out with your request for legal analysis. Our office regularly collaborates with members of the legislature to provide guidance on their bills and to help navigate potential legal concerns. However, as a general practice, we refrain from issuing opinions on the constitutionality of pending legislation.

Historically, issuing such opinions has led to challenges in litigation and has, at times, undermined Idaho's ability to defend itself in court. Providing a publicly available legal opinion that outlines potential constitutional challenges to a bill—particularly one the State of Idaho may later be required to defend—raises ethical and legal concerns that Attorney General Labrador believes should be avoided.

It is important to note that declining to issue legal opinions on pending legislation is the standard approach in most state Attorney General offices. In fact, most Attorneys General follow policies explicitly discouraging opinions on matters likely to be litigated. For reference, similar policies are in place in the following states:

1. California – "For policy reasons, the Attorney General also declines to give opinions on legal questions under special circumstances… pending legislation… pending litigation…" *Legal Opinions of the Attorney General* -

Frequently Asked Questions|State of California - Department of Justice - Office of the Attorney General, http://www.oag.ca.gov/opinions/faqs#: (last visited Feb. 2025).

2. Florida – "The following are examples of the kinds of questions the Attorney General may decline to address… questions on matters that are addressed in proposed legislation currently before the Legislature… questions pending before a court or administrative forum…" *Requesting an Attorney General Opinion | My Florida Legal*, https://www.myfloridalegal.com/attorney-general-opinions/frequently-asked-questions-about-attorney-general-opinions (last visited Feb. 2025).

3. Montana – "Some requests may not be appropriate for a written opinion…constitutionality of a law… matters in litigation… interpretations of legislative bills…." *Attorney General Opinions–Montana Department of Justice*, https://dojmt.gov/attorney-generals-office/attorney-general-opinions/ (last visited Feb. 2025).

4. New York – "We do not issue opinions on matters in or likely to be involved in litigation." *Appeals & Opinions Resource Center|New York State Attorney General*, https://ag.ny.gov/libraries-documents/opinions/appeals-opinions-resource-center (last visited Feb. 2025).

We appreciate your request and remain available to assist you with any legal questions related to your bills or other matters where we can be of service. Please do not hesitate to reach out.

Best regards,

PHIL N SKINNER
Chief of Staff
Deputy Attorney General

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March 7, 2025

The Honorable Mark Harris
Idaho State Senate
Idaho State Capitol
P.O. Box 83720
Boise, Idaho 83720-0081
VIA EMAIL: mharris@senate.idaho.gov

Re: Request for AG Analysis

Dear Senator Harris:

You asked several questions about Senate Bill 1053 because of comments you have received about the bill.

1. Does the new language in subsection 2 of the bill make the rest of the chapter null and void?

No. The new language in subsection 2 (lines 26 through 29) addresses the discrete situation of a landowner whose property adjoins federally managed land and who intends to prevent livestock from entering his land from the federally managed land. This new language would not affect fences between private landowners, or fences adjoining state property, or the rest of title 35, chapter 1, Idaho Code (Fences in General).

2. Would the new language in subsection 2 fit better in Section 35-107 (instead of -104 were it is in the current bill)?

No. Idaho Code § 35-107 addresses a prohibition against one landowner removing any part of a partition fence without meeting certain conditions. The new language in subsection 2 (lines 26 through 29) of the bill does not relate to removal of a partition fence and, instead

establishes a responsibility to erect and maintain a lawful fence in a specific situation.

3. Does the new language negatively affect Herd Districts?

No. The new language in Senate Bill 1053 has no apparent effect on the Herd District law. Herd Districts are managed by the board of county commissioners under title 25, chapter 24, Idaho Code. The county commissioners have authority to pay for fencing of a herd district, levy a property tax assessment, and require agricultural lands in a herd district in proximity to public domain be enclosed by a lawful fence. There does not appear to be any conflict between the language proposed in Senate Bill 1053 and the Herd District law.

4. Does the new language 'destroy Idaho fence law,' and increase costs and litigation expense for private landowners whose land adjoins federal land.

No. The new language in Senate Bill 1053 establishes that it is the sole responsibility of a landowner whose property adjoins federally managed land and who intends to prevent livestock from entering his land from the federally managed land to erect and maintain a lawful fence. It establishes a 'fence out' responsibility for landowners in this specific situation. The landowner can choose not to prevent livestock from entering his land from federally managed land, or the landowner can choose to erect and maintain a lawful fence. Any increased fence costs would be by choice. As noted in other answers, the new language in Senate Bill 1053 would not affect fences between private landowners, or fences adjoining state property, or the rest of title 35, chapter 1, Idaho Code (Fences in General). There also does not appear to be any conflict with the Herd District law. The possibility of litigation expense for private landowners whose land adjoins federal land is obscure. It is difficult to rule out the chance of litigation expense, but there is no clear probability of litigation relating to the new language in Senate Bill 1053.

Sincerely,

W. DALLAS BURKHALTER
Lead Deputy Attorney General

May 5, 2025

The Honorable Steve Berch
Idaho House of Representatives
Idaho State Capitol
P.O. Box 83720
Boise, Idaho 83720-0038
VIA EMAIL: sberch@house.idaho.gov

Re: Request for AG Analysis

Dear Representative Berch:

It sounds like your constituent is frustrated with the operations of the lateral association (Shavrer Lateral Association in particular). I'm happy to provide information regarding lateral associations. The code sections that govern lateral associations are Idaho Code §§ 42-1301 through 1313. One of your constituent's questions is about assessments. Assessment due dates are set by Idaho Code § 42-1304. Per this code section, assessments are:

> "payable on the first day of May of each year and if not so paid on or before the fifteenth day of June of such year, a penalty of ten per cent (10%) shall be added thereto, and the total amount due shall then draw interest at the rate of ten per cent (10%) per annum from said fifteenth day of June of such year until paid."

If not paid, the lateral can take a lien against the land per Idaho Code § 42-1311 and the lateral can get attorney fees if they move to collect the assessment per section 42-1307. While we cannot provide legal advice to individuals, I can say it is to their advantage to pay the assessment and then to work with the lateral association to address their concerns regarding fees and communications.

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.

Regarding questions about operations of lateral associations, lateral associations also usually have bylaws. A member can ask for a copy of the bylaws and that should help them understand how governance of the lateral association works. If they are still unhappy, they can seek to withdraw from the lateral association by following Idaho Code § 42-1312.

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

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.

May 15, 2025

The Honorable Ron Taylor
Idaho State Senate
Idaho State Capitol
P.O. Box 83720
Boise, Idaho 83720-0081
VIA EMAIL: rtaylor@senate.idaho.gov

Re: Request for AG Analysis

Dear Senator Taylor:

You asked whether the new statutory provisions enacted by House Bill 59 would allow an employer or insurance company to deny making workers' compensation payments for an injured worker if the treatment being sought goes against the beliefs of the employer or the insurance company, as well as self-insured employers.

SHORT ANSWER

No, House Bill 59 would not provide a basis for the denial of workers' compensation benefits. This would apply to both insurance companies and self-insured employers. Entitlement to workers' compensation benefits is determined by statute. If an injured worker is otherwise entitled to benefits, a conscience-based objection would not provide a basis to deny care.

ANALYSIS

The workers' compensation system is a creation of statute which is set forth in title 72, Idaho Code. Workers' compensation is not like a private health insurance plan in which entitlement to care/coverage is determined by contract. A covered injury or disease in the workers' compensation system is known as a "compensable" injury. A compensable injury is one in which there is a causal connection between

the claimant's (worker's) injury and his job, that can be proven to a reasonable degree of medical probability. If a claim is accepted by the surety (insurer), it will direct the claimant to a treating physician. If a claim is compensable under the law, the surety must accept coverage. This includes finding a medical provider and would also include finding an alternative provider if a medical provider made a conscience-based objection.

In Idaho, the surety has the right to direct care, meaning that the surety has control over which medical providers a claimant sees, and oversees and manages a chain of referrals between providers. Idaho Code § 72-305. If the surety were to send a claimant to a medical provider who refused to treat the claimant, the surety would be required to find another treating provider. This is a situation which already occasionally arises in workers' compensation claims. For example, some surgeons will not perform surgeries on patients who are smokers due to concerns about poor surgical outcomes. When this occurs, the surety must locate another surgeon to perform the procedure. The surety must also continue to pay any benefits owed until the claimant can return to work.

The Idaho Industrial Commission has jurisdiction over all disputes arising under title 72, subject to review by the Idaho Supreme Court. Idaho Code § 72-707. When reviewing Commission decisions, it is well-settled Idaho law that the court must liberally construe the provisions of the workers' compensation law in favor of the employee, in order to serve the humane purposes for which the law was promulgated. *Morris v. Hap Taylor and Sons, Inc.,* 154 Idaho 633, 636 (2013). If there were a dispute over the payment of a claim due to House Bill 59, that dispute would be adjudicated by the Industrial Commission in compliance with the workers' compensation laws of this State.

I hope this analysis is of assistance to you. Please feel free to contact our office should you have any additional questions.

Sincerely,

LEA KEAR
Deputy Attorney General

May 21, 2025

The Honorable Jeff Cornilles
Idaho House of Representatives
Idaho State Capitol
P.O. Box 83720
Boise, Idaho 83720-0038
VIA EMAIL: jcornilles@house.idaho.gov

Re: Question regarding HOA agreements

Dear Representative Cornilles:

Idaho homeowner's associations (HOAs) are primarily governed by the Idaho Homeowner's Association Act (title 55, chapter 32, Idaho Code) and the Idaho Nonprofit Corporation Act (title 30, chapter 30, Idaho Code), as most HOAs are formed as nonprofit corporations. HOAs must also comply with federal laws such as the Fair Housing Act. In Idaho, an HOAs authority to enforce rules, collect assessments, and maintain common areas derives from their governing documents—most importantly, the covenants, conditions, and restrictions (CC&Rs), bylaws, and any rules and regulations adopted by the board.

State law requires that HOAs provide due process when enforcing rules, including written notice of violations and an opportunity for homeowners to respond or correct issues before fines can be imposed. The law also limits the ability of HOAs to fine homeowners unless such authority is clearly stated in the CC&Rs and requires a formal process for imposing fines, including board approval and notice to the homeowner. *See* Idaho Code § 55-3206.

Regarding the specific situation where a developer-controlled HOA is asking a homeowner to sign an agreement conditioning facility access on being in "good standing" (current on assessments and in compliance with CC&Rs, rules, and agreement), this is generally within

the scope of an HOA's authority, provided such requirements are consistent with the governing documents and are applied fairly. Restricting access to amenities for non-payment of dues or rule violations is a common enforcement tool.

The enforceability of the provisions requiring homeowners to agree not to disparage or damage the reputation of the HOA or developer, including on social media—raises legal and public policy concerns. Such "non-disparagement" clauses could be challenged as overly broad, vague, or as infringing on homeowners' rights to free expression and to raise legitimate concerns about the HOA's or developer's conduct. Idaho law does not explicitly address the enforceability of these clauses, but courts may scrutinize them for reasonableness, clarity, and consistency with public policy. The enforceability of these clauses will ultimately depend on whether they are found to be reasonable, not unconscionable, and not in conflict with other governing documents or legal protections.

A constituent facing such an agreement should carefully review the HOA's governing documents, consider whether the proposed agreement is consistent with those documents and Idaho law, and may wish to seek legal counsel to assess the enforceability and fairness of any non-disparagement provisions or other unusual requirements.

Sincerely,

AMBER K. KAUFFMAN
Lead Deputy Attorney General

September 12, 2025

The Honorable Melissa Wintrow
Idaho State Senate
Idaho State Capitol
P.O. Box 83720
Boise, Idaho 83720-0081
VIA EMAIL: mwintrow@senate.idaho.gov

Re: Request for AG Analysis

Dear Senator Wintrow:

You requested an opinion on several questions related to the Crime Victims Compensation Account. It is our understanding that these questions have arisen because of the recent changes to Idaho Code § 67-7903, which was amended by House Bill 135. Your questions, as you presented them, are stated below along with our answers to each question.

Question 1

1. Is crime victim compensation awarded pursuant to title 72, chapter 10, Idaho Code considered:

a. A federal public benefit as defined in Idaho Code § 67-7902?

b. A state or local public benefit as defined in Idaho Code § 67-7902?

Answer 1

1.a. Idaho Code § 67-7902 says the term "federal public benefit" is defined by 8 U.S.C. section 1611(c).[1] That definition includes "any grant… provided by… appropriated funds of the United States" and "any… welfare, health,… or any other similar benefit… provided to an

individual… by appropriated funds of the United States…"[2] Therefore, the portion of Idaho crime victim compensation that comes from the Federal Victims of Crime Act ("VOCA") grant is a "federal public benefit."[3]

1.b. Idaho Code § 67-7902 says the term "state or local public benefit" is defined by 8 U.S.C. section 1621(c).[4] That definition includes "any… welfare, health,… or any other similar benefit… provided to an individual by an agency of a State or local government or by appropriated funds of a state…"[5] All of the Idaho crime victim compensation funds, from all sources, in the end, are a welfare, health, or other similar benefit provided to individuals by a state agency (the Industrial Commission). Therefore, all of the Idaho crime victim compensation awarded pursuant to chapter 10, title 72, Idaho Code, is a "state or local public benefit."

Question 2

2. Is the forensic or medical examination of an alleged victim of sexual assault, the cost of which is paid for from the Crime Victims Compensation Account pursuant to Idaho Code § 19-5303, considered:

a. A federal public benefit as defined in Idaho Code § 67-7902?

b. A state or local public benefit as defined in Idaho Code § 67-7902?

Answer 2

2.a. Based on the same authorities and reasons articulated above in the answer to 1.a., if the costs of any forensic or medical examination of an alleged victim are paid for with the Federal VOCA grant funds, then those services are a "federal public benefit" because they fit within the categories of "any grant… provided by… appropriated funds of the United States" and "any… welfare, health,… or any other similar benefit… provided to an individual… by appropriated funds of the United States…"[6]

2.b. Based on the same authorities and reasons articulated above in the answer to 1.b., if the costs of forensic or medical examination of an alleged victim are paid for from the Idaho Crime Victims Compensation Account, then those benefits are a "state or local public benefit" because they fit within the category of "any… welfare, health,… or any other similar benefit… provided to an individual by an agency of a State…"[7]

Question 3

3. I believe some funds in the Crime Victims Compensation Account are derived from a federal VOCA Victim Compensation Formula Grant. If so:

a. Are services provided using VOCA grant funds:

i. A federal public benefit as defined in Idaho Code § 67-7902?

ii. A state or local public benefit as defined in Idaho Code § 67-7902?

b. Is there a legal conflict between the provisions of title 67, chapter 79, Idaho Code and federal VOCA grant requirements?

c. In the event of a conflict between federal VOCA grant requirements and state law, would the state:

i. Be ineligible for grant funds?

ii. Be obligated to return grant funds?

Answer 3

3.a.i. Yes, as discussed above in 1.a. and 2.a., any services provided using VOCA funds are a "federal public benefit."

3.a.ii. Yes, as discussed above in 1.b. and 2.b., all of the Idaho crime victim compensation funds, from all sources (including the federal

VOCA grant), in the end, are a welfare, health, or other similar benefit provided to individuals by a state agency (the Industrial Commission). Therefore, services provided using VOCA funds are also a "state or local public benefit."

3.b. We are aware of one partial conflict. The federal VOCA grant regulations say, "Victim eligibility under this program for direct services is not dependent on victim's immigration status."[8] As defined by the VOCA statutes and regulations, the only "direct service" provided by the Industrial Commission is the "payment of all reasonable costs for a forensic medical examination of a crime victim."[9] Nothing in federal law prevents the Industrial Commission from asking for verification of immigration status, as directed by Idaho Code § 67-7903. However, to the extent this federal provision requires "payment of all reasonable costs for a forensic medical examination of a crime victim" regardless of the victim's immigration status, it preempts Idaho law.

3.c.i. As explained above in 3.b., in the scenario where the conflict might arise, the federal provision would govern and require "payment of all reasonable costs for a forensic medical examination of a crime victim" regardless of the victim's immigration status. Therefore, we are aware of no scenario where the requirements of title 67, chapter 79, Idaho Code, would cause the state to become ineligible to receive the VOCA funds.

3.c.ii. Like the answer in 3.c.i., we are aware of no scenario where the requirements of title 67, chapter 79, Idaho Code would cause the state to be obligated to return VOCA funds to the federal government.

Question 4

4. Does the federal Violence Against Women Act (VAWA) require participating states to allow for the anonymous forensic or medical examination of an alleged victim of sexual assault? If so, is there a conflict between VAWA and the provisions of chapter 79, title 67, Idaho Code?

Answer 4

No, VAWA[10] does not contain any explicit requirement that grantees must allow for anonymous forensic medical examinations of alleged victims of sexual assault.

Question 5

5. Idaho Code § 67-2919 permits collection of anonymous sexual assault evidence kits. Is there a legal conflict between any provision of Idaho Code § 67-2919 and the provisions of chapter 79, title 67, Idaho Code?

Answer 5

No, there is no conflict between those two statutes. An "anonymous" exam only requires that the kit be assigned an anonymized identifier that is provided to local law enforcement or the testing lab. Nothing about this process or the terms of Section 67-2919 prevents the medical provider from obtaining identifying information from a victim in order to verify lawful presence, while maintaining the victim's anonymity from law enforcement.

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

Sincerely,

PHIL N SKINNER
Chief of Staff
Deputy Attorney General

[1] Idaho Code § 67-7902.
[2] 8 U.S.C. § 1611(c).
[3] It is our understanding that the funding for Idaho's Crime Victim's Compensation Program comes from both federal grant money and state funds.
[4] Idaho Code § 67-7902.
[5] 8 U.S.C. § 1621(c).

[6] 8 U.S.C. § 1611(c).
[7] 8 U.S.C. § 1621(c).
[8] 28 C.F.R. § 94.103.
[9] 34 U.S.C. § 201013.
[10] 34 U.S.C. §§ 12291 et seq.; 28 C.F.R. §§ 90 et seq.

September 29, 2025

The Honorable Edward H. "Ted" Hill
Idaho House of Representatives
Idaho State Capitol
P.O. Box 83720
Boise, Idaho 83720-0038
VIA EMAIL: thill@house.idaho.gov

Re: Request for AG Analysis

Dear Representative Hill:

I asked a couple of our attorneys from our criminal law division to look at your draft drone legislation. They didn't have any constitutional or other concerns.

See attached some suggested edits to clean up the language a little bit. We broke apart your current subsection (3) and created two separate subsections: one to focus on the Dept. of Corrections responsibilities; and a separate subsection to focus on the penalties. Also, "nefarious manner" is a defined term in your first subsection, so you will see we changed the reference to "nefarious activity" in subsection (3) to instead say "nefarious manner."

I'm happy to meet and discuss if you feel that would be helpful.

Best regards,

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.

October 30, 2025

The Honorable Brandon Shippy
Idaho State Senate
Idaho State Capitol
P.O. Box 83720
Boise, Idaho 83720-0081
VIA EMAIL: bshippy@senate.idaho.gov

Re: Idaho Constitution article III, section 19

Dear Senator Shippy:

Article III, section 19 of the Idaho Constitution reads: "the legislature shall not pass local or special laws in any of the following enumerated cases . . . ." IDAHO CONST. art. III, § 19. This provision is then followed by thirty-two categories of laws. These include: granting divorces, regulating the practice of the courts of justice, and changing the names of persons or places. *Id.* This provision of the Idaho Constitution was added to the Idaho Constitution to "prevent legislation bestowing favors on preferred groups or localities*." Jones v. State Bd. of Medicine*, 97 Idaho 859, 876, 555 P.2d 399, 416 (1976) (citation omitted); *see also* (1 Proceedings and Debates of the Constitutional Convention of Idaho, 1889, p. 539 (Hart ed. 1912)). This policy is implemented through two separate prohibitions: 1) a prohibition on local laws, and 2) a prohibition on special laws.

A. Local Laws

The Idaho Supreme Court has held that "[l]ocal and special laws are defined separately and apply to different situations*." Moon v. North Idaho Farmers Ass'n.*, 140 Idaho 536, 546, 96 P.3d 637, 647 (Idaho 2004). "A local law is one that is special in the sense of applying to a particular locality or particular localities to the exclusion of others." *Sch. Dist. No. 25, Bannock Cnty. v. State Tax Comm'n*, 101 Idaho 283, 290,

612 P.2d 126, 134 (1980). "A statute is not 'local' in operation . . . when it applies equally to all areas of the state." *Id.*

For example, consider the following hypotheticals:

1) The Legislature passes a law stating that all agricultural property south of the Snake River will be assessed at 50% of fair market value for property tax purposes.

Step one of determining whether the law violates article III, section 19 is to check whether the subject matter falls within one of the enumerated categories in that section. In this case, laws "[f]or the assessment and collection of taxes" are covered by the section, so step one is met.

Step two is to ask whether the law applies to particular localities to the exclusion of others. In this case, the law applies only to localities "south of the Snake River" and so meets step two. Because the law falls under both steps, the law would likely be an unconstitutional local law.

2) The Legislature passes a law making it a misdemeanor to shoot a crossbow within the city limits of any city with a population greater than 100,000.

Step one is again met, as the prohibition extends to laws "[f]or the punishment of crimes and misdemeanors."

Step two however is not met. While only three cities in Idaho in 2025 (Boise, Meridian, and Nampa) meet the requirement of having a population of 100,000, that category is fluid and can fluctuate in the future, and so it does not apply to a "particular" locality.[1]

B. Special Laws

Special laws are laws that apply only to an individual or number of individuals out of a single class similarly situated and affected or to a special locality. *Planned Parenthood Great Nw. v. State*, 171 Idaho

374, 454, 522 P.3d 1132, 1212 (2023). Effectively, this is a prohibition on arbitrary, capricious, or unreasonable classifications, and will not invalidate a law where there is some legitimate interest in protecting the citizens of the State. *Id.*

An unconstitutional special law has three distinct characteristics, summarized in *Citizens Against Range Expansion v. Idaho Fish and Game Dep't*:

> *First*, a special law applies only to an individual or number of individuals out of a single class similarly situated and affected or to a special locality.
> . . .
> *Second*, we have found that when the Legislature pursues a legitimate interest in protecting citizens of the state in enacting a law, then it is not special.
>
> [*Third*], courts must determine whether the [statute's] classification is arbitrary, capricious, or unreasonable. If a law's classification is arbitrary, capricious, or unreasonable, it is a special law. In assessing the legitimacy of a particular law, as well as whether it is arbitrary, capricious, or unreasonable, this Court has on occasion examined not just the law itself, but its legislative history.

153 Idaho 630, 636, 289 P.2d 32, 38 (2012) (cleaned up). In contrast to special laws, general laws apply to all persons and subject matters in a like situation. *Id*.

For example, consider these cases:

In *Kirkland v. Blaine Cnty. Med. Ctr.*, 134 Idaho 464, 470, 4 P.3d 1115, 1121 (2000), the court considered a law that prospectively limited the amount of non-economic damages any plaintiff can collect. The Court found that this law was not an unconstitutional special law as

it satisfied the legitimate interest of protecting the availability of liability insurance in Idaho, by reducing potential payouts by insurers.

Similarly, in *Jones v. Lynn*, 169 Idaho 545, 498 P.3d 1174 (2021), the Idaho Supreme Court held that Idaho's Dram Shop Act, in limiting a sub-class of claimants' ability to bring negligence claims, did not constitute a special law because "it applies generally to all members of the class it creates, and it is not arbitrary, capricious, or unreasonable."

By contrast, in *Idaho Sch. For Equal Educ. Opportunity v. State*, 140 Idaho 586, 591-2, 97 P.3d 458-9 (2004), the court considered a law which it believed was passed to alter the procedure of a specific ongoing lawsuit. The court found that this attempt by the Legislature to change the process mid-stream was not a legitimate government purpose and therefore violated the prohibition on special laws.

C. Limited Application

It is worth noting that "our Constitution prohibits special legislation only if such legislation comes within one of the thirty-two expressly prohibited categories." *State ex rel. Idaho St. Park Bd. v. City of Boise*, 95 Idaho 380, 382, 509 P.2d 1301, 1303 (1973). Put another way, the Legislature may enact local or special laws that are not expressly forbidden by article III, section 19. In *City of Boise*, the Idaho Supreme Court expressly found that the law at issue, an act creating a state park and providing the State Park Board the authority to use eminent domain against the City of Boise to acquire property within its bounds, *was* a special law. *Id.* at 383. But, because the law did not fall within any of the thirty-two prohibited categories of special legislation, it did not violate article III, section 19.

CONCLUSION

Article III, section 19 of the Idaho Constitution prohibits local or special laws relating to thirty-two enumerated categories. Special laws are those which apply only to an individual or group within a specific class, do not serve a legitimate purpose, and are arbitrary, capricious, or unreasonable. Local laws apply to a specific locality while excluding others. Finally, special or local laws which do not fall within the enumerated list of prohibited local or special laws are constitutional.

Please feel free to contact me if you have any questions.

Sincerely,

AARON M. GREEN
Deputy Attorney General

[1] Though as to this example, it is worth noting that a law that does all *but* describe a specific locality by reference to population, with limited chances that another locality could join or leave the group, may not survive this analysis. *See Concerned Taxpayers of Kootenai Cnty. v. Kootenai Cnty.*, 137 Idaho 496, 500, 50 P.3d 991, 995 (2002) (abrog. on other grounds by *Moon*, 140 Idaho 536).

November 6, 2025

The Honorable Steve Berch
Idaho House of Representatives
Idaho State Capitol
P.O. Box 83720
Boise, Idaho 83720-0038
VIA EMAIL: sberch@house.idaho.gov

Re: Request for AG Analysis

Dear Representative Berch:

You asked about what would happen if the Joplin Cemetery District's board was unable to fill its board positions. The statutes governing cemetery maintenance districts are found in title 27, chapter 1, Idaho Code. The "Special District Dissolution Act" found in title 63, chapter 41, Idaho Code also applies to the analysis below. Here's a brief review of what would happen if the cemetery maintenance board cannot find people to serve as cemetery maintenance commissioners:

- Statute vests the authority to direct the affairs of a cemetery district in its board of commissioners. Members may either be elected, or in the case of a vacancy, appointed.
- The board of commissioners is responsible for district management, holding budget hearings, adopting a budget, and levying property tax.
- If there are no commissioners, then these functions could not be completed, and the cemetery district would not be eligible to levy a tax.
- If a cemetery district "fails or has ceased to function" for two or more years, then the county commissioners have authority to dissolve the district. Idaho Code § 63-4104. If a county board finds that an emergency exists, upon dissolving a district, it may

continue operating the services performed by the district and preserve its property.

- A cemetery district may also be dissolved by "a petition containing the signatures of qualified electors of the district or owners of property within the district equal in number to twenty-five percent (25%) of the largest number of persons who voted for any director in the last election of directors or if no election has been held within (2) years then a petition may be initiated by twenty-five (25) or more qualified electors or property owners of the district." Idaho Code § 63-4103. After a petition has been filed with the county clerk, the county may hold a hearing on the matter and, if necessary, hold an election to approve the dissolution.
- A cemetery district may consolidate with another cemetery district that is within 10 miles of its cemetery. Idaho Code § 27-129. However, consolidation may only occur if one of the districts in the proposed consolidation contains less than 150 registered electors. Additionally, to consolidate, Joplin would need to have an active board capable of approving the consolidation.

In summary, if Joplin is unable to find people to serve as commissioners, dissolution is the likely consequence. After dissolution, property that is currently in the cemetery district could then be annexed into other cemetery districts or a new cemetery district could be formed.

I would be happy to answer any further questions or consider additional information about this subject.

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.

December 3, 2025

The Honorable Dale Hawkins
Idaho House of Representatives
Idaho State Capitol
P.O. Box 83720
Boise, Idaho 83720-0038
VIA EMAIL: dhawkins@house.idaho.gov

Re: Request for AG Analysis of the implementation of House Bill 338, amending Idaho Code sections 33-909 and 33-911

Dear Representative Hawkins:

You inquired about the State Department of Education's recent implementation of House Bill 338 ("HB 338"). The questions you presented and our responses to those questions are below.

1. *According to Idaho Code §33-909 subpart 3, as amended, what is the correct panel composition – e.g., number of people and their positions?*

Answer: Idaho Code § 33-909(3) creates a 3-member panel consisting of the administrator of the Division of Occupational and Professional Licenses; the administrator of the Department of Public Works; and the Superintendent of Public Instruction. Each administrator has authority to appoint a designee to serve in his/her stead.

2. *Was the panel that convened on August 4, 2025, to review and vote on five school district applications for Idaho Code § 33-909 funding comprised of only the members authorized by the statute? If not, are the proceedings of the panel's August 4, 2025, meeting valid? If the proceedings are not valid, what is the remedy regarding that meeting?*

And what is the remedy for the panel composition and its future consideration of applications for Idaho Code § 33-909 funding?

Answer: Idaho Code § 33-909(5)(a) allows the panel to expend up to $150,000.00 per application to obtain additional plans and information. In an effort to limit such expenses, the panel created an 8-member advisory group which includes industry experts to assist with application reviews. The August 4, October 28, and November 4 panel meetings included non-binding votes by the advisory group members in addition to the binding votes of statutory panel members. The panel reconvened on November 21 for the three-member panel to consider and formally vote on previously presented applications, without any "votes" from the advisory group.

3. *How can these two districts [Filer and Camas] have qualified under 2a if they haven't held a safety-related bond or plant facility levy election within the previous two years? Shouldn't those districts have to wait to apply for Idaho Code § 33-909 funds until after they hold those elections and the voters reject a bond or levy? If they are required to have an election based on HB 338, Section 1, subpart 6, which was amended by the legislature to apply to category 2b and some category 2a loan requests, why isn't there a requirement for 2c applicants (such as the Salmon district) to have a bond/facility levy election (and its associated public involvement process) before their Idaho Code §33-909 loan is awarded?*

Answer: The Office of the Attorney General has not reviewed the applications and thus cannot answer the first question. Regarding the second question, nothing in the statute or the legislative history reveals the Legislature's reasoning for this policy decision.

4. *Since the Filer and Camas districts' requested funding amounts are relatively small, can those districts instead save (and invest) their Idaho Code § 33-911 Facilities Fund disbursements for two to three years rather than incur the expenses of a bond/levy election and interest payments on an Idaho Code § 33-909 State Dept. of Education loan?*

Answer: Nothing in the law appears to prohibit that, but each situation would need to be analyzed under the specific facts and applicable laws. For instance, every school district will always be subject to the mandatory payment priorities set forth in Idaho Code § 33-911(2)(a)-(f), and such payment priorities may be contingent upon any applicable terms for School Modernization Facilities funding found in sections 33-912 *et seq.*, including that district's Best Practices Plan for School Facilities as required by section 33-918.

5. *Does Salmon meet the 2c qualifications for the entire amount of requested facilities funding? Did the legislature intend for there to be an "open door" for a district to claim insufficient funding for a never-ending list of alleged facility safety concerns district-wide that existing single-topic bonds will always be insufficient to fund because the scope of expenditures from those approved bond assets is limited to a narrowly defined purpose or facility?*

Answer: Due to a lack of information about the application in question, the Office of the Attorney General cannot answer the first question posed in this section. The second question is a policy issue for the Legislature to answer.

6. *Would it help resolve the above problems if the 2025 amendments to Idaho Code § 33-909 and Idaho Code § 33-911 were repealed (or **nullified**), and the HB 338, **Section 3** transfer of $25 million from the bond levy equalization fund was allocated to the Idaho Code § 33-911 Facilities Fund instead? Nullification would restore the previous statute wording for Idaho Code § 33-909 and Idaho Code § 33-911 (which was not problematic). And the alternate transfer of funds would increase the annual funds provided to public school districts for taxpayer relief in a uniform manner and with far less state oversight. Districts would still receive Facilities Fund distributions for categories of taxpayer-levied bonds and levies in the unamended Idaho Code § 33-911 "cascade." And districts could still apply for facilities project loans through the unamended 33-909 FCFP process utilized by the Plummer-Worley and Salmon school districts.*

Answer: This is a policy question for the Legislature.

7. *Would it make the originally-worded Idaho Code § 33-909 Facilities Cooperative Funding Program more attractive to districts if the practice of charging interest for the duration of the loan was changed to a nominal fee (e.g., 3 percent of principle) that covered the state's costs to administer the loan?*

Answer: This is a policy question for the Legislature.

8. *Would it be prudent to immediately pause disbursement of Idaho Code § 33-909 awards and State Department of Education solicitation, receipt, or review of additional Idaho Code § 33-909 applications until these and other questions are investigated and resolved? This is a time-sensitive matter because Idaho Code § 33-909 loan funds may be distributed to round one qualifying districts in early October 2025, and the review panel may meet soon to decide on a second round of applications.*

Answer: Nothing in the statute appears to authorize such a pause. The statute says the panel shall consider all applications and approve, modify, or reject them.

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

Sincerely,

ALISON FOSTER DAVIS
Deputy Attorney General

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ATTORNEY GENERAL'S SELECTED AMICUS BRIEFS FOR THE YEAR 2025

RAÚL R. LABRADOR

ATTORNEY GENERAL
STATE OF IDAHO

INTRODUCTION

This year my Office of Solicitor General led amicus briefs on some of the biggest legal fights in the country, cases that will shape how much power the federal government has over states, how far the Second Amendment reaches, and whether states can be forced into unconstitutional programs to keep federal funding. An amicus brief, Latin for 'friend of the court,' lets a party who isn't directly involved in a case share legal arguments and expertise the court might not otherwise hear. Beyond the briefs we authored, we also joined dozens of others led by fellow states' Attorneys General this year, adding Idaho's voice whenever the outcome would affect our state or threaten the constitutional rights of Idahoans and all Americans. Below are short summaries of the briefs we authored this year, along with a closer look at three specific cases worth knowing about. A copy of one brief we're particularly proud of, our brief in *Wolford v. Lopez,* is included in full following this section.

WOLFORD V. LOPEZ: A WIN FOR THE SECOND AMENDMENT

The state of Hawaii passed a law that did two things. It made it a crime for a licensed concealed-carry holder to carry on private property open to the public unless the owner had affirmatively said it was allowed, and it declared a sweeping list of public places off limits entirely under a "sensitive places" label broad enough to cover most of the state. In effect, the government criminalized a constitutional right by default and made property owners the gatekeepers of when it applied. We co-led an amicus brief arguing that neither squares with the Second Amendment, and that the right to bear arms doesn't disappear because a state flips the default against gun owners or relabels ordinary public spaces as sensitive. On June 25, 2026, the Supreme Court ruled Hawaii's private-property default rule unconstitutional in a 6-3 decision, with Justice Alito writing that the law "hobbles what the Second Amendment protects: the right of Americans to carry arms for self-defense as they go about their daily lives" and that the Second Amendment "has the same meaning in all parts of the United States." This case matters well beyond Hawaii. It reins in a growing trend of states trying to regulate firearms out of practical existence through property and place restrictions rather than an outright ban.

DUNCAN V. BONTA: THE FIGHT OVER MAGAZINE BANS ISN'T OVER

California and Washington passed a law that banned the sale of magazines that hold more than 10 rounds, and both the Ninth Circuit and the Washington Supreme Court upheld the bans. We wrote amicus briefs arguing these courts got it wrong twice over. First, using a magazine is part of what it means to bear arms, so restricting magazines restricts the right itself. Second, these "large capacity" magazines are not unusual at all. Estimates put the number in circulation nationwide somewhere between 30 million and 160 million. A magazine that common cannot fairly be called dangerous and unusual. The Supreme Court is currently deciding whether to hear these cases, and it's a chance to correct lower courts that keep treating the Second Amendment as less important than the rest of the Bill of Rights.

MID-AMERICA MILLING v. USDOT, E.D. Ky.: STATES SHOULDN'T BE FORCED INTO RACIAL DISCRIMINATION

The federal Disadvantaged Business Enterprise program conditioned transportation funding on states giving preferential treatment to minority- and women-owned businesses when awarding contracts. When the federal government and the plaintiffs challenging the program reached an agreement stipulating that its race- and sex-based presumptions were unconstitutional, we joined an amicus brief supporting that outcome, arguing that the program cost states real money by pushing them toward more expensive bids based on the owner's race or sex rather than the merits of the bid, and that it invited fraud from those looking to game the system. Before the court could act on that agreement, the Department of Transportation changed its own rule in October 2025, eliminating the presumptions at the heart of the dispute, and the case was dismissed as moot in March 2026. The underlying constitutional question was never decided by a court, but the practical outcome we argued for, an end to race-based presumptions in awarding federal contracts, is now in effect.

OTHER AMICUS BRIEFS WE FILED OR JOINED THIS YEAR

Beyond the cases above, my office weighed in on a wide range of fights over the proper limits of federal power and the integrity of state self-government. We argued that the federal government cannot stretch statutory definitions to seize control of a state's own waters or nuclear waste policy, that Congress cannot commandeer state officials to do its regulatory compliance work, and that federal courts should show more deference to state courts on questions of state law. We argued that states, not federal judges, should set the rules for direct democracy, from ballot initiative language to who may collect signatures. We argued that biological sex, not gender identity, is the proper basis for government recordkeeping and for housing and treatment decisions in federal prisons. And we argued that states must retain primary authority over their own criminal sentencing, free from federal courts second-guessing IQ scores or restricting states' tools for public safety, including the right to keep and bear arms. Short summaries of each of these briefs follow below.

- ***Alaska v. United States*** — The Ninth Circuit ruled that Alaska's own navigable waters count as "public lands" the federal government can regulate, just because the federal government claims certain rights to use the water there. We argued that the decision stretches the law past its plain meaning and threatens every state's control over its own water.
- ***Center for Biological Diversity v. United States Fish and Wildlife Service*** — A federal court issued an order to set aside the federal government's determination that gray wolves in the Northern Rocky Mountains did not need to be listed as an endangered species. We argued to the court of appeals that the decision should be reversed, and supported the government's analysis of Idaho's wolf population estimates. The appeal is still pending.
- ***Commissioner v. Smith (decided as Hamm v. Smith)*** — Alabama argued a death row inmate should not escape execution just because one of five IQ tests suggested his score might dip below 70. Idaho argued *Atkins* should be construed narrowly and that states should retain primary authority over their own capital sentencing decisions. On May 21, 2026, the Supreme Court dismissed the case without deciding the question, by a 5-4 vote,

leaving the inmate's vacated death sentence in place. Three justices used the case to signal openness to revisiting *Atkins* itself in a future case.

- ***De La Fuente Diaz v. Gonzalez Colon*** — A federal court ruled that the Constitution requires governments to let people list "non-binary" on their birth certificate. We argued the Equal Protection Clause requires no such thing, and that states are free to keep their vital records based on biological sex. The case is still pending before the First Circuit.
- ***Doe v. Bondi / Kingdom v. Trump*** — Lower courts initially blocked the federal government from housing transgender-identifying male inmates by biological sex and from limiting gender-transition treatments in federal prisons. We argued the Eighth Amendment requires neither, and that these are policy calls for elected officials, not federal judges. On the housing question, the D.C. Circuit sided with our view in April 2026, ruling that inmates can't win blanket relief without showing individualized risk, and sent the matter back to the district court to sort out case by case. The treatment question remains contested in the lower courts.
- ***Florida Decides Healthcare v. Florida Secretary of State*** — A federal court struck down Florida's requirement that people collecting signatures for ballot initiatives be Florida residents and U.S. citizens. We argued states are free to set basic rules for their own direct democracy process without running afoul of the First Amendment. The case is pending before the Eleventh Circuit.
- ***NRC v. Texas*** — Texas and a private landowner challenged the NRC's authority to license a private company to store spent nuclear fuel off-site in West Texas, rather than at the single, secure federal repository long-term federal law actually requires. We explained to the Supreme Court Idaho's unique history with nuclear waste storage and warned that allowing indefinite private storage elsewhere undermines the federal government's decades-old commitment to remove waste from Idaho National Laboratory. On June 18, 2025, the Court ruled against Texas on procedural grounds, finding it lacked standing to bring the

challenge, without deciding whether the NRC actually has this licensing authority. The underlying question Idaho cares about remains unresolved.

- ***Premier Nutrition v. Montera*** — A federal court of appeals refused to send an unsettled question of state law to the state's own supreme court, deciding it themselves instead. We argued federal courts should defer to state courts on state law questions far more often than they do. The petition for the Supreme Court to hear the case is still pending.
- ***Texas Top Cop Shop v. Bondi*** — Filed on behalf of Idaho's Secretary of State, this case challenges the Corporate Transparency Act, which forces state officials to help enforce a federal ownership-disclosure mandate on businesses. We argued Congress can't commandeer state officers to do the federal government's compliance work for it. The case is now before the Supreme Court, which is considering hearing it alongside a similar challenge.
- ***Yost v. Brown*** — The Sixth Circuit ordered Ohio to certify an initiative petitioner's description of a proposed measure that Ohio's Attorney General had rejected multiple times as not fair and truthful. We argued states retain authority to review initiative language before it circulates, and that the Supreme Court should stay the Sixth Circuit's order. The Court denied the stay in April 2025—though three justices voted to grant it—letting the initiative move forward.
- ***Yukutake v. Lopez*** — A Ninth Circuit panel ruled that Hawaii's burdensome gun permit process violates the Second Amendment, but the full court ordered a rehearing. We argued the original panel got it right, and that piling on procedural hurdles to gun ownership is its own kind of infringement. The en banc court heard oral argument in March 2026; no decision yet.

No. 24-1046

In the Supreme Court of the United States

JASON WOLFORD, et al.,
Petitioner,

v.

ANNE E. LOPEZ, Attorney General of Hawaii,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE STATES OF MONTANA, IDAHO, 23 OTHER STATES, AND THE ARIZONA LEGISLATURE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER AND REVERSAL

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STATEMENT OF INTEREST AND INTRODUCTION[1]

Just a few years ago, this Court reminded lower courts that the right to keep and bear arms "is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" *N.Y. State Rifle & Pistol Ass'n* v. *Bruen*, 597 U.S. 1, 70 (2022) (quoting *McDonald* v. *City of Chi.*, 561 U.S. 742, 780 (2010) (plurality op.)). Yet courts across the country continue to defer to legislative "judgments regarding firearm regulations" despite *Bruen*'s declaration that "judicial deference to legislative interest balancing … is not [the] deference that the [Second Amendment] demands." *Id.* at 26. But the district court deferred to the balance struck by the American people—"'the right of law-abiding, responsible citizens to use arms' for self-defense." *Id.* (quoting *District of Columbia* v. *Heller*, 554 U.S. 570, 635 (2008)). The Ninth Circuit charted a different course: "blessing" Hawaii's efforts to ban "law-abiding and licensed citizens … from carrying firearms in most public and private spaces." Pet'rs' App. ("Pet.App.") at 170a (VanDyke, J., dissenting from denial of rehearing en banc).

To address concerns about public safety and gun violence, the Hawaii legislature banned the public carry of firearms in certain "sensitive places," including parks, beaches, and bars and restaurants serving alcohol. Not only that, but the Hawaii legislature flipped the default rule for public carry on private property held open to the public. Rather than presuming that public carry was permissible unless expressly forbidden, public carry is now presumptively forbidden in Hawaii unless expressly permitted.

No doubt courts may use analogies to "historical regulations of 'sensitive places' to determine that modern regulations prohibiting the carry of firearms in *new* and analogous sensitive places are constitutionally permissible." *Id.* at 30. But *Bruen*'s analogical inquiry

[1] As required by Rule 37.2, counsel for *amici* timely notified counsel of record its intent to file this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel contributed money intended to fund the preparation or submission of this brief.

requires courts to determine whether a modern and historical regulation are "relevantly similar"—that is, whether they impose a comparable burden and are comparably justified. *See United States* v. *Rahimi*, 602 U.S. 680, 692 (2024). States may not "expand[] the category of 'sensitive places' [too broadly]—*i.e.*, to "all places of public congregation"—as that would "exempt cities from the Second Amendment" and "eviscerate the general right to publicly carry arms for self-defense." *Bruen*, 597 U.S. at 31. Nor can states flip the default rule as subterfuge for banning law-abiding and licensed citizens from the public-carry right *Bruen* secured. *See* Pet.App.178a-180a. To ensure that courts properly employ the "nuanced approach" that *Bruen*'s analogical inquiry requires, the States of Montana, Idaho, Alabama, Alaska, Arkansas, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, Wyoming, and the Arizona Legislature ("Amici States") submit this amicus brief in support of petitioner and urge this Court to grant the petition.

STATEMENT OF THE CASE

In June 2023, Hawaii's legislature acted to address concerns about public safety and gun violence by enacting Act 52 (codified at Haw. Rev. Stat., ch. 134), which prohibits the carry or possession of firearms in designated sensitive places. Act 52 prohibits public carry in, as relevant here, bars and restaurants serving alcohol, *see* Haw. Rev. Stat. §134-9.1(a)(4), parks and beaches, *id.* §134-9.1(a)(9), and adjacent parking areas. Act 52's so-called "default rule" prohibits carrying a firearm on another's property without express authorization. *Id.* §134-9.5. Act 52's sweeping restrictions seek to convert many traditional public spaces into "sensitive places" where firearms "could be prohibited consistent with the Second Amendment." *See Bruen*, 597 U.S. at 30.

Plaintiffs Jason Wolford, Alison Wolford, Atom Kasprzycki, and the Hawaii Firearms Coalition allege that these sensitive-place restrictions violate their "constitutional right to bear arms in public for

self-defense."[2] *Bruen*, 597 U.S. at 70. Wolford sought a temporary restraining order ("TRO") and preliminary injunction ("PI") to enjoin Hawaii from enforcing the above provisions of Act 52. Pet.App.83a-84a & n.2. The district court considered only Plaintiffs' request for a TRO, and as relevant here it enjoined: §134-9.1(a)(4) (bars and restaurants serving alcohol), §134-9.1(a)(9) (parks and beaches), and §134-9.5 (private property held open to the public). Pet.App.83a-85a & n.2. By stipulation, the district court converted the TRO into a PI, Pet.App.215a-218a, and Hawaii appealed, Pet.App.10a. The Ninth Circuit reversed the district court's grant of the preliminary injunction as to Haw. Rev. Stat. §§134-9.1(a)(4), (9), and 134-9.5. Pet.App.79a. The full court denied Wolford's petition for hearing en banc. Pet.App.169a.

SUMMARY OF THE ARGUMENT

1. By reversing the injunction on Hawaii's default rule, the Ninth Circuit created a circuit split. Relying on the same precedent and the same historical regulations as the Ninth Circuit, the Second Circuit upheld an injunction on a nearly identical New York law.

2. Hawaii's laws addressed problems that have existed since the Founding, yet Hawaii failed to produce any "distinctly similar," Founding-era laws supporting its public-carry bans in public parks and beaches or in bars and restaurants serving alcohol. Hawaii's "failure to do so should be dispositive." Pet.App.195a. And even if Reconstruction-era analogues could establish a historical tradition of firearm regulation, the panel erred in concluding that Hawaii's proposed analogues were "relevantly similar." *Rahimi*, 602 U.S. at 692.

3. *Bruen* reassured law-abiding gun owners that the Second Amendment was no longer a "second-class right." 597 U.S. at 70. But lower courts have largely failed to follow through on that promise, resorting to manipulative en banc practices, ahistorical interpretations of covered "arms," and improperly calibrating the level of generality for

[2] This brief refers to Petitioner as "Wolford" and Respondent as "Hawaii" unless otherwise indicated.

Bruen's inquiry. These incursions on citizens' public-carry rights will continue to grow unless this Court intervenes.

REASONS TO GRANT THE PETITION

I. The Ninth Circuit's "default rule" holding created a circuit split.

The rights embedded in the Constitution generally protect against state action—not private action. *See, e.g.*, *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977). This means that Hawaii cannot prohibit its citizens from bearing arms in public, *Bruen*, 597 U.S. at 9, but private property owners are generally free to do so within the boundaries of their property. By changing the default rule—decreeing that firearms are prohibited on private property unless the owner expressly consents in advance—Hawaii coopts the owners' power to restrict Hawaiians' exercise of their right to bear arms.

But the Second Amendment is not the only constitutional right that property owners can interfere with. They can restrict speech on their property, or association, or religious exercise. *See, e.g.*, *Lloyd Corp.* v. *Tanner*, 407 U.S. 551, 570 (1972). Unless they are public accommodations, they can exclude people on the basis of race, sex, or another protected characteristic. *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 624 (1984).

In any of those contexts, a law like Hawaii's would be unconstitutional. Imagine an anti-abortion state banning abortion discussions on private property without the owner's prior express consent. Or imagine a state requiring express consent before visitors to a property could pray, or read *White Fragility*, or hold hands with a same-sex spouse. No doubt the owners could overrule the state and tell visitors that the forbidden conduct was permitted, but most visitors to stores and restaurants and such would never ask—compliance with the state's unconstitutional wishes would be easier.

The only reason a court would reach the opposite conclusion here is because it continues to treat the Second Amendment as a "second-class" right. *McDonald*, 561 U.S. at 780. Since this Nation's founding, a citizen could enter a business open to the public with a firearm unless

informed otherwise by the owner. Pet.App.173a. In explicit response to this Court's decision in *Bruen* and flipping this presumption, Hawaii enacted a new "default rule"—prohibiting a citizen from carrying a firearm on another's property without advance permission—whether or not the property is open to the public. Office of the Governor – News Release – *Gov. Green Signs Firearms Legislation*, https://tinyurl.com/2vrysv73; Haw. Rev. Stat. §134-9.5(b). As the Ninth Circuit noted, it did this knowing that few (if any) businesses will expressly provide this consent—narrowing the public's right to carry was a feature of the law, not a bug. Pet.App.57a.

The Ninth Circuit allowed this de facto public-carry ban to go forward and, in so doing, created a circuit split between it and the Second Circuit. *Compare* Pet.App.57a *with Antonyuk* v. *James*, 120 F.4th 941 (2d Cir. 2024), *cert. denied*, No. 24-795 (U.S. Apr. 7, 2025); Pet.App.200a. Ruling on nearly identical laws, the circuits came to opposite conclusions about the legality of the legislative ruse. And they reached their contrary holdings based on the same historical data. The result: New Yorkers may exercise their constitutional rights while Hawaiians may not. This case provides an ideal vehicle to remind courts that the Second Amendment requires no less from a state government than a "demonstrat[ion] that the regulation is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 17.

A. The Second Circuit rightly held that there was no historical tradition for flipping the presumption.

As the Second Circuit recognized when analyzing a law nearly identical to Hawaii's, the *Bruen* analysis here is straightforward. At step one, the court had "little difficulty" concluding that the "plain text of the Second Amendment" covers the individual's conduct. *Id.* at 32. The Second Amendment protects the right to bear arms in public. *Id*. at 33. And that right does not distinguish between public property or private property held open to the public. *Antonyuk*, 120 F.4th at 1044.

At step two, to determine whether the regulation was "consistent with the Nation's historical tradition of firearm regulation," the court asked whether the unprecedented inversion of the default rule was

"relevantly similar" to historical regulations based on "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id*. at 964 (citation omitted) (first quote); *id*. at 1046 (citation omitted) (second quote). And the court could not find a single relevantly similar law in the annals of history. *Id.*

The court reviewed a 1771 New Jersey statute and an 1865 Louisiana statute that, at the highest level of generality, prohibited the carriage of firearms on private property without the owner's consent. *Id*. at 1043.

The court started by observing that it was unclear how a few historical regulations could establish a historical tradition. *Id*. at 1046. But more troubling, these statutes did not share the same "how" and "why" as the regulation at issue—making them poor analogues. *Id*.

Starting with the why, the court found that the proffered analogues "were explicitly motivated by a substantially different reason (deterring unlicensed hunting) than the restricted location regulation (preventing gun violence)." *Id*. at 1046. As to the how, "none of the State's proffered analogues burdened Second Amendment rights in the same way as [the provision at issue]. All of the State's analogues appear to, by their own terms, have created a default presumption against carriage only on private lands *not open to the public*." *Id*. at 1046.

Because "the State's analogues fail[ed] to establish a national tradition motivated by a similar 'how' or 'why' of regulating firearms in property open to the public," the law violated the Second Amendment. *Id*. at 1047.

This makes sense. Reversing the traditional presumption that carrying firearms into businesses open to the public would effectively "exempt [states] from the Second Amendment" and "eviscerate the general right to publicly carry arms for self-defense." *Bruen*, 597 U.S. at 31. By doing so, New York's law would have "practically accomplish[ed] close to the same thing rejected in *Bruen*." Pet.App.171a.

B. Considering a similar law and identical historical regulations, the Ninth Circuit's decision explicitly creates a circuit split.

Around the same time, the Ninth Circuit decided this case, reviewing a nearly identical Hawaii law. *See* Pet.App.5a. To its credit, it correctly held that if a law falls within the plain text of the Second Amendment, then it falls within the plain text of the Second Amendment, Pet.App.58a—a notion that has not commanded the universal judicial assent one would hope for. *See, e.g.*, *Bianchi* v. *Brown*, 111 F.4th 438 (4th Cir. 2024) (holding that arms are not necessarily arms under the Second Amendment); *Bevis* v. *City of Naperville, Ill.,* 85 F.4th 1175 (7th Cir. 2023), *cert. denied sub nom. Harrel* v. *Raoul*, 144 S. Ct. 2491 (2024) (same); *Duncan* v. *Bonta*, No. 23-55805, 2025 WL 867583 (9th Cir. Mar. 20, 2025) (holding that necessary parts of a firearm are not necessarily protected by the plain text Second Amendment). But as *Bruen* requires, the Ninth Circuit correctly held that "[t]he government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." Pet.App.20a (citation omitted).

But after that the Ninth Circuit split with the Second Circuit (and *Bruen*). While it rightly discounted a smattering of anti-poaching laws, the Ninth Circuit upheld the law on the basis of two historical regulations the Second Circuit considered and rejected: the 1771 New Jersey law and the 1865 Louisiana law. Pet.App.61a. The court found that these laws purportedly "bann[ed] the carrying of firearms onto any private property without the owner's consent"—just like Hawaii's law. Pet.App.61a. And that was enough.

As both the Second Circuit and Judge VanDyke's dissent from the Ninth Circuit denial of rehearing en banc noted, New Jersey's law "was an antipoaching and antitrespassing ordinance—not a broad disarmament statute." Pet.App.186a; *Antonyuk*, 120 F.4th at 1046. And Judge VanDyke observed that Louisiana's law "was enacted as part of Louisiana's notorious Black Codes that sought to deprive African Americans of their rights, including the right to keep and bear arms."

Pet.App.187a. In short, neither law's purpose remotely resembled the "why" of Hawaii's law: a general reduction in gun violence.

Beyond missing the laws' purpose, the Ninth Circuit also split with the Second Circuit on whether the relevant laws even covered the same acts. The Second Circuit found that both Louisiana's and New Jersey's law only prohibited carrying firearms on private lands *not open to the public*. *Antonyuk*, 120 F.4th at 1046. But that prohibition is materially different from restricting *public* carrying of firearms. *Id*. at 1047.

Finally, contrary to the Second Circuit and Judge VanDyke's dissental and the dictates of this Court, the Ninth Circuit did not consider that these two laws, passed nearly a century apart, could be anything but idiosyncratic "outliers that our founders would never have accepted." *Bruen*, 597 U.S. at 30 (cleaned up); PetApp.182a; *Antonyuk*, 120 F.4th at 1044.

The Ninth Circuit just ignored these issues. Pet.App.61a-62a. After skipping most of the inquiry *Bruen* demanded, the court was able to not only find that the historical regulations are "relevantly similar" to Hawaii's law, but that they were "dead ringers." Pet.App.62a. With this, the court found an established historical tradition directly at odds with the text of the Second Amendment and upheld the law. Pet.App.62a.

* * *

Despite relying on the same precedent, the same historical regulations, and interpreting nearly identical laws as the Second Circuit, the Ninth Circuit reached the wrong conclusion. Even if a "historical twin" isn't required, the historical regulations the Ninth Circuit relied on aren't even distant relatives to relevantly similar analogues.

The Court should reject this latest attempt to give a critical constitutional right "second-class" status. *McDonald*, 561 U.S. at 780. Without swift correction, the Ninth Circuit's decision will muddle the clear Second Amendment standards this Court has adopted. And its decision will encourage other states to erode Americans' essential right to keep and bear arms.

II. The Ninth Circuit's "sensitive places" analysis deepens an existing split on the relevant historical era and improperly applied *Bruen*'s analogical inquiry.

On top of creating a split on the default rule, the Ninth Circuit deepened an existing split over the relevant era (*i.e.*, Founding or Reconstruction) to rely on for *Bruen*'s historical inquiry, *see* Pet.20-27, an independent basis for this Court to grant Wolford's petition. Rather than retreading that ground, Amici States instead focus on the analogical inquiry the Ninth Circuit *should* have conducted below.

After *Bruen*, courts must determine whether "the Second Amendment's plain text covers an individual's conduct." 597 U.S. at 17. If it does, "the Constitution presumptively protects that conduct." *Id.* And here, the Amendment's plain text "protects [Wolford's] proposed course of conduct—carrying handguns publicly for self-defense." *Id.* at 32. To justify its sensitive-place restrictions, Hawaii must show that its regulations are "consistent with this Nation's historical tradition of firearm regulation"—only then "may a court conclude that [Wolford's proposed] conduct falls outside the Second Amendment's 'unqualified command.'" *Id.* at 17 (quoting *Konigsberg* v. *State Bar of Cal.*, 366 U.S. 36, 50 n.10 (1961)).

Bruen's historical inquiry varies based on whether a challenged regulation addresses a longstanding or new "societal problem." *Id.* at 27-28. Whether the "societal problem" is old or new, courts must compare modern regulations with similar historical regulations. the only difference is the fit necessary to show that a modern regulation aligns with our Nation's historical tradition of firearm regulation. *See id.* When a modern regulation addresses a longstanding issue that traces back to the Founding era or earlier, the modern and historical regulations should be a close fit. *See id.* at 26-27 (in "straightforward" cases, the "lack of … distinctly similar historical regulation[s]" addressing the same problem or regulations addressing it "through materially different means" is evidence that the modern regulation is unconstitutional).

When evaluating modern regulations addressing new problems "that were unimaginable at the founding," courts must employ "a more nuanced approach." *See id.* at 27-28. In these cases, the fit need not be

so close: the government must identify a "well-established and representative historical *analogue*, not a historical *twin*." *Id.* at 30. *Bruen*'s analogical inquiry requires courts to determine that a modern regulation is "relevantly similar" to a proposed historical analogue—that is, that the "modern and historical regulations impose a *comparable burden* on the right of armed self-defense and … [are] *comparably justified*." *Id.* at 29 (emphasis added). Whether the modern regulation addresses longstanding or new societal problems, discerning "the *original meaning* of the Constitution" remains the guiding light of *Bruen*'s analogical inquiry. *See id.* at 81 (Barrett, J., concurring); *see also id.* at 83 ("[T]oday's decision should not be understood to endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights.").

Bruen assumed that "it [was] settled" that certain locations—including schools, government buildings, and polling places—were "sensitive places" where carrying a firearm "could be prohibited consistent with the Second Amendment." *Id.* at 30. But *Bruen*'s list of "settled" sensitive places *omits* public parks, beaches, and bars and restaurants serving alcohol, so Hawaii must show that its modern sensitive-place regulations are sufficiently analogous to the locations *Bruen* and *Heller* assumed were settled. And *Bruen*'s (and *Heller*'s) omission of these locations from the list of "settled" sensitive places strongly suggests that they haven't historically been viewed as sensitive places.

Bruen cautioned courts "against giving postenactment history more weight than it can rightly bear." *Id.* at 35. A regular course of conduct *can* sometimes "liquidate and settle the meaning of disputed or indeterminate terms and phrases in the Constitution," *id.* (cleaned up), but "postratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text," *id.* at 36 (quoting *Heller* v. *District of Columbia*, 670 F.3d 1244, 1274 n.6 (D.C. Cir. 2011) (Kavanaugh, J.,

dissenting)); *see also* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 13-14 (2019).

Viewed through the proper lens—both in timing and fit—Hawaii failed to carry its burden to show that its restrictions on public carry in public parks and beaches and bars and restaurants serving alcohol are "part of the historical tradition that delimits the outer bounds of the right to keep and bear arms," *Bruen*, 597 U.S. at 19. Yet "the panel distorted *Bruen*'s text-history-and-tradition analysis" by "extracting overbroad principles from strained analogies to unrelated laws" and blessed Hawaii's laws. Pet.App.171a.

A. Hawaii's late-nineteenth century analogues fail to show a historical tradition of public-carry bans in public parks and beaches.

1. *Heller* found that the Second Amendment, ratified in 1791, "codified a preexisting right" that is "rooted in 'the natural right of resistance and self-preservation.'" *Bruen*, 597 U.S. at 71 (Alito, J., concurring) (quoting *Heller*, 554 U.S. at 594). So historical evidence close in time to the Amendment's adoption provides the most relevant insight into its original meaning. *Id.* at 36 (quoting *Heller*, 554 U.S. at 614). Yet Hawaii offers *only limited evidence* of historical regulations of public parks between 1791 and 1868. Because Hawaii bears the burden to rebut Wolford's constitutional right to bear arms in public, including at public parks and beaches, its failure to produce adequate evidence of relevantly similar laws during this period strongly suggests no such tradition existed. *Cf. id.* at 60 (not courts' burden "to sift the historical materials for evidence to sustain" the regulation).

Hawaii only pointed to *two* pre-1868 local ordinances banning public carry in two New York public parks—Central Park in 1857 and Prospect Park in 1866. Pet.App.33a-34a. And it points to *one* 1868 Pennsylvania state law prohibiting public carry in Fairmont Park. Pet.App.34a But "the bare existence of [three] localized restrictions" between 1791 and 1868 "cannot overcome the overwhelming evidence of an otherwise enduring American tradition permitting public carry." *Bruen*, 597 U.S. at 67. Hawaii's failure to point to more than three local restrictions during this time "should be dispositive." Pet.App.193a.

2. Even if Reconstruction-era historical evidence is as probative of the scope of the Second Amendment's right to bear arms as Founding-era evidence,[3] Hawaii still failed to show a historical tradition of relevantly similar public-park restrictions.[4] *Bruen* directs courts to canvas the period from the founding through Reconstruction for similar regulations, always with an eye to "what the Founders understood the Second Amendment to mean." *Atkinson* v. *Garland*, 70 F.4th 1018, 1020 (7th Cir. 2023). Because public parks have existed since the founding, *see Koons* v. *Platkin*, 673 F.Supp.3d 515 639-42 (D.N.J. 2023) (tracing historical evidence for parks, or their analogues, to the establishment of Boston Common in 1634), Hawaii must point to "distinctly similar regulation[s] addressing *that* problem." *Atkinson*, 70 F.4th at 1021 (emphasis added); *see also* Pet.App.193a ("When the same locations that existed at the Founding still exist today, and there is *no* historical tradition of banning carry in those locations at the Founding, that lack of historical regulation must count for something.").

Hawaii's post-1868 evidence fails to establish a historical tradition of "relevantly similar regulations for at least two reasons. *First*, Hawaii's evidence isn't entitled to much weight because nearly all of the local ordinances and state laws it identifies were enacted well after Reconstruction. It identified only a handful of local ordinances passed in the decade after 1868—Golden Gate and Buena Vista Parks (San

[3] This is a shaky proposition at best. *Bruen*, 597 U.S. at 36 (explaining that "because post-Civil War discussions of the right to keep and bear arms 'took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources'" (quoting *Heller*, 554 U.S. at 614)); *see also Atkinson* v. *Garland*, 70 F.4th 1018, 1020 (7th Cir. 2023) ("[T]he pertinent question … is what the Founders understood the Second Amendment to mean" and noting that *Bruen* "cautioned against giving too much weight to laws passed [long] before or after the Founding.").

[4] To sidestep this problem, the panel considered when historical "parks"—which "existed well before the Founding" and had no firearm bans during that time, *see* Pet.App.194—began to resemble "modern parks." Pet.App.33a. But that "historical detour" is highly "suspect." Pet.App.194. While parks may have been "use[d] … differently," there is ample evidence dating back to Boston Common in 1634 that parks have long been used for recreational purposes. Pet.App.194. This Court should reject the panel's "feint to ignore the lack of [analogous] historical regulations." Pet.App.193.

Francisco, 1872), and all public parks in Chicago (1872), South Park, Illinois (1875), and Phoenixville, Pennsylvania (1878). Pet.App.34a. Beyond those laws, Hawaii identified 19 more local ordinances enacted between 1881 and 1899. *See* Pet.App.34a. But three pre-1868 and five more pre-1878 local ordinances are insufficient to show a national historical tradition of regulating firearms in public parks. *See Bruen*, 597 U.S. at 27-28. And the 19 local ordinances between 1881 and 1899 fare no better—indeed, this court rejected "freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights." *Bruen*, 597 U.S. at 83 (Barrett, J., concurring); *see also id.* at 35.

Second, many of these state laws and local ordinances either didn't impose a comparable burden on the public-carry right or weren't comparably justified. *See Bruen*, 597 U.S. at 29. Start with the burden. Some restrictions allowed citizens to carry firearms in parks if they obtained permission beforehand. *See, e.g.*, 2-Add-389 (1891 Springfield, Massachusetts ordinance banning public carry in public parks "except with prior consent of the Board"); 2-Add-417 (1895 Michigan law banning public carry in Detroit parks "without the permission of said commissioners"); 2-Add-423–24 (1896 Rochester, New York ordinance banning public carry in parks "without the consent of [the] Board").[5] So these restrictions imposed less of burden than §134-9.1(a)(9)'s complete ban.

Consider the justifications. Many of the other restrictions were justified on different grounds than the public safety interest that §134-9.1(a)(9) targets. For example, some restrictions appear tailored to prevent unlawful hunting in public parks or to protect wildlife. *See, e.g.*, 1-Add-300 (1881 St. Louis ordinance) (section entitled "protection of birds" prohibits the use or possession of "air gun[s] or other contrivance[s] for ejecting" certain items capable of inflicting injury); 2-Add-379 (1888 St. Paul, Minnesota ordinance) (shall not "carry firearms or shoot birds in any Park" or "kill any animal kept by the

[5] Citations to "Add" are to the addendum included in Respondent's opening brief before the Ninth Circuit. Addendum, Dkt. 6-2, *Wolford, et al.* v. *Lopez*, No. 23-16164 (9th Cir. Oct. 5, 2023).

direction of the Board"); 2-Add-398 (1893 Pittsburgh ordinance) (shall not "carry firearms," "shoot or … set snares for birds, rabbits, squirrels, or fish"); 2-Add-400 (1893 Wilmington, Delaware ordinance) (shall not "carry fire-arms or shoot birds or other animals within the Park").

Other restrictions were tailored to preserving the physical condition of the public parks. *See, e.g.*, 2-Add-398 (1893 Pittsburgh ordinance) (ordinance providing for the "control, maintenance, supervision and preservation of the public parks"); 2-Add-368 (1878 Phoenixville ordinance) (prohibition appears alongside restrictions that prohibit defacing trees, plants, property, signs, and that otherwise preserve or protect the park's physical condition). These distinct justifications diminish the weight of Hawaii's evidence.

All told, Hawaii identifies three arguably similar pre-1868 restrictions that *may* help clarify the Second Amendment's original meaning. *Atkinson*, 70 F.4th at 1020; *but see* Pet.App.195a ("Despite the undeniable presence of recreational-use parks at the Founding," the panel failed to provide "any Founding-era laws prohibiting firearms in those places"—"their failure to do so should be dispositive."). But Hawaii's remaining evidence warrants little weight in *Bruen*'s inquiry, so the Ninth Circuit should have held that Hawaii failed to meet its burden. This Court should grant the petition and demonstrate the proper inquiry.

B. Hawaii's historical evidence fails to show a historical tradition of public-carry bans in bars and restaurants serving alcohol.

1. Taverns and firearms have existed since the Founding, Pet.App.191—Hawaii even identified several pre-Founding laws that regulated militia members and taverns. 1-Add-90 (1746 New Jersey law); 1-Add-97 (1756 Delaware law); 1-Add-112 (1756 Maryland law); 1-Add-151, -154 (1780 Pennsylvania law). So the panel should have required a close fit between §134-9.1(a)(4) and Hawaii's proposed analogues. *Bruen*, 597 U.S. at 26-27; *see also* Pet.App.193 ("lack of historical regulations must count for something").

2. Hawaii identified some similar historical regulations, but it still failed to show a *national* historical tradition of regulating public-carry in bars or restaurants that serve alcohol. *See Bruen*, 597 U.S. at 67. To

start, Hawaii identified three state laws, enacted between 1853 and 1890 in Louisiana and New Mexico, banning firearms in places where alcohol was sold—restrictions that largely mirror §134-9.1(a)(4). Even if these laws are "relevantly similar" to §134-9.1(a)(4)—and they at least facially appear to be[6]—three local restrictions cannot, on their own, "overcome the overwhelming evidence of an otherwise enduring American tradition permitting public carry." *Id.*

To bolster its deficient historical record, Hawaii proposed four more categories of historical analogues, but each category fails to support a tradition of regulation similar to §134-9.1(a)(4). *First*, Hawaii identified four state laws that it claimed broadly restricted public carry in places where people regularly assembled for commercial or social purposes. Those four state laws—passed between 1817 and 1889—banned firearms in ballrooms, social gatherings, or similar places of public assembly. 1-Add-316 (1817 New Orleans law); 1-Add-325 (1870 Texas law); 1-Add-327 (1875 Missouri law); 1-Add-333 (1889 Arizona law). Only the New Orleans law pre-dates Reconstruction. And the "panel's principle of banning firearms in 'crowded places' … runs squarely into *Bruen*'s rejection of Manhattan's designation as a sensitive place 'simply because it is crowded and protected'" by the police. Pet.App.193a (citation omitted).

Second, Hawaii leaned on several laws regulating the use of and access to alcohol by members of the militia. Some of these laws forbid the sale of alcohol to members of the militia or prohibited militia members from getting drunk. *See, e.g.*, 1-Add-90 (1746 New Jersey law forbidding sale of "any strong Liquor" to militia members); 1-Add-112 (1756 Maryland law prohibiting militia members from getting "drunk on any Muster-day"). Others prohibited setting meeting locations near taverns or other locations that sold alcohol. *See, e.g.*, 1-Add-97 (1756 Delaware law). And others excluded "common drunkards" from the militia. *See, e.g.*, 1-Add-191 (1837 Massachusetts law providing measures to exclude "common drunkards" from the militia). The most

[6] 1-Add-262 (1853 New Orleans law prohibiting firearms in "Ball or Fandango … or room adjoining said ball where Liquors are sold"); 1-Add-265 (1879 New Orleans ordinance banning firearms in taverns); 1-Add-253 (1890 Oklahoma territorial law banning firearms in "any place where intoxicating liquors are sold").

that can be said about these laws is that they support a historical tradition of regulating the use of or access to alcohol by militia members. But they don't support the existence of a historical tradition of regulating members of the public from carrying firearms in bars and restaurants, without regard for whether they are consuming alcohol. Pet.App.192a-193a (quoting *United States* v. *Connelly*, 117 F.4th 269, 282 (5th Cir. 2024) (analogues "support, at most, a ban on carrying firearms while an individual is *presently* under the influence")).

Third, Hawaii identified other state laws that regulated the interaction of firearms and alcohol. But these other laws are not remotely analogous to §134-9.1(a)(4). Hawaii pointed to an 1851 Chicago law and an 1858 St. Paul ordinance that forbid granting liquor retailers permits to keep or sell gunpowder. *See* 1-Add-237 (Chicago law); 1-Add-242 (St. Paul ordinance). Regulating permits for liquor retailers to store gunpowder is not similar *at all* to §134-9.1(a)(4).

Fourth, Hawaii identified state laws prohibiting public carry *while intoxicated* and selling firearms to *intoxicated persons*. *See* 1-Add-244 (1867 Kansas law prohibiting carry of firearms while intoxicated); 1-Add-246 (1883 Missouri law) (same); 1-Add-248 (1883 Wisconsin law) (same); 1-Add-255 (1878 Mississippi law banning sale of firearms to intoxicated persons). But §134-9.1(a)(4) completely restricts the public-carry right in bars and restaurants that serve alcohol, even if the person isn't consuming alcohol. so §134-9.1(a)(4) doesn't impose a comparable burden to Hawaii's proposed analogues. *Bruen*, 597 U.S. at 29.

All told, Hawaii identified three arguably similar state laws, but the remaining laws it relies on either imposed different burdens or were justified on different grounds. When states address an issue that has persisted since the Founding, like the public carry of firearms in bars and restaurants serving alcohol, three state laws of questionable relevance fail to establish the *national* historical tradition Hawaii needs to meet its burden. *Bruen*, 597 U.S. at 26-27; *see also* Pet.App.193a ("[P]anel stretched to draw principles from unrelated laws that simply do not support its stated regulatory principle."). Given the absence of arguably similar restrictions, "panel should not have felt licensed to

extract principles from these unrelated laws in the first place." Pet.App.193a.

* * *

Bruen explained that "when it comes to interpreting the Constitution, not all history is created equal." 597 U.S. at 34. Rather, "[c]onstitutional rights are enshrined with the scope they were understood to have *when the people adopted them*." *Id.* (quoting *Heller*, 554 U.S. at 634-35). So evidence closer in time to the Second Amendment's adoption is most relevant for understanding the Amendment's scope. Of course, evidence of historical regulations through the end of the nineteenth century *could* be relevant, but only to the extent that it confirms what prior evidence "already … established." *Id.* at 37 (quoting *Gamble* v. *United States*, 139 S. Ct. 1960, 1976 (2019)).

The Second Amendment protects the right to possess handguns—at home and in public—for self-defense. *McDonald*, 561 U.S. at 767; *Bruen*, 597 U.S. at 70-71. With few exceptions, Hawaii relies on out-of-date historical analogues passed well after Reconstruction—"surely too slender a reed on which to hang a historical tradition of restricting the right to public carry" in the locations challenged here. *See Bruen*, 597 U.S. at 58. Even if Reconstruction-era statutes and local ordinances can provide probative evidence of the Second Amendment's original meaning, Hawaii's evidence *still fails* to identify relevantly similar historical analogues for Act 52's sensitive-place restrictions discussed above. Sweeping aside Hawaii's irrelevant evidence leaves little remaining historical support for Act 52's sensitive-place restrictions, but the Ninth Circuit instead "bless[ed] Hawaii's "creative" attempt to strip away the public carry right *Bruen* secured "on 96.4% of the publicly accessible land in Maui County." Pet.App.171a, 174a.

III. Given the lower courts' active resistance to *Bruen*, this Court's review is sorely needed.

Bruen reassured law-abiding and licensed gun owners that the Second Amendment was no longer a "a second-class right, subject to an

entirely different body of rules than the other Bill of Rights guarantees." 597 U.S. at 70 (citation omitted).

But lower courts have largely failed to follow through on that promise, resorting to manipulative en banc practices, *see, e.g.*, *Duncan* v. *Bonta*, No. 23-55805, 2025 WL 866011, at *41 (9th Cir. Mar. 20, 2025) (Bumatay, J., dissenting) (arguing that original en banc panel's decision to retake possession of the case—despite a new district court decision under new Supreme Court precedent, eight new judges, and five new senior judges on the en banc panel—violated 28 U.S.C. §46(c)), ahistorical interpretations of covered "arms," *see, e.g.*, *Bevis*, 85 F.4th at 1220-21, 1222 (Brennan, J., dissenting) (finding AR-15s weren't "Arms" by relying on abrogated precedent and holding that *Heller* limited covered "Arms" to "those not 'dedicated to military use'" (citation omitted)), and improper calibration of the level of generality for *Bruen*'s analogical inquiry, *see, e.g.*, Pet.App.197a ("panel extracted very broad principles from the historical record that could support the constitutionality of almost any firearms restriction"). Each of these ploys chips away at the scope of citizens' Second Amendment rights, and if unchecked by this Court, *Bruen*'s reassurance will be little more than an empty promise.

CONCLUSION

This Court should grant the petition.

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