July 21, 1995

Honorable Pete T. Cenarrusa
Secretary of State
HAND DELIVERED

Re: Certificate of Review;
Initiative Entitled "Family and Child Protection Act"

Dear Mr. Cenarrusa:

An initiative petition entitled "Family and Child Protection Act" was filed with your office on June 26, 1995. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the timeframe in which this office must respond and the complexity of the legal issues raised in this petition, our review can only identify areas of concern. Further, under the review statute, the Attorney General's recommendations are "advisory only," and the petitioner is free to "accept or reject them in whole or in part."

BALLOT TITLE

Following the filing of the proposed initiative, our office will prepare a short and long ballot title. The ballot title should impartially and straightforwardly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. If petitioner would like to propose language with these standards in mind, we would recommend that he do so. His proposed language will be considered, but our office is responsible for preparing the title.

MATTERS OF SUBSTANTIVE IMPORT

This review of the proposed initiative will be the third time this office has examined these or similar issues. On March 18, 1993, this office issued a certificate of review examining the original version of Proposition 1, the initiative that was narrowly defeated in November of 1994. On November 3, 1993, this office reviewed a revised version of Proposition 1, issuing a more comprehensive opinion. Since the defeat of Proposition 1 at the polls, this new initiative has been filed with the Secretary of State's Office. Some of the language has been revised, and the current proposed initiative is not identical to Proposition 1. Moreover, since the November 3, 1993, opinion, there have been developments in the case law on a number of the issues involved that need to be analyzed. Against this background, this office will review the four sections of the current proposed initiative which are most likely to be subject to a constitutional challenge if the proposed initiative is placed on the ballot and passed. Those four sections are: (1) the minority status provision; (2) the public funding provision; (3) the public school

provision; and (4) the library provision. This office will first, however, address the introductory language contained in the initiative.

I.

INTRODUCTORY LANGUAGE

The title to the proposed section 67-8002 states: "By voting 'yes' on this [i]nitiative . . . ." This is unusual language to be codified. Similar problems exist with the proposed section 67-8003. The language, if added to the Idaho Code, will create confusion and does little to inform the reader about the content of the proposed code section. We would recommend that this sentence be deleted in its entirety.

II.

SECTION 67-8002(a)
MINORITY STATUS

Section 67-8002(a) contains the "minority" status provision. It provides:

> A government agency, board, commission, council, department, district, institution, or elected or appointed officer of the state of Idaho, or of any political subdivision thereof:
>
> (a) Shall not declare any individual or group, solely on the basis of homosexual behavior, to constitute an officially sanctioned or recognized "minority", or otherwise grant to such individual(s) any special, exclusive, or preferential status, treatment, or classification under law.

This section is similar to the "special rights" provision of Proposition 1. It denies special or preferential rights to individuals based on homosexual behavior. But it also, by precluding legal "classifications" based on homosexual behavior, arguably bars any anti-discrimination laws that might be implemented not to confer "special" rights, but rather to protect homosexuals from unequal treatment and discrimination. It may be the case that the proponents of the "Family and Child Protection Act" do not intend to officially, throughout the state, ban laws prohibiting discrimination based on homosexual behavior. However, because the proposed initiative is drafted so broadly, such anti-discrimination laws are probably within its scope. If this was not the intent of the initiative's proponents, they should clarify section 67-8002(a) by expressly stating that the section's restrictions are not intended to ban laws prohibiting discrimination based on homosexual behavior. If, however, such a ban on anti-discrimination laws is intended by this section, the next question becomes whether this ban is constitutional.

A variety of courts have addressed this issue, and the precedent is currently mixed. Two courts, the Colorado Supreme Court and the Fourth District Court of Appeals in California, have found similar prohibitions to anti-discrimination laws to be unconstitutional. *See* Evans v. Romer, 854 P.2d 1270 (Colo. 1993); Citizens for Responsible Behavior v. Superior Court, 2 Cal. Rptr. 2d 648 (Ct. App. 4th Dist. 1991). These courts grounded their holdings essentially on two theories. The first theory is that an official ban on anti-discrimination laws protecting homosexuals makes the state a partner to private discrimination against homosexuals and, in so doing, violates the Equal Protection Clause of the United States Constitution. *See* Citizens for Responsible Behavior, 2 Cal. Rptr. 2d at 658. The second theory is that prohibiting anti-discrimination laws at all levels of government that affect one identifiable group, homosexuals, while allowing all other identifiable groups to seek similar anti-discrimination protection from these same government entities, unconstitutionally denies homosexuals equal access to the political process. *See* Evans v. Romer, 854 P.2d at 1285.

Until this spring, these were the primary cases addressing this issue. However, in May 1995 the Sixth Circuit Court of Appeals addressed a similar issue in Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 54 F.3d 261 (6th Cir. 1995), and concluded that a city charter amendment that rescinded a human rights ordinance protecting homosexuals from discrimination and banning such legal protection in the future was not unconstitutional. The court did not expressly address the state partnership in private discrimination theory. It did, however, unequivocally reject the equal access to the political process argument.

The United States Supreme Court, at the urging of the states of Colorado, Idaho, Virginia and Alabama, has recently agreed to review the Colorado Supreme Court's decision in Evans v. Romer and that appeal is now pending. The United States Supreme Court has, as part of its charter, the final authority to interpret the Federal Constitution. The Court's decision in the Evans case will likely settle the ongoing controversy concerning whether legal bans on anti-discrimination laws that would protect homosexuals, such as that contained in section 67-8002(a), violate an individual's constitutional rights.

There are strong sentiments on both sides of this issue. In light of the fact that a case involving issues like those involved in this initiative is now pending before the United States Supreme Court, it would be premature for this office to opine whether the language proposed in section 67-8002(a) violates the Federal Constitution. The only advice this office can offer is to defer the petition until the Supreme Court decides the Evans case. The United States Supreme Court has the ultimate responsibility of interpreting the Federal Constitution, and the prudent approach is to wait for the Court's decision.[1]

III.

SECTION 67-8002(c)
PUBLIC FUNDING

The next substantive section of the initiative that may pose constitutional problems is section 67-8002(c), the public funding provision. This section provides:

> A government agency, board, commission, council, department, district, institution, or elected or appointed officer of the state of Idaho, or of any political subdivision thereof:
>
> (c) Shall not expend tax dollars or any other public funds to promote, advocate, endorse, or encourage homosexual behavior.

This section prohibits tax dollars or public funds from being spent to "promote, advocate, endorse, or encourage" homosexual behavior. It is not clear whether this proposed initiative is intended to bring within its scope the expenditure of public funds in a manner that might indirectly, as well as directly, encourage homosexual behavior. Also not clear is what is included within the clause "promote, advocate, endorse, or encourage homosexual behavior." Does a film such as *Philadelphia*, which portrays a homosexual relationship in a positive light, promote homosexual behavior and would this section preclude a state university from showing that film in a public facility or renting it with university funds? Is the proposed initiative aimed at something narrower than that scenario? If so, the proponents of the initiative should clarify their intent. In matters involving the First Amendment, which this section clearly implicates, it is critical that laws be narrowly tailored and certain in their terms. An open-ended statute which impacts speech and expression is a prescription for problems under the First Amendment. As written, this section could arguably reach public funding of the arts and humanities, public university funds and the ideas that may be expressed in university classrooms or on university campuses and other publicly funded open forums where a diversity of opinions are expressed.

The United States Supreme Court has issued a number of opinions addressing the expenditure of public funds to subsidize speech and the restrictions that may be placed on that speech. Most recently, in Rosenberger v. Rector and Visitors of the University of Virginia, No. 94-329, 1995 WL 382046 (S. Ct. June 29, 1995), the Court went to extraordinary lengths to harmonize its prior precedent and to explain when a state may or may not place viewpoint restrictions on expression subsidized by public monies.

In Rosenberger, the University of Virginia, a state instrumentality, authorized payments from its Student Activities Fund to outside contractors for the printing costs of

a variety of publications issued by student groups. The university, however, withheld authorization for payments to a printer on behalf of Wide Awake Productions, solely because its student newspaper, "Wide Awake: A Christian Perspective at the University of Virginia," primarily promoted a religious viewpoint on current issues. The Supreme Court held that this viewpoint-based denial of public funds violated the free speech protections contained in the First Amendment of the United States Constitution. In reaching this decision, the Court explained when viewpoint-based restrictions may be placed on the expenditure of public funds:

> We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. When the government disburses private funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee. It does not follow, however, and we did not suggest . . . that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.

1995 WL 382046, at *10 (citations omitted).

In other words, while the government may place restrictions on the speech of a private entity that has been hired to convey a government message, the government may not expend money to encourage a diversity of views and then set up viewpoint-based restrictions on funding of those views. The Court went on to explain that while the government is "not required to subsidize the exercise of fundamental rights," it cannot "discriminate invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas.'" *Id*. (citation omitted).

The Court in Rosenberger invoked a public forum analogy. It explained that public forums can be more "metaphysical" than "spatial or geographic," but that the same First Amendment principles apply. *Id*. at *8. Government subsidies of private expression can create a public forum, even a limited one, and the government, having created this forum, must respect its legitimate boundaries. The state may confine a forum of its own creation to the "limited and legitimate purpose for which it was created" and reserve it for "the discussion of certain topics." *Id*. at *7. However, it may not "exclude speech where its distinction is not reasonable in light of the purpose served by the forum" or where the exclusion is based upon "viewpoint." *Id*.

> Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of the limited forum,

> and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.

Id. By way of example, if the state created a limited forum for the discussion of family issues, it could exclude a group that wanted to use that forum to discuss motorcycles, but it could not constitutionally exclude a group that wanted to discuss family issues from a Christian perspective. *See* Lamb's Chapel v. Center Moriches Union Free School Dist., 508 US —, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993).

Having rejected the university's argument that public forum principles should not be applied to public funding cases, the Supreme Court also rejected the university's position that it should have the discretion to allocate scarce resources as it chose, holding that "the government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity." Rosenberger, 1995 WL 382046, at *10. Comparing the situation to Lamb's Chapel, an open forum case involving physical facilities, the Court noted that, "had the meeting rooms in *Lamb's Chapel* been scarce, had the demand been greater than the supply, our decision would have been no different." *Id*. at *11. The Court reasoned that while it is "incumbent on the State" to "ration or allocate the scarce resources on some acceptable neutral principle," scarcity does not "give the State the right to exercise viewpoint discrimination that is otherwise impermissible." *Id*.

In sum, the government has no obligation to create open or limited open forums either through funding mechanisms or providing facilities or space. However, once it chooses to do so, it may not discriminate against certain viewpoints that are otherwise legitimately within the boundaries of those forums simply because it finds those viewpoints offensive. The First Amendment prohibits this type of viewpoint-based discrimination where public funding of private expression is involved.

Idaho has created any number of open and limited open forums in which it encourages, through public funding, "a diversity of views from private speakers." These range from funding of the arts and humanities to funding for social science research and educational symposiums. Likewise, our state universities, which receive substantial public funds, are traditionally viewed as areas where academic freedom and "creative inquiry" can flourish. Indeed, in this latter context, the Supreme Court has recently noted that "the quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment," and a regulation that casts "disapproval on particular viewpoints" risks the "suppression of free speech and creative inquiry in one of the vital centers for the nation's intellectual life, its college and university campuses." Rosenberger, 1995 WL 382046, at *11.

The proponents of this initiative clearly find certain viewpoints about homosexual behavior patently offensive. However offensive they may find those views, they cannot seek to silence them through an official public funding restriction that cuts into open or limited open forums created by the state and denies funds based on whether the proponents of this initiative agree with the ideas expressed. Under Rosenberger, this is a violation of First Amendment principles. Again, as noted, section 67-8002(c) of the proposed initiative is not drafted with absolute precision, and it is possible its drafters did not intend it to reach this far. If such is the case, the drafters should clarify their intent. Otherwise, absent a narrowing construction by a court, this section would face a serious constitutional challenge.

IV.

SECTION 67-8002(d)
PUBLIC SCHOOLS

Section 67-8002(d) of the proposed initiative contains the public school provision. It provides:

> A government agency, board, commission, council, department, district, institution, or elected or appointed officer of the state of Idaho, or of any political subdivision thereof:
>
> (d) Shall not authorize, approve, or allow the promotion, advocacy, endorsement, or encouragement of homosexual behavior in any officially sanctioned public school class, course, curriculum, activity, program, or event, and shall require that any discussion of such behavior therein occur only on an age-appropriate basis as defined by the local school board.

This section bans speech in "any officially sanctioned public school class, course, curriculum, activity, program, or event" that expresses approval of or advocates, endorses or encourages homosexual behavior. The section also requires that any discussion of such behavior will occur "only on an age-appropriate basis" as defined by the local school board. If this section is placed on the ballot and passes, the challenge that will be made to it will be based, again, on free speech.

At the outset, this office notes that the scope of this section is also not entirely clear. It covers school-sponsored speech in officially sanctioned public school classes, courses and curriculums. But, by also referring to officially sanctioned public school "activit[ies]" and "event[s]," this section could bring within its reach some non-school-sponsored speech, such as statements made at school board meetings or faculty meetings. Such speech would not necessarily be perceived as school-sponsored and, consequently, as explained below, different First Amendment principles would be applied to it. Again,

the drafters of this proposed initiative may only be seeking to restrict school-sponsored speech and not other types of expression, such as views expressed by one adult to another at a school board meeting. If such is the case, the drafters should redraft this section so that it is clear that it is only school-sponsored speech that is impacted.

A. School-Sponsored Speech

Schoolchildren and their instructors, even through the high school level, do not enjoy the same degree of First Amendment protections as the general public. When it comes to speech that could reasonably be perceived as being sponsored by the school, recent opinions from the United States Supreme Court have upheld restrictions on such speech. These recent opinions indicate that, although teachers and students in secondary schools retain some First Amendment protections, teachers' and students' speech which is curriculum-related and appears to carry the school's endorsement—such as statements made by a teacher in a classroom, articles in a student newspaper prepared by a journalism class and statements made by students during school assemblies or school theater productions—may be restricted if the restrictions are both reasonable and further "legitimate pedagogical concerns." Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988).

Kuhlmeier is the leading Supreme Court case in this area. In Kuhlmeier, the school principal had banned from a school newspaper an article concerning divorce and an article addressing teen pregnancy. The principal's decision rested on two grounds: first, one article was inaccurate and second, the school newspaper was available to all students, even freshmen, some of whom the principal deemed too immature to read the articles. The principal's decision was upheld by the Supreme Court.

The Court first determined that the newspaper was not a public forum, but instead part of the school's journalism curriculum. It then rejected the First Amendment challenge stating:

> [E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.

484 U.S. at 273 (footnote omitted). The Court then described "legitimate pedagogical concerns" expansively:

> In addition, a school must be able to take into account the emotional maturity of the intended audience. . . . A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct

> otherwise inconsistent with "the shared values of a civilized social order . . ." or to associate the school with any position other than neutrality on matters of political controversy . . . .

Id. at 272 (citation omitted).

There is clearly no constitutional problem with section 67-8002(d)'s requirement that any discussion of homosexuality within public schools be "age-appropriate." On the other hand, it does not necessarily further a "legitimate pedagogical concern" if a school opens up a political topic for discussion and then bans a viewpoint with which the state disagrees. As the Supreme Court noted in Kuhlmeier, 484 U.S. at 272, a school must "retain the authority to refuse . . . to associate the school with any position other than neutrality on matters of political controversy." Likewise, in Bethel School District No. 403 v. Fraser, 478 U.S. 675, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986), while the Court held a school had acted within its permissible authority in imposing sanctions upon a student in response to a speech he delivered at a school assembly in which he used elaborate and explicit sexual metaphors, the Court also emphasized that the penalties imposed and upheld "were unrelated to any political viewpoint." 478 U.S. at 685. Although the state, the school board and educators have broad discretion to establish and control school curriculum and school-sponsored speech, at some point this discretion can be abused. A court is unlikely to be sympathetic towards restrictions that, rather than furthering legitimate pedagogical concerns, are simply efforts to suppress political viewpoints with which the state disagrees.

Clearly, the balance here is difficult. The proponents of this proposed initiative can make a strong argument that Kuhlmeier and Fraser allow the state to require that the shared values of the community be taught in the public schools and, since homosexual sodomy, like heterosexual sodomy, is illegal in Idaho, s*ee* Idaho Code § 18-6605, the state is acting within its discretion when it prohibits speech that approves of or encourages homosexual behavior. Similarly, the proponents of this initiative can point to Kuhlmeier's holding that a school can refuse to sponsor speech advocating "irresponsible sex" and, again, argue that, given the criminal code's prohibition against sodomy, the speech restrictions contained in section 67-8002(d) are constitutional. The initiative's proponents can further argue that the state can no doubt prohibit teachers in classrooms from encouraging violations of the Idaho Code, including Idaho Code § 18-6605, the sodomy statute.

The counterposition is that, rather than furthering a legitimate pedagogical concern, the proponents of this proposed initiative are instead using the public schools to promote their own political agenda and silence political viewpoints on homosexual issues with which they disagree. In this regard, it is significant that section 67-8002(d) does not specifically refer to the sodomy statute and the behavior therein proscribed, but instead

prohibits speech that "endorse[s]" or "approve[s]" of "homosexual behavior," generally. This could prohibit a classroom discussion of both sides of certain current political issues such as homosexuals in the military or the pros and cons of this initiative itself. A teacher's concern might be that a frank discussion of both sides of these issues could be perceived as "endors[ing]" or expressing "approv[al]" of "homosexual behavior."

There is a legitimate question regarding the constitutionality of the proposed initiative's public school section. Given the stated purpose of this initiative, prohibiting government promotion of the "so-called 'homosexual rights' agenda" and the potentially broad reach of the public school section, a reviewing court could reasonably conclude that the restrictions are not an effort to further "legitimate pedagogical concerns," but are instead an attempt to dictate a political position in the public classrooms throughout the state. This question may be a close one. However, since this initiative, if placed on the ballot and passed, will likely be challenged, its drafters may want to consider narrowing the scope of the public school section so that it restricts only school-sponsored speech that directly advocates violations of Idaho Code § 18-6605, the sodomy statute.

B. Non-School-Sponsored Speech

As noted, the proposed initiative's restrictions extend not specifically to "school-sponsored" speech, but to speech at any "officially sanctioned public school . . . activity . . . [or] event" that endorses homosexual behavior. This phrase could be read as being broader than actual school-sponsored expression. It could encompass, for example, statements made by teachers at school board meetings and faculty meetings. Every statement made at such meetings is not reasonably perceived as bearing the "imprimatur of the school" and, consequently, being non-school-sponsored, the state's leeway in restricting it is much narrower.

The government's authority to limit school-sponsored speech to further legitimate pedagogical concerns does not extend to speech that is not sponsored by the school. Public school employees do not lose their First Amendment rights merely because they work for the state. *See* Pickering v. Board of Education of Township High School District 205, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968) (teacher cannot be fired for letter to editor of local newspaper criticizing school board); City of Madison v. Wis. Emp. Rel. Com'm, 429 U.S. 167, 97 S. Ct. 421, 50 L. Ed. 2d 376 (1976) (non-union teacher cannot be prohibited from speaking on negotiation issue at open school board meeting); National Gay Task Force v. Board of Education of the City of Oklahoma, 729 F.2d 1270 (10th Cir. 1984), *aff'd* 470 U.S. 903, 105 S. Ct. 1858, 84 L. Ed. 2d 776 (1985) (teacher cannot be punished for publicly advocating the repeal of an anti-sodomy law). To the extent that the proposed initiative encompasses speech that is not school-sponsored, such speech cannot constitutionally be restricted in this manner. Discussion and opinion on homosexual issues that do not bear the imprimatur of the state cannot be

censored by the state. It may be that the drafters of this section did not intend to restrict speech that is not sponsored by a school. If so, they can clarify their intent by adding language that states that section 67-8002(d) applies only to school-sponsored expression. If, however, their goal is to restrict all expression on this topic, at any school activity or event, regardless of whether the expression is reasonably perceived to be sponsored by the school, First Amendment considerations would, in all probability, prevail.

V.

SECTION 67-8002(f)
PUBLIC LIBRARIES

Finally, we turn to section 67-8002(f), the public library provision. This provision states:

> A government agency, board, commission, council, department, district, institution, or elected or appointed officer of the state of Idaho, or of any political subdivision thereof:
>
> (f) Shall not, in a public library, except with the direct supervision or consent of a parent or legal guardian, make available to a minor child any publication which promotes, advocates, endorses, or encourages homosexual behavior, or which attempts to persuade minor children that homosexual behavior is a positive, normal, healthy, or socially acceptable activity or lifestyle.

This provision limits a minor's access, in public libraries, to publications that endorse or encourage homosexual behavior or express the viewpoint that a homosexual "lifestyle" can be "positive, normal, healthy, or socially acceptable." Minors are not, under the section, denied all access to such materials. Rather, their access is impeded by the requirement that they either be supervised by a parent or legal guardian when viewing such materials or, at least, obtain parental consent. This section of the initiative probably violates the First Amendment under both the overbreadth and vagueness doctrines.

Turning first to the overbreadth doctrine, a statute restricting free expression is unconstitutionally overbroad if it reaches protected speech. In this regard, a few points need to be made at the outset. Free speech includes not only expression of ideas, but also access to information and ideas. Moreover, although the First Amendment rights of minors are not co-extensive with those of adults, they are substantial. For example, in Board of Education v. Pico, 457 U.S. 853, 102 S. Ct. 2799, 73 L. Ed. 2d 435 (1982), the Supreme Court held unconstitutional a school board's decision to remove from school libraries books that contained ideas the board found offensive. In reaching its decision, the Court emphasized that minors have First Amendment rights to receive information

and ideas and to "remain free to inquire, to study and to evaluate, to gain new maturity and understanding." 457 U.S. at 868 (citation and footnote omitted).

This is not to say that minors have a right to all information. To the contrary, material that is obscene is afforded no First Amendment protection and, in Ginsberg v. New York, 390 U.S. 629, 88 S. Ct. 1274, 20 L. Ed. 2d (1968), the Supreme Court held that states may constitutionally employ a variable obscenity standard which restricts the rights of minors to obtain sexually related materials that are not obscene as to adults, but are obscene as to minors. For example, a number of courts have upheld display statutes that restrict the display of materials that are obscene as to minors. *See* American Booksellers v. Webb, 919 F.2d 1493 (11th Cir. 1990); Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520 (Tenn. 1993). The display statutes, however, were directed at obscene material, narrowly tailored and not applied to materials containing serious literary, artistic, political or scientific value for a reasonable 17-year-old minor. *Id*. Likewise, restrictions on speech that were not directed at obscenity, even under the variable standard applied to minors, have been struck down. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975) (ordinance forbidding display in drive-in theaters of films containing nudity invalidated as all nudity cannot be deemed obscene even as to minors); Rushia v. Town of Ashburnham, 582 F. Supp. 900 (D. Mass. 1983) (town bylaw unconstitutional because it was not limited to materials obscene as to minors); Allied Artists Pictures Corp. v. Alford, 410 F. Supp. 1348 (W.D. Tenn. 1976) (ordinance overbroad because it prohibited exposing juveniles to films containing language that was not obscene as to juveniles).

Section (f) of the proposed initiative is not necessarily aimed at material obscene as to minors. Granted, the publications it addresses will involve issues related to sex and homosexuality, but not every discussion of those issues will be obscene or even erotic. The public library restriction is not so much directed at material that is somehow, under a variable obscenity standard, age-inappropriate, but rather at material that contains ideas the proponents of this initiative find offensive. It is precisely this type of restriction of the free exercise of First Amendment rights that the Constitution forbids.

In conjunction with the issue of overbreadth, the question arises as to whether this section can be narrowly construed, avoiding an overbreadth problem. The United States Supreme Court has stated that courts are required to construe challenged statutes narrowly, and that if a statute is "readily susceptible" to a narrowing construction that would make it constitutional, it will be upheld. Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975). The key to this principle is that the statute "must be 'readily susceptible' to limitation" and a court "will not rewrite a state law to conform it to constitutional requirements." American Booksellers v. Webb, 919 F.2d 1493, 1500 (11th Cir. 1990).

Since obscenity does not appear to be the concern of this section, but rather it is the expression of a particular viewpoint on homosexual issues that is targeted, a court may well have difficulty limiting this section to obscene speech that both expresses approval of a homosexual lifestyle and that also lacks serious artistic, literary, political or scientific value. A court would more likely conclude that the section is not "readily susceptible" to a limiting construction that does not involve essentially rewriting the provision.

The public library provision faces an additional problem under the vagueness doctrine. In the First Amendment context, laws restricting expression must not be so vague or so loose as to leave those who apply them too much discretion. Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 88 S. Ct. 1298, 20 L. Ed. 2d 225 (1968). As the Supreme Court has noted:

> Vague standards, unless narrowed by interpretation, encourage erratic administration whether the censor be administrative or judicial; 'individual impressions become the yardstick of action, and result in regulation in accordance with the beliefs of the censor rather than regulation by law.'

390 U.S. at 685 (citations omitted). Added to this is the risk that erratic standards cause expression not intended to be within the scope of the legal restriction to be impermissibly "chilled." Thus, in Interstate Circuit, Inc., the Supreme Court held unconstitutionally vague an ordinance providing for the classification of films as suitable or unsuitable for young persons, concluding the ordinance lacked sufficient precision and standards.

The public library section raises vagueness concerns. Preliminarily, it is unclear from its terms who is to determine what publications endorse homosexual behavior. Does each librarian make the determination or will an administrative body be the decision maker? In either case, which or whose standards are to be used? Does a psychology textbook that states that homosexuality is no longer considered a psychological disorder thereby "endorse" homosexual behavior or seek to "persuade" minors who may read such a text that homosexuality can be an acceptable lifestyle? This section lacks the standards and precision that would allow it to withstand a constitutional attack based upon vagueness.

The proposed initiative does not deny all access by minors to the materials addressed by this section, but instead requires parental supervision or consent. However, precedent suggests this will not cure the First Amendment problems. Interstate Circuit, Inc., for example, involved a classification system in which minors apparently could view films classified as "unsuitable for youth" so long as a parent accompanied them. The ordinance was nevertheless struck down.

More importantly, minors' access to the materials involved here is burdened, not, as noted, because the materials are age-inappropriate or obscene under a variable obscenity standard, but rather because the proponents of this initiative find offensive the ideas contained within those materials. If library material is vulgar, obscene or otherwise age-inappropriate for minors, with proper standards and tailoring, the state may enact laws that restrict or even prohibit minors' access to those materials. What the state may not do is establish unique burdens barring minors' access to library materials solely because the state disagrees with a viewpoint contained therein. This type of viewpoint-based censorship has been determined to be unconstitutional.

VI.

CONCLUSION

In conclusion, important constitutional issues raised by the "minority status" provision are now pending before the United States Supreme Court, and these issues should be resolved in the near future. The First Amendment questions implicated by the public funding, public school and public library provisions are substantial. The public funding and public library provisions are particularly vulnerable to attack. To increase the likelihood that these provisions would be able to withstand a constitutional attack on First Amendment grounds, the drafters may wish to modify the language of this proposed initiative to address the concerns discussed in this opinion.

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style and matters of substantive import and that the recommendations set forth above have been communicated to petitioner Kelly Walton by deposit in the U.S. Mail and by telefax a copy of this certificate of review.

Yours very truly,

ALAN G. LANCE
Attorney General

Analysis by:
MARGARET R. HUGHES
Deputy Attorney General
Civil Litigation Division

[1] The Idaho Constitution could be construed differently from the United States Constitution. There is, however, currently no direct precedent under the Idaho Constitution indicating how the Idaho Supreme Court would rule on these issues or if the Idaho Supreme Court would choose to vary its analysis from that of the United States Supreme Court.