STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

September 2, 2016

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

Re: Certificate of Review
Proposed Initiative Related to Legalization of Medical Use of Marijuana

Dear Secretary of State Denney:

An initiative petition was filed with your office on August 8, 2016. 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 issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only." The petitioners are free to "accept or reject them in whole or in part." Due to the available resources and limited time for performing the reviews, we did not communicate directly with the petitioner as part of the review process. The opinions expressed in this review are only those that may affect the legality of the initiative. This office offers no opinion with regard to the policy issues raised by the proposed initiative.

BALLOT TITLES

Following the filing of the proposed initiative, this office will prepare short and long ballot titles. The ballot titles must impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While our office prepares titles

P.O. Box 83720, Boise, Idaho 83720-0010
Telephone: (208) 334-2400, FAX: (208) 854-8071
Located at 700 W. Jefferson Street, Suite 210

for the initiative, petitioners may submit proposed titles for consideration. Any proposed titles should be consistent with the standard set forth above.

MATTERS OF SUBSTANTIVE IMPORT

A. Summary of the Initiative

The initiative, which is self-titled the "Idaho Medical Marijuana Act" (hereafter "Act") declares that persons engaged in the use, possession, manufacture, sale, and/or distribution of marijuana to persons suffering from qualifying medical conditions, as authorized by the procedures established in the Act, are protected from arrest, prosecution, property forfeiture, and criminal and other penalties under Idaho law. A summary of the Act's provisions, tentatively and more accurately[1] denominated as Idaho Code § 39-9300, *et seq.*, begins with its purpose, which is:

> THEREFORE the purpose of this chapter is to protect from arrest, prosecution, property forfeiture, and criminal and all other penalties, those patients who use marijuana to alleviate suffering from qualifying medical conditions, as well as their physicians, primary caregivers, and those who are authorized to produce marijuana for medical purposes and to facilitate the availability in Idaho for legal medical use.

Prop. I.C. § 39-9302.[2]

In general, the Act authorizes the Idaho Department of Health and Welfare ("Department") to establish a comprehensive registration system for instituting and maintaining the production and dispensing of marijuana for use by persons diagnosed with a qualifying medical condition. Prop. I.C. § 39-9305. The Act directs the Department to approve or deny applications for "registry identification cards" presented by "qualifying patients," their "designated caregivers," "agents" of "medical marijuana organizations," and "growers." Prop. I.C. §§ 39-9303(3), 9303(18), 9307-9312. The Department is required to issue "registration certificates" to qualifying "medical marijuana organizations," defined as "medical marijuana production facilities," "medical marijuana dispensaries," and "safety compliance facilities." Prop. I.C. §§ 39-9303(12), 9303(17), 9307, 9312, 9314. The Act permits, without state, civil or

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[1] The Act incorrectly designates its tentative statutory provisions as I.C. § 39-9200, *et seq.* In 2015, the Idaho Legislature enacted the "Idaho Direct Primary Care Act" under I.C. § 39-9200, *et seq.* Therefore, the Act's statutory citations to I.C. § 39-9200, *et seq* will be modified without further explanation to reflect that the Act proposes a new chapter 93 of title 39.

[2] References to "proposed" I.C. § 39-9300, *et seq.*, will read, "Prop. I.C. § 39-9300," etc.

criminal sanctions, marijuana to be produced by medical marijuana production facilities throughout the state (and qualified patients and/or designated caregivers and growers whose registry identification cards allow them to "cultivate" marijuana), tested for potency and contaminants at safety compliance facilities, and transported to medical marijuana dispensaries for sale to qualifying patients and/or their designated caregivers.

The Act provides that: (1) qualifying patients ("patients") may possess up to twenty-four (24) ounces of usable marijuana and, if a patient's registry identification card states that the patient "is exempt from criminal penalties for cultivating marijuana," the patient may also possess up to twelve (12) marijuana plants in an enclosed locked facility, etc., and any marijuana produced from those plants, (2) designated caregivers ("caregivers") may assist up to three (3) patients' medical use of marijuana, and may independently possess, for each patient assisted, the same amounts of marijuana described above, but not exceeding a total of thirty-six (36) marijuana plants (assuming the caregiver's registry identification card bears a "cultivator" exemption). Prop. I.C. § 39-9303(2). Additionally, a "grower" "can grow for up to four (4) patients, including themselves." Prop. I.C. § 39-9315.

In order to become a patient, a person must have a "practitioner" (defined as a person authorized to prescribe drugs pursuant to the Medical Practice Act (I.C. § 18-5400, *et seq.*)) provide a "written recommendation" stating that, in the practitioner's professional opinion, the patient "is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the patient's qualifying medical condition or symptoms associated with the qualifying medical condition." Prop. I.C. §§ 39-9303(15), 9303(23). The "recommendation" must specify the patient's qualifying medical condition and may only be signed (and dated) in the course of a "practitioner-patient relationship after the practitioner has completed a full assessment of the qualifying patient's medical history and current medical condition." Prop. I.C. § 39-9303(23). Minors are also entitled to be issued registry identification cards as patients under certain criteria. Prop. I.C. § 39-9309(2).

A "qualifying medical condition" includes, but is not limited to, those "chronic [3] diseases and conditions" specifically listed (such as cancer,

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[3] Merriam-Webster's Learner's Dictionary defines "chronic" as: medical
: continuing or occurring again and again for a long time
: happening or existing frequently or most of the time
: always or often doing something specified
Merriam Webster's Learner's Dictionary, http://www.merriam-webster.com/dictionary/chronic (Aug. 30, 2016).

glaucoma, HIV, AIDS, "agitation of Alzheimer's disease," post-traumatic stress syndrome, etc.), but also any treatment of those conditions "that produces cachexia or wasting syndrome and chronic pain, nausea, seizures, including those characteristic of epilepsy, or persistent muscle spasms, including those characteristic of multiple sclerosis," any terminal illness with life expectancy of less than twelve (12) months, or "[a]ny other medical condition or its treatment added by the Department." Prop. I.C. § 39-9303(4). The Act also has what appears to be a "catch-all" provision, which states that "[a]ny condition deemed necessary by a licensed practitioner; or acute conditions" are also qualifying medical conditions. Prop. I.C. § 39-9303(4)(d).

"Agents" are defined as principal officers, board members, employees, or volunteers of a medical marijuana organization who are at least twenty-one (21) years old and who have "not been convicted of a felony offense as defined." Prop. I.C. § 39-9303(1). A "felony offense" means a felony which is either a "violent crime" or a violation of a state or federal controlled substance law. Prop. I.C. § 39-9303(9). Caregivers are required to be at least twenty-one (21) years old, "agree to assist no more than three (3) qualifying patients at the same time, and cannot have been convicted of a felony as defined herein. Prop. I.C. § 39-9303(7). A "grower" "means a person who has been designated by a patient to be their medical marijuana grower, to be registered with the Department of Health and Welfare; must be at least 18 years of age; must have a valid US or federally issued photo I.D.; must not have been convicted of any class A or B felony[4] for manufacture or delivery of a controlled substance in the previous two (2) years; not growing for more than four (4) patients including him or herself." Prop. § 39-9303(5) (verbatim).

Patients, caregivers, growers, and agents may apply for registry identification cards. Prop. I.C. §§ 39-9307 (agents); 9308 (patients, caregivers, and growers). To obtain a registry identification card, a patient[5] must submit a written commendation issued by a practitioner within the last ninety (90) days, application and fee, with identifying information pertaining to the patient, the patient's practitioner, and the patient's caregiver. Prop. § 39-9308(1).[6] The Department is obligated to verify the information in an application (or renewal request) for a registry identification card within ten (10) days after receiving it, and must issue a card within five (5) more days thereafter. Prop. I.C. § 39-9309(1). A registry identification card must include

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[4] Idaho does not classify its felony crimes as class A or B; therefore, that aspect of the felony condition should be deleted.

[5] Even though Prop. I.C. § 39-9308 is entitled "Registration of Qualifying Patients, Designated Caregivers, and Growers," the requirements for submitting an application for a registry identification card appear to relate solely to patients. *See* Prop. I.C. § 39-9308(1).

[6] The Act also allows "visiting qualifying patients" from other states to possess medical marijuana while in Idaho. Prop. I.C. § 39-9303(22).

a "random twenty (20) digit alphanumeric identification number that is unique to the cardholder." Prop. I.C. § 39-9310(1)(d). Registry identification cards issued to agents of medical marijuana organizations must include a "statement that the cardholder is an agent of a medical marijuana dispensary, a medical marijuana production facility, or a safety compliance facility." Prop. I.C. § 39-9310(2)(b). The Department may deny an application or renewal request for a registry identification card for failing to meet the requirements of the Act, and must provide written notice of its reasons for doing so. Prop. I.C. § 39-9311. Registry identification cards expire after one (1) year, and may be renewed for a fee. Prop. I.C. § 39-9312.

Medical marijuana organizations must have operating documents that include procedures for the oversight of the organization and accurate recordkeeping, and are required to implement security measures to deter theft of marijuana and unauthorized entrance into areas containing marijuana. Prop. I.C. § 39-9314. Medical marijuana production facilities must restrict marijuana cultivation, harvesting, etc., within an enclosed, locked facility only accessible to registered agents. Prop. I.C. § 39-9314(3). Medical marijuana production facilities and dispensaries "may acquire usable marijuana or marijuana plants from a registered qualifying patient or a registered designated caregiver only if the . . . patient or . . . caregiver receives no compensation for the marijuana." Prop. I.C. § 39-9314(4).

The Department is required to "establish and maintain a verification system for use by law enforcement personnel and registered medical marijuana organization agents to verify registry identification cards." Prop. I.C. § 39-9316(1). Patients are required to notify the Department within ten (10) days of any change in name, address, designated caregiver, and their preference regarding who may cultivate marijuana for them, and, upon receipt of such notice, the Department has ten (10) days to issue a new registry identification card. Prop. I.C. § 39-9317(1), (4). If the patient changes the caregiver, the Department must notify the former caregiver that "his duties and rights . . . for the qualifying patient expire fifteen (15) days after the department sends notification." Prop. I.C. § 39-9317(6).

The Department is required to keep all records and information received pursuant to the Act confidential, and any dispensing of information by medical marijuana organizations or the Department must identify cardholders and such organizations by their registry identification numbers and not by name or other identifying information. Prop. I.C. § 39-9319(1), (2).

The "Limitations" provision, Prop. I.C. § 39-9304, states that, when any civil, criminal, or other penalty is sought to be imposed on a patient (or visiting

patient) for operating a motor vehicle (or boat, etc.) while under the influence of marijuana, the patient "may not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana without noticeable actions of impairment including slurred speech and lethargic movements." Prop. I.C. § 39-9304(4). This provision presents the following legal concerns: (1) Idaho's driving under the influence laws already address the need for prosecutors to prove "impairment" regardless of what substances (including legally prescribed drugs) caused such impairment; (2) the provision is based on what may be an incorrect assumption that persons are currently "considered to be under the influence of marijuana *solely* because of the presence of metabolites or components of marijuana"; and (3) requiring the state to prove impairment of patients by showing *both* slurred speech *and* lethargic movements will increase the State's burden in driving under the influence cases by specifically defining how the offense must be proved, and may preclude successful prosecution of defendants who choose not to speak at all.

Prop. I.C. § 39-9306(4) states, "No county, city, or legislature may enact a moratorium in any city, county, or state[.]" Not only is the provision vague about what type of moratorium it precludes, but such a provision appears to be an unlawful attempt to bind future legislatures. As explained by the Idaho Supreme Court in Gibbons v. Cenarrusa, 140 Idaho 316, 320, 92 P.3d 1063, 1067 (2002):

> The legislature cannot violate the reserved right of the people to propose laws and enact them at the polls. That process is, in the language of Article III, Section 1 of the Constitution, "independent of the legislature." However, as determined in *Luker* [*v. Curtis,* 64 Idaho 703, 136 P.2d 978 (1943)], *once* a law is enacted in the initiative process it is like any other law. It may be amended or repealed by the legislature or subsequent initiative. . . . Initiatives and laws passed by the legislature are on equal footing. The legislature may change the effective date of any law it passes. This legislative right includes repeal of an initiative, which once enacted, is treated as "other ordinary legislative measures."

Prop. I.C. § 39-9320 creates a rebuttable presumption that patients, caregivers, and growers are deemed to be lawfully engaged in the medical use of marijuana if their conduct complies with the Act. Significantly, the proposed statute provides that patients, caregivers, growers, and practitioners are not subject to arrest, prosecution, or penalty in any manner, or denial of any right or privilege, including any civil penalty or disciplinary action by a

court or occupational or professional licensing board or bureau for conduct authorized by the Act. *See generally* Prop. I.C. § 39-9320. Practitioners are protected from sanctions for conduct "based solely on providing written recommendations" (with the required diagnosis), but may be subject to sanction by a professional licensing board for "failing to properly evaluate a patient's medical condition or otherwise violating the standard or care for evaluating medical conditions." Prop. I.C. § 39-9320(4). No person is subject to criminal or civil sanctions for selling marijuana paraphernalia to a cardholder or medical marijuana organization, being in the presence of "the medical use of marijuana," or assisting a patient as authorized by the Act. Prop. I.C. § 39-9320(5).

The Act makes medical marijuana organizations and their agents immune from criminal and civil sanctions, and searches or inspections, if their conduct complies with the Act. Prop. I.C. § 39-9320(6)-(8). Further, the mere possession of, or application for, a registry identification card "may not constitute probable cause or reasonable suspicion, nor may it be used to support the search of the person or property of the person possessing or applying for the registry identification card." Prop. I.C. § 39-9320(10). Based upon the discussion that follows regarding the relationship between the Act and federal law, such a provision would have no impact upon a probable cause determination made in compliance with the Fourth Amendment of the United States Constitution.

Prop. I.C. § 39-9320(11) states that "[n]o school, landlord, or employer may be penalized or denied any benefit under state law for enrolling, leasing to, or employing a cardholder," or leasing to a registered medical marijuana organization. However, the Act "does not prevent the imposition of any civil, criminal, or other penalties" for possession or engaging in the medical use of marijuana on a school bus, pre-school, primary, or secondary school grounds or in any correctional facility, nor does it allow smoking marijuana on any other form of public transportation or in any public place. Prop. I.C. § 39-9304.

Prop. I.C. § 39-9320(13) reads:

> A qualifying patient, designated caregiver, or grower may not be subject to criminal penalty, or have his or her parental rights and/or residential time with a child restricted due to his or her medical use of marijuana, or his or her child's medical use of marijuana, in compliance with the terms of this chapter, absent written finding supported by substantial evidence that such use

> has resulted in a long-term impairment that interferes with the performance of parenting functions.

In short, Prop. I.C. § 39-9320(13) precludes criminal penalties and other parental-related sanctions based on a patient's medical use of marijuana in situations lacking substantial evidence of "long-term impairment" that interferes with parenting functions. More precisely, if a patient's "short-term" marijuana impairment resulted in harm or endangerment to the patient's child, the patient could "not be subject to criminal penalty" or parental-related sanction. For example, a patient could not be convicted of child endangerment based on driving under the influence of marijuana (with a child in the vehicle) if the patient was impaired by marijuana for only the "short-term." Idaho law currently recognizes no "short-term impairment" exception to its criminal or parental-related laws for any other substance, whether legally prescribed or not.

The Department is given the task of making extensive rules, pursuant to the Idaho Administrative Procedure Act ("IDAPA") for implementing the Act's measures, including rules for: the form and content of applications and renewals, the prevention of theft of marijuana and security at facilities, oversight, recordkeeping, safety, and safe and accurate packaging and labeling of medical marijuana. Prop. I.C. § 39-9305. Notably, the provision requires that, in establishing application and renewal fees for registry identification cards and registration certificates, "[t]he total amount of all fees must generate revenues sufficient to implement and administer this chapter, except fee revenue may be offset or supplemented by private donations." Prop. I.C. § 39-9305(1)(e)(i). The same self-funding requirement is repeated in Prop. I.C. § 39-9305(1)(e)(iii). A "medical marijuana fund" is established by Prop. I.C. § 39-9326, consisting of "fees collected, civil penalties imposed, and private donations received under this chapter," and is to be administered by the Department.

Under the heading "Affirmative Defense," the Act provides that patients, visiting patients, growers, and caregivers "may assert the medical purpose for using marijuana as a defense to any prosecution of an offense involving marijuana intended for a qualifying patient's or visiting qualifying patient's medical use, and this defense must be presumed valid if," several criteria are met. Prop. I.C. § 39-9321(1). If evidence shows that the listed criteria are met, the defense "must be presumed valid." *Id.* Further, Prop. I.C. § 39-9321(2) allows a person to assert the "medical purpose for using marijuana in a motion to dismiss, and the charges must be dismissed following an evidentiary hearing if the person shows the elements listed in subsection (1)." The provision gives defendants the unprecedented

opportunity of having an affirmative defense be the basis not only of acquittal at trial, but dismissal prior to trial. Finally, if the patient, grower, or caregiver, succeeds in demonstrating a medical purpose for the patient's use of marijuana, there can be no disciplinary action by a court or occupational or professional licensing board, etc. Prop. I.C. § 39-9321(3).

Under the heading, "Discrimination Prohibited," the Act makes it illegal for schools, landlords, nursing facilities, intermediate care facilities, hospice houses, hospitals, etc., to penalize a person solely for his status as a cardholder, unless to do so would violate federal law or cause the entity to lose a monetary or licensing benefit under federal law. Prop. I.C. § 39-9322(1). Prop. I.C. § 39-9322(5) further states:

> In any criminal, child protection, and family law proceedings, allegations of neglect or child endangerment by a qualified patient or qualified caregiver for conduct allowed under this chapter are not admissible to the court, without substantial evidence that the person's behavior creates an unreasonable danger to the safety of the minor(s) as established by written findings of clear and convincing evidence that such neglect or child endangerment is a direct outcome of a qualifying patient or caregiver's medical use or cultivation of marijuana.

Under Prop. I.C. § 39-9322(5), before evidence of medical marijuana use could be admitted in a court proceeding, the court would have to determine whether, by clear and convincing evidence, the neglect or endangerment of a child was directly caused by a patient's or caregiver's medical use of marijuana. Only once such a high evidentiary standard has been met could a court allow evidence that the patient or caregiver used medical marijuana. Requiring a court to make such a written finding during an ongoing court proceeding would constitute, in effect, a trial within a trial. Such an admissibility finding would necessarily include one of the ultimate determinations -- that the child has been neglected or endangered. Additionally, the "clear and convincing" threshold for the admission of evidence runs counter to the "relevance" standard Idaho courts generally apply. *See* I.R.E. 401 ("All relevant evidence is admissible except as otherwise provided by these rules or by other rules applicable in the courts of this state.").

Prop. I.C. § 39-9303 (emphasis added), entitled "Acts Not Required – Acts Not Prohibited" states in part:

> (1) Nothing in this chapter requires:

> (c) An employer to allow the ingestion of marijuana in any workplace or any employee to work while under the influence of marijuana, *except* a registered qualifying patient may not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana without written findings of substantial impairment.

The language of Prop. I.C. § 39-9303(1)(c) lacks specificity about the type of proceedings it applies to, whether criminal, civil, or administrative. As an "exception to an exception" within the Idaho Medical Marijuana Act, the provision may conflict with existing Idaho employment law and/or contractual agreements in regard to employees' use of controlled substances in, or affecting, the workplace.

The Act has measures for revoking registry identification cards and registration certificates for violations of its provisions, including notice and confidentiality requirements. Prop. I.C. §§ 39-9324, 9325. Under Prop. I.C. § 39-9324(7), it is a "misdemeanor for any person, including an employee or official of the Department or another state agency or local government, to breach the confidentiality of information obtained pursuant to this chapter." Subsection (8) of Prop. I.C. § 39-9324 reads, "[a] person who intentionally makes a false statement to a law enforcement official about any fact or circumstance relating to the medical use of marijuana to avoid arrest or prosecution is guilty of an infraction . . . . It is very questionable whether the phrase "any fact or circumstance relating to the medical use of marijuana" would withstand a "void for vagueness" constitutional challenge in court.

If the Department fails to adopt rules to implement the Act within one hundred twenty (120) days of the Act's enactment, any citizen may commence a mandamus action to compel compliance. Prop. I.C. § 39-9327(1)-(2). If the Department fails to issue or deny an application or renewal for a registry identification card within forty-five (45) days after submission of such application, a copy of the application is deemed a valid registry identification card. Prop. I.C. § 39-9327(3). Further, if the Department is not accepting applications or has not adopted rules for applications within one hundred forty (140) days after enactment of the Act, a "notarized statement" by a patient containing the information required in an application, with a written recommendation issued by a practitioner, etc., will be deemed a valid registry identification card. Prop. I.C. § 39-9327(4). The Department must submit an annual public report to the legislature with information set out in Prop. I.C. § 39-9318.

Notably, the Act does not contain a "Severability Clause" stating that if any of its provisions are declared invalid for any reason, such a declaration would not affect the validity of the remaining portions of the Act.

In sum:

1. The Act generally decriminalizes under state law the possession of up to twenty-four (24) ounces of marijuana and (if authorized as a "cultivator") twelve (12) marijuana plants for patients, and the same amounts (up to three (3)) per patient for caregivers and growers. For comparison, possession of twenty-four (24) ounces of marijuana qualifies as "trafficking in marijuana" and is punishable by up to fifteen (15) years in prison with a mandatory minimum sentence of one (1) year imprisonment. I.C. § 37-2732B(a)(1)(A).

2. The Act protects agents of medical marijuana production facilities, medical marijuana dispensaries, and safety compliance facilities from civil forfeitures and penalties under state law, and makes it illegal under state law to discriminate against all such participants in regard to education, housing, and employment. Notably, the Act grants extensive protections from civil liability, criminal punishment, or child protect protective actions not granted to users of prescription drugs or alcohol.

3. Patients certified by practitioners as having qualifying medical conditions may obtain marijuana for medicinal use from their (or their caregiver's) cultivation of marijuana (if authorized on the registry identification card), a grower, or a medical marijuana dispensary.

4. Patients, caregivers, growers, and agents of medical marijuana organizations must obtain registry identification cards, and medical marijuana organizations must obtain registry certificates from the Department, and continuously update relevant information.

5. The Department is tasked with an extensive list of duties, including, *inter alia*: formulating rules and regulations to implement and maintain the Act's numerous and far-reaching measures, verifying information and timely approving applications and renewal requests submitted for registry identification cards and registration certificates, establishing and maintaining a law enforcement verification system, providing rules for security, recordkeeping, and oversight, maintaining and enforcing confidentiality of records, and providing an annual report to the Idaho Legislature.

B. If Enacted, the Initiative Would Have No Legal Impact on Federal Criminal, Employment, or Housing Laws Regarding Marijuana

Idaho is free to enforce its own laws, just as the federal government is free to do the same. The United States Supreme Court has explained:

> In *Bartkus v. Illinois*, 359 U.S. 121 [1959], . . . and *Abbate v. United States*, 359 U.S. 187 [1959], . . . this Court reaffirmed the well-established principle that a federal prosecution does not bar a subsequent state prosecution of the same person for the same acts, and a state prosecution does not bar a federal one. The basis for this doctrine is that prosecutions under the laws of separate sovereigns do not, in the language of the Fifth Amendment, "subject [the defendant] for the same offence to be twice put in jeopardy":
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> An offence [sic], in its legal signification, means the transgression of a law . . . . Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. . . . *That either or both may (if they see fit) punish such an offender, cannot be doubted.*

United States v. Wheeler, 435 U.S. 313, 316-17, 98 S. Ct. 1079, 1082-83, 55 L. Ed. 2d 303 (1978) (superseded by statute) (quoting Moore v. Illinois, 14 How. 13, 19-20, 14 L.Ed. 306 (1852)) (footnote omitted; emphasis added); *See* State v. Marek, 112 Idaho 860, 865, 736 P.2d 1314, 1319 (1987) ("[T]he double jeopardy clause of the fifth amendment does not prohibit separate sovereigns from pursuing separate prosecutions since separate sovereigns do not prosecute for the 'same offense.'"). Under the concept of "separate sovereigns," the State of Idaho is free to create its own criminal laws and exceptions pertaining to the use of marijuana. However, the State of Idaho cannot limit the federal government, as a separate sovereign, from prosecuting marijuana-related conduct under its own laws.

In United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 486, 121 S. Ct. 1711, 1715, 149 L. Ed. 2d 722 (2001), the United States Supreme Court described a set of circumstances that appear similar to the system proposed in the initiative:

> In November 1996, California voters enacted an initiative measure entitled the Compassionate Use Act of 1996. Attempting "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes," Cal. Health & Safety Code Ann. § 11362.5 (West Supp. 2001), the statute creates an exception to California laws prohibiting the possession and cultivation of marijuana. These prohibitions no longer apply to a patient or his primary caregiver who possesses or cultivates marijuana for the patient's medical purposes upon the recommendation or approval of a physician. *Ibid.* In the wake of this voter initiative, several groups organized "medical cannabis dispensaries" to meet the needs of qualified patients. [Citation omitted.] Respondent Oakland Cannabis Buyers' Cooperative is one of these groups.

A federal district court denied the Cooperative's motion to modify an injunction that was predicated on the Cooperative's continued violation of the federal Controlled Substance Act's "prohibitions on distributing, manufacturing, and possessing with the intent to distribute or manufacture a controlled substance." *Id.* at 487. On appeal, the Ninth Circuit determined "medical necessity is a legally cognizable defense to violations of the Controlled Substances Act." *Id.* at 489. However, the United States Supreme Court reversed the Ninth Circuit and held:

> It is clear from the text of the [Controlled Substances] Act that Congress has made a determination that marijuana has no medical benefits worthy of an exception. The statute expressly contemplates that many drugs "have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people," § 801(1), but it includes no exception at all for any medical use of marijuana. Unwilling to view this omission as an accident, and unable in any event to override a legislative determination manifest in a statute, we reject the Cooperative's argument.
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> . . .
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> For these reasons, we hold that medical necessity is not a defense to manufacturing and distributing marijuana. The Court of Appeals erred when it held that medical necessity is a "legally cognizable defense." 190 F.3d. at 1114. It further erred when it instructed the District Court on remand to consider "the criteria for a medical necessity exemption, and, should it modify the

> injunction, to set forth those criteria in the modification order." *Id.* at 1115.

Id. at 493-95.

The Oakland Cannabis Buyers' Cooperative decision makes clear that prosecutions under the federal Controlled Substances Act are not subject to a "medical necessity defense," even though state law precludes prosecuting persons authorized to use marijuana for medical purposes, as well as those who manufacture and distribute marijuana for such use. Therefore, passage of the initiative would not affect the ability of the federal government to prosecute marijuana-related crimes under federal laws.

In sum, Idaho is free to pass and enforce its own laws creating or negating criminal liability relative to marijuana. But, as the United States Supreme Court's Oakland Cannabis Buyers' Cooperative decision demonstrates, even if the initiative is enacted, persons exempted from state law criminal liability under its provisions would still be subject to criminal liability under federal law.[7]

The same holds true in regard to federal regulations pertaining to housing and employment. In Assenberg v. Anacortes Housing Authority, 268 Fed. Appx. 643, 2008 WL 598310 at 1 (unpublished) (9th Cir. 2008), contrary to the plaintiff's contention that, because he was authorized under state law to use marijuana for medical purposes, he was illegally denied housing. The Ninth Circuit explained:

> The district court properly rejected the Plaintiffs' attempt to assert the medical necessity defense. *See Raich v. Gonzales*, 500 F.3d 850, 861 (9th Cir.2007) (stating that the defense may be considered only when the medical marijuana user has been charged and faces criminal prosecution). The Fair Housing Act, Americans with Disabilities Act, and Rehabilitation Act all expressly exclude illegal drug use, and AHA did not have a duty to reasonably accommodate Assenberg's medical marijuana use. *See* 42 U.S.C. §§ 3602(h), 12210(a); 29 U.S.C. § 705(20)(C)(i).

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[7] According to the Federal Register's Daily Journal of the United States Government, "[b]y letter dated July 19, 2016 the Drug Enforcement Administration (DEA) denied a petition to initiate rulemaking proceedings to reschedule marijuana." Federal Register, https://federalregister.gov/a/2016-17954 (Aug. 30, 2016); *See* 81 Fed. Reg. 53687-53766 (Aug. 12, 2016).

> AHA did not violate the Department of Housing and Urban Development's ("HUD") policy by automatically terminating the Plaintiffs' lease based on Assenberg's drug use without considering factors HUD listed in its September 24, 1999 memo.
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> . . .
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> Because the Plaintiffs' eviction is substantiated by Assenberg's illegal drug use, we need not address his claim . . . whether AHA offered a reasonable accommodation.
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> The district court properly dismissed Assenberg's state law claims. Washington law requires only "reasonable" accommodation. [Citation omitted.] Requiring public housing authorities to violate federal law would not be reasonable.

Similarly, the Oregon Supreme Court recently held that, under Oregon's employment discrimination laws, an employer was not required to accommodate an employee's use of medical marijuana. Emerald Steel Fabricators, Inc., v. Bureau of Labor and Industries, 230 P.3d 518, 520 (Or. 2010). Therefore, none of the provisions of the initiative can interfere or otherwise have an effect on federal laws, criminal or civil, which rely, in whole or part, on marijuana being illegal under the federal Controlled Substances Act.

C. Recommended Revisions or Alterations

The initiative contains "findings" in Prop. I.C. § 39-9302 that have not been verified for the purposes of this review due to time constraints. The Office of the Attorney General takes no position on those findings. In addition to the legal and non-legal problems previously discussed, the initiative has several other aspects that merit consideration, described as follows:

1. The first "WHEREAS" clause ("25 States," etc.) and the "THEREFORE" clause on the first page should be deleted. They are repeated after Prop. I.C. § 39-9301, where they should be located.

2. The second "WHEREAS" clause on the first page ("citizens of Idaho," etc.) should be moved to the second page under "Findings" (Prop. I.C. § 39-9302).

3. Prop. I.C. § 39-9315, "Growing and Dispensing for Medical Marijuana Use" lacks standards. It reads only that, "(1) Grower can grow for

up to four (4) patients, including themselves." *Id.* The provision fails to state where and under what conditions medical marijuana may be grown, and how it is to be dispensed.

4. Prop. I.C. § 39-9303(4)(a) reads in part, "agitation of Alzheimer's disease," which would be more correctly phrased "agitation of Alzheimer's patients."

5. In Prop. I.C. § 39-9303(11), a "medical marijuana dispensary or collective" is defined. However, the word "collective" does not appear elsewhere in the Act, and should be deleted as unnecessary.

6. Prop. I.C. § 39-9303(23)(a) states that the practitioner must "[s]pecify the qualifying patient's qualifying medical condition in the written recommendation; *and HIPAA compliant.*" The italicized portion of the provision should presumably read, "and must be HIPAA compliant."

7. Prop. I.C. § 39-9303(24), defining "Ombudsman," states:

> 'Ombudsman' means an official appointed to investigate individuals' complaints against maladministration, especially that of public authorities.
> (a) licensed practitioner
> (b) that they mediate between the Dept. of Welfare and Idaho Medical Marijuana Program

Prop. I.C. § 39-9303(24) does not state how an Ombudsman is appointed (or by whom), or what powers an Ombudsman has. Also, it is unclear what is intended by the reference to "licensed practitioner[s]," as they will unlikely be administrative "public authorities" made "especially" subject to investigation. Lastly, the reference to "Dept. of Welfare" should read "Department of Health and Welfare."

8. Prop. I.C. § 39-9305(3), under the "Rulemaking" heading, states, "Ombudsman must be a licensed practitioner." This provision should be moved to Prop. I.C. § 39-9303(24), which defines "Ombudsman."

9. Prop. I.C. § 39-9308(1)(c) has a subsection numbered (iiii), which should be changed to (iv).

10. Prop. I.C. § 39-9318(8), does not give specific requirements for the Department to meet in submitting "financial information regarding the

implementation and/or maintenance of the Act's provisions" in its Annual Report to the legislature.

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 Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Tesla Heidi Gillespie, 4948 W. Kootenai St. #203, Boise, Idaho 83705.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

JOHN C. McKINNEY
Deputy Attorney General