STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

December 13, 2010

The Honorable Ben Ysursa
Idaho Secretary of State
STATEHOUSE MAIL

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

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on November 15, 2010. 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 major 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 petitioner is 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 this proposed initiative.

BALLOT TITLE

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

MATTERS OF SUBSTANTIVE IMPORT

A. Introduction

The Initiative, which is self-titled the "Idaho Medical Choice Act," declares that persons engaged in the use, possession, manufacture, sale, and/or

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

distribution of marijuana to persons suffering from debilitating medical conditions, as authorized by the procedures established in the Initiative, are protected from arrest, prosecution, property forfeiture, and criminal and other penalties under Idaho law. A summary of the Initiative's provisions, tentatively denominated as Idaho Code § 39-4700, *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 other penalties, those patients who use marijuana to alleviate suffering from debilitation medical conditions, as well as their physicians, primary caregivers and those who are authorized to produce marijuana for medical purposes.

Prop. I.C. § 39-4702.[1]

The Initiative authorizes "qualifying patients" to use marijuana for medical purposes, and "primary caregivers" to assist patients' medical use of marijuana. Prop. I.C. §§ 39-4703 and 39-4704. To be a qualified patient, the patient's primary care physician must certify that the patient "is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the patient's debilitating medical condition or symptoms associated with the debilitating medical condition." Prop. I.C. § 39-4703(1). The Idaho Department of Health and Welfare ("Department") is mandated to set up a state registry maintaining the names of qualified patients and their primary caregivers authorized to use (and assist in the use of) marijuana for medical purposes, and issue a "registry identification card" to the patient and caregiver, which is valid for two (2) years. Prop. I.C. § 39-4704(1).

The specific requirements for being a "primary caregiver" are set forth in Prop. I.C. § 39-4703(12), and include that the caregiver "[i]s not currently on felony probation or parole under the Idaho Department of Correction or on misdemeanor probation under any county in Idaho." Prop. I.C. § 39-4703(12)(c). Minors are also entitled to be issued registry identification cards under certain criteria. Prop. I.C. § 39-4704(10). A denial by the Department of an application or renewal request for a registry identification card based on falsified information is "a final agency decision" subject to the provisions of the Idaho Administrative Procedure Act. Prop. I.C. § 39-4704(2).

The Initiative requires the Department to accept applications from entities for permits to operate as "Alternative Treatment Centers" with the "first two (2) centers issued a permit in the Panhandle, North Central, Central, Eastern, Southwest, South Central, and Southeast health districts" as nonprofit entities -- but subsequent centers may be nonprofit or for-profit entities. Prop. I.C. § 39-4707(1). The Director of the Department of Health and Welfare ("Director") must: require applicants to provide "such information as the department determines to be necessary pursuant to rules adopted pursuant to this chapter"; adopt rules requiring Centers to maintain written documentation of each delivery and pickup of

---

[1] References to "proposed" I.C. [Idaho Code] § 39-4700, *et seq.*, will read, "Prop. I.C. § 39-4700," etc.

marijuana; "adopt rules to [m]onitor, oversee, and investigate all activities performed" by a Center; and "adopt rules to [e]nsure adequate security of all facilities twenty-four (24) hours per day, including production and retail locations, and security of all delivery methods to registered qualifying patients." Prop. I.C. § 39-4707. Additionally, if an application to operate a Center is denied because of falsified information, or later suspended or revoked "for cause," such a determination "shall be subject to review pursuant to" the Idaho Administrative Procedure Act. Prop. I.C. § 39-4707(3). Once a permit is issued to a person to operate such a facility, the Alternative Treatment Center is authorized to:

> acquire a reasonable initial and ongoing inventory, as determined by the department, of marijuana seeds or seedlings and paraphernalia, possess, cultivate, plant, grow, harvest, process, display, manufacture, deliver, transfer, transport, distribute, supply, sell or dispense marijuana, or related supplies to qualifying patients or their primary caregivers who are registered with the department. . . .

Prop. I.C. § 39-4707(1). The Initiative does not provide specific qualifications for employment, ownership, or holding any other position, at an Alternative Treatment Center. The Initiative limits the dispensing of marijuana to no more than two and one-half (2½) ounces in any fourteen (14) day period, and requires careful record-keeping of how disbursements are made. Prop. I.C. § 39-4710. Alternative Treatment Centers are allowed to charge registered qualifying patients and primary caregivers for the "reasonable costs associated with the production and distribution of marijuana for the cardholder." Prop. I.C. § 39-4707(6).

The Director is mandated to issue a report to the governor and legislature within one (1) year of the Initiative's enactment, stating the actions taken to implement the provisions of the Initiative, and must thereafter provide annual reports of the number of applications for registry identification cards, the number of qualifying patients and primary caregivers registered, and other relevant information.[2] Prop. I.C. § 39-4713(1).

The Initiative exempts from state criminal liability any actions authorized within its provisions, and provides that qualifying patients and primary caregivers (for each qualifying patient under their care) may possess up to two and one-half (2½) ounces of usable marijuana and twelve (12) marijuana plants (no more than six (6) mature plants). Prop. I.C. § 39-4706(1). Among other protections listed, Prop. I.C. § 39-4706 reads in part:

---

[2] Under Prop. I.C. § 39-4713(3), the Director must report to the governor and legislature within two (2) years of the initiative's effective date and every two (2) years thereafter:

> evaluate whether there are sufficient numbers of alternative treatment centers to meet the needs of registered qualifying patients throughout the state; evaluate whether the maximum amount of medical marijuana allowed pursuant to this chapter is sufficient to meet the medical needs of qualifying patients; and determine whether any alternative treatment center has charged excessive prices for marijuana that the center dispensed.

(6) A qualifying patient or primary caregiver shall not be denied tenancy or be subject to eviction for acting in accordance with this act, unless the person's behavior is such that it creates an unreasonable danger or threat to the property under lease or to the health of co-existing tenants.

(7) A qualifying patient or primary caregiver shall not be denied potential employment or terminated from existing employment in the public or private sector for acting in accordance with this act, unless the person's behavior is such that it inhibits the performance of job duties.

. . . .

(11) A qualifying patient shall not be denied employment in the public or private sector on the basis of a positive test for marijuana.

Finally, conduct authorized by the Initiative is an available affirmative defense in a criminal case. Prop. I.C. § 39-4711.

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":
>
> > 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, 317, 985 S. Ct. 1079, 1083, 55 L.Ed.2d 303 (1978) (superseded by statute) (quoting Moore v. Illinois, 55 U.S. 13, 19-20, 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. . . . 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.
>
> . . . .

> 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.

The Oakland Cannabis Buyer's 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 Buyer's 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.

The same holds true in regard to federal regulations pertaining to housing and employment. In Assenberg v. Anacortes Housing Authority, 286 Fed. Appx. 643, 644, 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 Plaintiff's 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).
>
> AHA did not violate the Department of Housing and Urban Development's ("HUD") policy by automatically terminating the Plaintiff's lease based on Assenberg's drug use without considering factors HUD listed in its September 24, 1999 memo. . . . .
>
> Because the Plaintiff's eviction is substantiated by Assenberg's illegal drug use, we need not address his claim . . . whether AHA offered a reasonable accommodation.

> 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, 348 Or. 159, 161, 230 P.3d 518, 520 (2010). Therefore, the "protections" provisions of the Initiative, Prop. I.C. § 39-4706, cannot 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 has at least two (2) references to a "certification that meets the requirements of section 39-4705, Idaho code [sic]." The first, Prop. I.C. § 39-4704(1)(a), lists such a certification as a requirement for a qualifying patient or primary caregiver to be given a registry identification card by the Department. The second, Prop. I.C. § 39-4704(10)(b), requires a minor's parent or legal guardian to submit such a certification in order to have the minor issued a registry identification card. However, Prop. I.C. § 39-4705 reads:

> If the registered qualifying patient's certifying physician notifies the department in writing that either the registered qualifying patient has ceased o [sic] suffer from a debilitating medical condition or that the practitioner no longer believes the patient would receive therapeutic or palliative benefit from the medical use of marijuana, the card shall become null and void upon notification of the patient from the department. However, the registered qualifying patient shall have fifteen (15) days to dispose of his or her marijuana.

It is clear that the "certification" referred to in Prop. I.C. § 39-4704(1)(a) and (10)(b) is not Prop. I.C. § 39-4705. Rather, Prop. I.C. § 39-4703(1) seems to be the correct reference -- which defines "certification" as a physician's "professional opinion the patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana," etc.

It also appears that Prop. I.C. § 39-4704(10) subsections (d), (e), and (f) should be re-designated as subsections (i), (ii), and (iii) because they are logically subsections to Prop. I.C. § 39-4703(c). Finally, the Initiative has many misspellings and omitted words throughout its text. *See* Prop. I.C. §§ 39-4703(2)(e) ("medical condition or its treatment *hat* is approved . . . ."); 39-4703(11) (physician is one "with whom the patient has a bona fide physician-patient and who . . . ;" "authorization for a patient to *used* medical marijuana . . . .").

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Theresa Knox, 5919 S. Fireglow Ave., Boise, ID 83709.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

JOHN C. McKINNEY
Deputy Attorney General