ATTORNEY GENERAL OPINION NO. 93-11

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Per Request for Attorney General Opinion
Regarding the Idaho Citizens Alliance's Revised Initiative

Dear Senators Reed, Davis and Lloyd:

QUESTIONS PRESENTED

1. Section 67-8002 addresses minority status of those who engage in homosexual behavior as well as special classifications based upon homosexuality or sexual orientation. What would be the effect of this section and does it violate the United States Constitution?

2. Section 67-8003 addresses same-sex marriages and domestic partnerships. What, if any, is the legal effect of this provision and what does the term "domestic partnership" mean?

3. Section 67-8004 limits the discussion of homosexuality in the public elementary and secondary schools. Does this provision violate the United States Constitution?

4. Section 67-8005 limits expenditure of public funds and access to library materials discussing homosexuality. Does this provision violate the United States Constitution?

5. Section 67-8006 addresses consideration of private sexual behavior in the public employment context. What does this section mean? What is its scope and how

would a court likely construe this provision in context with the balance of the initiative's provisions?

6. Does the initiative violate any rights guaranteed under the Idaho Constitution?

7. If certain provisions of the initiative are unconstitutional, can the other provisions be given effect by employment of the initiative's severability clause?

CONCLUSION

1. Section 67-8002 essentially authorizes discrimination against homosexuals in such contexts as employment, housing, education and health care. This provision violates equal protection guarantees of the United States Constitution by officially condoning discrimination against homosexuals and by denying them equal access to the political process.

2. Section 67-8003, addressing same-sex marriages and domestic partnerships, is merely a statement of the current law already in place in Idaho. The term "domestic partnership" presumably means an arrangement whereby two homosexuals have agreed to share their home, financial resources and life together. Because the provision simply restates current law, it has no legal effect.

3. Section 67-8004 violates First Amendment protections. A state may reasonably restrict school-endorsed curriculum-related speech in elementary and secondary schools to further legitimate pedagogical concerns. Significant discretion is given to the state and local authorities in determining whether such restrictions are reasonable and whether the concerns they further are, in fact, legitimate pedagogical ones. Nevertheless, there are limits. Suppression of a viewpoint not based on legitimate pedagogical concerns but because the state disagrees with it falls outside the bounds of the state's permitted discretion. As to curriculum-related speech, section 67-8004 goes beyond the bounds of the state's discretion and violates the First Amendment. Further, the section restricts some non-curriculum-related speech as well as advice a counselor may offer a student/ patient. These restrictions are also violations of free speech rights.

4. Section 67-8005, addressing expenditure of public funds and access to library materials for minors, is unconstitutional. The government can place some restrictions on the expenditure of public funds to ensure those funds are not spent on speech which falls outside of the scope of the particular government program being subsidized. However, restricting funds to suppress an idea in numerous programs at state and local government levels falls far beyond what is a legitimate

restriction. Moreover, there are certain traditional areas, such as universities, public forums, doctor-patient relationships, artistic expression and scientific research, in which the government cannot censor speech even if that speech is directly subsidized by the government. Section 67-8005 is drafted in sweeping terms and violates this precept. Additionally, the provision addressing access to library materials is overbroad and violates the First Amendment rights of minors.

5. Section 67-8006 allows discrimination against homosexuals in the public employment context, but does not require it. More importantly, the section does not address discrimination in housing, education, health care and private employment contexts. Thus, section 67-8006 does not remedy the constitutional problems created by section 67-8002.

6. Like the United States Constitution, the Idaho Constitution guarantees equal protection of the law and free speech. These independent state constitutional rights are also violated by the initiative's sweeping terms.

7. The severability clause would not salvage this initiative because so many of its provisions violate the federal and state constitutions. A reviewing court will not rewrite a law when its basic core and purpose have been invalidated.

BACKGROUND

The Idaho Citizens Alliance ("ICA") is sponsoring an effort to place its initiative regarding homosexuality on the 1994 election ballot. The ICA submitted a draft of its initiative on March 4, 1993, and this office, in its March 18, 1993, Certificate of Review, stated that almost every provision of the proposed initiative was unconstitutional. The ICA subsequently redrafted the initiative, making, in at least some of the provisions, substantial changes. Consequently, this office's Certificate of Review is no longer completely germane as to each provision. This formal opinion will review afresh each of the initiative's provisions and discuss their validity.

ANALYSIS

I.

SECTION 67-8002

The first section of the ICA initiative, section 67-8002, provides:

> **SPECIAL RIGHTS FOR PERSONS WHO ENGAGE IN HOMOSEXUAL BEHAVIOR PROHIBITED.** No agency, department,

> or political subdivision of the State of Idaho shall enact or adopt any law, rule, policy, or agreement which has the purpose or effect of granting minority status to persons who engage in homosexual behavior, solely on the basis of such behavior; therefore, affirmative action, quota preferences, and special classifications such as "sexual orientation" or similar designations shall not be established on the basis of homosexuality. All private persons shall be guaranteed equal protection of the law in the full and free exercise of all rights enumerated and guaranteed by the U.S. Constitution, the Constitution of the State of Idaho, and federal and state law. All existing civil rights protections based on race, color, religion, gender, age, or national origin are reaffirmed, and public services shall be available to all persons on an equal basis.

This section violates the Equal Protection Clause of the United States Constitution, both by promoting discrimination against homosexuals and by denying them equal access to the political process.

A. The Legal Effect of Section 67-8002

A constitutional analysis of proposed section 67-8002 cannot be undertaken without first discussing the section's legal effect.

The section begins by forbidding any "agency, department or political subdivision of the State of Idaho" from enacting any "law, rule, policy or agreement" which has the "purpose or effect of granting minority status to persons who engage in homosexual behavior." Thus, the section is directed at three legal entities--agencies, departments and political subdivisions of the state. Agencies and departments include an array of governmental or public organizations ranging from the Department of Health and Welfare to the State Board of Education which governs public universities. The term "political subdivision[s] of the State of Idaho" clearly encompasses counties, entities such as county hospitals, and other subdivisions such as school, highway and irrigation districts. Finally, the term includes cities and public organizations which they fund.[1]

What the initiative targets is the enactment of certain "law[s], rule[s], polic[ies], or agreement[s]." The use of the term "law" is confusing in this context as it would normally refer to statutes, which only the legislature can enact. Consequently, the question arises as to whether this initiative is directed at the state legislature as well as agencies, departments and political subdivisions. However, it is well settled that the

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[1] "Political subdivision" is commonly defined in the Idaho Code to include numerous local governmental entities including counties, cities and other municipal corporations. *See, e.g.,* Idaho Code §§ 6-902, 21-101, 31-4510 and 63-3622 J.J. We assume a similar meaning was intended in the proposed initiative.

legislature cannot be bound by an initiative. Luker v. Curtis, 64 Idaho 703, 136 P.2d 978 (1943). Indeed, this settled principle likely accounts for the legislature not being expressly mentioned in the initiative. This office concludes that, while section 67-8002 is not entirely clear, the term "law" is probably used in a generic sense meaning enactments such as ordinances, rules and policies that have the force of law, and that its use is not intended to pull the legislature within the scope of this section.

Having addressed which public entities are restricted by the initiative, the next question is which group of citizens is burdened by these restrictions. Section 67-8002 forbids the granting of "minority status to persons who engage in homosexual behavior," but then adds that "special classifications such as 'sexual orientation' or similar designations" based on "homosexuality" cannot be established. (Emphasis added.) Thus, the provision is not limited to overt conduct, but encompasses the mere status of homosexuality. The "homosexual behavior" which falls within the section's reach is not defined by the initiative but is, instead, left vague. Arguably, the term encompasses conduct ranging from sexual acts criminalized by Idaho Code § 18-6605 (infamous crimes against nature) to clearly legal conduct such as holding hands.[2] *See* Watkins v. U.S. Army, 875 F.2d 699, 715 (9th Cir. 1989) (alleged knee-squeezing described as homosexual act). As to the status of "homosexuality," it is not necessarily linked to any behavior at all and includes within its scope feelings, thoughts and preferences, and an identification with a particular group.

Section 67-8002 of the initiative first precludes "granting minority status" to homosexuals. The term "minority status" alone has little legal significance. Idaho's statutory and case law recognize some legal classifications based upon race, color, religion, gender, age and national origin. In Idaho, the primary legal significance of these classifications is that they form the bases for legally required equal treatment in the areas of employment, real estate transactions, educational services and public accommodations. *See* Idaho Code §§ 18-7301 and 67-5909. Additionally, these legal classifications can be used to enhance penalties for "hate crimes." Idaho Code §§ 18-7902 and 18-7903.

It is important to note that Idaho law, as presently structured, does not confer special status upon any minority. Idaho Code §§ 18-7301 and 67-5909, for example, prohibit discrimination on the basis of race, national origin and religion. But those statutes offer no more protection to "minorities" such as blacks, Hispanics, or adherents of particular religions than to "non-minority" whites of mainstream religions.

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[2] It is important to note that, while the term "homosexual behavior" includes conduct proscribed by Idaho Code § 18-6605, that criminal statute is not limited to homosexual conduct alone. Idaho Code § 18-6605 proscribes heterosexual as well as homosexual sodomy. It also criminalizes oral sex, both heterosexual and homosexual. *See* State v. Goodrick, 102 Idaho 811, 641 P.2d 998 (1982).

To implement its "minority status" provision, however, section 67-8002 of the initiative further provides that "affirmative action, quota preferences and special classifications such as 'sexual orientation' or similar designations" may not be "established on the basis of homosexuality." (Emphasis added.) Idaho's statutory and case law do not have "affirmative action" or "quota preferences" for any specific group of people. However, Idaho does have legal classifications based upon characteristics such as race, gender, religion, age and national origin to legally require equal treatment for these groups. This initiative, in forbidding "special classifications such as 'sexual orientation'" or "similar designations . . . established on the basis of homosexuality," limits the protection homosexuals can obtain against discrimination. The true harm of section 67-8002 is its mandate precluding classifications based on homosexuality or sexual orientation. Under even the most narrow construction, this initiative, by forbidding classifications based upon "homosexuality" or "sexual orientation," ensures that homosexuals cannot receive the protections against discrimination in areas of employment, real estate transactions, educational services and public accommodations that other identifiable groups either currently receive or can seek. Section 67-8002, at a minimum, assures that rules, policies and agreements enacted or adopted by agencies, departments and political subdivisions of this state cannot require equal treatment of homosexuals.[3]

Finally, it is our opinion that the section's statement that "all private persons shall be guaranteed equal protection of the law" does not ameliorate the pragmatic consequences of section 67-8002. The equal protection guarantees provided in the state and federal constitutions reach only state action, not private acts of discrimination. Other types of legal provisions must be enacted or adopted to reach such private discrimination. Consequently, stating the Equal Protection Clause remains in effect does not soften the section's pragmatic effect of uniquely limiting the ability of agencies, departments and political subdivisions to legally require equal treatment of homosexuals. Indeed, this provision, reiterating equal protection guarantees, is little more than surplusage, as the ICA does not have the authority to suspend the Equal Protection Clause by initiative.

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[3] This is the most narrow reading of section 67-8002. Under a broader construction, by forbidding "special classifications" based upon homosexuality or sexual orientation, other types of beneficial legal provisions are arguably also precluded, such as AIDS education programs created by county hospitals and targeted at the homosexual community, or express policies at county sheriffs' offices to aggressively enforce criminal laws to combat local violence against homosexuals. In short, under a broader reading of section 67-8002, agencies, departments or political subdivisions of the state are forbidden to adopt any beneficial legal provision to address unique problems faced by the homosexual community because such provisions would invariably require a "special classification" based upon homosexuality.

In short, this section has significant pragmatic effects on the homosexual community. It prohibits agencies, departments and political subdivisions from adopting any laws, rules, policies or agreements requiring that homosexuals be treated equally.

B. Encouragement of Private Discrimination and the Equal Protection Clause

Given the legal effect of section 67-8002 of the ICA initiative, the next question is what the constitutional implications are likely to be. At the outset, the provision, even under its most narrow construction, violates the Equal Protection Clause by condoning discrimination against homosexuals.

Under current Idaho law, the state has taken no position on discrimination against homosexuals. Thus, for example, a private landlord can refuse to rent an apartment to someone because the landlord thinks (rightly or wrongly) that the person is a homosexual. That is a private bias. The state does not prohibit or approve of it; it simply does not address it. Its position is neutral, and the Equal Protection Clause is not implicated.

This initiative, however, goes one step further. It effectively gives state approval to that private bias by announcing that this bias cannot be prohibited by agencies, departments and political subdivisions of the state. Moreover, the initiative also forecloses public agencies, departments and political subdivisions of the state from adopting policies or rules to prohibit such a bias in the decisions made within their own structure.[4] The initiative, in essence, promises those who would discriminate that, no matter how serious the problems created by their discrimination or how dire the need for legal protections, absent a statute enacted by the legislature, the state will not interfere. By taking this position, the government becomes a partner in the discrimination against homosexuals, fostering that discrimination and placing upon it the state's endorsement.

Similar official sanctions of discrimination have been found to violate equal protection guarantees. One of the earliest cases, Reitman v. Mulkey, 387 U.S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967), involved a California amendment which prohibited the state from forbidding any person from selling or renting his real property to "such persons . . . as he, in his absolute discretion, chooses." The U.S. Supreme Court first reviewed the history of the amendment, noting its purpose was to overturn state laws prohibiting racial discrimination in housing and real estate, and concluded: "Section 26

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[4] As discussed below at p. 29, section 67-8006 of the initiative allows public employers to treat "private sexual behaviors" as a non-job-related factor. However, that section does not preclude discrimination against homosexuals in public employment, and it does not address discrimination in the areas of real estate, educational services, public accommodations and private employment, leaving the discriminatory effect of section 67-8002 intact as to these matters.

was intended to authorize, and does authorize, racial discrimination in the housing market. . . . [T]he section will significantly encourage and involve the State in private discriminations . . . ." *Id.* at 381. The Court struck down the amendment, holding that it violated the Equal Protection Clause of the Constitution.

Reitman involved discrimination against a racial minority. However, the Equal Protection Clause guarantees against invidious discrimination apply to all citizens, not just those who are members of traditionally "suspect" classes such as racial minorities. For example, in City of Cleburne, Texas v. Cleburne Living Center, Inc., 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985), the U.S. Supreme Court reviewed a zoning ordinance banning group homes for the mentally retarded in a particular zoning district. Acknowledging the mentally retarded are not a suspect class under the Equal Protection Clause, the Court, using a lesser standard of judicial scrutiny, nevertheless struck down the ordinance on the ground that it arbitrarily and invidiously discriminated against the mentally retarded:

> Our refusal to recognize the retarded as a quasi-suspect class does not leave them entirely unprotected from invidious discrimination. To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate government purpose . . . . [S]ome objectives--such as "a bare . . . desire to harm a politically unpopular group"--are not legitimate state interests . . . .

473 U.S. at 446-47 (emphasis added; citations omitted). Thus, it is apparent that the Equal Protection Clause applies to all citizens, and state encouragement of private discrimination violates constitutional protections even if the targeted group is not a suspect class such as a racial minority.

Indeed, the holding of Reitman, that state encouragement of private discrimination violates the Equal Protection Clause, has already been held to encompass discrimination against the homosexual community. In Citizens for Responsible Behavior v. Superior Court, 2 Cal. Rptr. 2d 648 (Cal. App. 4 Dist. 1991), a California court examined an initiative which would have prohibited the City of Riverside, California, from enacting "any policy or law which . . . classifi[ed] AIDS or homosexuality as the basis for determining an unlawful discriminatory practice . . . ." The court found that the proposed ordinance was designed to promote bias against a selected class of citizens--homosexuals --in violation of the Equal Protection Clause: "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." 2 Cal. Rptr. 2d at 658 (quoting Palmore v. Sidoti, 466 U.S. 429, 433, 104 S. Ct. 1879, 80 L. Ed. 2d 421 (1984)).

The ICA initiative, like the amendment in Reitman and the initiative in Citizens for Responsible Behavior, does not require private discrimination against homosexuals, but it condones it. It condones it by officially forbidding state agencies, departments and political subdivisions, like counties, from using their authority to require equal treatment of homosexuals. Thus, for example, a state agency contracting with builders could not include an anti-discrimination clause in its agreement. Likewise, a county could not use its inherent police power under art. 12, sec. 2 of the Idaho Constitution to require equal treatment of homosexuals in businesses within its borders. Moreover, the section condones public as well as private discrimination, as agencies, departments and political subdivisions are also forbidden to adopt policies prohibiting bias against homosexuals within their own confines. Importantly, this state-condoned discrimination is not based upon criminal conduct of the targeted group. As noted, this section of the initiative encompasses both conduct and status; behavior defined and prohibited by Idaho Code § 18-6605 as well as other behavior, feelings, preferences and an identification with a particular group. Thus, under the initiative's terms, the state is encouraging discrimination against a broad range of Idahoans, many of whom may be in absolute compliance with Idaho law.

When the state expressly announces that in many instances discrimination against a targeted group will not be halted, that discrimination bears the state's imprimatur. It is the opinion of this office that this state involvement in discrimination would not pass the most relaxed standard of review under the Equal Protection Clause--that the law be rationally related to a legitimate government purpose. Making the state a partner to discrimination against homosexuals in central areas of life is not a "legitimate" state objective nor a "legitimate" use of the government's power. City of Cleburne, 473 U.S. at 447; Citizens for Responsible Behavior, 2 Cal. Rptr. 2d at 658. Rather, it is an abuse of power based upon hostility to a particular group. An Idaho court would find that section 67-8002 is unconstitutional.

C. Access to the Political Process and the Equal Protection Clause

Section 67-8002 singles out homosexuals as a group and substantially limits their ability to have many of their problems addressed by agencies, departments and political subdivisions of the state. While homosexuals may still seek beneficial legislation at the statewide legislative level, agency, department and political subdivision avenues are foreclosed to them. The same is not true for any other independently identifiable group in Idaho seeking comparable legal protections. This redefining of the political structure as to homosexuals alone is an unconstitutional denial of their right to equal access to the political process.

In Evans v. Romer, 854 P.2d 1270 (Colo. 1993), the recent opinion addressing Colorado's Amendment 2, which, among other things, forbade "any statute, regulation, ordinance or policy . . . whereby homosexual[ity]" could "entitle any person" to a "claim of discrimination," the Colorado Supreme Court discussed at length the right of equal access to the political process. After reviewing a series of opinions from the U.S. Supreme Court, the Colorado court concluded that "[t]he Equal Protection Clause guarantees the fundamental right to participate equally in the political process" and, further, "laws may not create unequal burdens on identifiable groups with respect to the right to participate in the political process absent a compelling state interest." 854 P.2d at 1279.

This principle of equal access to the political process has been implicated in situations, like the one here, involving legislation intended to prevent an independently identifiable group of voters from using the normal political institutions and processes for obtaining legal protections beneficial to them. The landmark case is Hunter v. Erickson, 393 U.S. 385, 89 S. Ct. 557, 21 L. Ed. 2d 616 (1969), which involved an Akron city charter amendment that required any fair housing ordinance to be approved directly by the electorate, while all other types of ordinances could be enacted by the city council. The Court invalidated the amendment under the Equal Protection Clause because it "place[d] special burdens on racial minorities within the governmental process." 393 U.S. at 391. While the law reviewed targeted a particular racial minority, the principle at stake was broader. The Supreme Court stated that Akron was free to require a plebiscite as to "all its municipal legislation," but, having chosen to do otherwise, Akron could "no more disadvantage any particular group by making it more difficult to enact legislation on its behalf than it [could] dilute any person's vote or give any group a smaller representation than another of comparable size." *Id.* at 392-93 (emphasis added).

In Washington v. Seattle School District No. 1, 458 U.S. 457, 102 S. Ct. 3187, 73 L. Ed. 2d 896 (1982), the U.S. Supreme Court reviewed an initiative which prohibited local school districts from using busing as a means to achieve integration. Due to the initiative, unlike all other local education issues, busing alone could only be decided at the statewide level. Revisiting Hunter, the Supreme Court held that the voters of Washington had impermissibly interfered with the political process and unlawfully burdened the efforts of an independently identifiable group to secure public benefits. Washington, 458 U.S. at 467-70. The Court stated that the Equal Protection Clause reaches political structures that "distort[] governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." *Id.* at 467. The Court distinguished the Washington initiative from "laws structuring political institutions or allocating political power according to 'neutral principles' . . . [which] are not subject to equal protection attack." *Id.* at 470. Because laws based upon

neutral principles "make it more difficult for every group in the community to enact comparable laws, they 'provide a just framework within which the diverse political groups in our society may fairly compete.'" *Id.* (citation omitted). The Court held that the initiative invalidated in Washington was not based upon a "neutral principle" which burdened all seeking comparable laws equally, but instead used "the racial nature of an issue to define the governmental decisionmaking structure." *Id.*

The principles articulated in Hunter and Washington are clearly not limited to race and, indeed, have already been applied to laws restructuring the political process in order to burden the homosexual community's ability to obtain beneficial legislation. The Colorado Supreme Court in Evans concluded that the homosexual community's access to the political process was burdened by Colorado's recent amendment barring discrimination claims brought by homosexuals because, unlike any other identifiable group, homosexuals alone would now have to amend the state constitution in order to be protected from discrimination:

> Rather than attempting to withdraw antidiscrimination issues as a whole from state and local control, Amendment 2 singles out one form of discrimination and removes its redress from consideration by the normal political processes.
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> Amendment 2 expressly fences out an independently identifiable group. Like the laws that were invalidated in *Hunter*, which singled out the class of persons "who would benefit from laws barring racial, religious or ancestral discriminations," Amendment 2 singles out that class of persons (namely gay men, lesbians, and bisexuals) who would benefit from laws barring discrimination on the basis of sexual orientation. No other identifiable group faces such a burden--no other group's ability to participate in the political process is restricted and encumbered in a like manner. . . . Strict scrutiny is thus required because the normal political processes no longer operate to protect these persons. Rather, they, and they alone, must amend the state constitution in order to seek legislation which is beneficial to them.

854 P.2d at 1285. The Colorado Supreme Court remanded the case for trial, but also upheld the trial court's preliminary injunction that enjoined the amendment from going into effect, making it clear that the amendment would ultimately be struck down unless the state succeeded in proving a compelling interest justifying the burden placed upon the fundamental right of equal access to the political process.

Likewise, in Citizens for Responsible Behavior, the California court concluded that an initiative requiring voter approval only for ordinances prohibiting discrimination against homosexuals or AIDS victims, while all other comparable anti-discrimination laws could be enacted directly by the city council, violated the Equal Protection Clause:

> It is obvious that this provision raises obstacles in the path of persons seeking to have such ordinances enacted. The city council itself may enact ordinances barring discrimination against persons suffering from cancer or tuberculosis, or against families with children. However, under the proposed ordinance, persons seeking protective legislation against discrimination based on sexual orientation or AIDS must attempt to persuade a majority of the voters that such an ordinance is desirable. Precisely this arrangement was condemned in *Hunter v. Erickson* . . . .
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> . . . .
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> We are simply unable to conceive of any rational reason why the city council should be permitted to enact an ordinance barring discrimination against persons with any other disease, no matter how serious or communicable, but not one dealing with persons suffering from AIDS. Nor does any significant justification exist for allowing the City to continue to deal with housing difficulties faced by large families, but not with those confronting homosexuals.

2 Cal. Rptr. 2d at 655-56 (citations omitted).[5]

The ICA initiative also uses homosexuality to redefine the governmental decision-making structure. While the initiative does not require homosexuals to amend the state constitution or seek direct voter approval before obtaining beneficial laws, the initiative does foreclose to the homosexual community certain normal political avenues--namely, access to agencies, departments and political subdivisions which otherwise might be used to address their concerns. Thus, unlike all other identifiable political groups, homosexuals are barred from having their problems remedied via these regular political processes. Other identifiable groups can seek comparable anti-discrimination laws, rules, policies and agreements from an "agency, department or political subdivision of the State of Idaho." The homosexual community cannot. Regardless of the narrowness of the

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[5] In Citizens for Responsible Behavior, the court further noted that prohibiting local government from addressing local issues encountered by a specific group might also violate the First Amendment right to petition the government for redress of grievances as "the right becomes a hollow exercise if the local government has been deprived of the power to grant redress of the subject grievance." *Id.* at 655, n.9.

issue they need addressed or the local level of the interests involved, statewide legislative decision-making is all that is available to them.

If an initiative were proposed stating that farmers could not seek relief for their problems through the normal political processes, it would clearly be unconstitutional. Yet, that is what is happening here. An independently identifiable group is being subjected to political obstacles not because of the substantive nature of their problems, but, rather, because of who they, as a group, are. Using homosexuality as the basis to redefine the governmental decision-making structure and to foreclose normal routes of relief available to all other Idahoans seeking comparable protections violates the homosexual citizens' fundamental right to equal access to the political process. Under the strict scrutiny test and even under the rational basis test, it is difficult to conceive of a legitimate justification for this distinction. The Idaho judiciary would conclude that the distinction violates the Equal Protection Clause.

D. Summary

Section 67-8002 of the initiative, at a minimum, precludes the homosexual community from obtaining anti-discrimination laws, rules, policies or agreements from agencies, departments and political subdivisions of the state. This violates the Equal Protection Clause both by using the state to encourage discrimination against homosexuals and by denying homosexuals equal access to the political process. The section's statement that "equal protection of the law" continues to be protected under the federal and state constitutions does not ameliorate the constitutional problems raised by section 67-8002. A law which specifically deprives individuals of constitutional rights cannot be remedied by an additional boilerplate clause stating the constitution has not been suspended. This section, if it is passed and challenged, will not withstand judicial scrutiny.

II.

SECTION 67-8003

The next section of the initiative, section 67-8003, states:

> **EXTENSION OF LEGAL INSTITUTION OF MARRIAGE TO DOMESTIC PARTNERSHIPS BASED ON HOMOSEXUAL BEHAVIOR PROHIBITED.** Same-sex marriages and domestic partnerships are hereby declared to be against public policy and shall not be legally recognized in any manner by any agency, department or political subdivision of the State of Idaho.

This provision provides that same-sex marriages and domestic partnerships may not be legally recognized in Idaho. While the term "domestic partnership" is not defined in the initiative, presumably, the drafters intended to refer to arrangements whereby two homosexuals have agreed to share their home, financial resources and life together.

The legal effect of this provision is nil. The State of Idaho does not legally recognize either homosexual marriages or homosexual domestic partnerships. By statute, marriage is limited in Idaho to the union between a man and a woman. *See* Idaho Code § 32-202. Moreover, "domestic partnerships" are nowhere officially recognized in Idaho law. Thus, the state currently has a policy on the institution of marriage, and section 67-8003 is merely a restatement of state law and policy.

III.

SECTION 67-8004

Section 67-8004 of the initiative addresses speech relating to homosexuality in public elementary and secondary schools. The section provides:

> **PUBLIC SCHOOLS.** No employee, representative, or agent of any public elementary or secondary school shall, in connection with school activities, promote, sanction, or endorse homosexuality as a healthy, approved or acceptable behavior. Subject to the provisions of federal law, any discussion of homosexuality within such schools shall be age-appropriate as defined and authorized by the local school board of trustees. Counseling of public school students regarding such students' sexual identity shall conform in the foregoing.

This provision restricts speech that endorses the viewpoint that homosexuality is "healthy, approved or acceptable behavior." As with section 67-8002, the provision's language is inconsistent, referencing both homosexual "behavior," *i.e.*, conduct, as well as the status of "homosexuality."

The section restricts curriculum-related speech regarding homosexuality. In addition, the section's restrictions go beyond the classroom, preventing any "employee, representative or agent" from expressing those viewpoints in "connection with school activities." Finally, the section limits the discussion of homosexuality between counselors and students. Each of these restrictions will be discussed in turn.

A. Curriculum-Related Speech

When this office reviewed the proposed initiative on March 18, 1993, the public school provision under review encompassed all public schools, from elementary through the doctorate level. We concluded that the provision violated basic principles of academic freedom. Much of our focus was upon censorship of unpopular or controversial ideas at the university level. The "public schools" section of the ICA initiative has been substantially altered by its drafters and now encompasses only elementary and secondary schools and no longer addresses universities.[6] The question now is whether the restrictions placed upon teachers' and other school employees' speech in elementary and secondary schools, particularly as those restrictions relate to curriculum, violate any First Amendment rights of students or their teachers.

At the outset, it should be noted that schoolchildren and their instructors, even through the high school level, do not enjoy the same degree of First Amendment protections as do university students and faculty. The Supreme Court's recent opinions have upheld restrictions on speech at the high school level. 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).

Initially, the Supreme Court appeared poised to apply extensive First Amendment protections at the secondary school level similar to those associated with academic freedom at the university level. *See* Keyishian v. Board of Regents of U. of St. of N.Y., 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967). Two years after Keyishian, the Court upheld the right of schoolchildren to wear black armbands to class in protest of the Vietnam war, stating in now-famous language that it could "hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 506, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969). Tinker swept broadly in its protection of First Amendment rights while its description of exceptional situations justifying interference was narrow. The court stated that, in order to justify prohibiting

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[6] While public universities have now been excluded from section 67-8004, the "public schools" section of the initiative, they continue to be included within the broad scope of the "public funding" provision. The application and validity of the public funding restrictions as they relate to universities will be addressed at p. 22 discussing section 67-8005 of the initiative.

expression, the speech must "'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'" *Id.* at 509 (citation omitted).

Thirteen years later, in Board of Education v. Pico, 457 U.S. 853, 102 S. Ct. 2799, 73 L. Ed. 2d 435 (1982), the Supreme Court revisited free speech in public secondary schools and held that a school board could not remove books from a school library merely because of content objectionable to the board. In Pico, the Court began differentiating between school-sponsored as opposed to non-school-sponsored expression. Justice Brennan's plurality opinion focused on the library as the embodiment of the marketplace of ideas and, impliedly, less a part of the school curriculum than an opportunity for students' self-education. Chief Justice Burger's dissent viewed the library as part of the school's curricular environment and the selection of library materials as part and parcel of the school officials' authority to establish school curriculum. 457 U.S. at 889. Chief Justice Burger urged that school officials should be given wide discretion in exercising this authority.

In Bethel School District No. 403 v. Fraser, 478 U.S. 675, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986), the Court addressed the power of schools to impose standards not merely on formal curriculum but upon students' speech in school-sponsored forums. The Court in Fraser balanced free speech concerns against a high school's role in teaching "appropriate behavior" and "shared values." Holding that a school district had acted within its permissible authority in imposing sanctions upon a student in response to a speech he delivered at a voluntary school assembly in which he used elaborate and explicit sexual metaphors, the Court stated:

> These fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior.
>
> . . . .
>
> . . . The determination of what manner of speech in the classroom or in the school assembly is inappropriate properly rests with the school board. The process of educating our youth for citizenship in public schools

> is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise teachers--and indeed the older students--demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class.

478 U.S. at 681, 683 (citations omitted). Thus, in Fraser, the Supreme Court clarified that schoolchildren in school-sponsored forums do not have the full panoply of First Amendment free speech rights available to adults in other settings. Importantly, however, in reaching its holding the Court also emphasized that the penalties imposed and upheld in Fraser "were unrelated to any political viewpoint." 478 U.S. at 685.

The Court's subsequent opinion in Kuhlmeier dealt with a school's prepublication control of the content of a school newspaper. In Kuhlmeier, the principal had banned from a school newspaper an article concerning divorce and an article addressing teen pregnancy. The Court first determined that the newspaper was not a public forum but instead part of the school's journalism curriculum. The Court then upheld the restriction, 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 (emphasis added). The Court 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 . . . .

484 U.S. at 272. Likewise, the Court used a broad definition of "curriculum" which it said encompassed "school-sponsored publications, theatrical productions, and other expressive activities that students, parents and members of the public might reasonably perceive to bear the imprimatur of the school." *Id.* at 271.

Under the Supreme Court's recent jurisprudence, it is clear that elementary and secondary school speech that is curriculum-related may be reasonably restricted to further legitimate pedagogical concerns. A school may take into account the age of the audience and the sensitivity of issues being addressed. This is particularly so when sexual issues are involved, as Kuhlmeier held. *See also* Fraser, 478 U.S. 675. Thus, there is clearly no constitutional problem with section 67-8004'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 topic for political discussion and then bans the opposing viewpoint. A school could not, for example, establish a rule that during class discussions on current events, students who criticized one political party would be suspended while students who criticized another political party would receive higher marks. *See, e.g.,* Searcey v. Harris, 888 F.2d 1314 (11th Cir. 1989) (once school board determines students should learn about career opportunities at "career day," it cannot exclude peace organization solely because organization disagrees with board's views regarding the military). At some point, the state, the school board and educators' discretion to establish and control school curriculum can be abused. This abuse occurs if restrictions, rather than furthering "legitimate pedagogical concerns," are simply pretexts for suppressing political viewpoints with which the state does not agree.

When it comes to homosexuality, the balance is more difficult. Arguably, the state could exclude the issue from teachers' discussions altogether in curriculum-related activities. However, the ICA initiative does not do this. Age-appropriate discussion of the topic is allowed, but one viewpoint on the issue is prohibited. Yet, it is also true that homosexual sodomy, like heterosexual sodomy, is a crime in Idaho, *see* Idaho Code § 18-6605, and Kuhlmeier certainly holds that the advocacy of illegal or irresponsible behavior can be restricted in the classroom. The language of section 67-8004 of the initiative, however, goes beyond mere "endorsement" of the specific conduct prohibited by Idaho Code § 18-6605. It prohibits the "promot[ion], sanction[ing] or endorse[ment] [of] homosexuality as a healthy, approved or acceptable behavior." "Homosexuality" as used throughout the initiative is a broad term, encompassing both conduct and status; behavior defined and prohibited by Idaho Code § 18-6605; as well as other behavior, feelings, preferences and an identification with a particular group.

The ICA initiative abuses the discretion given the state and educators over school curriculum. Curriculum-related speech endorsing illegal or irresponsible sexual conduct can be restricted in elementary and secondary schools and, thus, the state could preclude teachers from advocating, in the classroom, illegal homosexual sodomy. But, the wording of the initiative goes beyond this. It would affect the discussion of topics

ranging from homosexuals in the military to AIDS. A court would be troubled by the breadth of the ICA initiative. The initiative, for example, would allow a teacher to raise, in a high school civics class, gays in the military as a topic for discussion, with the state officially dictating the outcome of the discussion and prohibiting one viewpoint on this topic from being addressed. The ICA initiative permits the state to cross the line between refusing to endorse illegal conduct and requiring the classroom to choose sides in an ongoing political debate and banning the viewpoint with which the state disagrees. Therefore, it is the opinion of this office that the ICA initiative has crossed that line by either prohibiting or chilling expression which is protected by the First Amendment.

B. Non-Curriculum-Related Speech

While the government has the discretion to significantly limit curriculum-related speech to further legitimate pedagogical concerns, this authority does not extend to non-curriculum-related or non-school-sponsored speech. Public school employees do not lose their First Amendment rights merely because they work for the state. *See* Pickering v. Board of Education, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968) (holding teacher could not be fired for letter to editor of local newspaper criticizing school board); City of Madison v. Wis. Emp. Rel. Com'n, 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); Levin v. Harleston, 966 F.2d 85 (2d Cir. 1992) (teacher cannot be disciplined for letters he wrote to *New York Times*); 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).

The ICA initiative prohibits speech sanctioning homosexuality by any "employee, representative or agent" of a public elementary or secondary school "in connection with school activities." The scope of this provision is much too broad. Not only does it encompass curriculum-related speech, it also encompasses such statements as those made by teachers at faculty meetings and by board members at board meetings. Discussion and opinion on homosexual issues cannot be censored by the state at these adult, non-curriculum-related functions. To even attempt to do so is a violation of First Amendment principles and would be enjoined by a court.

C. Counseling Services

Finally, section 67-8004 mandates that counseling of public school students must conform with the standard on homosexuality enunciated in that section. In short, a counselor must not indicate to a troubled youth seeking counseling that homosexual behavior can ever be considered "healthy, approved or acceptable."

This provision prohibits a non-judgmental approach toward sexual orientation and requires an institutional stance against homosexuality. Under this restriction, a counselor's independent judgment relative to the best interests of a minor client is subordinated to the state's endorsed sexual identity preference, regardless of the psychological needs of the client or the harm potentially inflicted.

The U.S. Supreme Court recently addressed First Amendment implications of restrictions placed upon government counseling services and upheld a regulation prohibiting funds granted under the federal Title X family planning program from being expended on abortion counseling. Rust v. Sullivan, ___ U.S. ___, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991). The Court reasoned that the speech at issue was simply beyond the scope of the narrow federal program being funded, 111 S. Ct. at 1773, also noting that fund recipients remained "free to pursue abortion-related activities when they [were] not acting under the auspices of the Title X project." 111 S. Ct. at 1775. Importantly, the Court further stated that some types of speech could not be censored by the government even if directly subsidized by the government, and that this "could" include speech that is part of a "traditional" relationship such as that between a "doctor and patient." 111 S. Ct. at 1776. The Court in Rust went on to conclude that the doctor-patient relationship in that case was so limited under the narrow federally funded program at issue, a patient would not be justified in expecting "comprehensive medical advice." Moreover, as the Title X program did not provide "post-conception medical care," a "doctor's silence with regard to abortion" would not "mislead a client into thinking that the doctor [did] not consider abortion an appropriate option for her." *Id.*

The counseling services at issue appear to fall within the scope of traditional relationships that, according to Rust, cannot be controlled by the state, even if the state is the funding source for that relationship. Moreover, unlike the doctor-patient relationship at issue in Rust, when a student seeks counseling on issues of sexual identity, that student is justified in expecting comprehensive and accurate information. To withhold such information either by silence or by offering only state-approved advice would be misleading and possibly harmful. Of course, this is not to say that counselors necessarily will sanction homosexuality as "acceptable" behavior. However, counselors should be able to exercise independent judgment and give accurate advice as to the psychological, medical and legal implications of homosexuality. They should be able to counsel students in a manner that serves the students' best interests and that is neither misleading nor harmful. In our opinion, to require otherwise in the name of an institutionalized position on homosexuality violates the First Amendment.

D. Summary

In short, section 67-8004 of the initiative restricts curriculum-related speech, some non-curriculum-related speech, and the discussions between school counselors and students. Generally, discretion is allowed as to restrictions of curriculum-related speech, but this initiative exceeds the bounds of that discretion to the extent it allows curriculum-related discussions concerning ongoing controversies while banning one particular point of view on those issues. A court would conclude that "legitimate pedagogical concerns" are not at the core of these curriculum-related restrictions, and that the restrictions are overly broad and violate the First Amendment. As to the potential non-curriculum-related censorship at school activities such as faculty and board meetings, the initiative clearly violates the First Amendment rights of school employees, representatives and agents. Finally, the counseling restrictions may also run afoul of the First Amendment. Taken as a whole, section 67-8004 is unconstitutional.

IV.

SECTION 67-8005

Section 67-8005 addresses public funding as well as access to library materials. This opinion will discuss each of these provisions separately.

A. Public Funding

The public funding portion of section 67-8005 states:

> **EXPENDITURE OF PUBLIC FUNDS.** No agency, department or political subdivision of the State of Idaho shall expend public funds in a manner that has the purpose or effect of promoting, making acceptable, or expressing approval of homosexuality. This section shall not prohibit government from providing positive guidance toward persons experiencing difficulty with sexual identity . . . .

This provision restricts both public funding and, potentially, counseling services. The funding restrictions are clearly unconstitutional; the counseling restrictions raise serious constitutional concerns.

1. Funding

The funding restriction prohibits the expenditure of public funds "in a manner" that would have the "purpose or effect of promoting, making acceptable, or expressing approval of homosexuality." The substance of this funding restriction is sweeping and,

again, it is aimed at homosexuality, not just homosexual behavior. For example, government funding of artistic endeavors which treat favorably homosexuality, such as the play *La Cage aux Folles*, would be prohibited. Likewise, a program addressing the pros as well as the cons of homosexual lifestyles could not be aired on public television without first being censored. Academic freedom at public universities would be curtailed to ensure public funds were not expended in a manner that could have the "effect" of "expressing approval" of homosexuality. This could impact the manner in which homosexual issues are discussed in sociology, psychology and law classes, the type of articles published in university publications, the research conducted at the university level and even the books purchased for university libraries.

Nor is the provision's array of consequences necessarily limited to the suppression of ideas. Public health and safety issues could also fall within its scope. By illustration, publicly funded AIDS education programs directed at high-risk groups might have to be tailored to avoid the "effect" of "expressing approval" of homosexuality--which could severely impact the candor and efficacy of such programs. Not only does this section constitute an aggressive effort to suppress controversial ideas, its terms could potentially be construed in a manner that would increase public health and safety risks for that segment of Idaho citizens that it targets.

This funding provision is repugnant to First Amendment free expression principles. The landmark case on restricting expenditure of public funds to regulate the content of expression is Perry v. Sindermann, 408 U.S. 593, 597, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972). In that opinion, the U.S. Supreme Court held that a state college could not refuse to rehire a professor solely because of his public criticism of the college administration. In so holding, the Court stated:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly."

Under Perry, the government cannot indirectly burden protected speech through its funding mechanisms.

In Rust, the Court revisited this issue in the context of a federal funding restriction on abortion counseling. The Court drew a distinction between the denial of a benefit to a recipient on account of his speech (which is unconstitutional) and an insistence that public funds be spent for the program purposes for which they are specifically authorized (which the Constitution allows). In so holding, the Court emphasized that it was not addressing a "general law singling out a disfavored group on the basis of speech content," but was instead only reviewing speech which was simply beyond the scope of the narrow federal program being funded. 111 S. Ct. at 1773. Moreover, even within the realm of government-subsidized programs and speech, the Court carved out areas as to which restrictions on the content of government-funded speech are not allowable, including open forums, universities, and traditional relationships such as that between a doctor and patient:

> This is not to suggest that funding by the government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify Government control over the content of expression. For example, this Court has recognized the existence of a government "subsidy" in the form of government-owned property, does not justify the restriction of speech in areas that have "been traditionally open to the public for expressive activity" . . . or have been "expressly dedicated to speech activity" . . . . Similarly, we have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment . . . . It could be argued by analogy that traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by Government.

111 S. Ct. at 1776 (citations omitted).

In short, under Rust, the government's interest is in ensuring that the money it raises and appropriates for a particular program is spent to further the purpose of that program. The government does not have a valid interest in simply suppressing speech with which it disagrees, and Rust does not stand for that proposition. Further, there are certain traditional areas such as government-owned open forums, universities and doctor-patient relationships where the content of speech cannot be controlled through funding expenditure restrictions, even if the government is the funding source for those programs

or relationships. In those areas, the historic value placed upon free speech overrides the government's interest in strictly controlling all of its funds.

Since Rust, lower courts have had the opportunity to clarify the list of areas that are "traditionally" open to free expression and, therefore, immune from government efforts to attach content-based conditions to the expenditure of subsidies. For example, in Board of Tr. of Leland Stanford Univ. v. Sullivan, 773 F. Supp. 472 (D.D.C. 1991), the court set aside the confidentiality clause in a research contract, stating it unconstitutionally impinged upon freedom of expression in the area of scientific research:

> The Supreme Court decided in *Rust v. Sullivan* that when the government grants money to an institution or a program, it may under certain circumstances condition that grant upon curtailment of the program participants' rights under the First Amendment. Defendants' argument in this case is that that decision is applicable to government grants and contracts generally, without substantial limitation. The *Rust* decision opened the door to government review and suppression of speech and publication in areas which had theretofore been widely thought immune from such intrusion; the government's position in this case, if endorsed by the courts, would take that door off its hinges.
>
> That position must be viewed in the context of the fact that few large-scale endeavors are today not supported, directly or indirectly, by government funds--from the health care of senior citizens, to farm subsidies, to the construction of weaponry, to name but a few of the most obvious. Defendants' proposal would, at least potentially, subordinate the free speech rights of the participants in the program receiving such federal monies to the government's wishes. To put it another way, if the Supreme Court decision were to be given the scope and breadth defendants advocate in this case, the result would be an invitation to government censorship wherever public funds flow, and acceptance by the courts of defendants' position would thus present an enormous threat to the First Amendment rights of American citizens and to a free society.

773 F. Supp. at 478 (emphasis added).

Likewise, in Finley v. National Endowment for the Arts, 795 F. Supp. 1457 (C.D. Cal. 1992), the court held that as artistic expression, like academic speech, is "at the core of a democratic society's cultural and political vitality," the government is without free reign to impose whatever content restrictions it chooses on funding for the arts:

> In both settings, limited public funds are allocated to support expressive activities, and some content-based decisions are unavoidable. Nonetheless, this fact does not permit the government to impose whatever restrictions it pleases on speech in a public university, nor should it provide such license in the arts funding context.

795 F. Supp. at 1475.

The public funding restrictions contained in the ICA initiative fall far beyond what Rust and its progeny have held is permissible. It would be apparent to a reviewing court that, unlike the narrow restriction upheld in Rust, these initiative provisions are not a good faith effort to ensure that specifically earmarked funds raised by the state are spent for the program purposes for which they are authorized. Rather, it is an effort to censor a controversial idea in numerous public programs at all levels, regardless of whether the censored speech falls within the scope of the funded programs' purposes. Worse, the restrictions cut severely into areas which the courts have expressly granted heightened free speech protection from government conditions on funding, such as universities, scientific research and the arts. In the words of the U.S. Supreme Court:

> We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 641-42, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943) (emphasis added). The public funding provision of section 67-8005 violates this First Amendment principle and would be struck down by a reviewing court.

2. Counseling Restrictions

Like the public school section, the public funding section also contains a counseling provision. Here, "positive guidance toward persons experiencing difficulty with sexual identity" is allowed. What constitutes "positive guidance" is not defined. The context of this initiative and its general tenor regarding homosexuality suggest that "positive guidance" on "sexual identity" difficulties means disapproving of homosexuality regardless of the client's needs and interests. As with the school

counseling provision addressed above, if this provision divests counselors and doctors of their independent judgment and intrudes upon the therapist-patient relationship to suppress an unpopular viewpoint, regardless of the health needs of the patient or the medical accuracy of the state-approved view, freedom of speech in a traditionally protected relationship is violated.

B. Library Materials

Section 67-8005 of the initiative addresses library materials as well as public funding, stating:

> This section shall not limit the availability in public libraries of books and materials written for adults which address homosexuality, provided access to such materials is limited to adults and meets local standards as established through the normal library review process.

Under the terms of this provision, materials "written for adults" which "address homosexuality" may still be retained in public libraries and adults may have access to them. However, such access is denied to minors. This provision violates the First Amendment of the United States Constitution.

As noted above, minors do have limited First Amendment rights, although these rights are not as broad as the rights of adults. As already discussed, substantial restrictions on free expression are allowed in the school classroom to further legitimate pedagogical concerns. Moreover, materials that are "pervasively vulgar," obscene or otherwise age-inappropriate for impressionable young minds may be denied to minors in or out of the classroom. *See* Ginsberg v. New York, 390 U.S. 629, 88 S. Ct. 1274, 20 L. Ed. 2d 195 (1968). However, despite these limits, minors nevertheless retain some First Amendment rights to receive information and gain knowledge. For example, in Pico, 457 U.S. at 871, the U.S. Supreme Court held that local school boards may not remove books from secondary school libraries simply because they dislike the ideas contained in those books:

> Our Constitution does not permit the official suppression of *ideas*. Thus, whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution.

In reaching its holding, 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 omitted). Under this analysis, it is evident that while minors may not have the full panoply of First Amendment rights as do adults, certainly, when it comes to library reading materials, minors cannot be denied access to those materials for no other reason than that the state disagrees with the ideas expressed therein.

The provision at issue here severely limits the library books that minors may read. The term "materials written for adults which address homosexuality" is both vague and overbroad. Arguably, it encompasses virtually any reading material not written for children that contains homosexual themes, references, allusions, etc. The list of books and other written materials affected by this provision includes literary works by Socrates, Plato, Thomas Mann, E.M. Forster, James Baldwin, Tennessee Williams and Walt Whitman, to name a few. Likewise, historical biographies on important figures such as Michelangelo, Alexander the Great, Oscar Wilde and King James I would be off-limits. Added to this are the numerous legal, political, scientific and social science writings which may address homosexuality. Moreover, access to widely read magazines generally available at libraries, such as *Time* or *Newsweek*, which periodically contain articles discussing homosexual issues would have to be strictly curtailed.

The provision's broad restrictions do not appear to be tied to any valid considerations such as the "age-appropriateness" of the banned material. Notably, under the provision, minors are not denied access to adult materials which address heterosexuality. Indeed, under the provision's terms, even explicit age-inappropriate material addressing heterosexuality would not be restricted. The provision is a transparent effort to prevent exposure to ideas with which the initiative's proponents disagree. This sweeping content-based restriction on minors' First Amendment rights to receive information and ideas violates the Constitution and is invalid.

Moreover, the library restriction is also unworkable. It is simply unrealistic to assume that librarians are aware of all adult materials which address homosexuality, and a librarian can hardly be expected to go through the library book-by-book, magazine-by-magazine, reading each one and separating any that address the topic. Indeed, a likely consequence of this unreasonable legal duty is that librarians, in an effort to comply with the law, will deny to minors materials to which they should have access even under this provision's restrictive terms. This foreseeable "chilling" effect further exacerbates the constitutional problems at play here.

In sum, while there are certainly materials in public libraries minors ought not to read, section 67-8005's sweeping provision does not address that problem in a realistic or

constitutional manner, but instead creates an unworkable scheme which violates the First Amendment rights of minors.

V.

SECTION 67-8006

Section 67-8006 states:

> **EMPLOYMENT FACTORS.** With regard to public employees, no agency, department or political subdivision of the State of Idaho shall forbid generally the consideration of private sexual behaviors as non-job factors, provided that compliance with Title 67, Chapter 80, Idaho Code is maintained, and that such factors do not disrupt the work place.

This section, unlike the other sections of the proposed initiative, does not address homosexuality alone, but, rather, addresses all private sexual behavior. This provision certainly clarifies that, in the public employment context at least, discrimination against either homosexuals or heterosexuals based upon their private sexual behavior is not required by the initiative, although it is permitted. The provision does not purport to address such areas as real estate transactions, public accommodations, education and private employment. Thus, the official state policy of section 67-8002 permitting discrimination against homosexuals in these areas remains firmly intact, as does the equal protection abridgment. Section 67-8006 does not cure any of the other constitutional problems discussed in this opinion.

VI.

THE IDAHO CONSTITUTION

The constitutional issues raised throughout this opinion have been analyzed under the United States Constitution. Idaho has its own state constitutional provisions which also protect freedom of speech and equal protection of the law. *See* art. 1, secs. 2, 9 and 10, Idaho Constitution. Importantly, the Idaho Supreme Court has held that the protections provided by the Idaho Constitution can be given broader scope than those provided under the United States Constitution. *See, e.g.,* State v. Guzman, 122 Idaho 981, 842 P.2d 660 (1992). Thus, the Idaho Supreme Court is not limited by the federal judiciary's interpretation of the United States Constitution. Rather, it can and has relied upon its own authority and responsibility to independently construe and apply state constitutional protections.

The placement of our own state "Bill of Rights" first in the Idaho Constitution reveals how deeply Idahoans cherish both their civil liberties and principles of fairness to others. This initiative, which burdens freedom of expression and equal treatment of all Idaho citizens, clearly violates the principles of the Idaho Constitution. The Idaho Supreme Court is unlikely to stand by and allow a segment of Idaho's citizens to be targeted for state-condoned discrimination and denial of equal access to the political process. Likewise, the court will no doubt find repugnant to free speech guarantees the burdens placed upon the expression of controversial ideas.

VII.

SECTION 67-8007

Section 67-8007 of the initiative is a severability clause stating that if any section of the "enactment" is "found unconstitutional," the "remaining parts will survive in full force and effect." Generally, courts favor severing unconstitutional provisions in a statute from the remaining portion, if such was the intent of the drafters. However, when the purpose of an act fails, the entire act must also fail. *See, e.g.,* State Water Conservation Board v. Enking, 56 Idaho 722, 58 P.2d 779 (1936). A court is not obligated to rewrite an entire statute when its purpose has been defeated.

This initiative could not survive constitutional scrutiny with respect to many, perhaps all, of its substantive portions. The purpose and concept of this initiative is fundamentally flawed, and it is unlikely that a court would invoke the severability clause in an attempt to salvage a portion of it. Indeed, even if a court were so inclined, it is doubtful the initiative could be severed in a constitutionally suitable manner.

CONCLUSION

The past holds a lesson for the present. In 1879, when U.S. Supreme Court Justice Stephen Field was handling circuit duties in California, he was presented with a San Francisco ordinance requiring that every male entering the county jail have his hair cut to a uniform length of one inch. Despite the innocuous terms in which the ordinance was written, Justice Field understood it to be legislation designed to punish the then-unpopular Chinese by subjecting them to the loss of their traditional "queue." In striking down the seemingly innocent ordinance, Justice Field had this to say:

> We cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men . . . .

Ho Ah Kow v. Nunan, 12 F. Cas. 546, p. 252 (D. Cal. 1879) (No. 6).

In the history of a nation composed of ever-initially unpopular groups, citizens of a homosexual orientation are but the most recent of frequently persecuted persons who look to the law and those who enforce it for fairness and decency. The ICA initiative seeks to corrupt that law, using it as an instrument of division and discrimination rather than for equal protection and equal rights. We live in a country in which our highest court has unequivocally held that some objectives such as "'a bare . . . desire to harm a politically unpopular group' . . . are not legitimate state interests." City of Cleburne, 473 U.S. at 447 (citation omitted). Further, that Court has stated:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials . . . . One's right to life, liberty, and property, to free speech, a free press, freedom of worship and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943) (emphasis added).

Freedom of speech, equal protection, fair access to the political process--these are all basic principles upon which our society rests. They are the principles which allow our society to flourish. This initiative, while purporting to deny special or unusual protection to one group, in fact seeks to deprive this group of the full enjoyment of these essential principles. The Idaho Supreme Court will not permit this to happen. It is our opinion that even if this initiative marking a politically unpopular group of Idahoans for abridgment of their core constitutional rights succeeds at the ballot, it will never be allowed to go into effect.

AUTHORITIES CONSIDERED

1. United States Constitution:

First Amendment.
Fourteenth Amendment.

2. Idaho Constitution:

Art. 1, sec. 2.
Art. 1, sec. 9.
Art. 1, sec. 10.

3. Idaho Code:

§ 18-6605.
§ 18-7301.
§ 18-7902.
§ 18-7903.
§ 32-202.
§ 67-2402.
§ 67-5909.

4. U.S. Supreme Court Cases:

Board of Education v. Pico, 457 U.S. 853, 102 S. Ct. 2799, 73 L. Ed. 2d 435 (1982).

Bethel School District No. 403 v. Fraser, 478 U.S. 675, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986).

City of Cleburne, Texas v. Cleburne Living Center, Inc., 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

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