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

April 22, 2019

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

Re: Certificate of Review
Proposed Initiative Creating New Medical Marijuana Act by Adding Chapter 92 to Title 39, Idaho Code, to Legalize the Use of Medical Marijuana

Dear Secretary of State Denney:

An initiative petition was filed with your office on March 28, 2019. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only." The petitioners are free to "accept them in whole or in part." Due to the available resources and limited time for performing the reviews, we did not communicate directly with the petitioner as part of the review process. The opinions expressed in this review are only those that may affect the legality of the initiative. This office offers no opinion with regard to the policy issues raised by the proposed initiative.

BALLOT TITLES

Following the filing of the proposed initiative, this office will prepare short and long ballot titles. The ballot titles should 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, petitioners may submit proposed titles for consideration. Any proposed titles should be consistent with the standard set forth above.

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MATTERS OF SUBSTANTIVE IMPORT

A. Summary of the Initiative

The initiative is self-titled the "Idaho Medical Marijuana Act" (hereafter "Act") and is denominated as Idaho Code § 39-9201, *et seq.*[1] Primarily, the initiative seeks to amend title 39, Idaho Code, by adding a new chapter 92, which declares that persons engaged in the use, possession, manufacture, sale, and/or distribution of marijuana to persons suffering from debilitating medical conditions, as authorized by the Act, are protected from arrest, prosecution, property forfeiture, and criminal and other penalties under Idaho law.

In general, the Act authorizes the Idaho Department of Health & Welfare ("Department") to establish a comprehensive registration system for instituting and maintaining the production and dispensing of marijuana for use by persons diagnosed with a debilitating medical condition. Prop. I.C. § 39-9206. The Act directs the Department to approve or deny applications for "registry identification cards" presented by "qualifying patients," their "designated caregivers," and "agents" of "medical marijuana organizations." Prop. I.C. §§ 39-9202(3), 39-9202(17), and 39-9208 to 39-9213. The Department is required to issue "registration certificates" to qualifying "medical marijuana organizations," defined as "medical marijuana production facilities," "medical marijuana dispensaries,"[2] and "safety compliance facilities." Prop. I.C. §§ 39-9202(11), 39-9202(16), 39-9207, 39-9213, and 39-9215. The Act permits, without state civil or criminal sanctions, marijuana to be produced by medical marijuana production facilities throughout the state (and qualified patients and/or designated caregivers whose registry identification cards allow them to "cultivate" marijuana), tested for potency and contaminants at safety compliance facilities, and transported to medical marijuana dispensaries for sale to qualifying patients and/or their designated caregivers.

Section 1 of the Act insulates from arrest, prosecution, and property forfeiture, "qualifying patients" diagnosed with having a "debilitating medical condition" who use marijuana for medicinal purposes, as well as their "designated caregivers." The Act establishes a complex regulatory system whereby "agents" of medical marijuana organizations – medical marijuana production facilities, medical marijuana dispensaries, and safety compliance facilities – are insulated from civil forfeitures and penalties under state law. Discrimination against

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[1] References to "proposed" I.C. § 39-9201, *et seq.*, will read, "Prop. I.C. § 39-9201," etc.

[2] The Act limits the number of medical marijuana dispensaries to "5 per 20,000 permanent residents in each county." Prop. I.C. §§ 39-9207(1) and 39-9216(2).

participants in the Act is prohibited in regard to education, housing, and employment. The Department is required to formulate rules and regulations to implement and maintain the Act's measures. Section 2 excludes from arrest, fine, or prosecution, any persons who possess marijuana paraphernalia who are participants in the Act's medical marijuana program. Section 3, entitled "Hemp Legalization," defines, legalizes, and regulates hemp consistent with federal law. Section 4 excludes "hemp" from the definition of "marijuana" as a Schedule I hallucinogenic controlled substance. Lastly, Section 5 is a "severability" provision which declares that, if any provision of the Act is declared invalid, the remaining portions of the Act remain valid.

Section 1 of the Act provides that: (1) qualifying patients ("patients") may possess up to four (4) ounces of marijuana and, if a patient's registry identification card states that the patient "is exempt from criminal penalties for cultivating marijuana," the patient may also possess up to six (6) marijuana plants in an enclosed locked facility, etc., and any marijuana produced from those plants; and (2) designated caregivers ("caregivers") to assist up to three (3) patients' medical use of marijuana, and to independently possess, for each patient assisted, the same amounts of marijuana described above. Prop. I.C. §§ 39-9202(2), 39-9202(6), and 39-9202(15). Apart from indicating that patients and caregivers may be designated as "exempt from criminal penalties for cultivating marijuana," there is no provision for anyone else to cultivate marijuana apart from a marijuana production facility.

In order to become a "qualifying patient," a person must have a "practitioner" (defined as a person authorized to prescribe drugs pursuant to the Medical Practice Act (I.C. §§ 54-1800, *et. seq.*)) provide a written recommendation that, in the practitioner's professional opinion, the patient "is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the patient's debilitating medical condition or symptoms associated with the debilitating condition." Prop. I.C. §§ 39-9202(14), 39-9202(15), and 39-9202(22). The recommendation must specify the patient's debilitating medical condition and may only be signed (and dated) in the course of a "practitioner-patient relationship after the practitioner has completed a full assessment of the qualifying patient's medical history and current medical condition." *Id.* Minors are also entitled to be issued registry identification cards as patients under certain criteria. Prop. I.C. § 39-9210(2).

A "debilitating medical condition" means not only the conditions listed (such as cancer, glaucoma, HIV, AIDS, Alzheimer's disease, post-traumatic stress disorder, etc.), but also "[a] chronic or debilitating disease or medical condition or

its treatment that produces cachexia or wasting syndrome, severe pain, chronic pain, severe nausea, seizures, including those characteristic of epilepsy, or severe and persistent muscle spasms, including those characteristic of multiple sclerosis," any terminal illness with life expectancy of less than twelve (12) months, or "[a]ny other medical condition or its treatment added by the Department pursuant to section 39-9204." Prop. I.C. § 39-9202(4). The Act provides that the public may petition the Department to add debilitating medical conditions or treatments to the list of those established in Prop. I.C. § 39-9202(4).

"Agents" are defined as principal officers, board members, employees, or volunteers of a medical marijuana organization who are at least twenty-one (21) years old and who have "not been convicted of a felony offense." Prop. I.C. § 39-9202(1). A "felony offense" means a felony which is either a "violent crime" or a violation of a state or federal controlled substance law; it does not include an offense "for which the sentence, including any term of probation, incarceration, or supervised release, was completed five or more years earlier." Prop. I.C. § 39-9202(8). Designated caregivers have the same "felony offense" restriction, are required to be at least twenty-one (21) years old, and "agree to assist no more than three (3) qualifying patients" at the same time. Prop. I.C. § 39-9202(6).

Patients may apply for registry identification cards for themselves and their caregivers by submitting a written recommendation issued by a practitioner within the last ninety (90) days, application, fee, and a "designation as to who will be allowed to cultivate Marijuana plants for the qualifying patient's medical use if a Medical Marijuana dispensary is not operating within five (5) miles of the qualifying patient's home and the address where the Marijuana plants will be cultivated." Prop. I.C. § 39-9209(1).[3] The Department is obligated to verify the information in an application (or renewal request) for a registry identification card, and approve or deny the application within ten (10) days after receiving it, and must issue a card within five (5) more days thereafter. Prop. I.C. § 39-9210(1). If a registry identification card "does not state that the cardholder is authorized to cultivate Marijuana plants, the Department must give written notice to the registered qualifying patient . . . of the names and addresses of all registered medical Marijuana dispensaries." Prop. I.C. § 39-9210(3). The registry identification cards must include a "random twenty (20) digit alphanumeric identification number that is unique to the cardholder," and a "clear indication of whether the cardholder has been authorized by this chapter to cultivate Marijuana plants for the qualifying patient's medical use." Prop. I.C. § 39-9211(1)(d), (g). The Department may deny an application or renewal request for a registry identification card for failing to meet

[3] The Act also allows "visiting qualifying patients" from other states to possess medical marijuana while in Idaho. Prop. I.C. § 39-9202(21).

the requirements of the Act, and must provide written notice of its reasons for doing so. Prop. I.C. § 39-9212. Registry identification cards expire after one (1) year, and may be renewed for a fee. Prop. I.C. § 39-9213.

Medical marijuana organizations must have operating documents that include procedures for the oversight of the organization and accurate recordkeeping, and are required to implement security measures to deter theft of marijuana and unauthorized entrance into areas containing marijuana. Prop. I.C. § 39-9215. Medical marijuana production facilities must restrict marijuana cultivation, harvesting, etc., within an enclosed, locked facility only accessible to registered agents. Prop. I.C. § 39-9215(3). Medical marijuana production facilities and dispensaries "may acquire usable Marijuana or Marijuana plants from a registered qualifying patient or a registered designated caregiver only if the . . . patient or . . . caregiver receives no compensation for the Marijuana." Prop. I.C. § 39-9215(4).

The Act adopts a tax of four percent (4%) on medical marijuana sales. Prop. I.C. § 39-9218(1). "After retaining no more than five percent (5%) of the tax revenue collected, the Idaho State Tax Commission shall disperse the remaining fifty percent (50%) to the Idaho Division of Veterans Services and the other fifty percent (50%) to the Idaho Department of Education[,]" which are "in addition to any funds regularly dispersed" to those entities. Prop. I.C. § 39-9218(2).

The Department is required to "establish and maintain a verification system for use by law enforcement personnel and registered medical Marijuana organization agents to verify registry identification cards." Prop. I.C. § 39-9219(1). Patients are required to notify the Department within ten (10) days of any change in name, address, designated caregiver, and their preference regarding who may cultivate marijuana for them, and, upon receipt of such notice, the Department has ten (10) days to issue a new registry identification card. Prop. I.C. § 39-9220(1), (4). If the patient changes the caregiver, the Department must notify the former caregiver that "his/her duties and rights . . . for the qualifying patient expire fifteen (15) days after the Department sends notification." Prop. I.C. § 39-9220(6).

The Department must submit an annual public report to the legislature with information set out in Prop. I.C. § 39-9221. The Department is required to keep all records and information received pursuant to the Act confidential, and any dispensing of information by medical marijuana organizations or the Department must identify cardholders and such organizations by their registry identification numbers and not by name or other identifying information. Prop. I.C. § 39-9222(1), (2).

Department employees may notify state or local law enforcement about suspected fraud or criminal violations "if the employee who suspects the falsified or fraudulent information was submitted has conferred with his supervisor and both agree the circumstances warrant reporting." Prop. I.C. § 39-9222(6)(a). Similarly, and somewhat redundantly, subsection (b) states that the Department may notify law enforcement "about apparent criminal violations of this chapter if the employee who suspects the offense has conferred with his supervisor and both agree the circumstances warrant reporting." Prop. I.C. § 39-9222(6)(b). To the extent the two "reporting" provisions disallow anyone, on their own, from reporting suspected crimes to law enforcement authorities, they are most likely unenforceable restrictions on the First Amendment's right to free speech. In contrast, Department employees may, on their own, notify the board of medical examiners "if they have reason to believe that a practitioner provided a written recommendation without completing a full assessment of the qualifying patient's medical history and current medical condition, or if the Department has reason to believe the practitioner violated the standard of care, or for other suspected violations of this chapter." Prop. I.C. § 39-9222(6)(c).

Prop. I.C. § 39-9223 is entitled "Presumption of Medical Use of Marijuana – Protections – Civil Penalties." Prop. I.C. § 39-9223(1) creates a rebuttable presumption in criminal, civil, and administrative court proceedings that patients and caregivers are deemed to be lawfully engaged in the medical use of marijuana if their conduct complies with the Act. The presumption may be rebutted with evidence that the conduct "was not for the purpose of treating or alleviating the qualifying patient's debilitating medical condition or symptoms." *Id.* The proposed statute provides that qualifying patients, visiting qualifying patients, and designated caregivers are not subject to arrest, prosecution, or penalty in any manner, or denial of any right or privilege, including any civil penalty or disciplinary action by a court or occupational or professional licensing board or bureau for conduct authorized by the Act. Prop. I.C. § 39-9223(2), (3). Additionally, practitioners are protected from sanctions for conduct "based solely on providing written recommendations" (or for otherwise stating) with the required diagnosis, but may be subject to sanction by a professional licensing board for "failing to properly evaluate a patient's medical condition or otherwise violating the standard or care for evaluating medical conditions." Prop. I.C. § 39-9223(4). No person is subject to criminal or civil sanctions for selling marijuana paraphernalia to a cardholder or medical marijuana *organization*, being in the presence of "the [authorized] medical use of Marijuana," or assisting a patient as authorized by the Act. Prop. I.C. § 39-9223(5). Although it may be reasonable to sell marijuana paraphernalia to a medical marijuana dispensary for resale, the need to sell marijuana paraphernalia

to either a medical marijuana production facility or a safety compliance facility is unclear.

The Act makes medical marijuana organizations and their agents immune from criminal and civil sanctions, and searches or inspections, if their conduct complies with the Act. Prop. I.C. § 39-9223(6)-(8). Further, the mere possession of, or application for, a registry identification card "may not constitute probable cause or reasonable suspicion, nor may it be used to support the search of the person or property of the person possessing or applying for the registry identification card." Prop. I.C. § 39-9223(10). Prop. I.C. § 39-9223(11) states that no school, landlord, or employer may be penalized or denied any benefit under state law for enrolling, leasing to, or employing a cardholder, and no landlord may be penalized or denied any benefit under state law for leasing to a registered Medical Marijuana organization."[4]

Prop. I.C. § 39-9223(9) reads:

> (9) Property, including all interests in the property, otherwise subject to forfeiture under Title 37, Idaho Code that is possessed, owned, or *used in connection* with the Medical use of Marijuana authorized under this chapter or *acts incidental* to the Medical use of Marijuana authorized under this chapter, is not subject to seizure or forfeiture. This subsection does not prevent civil forfeiture if the basis for the forfeiture is *unrelated* to the medical use of Marijuana.

The italicized words in the above Prop. I.C. § 39-9223(9) make the provision subject to constitutional challenges due to their vagueness.

Prop. I.C. § 39-9223(12) (emphasis added) states that an attorney "may not be subject to disciplinary action by the state bar association or other professional licensing association for providing legal assistance to a person *related to activity that is not subject to criminal penalties* under state law pursuant to this chapter." This provision appears to insulate attorneys from disciplinary action unless their representation relates to a *client's* activity that is subject to criminal penalties under state law. That condition would make it impossible for the state bar association to sanction an attorney for having a conflict of interest, mishandling of funds, case inaction, failure to communicate, and other types of professional malpractice,

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[4] However, the Act "does not prevent the imposition of any civil, criminal, or other penalties" for possessing or engaging in the medical use of marijuana on a school bus, on the "grounds of any licensed daycare, preschool, primary or secondary school," in a correctional facility, or smoking marijuana on any public transportation or in any public place. Prop. I.C. § 39-9205.

where the client's matter "is not subject to criminal penalties." Why the criminal aspect of a client's matter should determine whether the state bar can discipline an attorney for sub-par or unethical representation is not clear.

Prop. I.C. § 39-2223(13) (emphasis added) protects patients and caregivers from criminal penalty and parental rights sanctions due to medical marijuana use unless the court makes written findings based on substantial evidence that such use has resulted in the patient's (or caregiver's) "impairment *that interferes with the performance of parenting functions*." This language may be read to require that the harm to the child was caused by the patient's *ongoing* impairment from marijuana use -- not from occasional marijuana use that does not impair the general ability to parent. Additionally, the determination of when a criminal or parental rights sanction is "due to" medical marijuana use is open to constitutional challenge due to vagueness, as there would likely be many cases in which such use is an indirect or contributing factor.

Subsection (14) of Prop. I.C. § 39-2223 precludes schools and landlords from penalizing persons based on their status as a medical marijuana cardholder (referred to as "license holder" in this section), unless doing so "would imminently cause the school or landlord to lose a monetary or licensing related benefit under federal law or regulations." Subsection (15) employs the same monetary-licensing exception in precluding employers from discriminating against cardholders ("license holder"), and allows employers to take action against an employee if the cardholder "uses or possesses marijuana" at work during work hours.

Prop. I.C. § 39-2223(17) (emphasis added) states, "No person holding a medical marijuana license may *unduly* be withheld from holding a state issued license by virtue of their being a medical marijuana license holder." The word "unduly" is vague, and subject to constitutional challenge.

Prop. I.C. § 39-2223(18) reads, "No city or local municipality may unduly change or restrict zoning laws to prevent the opening of a retail marijuana establishment." Again, the word "unduly" may make the provision unconstitutionally vague. To the extent the provision limits the inherent ability of a governmental entity to enact reasonable zoning regulations, it would likely be held unconstitutional.

Prop. I.C. § 39-9205(4) states that the Medical Marijuana Act's provisions do not authorize persons to operate, etc., any motor vehicle, aircraft, or motorboat "while under the influence of marijuana[.]" The provision further states that qualifying patients and visiting qualifying patients may not be considered to be

under the influence of marijuana solely because of the presence of metabolites or components of marijuana "without noticeable actions of impairment including slurred speech and lethargic movements." *Id.* The provision does not explain who, or under what circumstances, a law enforcement officer, employer, or teacher, etc., would be precluded from "considering" whether a patient is under the influence of marijuana. Additionally, the requirement that a patient cannot be deemed to be under the influence of marijuana because of metabolites in their system "without noticeable actions of impairment *including* slurred speech and lethargic movements" appears to mandate the latter two (2) symptoms when metabolites are present. (Emphasis added.) This overlooks several other physical symptoms law enforcement officers, including drug recognition experts, are trained to detect regarding marijuana use.[5] *See* State v. Johnson, 137 Idaho 656, 660, 51 P.3d 1112, 1116 (Ct. App. 2002) ("Johnson's failure of that test, together with other factors—his dilated pupils, bloodshot eyes, body tremors, and excessive nervousness—enhanced Wunsch's suspicion that Johnson may have been using marijuana."); State v. Morin, 158 Idaho 622, 625, 349 P.3d 1213, 1216 (Ct. App. 2015) ("He opined that dilated pupils, confusing speech patterns, impairments to balance and other psychomotor function, 'lack of convergence,' and a green coating of the tongue were all diagnostic indications of marijuana intoxication exhibited by Morin."). In short, Prop. I.C. § 37-9205(4) attempts to restrict how persons in authority may detect whether patients are under the influence of marijuana.

The Department is given the task of making extensive rules, pursuant to the Idaho Administrative Procedure Act ("IDAPA") for implementing the Act's measures, including rules for: the form and content of applications and renewals, a system to "numerically score competing medical marijuana dispensary applicants," the prevention of theft of marijuana and security at facilities, oversight, recordkeeping, safety, dispensing of medical marijuana "by use of an automated machine," and safe and accurate packaging and labeling of medical marijuana. Prop. I.C. § 39-9206. Notably, the provision requires that, in establishing application and renewal fees for registry identification cards and registration certificates, "[t]he total amount of all fees must generate revenues sufficient to implement and administer this chapter, except fee revenue may be offset or supplemented by private donations." Prop. I.C. § 39-9206(1)(g)(i). The same self-funding requirement is repeated in Prop. I.C. § 39-9206(1)(g)(iii). A "medical marijuana fund" is established by Prop. I.C. § 39-9229. The fund consists of "fees

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[5] Instead of reading "*including* slurred speech and lethargic movements," a provision stating "*such as* slurred speech" would not limit the symptoms a law enforcement officer could consider in determining whether a person is affected by marijuana use.

collected, civil penalties imposed, and private donations," and is to be administered by the Department.

Under the heading "Affirmative Defense," the Act provides that patients, visiting patients, and caregivers "may assert the medical purpose for using Marijuana as a defense to any prosecution of an offense involving Marijuana intended for a qualifying patient's or visiting qualifying patient's medical use, and this defense must be presumed valid if," several criteria are met. Prop. I.C. § 39-9224(1). If evidence shows that the listed criteria are met, the defense "must be presumed valid." *Id.* Further, Prop. I.C. § 39-9224(2) allows a person to assert the "medical use" affirmative defense "in a motion to dismiss, and the charges must be dismissed following an evidentiary hearing if the person shows the elements listed in subsection (1)." Prop. I.C. § 39-9224 clearly creates a conclusive presumption, which is not only disfavored in law, but is also inconsistent with the way affirmative defenses operate – i.e., by requiring the defense to present prima facie evidence at trial to support an affirmative defense before a jury instruction on the affirmative defense is deemed warranted. Moreover, the provision gives defendants the opportunity of having an affirmative defense be the basis not only of acquittal at trial, but dismissal prior to trial. Finally, if the patient or caregiver succeeds in demonstrating a medical purpose for the patient's use of marijuana, there can be no disciplinary action by a court or occupational or professional licensing board, etc. Prop. I.C. § 39-9224(3).

Under the heading, "Discrimination Prohibited," the Act makes it illegal for schools, landlords, nursing facilities, intermediate care facilities, hospice houses, hospitals, etc., to penalize a person solely for his or her status as a cardholder, unless to do so would violate federal law or cause the entity to lose a monetary or licensing benefit under federal law. Prop. I.C. § 39-9225(1). Subsection (5) of the proposed statute further states:

> (5) In any criminal, child protection, and family law proceedings, allegations of neglect or child endangerment by a qualified patient or qualified caregiver for conduct allowed under this chapter are not admissible to the court, without *substantial evidence* that the person's behavior creates an unreasonable danger to the safety of the minor(s) as established by written findings of *clear and convincing evidence* that such neglect or child endangerment is a direct outcome of a qualifying patient or caregiver's medical use or cultivation of Marijuana.

Prop. I.C. § 39-9225(5) (emphasis added). There are several problems with the proposed provision. First, the "substantial evidence" and "clear and convincing" standards are incompatible with each other, and run counter to the Idaho Rules of Evidence and the authority of the Idaho Supreme Court in determining the criteria for admitting evidence at trial. Next, the requirement that a court enter "written findings of clear and convincing evidence" that "such neglect or child endangerment is a direct outcome" creates a *de facto* presumption that, as explained above, is inconsistent with the way affirmative defenses function at trial. Lastly, requiring a court to essentially hear and decide the merits of a case prior to trial by one of the highest standards of proof is virtually unprecedented.

The Act has measures for revoking registry identification cards and registration certificates for violations of its provisions, including notice and confidentiality requirements. Prop. I.C. §§ 39-9227 and 39-9228. Subsection (8) of Prop. I.C. § 39-9228 reads, "A person who intentionally makes a false statement to a law enforcement official about any fact or circumstance relating to the medical use of Marijuana to avoid arrest or prosecution is guilty of an infraction . . . ." It is questionable whether the phrase "any fact or circumstance relating to the medical use of Marijuana" would withstand a "void for vagueness" constitutional challenge in court. Prop. I.C. § 39-9229(1) establishes a Medical Marijuana Fund, consisting of "fees collected, civil penalties imposed, and private donations received[,]" which are to be administered by the Department.

If the Department fails to adopt rules to implement the Act within one hundred twenty (120) days of the Act's enactment, any citizen may commence a mandamus action to compel compliance. Prop. I.C. § 39-9230(1). If the Department fails to issue or deny an application or renewal for a registry identification card within forty-five (45) days after submission of such application, a copy of the application is deemed a valid registry identification card. Prop. I.C. § 39-9230(3). Further, if the Department is not accepting applications or has not adopted rules for applications within one hundred forty (140) days after enactment of the Act, a "notarized statement" by a patient containing the information required in an application, with a written recommendation issued by a practitioner, etc., will be deemed a valid registry identification card. Prop. I.C. § 39-9230(4).

In sum, Section 1 of the Act generally decriminalizes under state law the possession of up to four (4) ounces of marijuana and (if authorized as a "cultivator") six (6) marijuana plants for patients and caregivers. The Act also protects agents of medical marijuana production facilities, medical marijuana dispensaries, and safety compliance facilities from civil forfeitures and penalties under state law, and makes it illegal under state law to discriminate against all such participants in

regard to education, housing, and employment. Patients receiving a written recommendation by a practitioner stating that they have a debilitating medical condition may obtain marijuana for medicinal use from their (or their caregiver's) cultivation of marijuana (if authorized on the registry identification card), the patient's caregiver or a medical marijuana dispensary. Patients, caregivers, and agents of medical marijuana organizations must obtain registry identification cards, and medical marijuana organizations must obtain registry certificates from the Department, and continuously update relevant information. The Department is tasked with an extensive list of duties, including, *inter alia*: formulating rules and regulations to implement and maintain the Act's numerous and far-reaching measures, verifying information and timely approving applications and renewal requests submitted for registry identification cards and registration certificates, establishing and maintaining a law enforcement verification system, providing rules for security, recordkeeping, oversight, maintaining and enforcing confidentiality of records, and providing an annual report to the Idaho Legislature.

Section 2 of the Act is very short. It adds Prop. I.C. § 37-2734A(4), which states that "[a]ny person who provides proof of their qualification and participation in the Idaho Medical Marijuana Program, or another State's medical Marijuana program, is excluded from any arrest, fine, or prosecution for possessing Marijuana paraphernalia, as is anyone that provides the qualified patient the paraphernalia, and any seized paraphernalia must be returned." Taken literally, anyone in the Medical Marijuana Program could sell marijuana paraphernalia to *anyone*, and be protected from arrest, fine, and prosecution for possessing drug paraphernalia. The "return" requirement of the provision does not state when paraphernalia must be returned, leaving open the possibility that it could be kept until related court proceedings (and appeal) are final.

Section 3 is entitled "Hemp Legalization" or the "Idaho Hemp Regulation Provision." It is likely that the inclusion of its provisions within the Idaho Medical Marijuana Act violates the single-subject rule set forth in art. XX, sec. 2 of the Idaho Constitution, which states, "If two (2) or more amendments are proposed, they shall be submitted in such manner that the electors shall vote for or against each of them separately." In Idaho Watersheds Project v. State Bd. of Land Comm'rs, 133 Idaho 55, 60, 982 P.2d 358, 363 (1999), the Idaho Supreme Court invalidated an initiative amending the Idaho Constitution that both established a fund in which the proceeds from the sale of school lands must be deposited and also required that the sale of school lands must take place at public auctions. The defendant argued that the single-subject rule was satisfied simply because "[a]ll of the language [of the amendment] relates to the subject of the sale of land and the use of the proceeds of the sale of land." *Id.* The Court rejected that argument, stating:

> [W]e find that the subject of how school endowment land proceeds are invested differs essentially from the subject of whether auctions should take place regarding only sales, as opposed to leases and sales, of school endowment lands. We conclude that the proposed amendments to the two sections of Article 9 do not in any way depend upon one another. They are "incongruous and essentially unrelated," and consequently should have been submitted separately to the voters. [Citation omitted.] We therefore hold that the amendments proposed by H.J.R. 6 violate Article 20, § 2 of the Idaho Constitution.

Id. Here too, the Idaho Medical Marijuana Act and Idaho Hemp Regulation Provision "are incongruous and essentially unrelated," and "do not in any way depend upon one another." *Id.* Therefore, the initiative violates the single-subject rule of art. XX, sec. 2 of the Idaho Constitution and should be limited to presenting the Idaho Medical Marijuana Act.[6]

Even if considered, there are several concerns with the Hemp Legalization provisions. Prop. I.C. § 22-1802 defines hemp as Cannabis sativa L. with not more than 0.3% of tetrahydrocannabinol ("THC") on a dry weight basis. The provisions dealing with the promulgation of rules, non-interference by state and local agencies in hemp-related activities (Prop. I.C. § 22-1803(1)), protection from arrest, prosecution, and imprisonment (Prop. I.C. § 22-180(2)), and the return of seized hemp (Prop. I.C. § 22-1803(3)), all have the same flaw; they incorporate the "state law where the hemp originated" as one of the alternate limitations on the authority of Idaho state law. For example, Prop. I.C. § 22-1803(3) (emphasis added), states, "Any hemp seized shall be returned if legally utilized under federal law, Idaho law or regulations, *or the law of the state where the hemp originate*d." That italicized clause, repeated in the three above-cited provisions, effectively makes less restrictive hemp laws of the originating state become the hemp laws of Idaho within the context of each provision.

Section 4, "Hemp Exclusion," excludes hemp from the definition of "marijuana" in I.C. § 37-2701(t). However, it fails to exclude hemp from the statute that makes any substance containing "any quantity" of THC an illegal Schedule I hallucinogenic substance, I.C. § 37-2705(d)(27).

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[6] It should be noted that, as of this date, the Idaho House of Representatives has passed a Hemp Bill, House Bill 122, which is pending consideration by the Idaho Senate.

Section 5, "Severability," provides that "if any provision of this acts [sic] or the application of such provision . . . is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this act."

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

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

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

United States v. Wheeler, 435 U.S. 313, 317, 98 S. Ct. 1079, 1082-93, 55 L. Ed. 2d 303 (1978) (superseded by statute) (quoting Moore v. People of State of Illinois, 55 U.S. 13, 19-20, — S. Ct. —, 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' Coop., 532 U.S. 483, 486, 121 S. Ct. 1711, 1715, 149 L. Ed. 2d 722 (2001), the United States Supreme Court Supreme Court described a set of circumstances that appear similar to the system proposed in the Initiative:

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

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

> It is clear from the text of the [Controlled Substances] Act that Congress determined 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.

Id. at 493-95.

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, 268 Fed. Appx. 643, 644 (unpublished) (9th Cir. 2008), contrary to the plaintiff's contention that, because he was authorized under state law to use marijuana for medical purposes, he was illegally denied housing, the Ninth Circuit explained:

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

> AHA did not violate the Department of Housing and Urban Development's ("HUD") policy by automatically terminating the Plaintiffs' lease based on Assenberg's drug use without considering factors HUD listed in its September 24, 1999 memo. . . . .
>
> Because the Plaintiffs' 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 has 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 & Industries, 230 P.3d 518, 520 (Or. 2010). Therefore, the provisions of the initiative, Prop. I.C. §§ 39-9201, *et seq.*, cannot interfere or otherwise have an effect on federal laws, criminal or civil, which rely, in whole or in part, on marijuana being illegal under the federal Controlled Substances Act.

C. Recommended Revisions or Alterations

In addition to the legal and non-legal problems previously discussed, the initiative has several other aspects that merit consideration, described as follows:

1. All references to title 39, chapter 92, Idaho Code need to be changed because chapter 92 is currently assigned to the Idaho Direct Primary Care Act. Assuming no other currently pending legislation is reserved for chapter 96, it would be the next available chapter in title 39 for new statutes. Additionally, Prop. I.C. § 39-9212 is mistakenly numbered 39-9112; subsection (1)(a) should refer to 39-9202(15) instead of 39-9203(14); subsection (2)(a) should cite 39-9202(6) instead of 39-9203(6); and subsection (3)(a) should cite 39-9202(1) instead of 39-9203(1).

2. The Act skips from Prop. I.C. § 39-9202 to Prop. I.C. § 39-9204. Therefore, Prop. I.C. § 39-9204 needs to be changed to Prop. I.C. § 39-9203, and each successive provision needs to be modified accordingly.

3. Prop. I.C. § 39-9202(15) should add that it must be a "practitioner" that diagnoses a minor as having a debilitating medical condition.

4. Prop. I.C. § 39-9207(3)(e) states that one of the conditions for a medical marijuana dispensary to receive a registration certificate is:

> It is located in a county with more than twenty thousand (20,000) permanent residents and the county *already contains the maximum number* of medical Marijuana dispensaries allowed for each 20,000 permanent residents.

(Emphasis added.) The above provision may read the opposite way intended, i.e., that "the county *does not already contain* the maximum number of medical Marijuana dispensaries allowed for each 20,000 permanent residents."

5. Prop. I.C. § 39-9218(1) should read in part "sold by *a* Medical Marijuana organization." Subsection (2) should read in part "shall disperse fifty percent (50%) of the remaining amount" . . . .

6. Prop. I.C. § 39-9220(5) should change the two references to "certifying practitioner" to "recommending practitioner."

7. Prop. I.C. § 39-9221(6) should omit the "and" at the end, and subsection (7) should omit the period at the end and add "; and".

8. Prop. I.C. § 39-9223(15) states that "an employer may not discriminate against a person in hiring . . . or otherwise penalize a person based upon *either*: 1. The person's status as a medical marijuana license holder; *or* 2. Employers may take action against a holder of a medical marijuana license holder if . . . ." The second prohibition ("2.") does not fit the either/or set up of this anti-discrimination provision. Rather, it should be a stand-alone provision that, under certain conditions, allows employers to sue employees who are medical marijuana license holders.

9. Under Prop. I.C. 39-9227(1), (2), (3), (6), (7) and (8), the references to 39-9227 should be changed to 39-9228.

10. Prop. I.C. § 39-9228(1)'s reference to 39-9219 should be changed to 39-9220.

11. In Section 3, under 22-1803, subsection (3) should be subsection (2).

12. In Section 4, the subsection "(1)" is unnecessary because there are no other subsections in that statutory provision.

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 John Belville, 1606 N. Irene Drive, Nampa, Idaho 83687.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

John C. McKinney
Deputy Attorney General