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

July 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 96 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 June 27, 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 §§ 39-9601, *et seq.*[1] Primarily, the initiative seeks to amend title 39, Idaho Code, by adding a new chapter 96, 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 adopt regulations necessary for the implementation of a registration-based system for instituting and maintaining the production and dispensing of marijuana for use by persons diagnosed with a debilitating medical condition. Prop. I.C. § 39-9605. The Act directs the Department to approve or deny applications for "registry identification cards" presented by "qualifying patients" and their "designated caregivers."[2] Prop. I.C. §§ 39-9602(6), (15); 39-9607 to 39-9611. The Department is required to issue a "registration certificate" to a qualifying "medical marijuana organization," defined as a "medical marijuana dispensary, a medical marijuana production facility, or a safety compliance facility." Prop. I.C. §§ 39-9602(10), 39-9605 to 39-9606, 39-9611, and 39-9613. The Act permits, without state civil or criminal sanctions, marijuana to be produced by medical marijuana production facilities throughout the state, 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" ("patients") diagnosed with having a "debilitating medical condition" who use marijuana for medicinal purposes, as well as their "designated caregivers" ("caregivers"). The Act establishes a complex regulatory system whereby medical marijuana production facilities, medical marijuana dispensaries, and safety compliance facilities are insulated from civil forfeitures and penalties under state law. Discrimination against 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

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[1] References to "proposed" I.C. §§ 39-9601, *et seq.*, will read, "Prop. I.C. § 39-9601," etc.

[2] A "designated caregiver" can be a natural person or "an entity licensed in Idaho to provide healthcare services to assist with qualifying patients' medical use of marijuana[.]" Prop. I.C. § 39-9602(6).

measures. Section 1 also excludes from arrest, fine, or prosecution, any persons who possess marijuana paraphernalia who are participants in the Act's medical marijuana program. Section 2 states that any measures "concerning the legalization, control, regulation, or taxation of marijuana for medical use that are on the same ballot "shall be deemed to be in conflict with this measure," and that this measure prevails over other measures if it "receives a greater number of affirmative votes[.]" Section 3 is a "severability" provision which declares that, if any provision of the Act is declared invalid, the remaining portions of the Act remain valid. This review discusses the more notable provisions of the proposed Act in roughly the same sequence in which they occur.

Many of the "Definitions" in Prop. I.C. § 39-9602 are also substantive requirements under the Act. In short, they provide that: (1) patients may possess up to four (4) ounces of marijuana and, if a patient's registry identification card states that the patient has a "hardship cultivation designation," the patient may also possess up to six (6) marijuana plants in an enclosed locked facility (etc.), and any marijuana produced from the plants grown at the premises or at the patient's residence,[3] and (2) caregivers may assist up to three (3) patients' medical use of marijuana, and possess, for each patient assisted, the same amounts of marijuana described above. Prop. I.C. § 39-9602(2), (6), and (15). Apart from indicating that patients and caregivers are "not subject to arrest, prosecution, or penalty in any manner [etc.]," Prop. I.C. § 39-9621(1), there is no provision for any other person or entity to cultivate marijuana -- except 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. §§ 54-1801, *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 medical condition." Prop. I.C. § 39-9602(14), (15), and (19). The recommendation must specify the patient's debilitating medical condition and may only be signed (and dated) in the course of a "bona fide practitioner-patient relationship after the practitioner has completed a full assessment of the patient's

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[3] If a qualifying patient's access to a marijuana dispensary is limited by proximity, financial hardship, or physical incapacity, the Department shall issue a "hardship cultivation designation," allowing the patient and the patient's caregiver to "cultivate up to six (6) marijuana plants" and keep the marijuana produced from those plants on the premises. Prop. I.C. §§ 39-9602(2)(a)(ii), (b)(ii); 39-9602(6), (15); and 39-9609. Although the "hardship cultivation designation" requires the six (6) marijuana plants to be "contained in an enclosed, locked facility" (unless being transported), there is no parallel provision in regard to "marijuana produced from the plants." *See* Prop. I.C. § 39-9602(2)(a)(ii), (2)(b)(ii).

medical history and current medical condition." Prop. I.C. § 39-9602(19). Minors are also entitled to be issued registry identification cards as patients under certain criteria. Prop. I.C. § 39-9607(3).

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 as determined by a licensed medical physician[,]" or "[a]ny other serious medical condition or its treatment added by the Department pursuant to section 39-9616." Prop. I.C. § 39-9602(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. § 39-9616.

"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 "meet the qualifications of this act." Prop. I.C. § 39-9602(1). Agents of medical marijuana organizations – marijuana dispensaries, marijuana production facilities, and marijuana safety compliance facilities – are exempt from "prosecution, search, or inspection, except by the Department pursuant to 39-9613(6), seizure, or penalty in any manner, and may not be denied any right or privilege, including civil penalty or disciplinary action by a court or business licensing board or entity, for acting pursuant to [the Act]." Prop. I.C. § 39-9621(6) to (8).

Prop. I.C. § 39-9603 – "Limitations" – states that the Act's provisions do not "prevent the imposition of any civil, criminal, or other penalties" for:

(1) "Undertaking any task under the influence of marijuana that would constitute negligence or professional malpractice".
(2) "Possessing or engaging in the medical use of marijuana:
    (a) On a school bus; or
    (b) In any correctional facility."
(3) "Smoking marijuana:
    (a) On any form of public transportation;
    (b) On the grounds of a licensed daycare, preschool, primary or secondary school; or
    (c) In any public place[;]" or

> (4) Operating (etc.) "any motor vehicle, aircraft, train, motorboat, or other motorized form of transport while under the influence of marijuana." . . .

Under subsection (4) of Prop. I.C. § 39-9603, cardholders and nonresident cardholders "may not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment."

Prop. I.C. § 39-9603(5) states that the Act does not "prevent the imposition of any civil, criminal or other penalties" for persons engaging in "Solvent-based extractions on marijuana using solvents *other than water, glycerin, propylene glycol, vegetable oil, or food grade ethanol* by a person not licensed for this activity by the Department." (Emphasis added.) This implies that persons engaged in solvent-based extractions on marijuana using solvents consisting of "water, glycerin, propylene glycol, vegetable oil, or food grade ethanol" are not subject to such penalties. Whether such a provision is based upon accepted and reasonable scientific, health, and safety considerations is beyond the scope of this review.

Prop. I.C. § 39-9604(1) – "Facility Restrictions" – allows any "nursing facility, intermediate care facility, hospice house, hospital, or other type of residential care or assisted living facility" to adopt "reasonable restrictions" on the medical use of marijuana. Those facilities do *not* have to store a qualifying patient's supply of marijuana or provide marijuana to qualifying patients. Prop. I.C. § 39-9604(1)(a) to (b). The facilities may require that "marijuana is consumed by a method other than smoking," and may specify the place where marijuana may be consumed. Prop. I.C. § 39-9604(1)(c) to (d).

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 "score numerically competing medical marijuana dispensary applicants," the prevention of theft of marijuana and security at facilities, oversight, recordkeeping, safety," and safe and accurate packaging and labeling of medical marijuana. Prop. I.C. § 39-9605. 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. § 39-9605(1)(k)(i).

Upon satisfactory application by a medical marijuana organization, the Department must approve a registration certificate within ninety (90) days. Prop. I.C. § 39-9606. Medical marijuana organizations must have operating documents that include procedures for the oversight of the organization and accurate recordkeeping, and are required to implement adequate security measures. *Id.* Medical marijuana production facilities must restrict marijuana cultivation, harvesting, etc., within a secure, locked facility only accessible to registered agents.[4] Prop. I.C. § 39-9613(2). Medical marijuana production facilities and dispensaries "may acquire 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. § 39-9613(3).

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 whether the qualifying patient or the designated caregiver will be allowed to cultivate marijuana plants for the qualifying patient's medical use if the qualifying patient qualifies for a hardship cultivation designation." Prop. I.C. § 39-9607(1).[5] This provision suggests that, if a patient has such a designation, *either* the patient or the caregiver may cultivate six (6) marijuana plants and retain the marijuana from those plants – not both (which would allow a total of twelve (12) marijuana plants). 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 twenty (20) days after receiving it, and must issue a card within ten (10) more days thereafter. Prop. I.C. § 39-9607(2). If a registry identification card "of either a qualifying patient or the qualifying patient's designated caregiver does not state that the cardholder is permitted to cultivate marijuana plants,[6] the Department must give written notice to the registered qualifying patient . . . of the names and addresses of all the registered medical marijuana dispensaries." Prop. I.C. § 39-9607(4). The Department may deny an application or renewal request for a registry identification card for failing to meet the requirements of the Act, and must provide written notice of its reasons for doing so. Prop. I.C. § 39-9610. Registry identification cards expire after one (1) year, and may be renewed for a fee. Prop. I.C. § 39-9611. A registry identification card must contain the cardholder's identifying information, and clearly indicate "whether the cardholder

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[4] Although patients and caregivers must be given registry identification cards, there is no similar provision for identifying "agents" as authorized participants in the Act.

[5] The Act also allows a "nonresident cardholder" from another state to possess medical marijuana while in Idaho. Prop. I.C. § 39-9602(13).

[6] The "cultivator" notation refers to the Act's "hardship cultivation designation." *See* Prop. I.C. § 39-9609.

is permitted to cultivate marijuana plants for the qualifying patient's medical use" (i.e., whether the patient has a "hardship cultivation designation"). Prop. I.C. § 39-9608.

The Department is required to "establish and maintain a verification system for use by law enforcement personnel to verify registry identification cards." Prop. I.C. § 39-9612(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. § 39-9618(1) to (3). 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. § 39-9618(5).

Cities and counties "may enact reasonable zoning ordinances and regulations not in conflict with the chapter . . . governing the time, place and manner of medical marijuana organization operations." Prop. I.C. § 39-9614(1). However, a medical marijuana dispensary cannot be located within one thousand (1,000) feet of a public or private school, and its renewal cannot be denied "if a school opens or moves within" that distance of the dispensary. Prop. I.C. § 39-9614(2).

Prop. I.C. § 39-9615 states that before dispensing marijuana to a patient or caregiver, a "medical marijuana dispensary agent *must not believe* that the amount dispensed would cause the cardholder to possess more than the allowable amount of marijuana." (Emphasis added.) The italicized portion of the provision is subject to a constitutional challenge based on vagueness.

The Act adopts a tax of four percent (4%) on medical marijuana sales. Prop. I.C. § 39-9617(1). After disbursing tax revenue to the Department "to cover reasonable costs incurred . . . in carrying out this chapter[,]" the remaining amount of revenue is to be equally distributed with fifty percent (50%) to the Idaho Division of Veterans Services (in additional to any funds regularly dispersed to it) and the other fifty percent (50%) to the General Fund. Prop. I.C. § 39-9617(2).

The Department must submit an annual public report to the legislature with information set out in Prop. I.C. § 39-9619. 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. § 39-9620(1) to (2).

Information and records kept by the Department are confidential, and may only be disclosed as authorized by the Act. Prop. I.C. § 39-9620(1). Department employees may notify state or local law enforcement about falsified or fraudulent information submitted to the Department, and "about apparent criminal violations" of the Act. Prop. I.C. § 39-9620(4)(a) and (b). Department employees may "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. § 39-9620(4)(c).

The heart of the Act is Prop. I.C. § 39-9621 – "Protections for the Medical Use of Marijuana." Subsection (1) sets the pattern by stating, "a cardholder who possesses a valid registry identification card is 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[.][7] Subsections (1)(b) (nonresident cardholders), (3) (practitioners), (6) (medical marijuana dispensaries and their agents), (7) (medical marijuana production facilities and their agents), and (8) (safety compliance facilities and their agents), are given the same criminal, civil, and administrative protections in regard to their various functions under the Act.

Prop. I.C. § 39-9621(2) creates a rebuttable presumption in criminal, civil, and administrative court proceedings that cardholders are deemed to be "engaged in the medical use of marijuana pursuant to this chapter if the person is in possession of a registry identification card and an amount of marijuana that does not exceed the allowable amount." 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 associated with the qualifying patient's debilitating medical condition pursuant to this chapter." *Id.*

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[7] The proposed statute specifically protects cardholders for (a) the medical use of marijuana pursuant to the Act, (b) payment by patients and caregivers for goods or services for the patient's medical use of marijuana, (c) transferring marijuana to a safety compliance facility for testing, (d) compensating a medical marijuana dispensary or safety compliance facility for goods or services, (e) offering or providing marijuana to a cardholder for a patient's medical use, or to a medical marijuana dispensary if nothing of value is transferred in return. Prop. I.C. § 39-9621(1)(a) to (e).

Practitioners are protected from sanctions for conduct "based solely on providing written recommendations or for otherwise stating that, in the practitioner's professional opinion, a patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana, . . . but nothing . . . prevents a professional licensing board from sanctioning a practitioner for failing to properly evaluate a patient's medical condition or otherwise violating the standard of care for evaluating medical conditions." Prop. I.C. § 39-9621(3).

Under Prop. I.C. § 39-9621(5)(a) to (c), no person is subject to arrest, prosecution, other penalty, or denial of right or privilege, for providing or selling marijuana paraphernalia to a cardholder, nonresident cardholder, or medical marijuana organization, or for being in the presence or vicinity of, or assisting in, the authorized medical use of marijuana.

Prop. I.C. § 39-9621(9) reads:

> (9) Property, including all interests in the property, otherwise subject to forfeiture under state or local law that is possessed, owned, or used in any activity permitted 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.

(Emphases added.) Prop. I.C. § 39-9621(9) may be an attempt to state that no property is subject to seizure or forfeiture on the basis of it being used as authorized by this Act. However, the proposed statute could be construed as preventing the seizure or forfeiture of property in regard to *criminal* activity under all circumstances. Additionally, whether a civil forfeiture is "unrelated" to the medical use of marijuana is potentially subject to a constitutional challenge due to vagueness.

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. § 39-9621(10).

Under the heading, "Discrimination Prohibited," Prop. I.C. § 39-9622 makes it illegal for schools, landlords, nursing facilities, intermediate care facilities, hospice houses, hospitals, etc., to penalize a person "for engaging in conduct allowed under this chapter, unless doing so would violate federal law or regulations or cause" the entity "to lose a monetary or licensing-related benefit under federal

law."[8] Prop. I.C. § 39-9622(1). Subsection (2) gives patients the same rights (and privileges, etc.) as persons prescribed medications with regard to interactions with employers, drug testing by an employer, and drug testing required by state or other governmental authorities. Subsection (4) states that no employer is required to allow the ingestion of marijuana in any workplace (etc.), and repeats that a patient "shall not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of cannabis that appear in insufficient concentration to cause impairment." *See* Prop. I.C. § 39-9603(4). Subsections (5) through (7) preclude discrimination in regard to organ and tissue transplants, child custody and visitation rights, and firearm possession or ownership. Subsection (8) states, "[n]o school, landlord, or employer may be penalized or denied any benefit under state law for enrolling, leasing to, or employing a cardholder."

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 so long as the evidence shows" that (essentially), the requirements of the Act were complied with. Prop. I.C. § 39-9623(1).

The Act allows the Department, "after investigation and opportunity at a hearing at which the medical marijuana organization has an opportunity to be heard," to fine, suspend, or revoke a registration certificate for violations of the Act. Prop. I.C. § 39-9624(1). Also, "[t]he Department may revoke the registry identification card of any cardholder who knowingly violates this chapter." Prop. I.C. § 39-9624(2). Revocation is subject to review under title 67, chapter 52, Idaho Code.

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. § 39-9625.

In sum, Section 1 of the Act generally decriminalizes under state law the possession of up to four (4) ounces of marijuana and (if given a "hardship cultivator" designation) six (6) marijuana plants for patients or caregivers. The Act also protects agents of medical marijuana production facilities, medical marijuana dispensaries, and safety compliance facilities from civil forfeitures and penalties

[8] 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. § 39-9603(1) to (3).

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 or a medical marijuana dispensary. Patients, and caregivers must obtain registration identification cards, and medical marijuana organizations must obtain registration 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.

As noted at the beginning of this review, Section 2 states that any measures "concerning the legalization, control, regulation, or taxation of marijuana for medical use that are on the same ballot "shall be deemed to be in conflict with this measure," and that this measure prevails over other measures if it "receives a greater number of affirmative votes[.]"

Section 3, "Severability," provides that if any provision of the Act is declared invalid, the remaining portions of the Act remain valid.

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

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

> In *Bartkus v. Illinois*, 359 U.S. 121 [1959], . . . and *Abbate v. United States*, 359 U.S. 187 [1959], . . . this Court reaffirmed the well-established principle that a federal prosecution does not bar a subsequent state prosecution of the same person for the same acts, and a state prosecution does not bar a federal one. The basis for this doctrine is that prosecutions under the laws of separate sovereigns do not, in the language of the Fifth Amendment, "subject [the defendant] for the same offence to be twice put in jeopardy":

> "An offence [sic], in its legal signification, means the transgression of a law. . . . Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. . . . *That either or both may (if they see fit) punish such an offender, cannot be doubted.*"

United States v. Wheeler, 435 U.S. 313, 316, 98 S. Ct. 1079, 1082, 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 has made a determination that marijuana has no medical benefits worthy of an exception. The statute expressly contemplates that many drugs "have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people," § 801(1), but it includes no exception at all for any medical use of marijuana. Unwilling to view this omission as an accident, and unable in any event to override a legislative determination manifest in a statute, we reject the Cooperative's argument.
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> . . . .
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> For these reasons, we hold that medical necessity is not a defense to manufacturing and distributing marijuana. The Court of Appeals erred when it held that medical necessity is a "legally cognizable defense." 190 F.3d. at 1114. It further erred when it instructed the District Court on remand to consider "the criteria for a medical necessity exemption, and, should it modify the injunction, to set forth those criteria in the modification order." *Id.*, at 1115.

Id. at 493-95.

The Oakland Cannabis 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).
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> AHA did not violate the Department of Housing and Urban Development's ("HUD") policy by automatically terminating the Plaintiffs' lease based on Assenberg's drug use without considering factors HUD listed in its September 24, 1999 memo. . . . .
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> 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. §§ 39-9601, *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 96, Idaho Code, need to be changed because chapter 96 was assigned in the 2019 legislative session to "Maternal Mortality Review."

2. Prop. I.C. § 39-9602(11) should have a comma inserted between "stores" and "delivers."

3. "Usable marijuana" is referred to only three times in the Act, with each reference occurring in the provision for "Protections for the Medical Use of Marijuana" relating to safety compliance facilities and their agents, and it is not defined in the Act. *See* Prop. I.C. § 39-9621(8)(a), (b), and (e). It is suggested that, for clarity, either "usable marijuana" be defined or the word "usable" be omitted.

4. Prop. I.C. § 39-9605(1)(c)(iv) should refer to "Chapter 5, Title 65, Idaho Code" instead of "Section 65-502."

5. The introductory sentence of Prop. I.C. § 39-9605(1)(e) should end with a full colon.

6. Prop. I.C. § 39-9610(1)(e) has two miss-typed words: (1) "caregiver '**is**' younger than twenty-one (21) years of age and '**is**' not . . . ."

7. Prop. I.C. § 39-9620(1)(c) omits the word "**of**" between "information" and "persons."

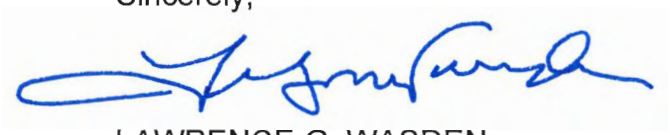
8. Prop. I.C. § 39-9621(1)(a) should read in part, "if the cardholder '**is**' allowed to . . . ." It is also suggested that the sentence end with "or are being transported '**in accordance with this Act**;'"

9. Prop. I.C. § 39-9622(1) ("Discrimination Prohibited") should add I.C. § 39-9603 in the "Except as provided in 39-9604" introductory phrase because Prop. I.C. § 39-9603 includes limitations on medical marijuana use in schools.

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
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Analysis by:

John C. McKinney
Deputy Attorney General