

**IDAHO  
ATTORNEY  
GENERAL'S  
ANNUAL REPORT**

**CERTIFICATES  
OF REVIEW**

AND

**SELECTED ADVISORY  
LETTERS**

FOR THE YEAR

**2020**

**Lawrence G. Wasden**  
Attorney General

Printed by The Caxton Printers, Ltd.  
Caldwell, Idaho

This volume should be cited as:

2020 Idaho Att'y Gen. Ann. Rpt.

Thus, the Certificate of Review of November 17, 2020 is found at:

2020 Idaho Att'y Gen. Ann. Rpt. 5

The Advisory Letter of January 8, 2020 is found at:

2020 Idaho Att'y Gen. Ann. Rpt. 29

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## ATTORNEYS GENERALS OF IDAHO

GEORGE H. ROBERTS .....	1891-1892
GEORGE M. PARSONS.....	1893-1896
ROBERT McFARLAND .....	1897-1898
S. H. HAYS .....	1899-1900
FRANK MARTIN .....	1901-1902
JOHN A. BAGLEY .....	1903-1904
JOHN GUHEEN.....	1905-1908
D. C. McDOUGALL.....	1909-1912
JOSEPH H. PETERSON .....	1913-1916
T. A. WALTERS.....	1917-1918
ROY L. BLACK .....	1919-1922
A. H. CONNER .....	1923-1926
FRANK L. STEPHAN.....	1927-1928
W. D. GILLIS.....	1929-1930
FRED J. BABCOCK.....	1931-1932
BERT H. MILLER.....	1933-1936
J. W. TAYLOR .....	1937-1940
BERT H. MILLER.....	1941-1944
FRANK LANGLEY .....	1945-1946
ROBERT AILSHIE (Deceased November 16).....	1947
ROBERT E. SMYLIE (Appointed November 24) .....	1947-1954
GRAYDON W. SMITH .....	1955-1958
FRANK L. BENSON.....	1959-1962
ALLAN B. SHEPARD.....	1963-1968
ROBERT M. ROBSON .....	1969-1970
W. ANTHONY PARK .....	1971-1974
WAYNE L. KIDWELL.....	1975-1978
DAVID H. LEROY .....	1979-1982
JIM JONES .....	1983-1990
LARRY ECHOHAWK.....	1991-1994
ALAN G. LANCE.....	1995-2002
LAWRENCE G. WASDEN.....	2003



**Lawrence G. Wasden**

Attorney General

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## INTRODUCTION

Dear Fellow Idahoan:

I once again welcome the opportunity to share with you, as citizens and elected officials, my office's most significant achievements over the past year. 2020 will be remembered as a year in which COVID-19 affected nearly all aspects of our lives. Despite the challenges the pandemic presented, my office continued to provide critical legal services to help Idaho state government function successfully. I'm especially proud of the attorneys and staff in my office and the commitment they showed during a difficult time.

2020 Highlights from the Consumer Protection Division include \$1.4 million in obtained consumer restitution. The Division also negotiated \$1.5 million in consumer redress from three Idaho gas retailers following a price gouging investigation. Consumer Protection attorneys also continue to litigate cases stemming from the 1998 Tobacco Master Settlement Agreement, which continues to result in annual payments to the state. To date, Idaho's payments total more than a half billion dollars.

Civil Litigation attorneys successfully defended Idaho's initiative process before the United States Supreme Court. They also worked closely with the Idaho Department of Correction to obtain a federal district court decision terminating a class action brought by inmates against the Department 39 years ago.

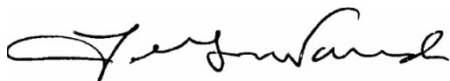
Attorneys in the Natural Resources Division continued to protect Idaho's sovereignty against encroachment by the federal government under the Endangered Species Act. They prevailed in two cases which will help ensure that Idaho is allowed to manage elk and grizzly bears. They continued to support the Legislature and Governor in cases involving salmon and sage grouse to protect Idahoans from onerous federal mandates.

The Idaho Internet Crimes Against Children (ICAC) Unit's tremendously important work continued. In 2020, ICAC saw a 55-percent increase in the number of opened cases, an 86-percent increase in the number of cyber tips received and a 68-percent increase in the number of arrests made.

Finally, 2020 was my 18th year in office. As has been a trademark of my tenure, I once again conducted my office's business with this important philosophy at the forefront: to provide accurate and objective legal advice that defends Idaho's laws and sovereignty, while adhering to the Rule of Law. My office will continue to represent Idaho's legal interests in this manner throughout my tenure as Attorney General.

I encourage everyone to visit my website at <http://www.ag.idaho.gov> to learn more about the office, the work being done and the resources available for consumers and other legal matters.

Thank you for your interest in Idaho's legal affairs.

A handwritten signature in black ink, appearing to read "Lawrence G. Wasden". The signature is fluid and cursive, with a large initial "L" and "W".

LAWRENCE G. WASDEN  
Attorney General



# ANNUAL REPORT OF THE ATTORNEY GENERAL

## OFFICE OF THE ATTORNEY GENERAL LAWRENCE G. WASDEN ATTORNEY GENERAL

### 2020 STAFF ROSTER

#### ADMINISTRATION

Sherman Furey III Chief Deputy	Brian Kane Assistant Chief Deputy	Janet Carter Executive Assistant	Kimi White Paralegal	Kara Holcomb Receptionist/Secretary
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#### DIVISION CHIEFS

Tara Orr / Robyn Lockett, Administration & Budget	Andrew Snook, Contracts & Administrative Law
Steven Olsen, Civil Litigation	Colleen Zahn, Criminal Law
Brett DeLange, Consumer Protection	Nicole McKay, Health & Human Services
Darrell Early, Natural Resources	

#### DEPUTY ATTORNEYS GENERAL

Robert Adelson	Douglas Fleenor	Amber Kauffman	David Morse	Phil Skinner
Lawrence Allen	Robert Follett	Angela Kaufmann	Stephanie Nemore	John Spalding
LaMont Anderson	Kristina Fugate	John Keenan	Charina Newell	Steven Strack
James Baird	Kale Gans	Scott Keim	Brian Nicholas	Lincoln Strawhun
Garrick Baxter	Kathryn Garrett	Chelsea Kidney	Nathan Nielson	Floyd Swanton Jr
Robert Berry	Cheryl George	Brent King	Jeffery Nye	Timothy Thomas
Rondee Blessing	Richard Grisel	Oscar Klaas	Lisa O'Hara	Kathleen Trever
Ali Breshears	Stephanie Guyon	Karl Klein	John Olson	Joy Vega
Dallas Burkhalter	Tiffany Hales	Rachel Kolts	Mark Olson	Ann Vonde
Jessica Cafferty	Susan Hamlin	Chris Kronberg	Rebecca Ophus	Andrew Wake
Lisa Carlson	John Hammond Jr	Mark Kubinski	Michael Orr	Nicholas Warden
Meghan Carter	Dayn Hardie	Jessica Kuehn	Edith McCillo	Adam Warr
Mark Cecchini-Beaver	Richard Hart	Megan Larrondo	Justin Porter	Julie Weaver
Jason Chandler	Leslie Hayes	Amy Long	Cheryl Rambo	Logan Weis
Shantel Chapple Knowlton	Stephen Herring	Gary Luke	Kolby Reddish	Jennifer Wendel
Brian Church	Jane Hochberg	Emily Mac Master	Dayton Reed	Douglas Werth
Sean Costello	Renee Hollander-Vogelpohl	Karin Magnelli	Kenneth Robins	Teri Whilden
Marc Crecelius	Spencer Holm	Elisa Magnuson	Denise Rosen	Mark Withers
Timothy Davis	Daphne Huang	Jenifer Marcus	Nicole Schafer	Michael Witry
Patrick Denton	Matthew Hunter	John McKinney	Kristina Schindele	Cynthia Yee-Wallace
Katylyn DeVries	Blair Jaynes	Loren Messerly	Paul Schlegel	David Young
Adam Dingeldein	Edward Jewell	Kerry Michaelson	John Shackelford	Hannah Young
Thomas Donovan	Kacey Jones	Madison Miles	Erick Shaner	Jeremy Younggren
Merritt Dublin	Kenneth Jorgensen	Alana Minton	Karen Sheehan	Scott Zanzig
		Owen Moroney		

#### INVESTIGATORS

Ken Boals	Chris DeLoria	Chris Hardin	Gregg Lockwood	Tamara Pittz
Amanda Burgoyne	Nicholas Edwards	David Holt	Chris McCormick	Robert Solito
Mark Dalton	Tami Faulhaber	Asmir Kararic	Dana Miller	Michael Steen
Arena Dawson	William Hanley	Ashley Klenski	Jeffrey Peterson	Tyler Teuscher
		Eric Lewis		

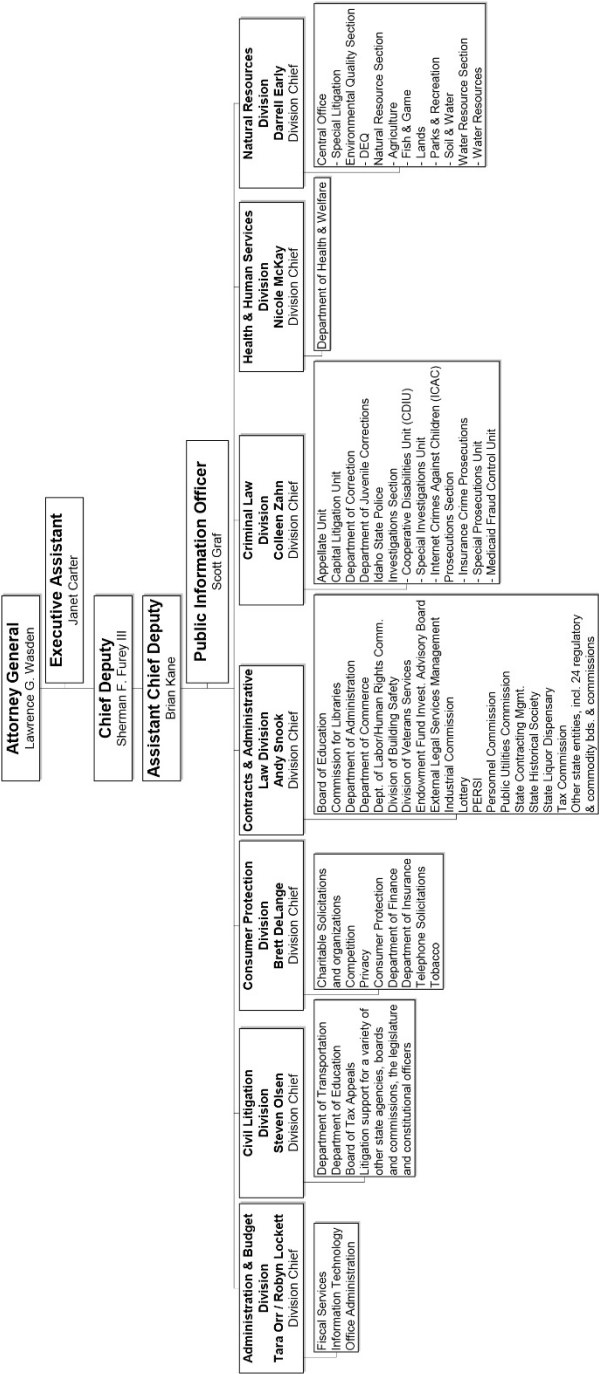
#### PARALEGALS

Mandy Ary	Mathew Cundiff	Rita Jensen	Rena Rallis	Lisa Warren
Patricia Campbell	Kimberle English	Beth Kittelmann	Victoria Rutledge	Penny Wilcox
Tammie Cooley	Zachari Hallett	Bernice Myles	Sandra McCue	Paula Wilson
Suzy Cooley-Denney	Rebecca Ihli	Catherine Minyard	Stephanie Sze	Colleen Young
		Angel O'Brien		

#### NON-LEGAL PERSONNEL

Renee Ashton	Colleen Funk	Kara Lansberry	Sara Pallante	Kayla Sharp
Kelly Bassin	Marilyn Gerhard	Ana Lara	Kathleen Popp	Carla Shupe
Kriss Bivens Cloyd	Leslie Gottsch	Rachelle Littau	Lee Post	Rebekah Skirletz
Casey Boren	Scott Graf	Elaine Maneck	Lorraine Robinson	Alicia Spero
Nicholas Budig	Alicia Hymas	April McKinnie	Jolene Robles	Aimee Stephenson
Renee Chariton	Patricia Jordan	Ronda Mein	Dustin Russell	Teresa Taylor
Kevin Day	Jacob Kofoed	Emily Moon	Robyn Sabins	Lonny Tutko
DeLayne Deck	Melanie Kolbasowski	Lynn Mize	Angelica Santana	Nancy Wagner
Patrick Donnellon	Annette Krause	Natalie Morris	Rebekah Serrato	Rebecca Wills
Deborah Forgy		Mariah Nilges		Victoria Wigle

Office of the Idaho Attorney General  
Organizational Chart - 2020



**ATTORNEY GENERAL'S  
CERTIFICATES OF REVIEW  
FOR THE YEAR 2020**

**LAWRENCE G. WASDEN**

**ATTORNEY GENERAL  
STATE OF IDAHO**



## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

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November 17, 2020

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

Re: Certificate of Review  
Proposed Initiative Creating New Medical Marijuana Act  
by Adding Chapter 97 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 October 29, 2020. Pursuant to Idaho Code section 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.

## MATTERS OF SUBSTANTIVE IMPORT

### A. Summary of the Initiative

The initiative is self-titled the “Idaho Medical Marijuana Act” (hereafter “Act” or “Initiative”) and is denominated as Idaho Code section 39-9701, *et seq.*<sup>1</sup> Primarily, the Initiative seeks to amend title 39, Idaho Code, by adding a new chapter 97, 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 and 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. Idaho Code § 39-9705. The Act directs the Department to approve or deny applications for “registry identification cards” presented by “qualifying patients” and their “designated caregivers.”<sup>2</sup> See Prop. Idaho Code §§ 39-9702(6), (15); -9707 to -9711. 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.” See Prop. Idaho Code §§ 39-9702(10), (16); -9705 to -9706, -9711, -9713. 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. See Prop. Idaho Code § 39-9721.

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

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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 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 proposed Idaho Code section 39-9702 are also substantive requirements under the Act. In short, they provide that: (1) patients may possess up to four 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 marijuana plants in an enclosed locked facility, and any marijuana produced from the plants grown at the premises or at the patient's residence<sup>3</sup>; and (2) caregivers may assist with up to three patients' medical use of marijuana, and possess, for each patient assisted, the same amounts of marijuana described above. Prop. Idaho Code § 39-9702(2), (6), (15). Apart from indicating that patients and caregivers are "not subject to arrest, prosecution or penalty in any manner, [etc.]," prop. Idaho Code § 39-9721(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 (Idaho Code §§ 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

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the debilitating medical condition.” Prop. Idaho Code § 39-9702(14), (15), (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 medical history and current medical condition[.]” Prop. Idaho Code § 39-9702(19). Minors are also entitled to be issued registry identification cards as patients under certain criteria. Prop. Idaho Code § 39-9707(3).

A “debilitating medical condition” means not only the conditions listed (cancer, glaucoma, positive status for HIV, AIDS, hepatitis C, A.L.S., Crohn’s disease, Alzheimer’s disease, post-traumatic stress disorder, inflammatory bowel disease, Huntington’s disease, and Tourette syndrome), 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;” “[a]ny 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 39-9716.” Prop. Idaho Code § 39-9702(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 proposed Idaho Code § 39-9702(4). Prop. Idaho Code § 39-9716 (1).

“Agents” are defined as principal officers, board members, employees, or volunteers of a medical marijuana organization who are at least 21 years old and who “meet the qualifications set forth in this act.” Prop. Idaho Code § 39-9702(1). Agents of medical marijuana organizations—marijuana dispensaries, marijuana production facilities, and safety compliance facilities—are exempt from “prosecution, search, or inspection, except by the Department pursuant to 39-9713(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. Idaho Code § 39-9721(6)-(8).



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Prop. Idaho Code section 39-9703, titled “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 any licensed daycare, preschool, primary or secondary school; or
  - (c) In any public place[;]
- (4) Operating, [etc.,] any motor vehicle, aircraft, train, motorboat, or other motorized form of transport while under the influence of marijuana. . . .

Under proposed Idaho Code section 39-9703(4), 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.”

Proposed Idaho Code section 39-9703(5) states that the Act does not “prevent the imposition of any civil, criminal or other penalties” for persons engaging in “[s]olvent-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.

Proposed Idaho Code section 39-9704(1), titled “Facility Restrictions,” allows “[a]ny 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. Idaho Code § 39-9704(1)(a), (b). The facilities may require that “marijuana is consumed by a method other than smoking,” prop. Idaho Code § 39-9704(1)(c), and may specify the place where marijuana may be consumed, proposed Idaho Code § 39-9704(1)(d).

The Department is given the task of making extensive rules, pursuant to the Idaho Administrative Procedure Act 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; facility security; oversight; recordkeeping; safety; and safe and accurate packaging and labeling of medical marijuana. Prop. Idaho Code § 39-9705. 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. § 39-9705(1)(k)(i).

Upon satisfactory application by a medical marijuana organization, the Department must approve a registration certificate within 90 days. Prop. Idaho Code § 39-9706(2). 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 the facility’s agents.<sup>4</sup> Prop. Idaho Code § 39-9713(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. Idaho Code § 39-9713(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 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. Idaho Code § 39-9707(1).<sup>5</sup> This provision suggests that, if a patient has such a designation, *either* the patient or the caregiver may cultivate six marijuana plants and retain the marijuana from those plants—not both (which would allow a total of 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 20 days after receiving it, and must issue a card within ten more days thereafter. Prop. Idaho Code § 39-9707(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,"<sup>6</sup> the Department must give written notice to the registered qualifying patient . . . of the names and addresses of all registered medical marijuana dispensaries." Prop. Idaho Code § 39-9707(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. Idaho Code § 39-9710. Registry identification cards expire after one year, and may be renewed for a \$25 fee. Prop. Idaho Code § 39-9711 (1), (3). A registry identification card must contain the cardholder's identifying information, and clearly indicate "whether the cardholder is permitted to cultivate marijuana plants for the qualifying patient's medical use" (*i.e.*, whether the patient has a "hardship cultivation designation"). Prop. Idaho Code § 39-9708.

The Department is required to "establish and maintain a verification system for use by law enforcement personnel to verify registry identification cards." Prop. Idaho Code § 39-9712(1). Patients are required to notify the Department within ten 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 days to issue a new registry identification card. Prop. Idaho Code § 39-9718(1)-(3). If the patient changes their caregiver, the Department must notify the former caregiver that his/her "duties and rights under this Chapter for the qualifying patient expire fifteen (15) days after the Department sends notification." Prop. Idaho Code § 39-9718(5).

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

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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. Idaho Code § 39-9714(1). A medical marijuana dispensary cannot be located within 1,000 feet of a public or private school, but its renewal cannot be denied “if a school opens or moves within” that distance of the dispensary after it is licensed. Prop. Idaho Code § 39-9714(2).

Proposed Idaho Code section 39-9715 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 an excise tax of 4% “upon the gross receipts of all marijuana sold by a medical marijuana dispensary to a qualifying patient or a designated caregiver.” Prop. Idaho Code § 39-9717(1). After disbursing tax revenue “to the Department to cover reasonable costs incurred by the Department in carrying out its duties” under the Act, the remaining amount of tax revenue is to be equally distributed with 50% to the Idaho Division of Veterans Services (in addition to any funds regularly dispersed to it) and the other 50% to the General Fund. Prop. Idaho Code § 39-9717(2).

The Department must submit an annual public report to the Legislature with information set out in proposed Idaho Code section 39-9719. The Department is required to keep all records and information received pursuant to the Act confidential, and any disclosing 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. Idaho Code § 39-9720(1)-(2).

Information and records kept by the Department are confidential, and may only be disclosed as authorized by the Act. Prop. Idaho Code § 39-9720(1). Department employees may notify state or local law enforcement about falsified or fraudulent information submitted to the Department, and “about apparent criminal violations”

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

of the Act. Prop. Idaho Code § 39-9720(4)(a), (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. Idaho Code § 39-9720(4)(c).

The heart of the Act is proposed Idaho Code section 39-9721, titled “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[.]”<sup>7</sup> Subsections (1)(f) (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. Idaho Code section 39-9721(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.*

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

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

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medical condition or otherwise violating the standard of care for evaluating medical conditions.” Prop. Idaho Code §39-9721(3).

Under proposed Idaho Code section 39-9721(5)(a) through (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.

Proposed Idaho Code section 39-9721(9) reads:

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 or criminal forfeiture if the basis for the forfeiture is *unrelated* to the medical use of marijuana.

(Emphases added.) Whether a civil or criminal forfeiture is “unrelated” to the medical use of marijuana under proposed Idaho Code section 39-9721(9) 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. Idaho Code § 39-9721(10).

Under the heading, “Discrimination Prohibited,” proposed Idaho Code section 39-9722 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.”<sup>8</sup> Prop. Idaho Code § 39-9722(1). Subsection (2) gives patients the same rights, privileges, and protections under state and local law as persons prescribed medications with regard to interactions with

employers, drug testing by employers, and drug testing required by state or other governmental authorities. Subsection (4) states that “[n]o employer is required to allow the ingestion of marijuana in any workplace or to allow any employee to work while under the influence of marijuana.” The subsection 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.” *Id.*; see Prop. Idaho Code § 39-9703(4). Subsections (5) through (7) preclude discrimination in regard to organ and tissue transplants, child custody and visitation rights, and firearm possession or ownership. Under subsection (8), “[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), they complied with the requirements of the Act. Prop. Idaho Code § 39-9723(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. Idaho Code § 39-9724(1). Also, “[t]he Department may revoke the registry identification card of any cardholder who knowingly violates this Chapter.” Prop. Idaho Code § 39-9724(3). Revocation is subject to review under chapter 52, title 67, Idaho Code. Idaho Code § 39-9724(4).

If the Department fails to adopt rules to implement the Act within 120 days of the Act’s enactment, any citizen may commence a mandamus action to compel compliance. Prop. Idaho Code § 39-9725.

In sum, Section 1 of the Act generally decriminalizes under state law the possession of up to four ounces of marijuana and, if given a “hardship cultivation designation,” six marijuana plants for patients or caregivers. The Act also protects agents of medical marijuana

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

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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 with 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, and oversight; maintaining and enforcing confidentiality of records; and providing an annual report to the Idaho Legislature.

As noted in 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, titled "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, 317, 98 S. Ct. 1079, 1082, 55 (emphasis added) (footnote omitted) (quoting Moore v. Illinois, 55 U.S. 13, 19-20, — S. Ct. —, 14 L. Ed. 306 (1852)), *superseded in other aspects by statute*, 25 U.S.C. §§ 1301-1303, *as recognized in* United States v. Lara, 541 U.S. 193, 124 S. Ct. 1628, 158 L. Ed. 2<sup>nd</sup> 420 (2004). See State v. Marek, 112 Idaho 860, 865, 736 P.2d 1314, 1319 (1987) (citation omitted) (“[T]he double jeopardy clause of the fifth amendment does not prohibit separate sovereigns from pursuing separate prosecutions since separate sovereigns do not prosecute for the ‘same offense.’”). Under the concept of “separate sovereigns,” the State of Idaho is free to create its own criminal laws and exceptions pertaining to the use of marijuana. However, the State of Idaho cannot limit the federal government, as a separate sovereign, from prosecuting marijuana-related conduct under its own laws.

In United States v. Oakland Cannabis Buyers’ Cooperative, 532 U.S. 483, 486, 121 S. Ct. 1711, 1715, 149 L. Ed. 2d 722 (2001) (last citation omitted), the United States Supreme Court described a set of

circumstances that appear similar to the system proposed in the Initiative:

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

A federal district court denied the Cooperative’s motion to modify an injunction that was predicated on the Cooperative’s continued violation of the federal Controlled Substance Act’s “prohibitions on distributing, manufacturing, and possessing with the intent to distribute or manufacture a controlled substance.” *Id.* at 487 (citation omitted). 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,” [21 U.S.C.] § 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

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

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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." [United States v. Oakland Cannabis Buyer's Coop., 190 F.3d. 1109, 1114 (9th Cir. 1999)]. 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 (footnotes omitted).

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, the State of 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. App'x 643, 644 (unpublished) (9th Cir. 2008) (last citation omitted), 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. 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 & Indus., 230 P.3d 518, 520 (Or. 2010). Therefore, the provisions of the Initiative, prop. Idaho Code sections 39-9701, *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.

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

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### C. Other Recommended Revisions or Alterations

In addition to the legal and non-legal problems previously discussed, the Initiative has one other aspect that merits consideration. Although “usable” marijuana is referred to in the proposed ballot title, it is not found anywhere else in the Act. It is suggested that, for clarity, the word “usable” be omitted in that respect.

### 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 Jackee K. Winters, 154 E. Gettysburg Street, Boise, Idaho 83706.

Sincerely,

LAWRENCE G. WASDEN  
Attorney General

### Analysis by:

John C. McKinney  
Deputy Attorney General

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<sup>1</sup> References to “proposed” Idaho Code sections 39-9701, *et seq.*, will read, “Prop. Idaho Code § 39-9701,” etc.

<sup>2</sup> A “designated caregiver” can be a natural person at least 21 years of age or “an entity licensed in Idaho to provide healthcare services that agrees to assist with qualifying patients’ medical use of marijuana[.]” Prop. Idaho Code § 39-9702(6).

<sup>3</sup> 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. Idaho Code §§ 39-9702(2)(a)(ii), (b)(ii); 9702(6), (15); -9709. Although the “hardship cultivation designation” requires the six marijuana plants to be “contained in an enclosed, locked facility” (unless being transported), there is no parallel provision in

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

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regard to “marijuana produced from the plants.” See Prop. Idaho Code §§ 39-9702(2)(a)(ii), (b)(ii).

<sup>4</sup> Although patients and caregivers must be given registry identification cards, there is no similar provision for identifying “agents” as authorized participants in the Act.

<sup>5</sup> The Act also allows a “nonresident cardholder” from another state to possess medical marijuana while in Idaho. Prop. Idaho Code § 39-9702(13).

<sup>6</sup> The “cultivator” notation refers to the Act’s “hardship cultivation designation.” See Prop. Idaho Code § 39-9709.

<sup>7</sup> 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; or (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. Idaho Code § 39-9721(1)(a)-(e).

<sup>8</sup> 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. Idaho Code § 39-9703(1)-(3).

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**ATTORNEY GENERAL'S  
SELECTED  
ADVISORY LETTERS  
FOR THE YEAR 2020**

**LAWRENCE G. WASDEN**

**ATTORNEY GENERAL  
STATE OF IDAHO**



SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

January 8, 2020

The Honorable Bert Brackett  
Senator, District 23  
Idaho State Legislature  
VIA HAND DELIVERY

Re: DRKAGO54

Dear Senator Brackett:

This letter is in response to your request for review of DRKAGO54, which would establish criteria for designating “chronic depredation zones” and establish certain big-game hunting units as “wolf free zones.” We reviewed this legislation in the context of the federal rule removing Northern Rocky Mountain (“NRM”) gray wolves from the list of endangered species established under the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, and in the context of the Idaho Legislative Wolf Oversight Committee’s IDAHO WOLF CONSERVATION AND MANAGEMENT PLAN (March 2002) (“Plan”), <https://idf.idaho.gov/old-web/docs/wolves/plan02.pdf>.

The federal rule delisting the Northern Rocky Mountain gray wolf population identified three specific scenarios that could lead the U.S. Fish and Wildlife Service to initiate a status review and analyze threats to determine if relisting of the Northern Rocky Mountain wolf population “was warranted including: (1) If the wolf population falls below the minimum NRM wolf population recovery level of 10 breeding pairs of wolves and 100 wolves in either Montana or Idaho at the end of the year; (2) if the wolf population segment in Montana or Idaho falls below 15 breeding pairs or 150 wolves at the end of the year in any one of those States for 3 consecutive years; or (3) if a change in State law or management objectives would significantly increase the threat to the wolf population.” 74 Fed. Reg. 15,123, 15,186 (Apr. 2, 2009). The delisting rule states that all such reviews would be made available for public review and comment, including peer review by select species experts. “Breeding pair” is defined in the delisting rule.

## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

The Plan, referenced in the draft legislation and relied upon in the federal delisting rule, establishes management directives that differ depending on whether there are more or less than 15 packs.

The draft legislation would remove the Idaho Fish and Game Commission's ("Commission") discretion in exercising its season setting authority for wolf hunting in certain big game management units, whether those meet the qualifying conditions of "chronic depredation zones" or the units designated as "wolf-free zones." Exercise of the Legislature's prerogative to limit the Commission's authority, while an apparent departure from the Plan, is a defensible change in state law. However, it is beyond the scope of this analysis to determine whether the U.S. Fish and Wildlife Service would consider these changes, along with the directive to reduce wolf populations to "conform with the Idaho management plan," to be a "significant" increase in threat to the wolf population for purposes of the scenarios identified for a federal status review.

One additional note: for clarity of references to big game management units in subsections (1) and (2) of the draft legislation, the Idaho Fish and Game Commission, rather than the Idaho Fish and Game Department, identifies and describes these units by administrative rules, IDAPA 13.01.08, sections 600 to 615.

Sincerely,

STEVEN W. STRACK  
Deputy Attorney General

## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

January 8, 2020

The Honorable Bert Brackett  
Senator, District 23  
Idaho State Legislature  
VIA HAND DELIVERY

Re: DRKAGO54 (amended)

Dear Senator Brackett:

This letter is in response to your request for review of the amended version of DRKAGO54. The amended version retains the provisions regarding chronic depredation zones and wolf-free zones. As stated in our previous analysis, such provisions should be reviewed in the context of the federal rule removing Northern Rocky Mountain (“NRM”) gray wolves from the list of endangered species established under the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, and in the context of the Idaho Legislative Wolf Oversight Committee’s IDAHO WOLF CONSERVATION AND MANAGEMENT PLAN (March 2002) (“Plan”), <https://idf.idaho.gov/old-web/docs/wolves/plan02.pdf>.

The federal rule delisting the Northern Rocky Mountain gray wolf population identified three specific scenarios that could lead the U.S. Fish and Wildlife Service to initiate a status review and analyze threats to determine if relisting of the Northern Rocky Mountain wolf population “was warranted including: (1) If the wolf population falls below the minimum NRM wolf population recovery level of 10 breeding pairs of wolves and 100 wolves in either Montana or Idaho at the end of the year; (2) if the wolf population segment in Montana or Idaho falls below 15 breeding pairs or 150 wolves at the end of the year in any one of those States for 3 consecutive years; or (3) if a change in State law or management objectives would significantly increase the threat to the wolf population.” 74 Fed. Reg. 15,123, 15,155, 15,186 (Apr. 2, 2009). The delisting rule states that all such reviews would be made available for public review and comment, including peer review by select species experts. “Breeding pair” is defined in the delisting rule.

## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

The Plan, referenced in the draft legislation and relied upon in the federal delisting rule, establishes management directives that differ depending on whether there are more or less than 15 packs. When the number of wolf packs falls below 15, the Plan contemplates that sport hunting of wolves will cease, and that more stringent limits will be placed on depredation control actions.

The draft legislation would remove the Idaho Fish and Game Commission's ("Commission") discretion in exercising its season setting authority for wolf hunting in certain big game management units, whether those meet the qualifying conditions of "chronic depredation zones" or the units designated as "wolf-free zones." Exercise of the Legislature's prerogative to limit the Commission's authority is a defensible change in state law. However, it is beyond the scope of this analysis to determine whether the U.S. Fish and Wildlife Service would consider these changes to constitute a "significant" increase in threat to the wolf population for purposes of the scenarios identified for a federal status review. The likelihood of such status review, however, is reduced by subsection (3) of the bill, which would suspend operation of subsections (1) and (2) in the event the Idaho wolf population falls below 20 packs. It should be noted, however, that maintenance of 20 packs does not necessarily prevent a status review—if pack sizes are small enough, the Idaho wolf population could still fall below the 100/150 wolf thresholds in the 2009 delisting rule.

One additional note: for clarity of references to big game management units in subsections (1) and (2) of the draft legislation, the Commission, rather than the Idaho Fish and Game Department ("Department"), identifies and describes these units by administrative rules, IDAPA 13.01.08, sections 600 to 615. Likewise, in subsection (3), the season-setting necessary to comply with the directive to restore a minimum of 20 wolf packs would be carried out by the Commission, not the Department.

Sincerely,

STEVEN W. STRACK  
Deputy Attorney General



## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

January 13, 2020

Senator Don Cheatham  
Idaho Senate  
Idaho State Capitol  
Boise, ID 83720

Re: Inquiry regarding draft bill adding new sections, Idaho  
Code sections 18-7045 and 18-7046

Dear Senator Cheatham:

This letter responds to your request for a legal analysis of draft legislation that would add two new statutes to Idaho's criminal code, proposed Idaho Code sections 18-7045 and 18-7046. Upon comparing the present draft legislation with similar legislation presented last year, S.B. 1090, 65th Leg., 1st Reg. Sess. (Idaho 2019), the only apparent difference appears to be the elimination of a purported savings clause contained in the 2019 draft, which specifically exempted constitutionally protected expressions of free speech or free association. The remaining provisions of the 2020 draft appear to contain the same language as the 2019 draft. The removal of the savings clause does not rectify the concerns identified in our 2019 analysis; in fact, while a savings clause may not be definitive on the issue of constitutionality of a statute, such a clause assists the State in defending against constitutional challenges. We continue to have the same concerns with the current draft as we did with the 2019 version. I have not repeated those concerns here, but have attached the 2019 analysis for your review.

I also want to make you aware of litigation in other parts of the country concerning similar statutes adopted in other states. Similar legislation has been adopted in several states including Iowa, Iowa Code § 716.11 (West 2018); Oklahoma, 21 Okla. Stat. Ann. tit. 21 § 1792 (West 2017); South Dakota, S.D. Codified Laws §§ 20-9-54 and -56 (West 2019); and Texas, Tex. Gov't Code Ann. § 424.052 (West 2019). Additional states amended existing laws to address pipelines and/or other critical infrastructure, including North Dakota, N.D. Cent. Code Ann. § 12.1-21-06 (West 2019) (amending the tampering with a

## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

public service statute to include critical infrastructure); and Louisiana, La. Stat. Ann. § 14:61 (2018) (adding pipelines and “any site where the construction or improvement of any facility or structure referenced in this Section is occurring” to the provision governing unauthorized entry of a critical infrastructure).

At least two states are currently engaged in litigation involving these statutes. In South Dakota, parties seeking to protect construction of a petroleum pipeline have sued the State in federal court, challenging the State’s riot statutes on First Amendment grounds. That case is Dakota Rural Action v. Noem, No. 5:2019-cv-05026 (D.S.D.). While labeled a riot boosting statute, the South Dakota legislation targets the same type of conduct that the 2020 draft Idaho legislation appears to prohibit, including efforts to curtail efforts to provide advice and aid to protestors. In fact, the South Dakota federal judge stated, “[t]he publicly made claims by the Governor and others were that the legislation was to address costs of various persons and entities from anticipated rioting as a result of the building of the Keystone XL pipeline through South Dakota.” (Order at 1, Dakota Rural Action, No. 5:2019-cv-05026 (D.S.D. Sept. 18, 2019), ECF No. 50.) The federal judge entered a preliminary injunction in September 2019 enjoining enforcement of the criminal riot statute. (See id. at 23.) Following the preliminary injunction, the parties entered into a settlement agreement wherein the State agreed to not enforce the criminal provisions of the riot statute.

In Louisiana, two separate civil cases are proceeding, concerning Louisiana’s amended critical infrastructure protection statute. First, in White Hat v. Landry, No. 3:2019-cv-00322 (M.D. La.), residents (including those charged with violating the statute, landowners whose rights have been affected by the statute, and constitutional advocates) have filed a facial challenge against the statute on First Amendment grounds. The defendants have filed a motion to dismiss the lawsuit, but the Court has not yet ruled on the motion. Second, in Spoon v. Bayou Bridge Pipeline LLC, No. 3:2019-cv-00516 (M. D. La.), plaintiffs who were arrested during a protest of a pipeline construction have filed suit against the pipeline company and various law enforcement officials, alleging wrongful arrest and First Amendment violations. In that matter, the defendants have also filed a motion to dismiss, which the Court has not yet decided. As of this

## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

writing, I am not aware of any other pending litigation concerning similar statutes.

I hope you find this information helpful. Please feel free to contact our office if you have any questions.

Sincerely,

KRISTINA SCHINDELE  
Deputy Attorney General

## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

January 14, 2020

The Honorable Bert Brackett  
Senator, District 23  
Idaho State Legislature  
VIA HAND DELIVERY

Re: DRKAGO54 (amended)

Dear Senator Brackett:

This letter is in response to your request for review of the second amended version of DRKAGO54. This version retains the provisions regarding chronic depredation zones and wolf-free zones. Additionally, when the number of wolf packs drops below 20 or the Idaho wolf population drops below 200, the Idaho Fish and Game Commission is directed to review wolf management policies and take appropriate action to restore a minimum of 20 packs and at least 200 wolves.

We reviewed these directives by comparing them to the IDAHO WOLF CONSERVATION AND MANAGEMENT PLAN (Mar. 2002) ("Plan"), <https://idfg.idaho.gov/old-web/docs/wolves/plan02.pdf>). The proposed legislation would modify the Plan in one respect: the Plan provides that when the wolf population exceeds 15 packs, "[d]epredation control is treated like all large mammalian predators." The proposed legislation would replace this directive in certain big game units with a directive to seek the removal of wolves entirely, and, in units with a confirmed depredation in four of the preceding calendar years, would require year-round hunting seasons for wolves.

Otherwise, the proposed legislation is consistent with the Plan, which establishes management directives that differ depending on whether there are more or less than 15 packs. When the number of wolf packs falls below 15, the Plan contemplates that sport hunting of wolves will cease, and that more stringent limits will be placed on depredation control actions. The proposed legislation adds an additional trigger for review and implementation of wolf management policies, but does not supersede or conflict with the Plan.

## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

We also compared the directives in DRKAGO54 to the provisions of the federal rule removing Northern Rocky Mountain gray wolves from the list of endangered species established under the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* The delisting rule was published in 74 Fed. Reg. 15,123 (Apr. 2, 2009), and confirmed by an act of Congress. Pub. L. 112-10 § 1713, 125 Stat. 38 (Apr. 15, 2011). The delisting rule identifies three specific scenarios that could lead the United States Fish and Wildlife Service (“Service”) to initiate a status review to determine if relisting of the Northern Rocky Mountain wolf population is warranted. Those scenarios are:

1. If the wolf population falls below 10 breeding pairs of wolves and 100 wolves in either Montana or Idaho at the end of the year;
2. If “the wolf population segment in Montana or Idaho falls below 15 breeding pairs or 150 wolves at the end of the year in either of those States for 3 consecutive years;” or
3. If “a change in State law or management objectives would significantly increase the threat to the wolf population.”

74 Fed. Reg. 15,123, 15,155, 15,186 (Apr. 2, 2009). The proposed legislation, with its directive to maintain at least 20 packs and 200 wolves, may avoid the first two scenarios, though it should be noted that not all wolf packs contain a breeding pair of wolves, so it may be possible to fall below the threshold of 15 breeding pairs (as defined in the delisting rule) even if there are 20 or more packs in the state. See, e.g., Jason Husseman & Jennifer Struthers, Idaho Dep’t of Fish & Game, 2015 IDAHO WOLF MONITORING PROGRESS REPORT, at 10 (Mar. 2016), <https://idfg.idaho.gov/sites/default/files/idaho-wolf-monitoring-progress-report-2015.pdf> (for packs where breeding pair determination was made, 62% of packs contained a breeding pair).

It is beyond the scope of legal analysis to determine whether the directive that certain big game units should be “wolf-free,” and the directive to authorize year-round hunting in units with a confirmed depredation in four of the preceding calendar years, would be considered by the Service to be a “change in State law or management objectives that would significantly increase the threat to the wolf population.” In determining whether a regulation threatens the recovered wolf population, the Service may consider not just the effect

## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

on the numerical population, but also effects on geographic distribution, connectivity, and genetic exchange. See, e.g., 74 Fed. Reg. at 15,130-32 (“wolf recovery and long-term wolf population viability is dependent on its distribution as well as maintaining the minimum numbers of breeding pairs and wolves”); *id.* at 15,142 (concluding that maintenance of a population of over 1,000 wolves in Idaho and Montana would likely provide adequate connectivity and genetic exchange, but noting availability of “agency-managed genetic exchange” if “the population is managed to the minimum recovery target of 150 wolves per State”).

Sincerely,

STEVEN W. STRACK  
Deputy Attorney General

SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

January 17, 2020

Senator Steve Bair  
Chairman, Senate Finance Committee  
Co-Chairman, Joint Finance & Appropriations Committee  
District 31, Bingham County  
VIA HAND DELIVERY

Re: Streamside Tree Retention Rule ("Shade Rule")

Dear Senator Bair:

This letter is in response to your request for a legal analysis of the concerns that the Idaho Farm Bureau Federation ("Farm Bureau") identified in its letter of August 15, 2019, to the Idaho Department of Lands concerning the Streamside Tree Retention Rule ("Shade Rule"), IDAPA 20.02.01.030.07.e.ii. This letter will identify the concerns expressed by the Farm Bureau, using the numbering in the Farm Bureau letter, followed by our responses.

**Farm Bureau Concern 1: "The shade rule is unconstitutional."**

The Farm Bureau asserts that the shade rule takes private property without just compensation, in violation of article I, section 14 of the Idaho Constitution, and the Fifth Amendment to the United States Constitution. There is no legal basis for such concern. It is well-established that the State may require a land-owner to refrain from developing or improving a portion of its property in order to promote the common good. Such restrictions would constitute a taking if the regulation "denies all economically beneficial or productive use of land." Murr v. Wisconsin, 137 S. Ct. 1933, 1942-43, 198 L. Ed. 2d 497 (2007) (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 617, 121 S. Ct. 2448, 2457, 150 L. Ed. 2d 592 (2001)). The Idaho Supreme Court refers to such takings as "categorical" takings. City of Coeur d'Alene v. Simpson, 142 Idaho 839, 847, 136 P.3d 310, 318 (2006).

If a regulation does not effect a categorical taking, it may nonetheless effect a "non-categorical taking by virtue of diminishing the

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value of [the] property.” Id. Whether a regulation so diminishes property value as to constitute a taking requires an “ad hoc, factual inquir[y]” that considers (1) the economic impact of the regulation; (2) the extent to which the regulation interferes with reasonable investment-backed expectations; and (3) the character of the governmental action.” Id. (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124, 98 S. Ct. 2646, 2659, 57 L. Ed. 2d 631, 648 (1978)).

Whether a regulation is alleged to be a categorical or non-categorical taking, the courts examine the impacts of the regulation on the property as a whole:

When government regulations prohibit development on a portion of an owner's property, the owner often argues that the court should pretend that the regulated portion has been separated from the remainder and consider it separately. This argument is called “conceptual severance.”

City of Coeur d'Alene, 142 Idaho at 859, 136 P.3d at 330 (Eismann, J., dissenting) (citation omitted). Conceptual severance is not a recognized basis for a takings claim: “Taking’ jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.” Penn Cent. Transp. Co., 438 U.S. at 130.

Because the shade rule affects only portions of timber parcels, and allows unhindered economic use of the remaining lands, it is difficult to imagine a set of circumstances that would lead a court to determine that the burden imposed is so onerous as to constitute a taking, especially given the character of the governmental action. Takings jurisprudence attempts to “reconcile two competing objectives . . . . One is the individual's right to retain the interests and exercise the freedoms at the core of private property ownership.” Murr, 137 S. Ct. at 1943 (citation omitted). “The other persisting interest is the government's well-established power to “adjus[t] rights for the public good.” Id. (quoting Andrus v. Allard, 444 U.S. 51, 65, 100 S. Ct. 318, 326, 62 L. Ed. 2d 210 (1979)). Pursuant to the latter interest, the Supreme Court has consistently held that “reasonable land-use



regulations do not work a taking.” Id. at 1947 (citation omitted). For example, in Murr, the Supreme Court upheld substantial restrictions on development of riverfront property “enacted as part of a coordinated federal, state, and local effort to preserve the river and surrounding land.” Id. at 1949-50.

In sum, restrictions on streamside harvest to protect fish habitat are, except in unusual circumstances, unlikely to result in an unconstitutional taking so long as timber harvest may be economically carried out on the property as a whole. See, e.g., Coast Range Conifers, LLC v. State ex rel. Or. State Bd. of Forestry, 117 P.3d 990 (Or. 2005) (no taking occurred when Oregon Board of Forestry denied logging permit for nine acres of 40-acre parcel in order to protect nesting site for bald eagles).

**Farm Bureau Concern 3: “There is no clear authorization in the Forest Practices Act for the shade rule.”**

The State Board of Land Commissioners (“Land Board”) is authorized to adopt rules that “[p]rovide for the harvesting of forest tree species in a manner that will maintain the productivity of the forest land, minimize soil and debris entering streams and protect wildlife and fish habitat.” Idaho Code § 38-1304(1)(a). More broadly, the Forest Practices Act states that:

Recognizing that federal, state and private forest lands make a vital contribution to Idaho by providing jobs, products, tax base, and other social and economic benefits, by helping to maintain forest tree species, soil, air and water resources, and by providing a habitat for wildlife and aquatic life, it is the public policy of the state to encourage forest practices on these lands that maintain and enhance those benefits and resources for the people of the state of Idaho. . . . [I]t is the purpose of this chapter to vest in the board authority to adopt rules designed to assure the continuous growing and harvesting of forest tree species and to protect and maintain the forest soil, air, water resources, wildlife and aquatic habitat.

Idaho Code § 38-1302(1), (2).

When addressing allegations that a rule is not authorized by statute, the courts ask whether the rule “conforms” with the statute and “is reasonably directed to the accomplishment of the principles of that law.” Mason v. Donnelly Club, 135 Idaho 581, 583, 21 P.3d 903, 905 (2001). Sections 38-1302 and 38-1307, Idaho Code, vest the Land Board with broad authority to protect aquatic habitat. The Shade Rule, which is intended to prevent rises in stream temperature, is reasonably directed to accomplishment of that goal: cold water is an essential component of fish habitat for many salmonid species. See, e.g., *Trout Temperature Requirements (Literature Review)* (Feb. 2007), [https://www.sce.com/sites/default/files/inline-files/apdea\\_attachmenttrouttemperaturerequirements.pdf](https://www.sce.com/sites/default/files/inline-files/apdea_attachmenttrouttemperaturerequirements.pdf). Given such facts, it appears clear that the Land Board’s determination that protection of aquatic habitat requires regulation of streamside cutting is a reasonable construction of the Forest Practices Act, especially since Idaho courts have “long followed the rule that the construction given to a statute by the executive and administrative officers of the State is entitled to great weight and will be followed by the courts unless there are cogent reasons for holding otherwise.” J.R. Simplot Co. v. Idaho State Tax Comm’n, 120 Idaho 849, 854, 820 P.2d 1206, 1211 (1991) (citations omitted).

**Farm Bureau Concern 4: “Other portions of the FPA indicate that the act is purely voluntary and cooperative.”**

The Forest Practices Act is intended to “encourage” forest practices that provide habitat for wildlife and aquatic life. Idaho Code § 38-1302. The Farm Bureau, however, is incorrect in asserting that use of the word “encourage” renders the Act “purely voluntary and cooperative.” Idaho Code section 38-1307 plainly provides that “[w]hen the department determines that an operator violated any provision of this chapter or rule, it shall issue a notice of violation,” and may direct the operator to “cease further violation and to commence and continue repairing the damage or correcting the unsatisfactory condition.” Idaho Code § 38-1307(1), (2) (emphasis added). If the violation is not corrected, the county attorney or the attorney general may “file an action to enjoin the operator’s violations and to recover the costs of repair and administrative and legal fees.” Idaho Code § 38-1307(2)(e).

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Further, the Act provides that a violation of “a rule adopted under section 38-1304 . . . is a misdemeanor.” Idaho Code § 38-1310(1). Given such provisions, it is clear that the Legislature intended that compliance with Forest Practice rules would be mandatory, not voluntary.

### **Farm Bureau Concern 5: “The Legislature clearly intended flexibility in reforestation.”**

The Farm Bureau letter correctly notes that the Forest Practices Act contemplates that the Land Board will adopt rules that “provide for reforestation” and stabilization of exposed soils after timber harvest. Idaho Code § 38-1304(1)(c). It then makes leaps to the conclusion that the authority to adopt rules addressing reforestation and soil stabilization necessarily contemplate that all forest lands are subject to harvest and exposure of soils and, they suggest, precludes the Department from adopting rules which restrict harvest. Such an interpretation, however, would render null those provisions in the same statute requiring the Land Board to adopt rules that “[p]rovide for the harvesting of forest tree species in a manner that will . . . minimize soil and debris entering streams and protect wildlife and fish habitat.” Idaho Code § 38-1304(1)(a). A fundamental rule of statutory construction is that courts must “give effect to every word, clause and sentence of a statute, where possible.” Univ. of Utah Hosp. & Med. Ctr. v. Bethke, 101 Idaho 245, 248, 611 P.2d 1030, 1033 (1980) (citations omitted). In other words, the Forest Practices Act expressly contemplates that the Board will adopt rules that both minimize impacts on fish habitat and require restoration of habitat where minimization of impacts is impossible or impractical.

### **Farm Bureau Concern 6: “The legislature intended to defer to private owner management decisions.”**

The Farm Bureau notes, correctly, that Idaho Code section 38-1304(1)(f), which addresses salvage of dead or dying timber, provides that “[n]othing in this paragraph shall be construed as requiring the removal of timber from private lands against the wishes of the private landowner.” Idaho Code § 38-1304(1)(f) (emphasis added). It then goes on to posit, however, that the opposite must be true: nothing in

the Act should be construed as prohibiting the removal of timber against the wishes of the landowner.

The Farm Bureau's assertion that a statute must mean the exact opposite of what it states is unique, to say the least. Once again, the Farm Bureau's assertion ignores the fundamental rule that effect must be given "to every word, clause and sentence of a statute, where possible." Univ. of Utah Hosp. & Med. Ctr., 101 Idaho at 248, 611 P.2d at 1033. The Forest Practices Act authorizes the Land Board to regulate "the harvesting of forest tree species in a manner that will . . . protect wildlife and fish habitat." Idaho Code § 38-1304(1)(a). Nothing in subsection (e), which is limited by its terms to the harvest of dead or dying trees, overrides or supersedes the provisions in subsection (1)(a) authorizing the Board to regulate the "manner" of "harvesting" live trees. The fact that landowners may opt not to harvest dead or dying timber is entirely consistent with the promulgation of rules providing that certain streamside trees shall not be harvested where necessary to protect fish habitat.

**Farm Bureau Concern 7: "Changes in the shade rule are barred by the statute itself."**

Idaho Code section 38-1305 provides, in part, that "[a]ll site-specific BMPs approved at the time of the effective date of this act shall remain in force and be enforced by the designated agency[.]" Idaho Code § 38-1305(7). The Farm Bureau asserts that the Shade Rule is a "site-specific BMP" that existed at the time of subsection (7)'s adoption in 1990, and therefore cannot be modified.

The Farm Bureau's assertion ignores the fact that subsection (7) only applies to "site-specific" BMPs. Such limiting language cannot be simply ignored: effect must be given "to every word, clause and sentence of a statute, where possible." Univ. of Utah Hosp. & Med. Ctr., 101 Idaho at 248, 611 P.2d at 1033. The Land Board's Forest Practice Rules describe the term "site-specific BMP" to mean a "BMP that is adapted to and takes account of the specific factors influencing water quality, water quality objectives, on-site conditions, and other factors applicable to the site where a forest practice occurs[.]" IDAPA 20.02.01.010.54. In contrast, the term "best management practice," when not modified by the term "site-specific," means a "practice or

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combination of practices determined by the board, in consultation with the department and the forest practices advisory committee, to be the most effective and practicable means of preventing or reducing the amount of nonpoint pollution generated by forest practices.” IDAPA 20.02.01.010.05.

The Shade Rule, by its terms, applies to “all Class 1 streams.” IDAPA 20.02.01.030.07.e.ii. Thus, while the Shade Rule may fall within the broad definition of “best management practices,” it is not a “site-specific BMP,” and therefore is not subject to the terms of Idaho Code section 38-1305(7).

**Farm Bureau Concern 8: “The science is inconclusive, and often contradictory on this issue.”**

The Farm Bureau’s comments describing the science underlying the Shade Rule as “inconclusive” and “contradictory” do not lend themselves to legal analysis by this Office. Such questions are best addressed to the Idaho Department of Lands.

Sincerely,

STEVEN W. STRACK  
Deputy Attorney General

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January 22, 2020

The Honorable Brooke Green  
Idaho House of Representatives  
Idaho State Capitol  
700 W. Jefferson Street, Room EW29-11  
Boise, Idaho 83702  
VIA EMAIL: [bgreen@house.idaho.gov](mailto:bgreen@house.idaho.gov)

Re: Request for legislation review of H.B. 322

Dear Representative Green:

You have requested an analysis of House Bill 322, 65th Legislature, 2nd Regular Session (Idaho 2020); specifically, you have asked whether there are due process or other constitutional concerns with the bill and whether the emergency clause would have potential retroactive effect on those who had not changed registration by December 10, 2019.

### **CONCLUSION**

House Bill 322 appears constitutionally permissible based upon precedent. The main issue in the bill is the balance to be found between the rights of individual voters to change affiliation to vote in a primary election versus the process by which a political party selects its nominees for general election. Precedent weighs in favor of the political party selection process and the First Amendment right to association. Given the emergency clause, which is within the Legislature's discretion to include, it would apply once signed by the Governor and it appears to have retroactive effect on those who had not changed registration by December 10, 2019, since the amendment affords of no other interpretation to Idaho Code. Voters would still be able to change party affiliation before the bill is signed by the Governor.

### **ANALYSIS**

States have considerable authority to manage elections and impose order on the conduct of elections. State election codes

prescribe filing deadlines for candidates, procedures for the filing of nominating petitions, and require that candidates demonstrate a modicum of support before getting their name on the ballot. Ballot space is not infinite, and courts have long recognized that to avoid chaos in the election process, significant deference to reasonable state laws is required. “[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.”<sup>1</sup>

When evaluating whether a state election law infringes a First Amendment right, courts apply the balancing test derived from Anderson v. Celebrezze, 460 U.S. 780, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983), and Burdick v. Takushi, 504 U.S. 428, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992). These cases hold that, in examining a State’s elections laws, a court must “weigh ‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments . . . ’ against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule[.]’”<sup>2</sup> The approach first requires the court to determine whether the state law subjects the individual’s rights to “severe” restrictions.<sup>3</sup> If the State does impose a severe restriction on the right to vote, the regulation must be narrowly drawn in support of a compelling state interest.<sup>4</sup> If, however, the State imposes “reasonable, nondiscriminatory restrictions on these rights . . . the [S]tate’s important regulatory interests will generally be sufficient to justify the regulations.”<sup>5</sup>

In assessing the “character and magnitude” of the asserted burden, the Court must evaluate the alleged burden not “in isolation, but within the context of the [S]tate’s overall scheme of election regulations.”<sup>6</sup> The U.S. Constitution permits states to “enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.”<sup>7</sup> Such regulations may address the risk that the ballot may become “cluttered with candidates from minor parties who did not command significant voter support.”<sup>8</sup> Thus, states may “condition access to the general election ballot by a minor-party or independent candidate upon a showing of a modicum of support among the potential voters for the office.”<sup>9</sup> These same concerns apply to a primary ballot for a major party.

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However, “the process by which a political party selects its nominees for general elections is not a wholly public affair which a state may freely regulate.”<sup>10</sup> “A state must act within constitutional limits when it regulates a political party’s internal processes.”<sup>11</sup> “Among those constitutional limits is the First Amendment right to freedom of association, which protects the freedom to join together in furtherance of common political beliefs” and this includes the “right not to associate.”<sup>12</sup> “This political freedom of association (and right to exclude) is most critically manifested in the political party’s process of selecting its nominees.”<sup>13</sup> “For this reason, the Supreme Court consistently ‘affirm[s] the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party select[s] a standard bearer who best represents the party’s ideologies and preferences.’”<sup>14</sup>

In Yursa, the court found that Idaho’s open primary system violated the Republican Party’s First Amendment rights. The open primary system violated the right to freedom of association by allowing non-party members to “cross-over” and participate in the party’s selection of its nominees. As part of its ruling, the court noted that even a slight prospect of “cross-over” violated the party’s First Amendment rights, because “even ‘a single election in which the party nominee is selected by nonparty members could be enough to destroy the party.’”<sup>15</sup> “[N]o heavier burden on a political party’s associational freedom” where that party’s message could be changed.<sup>16</sup>

Contrasting this right is the right to vote in Idaho, which is a fundamental right.<sup>17</sup> This right is found in two places in the Idaho Constitution: article I, section 19 and article VI.<sup>18</sup> “Because the Idaho Constitution expressly guarantees the right of suffrage, we hold that voting is a fundamental right under the Idaho Constitution.”<sup>19</sup> Since the right to vote is a fundamental right, strict scrutiny would apply to any law infringing upon this right.<sup>20</sup> “Under the strict scrutiny standard of review, a law which infringes on a fundamental right will be upheld only where the State can demonstrate the law is necessary to promote a compelling state interest.”<sup>21</sup>

House Bill No. 322 does not appear to be targeting the fundamental right to vote; rather, the bill appears to solve an omission in Idaho statute in regards to a political party’s process of selecting its



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nominees at the presidential primary. In light of Ysursa, the amendment on this part alone would face no issue. However, because of the emergency clause, it appears that rights of voters to change party affiliation and then participate in a presidential primary may be effectively foreclosed for 2020.

The Legislature is given the discretion in declaring emergencies.<sup>22</sup> The “legislature’s determination of an emergency in an act is a policy decision *exclusively* within the ambit of legislative authority and the judiciary cannot second-guess that decision.”<sup>23</sup>

The justification for legislative discretion in this area is that the decision to declare an emergency is “a decision-making function that is uniquely legislative. The courts are ill equipped to make such policy decisions.” [Idaho State AFL-CIO v. Leroy, 110 Idaho 691, 695, 718 P.2d 1129, 1133 (1986)]. “The respect due to the co-equal and independent legislative branch of state government and the need for finality and certainty about the status of a duly enacted statute contribute to the reluctance of the courts to inquire into whether the legislature’s determination of an effective date is justified.” Id. Justice Shepherd, concurring in Assoc. Taxpayers of Idaho, Inc. v. Cenarrusa, 111 Idaho 502, 725 P.2d 526 (1986), stated that “[i]n my view it is exceedingly dangerous for this Court, or any court, to interfere with the legislative process.”<sup>24</sup>

As currently drafted, House Bill No. 322 now includes two potential deadlines in which party affiliation may be changed for a primary. The first deadline may be found in Idaho Code section 34-704, but the deadline there only speaks to primaries and not “presidential primaries.” Accordingly, the applicable deadline for a presidential primary to change party affiliation would be found in the amended language of Idaho Code section 34-732, which creates a ninety day deadline prior to the presidential primary. This deadline passed in December 2019.

In Idaho, “legislation does not have retroactive effect in the absence of an express legislative statement of intent to that effect.”<sup>25</sup>

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“A statute should be applied retroactively only if the legislature has clearly expressed that intent or such intent is clearly implied by the language of the statute. As with new legislative enactments, amendments to statutes are also not given retroactive effect unless there is an ‘express legislative statement to the contrary.’”<sup>26</sup> While there is no express statement of retroactive effect, the clear intent of the bill appears to be that no one may now change party affiliation, since that deadline passed in December.

The main issue then is the balance between the rights of individual voters to change affiliation to vote in a primary versus the process by which a political party selects its nominees for general elections. The precedent of Ysursa weighs in favor of the political party selection process, including application of the amendment to prohibit a change in party affiliation prior to the Presidential primary after December 10, 2019.

### **CONCLUSION**

House Bill No. 322 appears constitutionally permissible based upon precedent, which weighs in favor of the political party selection process. The emergency clause is within the Legislature’s discretion to include. Once the bill is signed by the Governor, it would have potential retroactive effect on those who had not changed registration by December 10, 2019.

Sincerely,

BRIAN KANE  
Assistant Chief Deputy

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<sup>1</sup> Storer v. Brown, 415 U.S. 724, 730, 94 S. Ct. 1274, 1279, 39 L. Ed. 2d 714 (1974); see also Navarro v. Neal, 716 F.3d 425, 430-31 (7th Cir. 2013); Libertarian Party of Ill. v. Rednour, 108 F.3d 768, 774 (7th Cir. 1997) (citations omitted) (“States have not only an interest, but also a duty to ensure that the electoral process produces order rather than chaos.”).

<sup>2</sup> Burdick, 504 U.S. at 434 (quoting both Anderson, 460 U.S. at 789, and Tashjian v. Republican Party of Conn., 479 U.S. 208, 213-14, 107 S. Ct. 544, 547-48, 93 L. Ed 2d 514 (1986)).

<sup>3</sup> Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358, 117 S. Ct. 1364, 1370, 137 L. Ed. 2d 589 (1997).

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- <sup>4</sup> Id.
- <sup>5</sup> Libertarian Party of Ill., 108 F.3d at 773 (citing Burdick, 504 U.S. at 434).
- <sup>6</sup> Lerman v. Bd. of Elections in N.Y.C., 232 F.3d 135, 145 (2d Cir. 2000).
- <sup>7</sup> Timmons, 520 U.S. at 358 (citations omitted).
- <sup>8</sup> Munro v. Socialist Workers Party, 479 U.S. 189, 196, 107 S. Ct. 533, 538, 93 L. Ed. 2d 499 (1986).
- <sup>9</sup> Id. at 193.
- <sup>10</sup> Idaho Republican Party v. Ysursa, 765 F. Supp. 2d 1266, 1269 (D. Idaho 2011) (citation omitted).
- <sup>11</sup> Id. (citation omitted).
- <sup>12</sup> Id. (citations omitted).
- <sup>13</sup> Id.
- <sup>14</sup> Id. (quoting Cal. Democratic Party v. Jones, 530 U.S. 567, 575, 120 S. Ct. 2402, 2408, 147 L. Ed. 2d 502 (2000)).
- <sup>15</sup> Id. (quoting Jones, 530 U.S. at 579).
- <sup>16</sup> Id. at 1276 (quoting Jones, 530 U.S. at 582).
- <sup>17</sup> Van Valkenburgh v. Citizens for Term Limits, 135 Idaho 121, 125-26, 15 P.3d 1129, 1133-34 (2000).
- <sup>18</sup> See id. at 126, 15 P.3d at 1134 (citations omitted).
- <sup>19</sup> Id.
- <sup>20</sup> Id. (citation omitted).
- <sup>21</sup> Id. (citations omitted).
- <sup>22</sup> Gibbons v. Cenarrusa, 140 Idaho 316, 320, 92 P.3d 1063, 1067 (2002) (citation omitted).
- <sup>23</sup> Id. (citation omitted).
- <sup>24</sup> Id.
- <sup>25</sup> Regan v. Owen, No. 43848, 2017 WL 3927024, at \*5 (Idaho Sept. 8, 2017) (citing Idaho Code § 73-101).
- <sup>26</sup> Id. (quoting Guzman v. Piercy, 155 Idaho 928, 938, 318 P.3d 918, 928 (2014)).

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January 22, 2020

Representative Caroline Nilsson Troy  
Idaho House of Representatives  
Capitol Building  
Boise, ID 83720

Re: Inquiry Regarding Proposed Hemp Legislation

Dear Representative Troy:

This letter is in response to your inquiry concerning two aspects of proposed legislation to legalize the industrial production and transportation of industrial hemp, and specifically: (1) the portion of the highlighted portion of the legislation concerning the authorization of the production, processing and research of industrial hemp; and (2) the civil penalty provision. We have no concerns regarding the highlighted portion of the proposed legislation, but do believe the civil penalty provision is likely unconstitutionally void for vagueness because it is not clear what conduct is prohibited. We also address several other items of note regarding the proposed legislation.

### **QUERY REGARDING THE AUTHORIZATION PROVISION**

The highlighted portion of the legislation, proposed code section 22-1705(1), states:

Notwithstanding any provision of chapter 27, Title 37, Idaho Code, to the contrary, and subject to the rules promulgated under this chapter, production, processing and research of industrial hemp in the state of Idaho are authorized.

The above provision accomplishes two things. First, it indirectly precludes persons who engage in the legal production, processing, and research of industrial hemp from having criminal liability for such actions. Second, it serves as the basic “authorization” for the state to engage in the production (etc.) of industrial hemp as long as the rules of the remaining sections of the proposed chapter are followed, which,

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in turn, require conformance with the 2018 Farm Bill. We have no legal concerns with the highlighted portion of the proposed code section 22-1705(1).

We do want to note a point concerning proposed code section 22-1705(3). Subsection (3) requires the Director of the Idaho State Department of Agriculture to “promulgate rules in time to allow for the production, processing and research of industrial hemp in Idaho, ideally for the fall 2020 growing season, but no later than the 2021 spring growing of industrial hemp.” This section allows Idaho farmers to grow industrial hemp once the Director of the Idaho State Department of Agriculture creates rules for such production, which could be prior to the Secretary of Agriculture’s approval of a state plan to regulate the production of hemp. These sections appear to be properly based on the authority of 7 U.S.C. § 1639p(f) of the 2018 Farm Bill. Although the proposed code section does not specify the rules to be adopted, in order to be legal under the 2018 Farm Bill, those rules must be “in accordance with section 1639q” of the 2018 Farm Bill.<sup>1</sup> 7 U.S.C. § 1639p(f)(1). It follows that, if the State Department of Agriculture’s rules are not consistent with section 1639q, then the production of hemp would not be legal, regardless of what the proposed code section 22-1705(1) provides.

### **QUERY REGARDING CIVIL PENALTIES**

You also requested an opinion concerning the civil penalties provision of the draft legislation, which is contained in proposed code section 67-2920(5):

Except when industrial hemp is transported as authorized by the law, nothing in this section shall otherwise inhibit or restrict any peace officer from enforcing the provisions of Chapter 27, Title 37, Idaho Code. Provided however, no penalty greater than a civil fine established by rule under this section shall apply to transporters of *industrial hemp* in violation of this section.

(Emphasis added.) The above provision is likely unconstitutionally vague because it does not clearly state what type of conduct is subject

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to the civil fine penalty. It allows for civil fines (only) to be given to “transporters of industrial hemp.” But such transporters would not be guilty of any Idaho criminal code violation (assuming hemp is legalized) or any violation of this new section. It is unclear then, what type of conduct would subject the transporters to the proposed civil fine.

### **GENERAL ANALYSIS**

While reviewing the Draft, we noted several other issues that we wish to bring to your attention.

1. We note there is currently an Idaho Code section designated as “67-2920” which addresses the “Blue Alert system.” We are unsure whether the intent is to replace that currently existing statute, or if a different statutory section should be created for the penalty provision.

2. The definition section of proposed code section 67-2929 defines four terms that are not repeated elsewhere in the Draft: subsection (1)(c) “Bill of Lading,” subsection (1)(d) “Driver Affirmation,” subsection (1)(g) “Lawful-Hemp Verification,” and subsection (1)(h) “Laboratory Report.” Because none of those terms are found outside the definitions section, they do not describe any conduct or action that is required, recommended, or prohibited. Under these circumstances, these definitions appear unnecessary.

3. Proposed code section 67-2920(1)(f) refers to 18 U.S.C. § 1151, which defines “Indian Country,” not “Indian Tribe.” The 2018 Farm Bill adopts 25 U.S.C. § 5304 as its definition of “Indian Tribe.” See 7 U.S.C. § 1639o(2). We recommend revising this section to mirror the definition language in the 2018 Farm Bill.

4. Proposed code section 67-2920(1)(g) and (1)(h) should be modified to read “2014 Farm Bill *and* the 2018 Farm Bill” – not “or.” Because “lawful-hemp verification” (section (1)(g)) and “laboratory report” (section (1)(h)) are both creations of the 2018 Farm Bill, that Bill must be complied with in all instances.

5. We suggest you add the word “concentration” to proposed code section 67-2920(4), after “(THC).”

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6. In proposed code section 22-1705(5)(b), and as noted previously herein, the statutory reference to section 67-2920 references an existing statute concerning the “Blue Alert system.”

Please feel free to contact me if you have additional questions regarding this matter.

Sincerely,

COLLEEN D. ZAHN  
Deputy Attorney General  
Chief, Criminal Law  
Division

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<sup>1</sup> 7 U.S.C. § 1639q provides the general guidelines for the federal Department of Agriculture to follow when a state plan is not approved; it reads:

In the case of a State . . . for which a State . . . plan is not approved under section 1639p of this title, the production of hemp in that State or the territory of that Indian tribe shall be subject to a plan established by the Secretary to monitor and regulate that production in accordance with paragraph (2).

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January 28, 2020

The Honorable Todd M. Lakey  
Idaho State Senator  
Idaho State Legislature  
VIA EMAIL: [tlakey@senate.idaho.gov](mailto:tlakey@senate.idaho.gov)

Re: International Energy Conservation Code

Dear Senator Lakey:

This letter is in response to your questions regarding the adoption of the International Energy Conservation Code (International ECC). This analysis should not be interpreted as a determination of the legality of any particular legislative action with regard to the International ECC, but provides a general overview of this Office's understanding of your questions based on generally applicable law.

**1. Idaho Code section 39-4109 and IDAPA 07.03.01.004.04 interdependently require compliance with the Idaho Energy Conservation Code.**

First, you ask whether removal of Idaho Code section 39-4109(1)(c), IDAPA 07.03.01.004.04, or both, is needed to eliminate the requirement of compliance with the International ECC. Removal of either Idaho Code section 39-4109 or IDAPA 07.03.01.004.04 would in effect eliminate the requirement of compliance with the *Idaho* Energy Conservation Code (Idaho ECC).

Idaho Code section 39-4109 states:

(1) The following codes are hereby *adopted* for the state of Idaho division of building safety . . . :

...

(c) The version of the *International* Energy Conservation Code adopted by the Idaho building code board, together with the amendments, deletions or additions adopted by the Idaho building code board through the negotiated rulemaking process provided in



this chapter, shall be *in effect*. The *International* Energy Conservation Code, together with any amendments, revisions or modifications made by the board, shall collectively constitute and be named the *Idaho* energy conservation code. The *Idaho* energy conservation code shall be *in effect* until such time as a subsequent version is adopted by the Idaho building code board, at which time the subsequent versions of the *Idaho* energy conservation code, as adopted and amended by the Idaho building code board through the negotiated rulemaking process provided in this section, shall be *in effect*.

(Emphasis added.) Idaho Code section 39-4109(1)(c) adopts and makes effective<sup>1</sup> the Idaho ECC as defined, and defines the Idaho ECC as the version of the International ECC adopted and amended by the Idaho Building Code Board (Board) in rule. In general, Idaho Code section 39-4109(1)(c) requires compliance with the version of the International ECC the Board has adopted and amended in rule. Accordingly, if IDAPA 07.03.01.004.04 (the rule promulgated by the Board that adopts and amends the 2015 version of the International ECC) were removed, there would be nothing with which to comply.<sup>2</sup> Put another way, although Idaho Code section 39-4109(1)(c) would continue to require compliance with the Idaho ECC if IDAPA 07.03.01.004.04 were removed, without IDAPA 07.03.01.004.04, the Idaho ECC would not contain any material with which to comply. Thus, removal of IDAPA 07.03.01.004.04 would in effect eliminate the requirement of compliance with the Idaho ECC as defined by Idaho Code section 39-4109(1)(c). Please keep in mind that the removal of IDAPA 07.03.01.004.04 through legislative rejection of the rule must be accomplished in compliance with the constitutional and statutory provisions quoted in the second section of this letter.

Rules are traditionally afforded the same effect of law as statutes. Huyett v. Idaho State Univ., 140 Idaho 904, 908, 104 P.3d 946, 950 (2004). Further, a code incorporated by reference into an agency's rules has the "same force and effect as a rule." Idaho Code § 67-5229(4). IDAPA 07.03.01.004.04 adopts and incorporates by reference the 2015 edition of the International ECC with the amendments set out in the rule. Thus, IDAPA 07.03.01.004.04 requires

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compliance with the Idaho ECC as defined by Idaho Code section 39-4109(1)(c).

However, an administrative body is limited to the authority granted to it by the Legislature and may not exercise its sub-legislative powers to enlarge the provisions of the legislative act being administered. Roberts v. Transp. Dep't, 121 Idaho 727, 732, 827 P.2d 1178, 1183 (Ct. App. 1991), *aff'd*, 121 Idaho 723, 827 P.2d 1174 (1992). IDAPA 07.03.01.004.04 draws its legal authority from Idaho Code section 39-4107(1). See IDAPA 07.03.01.000. Idaho Code section 39-4107(1) authorizes the Board “to adopt and enforce the codes specified in section 39-4109, Idaho Code, or later editions of such codes, and to promulgate rules in accordance with chapter 52, title 67, Idaho Code, to implement the provisions of this chapter.” Because Idaho Code section 39-4107(1) only allows the Board to adopt the codes specified in Idaho Code section 39-4109, IDAPA 07.03.01.004.04 would likely exceed the Board’s authority and be invalid and unenforceable if reference to the Idaho ECC and International ECC were removed from Idaho Code section 39-4109. Thus, removal of reference to the Idaho ECC and International ECC from Idaho Code section 39-4109 would eliminate the requirement of compliance with the Idaho ECC.

### **2. Idaho Code section 39-4109 does not conflict with article III, section 29 of the Idaho Constitution.**

Lastly, you ask if Idaho Code section 39-4109 conflicts with article III, section 29 of the Idaho Constitution. It does not.

Article III, section 29 of the Idaho Constitution states:

The legislature may *review* any administrative rule to ensure it is consistent with the legislative intent of the statute that the rule was written to interpret, prescribe, implement or enforce. After that review, the legislature may *approve* or *reject*, in whole or in part, any rule *as provided by law*.

(Emphasis added.) Idaho Code section 67-5291(1) provides:

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A concurrent resolution may be adopted approving the rule, in whole or in part, or rejecting the rule where it is determined that the rule, or part of the rule, is not consistent with the legislative intent of the statute that the rule was written to interpret, prescribe, implement or enforce, or where it is determined that any rule, or part of a rule, previously promulgated and reviewed by the legislature shall be deemed not to be consistent with the legislative intent of the statute the rule was written to interpret, prescribe, implement or enforce.

When taken together (as the constitutional provision requires), the constitutional and statutory provisions quoted above only allow the Legislature to review rules and approve them for consistency, or reject them for inconsistency, with legislative intent. The Legislature's constitutional authority to *review* and *approve* or *reject* rules does not conflict with or override the Board's legislative authority in Idaho Code sections 39-4107 and 39-4109 to *adopt* codes and *promulgate* rules.

I hope you find this analysis helpful. Please let me know if you have any additional questions or if I can provide further assistance.

Sincerely,

SPENCER W. HOLM  
Deputy Attorney General

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<sup>1</sup> Idaho Code section 39-4109(1)(a)(iii) also appears to adopt and make effective the Idaho ECC as part of the International Building Code.

<sup>2</sup> While Idaho Code section 39-4109 adopts the Idaho ECC for the State of Idaho, Idaho Code section 39-4116(2) requires "[l]ocal governments that issue building permits and perform building code enforcement activities" to adopt the Idaho ECC "together with any amendments or revisions set forth in section 39-4109, Idaho Code[.]"

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January 30, 2020

The Honorable Michelle Stennett  
Idaho State Senate  
Idaho State Capitol  
700 W. Jefferson St., Room W304  
Boise, Idaho 83702  
VIA EMAIL: [mstennett@senate.idaho.gov](mailto:mstennett@senate.idaho.gov)

Re: Request for AG analysis – Our File No. 20-68397

Dear Senator Stennett:

This letter is in response to your inquiry regarding the duties of the Secretary of the Senate. At the outset, your inquiry referenced a number of provisions of MASON'S MANUAL OF LEGISLATIVE PROCEDURE along with Senate Rule 7(D). Legislative authority with regard to rules is assigned by article III, section 9 of the Idaho Constitution:

Section 9. POWERS OF EACH HOUSE. **Each house when assembled shall** choose its own officers; judge of the election, qualifications and returns of its own members, **determine its own rules of proceeding**, and sit upon its own adjournments; but neither house shall, without the concurrence of the other, adjourn for more than three days, nor to any other place than that in which it may be sitting.

(Emphasis added.) Along with the power to determine its own rules, each house has the ability to determine how those rules are interpreted and applied. See PAUL MASON, NAT'L CONFERENCE OF STATE LEGISLATURES, ET AL., MASON'S MANUAL OF LEGISLATIVE PROCEDURE § 24 ¶¶ 2-4. Under Senate Rule 48, MASON'S operates to cover situations not covered by the Senate Rules. Senate Rule 48 states:

**Matters Not Covered by Rules.** — In all cases not herein provided for, and in which they are not inconsistent with these rules or the joint rules of the Senate and House of Representatives, the general rules

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of parliamentary practice and procedure as set forth in Mason's Manual of Legislative Procedure shall govern the proceedings of the Senate.

Under both MASON'S and Senate Rule 48, the Senate is the determinant of whether a matter is covered by the Senate Rules, and further whether the acts of members comply with the rules. Senate Rule 7(D) states:

**Supervision of Employees.** — (D) Subject to the overall supervision of the President Pro Tempore, the Secretary of the Senate shall have general responsibility for all Senate employees, although doorkeepers, watchmen, janitors, pages, and others charged with housekeeping functions, shall be immediately responsible to the Sergeant at Arms.

This provision assigns supervision of all Senate employees to both the President Pro Tempore, and the Secretary of the Senate. But the assignment of responsibility to the Secretary of the Senate is equivocated with the phrase, "Subject to the overall supervision of the President Pro Tempore." This means that, although Rule 7(D) assigns the Secretary of the Senate "general responsibility for all Senate employees," that responsibility is tempered by the authority granted to the President Pro Tempore of "overall supervision." In other words, the Secretary has responsibility for Senate employees, but that responsibility is subject to the terms and conditions imposed by the President Pro Tempore. Based upon the wording of Senate Rule 7(D), the creation of the position of Secretarial Supervisor may fall within the provision, "Subject to the overall supervision of the President Pro Tempore."

This office's understanding of the authority granted the Idaho Senate by article III, section 9 of the Idaho Constitution and of the Senate's ability to interpret its own rules as recognized by MASON'S indicates that any questions regarding the interpretation and application of Senate Rule 7(D) should be addressed to the Senate itself. Similarly, the scope of authority granted to the President Pro Tempore under Senate Rule 7(D) is within the discretion of the Senate. The Senate

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may choose to revisit the wording of Senate Rule 7(D) to provide additional clarity.

I hope that you find this analysis helpful.

Sincerely,

BRIAN KANE  
Assistant Chief Deputy

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February 5, 2020

The Honorable Rick D. Youngblood  
Idaho House of Representatives  
Idaho State Capitol  
700 W. Jefferson Street, Room C316  
Boise, Idaho 83702  
VIA EMAIL: [ryoungblood@house.idaho.gov](mailto:ryoungblood@house.idaho.gov)

Re: Analysis of Proposed Resolution to adopt Joint Rule 23,  
requiring “In God We Trust” display in House and  
Senate Chambers – Our File No. 20-68432

Dear Representative Youngblood:

### **SUMMARY OF CONCLUSION**

The draft resolution would require that the words “In God We Trust” be prominently displayed in the House and Senate Chambers. This display would be defensible against an Establishment Clause challenge.

### **ANALYSIS**

Because the draft resolution requires a government building to contain a message that makes reference to “God,” it implicates the First Amendment’s Establishment Clause, which provides, “Congress shall make no law respecting an establishment of religion . . . .”<sup>1</sup> This clause makes reference to Congress, but it also applies to the State of Idaho.<sup>2</sup> Courts have applied the Establishment Clause to determine whether the government may display words or symbols with religious connotation.<sup>3</sup>

To determine if a government action violates the Establishment Clause, the Ninth Circuit Court of Appeals “look[s] to governmental purpose; and, in order to evaluate the effect of the activity, ‘(i) whether governmental aid results in government indoctrination; (ii) whether recipients of the aid are defined by reference to religion; and (iii)

whether the aid creates excessive government entanglement with religion.”<sup>4</sup>

### **A. Governmental Purpose**

In 2010, the Ninth Circuit Court of Appeals addressed the use of “In God We Trust” on coins and currency and observed that it had already answered—40 years prior—the question of whether this violates the Establishment Clause.<sup>5</sup> The Ninth Circuit’s recitation of its reasoning in its 1970 Aronow decision is instructive on the question of the governmental purpose behind the use of “In God We Trust”:

It is quite obvious that the national motto and the slogan on coinage and currency “In God We Trust” has nothing whatsoever to do with the establishment of religion. Its use is of a patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise.

\* \* \*

It is not easy to discern any religious significance attendant the payment of a bill with coin or currency on which has been imprinted “In God We Trust” or the study of a government publication or document bearing that slogan. . . . While “ceremonial” and “patriotic” may not be particularly apt words to describe the category of the national motto, it is excluded from First Amendment significance because the motto has no theological or ritualistic impact. As stated by the Congressional report, it has “spiritual and psychological value” and “inspirational quality.”<sup>6</sup>

The Statement of Purpose provided with the draft resolution echoes these sentiments. It recounts the historical significance of the motto, its unifying message, and its purpose to “serve as a constant reminder of the importance” of the Legislature’s work. The Statement of Purpose appears to emphasize the motto’s “patriotic or ceremonial character” and does not appear to sponsor religious exercise. This, combined with the Ninth Circuit’s recognition that the motto “has no



theological or ritualistic impact,” appears to support a defensible case that the motto is not being used with a purpose to establish religion.

## **B. Effect**

While the Ninth Circuit evaluated the motto’s use on coins and currency, the Fourth Circuit Court of Appeals has addressed the motto’s fairly recent inscription on the façade of a government building. In Lambeth, two lawyers challenged the inscription “In God We Trust,” in 18-inch block letters, on a government building in which they regularly practice.<sup>7</sup> They argued that the inscription has the effect of endorsing religion,<sup>8</sup> and that it is different from the motto’s historical uses because it was recently<sup>9</sup> installed. The Fourth Circuit disagreed.

The Fourth Circuit began by observing that the motto is used on coins and currency as a “patriotic and ceremonial motto with no theological or ritualistic impact”<sup>10</sup>—using the Ninth Circuit’s language in Aronow.<sup>11</sup> The Fourth Circuit then recounted the federal government’s longstanding use of the motto, including its inscription “above the Speaker’s Chair in the House of Representatives, and also above the main door of the Senate Chamber.”<sup>12</sup> The court reasoned that the inscription on the building’s façade would not have the effect of endorsing religion, even though, unlike other longstanding uses, it was recently inscribed:

A reasonable observer contemplating the inscription of the phrase on the Government Center would recognize it as recently installed, but also as incorporating familiar words—a phrase with religious overtones, to be sure, but also one long-used, with all its accompanying secular and patriotic connotations as our national motto and currency inscription.<sup>13</sup>

The Fourth Circuit ultimately found that the inscription did not violate the Establishment Clause.<sup>14</sup>

Like the inscription analyzed in Lambeth, the draft resolution’s proposed inscription would be recently and prominently installed on a government building. The familiar motto should have the same effect on observers in Idaho as the inscription in Lambeth and the inscriptions

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in the federal Capitol building, carrying secular and patriotic connotations. As such, it would not have the effect of indoctrinating, nor would it provide any particular aid to religion, being a patriotic and ceremonial motto with no theological or ritualistic impact. Like the inscription in Lambeth, the draft resolution's inscription would be defensible as not having an effect to advance or establish religion.

### **C. Entanglement**

The nature of the inscription does not raise any significant concerns about excessive entanglement with religion. The Ninth Circuit Court of Appeals has explained that entanglement can take many forms, including “[a]dministrative entanglement [which] typically involves comprehensive, discriminating, and continuing state surveillance of religion”; taking sides in a religious matter or taking an official position on religious doctrine; or intervening in a religious dispute.<sup>15</sup> The inscription implicates none of these types of entanglement. The inscription would not require “pervasive monitoring or other maintenance by public authorities. Nor does the display require any other sort of continued and repeated government involvement with religion.”<sup>16</sup> The inscription is defensible as not constituting an excessive entanglement with religion.

### **D. Summary**

The draft resolution appears to be defensible from an Establishment Clause challenge because it does not appear to run afoul of the considerations identified by the Ninth Circuit Court of Appeals.

I hope you find this analysis useful.

Sincerely,

BRIAN KANE  
Assistant Chief Deputy

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<sup>1</sup> U.S. Const. amend. I.

<sup>2</sup> Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 8, 67 S. Ct. 504, 508, 91 L. Ed. 711 (1947).

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<sup>3</sup> See Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080-83, 204 L. Ed. 2d 452 (2019).

<sup>4</sup> Card v. City of Everett, 520 F.3d 1009, 1015 (9th Cir. 2008) (quoting Cnty. House, Inc. v. City of Boise, 490 F.3d 1041, 1054-55 (9th Cir. 2007) (discussing the criteria laid out in Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L.Ed.2d 745 (1971), and refined in Agostini v. Felton, 521 U.S. 203, 117 S. Ct. 1997, 138 L.Ed.2d 391 (1997))).

<sup>5</sup> Newdow v. Lefevre, 598 F.3d 638, 644 (9th Cir. 2010).

<sup>6</sup> Id. (quoting Aronow v. United States, 432 F.2d 242, 243-44 (9th Cir. 1970)).

<sup>7</sup> Lambeth v. Bd. of Comm'rs of Davidson Cty., 407 F.3d 266, 267-68 (4th Cir. 2005).

<sup>8</sup> Id. at 270.

<sup>9</sup> Id. at 271.

<sup>10</sup> Id. at 270 (internal quotation marks omitted).

<sup>11</sup> N.C. Civil Liberties Union Legal Found. v. Constangy, 947 F.2d 1145, 1151 (4th Cir.1991) (quoting Aronow, 432 F.2d at 243).

<sup>12</sup> Lambeth, 407 F.3d at 270-71.

<sup>13</sup> Id. at 272.

<sup>14</sup> Id. at 273.

<sup>15</sup> Catholic League for Religious & Civil Rights v. City & Cty. of San Francisco, 567 F.3d 595, 607-08 (9th Cir. 2009), *on reh'g en banc*, 624 F.3d 1043 (9th Cir. 2010).

<sup>16</sup> Lambeth, 407 F.3d at 273 (citations omitted).

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February 6, 2020

Jared Larsen, Policy Advisor  
Idaho Office of the Governor  
Policy Division  
STATEHOUSE  
Boise, Idaho  
VIA EMAIL: [jared.larsen@gov.idaho.gov](mailto:jared.larsen@gov.idaho.gov)

Re: Request for Analysis – Constitutionality of Idaho Code  
section 32-403(2)(b), as Written and as Proposed to Be  
Amended by H.B. 349 – Our File No. 20-68431

Dear Mr. Larsen:

You have requested an opinion concerning the constitutionality of Idaho Code section 32-403(2)(b), as it is currently written and as it is proposed to be amended by H.B. 349, 65th Legislature, 2nd Regular Session (Idaho 2020).

### **BRIEF CONCLUSION**

Section 32-403(2)(b) burdens the right to marry, which is a fundamental constitutional right. Thus, if challenged, the law must satisfy strict scrutiny, which requires the government to demonstrate that the law is narrowly tailored to promote a compelling government interest.

Both as it exists and as it is proposed to be amended, the statute requires an applicant for a marriage license who lacks a social security number to submit “proof” that he or she “is lawfully present in the United States.” Neither version of the statute explains the purpose of this requirement, nor why the requirement is the best way to achieve the legislature’s goal. Therefore, either version of the statute likely would be found unconstitutional if challenged, unless the State could meet the exceptionally high strict scrutiny standard.

**SUMMARY OF STATUTE AND PROPOSED AMENDMENT  
ANALYZED**

Idaho Code section 32-403 sets forth the requirements to obtain a marriage license. Subsection (1) authorizes county recorders to issue licenses to applicants who pay a fee. If the recorder has personal knowledge of the applicants' competency to marry, he may issue the license based on that knowledge. If not, the applicants must provide affidavits establishing their competency.

Subsection (2) requires applicants to furnish their social security numbers ("SSNs"), unless they do not have an SSN. If they do not, subsection (2)(b) requires them to provide three things: (i) verification from the Social Security Administration that they have not been assigned an SSN; (ii) a birth certificate, passport, or other documentary evidence of their identity; and (iii) "proof" that the applicant "is lawfully present in the United States."

The Legislature added the requirements in lieu of an SSN in 1999. See S.B. 1159, 55th Leg., 1st Reg. Sess., 1999 Idaho Sess. Laws 909-10. Senate Bill 1159's Statement of Purpose indicates that the legislation was designed to permit lawfully present immigrants to obtain marriage licenses. The law previously allowed only applicants with an SSN to obtain a license. The 1999 amendments to section 32-403 do not explain why the amended law excludes from marriage immigrants not lawfully present.

Subsection (2)(b)(iii) currently reads: "Submit such proof as the department may require that the applicant is lawfully present in the United States." The statute does not explain the purpose of this requirement. Nor does it identify "the department" authorized to establish the proof required.

Current House Bill 349 would eliminate the reference to the unidentified department. The bill would amend subsection (2)(b)(iii) to read: "Submit proof that the applicant is lawfully present in the United States." The proposed amendment does not specify the proof required. Nor does it explain the need for a marriage license applicant to supply such proof.

Both the current version of Idaho Code section 32-403 and the proposed amended version would prohibit a United States citizen from marrying a non-citizen who is not lawfully present in this country. It also would prohibit two such non-citizens from marrying.

### ANALYSIS

The right to marry is a fundamental right protected by the United States Constitution. Obergefell v. Hodges, 576 U.S. 644, 664, 135 S. Ct. 2584, 2598, 192 L. Ed. 2d 609 (2015). Obergefell held that states violate the fundamental right to marry by refusing to permit same-sex couples to marry. The Supreme Court cited a number of its cases striking down laws that interfered with the right to marry. *E.g.*, Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) (invalidating ban on interracial marriage); Zablocki v. Redhail, 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed.2d 618 (1978) (invalidating law prohibiting fathers behind on child support from marrying); Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987) (invalidating regulations that limited prison inmates' rights to marry).

When a law burdens the exercise of a fundamental right, courts place a heavy burden on the government to justify such a burden. If challenged, such laws are subject to strict scrutiny. Under strict scrutiny, the challenged law is "presumed unconstitutional and will survive strict scrutiny only when the government can show the law is narrowly tailored to a compelling government interest." Latta v. Otter, 19 F. Supp. 3d 1054, 1073 (D. Idaho 2014) (citing Zablocki, 434 U.S. at 388). See also Plyler v. Doe, 457 U.S. 202, 217, 102 S. Ct. 2382, 2395, 72 L. Ed. 2d 786 (1982) (law that affects the exercise of a fundamental right must be "precisely tailored to serve a compelling governmental interest").

Our research has found little authority directly addressing the constitutionality of state statutes prohibiting undocumented aliens from marrying. The one federal court that has addressed the issue head-on held that such a law was likely unconstitutional. Buck v. Stankovic, 485 F. Supp. 2d 576, 584-85 (M.D. Pa. 2007). In Buck, a U.S. citizen and her undocumented fiancé challenged a county policy requiring non-citizens to provide a Green Card or passport with a valid visa to obtain a marriage license. The court granted a preliminary injunction in the

plaintiffs' favor based on the determination that there was a reasonable probability that the policy violated the Due Process and Equal Protection Clauses. Id. at 585.

The Buck court noted that the law is well-established that U.S. citizens like Ms. Buck have a fundamental constitutional right to marry. Thus, the Pennsylvania policy was subject to strict scrutiny. Id. at 582-83. In addition, the court found authority suggesting that even a non-citizen like Ms. Buck's fiancé has a fundamental right to marry. Id. The court analyzed the government's proffered justifications for the policy and determined that they likely could not satisfy strict scrutiny. The proffered justifications were: (1) a passport with a current visa is the only way to accurately identify a foreign national; and (2) states have a compelling interest in preventing marriage fraud under federal immigration law. Id. at 584. The court rejected the argument that requiring a passport with a current visa is the only way to verify a foreign national's identity. Id. at 584-85. The court also rejected the marriage fraud justification, largely because the defendant official admitted that federal immigration marriage fraud laws were "not her concern." Id. at 585.

The Buck decision appears consistent with Supreme Court authority in two important respects: (1) laws that condition the right to marry on an applicant's immigration status burden a fundamental right; and (2) therefore, such laws likely must satisfy strict scrutiny. Strict scrutiny places an exceptionally difficult burden on the government to justify a law burdening the right to marry. Neither the current nor the proposed version of Idaho Code section 32-403(2)(b) identifies any government interest, much less a compelling one, furthered by prohibiting undocumented aliens from marrying. Unless the State can identify such an interest and show that the statute is narrowly tailored to serve that interest, neither version of section 32-403(2)(b) could withstand a constitutional challenge.

## CONCLUSION

Unless the State can identify a compelling interest served by Idaho Code section 32-403(2)(b)(iii)'s requirement that an applicant is lawfully present, and demonstrate that the statute is narrowly tailored

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to serve that interest, both the current and proposed versions of the statute likely would be declared unconstitutional.

If you have additional questions, please do not hesitate to contact me.

Sincerely,

BRIAN KANE  
Assistant Chief Deputy



## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

February 13, 2020

Members of the Senate State Affairs Committee  
c/o The Honorable Patti Anne Lodge, Chair  
Idaho State Senate  
700 W. Jefferson Street  
Boise, Idaho 83702  
VIA HAND DELIVERY

Dear Madame Chair Lodge:

This letter is a follow up to the February 10, 2020, Senate State Affairs Committee meeting in which S.B. 1274, 65th Leg., 2nd Reg. Sess. (Idaho 2020), was discussed. I respectfully ask that my Fair Hearings Unit and its work be exempted from the legislation to maintain a modicum of continuity within the process. Importantly, since the impetus for this legislation is to address perceived bias within the system, the Fair Hearings Unit has already successfully met the goal of S.B. 1274 in a manner that has been found fully compliant by the overarching federal programs that it hears matters on. S.B. 1274 is an ambitious and aggressive piece of legislation, but it is also creating an unknown. Importantly, it is a piece of legislation that dismantles existing and highly functional elements of government to address a perceived problem, not a problem that has been found to actually exist.<sup>1</sup>

It is essential to note the scope of S.B. 1274. Based upon my understanding of the timeline for creation of the Office of Administrative Hearings, the Chief Administrative Hearing Officer will be hired on July 1, 2020 and then be required to staff and hear administrative contested cases beginning January 1, 2021. This timeline is exceptionally aggressive and optimistic. Reviewing the data from the February 2016, Office of Performance Evaluations report on RISK OF BIAS IN ADMINISTRATIVE HEARINGS, the study evaluated hearings over 5 fiscal years and found the following:

1. 75 state agencies have statutes or rules that provide an opportunity for hearing;
2. 42 agencies actively held hearings over that 5-year term;

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3. 52,488 hearings were held by these 42 agencies within the 5-year term.<sup>2</sup>

Doing simple math, this means that the State of Idaho, through its agencies, is conducting more than 10,000 hearings per year. Notably, this data is now more than 5 years old, and Idaho's population and the demands on state agencies have grown significantly since 2015. On January 1, 2021, the Office of Administrative Hearings will need to be prepared to receive approximately 40 requests for hearings per day, prepare for those hearings, and conduct those hearings on an ongoing basis. The agency will need to develop both familiarity and expertise across at least 42 different agency subject areas, which is a particularly high hurdle considering it is unknown whether any existing state employees would be able to move into this new office.

This approach places the State in a particularly precarious legal position. At a minimum, I ask that the work of the Fair Hearings Unit be preserved to avoid sacrificing legal expertise, federal program compliance, and the efficiency of uninterrupted hearing continuity for the unknown. My office has asked Senator Burgoyne to include language to preserve the Fair Hearings Unit as part of S.B. 1274, but he has declined.

The Office of Performance Evaluation's (OPE) numbers also call into serious question S.B. 1274's reported fiscal impact. Based on OPE's report and my understanding of the way that administrative hearings are conducted, the Idaho Department of Labor (DOL) has at least 7 full time hearing officers (and 60% of the administrative hearing caseload (approx. 6,380 hearings per year)); and the Idaho Department of Transportation (ITD) has at least 3 full time hearing officers (and 25% of the administrative hearing caseload (approx. 2670 hearings per year)).<sup>3</sup> These hearing officers conduct administrative hearings solely within these areas of expertise and the caseloads are enormous. A new office will require at least this many new hearing officers initially because the existing hearing officers would likely need to remain within their current agencies to finish out their caseloads and then potentially be subject to an abrupt termination.<sup>4</sup> Given the numbers involved and the initial inability for these existing state employees to continue on in the new Office of Administrative Hearings, I respectfully request that you seek input from those agencies, such as the Idaho Department of

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Health and Welfare, ITD, and DOL, that will see a significant change to their operations under S.B. 1274.

I respectfully ask that S.B. 1274 be held in committee or that the legislation be amended to exclude the Fair Hearings Unit and its work.

Thank you for your time and consideration of this important matter.

Sincerely,

LAWRENCE G. WASDEN  
Attorney General  
State of Idaho

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<sup>1</sup> The Office of Performance Evaluations found that less than 1% of hearings conducted were are a high risk for bias. IDAHO LEGISLATURE, OFFICE OF PERFORMANCE EVALUATIONS, REPORT NO. 16-02, RISK OF BIAS IN ADMINISTRATIVE HEARINGS (Feb. 2016), at 31. In virtually all instances of a high risk of bias, it was because the agency head acted as a hearing officer. Id.

<sup>2</sup> Id. at 8.

<sup>3</sup> Id. at 15, Ex. 2. For caseload numbers, see id. at 56 (DOL), 58 (ITD).

<sup>4</sup> This overlap issue is significant because existing caseloads do not transition over to the Office of Administrative Hearings, thus agencies will risk losing hearing officers to the new Office of Administrative Hearings and have to address an existing administrative hearing caseload, or hearing officers will finish up existing caseloads and run the risk of not being hired within the Office of Administrative Hearings because there are no available positions due to the overlap.

## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

February 13, 2020

Representative Muffy Davis  
Idaho House of Representatives  
Capitol Building  
Boise, ID 83720

Re: Inquiry Regarding Changes to Idaho Code section 18-3302J, and new proposed section 18-3302L

Dear Representative Davis:

You requested an analysis of two pieces of draft legislation you provided to this office that seek to amend Idaho Code section 18-3302J and add section 18-3302L. This letter provides a brief legal analysis and focuses on potential constitutional conflicts involving the First Amendment and the Due Process Clause, as well as other concerns.

**I. The proposed amendment to Idaho Code section 18-3302J implicates constitutional protections, including the First Amendment and Due Process**

**A. Proposed amendments to Idaho Code section 18-3302J**

The draft legislation proposes two primary amendments to Idaho Code section 18-3302J. First, the draft adds language to subsection 2 of the statute to clarify the prohibitions applicable to a county, city, agency, board or other political subdivision of this state in the field of firearm regulation. Specifically, the proposal provides that no enumerated public entity may:

[A]dopt, display, or enforce any tax, law, rule, regulation, or ordinance which, order, policy, directive, measure, or signage that regulates, discourages or otherwise limits in any manner the sale, acquisition, transfer, ownership, possession, transportation, carrying, or storage of firearms....<sup>1</sup>

Prop. Idaho Code § 18-3302J(2).

## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

The draft legislation also adds a subsection addressing prohibitions and penalties that includes: (1) creation of a misdemeanor offense for a violation of the code section; (2) providing civil enforcement, including a permanent injunction; (3) identifying employment and/or contractor implications for a violation; and (4) establishing what purports to be a cure mechanism. Prop. Idaho Code § 18-3302J(6).

### **B. First Amendment Concerns**

The First Amendment of the United States Constitution prohibits the government from restricting an individual's ability to speak freely. U.S. Const. amend I. In a traditional or designated public forum, the government is prohibited from restricting speech on the basis of its content, unless the restrictions satisfy strict scrutiny. Pleasant Grove City v. Summum, 555 U.S. 460, 469, 129 S. Ct. 1125, 1132, 172 L. Ed. 2d 853 (2009). In a limited public forum, content-based restrictions are permissible, so long as they are reasonable and viewpoint neutral. Id. at 470. Regardless of the type of public forum at issue, the government is generally prohibited from imposing restrictions on speech based on the viewpoint it expresses.

The proposed amendment to section 18-3302J(2) likely violates the First Amendment. The language prohibits Idaho counties, cities, agencies, boards or other political subdivisions from displaying "signage" that "discourages" in any manner the sale, acquisition, transfer, ownership, possession, transportation, carrying or storage of a firearm. The proposed amendment covers all three constitutionally recognized public forums, and restricts speech based on the viewpoint it expresses because it applies only to speech that discourages certain acts related to firearms. The proposed amendment to subsection (2) appears to be unconstitutional on its face.

### **C. Due Process Concerns**

Both the United States and Idaho Constitutions guarantee the right to due process. U.S. Const. amend. XIV, § 1; Idaho Const. art. I, § 13. The Idaho Supreme Court has held that a basic principle of due process requires a court to hold an enactment void for vagueness if its prohibitions are not clearly defined. State v. Korsen, 138 Idaho 706,

711, 69 P.3d 126, 131 (2003), *abrogated on other grounds by Evans v. Michigan*, 568 U.S. 313, 133 S. Ct. 1069, 185 L. Ed. 2d 124 (2013). In *Korsen*, the Court cited the United States Supreme Court, holding that “a statute defining criminal conduct [must] be worded with sufficient clarity and definiteness that ordinary people can understand what conduct is prohibited and that the statute be worded in a manner that does not allow arbitrary and discriminatory enforcement.” *Id.* (citing *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 362 (1982)).

The proposed updates to subsection (2) of Idaho Code section 18-3302J add several prohibitions against limitations a county, city, agency, board or any other political subdivision of the state of Idaho may impose on the sale, acquisition, transfer, ownership, possession, transportation, carrying, or storage of firearms or any element relating to firearms and components thereof. These prohibitions are not vague in nature. Instead, they specifically enumerate restrictions placed on the counties, cities, agencies, boards or any other political subdivisions of the state of Idaho. Additionally, these prohibitions do not run afoul of the express authority granted to the governing boards of public colleges and universities regarding firearms proscribed under Idaho Code section 18-3309.

At first glance, the consequences contemplated in subsection (6)(a) appear to be clear and unambiguous. Subsection (6)(a) clearly defines the penalty for a violation of the provisions of Idaho Code section 18-3302J. Constitutional concerns arise, however, with the language that extends liability to unidentified individuals, “[s]uch persons shall include but not be limited to. . . .” The statutory language fails to clearly identify to whom it applies and likely renders subsection 6(a) unconstitutionally vague.

Additional concerns relate to the language in subsection (6)(a) that indicates misdemeanor liability extends to: “(i) Anyone acting as an agent; (ii) A representative acting on behalf of a political subdivision of this state.” This raises the question on whose behalf the referenced “agent” is acting. It also begs the question who is considered a “representative” and how does a representative differ from an “agent”? Additionally, it is not clear whether “representative acting on behalf of a political subdivision of this state” includes elected officials, employees,

contractors, volunteers or possibly others. This language may be found unconstitutionally vague. If not found unconstitutionally vague, this language may create a basis for defendants to argue that it is unclear whose conduct gives rise to criminal liability.

**II. The proposed amendment to Idaho Code section 18-3302J raises some drafting concerns**

A review of chapter 33 of title 18 uncovered no inconsistencies between the proposed amendment to Idaho Code section 18-3302J and other sections within the chapter. However, the inclusion of civil remedies in a criminal statute and some of the wording used in the proposed amendment raises some additional concerns.

The language of proposed subsection (6)(b) creates some confusion. First, it references a violation of “this section.” It is not clear what the term “this section” means—Idaho Code section 18-3302J in its entirety or subsection 6. Second, it mandates that a court declare whatever “item” was used by the violator to be invalid. The use of the term “item” is vague in the context of this provision. Third, the mandate requiring the court to issue a permanent injunction against the offender who is prohibiting “its enforcement” appears to impermissibly infringe on the powers of the judiciary. Case law, statutes, and rules set forth the standards that must be met before an injunction may be issued and is unlikely the legislature can direct the courts to ignore those when issuing injunctions for this statute. We note that subsection (6)(b) refers to issuance of an injunction against a private offender, but the other prohibitions and penalties in this section do not appear to encompass private individuals. Finally, subsection (6)(b) mandates issuance of a permanent injunction against “its” enforcement, but it is unclear what “its” is. Presumably it is the “item” referenced earlier in the sentence, but the word “item” is not defined. The prohibitions contained earlier in subsection (2) extend to laws, rules, administrative acts, and other actions that may not fall within the definition of “item” and, as a result, it is unclear what the section purports to enjoin.

Proposed subsection (6)(c) prohibits the use of public funds to defend against unlawful conduct under “this section.” Again, it is not clear if the prohibition applies to the entirety of section 18-3302J or just subsection (6). Additionally, it is questionable whether the Idaho

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Legislature may dictate a political subdivision's use of public funds to defend what the subdivision may consider a lawful exercise of its authority, even if a court ultimately determines the subdivision's actions were unlawful.

Proposed subsection (6)(d) provides grounds for "termination of employment or contract." This subsection presents several potential issues. First, the subsection applies to an individual who, in his official capacity, knowingly and willfully violates any provision of this section by enacting or enforcing any item prohibited under section (2). This subsection refers to any knowing and willful violation of "any provision of this section" and a violation of section (2). Additional prohibitions are contained in subsections (2), (3), and (4). The references to "this section" and then to "subsection (2)" create confusion about which conduct can give rise to termination. Second, elected officials are not employees or contractors—therefore this subsection would not apply to them. To the extent the intent is to permit the punishment of an elected official who violates the prohibitions set forth in section 18-3302J, then removal from office may need to be addressed. See Idaho Code § 18-5702(5)(a). Third, it is questionable whether the Legislature has authority to address a political subdivision's employment decisions or contracts. Fourth, if the individual's decision to engage in a certain action is taken on the good faith belief that to do otherwise would violate another law, then the individual has arguably engaged in conduct protected by the Idaho Protection of Public Employees Act, Idaho Code section 6-2104. Under that circumstance, termination could result in a legal claim against the governmental entity.

Finally, proposed subsection (6)(e) appears to create a cure provision whereby individuals or organizations adversely affected by a violation of "this section" must give a 60-day notice to the political subdivision or person of such violation. It is unclear whether the person or entity has an opportunity to cure the violation within that 60 day period and the effect, if any, of such a cure. Additionally, it is not clear from the plain language of subsection (6)(e) whether the State must give a criminal violator the same 60-day notice and opportunity to cure.

### **III. The proposed new section, Idaho Code section 18-3302L, raises the same concerns as the proposed amendments to Idaho Code section 18-3302J**



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We have not identified any constitutional concerns with the general concept of the proposed new section Idaho Code section 18-3302L, which is to require those who lease public property to comply with Idaho's gun laws. The language of proposed Idaho Code section 18-3302L, however, incorporates the prohibitions contained in the proposed Idaho Code section 18-3302J. As a result, we have the same constitutional and other concerns identified previously in this letter regarding proposed Idaho Code section 18-3302J.

I believe this analysis fully responds to your inquiry. Should you have any additional questions, please feel free to contact our office.

Sincerely,

COLLEEN D. ZAHN  
Deputy Attorney General

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<sup>1</sup> Amendments noted by underline and strikethrough.

## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

February 18, 2020

The Honorable Scott Bedke  
Speaker of the House  
Idaho House of Representatives  
Idaho State Capitol  
700 W. Jefferson Street, Room E303  
Boise, Idaho 83702  
VIA EMAIL: [sbedke@house.idaho.gov](mailto:sbedke@house.idaho.gov)

Re: Request for legislation review of H.B. 440 – Our File No. 20-68547

Dear Speaker Bedke:

You requested an analysis of House Bill No. 440, 65th Legislature, 2nd Regular Session (Idaho 2020), which would amend chapter 59, title 67, Idaho Code, by adding a new section 67-5909A, Idaho Code.

You asked (1) whether the proposed section would be legal, and (2) whether an issue might arise with the proposed section because “age” and “religion” are not included in the enumerated categories of individuals or groups who may not be discriminated against or granted preferential treatment.

In short, it appears that the proposed section would likely be found constitutional and not preempted by federal law. It also appears that the absence of age and religion from the enumerated groups would not be found problematic by a reviewing court. That being said, the bill as drafted raises concerns that it might cause state agencies to lose some federal funding.

### **SUMMARY OF PROPOSED LEGISLATION**

If enacted, the proposed section 67-5909A would prohibit the State, including any city, county, public university, community college, school district, special district or any other political subdivision or governmental instrumentality, from “discriminat[ing] against, or

grant[ing] preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” Prop. Idaho Code § 67-5909A(1).

Proposed section 67-5909A contains an exception for “bona fide qualifications based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting.” Prop. Idaho Code § 67-5909A(3). It also contains a savings clause with regard to any conflict between any part or parts of the proposed section and the U.S. Constitution. Prop. Idaho Code § 67-5909A(7).

The proposed section would only apply to actions taken after the law’s effective date, and it would not invalidate any currently enforceable court order or consent decree. Prop. Idaho Code § 67-5909A(2), (4).

## ANALYSIS

### **I. The proposed section 67-5909A, Idaho Code, would likely be “legal” as it would likely withstand a constitutional challenge, as well as any preemption challenge.**

I understand your question asking whether the proposed section would be legal as asking whether the proposed section would be invalidated as unconstitutional under either the United States or Idaho Constitutions or whether it would be preempted by federal law.

At least seven other states have similar provisions in their constitutions or statutes.<sup>1</sup> It does not appear that any of these provisions have been struck down. California and Michigan’s laws have been upheld by the Ninth Circuit and the U.S. Supreme Court, respectively.

The Ninth Circuit’s analysis is highly instructive and suggests that the proposed section would survive a court challenge arguing it is either unconstitutional or preempted by federal law. In Coalition for Economic Equity v. Wilson, the Ninth Circuit upheld California’s virtually-identical constitutional amendment, which prohibited the state

from taking action to “discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” See Coal. for Econ. Equity v. Wilson, 122 F.3d 692, 696 (9th Cir. 1997) (quoting Cal. Const. art I, § 31(a)), as amended on denial of reh’g and reh’g en banc (Aug. 21, 1997), as amended (Aug. 26, 1997).

There, groups representing the interests of women and racial minorities argued that the California law denied those groups equal protection of the law under the Fourteenth Amendment and that the law was void under the Supremacy Clause of the U.S. Constitution because it impermissibly conflicted with Titles VI and VII of the Civil Rights Act of 1964 and Title IX of the Educational Amendments Act of 1972. Id. at 697. The district court had granted plaintiffs a preliminary injunction as to programs that granted preferential treatment to individuals on the basis of race or gender, finding plaintiffs had demonstrated a likelihood of success on the merits of their claims.<sup>2</sup> Id. at 698, 700.

The Ninth Circuit reversed the preliminary injunction, concluding that California’s law was constitutional and that Title VII, by its plain language, did not preempt the law. Id. at 709-10. The court first analyzed the two possible equal protection arguments. A conventional equal protection analysis “focuses on whether the government has classified individuals on the basis of impermissible criteria.” Coal. to Defend Affirmative Action v. Brown, 674 F.3d 1128, 1132 (9th Cir. 2012) (citation omitted). The Ninth Circuit found no conventional equal protection issue, concluding “[r]ather than classifying individuals by race or gender, [the California law] *prohibits* the State from classifying individuals by race or gender.” Coal. for Econ. Equity, 122 F.3d at 702. Therefore, the court concluded, the law survived a conventional equal protection analysis.

The Ninth Circuit then undertook the “political structure” or “political process” analysis under the Equal Protection Clause. Id. at 702-03. A “political structure” analysis analyzes the impact of a law on minorities and protected classes with regard to the processes of government. See Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary, 572 U.S. 291, 305, 134 S. Ct. 1623, 1633, 188 L. Ed. 2d

613 (2014) (plurality). In conducting its analysis, the Ninth Circuit held “[i]mpediments to preferential treatment do not deny equal protection.” Coal. for Econ. Equity, 122 F.3d at 708. The Ninth Circuit concluded there was no “political structure” violation as the California law addressed race-related and gender-related matters in “neutral-fashion.” Id. at 709.

Finally, the Ninth Circuit concluded that the plain language of Title VII did not preempt the California law, noting that the California law was not inconsistent with any purpose or provision of the 1964 Civil Rights Act and that Title VII explicitly stated that nothing in the law required the granting of preferential treatment on the basis of race, color, religion, sex or national origin. Id. at 710.

The U.S. Supreme Court reinforced the Ninth Circuit’s “political structure” analysis when reviewing Michigan’s voter-enacted constitutional amendment prohibiting the state from discrimination and preferential treatment on the basis of race, sex, ethnicity or national origin in public employment, public education or public contracting in Schutte. There, the U.S. Supreme Court upheld Michigan’s law against an equal protection challenge in a 6-2 decision with no majority opinion.

That case focused on whether the amendment’s prohibition of race-based preferences in the admissions process that had been used by Michigan’s university system violated the equal protection clause. The three-justice plurality concluded that the “political structure” doctrine only prohibited state action that “had the serious risk, if not purpose, of causing specific injuries on account of race[.]” Id., 572 U.S. at 305 (plurality opinion). The plurality concluded that the amendment’s prohibition was not such a law and, as such, it must defer to the Michigan voters’ policy choice. Id. at 314. The plurality concluded that the voters of the state of Michigan could choose to prohibit the consideration of racial preferences in governmental decisions. Id. at 310. Notably, it cited to the California Supreme Court and the Ninth Circuit decisions upholding the California constitutional amendment with approval. Id. at 310-11.

Two justices wrote a concurrence that would have gone further, invalidating earlier Supreme Court equal protection jurisprudence, and

one justice concurred based on the elected nature of the body making the decision to adopt race-conscious policies and the purpose of the affirmative action policy. Id. at 316-37 (Scalia, J., with Thomas, J., concurring in the judgment). Finally, two justices dissented, concluding that the constitution prohibited the majority “stacking the political process against minority groups permanently, forcing the minority alone to surmount unique obstacles in pursuit of its goals[.]” Id. at 342 (Sotomayor, J., with Ginsburg, J., dissenting).

It appears that a reviewing court would likely follow the Ninth Circuit’s analysis of the equal protection and preemption issues discussed above, as reinforced by the U.S. Supreme Court’s decision in Schuetz and reiterated by the Ninth Circuit in Coalition to Defend Affirmative Action, 674 F.3d at 1131-32. There, the Ninth Circuit affirmed the dismissal of another challenge to California’s anti-discrimination and anti-preference law on equal protection grounds as the court concluded it was bound by its earlier decision in Coalition for Economic Equity.

This proposed section would likely also survive a challenge brought under the equal protection provisions of the Idaho Constitution as “[t]he majority of Idaho cases ... state that the equal protection guarantees of the federal and Idaho Constitutions are substantially equivalent.” Alpine Vill. Co. v. City of McCall, 154 Idaho 930, 937, 303 P.3d 617, 624 (2013) (quoting Rudeen v. Cenarrusa, 136 Idaho 560, 568, 38 P.3d 598, 606 (2001)). It is likely that any interpretation of the Idaho Constitution would be heavily guided by the analyses discussed above and fall on the side of finding the proposed section constitutional.

In short, it appears that the proposed section likely would not run afoul of any constitutional prohibition nor would it be found preempted by federal law.

**II. The exclusion of other groups from the proposed section, who could continue to benefit from affirmative action, would likely not be found to be problematic.**

You raised concerns over whether the exclusion of “age” and “religion” from the enumerated groups in the proposed section might be found problematic.

In Coalition for Economic Equity, the Ninth Circuit noted that California's anti-discrimination and anti-preference law allowed "those seeking preferences based on any ground other than race or gender, such as age, disability, or veteran status" to "continue to enjoy access to the political process on all levels of government." 122 F.3d at 708 n.17. The Ninth Circuit suggested that this was not constitutionally problematic. The Ninth Circuit reached this conclusion primarily because it held "[i]mpediments to preferential treatment do not deny equal protection." Id. at 708. Notably, the law did not preclude women and minorities from seeking preferential treatment on grounds such as age, disability, and veteran's status. Id. at 708 n.17.

In other words, it appears that the Ninth Circuit has indicated that the exclusion of groups from the enumerated groups in the proposed section is not constitutionally problematic. It is unlikely that a reviewing court would find the exclusion of "age" or "religion" problematic.

**III. While the proposed section would likely not be preempted by federal law, it might cause some state agencies to lose some federal funding.**

Every one of the states that we have identified that has implemented a state-wide anti-discrimination and anti-preference law has included a provision that allows for action that is necessary to maintain eligibility for federal funding, if ineligibility would result in the loss of federal funds.<sup>3</sup> The proposed section does not contain an equivalent subsection.

The absence of an equivalent subsection could prevent state agencies from receiving some federal funding. For example, the Department of Health and Human Services has a regulation as part of its regulatory scheme effectuating Title VI of the Civil Rights Act of 1964 stating: "In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination." 45 C.F.R. § 80.3(b)(6)(i). Thus, if a state agency has evidence of prior discrimination, the federal regulations would require the agency to take potential preferential measures to remedy the prior discrimination. The proposed section as

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written does not contain an exception to allow the agency to take any such measures.

I hope you find this analysis helpful.

Sincerely,

BRIAN KANE  
Assistant Chief Deputy

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<sup>1</sup> Ariz. Const. art. II, § 36; Cal. Const. art. I, § 31; Mich. Const. art. I, § 26; Neb. Const. art. I, § 30; N.H. Rev. Stat. Ann. § 188-F:3-a (limited to community colleges); Okla. Const. art. II, § 36A; Wash. Rev. Code § 49.60.400.

<sup>2</sup> Regarding the preemption argument, the district court only found a likelihood of success on the merits as to Title VII of the Civil Rights Act. Coal. for Econ. Equity, 122 F.3d at 709. The district court found that Title VI of the Civil Rights Act and Title IX did not preempt the California law and plaintiffs did not challenge that finding on appeal. Id. at 709 n.19.

<sup>3</sup> See Ariz. Const. art. II, § 36(B)(2); Cal. Const. art. I, § 31(e); Mich. Const. art. I, § 26(4); Neb. Const. art. I, § 30(5); Okla. Const. art. II, § 36A(E); Wash. Rev. Code § 49.60.400(6).



## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

February 19, 2020

Representative Chad Christensen  
Idaho House of Representatives  
Capitol Building  
Boise, ID 83720  
VIA EMAIL: [cchristensen@house.idaho.gov](mailto:cchristensen@house.idaho.gov)

Re: Inquiry Regarding ISP Employment of Investigators  
Who Are Not POST-Certified

Dear Representative Christensen:

This letter is in response to your inquiry concerning the Idaho State Police's authority to hire investigators who are not certified peace officers.

### **Question Presented**

Whether under existing Idaho law the Idaho State Police (ISP) may employ investigators who are not certified as peace officers by the Peace Officers Standards & Training (POST) Council.

### **Brief Answer**

Yes. The ISP currently employs several non-certified individuals as "Investigative Assistants." These individuals are non-commissioned employees who perform tasks such as contacting and interviewing potential witnesses, collecting evidence samples, preparing reports, and testifying in court. Those individuals may not, however, engage in enforcement activities such as arresting individuals, executing search warrants, or using force in the performance of their duties because the Idaho Code restricts the performance of those activities to certified peace officers.

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### **1. ISP may hire non-certified individuals to perform certain investigative tasks.**

Idaho Code section 67-2901(12), in relevant part, grants the Director of the Idaho State Police the mandate and power to:

(a) Establish such ranks, grades and positions as shall appear advisable and designate the authority and responsibility in each such rank, grade and position;

(b) Appoint such personnel to such rank, grade and position as are deemed by him to be necessary for the efficient operation and administration of the Idaho state police, and only those applicants shall be appointed or promoted who best meet the prescribed standards and prerequisites; provided however, that all employees shall be selected in the manner provided for in chapter 53, title 67, Idaho Code, and shall be probationers and on probation for a period of one (1) year from the date of appointment[.]

Pursuant to this statute, the ISP employs both commissioned employees who exercise enforcement powers unique to peace officers and non-commissioned employees who support the efficient operation and administration of the ISP.

Idaho Code section 19-5101(d) defines “peace officer” as, “any employee of a police or law enforcement agency . . . whose duties include and primarily consist of the prevention and detection of crime and the enforcement of penal, traffic or highway laws of this state or any political subdivision.” The Idaho Code restricts the performance of certain law enforcement duties to certified peace officers.<sup>1</sup>

However, if an investigator’s primary duties do not consist of the enforcement of laws, then POST certification is not required. ISP currently has two different job descriptions for basic level investigative positions: ISP Specialist and ISP Investigative Assistants. ISP Specialist positions are Detective positions, which require peace officer certification. ISP Investigative Assistant positions are not certified peace officers, and they assist ISP Detectives by performing non-enforcement investigative activities, including, but not limited to,

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contacting and interviewing potential witnesses, collecting evidence samples, preparing reports, and testifying in court or administrative proceedings.

ISP currently employs eight full-time Investigative Assistants who work in a hybrid investigative model with ISP detectives. ISP has the legal authority to hire non-certified peace officer individuals to work as Investigative Assistants. Those individuals can perform non-law enforcement tasks that do not require peace officer certification.

I hope you find this analysis useful. Should you have any additional questions, please feel free to contact our office.

Sincerely,

COLLEEN D. ZAHN  
Deputy Attorney General  
Chief, Criminal Law Division

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<sup>1</sup> See, e.g., Idaho Code §§ 19-509, 19-603, 19-4401, and 19-4408 (arresting, charging by citation, executing arrest and search warrants, using force in performance of duties).

## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

February 19, 2020

The Honorable Lawrence Denney  
Idaho Secretary of State  
Idaho State Capitol  
700 W. Jefferson Street  
Boise, Idaho 83702  
VIA HAND DELIVERY

Re: Request for AG analysis on convicted felons' voting eligibility

Dear Mr. Secretary:

You have asked whether former Representative John Green, who was convicted of a felony in the state of Texas but has not yet been sentenced, is eligible to vote.

Idaho Constitution article VI, section 3 and Idaho Code section 18-310 govern the suspension of civil rights for those convicted of a felony.

Idaho Constitution article VI, section 3 states in relevant part: "No person is permitted to vote . . . who has, at any place, been convicted of a felony, and who has not been restored to the rights of citizenship, or who, at the time of such election, is confined to prison on conviction of a criminal offense."

The constitutional provision therefore specifies that no person is permitted to vote if that person has been convicted of a felony and (1) has not been restored to the rights of citizenship or (2) is confined in prison. As Mr. Green was convicted of a felony in Texas and is not currently confined in prison, he is currently unable to vote under the language of the Idaho Constitution if he has not yet been "restored to the rights of citizenship."

Section (4) of Idaho Code section 18-310 addresses when the voting rights of individuals convicted of felonies in other states or jurisdictions have been restored: "Persons convicted of felonies in

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other states or jurisdictions shall be allowed to register and vote in Idaho upon final discharge which means satisfactory completion of imprisonment, probation and parole as the case may be.” Idaho Code § 18-310(4).

Thus, Idaho Code section 18-310(4) prohibits former Representative Green from currently voting in Idaho as he has not yet satisfactorily completed any period of imprisonment, probation, and parole related to his Texas felony conviction.

I hope that you find this analysis helpful.

Sincerely,

BRIAN KANE  
Assistant Chief Deputy

SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

February 21, 2020

The Honorable Patti Anne Lodge  
Idaho State Senate  
Idaho State Capitol  
700 W. Jefferson Street, Room WW42  
Boise, Idaho 83702  
VIA HAND DELIVERY

Re: Request for legislation review of RS 27546 – Our File  
No. 20-68638

Dear Senator Lodge:

This letter is in response to your recent inquiry regarding RS 27546 (Idaho 2020) and the impact of the emergency clause contained therein on currently circulating initiatives. Reading through the legislation, it appears that the requirement for a fiscal impact statement and funding source requires that it be done when the initiative is submitted for review and prior to circulation. Prop. Idaho Code §§ 34-1802(1), 34-1804(2). Additionally, the fiscal impact statement would be required to be attached to the petition as it circulates. Prop. Idaho Code § 34-1804(3). It appears that the timeline for inclusion of this portion of the amendments has already passed for currently circulating petitions, which would not be subject to them. Similarly it appears that the Rubicon has been crossed with respect to the application of the proposed amendments requiring inclusion of the fiscal impact statements and funding source within the voters' pamphlet. See prop. Idaho Code §§ 34-1812, 34-1812C.

The emergency clause would require the application of all amendments to any initiatives that have not yet received their official ballot title from the Secretary of State.

I hope that you find this analysis helpful.

Sincerely,

BRIAN KANE  
Assistant Chief Deputy

## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

February 25, 2020

Members of the Senate  
State Affairs Committee  
c/o The Honorable Patti Anne Lodge  
Chair, Idaho State Senate  
Boise, ID 83702  
VIA EMAIL: [palodge@senate.idaho.gov](mailto:palodge@senate.idaho.gov)

Dear Chair Lodge:

This letter is a follow up to my office's appearances in front of your Committee regarding S.B. 1274 (now RS 27812), 65th Legislature, 2nd Regular Session, and my February 13, 2020 letter. At the Committee's direction, my office met with Senator Burgoyne to discuss an orderly transition of my office's Fair Hearings Unit (FHU) Department of Health and Welfare (DHW) caseload to the proposed Office of Administrative Hearings (OAH). Senator Burgoyne has expressed a preference for a fixed transition date of January 1, 2022, while my office recommends a more measured and flexible approach. With this in mind, I recommend that the OAH conduct hearings for a full year to work out any issues with hiring, contracting, workloads, decisions, timelines, and all other administrative matters that could potentially arise. I further recommend that following a one-year period of conducting administrative hearings, the OAH Advisory Committee evaluate and issue a recommendation as to those DHW cases appropriate for transfer to the Office of the Attorney General (OAG). Notably, any transfer of DHW cases from my office's FHU to the OAH will require DHW to seek amendments and waivers to the State Medicaid Plan, as discussed more specifically below, which may affect the timeline.

**RS27812 Will Require Idaho to Amend Its State Medicaid Plan and Seek a Waiver from the Centers for Medicare & Medicaid Services (CMS) Prior to Any Transition of Cases to a New Hearing Agency—Approval of the Amended Plan and Any Waivers is Uncertain.**

If RS27812 passes in either its current form, or as amended by Senator Burgoyne, DHW's Division of Medicaid must amend the State

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Medicaid Plan and at least three of its waivers. Under federal law, DHW is the single state agency with authority to administer the Medicaid program. When Medicaid hearings were initially moved to my office's FHU in 2015, the State Medicaid Plan was amended to show the delegation of authority to my office to conduct and administer those hearings. However, even under this delegation of authority, DHW retained final decision-making authority over the hearing decisions, as well as the authority to supervise the State Medicaid Plan and "to develop or issue policies, rules, and regulations on program matters." CMS also required DHW and my office to develop and enter an agreement to ensure DHW's responsibility to oversee the FHU, which agreement is also subject to CMS' approval. In the agreement, DHW has an ongoing legal requirement to monitor the FHU for the following issues:

- compliance with all relevant Federal and State laws, regulations, and policies;
- conflicts of interest;
- confidentiality;
- informing applicants and beneficiaries of their fair hearing rights, including how to contact the Medicaid agency and how to contact and obtain information about fair hearings from the OAG;
- compliance and oversight of appeals decisions;
- quality and accuracy of the final decisions made by the OAG; and
- instituting corrective action as needed, including, but not limited to, the rescission of the delegated authority.

All of the above assurances are in the current State Medicaid Plan; therefore, any transition of these functions must be amended and approved by CMS before any Medicaid cases can be transferred to any new hearing entity. Several of the waiver documents describe DHW's hearing process and would require an amendment as well. State Medicaid Plan and waiver amendments can take a significant amount of time to gain approval from CMS. The initial state plan amendment process related to the FHU took approximately two years for approval. There is no guarantee CMS will approve DHW's delegation of authority to a new administrative hearing unit, and it is unlikely CMS would allow rulemaking authority to be delegated outside of DHW. While RS27812



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does not require the new administrative hearing office to enter into an agreement with DHW, one similar to the current agreement between DHW and my office will nonetheless be required by CMS. That agreement must also include the authority of DHW to rescind the delegated authority, which this legislation does not permit.

As stated, and for those reasons discussed above, I recommend that the transition of DHW's Medicaid cases from my office's FHU to the OAH be done in a manner that allows for the process outlined above to take place in a way that insures all necessary approvals and agreements are in place prior to the transition. The OAH Advisory Council provides a mechanism by which the above can be confirmed and implemented, a recommendation made, and then the transition can be effected through an appropriations bill.

### **Amendments Proposed**

To assist the Committee, I propose the following amendments:

Page 5, line 16: after "govern" add "unless otherwise required by governing federal law."

Justification: CMS required DHW to retain the authority to develop and issue policies and rules.

Page 12, line 40: after "2022" add "and upon completion of the following: (1) the Advisory Council determines the Office of Administrative Hearings is operationally prepared to commence adjudicating IDHW contested cases; (2) CMS has approved IDHW's state plan amendment and all required waivers to delegate appeals and determinations to the Office of Administrative Hearings; and (3) IDHW and the Office of Administrative Hearings have executed a Memorandum of Agreement (MOA) and the MOA has been approved by CMS."

Justification: all three conditions are required by CMS before cases can be transferred to a new hearing unit.

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Page 12, lines 41-42: after "the" on line 1, strike "office of administrative hearings" and insert "hearing officers in the office of the attorney general."

Justification: this appears to be a drafting error.

### **Suggested revision:**

Page 11, lines 36-41: designation of a non-attorney member of the public to be a member of an advocacy organization serving persons eligible for public assistance benefits.

Justification: including a member of an advocacy organization serving persons eligible for public assistance will bring an essential perspective and voice to the counsel to establish and maintain quality operations. In particular, including a member who represents individuals with intellectual and developmental disabilities will ensure ongoing compliance with the due process requirements developed under the K.W. v. Armstrong settlement agreement.

Page 7, lines 11-17: delete proposed subsection (4) in its entirety.

Justification: proposed subsection (4) stands to exclude highly qualified hearing officers from even being considered for the initial chief position. But an attorney who has been consistently adverse to the State and may have an axe to grind with an agency cannot only be considered, but is preferred. This makes no sense. The Governor should be allowed, and trusted, to appoint the most qualified person for the position. Moreover, the Senate confirmation proceeding will thoroughly evaluate the appointee's background and qualifications, including any biases, and further ensure that the most qualified person is appointed to the position.

Page 6, line 17: strike "herein" and replace with "in this section".

Justification: it is unclear whether "herein" applies beyond 67-5280. It appears the "herein" is intended to be limited to 67-5280, thus the proposed change is appropriate.

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These amendments insure that the State of Idaho will not place its Medicaid funds in jeopardy. They also insure that the State remains legally compliant with all of the requirements imposed upon its administration of federal programs and the procedures they require. Absent these proposed amendments, I request the Fair Housing Unit's work for DHW be exempted from this legislation in the same manner as the exemption of IDWR and IWRB found in 67-5280(3).

Thank you for your time and consideration in this matter.

Sincerely,

LAWRENCE G. WASDEN  
Attorney General

## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

February 25, 2020

The Honorable John Gannon  
Idaho House of Representatives  
Idaho State Legislature  
VIA HAND DELIVERY

Re: Request for legislation review of Senate Bill 1317

Dear Representative Gannon:

The following is written in response to specific questions you have asked concerning Senate Bill 1317, 65th Legislature, 2nd Regular Session (Idaho 2020). Each question is set out below with the answer following.

**1. Does S. 1317 allow a member of the public to trespass onto private property?**

No. The language of S. 1317 regulates the conduct of persons who would "post, sign or otherwise indicate or communicate" that public lands are "privately owned or not open for public use" or "obstruct[ing], block[ing] or otherwise interfer[ing]" with a person's "attempt to lawfully enter" or use public lands. On its face the language does not allow for conduct, but rather prohibits conduct.

**2. Does S. 1317 allow a member of the public to trespass on private property to get to public grounds?**

No. As discussed above, the language of S. 1317 is prohibitory in nature and would not abrogate Idaho's trespass laws. It governs and regulates attempts to block access to public lands by signage, fencing or gates.

**3. Does S. 1317 erode any rights of private property?**

Potentially in one aspect. The question asked is broad in that there are numerous rights in private property afforded by the law. Assuming, however, that the question is focused upon the primary

rights of "exclusive possession" and "quiet enjoyment," which are fundamental to the concept of "private property," the bill largely will not erode those primary interests in private property because existing laws protect public access across private lands pursuant to established public roads, valid easements, and valid access or right-of-way agreements. For example the law permits the access of navigable streams below the ordinary high water mark pursuant to Idaho Code section 36-1601 as specifically referenced in the new section 18-7008A(2)(iv). Section 36-1601 establishes an easement allowing public passage regardless of ownership of the streambed so long as the stream will float a six-inch log. See S. Idaho Fish & Game Ass'n v. Picabo Livestock, Inc., 96 Idaho 360, 363, 528 P.2d 1295, 1298 (1974). Idaho Code section 36-1601 therefore eliminates any expectation of "exclusive possession" or "quiet enjoyment" that a landowner might have in the stream, and this is not expanded by S. 1317.

However, in one respect S. 1317 may erode private property rights because of the expansive definition of "highway" in the new section 18-7008A(1)(c) and (2)(a)(iii) incorporating by reference Idaho Code section 49-109. As discussed below in response to question six, the use of this definition could, in reference to the prohibitions on signing or obstructing "highways," result in a person being prohibited from blocking or signing a road even when there is no valid "right of way" for such road across their private lands. In the absence of a valid right of way created under the law, the use of such a road could be permissibly blocked. By making this a prosecutable offense, S. 1317 would erode the right of a private property owner to block or sign a roadway for which no valid right of way exists.

**4. Does S. 1317 criminalize the closing, but not locking, of a cattle gate on public roads?**

Possibly. Because the terms "obstruct" and "interfere" cover a broad range of conduct, a cattle gate, even if unlocked, could be construed to obstruct or interfere with attempts to lawfully enter upon or use public land. See Am. Heritage Dictionary 1214 (4th ed. 2000) (defining "obstruct" to include activities that impede, retard, or hinder another's action); and see id. at 913 (defining "interfere" to include action that "create a hindrance or obstacle"). Such possibility is enhanced by the provision in proposed section 18-7008(2)(a) that its

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prohibitions are not limited to "the use of locks." If the gate is authorized by a "valid existing exclusive control lease or special use permit" it would be permissible for a person to put up and close a gate. If there are no such documents or the documents do not specifically permit the gate, it is possible that under proposed section 18-7008A2(a), a person could be prosecuted for placing an unlocked cattle gate across the road. This analysis depends upon the interpretation of terms "knowingly or having reason to know" and "shall act to willfully obstruct, block, or otherwise interfere..." as set forth in proposed section 18-7008A(2)(a).

We note that the terms "knowingly" and "willfully" are two different mens rea standards and rarely, if ever, appear in the same criminal prohibition. It is unclear if S. 1317 is intended to require two different mens rea standards be satisfied in order to establish a violation of proposed section 18- 7008A(2)(a), but the use of two different standards could create confusion about whether the State must prove one or both in order to establish a criminal violation. In a criminal action, a jury will decide whether someone acted knowingly, with reason to know, and/or willfully.

"Knowingly" is defined in Idaho Code section 18-101(5):

The word "knowingly," imports only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of such act or omission.

In the context of subsection (2)(a), the "knowingly" standard requires that a defendant know that placing an unlocked cattle gate would obstruct, block or otherwise interfere with another person's attempt to lawfully enter upon one of the four categories of land identified in subsection (2)(a).

"Reason to know" is not defined in Idaho Code, but was defined in State v. Loya, No. 44227, 2017 WL 2774380, at \*6 (Idaho Ct. App. Jun. 27, 2017) (quoting Black's Law Dictionary 1294 (8th ed. 2004)) as:

Information from which a person of ordinary intelligence—or of the superior intelligence that the

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person may have—would infer that the fact in question exists or that there is substantial enough chance of its existence that, if the person exercises reasonable care, the person can assume the fact exists.

This is generally consistent with the concept of "constructive knowledge" which will impute knowledge to an individual if, through the exercise of ordinary care, he would have been aware of the facts. In the context of subsection (2)(a), the "reason to know" standard requires the defendant have "reason to know" placing an unlocked cattle gate would obstruct, block, or otherwise interfere with another's attempt to lawfully enter upon one of the four categories of land identified in subsection (2)(a).

"Willfully" is defined in Idaho Code § 18-101(1):

The word "wilfully," when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.

In the context of subsection (2)(a), a defendant would act willfully if he placed an unlocked cattle gate that obstructed, blocked or otherwise interfered with another person's attempt to access one of the categories of public land identified in subsection (2)(a). The defendant would not need to know the unlocked gate actually obstructed, blocked or otherwise interfered with anyone. Nor would he need to know the unlocked gate impeded access to any of the categories of public land identified in the subsection. The mere fact that he intended to place the gate where he placed it would satisfy the "willful" element of the statute.

Whether S. 1317 criminalizes the closing of an unlocked cattle gate on a public road will be determined on a case-by-case basis. Someone grazing cattle on public land would likely argue that the unlocked gate is not intended to keep others out, but rather to keep the cattle in and that it is not an obstruction or interference if someone can open the gate to gain access. However, if the person intended to construct the gate, then the willful element of the statute is met

regardless of whether the person knew the gate would obstruct, block or otherwise interfere with others' attempts to access the land and regardless of whether the person realized the land in question was one of the categories of public land identified in subsection (2)(a). With regard to the "knowingly" or "reason to know" elements of the statute, it is also possible that a jury could find that a person "should have known" that a closed, but unlocked, cattle gate obstructs, blocks or otherwise interferes with access to public land. A person may also admit that the gate technically obstructs or interferes with access to the land, but argue it was not difficult to open the gate in order to access public land. In this latter scenario, a jury could find the person actually knew the gate was an obstruction or impediment to accessing public land and therefore find he violated the statute.

For these reasons, it is possible that someone who places a closed, but unlocked, cattle gate on a public road could be found in violation of the statute.

**5. Does S. 1317 criminalize any normal agricultural practices which may unintentionally obstruct access on publicly accessible grounds as defined in S. 1317?**

Possibly. Section 18-7008A(3)(a) provides that "[t]he conduct declared unlawful in this section shall not include any incidental interference arising from lawful activity by land users or interference by a landowner or members of his immediate family arising from activities on his own property, including normal and accepted agricultural practices." Clearly normal agricultural activities occurring on private land would not be found to violate section 18-7008A as proposed due to this provision. Proposed section 18-7008A(2)(b) also states that "[n]othing in the subsection shall alter or limit, in any way, the use of canals and the facilities for diversion, appropriation, and use of water" as provided in Idaho Code title 42, chapters 11 and 12, so activities pursuant to those chapters are not criminalized.

Where the activity occurs on public land, however, and does not implicate use of water as provided in Idaho Code title 42, chapters 11 and 12, the practices could be subject to prosecution if they meet the requirements of proposed section 18-7008A(2)(a). As discussed with the answer to question four above, the answer to this question will be



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determined on a case-by-case basis and turn on a jury's determination of whether the practice in question obstructed, blocked or otherwise interfered with another's access to one of the categories of public land, and whether the defendant acted knowingly, with reason to know, and/or willfully when performing the agricultural practice. As mentioned previously, the use of two different mens rea standards in this subsection could create confusion as to which mens rea elements must be proven to establish a statutory violation.

**6. Does S. 1317 provide any interface with roads which may not have a recorded easement for public use, such as RS2477 roads or roads fulfilling prescriptive easement requirements?**

Yes. RS2477 Roads<sup>1</sup> and "prescriptive easement roads"<sup>2</sup> present a similarly complex issue in the law regarding public access, and are likely impacted by S. 1317 as explained below.

As written, proposed section 18-7008A(1)(c) and (2)(a)(iii) specifically governs the posting of signage or the obstruction of "Highways as defined by Idaho Code § 49-109, Idaho Code[.]" That section in turn defines a "highway" as:

"Highway" means the entire width between the boundary lines of every way publicly maintained when any part is open to the use of the public for vehicular travel, with jurisdiction extending to the adjacent property line, including sidewalks, shoulders, berms and rights-of-way not intended for motorized traffic. The term "street" is interchangeable with highway.

Idaho Code § 49-109(4) (emphasis added).

It should be noted here that S. 1317 uses the definition of "highway" found in title 49, Idaho Code, which establishes laws relating to the operation of motor vehicles on the roads of Idaho and not the definition found in title 40, Idaho Code,<sup>3</sup> which governs the creation and responsibility for roads in Idaho. While similar, the two definitions are not worded the same and this difference impacts the applicability of S. 1317 to RS2477 and "prescriptive easement" roads. Moreover, as

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noted above in response to question three, the difference is meaningful, in that the existence of a public road and thus, the right of the public to otherwise cross private land, is governed by title 40, Idaho Code. A road meeting the definition in Idaho Code section 49-109, however, may not have a valid right of way under Idaho Code sections 40-109 and 40-202.

As currently worded, S. 1317 would apply to all roads that are currently being "publicly maintained" and that are presently "open to the use of the public for vehicular travel." This definition would potentially sweep within its ambit roads for which there are not existing easements for public use. And which have not been made a public highway under the provisions of Idaho Code sections 40-202 and 40-203A.

Forest Road 734, commonly known as the Bogus Ridge Road in the Boise National Forest may be a good illustration of this situation. Based upon preliminary information available to the OAG, that roadway is "publicly maintained" by the USFS, see Idaho Code § 40-106(3) (definition of "expense of the public" to include maintenance by a federal agency), and has traditionally been open to vehicular travel by the public. It is contended by DF Development, however, that the USFS does not have valid recorded easements for certain segments of the road and thus, they contend can be gated legally. S. 1317 would potentially make this conduct illegal despite the fact that none of the procedures found in Idaho law for the validation of highways and public rights of way have been followed.

Based upon the definition of "highway" in the current version of S. 1317, roads such as RS2477 roads or other "prescriptive roads" for which no record reflect their existence would likely be swept within the scope of S. 1317 if they are "publicly maintained" and "open to vehicular traffic by the public."

### **7. Does S. 1317 criminalize a landowner whose fencing may be inaccurately placed on public land?**

Possibly.<sup>4</sup> As previously discussed with the answer to question four, the answer to this question will be governed by proposed section 18-7008A(2)(a) and will be determined on a case-by-case basis. The analysis will turn on a jury's determination of whether the fence in

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question obstructed, blocked or otherwise interfered with another's access to one of the categories of public land, and whether the defendant acted knowingly, with reason to know, and/or willfully when placing the fence. The placement of the fence would be enough to establish the willful element of the statute. With regard to the knowing or reason to know element, a jury would determine whether the person knew or had reason to know of the proper boundary location. The jury would also need to determine whether the person knew or had reason to know the other property was one of the identified categories of public land.<sup>5</sup> As mentioned previously, the use of two different mens rea standards in this subsection could create confusion as to which mens rea elements must be proven to establish a statutory violation.

I hope you find the analysis above helpful. Please do not hesitate to call with any questions.

Sincerely,

DARRELL G. EARLY  
Deputy Attorney General  
Chief, Natural Resources Division

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<sup>1</sup> RS2477 refers to a provision of section 8 of the Mining Act of 1866, 14 Stat. 251, 253 (1866) (repealed 1976), which granted general right of way across public lands. RS2477 was repealed by the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, § 706(a), 90 Stat. 2743, 2793 (1976). However, any roads created under the provisions of RS2477 are valid easements if they satisfied the substantive state law for public road creation prior to withdrawal of the land in question or repeal. See *generally* S. Utah Wilderness All. v. BLM, 425 F.3d 735, 761 (10th Cir. 2005). RS2477 roads must have been created before the public lands were withdrawn from the public domain. In areas of Forest Service jurisdiction in Idaho, that is generally around 1907 when the majority of forests in Idaho were created. Areas of Idaho under BLM authority may have roads created later in time because those lands generally remained part of the public domain until the passage of FLPMA.

<sup>2</sup> The term "prescriptive easement" roads for purposes of this analysis refer to roads created by public use under the various iterations of Idaho's public road statutes. This analysis will not address private prescriptive easements because the prohibitions found in S. 1317 would only apply to highways for public use. See *generally* Kirk v. Schultz, 63 Idaho 278, 119 P.2d 266 (1941) (no public road was created, but individuals did establish a private

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road by prescription). Idaho's current iteration of public road creation generally provides that a road may be created by virtue of five years of continuous public use, coupled with maintenance by a public entity. See Idaho Code §§ 40-109(5), 40-202.

<sup>3</sup> "Highways" mean roads, streets, alleys and bridges laid out or established for the public or dedicated or abandoned to the public. Highways shall include necessary culverts, sluices, drains, ditches, waterways, embankments, retaining walls, bridges, tunnels, grade separation structures, roadside improvements, adjacent lands or interests lawfully acquired, pedestrian facilities, and any other structures, works or fixtures incidental to the preservation or improvement of the highways. Roads laid out and recorded as highways, by order of a board of commissioners, and all roads used as such for a period of five (5) years, provided they shall have been worked and kept up at the expense of the public, or located and recorded by order of a board of commissioners, are highways. Idaho Code § 40-109(5)(emphasis added).

<sup>4</sup> It should be noted that the landowner's conduct erroneously placing fencing upon the land of another would be a "trespass" within the meaning of Idaho Code section 18-7008 if they refused to remove the fencing after being told by the adjacent public land owner of the trespass.

<sup>5</sup> It should also be noted that there are specific code sections relating to partition fences which may also be applicable here and which may address this issue. See Idaho Code §§ 35-101 through -112.

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March 3, 2020

The Honorable Chuck Winder  
Idaho State Senate  
Idaho State Capitol  
700 West Jefferson Street, Room W330  
Boise, Idaho 83702  
[cwinder@senate.idaho.gov](mailto:cwinder@senate.idaho.gov)  
VIA HAND DELIVERY AND EMAIL

Re: Request for AG analysis regarding administrative rules  
processes – Our File No. 20-68784

Dear Senator Winder:

This letter is in response to your recent inquiry concerning the Legislature's options for approving or rejecting the administrative rules currently before the Legislature. The process for legislative rule review implicates several statutes, including Idaho Code sections 67-5224, 5291, and 5292, as well as Idaho Constitution article III, section 29. Several of these statutes predate the adoption of article III, section 29. This office recommends that these statutes and the legislative rules review process required by law under article III, section 29 be updated by the Legislature. This response is based on a review of the current authorities and offers the most defensible interpretation of those collective authorities.

Given there was no "going home" or extension bill passed by the Legislature with respect to rules at the end of the 2019 session, all rules currently before the Legislature are either pending fee rules or pending non-fee rules.

Pending fee rules only become final and effective upon an approving concurrent resolution of the Legislature. Idaho Code § 67-5224(5)(c). In other words, pending fee rules must be approved by both chambers of the Legislature in order to become final and effective.

Pending non-fee rules become final and effective in one of two ways. First, a pending non-fee rule becomes "final and effective upon

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the conclusion of the legislative session<sup>1</sup> at which the rule was submitted to the legislature for review,” unless rejected by a concurrent resolution of the Legislature.<sup>2</sup> Idaho Code §§ 67-5224(5)(a), 67-5291(1). Simply put, a pending non-fee rule becomes final and effective when the Legislature adjourns *sine die* unless rejected by both chambers of the Legislature. Second, pending non-fee rules become final and effective upon an approving concurrent resolution of the Legislature. Idaho Code §§ 67-5224(5)(b), 67-5291(1).

Any pending rules becoming final and effective following this 2020 session shall remain effective until July 1, 2021, unless otherwise extended by statute in subsequent sessions. Idaho Code § 67-5292(1) (“[E]very rule adopted and becoming effective after June 30, 1990, shall automatically expire on July 1 of the following year unless the rule is extended by statute.”).<sup>3</sup>

I hope you find this analysis helpful.

Sincerely,

BRIAN KANE  
Assistant Chief Deputy

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<sup>1</sup> An alternate effective date may be “provided in the rule, but no pending rule adopted by an agency shall become final and effective before the conclusion of the regular or special legislative session at which the rule was submitted for review.” Idaho Code § 67-5224(5)(a).

<sup>2</sup> The Legislature may only reject a pending rule “where it is determined that the rule, or part of the rule, is not consistent with the legislative intent of the statute that the rule was written to interpret, prescribe, implement or enforce[.]” Idaho Code § 67-5291(1); *see also* Idaho Const. art. III, § 29.

<sup>3</sup> It should also be pointed out that the process identified in Idaho Code section 67-5292 is not consistent with article III, section 29. This statute predates the constitutional amendment and this office recommends the Legislature consider its applicability.

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March 5, 2020

The Honorable Bert Brackett  
Idaho State Senate  
Idaho State Capitol  
700 W. Jefferson Street, Room WW33  
Boise, Idaho 83702  
VIA EMAIL: [bbrackett@senate.idaho.gov](mailto:bbrackett@senate.idaho.gov)

Re: Request for AG analysis regarding Local Improvement Districts – Our File No. 20-68856

Dear Senator Brackett:

This letter is in response to your request for a legal analysis. This letter addresses your question by first providing a brief answer and then offering further discussion.

### **QUESTION PRESENTED**

Can a city form a Local Improvement District (“LID”) without being a utility?<sup>1</sup>

### **BRIEF ANSWER**

Yes. A city may form a LID to make and pay for infrastructure improvements without being a public utility. The mechanism by which a city pays for and builds a system that provides broadband services is not determinative of whether the city is a regulated public utility or telephone corporation under the Idaho Public Utilities Law.

### **ANALYSIS**

#### **1. A City is Authorized to Make Improvements Funded by a LID.**

Idaho Code section 50-1703(b) empowers a municipality’s governing body to create a LID to make and pay for any improvements listed in Idaho Code section 50-1703(a)(1) through (a)(15). These

include improvements to utility-type infrastructure—such as water mains and pipes or a municipally-owned electrical distribution system—and any other legally authorized improvements that specifically benefit a particular area in the city. See Idaho Code § 50-1703(a)(4), (6), (12). The city funds these improvements by levying assessments on property in the LID that is benefited by the improvements and issuing warrants or bonds. Idaho Code § 50-1703(b).

**2. A City Does Not Become a “Public Utility” Merely by Using a LID to Pay for Improvements.**

A city does not become a regulated public utility merely by creating a LID and making improvements under Idaho Code section 50-1703, including those that could be used to provide utility-type services to itself or its citizens. Idaho Code section 61-129 defines “public utility” to include “common carriers,” “pipeline corporations,” “gas corporations,” “electrical corporations,” and “telephone corporations.” The Telecommunications Act of 1988, as adopted in the Idaho Code, defines “telephone corporation” to mean:

[E]very corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, providing telecommunication services for compensation within this state, provided that municipal, cooperative, or mutual nonprofit telephone companies shall be included in this definition only for the purposes of sections 62-610 and 62-617 through 62-620, Idaho Code.

Idaho Code § 62-603(14) (emphasis added).<sup>2</sup> A municipal corporation providing broadband/data service from a system paid for through a LID (or through any other mechanism) would not be a regulated “public utility” under Idaho Code section 61-129 because it would not be a “telephone corporation” as defined in Idaho Code section 62-603(14). Municipal corporations are excluded from the definition of “telephone corporations” except in very limited circumstances where they might be providing certain types of intrastate two-way switched voice services (e.g., intrastate Message Telecommunications Service (“MTS”) or Wide Area Telephone Service (“WATS”), both of which are voice products). See Idaho Code § 62-610. In such limited circumstances, the law



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would consider them to be a “telephone corporation” that must collect end-user surcharges to help support three telecommunications access programs the Commission oversees. *Id.* Since broadband services do not involve two-way switching (or at least not explained how they would), a city would not trigger the exception—or become a “telephone corporation” even for limited purposes—just by providing broadband services.

I hope that you find this analysis helpful.

Sincerely,

BRIAN KANE  
Assistant Chief Deputy

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<sup>1</sup> For purposes of answering this question, we assumed the term “utility” refers to a “public utility” as defined in the Idaho Public Utilities Law, and specifically Idaho Code section 61-129.

<sup>2</sup> Idaho Code section 61-104 clarifies that municipal corporations are not included in the definition of “corporation” providing:

The term "corporation" when used in this act includes a corporation, a company, an association and a joint stock association, but does not include a municipal corporation, or mutual nonprofit or cooperative gas, electrical, water or telephone corporation or any other public utility organized and operated for service at cost and not for profit, whether inside or outside the limits of incorporated cities, towns or villages.

Id. (emphasis added).

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March 5, 2020

The Honorable Caroline Nilsson Troy  
Idaho House of Representatives  
Idaho State Capitol  
700 W. Jefferson Street, Room EG38  
Boise, ID 83702  
VIA EMAIL: [cntroy@house.idaho.gov](mailto:cntroy@house.idaho.gov)

Re: Request for legislation review of H.B. 503 – Our File No. 20-68851

Dear Representative Troy:

You requested an analysis of possible First Amendment concerns with a provision of H.B. 503, 65th Legislature, 2nd Regular Session (Idaho 2020), which would amend section 55-115, Idaho Code, to prohibit homeowner's associations from enforcing CCR's that would prohibit display of the American flag, the Idaho state flag, the POW/MIA flag or the flag of a United States armed forces branch.

This provision of the bill does not appear to violate the First Amendment as written.

### **SUMMARY OF BILL PROVISION**

Proposed section 55-115(6) would prohibit a homeowner's association ("HOA") from adding, amending or enforcing any covenant, condition or restriction that would prohibit the display of the American flag, the Idaho state flag, the POW/MIA flag or the flag of any United States armed forces branch. The provision would allow an HOA to adopt rules requiring that the display of the American flag comport with the United States Flag Code, 4 U.S.C. sections 1 through 10, and establish reasonable rules for the construction of flagpoles, the size and number of flagpoles, the size of the displayed flag, and the nature of lights for illuminating the flag.

The bill does not provide for similar protections as to displaying other flags than those named in the bill.

## ANALYSIS

The Free Speech Clause of the First Amendment prohibits laws “abridging the freedom of speech.” The Free Speech Clause is implicated when the government prohibits citizens from speaking, or when the government compels citizens to speak on a certain message.<sup>1</sup> But the Free Speech Clause protects individuals only against the government; it does not protect individuals from private prohibitions on speech.<sup>2</sup>

Based on context, displaying any of the flags named in H.B. 503 could be considered protected speech for First Amendment purposes.<sup>3</sup> Similarly, flying other flags could be protected speech. If the Legislature passed a law prohibiting the display of any flag except for the flags identified in H.B. 503, the First Amendment Free Speech clause would be implicated, and a court would use an analysis of the State’s interests in prohibiting the display of flags to determine whether the law violated the First Amendment. However, H.B. 503 does not prohibit the display of any flags, nor does it compel the display of any flags. If enacted, H.B. 503 would not constitute a government action abridging the freedom of speech.

Instead, H.B. 503 facilitates certain speech, specifically the display of certain patriotic flags. The flag provision in the bill extends a statutory right to homeowners within HOAs that they would not have under the First Amendment alone. An HOA is not a government,<sup>4</sup> and its rules are not susceptible to challenge under the First Amendment. Any HOA rule or regulation prohibiting the display of flags other than those named in H.B. 503 would be private action not required by the bill. There is no controlling law holding that the State would abridge the freedom of speech by extending this statutory right facilitating speech.

If enacted, H.B. 503 would not be a unique law. Congress has passed a similar law regarding the American flag.<sup>5</sup> Multiple states have passed similar laws.<sup>6</sup> For example, Arizona has passed a law that protects the display of all the flags named in H.B. 503, as well as Tribe flags and the Gadsden flag.<sup>7</sup> No case in the Ninth Circuit has invalidated any of these similar laws under the First Amendment.

## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

It is likely that the flag provision in H.B. 503 does not violate the First Amendment.

I hope you find this analysis helpful. Please contact me if you have any additional questions.

Sincerely,

BRIAN KANE  
Assistant Chief Deputy

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<sup>1</sup> Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298, 309, 132 S. Ct. 2277, 2288, 183 L. Ed. 2d 281 (2012).

<sup>2</sup> Prager Univ. v. Google LLC, 951 F.3d 991, 996 (9th Cir. 2020).

<sup>3</sup> See Dimmitt v. City of Clearwater, 782 F. Supp. 586, 588-89 (M.D. Fla. 1991) (explaining expressive message of displaying the American flag), *aff'd and modified*, 985 F.2d 1565 (11th Cir. 1993).

<sup>4</sup> See Yan Sui v. Southside Towing, No. SACV 10-01973 JAK (AJW), 2012 WL 13048510, at \*3 (C.D. Cal. Jun. 5, 2012) (explaining that HOA was not a state actor for purposes of § 1983), *report and recommendation adopted*, No. SACV 10-1973 JAK (AJW), 2012 WL 2564778 (C.D. Cal. Jun. 29, 2012), *aff'd*, 582 F. App'x 731 (9th Cir. 2014).

<sup>5</sup> Freedom to Display the American Flag Act of 2005, Pub. L. No. 109-243, 120 Stat. 572 (2006) (codified in scattered sections of U.S.C.).

<sup>6</sup> *E.g.*, Ariz. Rev. Stat. Ann. § 33-1808 (Arizona); Cal. Civ. Code § 4705 (California); Nev. Rev. Stat. Ann. § 111.238 (Nevada); Utah Code Ann. § 57-24-102 (Utah); Wash. Rev. Code Ann. § 64.38.033 (Washington).

<sup>7</sup> Ariz. Rev. Stat. Ann. § 33-1808(A).

## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

March 5, 2020

Hon. Laurie Lickley  
Idaho House of Representatives  
Idaho State Capitol  
700 W. Jefferson Street  
Boise, Idaho 83702  
VIA EMAIL: [lickley@house.idaho.gov](mailto:lickley@house.idaho.gov)

Re: Senate Bill 1291

Dear Representative Lickley:

Your email dated March 4, 2020 to Brian Kane regarding Senate Bill 1291, 65th Legislature, 2nd Regular Session (Idaho 2020), was referred to me for response. You asked: "whether Senate Bill 1291 could be challenged under the NC v. FTC case, and whether the Partner Advisory Council as a component of the University of Idaho Rangeland Center involvement would have any legal connotations?" The following is provided in response.

Senate Bill 1291 proposes to amend Idaho Code section 58-1403 to remove one entity and designate two other entities to nominate and submit names for gubernatorial appointment to the Idaho Rangeland Resource Commission ("Commission").

The Commission is a five member self-governing agency created for the purpose to:

promote the economic and environmental welfare of the counties and the state by providing a means for the collection and dissemination of information and research regarding the management and uses of the county's and the state's public and private rangeland resources and the livestock grazing industry.

Idaho Code § 58-1401. The Commission is funded by assessment fees (dry land grazing acreage fee, animal fees for utilizing grazing lands), grants, donations, and gifts. Based upon review of its statutory

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authority, the Commission does not appear to have any regulatory or occupational licensing authority. See Idaho Code § 58-1408.

The case referenced in your question, North Carolina State Board of Dental Examiners v. Federal Trade Commission, 574 U.S. 494, 135 S. Ct. 1101, 1191 L. Ed. 2d 35 (2015), involved anti-trust concerns about an occupational licensing board. The United States Supreme Court held that a state occupational licensing board comprised primarily of persons active in the occupation it regulates has immunity from federal anti-trust law only when it is actively supervised by the state. Idaho addressed the concerns raised by this case by modernizing a number of older regulatory licensure board and commission statutes. See H.B. 482, 63rd Leg., 2nd Reg. Sess, 2016 Idaho Sess. Laws 930.

Because the Idaho Rangeland Resource Commission does not appear to be a regulatory or occupational licensing agency, there do not appear to be any federal anti-trust issues such as those raised in North Carolina State Board of Dental Examiners. Accordingly, Senate Bill 1291's proposed changes do not appear to raise the legal concerns present in that case.

To the extent your inquiry asked about other "legal connotations" associated with participation by the Partner Advisory Council, we are unable to completely respond due to the breadth of that question and the fact that the Office of the Attorney General does not represent the University of Idaho. On the face of the statutory authority of the Rangeland Resource Commission, there do not appear to be any legal impediments to its participation. However, because we are not familiar with the Partner Advisory Council, it is recommended that you consult with counsel for the University of Idaho concerning whether participation by the Partner Advisory Council presents any conflict of interest or legal concern to the University.

Sincerely,

W. DALLAS BURKHALTER  
Lead Deputy Attorney General

## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

March 5, 2020

The Honorable Bert Brackett  
Idaho State Senate  
P.O. Box 83720  
Boise, ID 83720-0081  
VIA EMAIL: [bbrackett@senate.idaho.gov](mailto:bbrackett@senate.idaho.gov)

Re: Idaho's "Robocall" Statute

Dear Senator Brackett:

This letter responds to your request for information about Idaho's "robocall" statute and what options are available to improve the law or otherwise address constituents' frustrations with robocalls.

Idaho's "robocall" law is codified at section 48-1003C of the Idaho Telephone Solicitation Act (ITSA), title 48, chapter 10, Idaho Code. The ITSA is a civil statute that also includes Idaho's "Do Not Call" and telephone solicitor registration laws. Idaho Code §§ 48-1003A, 48-1004. The Attorney General has enforcement authority over the ITSA pursuant to Idaho Code section 48-1006, and, under certain conditions, consumers may bring a private cause of action to recover damages from telephone solicitors under Idaho Code section 48-1007.

Many Idahoans do not understand that the ITSA's Do Not Call and registration laws apply only to "telephone solicitors." Under the ITSA, "telephone solicitors" are persons who conduct unsolicited calls to purchasers to encourage them to buy or invest in goods or services during the call.<sup>1</sup> Charities, surveyors, appointment setters, political campaigns, persons with an established business relationship, debt collectors, and other *non-commercial callers* are not "telephone solicitors."

Implementation and enforcement of Idaho's Do Not Call and telephone solicitor registration laws have greatly reduced the number of unsolicited telephone calls that consumers receive from legitimate telephone solicitors. The Attorney General's Office rarely receives Do

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Not Call complaints and, when necessary, has promptly taken enforcement actions against unregistered telephone solicitors.<sup>2</sup>

Unlike Idaho's Do Not Call and telephone solicitor registration laws, the state's auto-dialer ("robocall") law applies to both *commercial and non-commercial* callers, including charitable fundraisers, political campaigns, and surveyors. Idaho Code section 48-1003C(1) requires all auto-dialed phone calls to include three disclosures at the beginning of the call: (a) the name of the caller, (b) the purpose of the call, and (c) the caller's contact information. The law does not prohibit robocalls or require consumers' prior written consent before callers may call consumers.

By far, most unwanted calls that Idahoans receive are robocalls originating from foreign locales and involving criminal schemes to steal consumers' identities and money. These criminal calls fall outside the purview of Idaho's robocall law, the ITSA in general, and the civil authority of the Attorney General's Consumer Protection Division. Furthermore, the Consumer Protection Division cannot "trace" phone numbers or identify persons associated with fake ("spoofed") numbers.

The explosion of robocalls in the past few years does not stem from inadequate laws. Rather, the problem derives from the criminal exploitation of technology. However, through better technology and industry diligence, as well as consumer education, we can tackle this problem.

The telecommunication industry is working to implement new call authentication technology that will improve the integrity of caller ID and help voice-service providers more quickly identify call sources. Additionally, the Industry Traceback Group (ITG), a collaborative effort of voice service providers, is actively working to identify and report the source of illegal robocalls. The ITG coordinates with providers at all network levels to help stop illegal robocall traffic.

Technological fixes take time and the telecommunication industry openly acknowledges that consumers are unlikely to see robocalls decrease in the near future. Idahoans should not assume, however, that continued calls mean no one is trying to address the



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problem. On the contrary, new federal legislation, task forces, and industry groups now exist because everyone is tired of robocalls.

For now, consumers do have options to help reduce the number of unwanted calls they receive. In addition to registering their telephone numbers on the Federal Trade Commission's National DNC Registry at [www.donotcall.gov](http://www.donotcall.gov), consumers should:

- **Ignore calls from unknown numbers.** It is okay to ignore a ringing telephone, and voicemail screening is a perfectly acceptable practice—especially when the caller ID information is unfamiliar. As a side note, if a consumer finds himself or herself on the phone with an unknown or sketchy caller, the consumer should refrain from answering “yes” to any of the caller’s questions and immediately hang up. Answering “yes” to questions sets the consumer up for a scheme where the caller uses the consumer’s recorded “yes” to allow unauthorized charges to the consumer’s credit card.
- **Hang up on robocalls.** Consumers should not interact with robocalls (e.g., pressing “1” to speak to a live operator or “2” to place the number on the company’s do-not-call list). Scammers who employ auto-dialing technology are searching for live phone numbers. If the consumer interacts with the robocall, the consumer has confirmed his or her number is active, and he or she will receive even more calls. It is never a good idea to respond to unknown text messages or call back unknown numbers. Much like interacting with robocalls, responding to text messages and calling back unknown numbers serves only to confirm the consumer’s number is active.
- **Use call-blocking services and programs.** Landline and wireless phone companies offer services that help their customers limit the number of unwanted calls they receive. Consumers also can download applications designed specifically to block robocalls. The following list, which is not comprehensive, identifies some popular services and applications presently available to consumers:

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Landlines	
<b>CenturyLink</b>	<b>Anonymous Call Rejection.</b> Rejects anonymous callers. <b>Caller ID.</b> Identifies caller. <b>Caller ID with Privacy+.</b> Intercepts calls that don't show Caller ID information and allows callers to record their names instead. <b>Call Rejection.</b> Blocks specific phone numbers. <b>No Solicitation &amp; Security Screen features.</b> Function as a call-screening services.
<b>Frontier Communications</b>	<b>Caller ID with Robocaller Alert.</b> Detects robocalls and possible fraudulent calls and provides caller ID alerts.
Mobile Carriers	
<b>AT&amp;T Mobile</b> <a href="http://www.att.com">www.att.com</a>	<b>Basic</b> (free). Provides automatic fraud and spam risk blocking, nuisance and unknown call warnings, and personal block list. <b>Plus</b> (\$3.99/mo.). Includes Caller ID and reverse number lookup.
<b>Sprint</b> <a href="http://www.sprint.com">www.sprint.com</a>	<b>Call Screener Basic</b> (free). Identifies and blocks "highest-risk" spam calls. <b>Call Screener Plus</b> (\$2.99/mo.). Identifies fraud risk level of incoming calls and displays callers as robocallers, spammers, or spoofers.
<b>T-Mobile</b> <a href="http://www.t-mobile.com">www.t-mobile.com</a>	<b>Scam ID</b> (free). Identifies calls from known scammers. <b>Scam Block</b> (free). Allows blocking of known scammers. <b>Name ID</b> (\$4.00/mo.). Identifies the caller's name and location.
<b>Verizon</b> <a href="http://www.verizon.com">www.verizon.com</a>	<b>Call Filter</b> (free & automatic). Identifies & blocks robocalls. <b>Premium Call Filter</b> (\$2.99/mo.). Automatically blocks robocalls.
Applications	
<b>Nomorobo</b> <a href="http://www.nomorobo.com">www.nomorobo.com</a>	<b>VoiP landlines</b> (free). Blocks calls from known scammers. <b>iOS &amp; Android</b> (\$1.99/mo.).
<b>Youmail</b> <a href="http://www.youmail.com">www.youmail.com</a>	<b>iOS &amp; Android</b> (free). Limits robocalls.
<b>Hiya</b> <a href="http://www.hiya.com">www.hiya.com</a>	<b>iOS &amp; Android</b> (free). Blocks calls and blacklists unwanted phone numbers.
<b>Truecaller</b> <a href="http://www.truecaller.com">www.truecaller.com</a>	<b>iOS &amp; Android</b> (free or \$1.99/mo.). Search tool for unknown numbers and call blocker.

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- **Report unwanted calls and numbers to regulators and businesses.** Consumers need to file complaints with regulators and, in some instances, non-governmental entities, so regulators are kept apprised of new and ongoing scams and can maintain accurate statistical records. The following list identifies where consumers may report specific types of calls:

Regulator / Agency / Business	Call Type
<b>Attorney General's Consumer Protection Division</b> ( <a href="http://www.ag.idaho.gov">www.ag.idaho.gov</a> )	<ul style="list-style-type: none"><li>• Unsolicited telephone solicitations to numbers registered on the National DNC Registry</li><li>• Telephone solicitations from unregistered solicitors</li><li>• Non-criminal robocalls that violate Idaho Code section 48-1003C</li></ul>
<b>Federal Trade Commission</b> ( <a href="http://www.ftc.gov">www.ftc.gov</a> )	<ul style="list-style-type: none"><li>• Unsolicited interstate telephone solicitations to numbers registered on the National DNC Registry</li><li>• Unlawful interstate robocalls</li></ul>
<b>Federal Communications Commission</b> ( <a href="http://www.fcc.gov">www.fcc.gov</a> )	<ul style="list-style-type: none"><li>• Unlawful interstate robocalls</li></ul>
<b>Treasury Inspector General for Tax Administration</b> ( <a href="http://www.treasury.gov/tigta/contact_report_scam.shtml">www.treasury.gov/tigta/contact_report_scam.shtml</a> )	<ul style="list-style-type: none"><li>• IRS impersonation calls</li></ul>
<b>Social Security Administration</b> ( <a href="https://oig.ssa.gov/report">https://oig.ssa.gov/report</a> )	<ul style="list-style-type: none"><li>• Social Security phone scam</li></ul>
<b>Microsoft Corporation</b> ( <a href="http://www.microsoft.com/en-us/reportascam">www.microsoft.com/en-us/reportascam</a> )	<ul style="list-style-type: none"><li>• Microsoft tech-scam calls</li></ul>

I hope this information is helpful to you. If you have any questions or need further information, please call me.

Sincerely,

STEPHANIE N. GUYON  
Deputy Attorney General

## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

<sup>1</sup> Idaho Code § 48-1002(11). A “telephone solicitation” also includes a communication in which a gift or a prize is offered or in which goods or services are offered below regular price and (a) a return telephone call is invited or the communication is followed up by a call to the purchaser by the telephone solicitor; and (b) it is intended during the course of the return or follow-up call with the purchaser that an agreement to purchase, or a purchase be made. Idaho Code § 48-1002(11)(b).

<sup>2</sup> The Attorney General’s 2019 Annual Report for Consumer Protection, Competition, Charities, Telephone Solicitations, and Tobacco Enforcement details complaint statistics, and the Attorney General’s enforcement actions against unregistered telephone solicitors. The Report is available at [www.ag.idaho.gov](http://www.ag.idaho.gov).

## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

March 11, 2020

The Honorable Michelle Stennett  
Minority Leader  
Idaho Senate  
VIA EMAIL: [mstennett@senate.idaho.gov](mailto:mstennett@senate.idaho.gov)

Re: Request for legislation review of H.B. 592 and H.B. 615

Dear Senator Stennett:

This letter responds to the questions raised in your email of March 10, 2020 addressed to Brian Kane regarding House Bill No. 592 ("H.B. 592") and House Bill No. 615 ("H.B. 615"), 65th Legislature, 2nd Regular Session (Idaho 2020). In your letter you ask the following questions:

1. To what extent do the provisions of H.B. 592 apply to forfeiture of stock water rights held by state agencies?
2. What are the implications of H.B. 592, read in conjunction with H.B. 615?
3. Is the Office of the Attorney General ("OAG") aware that representatives of the United States Bureau of Land Management ("BLM") attended the debate in the Senate Resources and Environment Committee on H.B. 592 and asked for the ability to negotiate the requirements of this bill or the BLM will litigate against the State? Is the State already in court against the BLM as it pertains to the Joyce Livestock decision?

### **RESPONSE**

Your first question asks to what extent H.B. 592 applies to stockwater rights held by state agencies. As defined in the bill, the term "stockwater" means "the use of water solely for livestock or wildlife where the total diversion is not in excess of thirteen thousand (13,000) gallons per day." H.B. 592, § 1 at 2:20-21 (referencing the definition of stockwater in Idaho Code § 42-1401A(11)). Thus, the bill applies to

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what water users commonly call “de minimis” stockwater rights. The bill defines “stockwater right owner” as “the owner of the stockwater right shown in the records of the department of water resources at the time of service of the order to show cause.” H.B. 592, § 1 at 2:22-24. Furthermore, the bill includes an express statement that it applies “to all stockwater rights except those stockwater rights decreed to the United States based on federal law.” H.B. 592, § 1 at 2:25-26.

Based on the above, H.B. 592 is facially neutral as related to ownership of State-based water rights and thus would apply to de minimis State-based stockwater rights held by any person, including state agencies. However, H.B. 592 also provides that forfeiture would not apply “where the holder or holders of any livestock grazing permit or lease on a federal grazing allotment asserts a principal/agent relationship with the federal agency managing the grazing allotment.” H.B. 592, § 1 at 2:27-31. While this provision applies only to livestock grazing on a “federal grazing allotment,” the ability of an entity to use the principal/agent relationship to establish a water right was recognized in the Joyce Livestock case. Joyce Livestock Co. v. United States, 144 Idaho 1, 18, 156 P.3d 502, 519 (2007). H.B. 592 does not prevent state agencies from using the principal/agent relationship as recognized in Joyce Livestock to protect State stockwater rights from forfeiture. State agencies oftentimes have specific terms in their leasing documents to cover such issues, thus whether a water right held by a particular state agency could be declared forfeited is a fact-specific question.

Your second question asks about the implications of H.B. 592, when read in conjunction with H.B. 615. H.B. 615 is a trailer bill to H.B. 592 which codifies certain forfeiture standards established in Idaho case law. First, the bill codifies that forfeiture of a water right must be proven by “clear and convincing evidence.” H.B. 615, § 1 at 3:12-13. Idaho courts have traditionally applied a clear and convincing evidence standard to forfeiture cases because “[f]orfeitures are not favored[.]” Jenkins v. State, Dep’t of Water Res., 103 Idaho 384, 389, 647 P.2d 1256, 1261 (1982). Second, the bill codifies the doctrine of “resumption of use,” which Idaho courts have previously recognized and which was explored in detail in the case Sagewillow, Inc. v. Idaho Dep’t of Water Res., 138 Idaho 831, 835-44, 70 P.3d 669, 673-82 (2003); H.B. 615 at 6, Lns. 6-14. This doctrine allows a person to assert, as an affirmative

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defense to forfeiture, a resumption of use that occurs after the five year period for forfeiture has run, but prior to a claim of right by a third party. The implications of H.B. 592, when read in conjunction with H.B. 615, are two-fold. First, any party asserting that a water right has been forfeited, pursuant to H.B. 592, has the burden of proving forfeiture by clear and convincing evidence. Second, that any party seeking to resume a use after the five year period for forfeiture has run would need to do so prior to a claim of right by a third party seeking to have a water right declared forfeited pursuant to H.B. 592.

Regarding your question concerning the statements of the BLM during hearings on H.B. 592, the OAG is aware of concerns the BLM and the United States Department of Justice (“DOJ”) have expressed regarding existing Idaho law relating to the forfeiture of federal stock water rights. See Idaho Code § 42-503 (2019). There is no pending litigation concerning the existing law of Idaho, but there have been threats of litigation by the BLM and the DOJ. The OAG has participated in several meetings with the Department of Interior and the DOJ seeking to resolve the matter without litigation. It is likely that some of the concerns related to those provisions of law also apply to H.B. 592. However, the statements made by the BLM to date regarding H.B. 592 have not identified specific concerns regarding the changes, but have expressed more general concerns. See Att. 2, Hearing on H.B. 592 Before the S. Res. & Env’t Comm., 65th Leg. (Mar. 9, 2020) (statement of June Shoemaker, Deputy State Director for Resources & Science, BLM, Idaho State Office, in opposition to H.B. 592, attached hereto). The OAG has not received any specific communication from the BLM or the DOJ threatening litigation concerning H.B. 592 or H.B. 615.

I hope this analysis is helpful to you. If you have any questions please do not hesitate to contact me.

Sincerely,

GARRICK BAXTER  
Deputy Attorney General

## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

March 16, 2020

The Honorable Lance W. Clow  
Idaho House of Representatives  
Idaho State Capitol  
700 W. Jefferson Street, Room EG56  
Boise, ID 83702  
VIA EMAIL: [lclow@house.idaho.gov](mailto:lclow@house.idaho.gov)

Re: Request for legal advice: S.B. 1409, S.B. 1410, H.B. 625

Dear Representative Clow:

This letter briefly answers the questions you raised in our March 13, 2020 phone call, which asked: (1) What authority does Idaho Code section 33-125 grant to the State Department of Education (“SDE”) and the Superintendent of Public Instruction regarding control over student data; (2) is H.B. 625 consistent with State law; (3) is an appropriation that moves 18 FTP pertaining to IT and data from SDE to the State Board of Education (“Board”) contrary to State law; and (4) does Idaho Code section 33-133 bear on the question of authority over student data?

“The Legislature may not prevent a constitutional officer from performing [her] constitutional duties.” Williams v. State Legislature of State of Idaho, 111 Idaho 156, 157, 722 P.2d 465, 466 (1986) (citing Wright v. Callahan, 61 Idaho 167, 178, 99 P.2d 961, 965 (1940)). The Superintendent is a constitutional officer, her office being specifically provided for in article IV, section 1 of the Idaho Constitution. However, the constitution does not set forth express powers for the Superintendent. See Williams, 111 Idaho at 157, 722 P.2d at 466 (recognizing that Idaho Const. art IV, § 1 does not set forth express powers for the State Auditor).

**What authority does Idaho Code section 33-125 grant to the SDE and the Superintendent of Public Instruction regarding control over student data?**



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Idaho Code section 33-125 provides for the SDE as “an executive agency of the state board of education,” with the Superintendent as the executive officer. Under the statute, SDE is tasked with “carrying out policies, procedures and duties authorized by law or established by the state board of education for all elementary and secondary school matters[.]” The statute makes clear that SDE is subordinate to the Board, although it has statutory authority to carry out the Board’s policies, procedures, and duties regarding K-12 matters.

Idaho Code section 33-125 provides general principles, but it does not specifically speak to the question of whether SDE has authority over student data. While the statute states that SDE has authority to act with regard to “all elementary and secondary school matters,” this is limited by two phrases in the statute. First, SDE’s authority is limited to “carrying out [the Board’s] policies, procedures and duties.” SDE cannot create its own policies or procedures that conflict with the Board’s, nor can it choose to disregard the Board’s policies and procedures. Second, SDE’s authority is limited to policies, procedures and duties “authorized by law or established by the state board of education[.]” The Board has the ability to circumscribe SDE’s authority in a way by prescribing policies and procedures.

The practical consequence of SDE’s limited authority is that the Board could theoretically prescribe policies and procedures under which it maintained full control over student data and managed the associated personnel, and under which SDE had access to that data for the purpose of carrying out its responsibilities. Therefore, it is not clear that just because Idaho Code section 33-125 describes SDE’s responsibility as touching *all* K-12 matters, that SDE necessarily has statutory control over student data and the associated personnel.

### **Is H.B. 625 consistent with State law?**

SDE is a statutory creation, and its authority is derived from statute. SDE is tasked with carrying out the policies, procedures, and duties that are both “established by the state board of education,” as well as those “authorized by law.” Idaho Code § 33-125.

H.B. 625, 65th Legislature, 2nd Reg. Sess. (Idaho 2020), specifically creates a technology services unit within the SDE. It

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provides specific responsibilities to that unit with regard to student data. It further allows the Superintendent and the Board to assign the unit duties. So long as the Superintendent does not assign the unit duties that conflict with article IX, section 2 of the Idaho Constitution—providing that the Board has authority over the “general supervision of the state educational institutions and public school system”—then H.B. 625 appears to be consistent with Idaho law. Duties assigned to the unit would be duties “authorized by law” under Idaho Code section 33-125.

### **Is an appropriation that moves 18 FTP pertaining to IT and data from SDE to the Board contrary to State law?**

This question is essentially a constitutional issue, as to whether this appropriation would prevent the Superintendent from performing her constitutional duties. However, the answer is not clear.

“The Legislature may not prevent a constitutional officer from performing [her] constitutional duties.”<sup>1</sup> The Superintendent is a constitutional officer, her office being specifically provided for in article IV, section 1 of the Idaho Constitution. However, the constitution does not set forth express powers for the Superintendent.<sup>2</sup> To determine the authority of constitutional officers in such a situation, the Idaho Supreme Court would likely look to Territorial laws governing the duties of comparable officials to determine whether the constitutional officer has implied duties under the Idaho Constitution.<sup>3</sup>

In 1866, the Territorial laws provided for a Superintendent of Public Instruction who had specific duties performed “with the advice and subject to the supervision of the Territorial Board of Education,” including “[t]o exercise a general supervision over such schools as may be established by law,” and apportioning school funds in proportion to the number of students according to reports of County Superintendents, “and make a record thereof in the book of records to be kept by the Territorial Board of Education.”<sup>4</sup>

Later, in 1887, the Revised Statutes of Idaho Territory rewrote the law regarding the Territorial Superintendent of Public Instruction. This new law provided that the Superintendent would act “by and with the advice and consent of the Legislative Council,” and did not mention

## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

a board of education. The Superintendent would have the duty to report to the Governor yearly on the condition of public schools, including providing a report detailing “the number of school children in the Territory, the number attending public schools and the average attendance,” and an accounting of school funding. Further, the Superintendent was to present suggestions regarding constructing schools, management of schools, and raising funds.<sup>5</sup>

The Territorial laws do not speak to the management of student data as we know it today, because such a thing was not envisioned at the time. However, the laws do touch on similar subjects. In 1866, data on school attendance and the proportional funding was kept in the records of the Board of Education. The 1887 Revised Statutes are silent as to where such records were kept, but did provide that the Superintendent would act with the advice and consent of the Legislative Council rather than a board of education, and would report on some points of student data, such as attendance.

With regard to education, the Idaho Constitution appears to more closely mirror the older Territorial laws rather than the newer ones in force when the constitution was ratified. Like the older Territorial laws, we now have a Board as well as a Superintendent. Therefore, the question is uncertain: which version of the Territorial Superintendent would the court look to for implied powers in our current constitutional Superintendent? The older, but more familiar version, or the version at the time the Idaho Constitution was ratified? Further, are the powers of either version of the Territorial Superintendent comparable enough with authority over modern electronic student data to answer the question?

There are good arguments on both sides of the issue, and little guidance. Therefore, the question of whether an appropriation moving authority over K-12 student data from the Superintendent to the Board is unconstitutional has an unclear answer. H.B. 625 would easily resolve these concerns by making it clear in the law that K-12 student data is controlled by SDE for purposes of the SDE to provide reports on data pertaining to K-12.

**Does Idaho Code section 33-133 bear on the question of authority over student data?**

Idaho Code section 33-133 primarily deals with privacy with regard to student data. It provides for FERPA compliance, protection with regard to public records requests, and aggregation of data that will be disclosed.

Subsection (2) states:

Unless otherwise provided for in this act, the executive office of the state board of education shall be the entity responsible for implementing the provisions of this act. All decisions relating to the collection and safeguarding of student data shall be the responsibility of the executive office of the state board of education.

This provision places the responsibility for data privacy on the Board. Although it states that the Board is responsible for “decisions relating to the collection and safeguarding of student data,” this statement is made in the context of the whole statute. The provision simply places ultimate authority for data security on the Board. It does not provide that SDE is precluded from having a technology services unit that administers a student data system. However, SDE’s technology services unit must comply with the data security requirements of the Board under Idaho Code section 33-133.

In summary, Idaho Code section 33-133 does not bear on the question of whether H.B. 625 can allow SDE to administer a student data system.

I hope you find this analysis helpful. Please contact me if you have any additional questions.

Sincerely,

LESLIE M. HAYES  
Deputy Attorney General

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<sup>1</sup> Williams, 111 Idaho at 157, 722 P.2d at 466 (citing Wright, 61 Idaho at 178, 99 P.2d at 965).

<sup>2</sup> See Williams v. State Legislature of State of Idaho, 111 Idaho 156, 157, 722 P.2d 465, 466 (1986) (recognizing that Idaho Const. art IV, § 1 does not set forth express powers for the State Auditor).

<sup>3</sup> See *generally* Williams, 111 Idaho at 157, 722 P.2d at 466.

<sup>4</sup> Laws of the Territory of Idaho, ch. VI, tit. II, art. II, § 1 (1866).

<sup>5</sup> Idaho Rev. Stat., tit. III, ch. II, §§ 630-31 (1887).

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April 13, 2020

The Honorable Steven P. Thayn  
Idaho State Senate  
Idaho State Capitol  
700 W. Jefferson Street, Room WG33  
Boise, Idaho 83702  
VIA EMAIL: [sthayn@senate.idaho.gov](mailto:sthayn@senate.idaho.gov)

Re: Request for AG Analysis Regarding Access to  
Landlocked Parcels of State Land – Our File No. 20-  
69151

Dear Senator Thayn:

This letter is in response to your questions concerning public access to landlocked parcels of state land. Your questions are followed by an analysis presented below.

**Question 1:** Idaho has land that is surrounded by private land and/or federal land. How does the State of Idaho gain access to these landlocked parcels of land?

**Answer to Question 1:** If a parcel of state endowment land is landlocked by private property or federal land without a legal right of access, the State's ability to access that state land is limited. Such land may be accessed by helicopter or via navigable river if present. However, absent access by air or water, generally the only way for the State to gain a legal right to cross the property of another is with the permission or consent of the other landowner,<sup>1</sup> whether private or federal;<sup>2</sup> or, under limited circumstances, the State may condemn a right of access across the adjoining land in order to develop the natural resources of the state land.<sup>3</sup>

In order to carry out its management obligations on landlocked endowment lands, the Idaho Department of Lands ("IDL") typically tries to negotiate with the adjacent landowner in order to obtain the landowner's permission to cross their land. The most preferable permissive use typically involves some form of perpetual easement or

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right-of-way. If IDL is unable to obtain a perpetual right via easement or right-of-way, then IDL may seek a term easement or permit authorizing access for a certain term or for a specific purpose, or IDL will seek to acquire the oral or written permission in the form of a license. Other forms of negotiated agreements for access might include a contract or lease.

Unless the landowner is willing to grant a full public access across their land, any legal right to cross that land will be narrowly construed and limited to the terms and conditions of the instrument granting a right of access. Access to state endowment land for a specific purpose, such as to manage state land and state resources, or to haul timber or minerals, does not allow the use of that easement or right of access for other purposes, and does not grant a right to the public to use any such right of access.

**Question 2:** Can private Idaho citizens gain access to Idaho State-owned land that is landlocked in the same manner?

**Answer to Question 2:** Private citizens may seek the permission of a landowner and negotiate an easement, contract, lease, permit or license to cross their property.

However, the right of the public or other private citizens to cross private or federal property based on any right of access that landowner has granted to IDL is limited to the express terms and conditions of any such written instrument or license granted to the State. Unless the instrument granted to IDL expressly includes a right of public access, such as for hunting or hiking by the public, the public or other private citizens obtain no right to cross the landowner's property, and crossing the landowner's property without the landowner's permission would be subject to Idaho's civil and criminal trespass statutes set forth in Idaho Code sections 6-202 and 18-7008, respectively.

Public access to landlocked state lands is obtained primarily through the Idaho Department of Fish and Game's ("IDFG") "Access Yes!" program. See Idaho Code § 36-111. The program works with private landowners to secure easements or other access agreements through private property that allow hunting and fishing access. Through the Access Yes! program, IDFG has secured access to over 525,115

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acres of state and federal public land for hunters and anglers. IDAHO FISH & GAME DEP'T, ACCESS YES!, <https://idfg.idaho.gov/yes>.

I hope you find this analysis helpful.

Sincerely,

BRIAN KANE  
Assistant Chief Deputy

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<sup>1</sup> Idaho Code § 6-202(1)(f) and (7) (Civil Trespass); and Idaho Code § 18-7008(1)(f) and (6) (Criminal Trespass).

<sup>2</sup> “The statute [Idaho Code section 18-7008] makes no distinction between private and public property.” State v Korsen, 138 Idaho 706, 713, 69 P.3d 126, 133 (2003). Federal statutes require that the Secretary of Agriculture “shall provide such access to nonfederally owned land within the boundaries of the National Forest System as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof....” 16 U.S.C. § 3210(a).

<sup>3</sup> The right of condemnation through eminent domain, though rarely used by the Idaho Department of Lands, is a constitutional and statutory right to condemn private property for “public use” (not simple access to landlocked state land) or development of state resources. Idaho Const., art. I, § 14; Idaho Code §§ 7-701, *et seq.*



## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

April 21, 2020

The Honorable Scott Bedke  
Speaker of the House  
Idaho House of Representatives  
Idaho State Capitol  
700 W. Jefferson Street, Room E303  
Boise, Idaho 83702  
VIA EMAIL: [sbedke@house.idaho.gov](mailto:sbedke@house.idaho.gov)

Re: Request for AG analysis

Dear Speaker Bedke:

This letter is in response to your inquiry regarding whether the Idaho Legislature may convene itself outside of its annual regular session. As outlined below, the Idaho Constitution limits the Legislature to convening in a regular session each January, and then subject to the call of the Governor.

Article III, section 8 of the Idaho Constitution authorizes legislative sessions as follows:

The sessions of the legislature shall be held annually at the capital of the state, commencing on the second Monday of January of each year, unless a different day shall have been appointed by law, **and at other times when convened by the governor.**

(Emphasis added.) Idaho Code section 67-404 provides:

SESSIONS OF LEGISLATURE. At the hour of twelve o'clock M. on the Monday on or nearest the ninth day in January the regular session of the legislature shall be convened. The presiding officer must call the same to order and preside. Neither house must transact any business, but must adjourn from day to day, until a majority of all the members authorized by law to be elected are present. Each legislature shall have a term

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of two (2) years, commencing on December 1 next following the general election, and shall consist of a "First Regular Session" which shall meet in the odd-numbered years and a "Second Regular Session" which shall meet in the even-numbered years and any extraordinary session or sessions which may be called as provided by law.

Idaho Code section 67-404 establishes that a different day has been appointed by law for the convening of a regular (annual) session (Monday closest the 9th vs. second Monday). This appears to be the only legislative discretionary element of this provision. The Legislature is authorized to convene a single annual session per year on a date determined by the Legislature (or if no date is determined, on the second Monday in January). All other sessions of the Legislature must be convened by the Governor.

Article IV, section 9 of the Idaho Constitution defines the authority of the Governor and limits the scope of any special session to the call of the Governor:

**EXTRA SESSIONS OF LEGISLATURE.** The governor may, on extraordinary occasions, convene the legislature by proclamation, stating the purposes for which he has convened it; but when so convened it shall have no power to legislate on any subjects other than those specified in the proclamation; but may provide for the expenses of the session and other matters incidental thereto. He may also, by proclamation, convene the senate in extraordinary session for the transaction of executive business.

Finally, article II, section 1 of the Idaho Constitution prohibits any of the co-ordinate branches of government from exercising "any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted."

Thus, it appears that, in Idaho, the Legislature is without any authority to call itself into a special session. See a/so Miles v. Idaho Power Co., 116 Idaho 635, 639, 778 P.2d 757, 761 (1989) (citing

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Diefendorf v. Gallet, 51 Idaho 619, 638, 10 P.2d 307, 315 (1932)) (noting the Governor's power to convene an extraordinary session and noting that Idaho Constitution expressly left the responsibility and discretion with the governor for determining the existence of "extraordinary occasions").

If the Legislature desired this authority, the Idaho Constitution would need to be amended. This link will take you to the NCSL's summary of the different types of authority that states have enacted to authorize their legislatures to call themselves into special session: <https://www.ncsl.org/research/about-state-legislatures/special-sessions472.aspx>.

I hope that you find this analysis helpful.

Sincerely,

BRIAN KANE  
Assistant Chief Deputy

## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

June 12, 2020

The Honorable Brent Hill  
President Pro Tempore  
Idaho State Senate  
700 W. Jefferson Street, Room W331  
Boise, Idaho 83702  
VIA EMAIL: [bhill@senate.idaho.gov](mailto:bhill@senate.idaho.gov)

Re: Request for AG analysis

Dear Pro Tem Hill:

This letter is in response to your recent inquiry regarding the Legislature's authority to call itself into special session. As explained in greater detail below, the authority to call the Legislature into special session is reserved to the Idaho Governor.

### **Idaho's Constitution Assigns the Governor Authority to Call for a Special Session of the Idaho Legislature.**

Article III, section 8 of the Idaho Constitution authorizes legislative sessions as follows:

The sessions of the legislature shall be held annually at the capital of the state, commencing on the second Monday of January of each year, unless a different day shall have been appointed by law, **and at other times when convened by the governor.**

(Emphasis added.) Idaho Code section 67-404 provides:

SESSIONS OF LEGISLATURE. At the hour of twelve o'clock M. on the Monday on or nearest the ninth day in January the regular session of the legislature shall be convened. The presiding officer must call the same to order and preside. Neither house must transact any business, but must adjourn from day to day, until a majority of all the members authorized by law to be

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elected are present. Each legislature shall have a term of two (2) years, commencing on December 1 next following the general election, and shall consist of a "First Regular Session" which shall meet in the odd-numbered years and a "Second Regular Session" which shall meet in the even-numbered years and any extraordinary session or sessions which may be called as provided by law.

Idaho Code section 67-404 establishes that a different day has been appointed by law for the convening of a regular (annual) session (Monday closest the 9th vs. second Monday). This appears to be the only legislative discretionary element of this provision. The Legislature is authorized to convene a single annual session per year on a date determined by the Legislature (or if no date is determined, on the second Monday in January). All other sessions of the Legislature must be convened by the Governor.

Article IV, section 9 of the Idaho Constitution defines the authority of the Governor and limits the scope of any special session to the call of the Governor:

**EXTRA SESSIONS OF LEGISLATURE.** The governor may, on extraordinary occasions, convene the legislature by proclamation, stating the purposes for which he has convened it; but when so convened it shall have no power to legislate on any subjects other than those specified in the proclamation; but may provide for the expenses of the session and other matters incidental thereto. He may also, by proclamation, convene the senate in extraordinary session for the transaction of executive business.

Finally, article II, section 1 of the Idaho Constitution prohibits any of the co-ordinate branches of government from exercising "any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted."

Thus, it appears that, in Idaho, the Legislature is without any authority to call itself into a special session. See *a/so Miles v. Idaho*

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Power Co., 116 Idaho 635, 639, 778 P.2d 757, 761 (1989) (citing Diefendorf v. Gallet, 51 Idaho 619, 638, 10 P.2d 307, 315 (1932)) (noting the Governor's power to convene an extraordinary session and noting that Idaho Constitution expressly left the responsibility and discretion with the governor for determining the existence of "extraordinary occasions").

### **Even if Idaho Code section 67-422 Were Constitutional, the Criteria Set by Statute for Its Use Have Not Been Met.**

Idaho Code section 67-422 requires that in the event of an "attack," the Governor is required to call the Legislature into special session within 90 days of the attack, or the Legislature is required to call itself into special session if the Governor fails to issue the call for a special session. This provision is part of the Emergency Interim Legislative Succession Act. See Idaho Code §§ 67-413 through -426.

Idaho Code section 67-414 states:

DECLARATION OF POLICY. The legislature declares: (1) That recent technological developments make possible an enemy attack of unprecedented destructiveness, which may result in the death or inability to act of a large proportion of the membership of the legislature; (2) That to conform in time of attack to existing legal requirements pertaining to the legislature would be impracticable, would admit of undue delay, and would jeopardize continuity of operation of a legally constituted legislature; and (3) That it is therefore necessary to adopt special provisions as hereinafter set out for the effective operation of the legislature.

Idaho Code section 67-415(a) defines an attack as:

"Attack" means any action or series of actions taken by an enemy of the United States resulting in substantial damage or injury to persons or property in this state whether through sabotage, bombs, missiles, shellfire, or atomic, radiological, chemical, bacteriological, or biological means or other weapons or methods.

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This definition requires the following elements be met:

1. An action or series of actions;
2. Taken by an enemy of the United States;
3. Substantial injury to persons or property in the state; and
4. Through the listed means.

In reviewing the current pandemic, the first two statutory elements have not been met. First, there is no action or series of actions that have been taken in targeting the United States (or Idaho). This office's understanding of the events related to the cause of the pandemic is that it began in some fashion or another in China, but the actual details regarding the virus's spread are uncertain although numerous rumors and speculation exist. This office's understanding is that this release was not intentional nor targeted at the United States or Idaho. In fact, no evidence has been advanced or even rumored that China was targeting Idaho. Similarly, China is not considered an enemy of the United States. Although China is a rival to the United States, neither the President nor Congress has designated China as an enemy. This does not mean that evidence could surface at some point to indicate that this was an attack; simply, based on the current posture, the events thus far do not appear to meet the definition of an "attack" under Idaho Code section 67-415, even setting aside any concerns about the constitutionality of the statute.

**Reading Idaho Code § 67-422 in the Manner Required to Preserve Its Constitutionality Would Require that the Governor and All Constitutionally-Designated Successors to be Unavailable to Call for a Special Session.**

As stated above, Idaho Code section 67-422 requires the Governor to call the Legislature into special session in certain circumstances or the Legislature is required to call itself into special session if the Governor fails to issue the call.

There are significant constitutional issues with this statute. Under article II, section 1 of the Idaho Constitution, the Legislature cannot force the Governor to exercise a constitutional authority that is discretionary in nature.<sup>1</sup> Article IV, section 9 of the Idaho Constitution specifically vests the discretion to call and set the purpose for a special

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session with the Governor. Article II, section 1 limits the Legislature's authority to limit the Governor's discretion with regard to article IV, section 9. As explained in detail above, under Idaho's Constitution, only the Governor may call the Legislature into a special session. A statute cannot supersede the constitution's delegation of authority.

That said, Idaho Code section 67-422 may be constitutional in certain circumstances under article III, section 27, which provides the Legislature with specific authority to insure the continuity of state and local governmental operations:<sup>2</sup>

CONTINUITY OF STATE AND LOCAL GOVERNMENTAL OPERATIONS. The legislature, in order to insure continuity of state and local governmental operations in periods of emergency resulting from disasters caused by enemy attack or in periods of emergency resulting from the imminent threat of such disasters, shall have the power and the immediate duty (1) to provide for prompt and temporary succession to the powers and duties of public offices, of whatever nature and whether filled by election or appointment, the incumbents of which may become unavailable for carrying on the powers and duties of such offices, and (2) to adopt such other measures as may be necessary and proper for so insuring the continuity of governmental operations. **In the exercise of the powers hereby conferred, the legislature shall in all respects conform to the requirements of this constitution except to the extent that in the judgment of the legislature so to do would be impracticable or would admit of undue delay.**

(Emphasis added.) Importantly, this constitutional provision, as highlighted within the bolded sentence above, requires that the powers conferred upon the Legislature by this section be exercised in a manner consistent with the Idaho Constitution. The only exception is when compliance would be impracticable or cause an undue delay.

There are possible circumstances under article III, section 27 of the Idaho Constitution that Idaho Code section 67-422 could become



operable. If an attack occurred under which the Governor was unavailable, and the attack resulted in the unavailability of successors to the Governor's office<sup>3</sup> and the Legislature was unable to provide for the prompt and temporary succession of the office, then there could be a scenario in which the Legislature would be able to convene itself under article III, section 27 to ensure the continued operation of government.<sup>4</sup> In essence, the Legislature would have to find that compliance with the Idaho Constitution was either impracticable or would cause undue delay<sup>5</sup>—neither of which are applicable to the current pandemic situation.<sup>6</sup>

**No Circumstances Exist for the Legislature to Convene Itself.**

It is highly doubtful that circumstances exist for article III, section 27 of the Idaho Constitution to be operative at this time. Additionally, if article III, section 27 were to be applied at this time, the Legislature would have no authority to convene itself under article III, section 27 because no facts have been identified that require constitutional requirements be set aside.

None of the conditions under article III, section 27 have been met for the Legislature to take any steps to insure the continuity of state and local government. There has been no interruption of state or local government services. There has been no need for the Legislature to provide for succession of officers. No set of circumstances exists requiring the setting aside of any constitutional requirement at this time. Absent a call for a special session issued by the Governor under article IV, section 9, the Idaho Legislature has no authority to convene at this time.

I hope that you find this analysis helpful.

Sincerely,

BRIAN KANE  
Assistant Chief Deputy

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<sup>1</sup> Article II, section 1 limits:  
DEPARTMENTS OF GOVERNMENT. The powers of the government of this state are divided into three distinct

departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

<sup>2</sup> This constitutional provision was approved by the Idaho Legislature in 1959 and approved by the Idaho voters in 1960. It has not been amended since. Based on history, it is clear that this constitutional provision and its corresponding statutory provisions in Idaho Code sections 67-414 through 426, were all enacted in preparation for a nuclear attack, most likely from the former Soviet Union. The timing of these provisions coincide with the Soviet development and successful testing of an Intercontinental Ballistic Missile with nuclear capabilities along with the Soviet Union's successful completion of the Sputnik mission. In sum, all of these provisions can be read as addressing how Idaho state and local government would be put back together and continue on following a large-scale attack, such as a nuclear missile or bomb being detonated in Idaho's population centers.

<sup>3</sup> Article IV, section 14 of the Idaho Constitution outlines the succession to the Office of Governor in the event the Governor is unavailable as follows: The Lieutenant Governor, the President Pro Tempore of the Senate, the Speaker of the House. See *also* Idaho Code §§ 67-805, -805A.

<sup>4</sup> It is important to note that if this scenario unfolded, the authority under article III, section 27 likely is sufficient with or without a statutory structure. This is similar to the Governor's executive authority under article IV, sections 4 and 5: although the statutes may provide guidelines for how this authority is exercised, the statutes cannot limit the constitutional authority these provisions respectively grant.

<sup>5</sup> It is worth noting that the 90-day time limit within Idaho Code section 67-422 and "undue delay" within the constitutional provision are difficult to reconcile. In the context of a response to an attack, 90 days is a long time period. Placing the 90-day limit's contrast with the constitutional use of "undue delay" into context, within a year of adoption of these statutes, the Cuban Missile Crisis occurred. America stood on the precipice of nuclear war for 13 days.

<sup>6</sup> This provision likely operates to prohibit a legislatively convened legislative session with a reduced quorum requirement as well. Idaho Code section 67-425. The analysis of Idaho Code section 67-422 applies to Idaho Code section 67-425, making its constitutionality suspect at best. Absent a catastrophic event that has resulted in the interruption of government continuity and the unavailability of legislators, the provisions of article III, section 27 cannot be initiated. Additionally, article III, section 27 requires compliance with the constitutional requirements for legislative actions unless the requirements are impractical or cause undue delay. No such event has

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occurred and no set of circumstances exists for article III, section 27 to apply; therefore, the constitutional requirement for a quorum cannot be set aside. See Idaho Const. art. III, § 10.

## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

June 22, 2020

The Honorable Janice McGeachin  
Lieutenant Governor  
State of Idaho  
VIA HAND DELIVERY

Dear Lieutenant Governor McGeachin:

This letter is in response to your recent inquiry seeking a “copy of every legal opinion [my] office has provided to anyone related to the Covid-19 pandemic.” Within this, you also seek oral opinions and advice. In this regard, it appears that you are asking me to summarize all of the advice I, and my office, have delivered regarding the pandemic. In reading through your request, it does not appear that you are seeking legal advice or posing a specific legal question to me or my office.

Because you are seeking legal advice that I have delivered upon the request of specific clients and are not asking for legal advice for yourself, I will not disclose legal advice I have delivered pursuant to my duties in Idaho Code section 67-1406(1), (2), (6), (7). I respectfully decline your request for me to violate attorney/client privilege. Idaho Code section 3-201(5) requires attorneys: “To maintain inviolate the confidence, and at every peril to himself, to preserve the secrets of his clients.” This privilege is further recognized within the Idaho State Bar’s Idaho Rules of Professional Conduct under Rule 1.6. As the attorney for the State, all of its boards, commissions and agencies, I am precluded from disclosing my advice to those entities without their consent. If you were to seek legal advice from me or my office, my duty of confidentiality to you as the Lieutenant Governor would be the same. I expect that you can understand and respect my duty and responsibility with regard to ethically representing the State in all of its legal facets.

In your letter, you also make a policy argument that indicates I should have offered a public opinion as to the legality of the Governor’s Orders. I did just that. On April 3, 2020, I released a public statement indicating that the Governor’s Order was well within the constitutional

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and statutory boundaries of his authority. That statement received extensive coverage around the State and I have responded to follow-up requests from specific elected officials, departments and agencies. I am also currently defending the validity of the Governor's order in Federal District Court in the Herndon case. Herndon v. Little, Case No.1:20-cv-00205-DCN (filed May 1, 2020). Notably, you have not sought any legal analysis from me or my office.

I note that you have vastly misstated the holding of Idaho Press Club, Inc. v. State Legislature of the State, 142 Idaho 640, 132 P.3d 397 (2006). In that case, the court held that the Idaho Constitution article III, section 12 requirement that legislative business be transacted openly and not in secret, "does not apply to legislative committee meetings." Idaho Press Club at 646, 132 P.3d at 403. What it did NOT hold is that, "Governmental acts and powers exercised on behalf of the Idaho Republic and its citizens must usually be done in public," as you have improperly claimed. Further, your letter indicates your significant misunderstanding of the duties of the Attorney General. I am most happy to discuss these issues with you at a mutually convenient time.

As I stated at the outset of this letter, I am happy to provide you with legal advice if you have specific legal questions with regard to the legality of the Governor's Order. As I have stated publicly, the law of quarantine is well settled within the United States Constitutional system, and the United States Supreme Court recently confirmed the legality of a governor's order arising out of California. See S. Bay Pentecostal Church v. Newsom, 590 U.S. \_\_\_, 140 S. Ct. 1616, 207 L. Ed. 2d 154 (mem.) (2020).

I hope that you find this letter helpful and I hope that in the future you will reach out directly to me for legal advice.

Sincerely,

LAWRENCE G. WASDEN  
Attorney General

## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

July 7, 2020

The Honorable Sally Toone  
Idaho House of Representatives  
2096 East 1500 South  
Gooding, Idaho 83330  
VIA EMAIL: [stoone@house.idaho.gov](mailto:stoone@house.idaho.gov)

Re: CARES Funds Question

Dear Representative Toone:

You requested guidance on the legal validity of using Idaho's CARES Act funds to replace public safety personnel costs already budgeted for by counties and cities. I have identified your main question to be:

Does the CARES Act and the United States Department of the Treasury direction allow for the use of Idaho's CARES funds to pay salaries that were already budgeted for?

Yes, provided those costs are incurred for a substantially different use than accounted for in the most recent budget. A more thorough examination of the background and this issue is presented below.

### **The CARES Act Requirements**

The CARES Act requires that payments from CARES Act funds can only be used to cover costs that:

1. Are necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19);
2. Were not accounted for in the budget most recently approved as of March 27, 2020 for the State or government; and

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3. Were incurred during the period that begins on March 1, 2020, and ends on December 30, 2020.

CARES Act, 42 U.S.C. § 801(d).

Each of these three requirements must be satisfied for an expense to be eligible for the use of CARES Act funds. This letter relies upon the most current versions of these requirements as explained through the following pieces of guidance (both included as attachments to this letter) from the Department of the Treasury: (1) Coronavirus Relief Fund Guidance for State, Territorial, Local, and Tribal Governments published on April 22, 2020 (the “Guidance”); and (2) Coronavirus Relief Fund Frequently Asked Questions Updated as of June 24, 2020 (the “FAQ”).

As the first two requirements are the ones implicated by your question, these requirements—as explained by the Guidance and the FAQ—are analyzed and applied to your question below.

### **Necessary Expenditures Requirement**

The first requirement for costs to qualify for the use of CARES Act funds is that those costs “are **necessary expenditures** incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19)[.]” 42 U.S.C. § 801(d)(1) (emphasis added). The Guidance explains that:

[E]xpenditures must be used for actions taken to respond to the public health emergency. These may include expenditures incurred to allow the State, territorial, local, or Tribal government to respond directly to the emergency, such as by addressing medical or public health needs, as well as expenditures incurred to respond to second-order effects of the emergency, such as by providing economic support to those suffering from employment or business interruptions due to COVID-19-related business closures.

Funds may not be used to fill shortfalls in government revenue to cover expenditures that would not otherwise

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qualify under the statute. Although a broad range of uses is allowed, revenue replacement is not a permissible use of Fund payments.

Guidance at 1.

The Guidance then provides a list of eligible expenditures that qualify as necessary expenditures, including: “payroll expenses for public safety, public health, health care, human services, and similar employees whose services are substantially dedicated to mitigating or responding to the COVID-19 public health emergency.” Id. at 3.

The FAQ explains the new phrase “substantially dedicated” in the following question and response:

***How does a government determine whether payroll expenses for a given employee satisfy the “substantially dedicated” condition?***

The Fund is designed to provide ready funding to address unforeseen financial needs and risks created by the COVID-19 public health emergency. For this reason, and as a matter of administrative convenience in light of the emergency nature of this program, a State, territorial, local, or Tribal government may presume that payroll costs for public health and public safety employees are payments for services substantially dedicated to mitigating or responding to the COVID-19 public health emergency, unless the chief executive (or equivalent) of the relevant government determines that specific circumstances indicate otherwise.

FAQ at 1 (underlined emphasis added).

This explanation is continued in a later response within the FAQ: “As a matter of administrative convenience, the entire payroll cost of an employee whose time is substantially dedicated to mitigating or responding to the COVID-19 public health emergency is eligible, provided that such payroll costs are incurred by December 30, 2020.” Id. at 9.



Taking the above together, the entire payroll cost for public health and public safety employees are presumed to be necessary expenditures—as expenses substantially dedicated to mitigating or responding to COVID-19—satisfying the first requirement for using CARES Act funds.

### **Unbudgeted or Substantially Different Use Requirement**

The second requirement for costs to qualify for the use of CARES Act funds is that those costs “were not accounted for in the budget most recently approved as of March 27, 2020 [the date of enactment of the CARES Act] for the State or government[.]” 42 U.S.C. § 801(d)(2). However, the Guidance directs that costs meet this requirement “if either (a) the cost cannot lawfully be funded using a line item, allotment, or allocation within that budget or (b) the cost is for a substantially different use from any expected use of funds in such a line item, allotment, or allocation.” Guidance at 1-2. Thus, the second requirement is satisfied by a showing of the costs being actually unbudgeted **or** for a substantially different use than what was originally budgeted for.

The FAQ explains this substantially different use method of satisfying the requirement in this way:

Costs incurred for a “substantially different use” include, but are not necessarily limited to, costs of personnel and services that were budgeted for in the most recently approved budget but which, due entirely to the COVID-19 public health emergency, have been diverted to substantially different functions. This would include, for example, the costs of redeploying corrections facility staff to enable compliance with COVID-19 public health precautions through work such as enhanced sanitation or enforcing social distancing measures; the costs of redeploying police to support management and enforcement of stay-at-home orders; or the costs of diverting educational support staff or faculty to develop online learning capabilities, such as through providing information technology support that is not part of the staff or faculty’s ordinary responsibilities.

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Note that a public function does not become a “substantially different use” merely because it is provided from a different location or through a different manner. For example, although developing online instruction capabilities may be a substantially different use of funds, online instruction itself is not a substantially different use of public funds than classroom instruction.

FAQ at 1 (emphasis added).

As the only direction offered by the Guidance and the FAQ on this point, it is clear from the above that satisfying this requirement by demonstrating a substantially different use is a fact-intensive inquiry. It is unclear whether the Department of Treasury’s direction regarding assumptions as a matter of administrative convenience also apply in some way to this question. Due to the factual nature of determining whether any cost is for a substantially different use, the Office of the Attorney General is unable to conclude whether generally all public safety personnel costs satisfy this second requirement by being incurred for a substantially different use.

### **Conclusion**

The Department of Treasury’s direction does indicate that already budgeted for personnel costs can qualify for CARES Act funds payments if those costs are incurred for a substantially different use. Given the factual nature of determining whether any particular cost was incurred for a substantially different use coupled with the Department of Treasury’s Guidance that public safety expenditures presumptively qualify, this office cannot offer a definitive legal conclusion. The best approach appears to be a recognition that public safety is a presumptively valid use, but that caution should be exercised with attempts to expand the application of public safety personnel costs to positions not traditionally associated with public safety.

Please let us know if we may be of further assistance.

Sincerely,

BRIAN KANE  
Assistant Chief Deputy

## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

July 29, 2020

Brian Wonderlich  
General Counsel  
Office of the Governor  
State of Idaho  
P.O. Box 83720  
Boise, Idaho 83720  
VIA EMAIL: [brian.wonderlich@gov.idaho.gov](mailto:brian.wonderlich@gov.idaho.gov)

Re: Request for AG analysis – Our File No. 20-70182

Dear Mr. Wonderlich:

This letter is in response to your inquiry of this office on July 15, 2020, regarding existing liability protections for school entities and personnel during the ongoing pandemic. More specifically, this inquiry seeks review of this structure based upon the explanation provided within your inquiry of the existing liability protections available for school entities and personnel and specific protections for instances of the spread of communicable diseases at school or school-related activities.

This query is governed by the Idaho Tort Claims Act ("ITCA").<sup>1</sup> In general, the ITCA subjects governmental entities to liability for torts under the laws of the state of Idaho and provides exceptions from governmental liability in certain circumstances. School districts are political subdivisions that are covered by the ITCA.<sup>2</sup> Public charter schools are likely also covered by the ITCA; however, an amendment to the ITCA or the Public Charter Schools Act of 1998 may help to clarify public charter schools' coverage under the ITCA.<sup>3</sup>

Most ITCA defenses are raised as a motion to dismiss pursuant to Rule 12(b) of the Idaho Rules of Civil Procedure or its federal counterpart. If not dismissed at that stage, in order to survive a motion for summary judgment based upon an immunity defense under the ITCA, a plaintiff must (1) state a cause of action for which a private person or entity would be liable for money damages under the laws of the state of Idaho; (2) show that no exception to liability under the ITCA

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shields the alleged misconduct from liability; and (3) if no exception applies, show the plaintiff is entitled to recover based on the merits of its claim.<sup>4</sup>

1. Cause of action for which tort recovery is allowed under the laws of Idaho.

The ITCA states:

[E]very governmental entity is subject to liability for money damages arising out of its negligent or otherwise wrongful acts or omissions and those of its employees acting within the course and scope of their employment<sup>5</sup> or duties, whether arising out of a governmental or proprietary function, where the governmental entity if a private person or entity would be liable for money damages under the laws of the state of Idaho. . . .<sup>6</sup>

Under the ITCA, a cause of action for which a private person or entity would be liable under the laws of the state of Idaho is the tort of negligence.

2. Exceptions to governmental liability under the ITCA.

Several exceptions to governmental liability exist under Idaho Code sections 6-904 through 6-904C. Two such exceptions to governmental liability that may apply to school entities and personnel are in Idaho Code section 6-904(1), which states:

A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which:

1. Arises out of any act or omission of an employee of the governmental entity exercising ordinary care, in reliance upon or the execution or performance of a statutory or regulatory function, whether or not the statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a

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governmental entity or employee thereof, whether or not the discretion be abused.

The first, regulatory or operational function, clause of Idaho Code section 6-904(1):

affords governmental employees immunity if they act with ordinary care and in accordance with policy decisions. However, if a governmental employee fails to exercise ordinary care while carrying out the government's policy, then this exception would not afford immunity. "Indeed the fact that the first clause extends immunity to non-negligent conduct in the execution of policy carries with it the converse implication that there is no immunity where the government official was negligent in failing to execute that policy."<sup>7</sup>

Such immunity would only attach to routine, everyday functions executed or performed pursuant to statutory or regulatory policy, and not requiring evaluation of broad policy factors.<sup>8</sup> This exception to governmental liability would apply to the everyday functions of school entities and personnel, such as teachers, exercising ordinary care in the execution of policy and in accordance with such policy, even if the policy was negligently formed.<sup>9</sup>

The second, discretionary function, clause of Idaho Code section 6-904(1) "applies to government decisions entailing planning or policy formation, and 'does not include functions which involve *any* element of choice, judgment, or ability to make responsible decisions,' otherwise every government action would fall under the exception."<sup>10</sup> "Discretionary decisions do not involve the execution or performance of statutory or regulatory policy."<sup>11</sup> However, "decisions made under statutes and regulations which leave room for policy judgment in their execution *are* discretionary."<sup>12</sup>

Since discretionary functions involve actions qualitatively different from implementing policy, and since the former by definition involve the exercise of choice, judgment, and the ability to make responsible

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decisions, then discretionary functions must actually involve the formulation of policy.” . . . [D]ecisions that involve “consideration of the financial, political, economic and social effects of a policy or plan will generally be planning and ‘discretionary.’”<sup>13</sup>

The underlying policies of the discretionary function are to “permit governance without undue inhibition from the threat of tort liability and to limit judicial examination of policy decisions entrusted to other government branches.”<sup>14</sup> Immunity from governmental liability under the discretionary function exception would likely apply to the planning and policy decisions of school entities and personnel that involve consideration of the budgetary, financial, political, economic, and social effects of the policy or plan.<sup>15</sup>

Another exception to governmental liability that may apply to school entities and personnel is in Idaho Code section 6-904A(2), which states:

A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent and without reckless, willful and wanton conduct as defined in section 6-904C, Idaho Code, shall not be liable for any claim which:

. . .

2. Arises out of injury to a person or property by a person under supervision, custody or care of a governmental entity . . . .

Immunity under this subsection “arises from the status of the person(s) causing the injury, not the status of the person injured.”<sup>16</sup> Further, no immunity arises under this subsection when a claim arises out of an injury caused by a person not under the supervision, custody, or care of a governmental entity, such as a teacher<sup>17</sup> or contractor.<sup>18</sup> Finally, although school districts owe a duty under Idaho Code section 33-512(4) to act affirmatively to prevent foreseeable harm to persons in their custody,<sup>19</sup> that duty does not defeat the immunity protections of Idaho Code section 6-904A(2).<sup>20</sup> As with all exceptions to governmental liability, whether this exception applies will be a fact-specific question determined on a case-by-case basis.

3. Merits of the claim.

If no exceptions to liability apply, a plaintiff must then prove the merits of a negligence claim.

“The elements of a common law negligence claim are ‘(1) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant’s conduct and the resulting injury; and (4) actual loss or damage.’”<sup>21</sup>

School districts owe students a general duty of care to protect the students’ morals and health.<sup>22</sup> However, “[t]he duty is not an absolute mandate to prevent all harm; rather, schools are obligated to exercise due care and take reasonable precautions to protect their students.”<sup>23</sup> School districts must also “exclude from school, pupils with contagious or infectious diseases who are diagnosed or suspected as having a contagious or infectious disease or those who are not immune and have been exposed to a contagious or infectious disease; and to close school on order of the state board of health and welfare or local health authorities[.]”<sup>24</sup> Proving a breach of this duty will be a fact-specific question determined on a case-by-case basis.

The third element requires that the action is the proximate cause of the plaintiff’s injury.<sup>25</sup> Proximate cause is where there is a continuous sequence of events, “unbroken by any efficient intervening cause[.]”<sup>26</sup> The two components of proximate cause are the actual cause in fact and the legal cause.<sup>27</sup> Actual cause is a factual question of whether the action produced the injury.<sup>28</sup> Legal cause asks whether policy supports responsibility being attached to the consequences of conduct.<sup>29</sup> For liability to attach, a plaintiff must prove both. Proving causation will likely be the biggest hurdle for a plaintiff in any negligence action. In a case involving physical injuries resulting from a communicable disease, expert witness testimony or other evidence is required. A plaintiff in such a case would have to prove, by a preponderance of the evidence, through expert witness testimony or other evidence that he or she contracted the communicable disease at school, as opposed to anywhere else where community spread occurs. The source of the communicable disease would remain a factual

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question to be determined by the jury. If causation can be proved, a plaintiff must also prove damages.

If a negligence claim were successful, other protections and measures exist that a governmental entity can take.

#### 4. Liability cap and liability insurance.

For all other claims for which a school entity may be liable, a combined aggregate liability cap, including damages costs and attorney's fees, exists.

Idaho Code section 6-926(1) states:

[O]n account of bodily or personal injury, death or property damage, or other loss as the result of any one (1) occurrence or accident regardless of the number of persons injured or the number of claimants, shall not exceed and is limited to five hundred thousand dollars (\$500,000), unless the governmental entity has purchased applicable, valid, collectible liability insurance coverage in excess of said limit, in which event the controlling limit shall be the remaining available proceeds of such insurance.

The liability cap relates to any one occurrence regardless of the number of persons or the number of claimants. Though an occurrence is limited to persons or claimants, it is not otherwise defined in Idaho law and therefore is unsettled. Courts have allowed liability to exceed \$500,000 where multiple occurrences were found.<sup>30</sup>

School entities may mitigate exposure to risk of damages by purchasing applicable liability insurance. Political subdivisions are authorized and public charter schools are required to purchase liability insurance.<sup>31</sup> As stated above, the \$500,000 liability cap exists unless the school entity has purchased liability insurance coverage in excess of the cap.<sup>32</sup> Purchasing a coverage amount in excess of the liability cap will not provide additional coverage as the coverage amount will become the new limit. An option to explore could be determining whether a separate policy exists that specifically covers the actions to



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be taken for which the school district or public charter school does not have a current policy.

In sum, a plaintiff would have to successfully prove a cause of action for which tort recovery is allowed in Idaho, that no exceptions to governmental liability apply, and the merits of its claim to survive a motion for summary judgment based upon an immunity defense under the ITCA. Further, several liability protections are available to school entities and personnel under Idaho law.

I hope you find this analysis helpful. Please let me know if you have any questions.

Sincerely,

BRIAN KANE  
Assistant Chief Deputy

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<sup>1</sup> Idaho Code §§ 6-901, *et seq.*

<sup>2</sup> “Statutes, cases, and the Idaho Constitution itself have continually held that school districts are political subdivisions of the state itself and not of counties, cities, or municipal corporations.” Daleiden v. Jefferson Cty. Jt. Sch. Dist. No. 251, 139 Idaho 466, 470, 80 P.3d 1067, 1071 (2003) (citations omitted). “‘Political subdivision’ means any county, city, municipal corporation, health district, school district, irrigation district, an operating agent of irrigation districts whose board consists of directors of its member districts, special improvement or taxing district, or any other political subdivision or public corporation.” Idaho Code § 6-902(2). “‘Governmental entity’ means and includes the state and political subdivisions as herein defined.” Idaho Code § 6-902(3).

<sup>3</sup> Public charter schools formed under the Public Charter Schools Act of 1998 are “organized and managed under the Idaho nonprofit corporation act,” Idaho Code § 33-5204(1), but are generally considered public entities. See Nampa Charter Sch., Inc. v. DeLaPaz, 140 Idaho 23, 28, 89 P.3d 863, 868 (2004) (“[The Public Charter Schools Act of 1998] provides that public charter schools ‘operate within the existing public school system’ (I.C. § 33-5202) and ‘charter schools shall be part of the state’s program of public education.’ (I.C. § 33-5203). Moreover, the ‘board of directors of a charter school shall be deemed public agents’ and ‘a charter school shall be considered a public school for all purposes.’ (I.C. § 33-5204).” The court found that the public charter school was “a governmental entity in terms of its ability to sue or be sued.”); Nampa Classical Acad. v. Goesling, 447 F. App’x 776,

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777-78 (9th Cir. 2011) (footnote and citations omitted) (“Idaho law contains numerous provisions that, when taken as a whole, demonstrate that Idaho charter schools are governmental entities. Idaho charter schools are also subject to state control that weighs in favor of a finding that they are governmental entities. Like other political subdivisions, Idaho charter schools are creatures of Idaho state law that are funded by the state, subject to the supervision and control of the state, and exist at the state’s mercy.”). Further, Idaho Code section 33-5204(3) provides:

A public charter school may sue or be sued . . . to the same extent and on the same conditions as a traditional public school district, and its employees, directors and officers shall enjoy the same immunities as employees, directors and officers of traditional public school districts and other public schools, including those provided by chapter 9, title 6, Idaho Code.

However, this subsection only applies the ITCA to public charter school employees, directors, and officers, not public charter school entities, and no court has addressed the question of whether the ITCA applies to a public charter school entity formed under the Public Charter Schools Act of 1998.

<sup>4</sup> Sherer v. Pocatello Sch. Dist. No. 25, 143 Idaho 486, 490, 148 P.3d 1232, 1236 (2006) (citations omitted).

<sup>5</sup> “For the purposes of this act and not otherwise, it shall be a rebuttable presumption that any act or omission of an employee within the time and at the place of his employment is within the course and scope of his employment and without malice or criminal intent.” Idaho Code § 6-903(5).

<sup>6</sup> Idaho Code § 6-903(1) (emphasis added).

<sup>7</sup> Rees v. State, Dep’t of Health & Welfare, 143 Idaho 10, 20, 137 P.3d 397, 407 (2006) (quoting Sterling v. Bloom, 111 Idaho 211, 231, 723 P.2d 755, 775 (1986) (overruled on other grounds)) (remaining citation omitted).

<sup>8</sup> Lamont Bair Enters., Inc. v. City of Idaho Falls, 165 Idaho 930, 934, 454 P.3d 572, 576 (2019).

<sup>9</sup> See Brooks v. Logan, 127 Idaho 484, 488, 903 P.2d 73, 77 (1995), *superceded by statute on other grounds*, Idaho Code § 33-512B, as *recognized in* Stoddart v. Pocatello Sch. Dist. #25, 149 Idaho 679, 684-85, 239 P.3d 784, 789-90 (2010); Jones v. City of St. Maries, 111 Idaho 733, 745, 727 P.2d 1161, 1173 (1986).

<sup>10</sup> Shubert v. Ada County, 166 Idaho 458, 461 P.3d 740, 750 (2020) (quoting Czaplicki v. Gooding Jt. Sch. Dist. No. 231, 116 Idaho 326, 331, 775 P.2d 640, 645 (1989)).

<sup>11</sup> Lamont Bair Enters., Inc., 165 Idaho at 934, 454 P.3d at 576.

<sup>12</sup> Oppenheimer Indus., Inc. v. Johnson Cattle Co., 112 Idaho 423, 425, 732 P.2d 661, 663 (1986).

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<sup>13</sup> Lamont Bair Enters., Inc., 165 Idaho at 934, 454 P.3d at 576 (quoting Bingham v. Franklin County, 118 Idaho 318, 321, 796 P.2d 527, 530 (1990)).

<sup>14</sup> Id.

<sup>15</sup> Brooks, 127 Idaho at 488, 903 P.2d at 77.

<sup>16</sup> Coonse ex rel. Coonse v. Boise Sch. Dist., 132 Idaho 803, 806, 979 P.2d 1161, 1164 (1999).

<sup>17</sup> Hei v. Holzer, 139 Idaho 81, 87, 73 P.3d 94, 100 (2003).

<sup>18</sup> Sherer, 143 Idaho at 493, 148 P.3d at 1239.

<sup>19</sup> Mareci v. Coeur d'Alene Sch. Dist. No. 271, 150 Idaho 740, 743, 250 P.3d 791, 794 (2011).

<sup>20</sup> Brooks v. Logan, 130 Idaho 574, 577, 944 P.2d 709, 712 (1997).

<sup>21</sup> Haight v. Idaho Dep't of Transp., 163 Idaho 383, 390, 414 P.3d 205, 212 (2018) (quoting Griffith v. JumpTime Meridian, LLC, 161 Idaho 913, 915, 393 P.3d 573, 575 (2017)).

<sup>22</sup> Idaho Code § 33-512(4).

<sup>23</sup> Sherer, 143 Idaho at 491, 148 P.3d at 1237.

<sup>24</sup> Idaho Code § 33-512(7) (emphasis added). *See generally* IDAPA 16.02.10.460.

<sup>25</sup> Smith v. Sharp, 82 Idaho 420, 426, 354 P.2d 172, 175 (1960) (first citing Chatterton v. Pocatello Post, 70 Idaho 480, 223 P.2d 389 (1950); and then citing Clark v. Chrishop, 72 Idaho 340, 241 P.2d 171 (1952)).

<sup>26</sup> Id. (citing 65 C.J.S. *Negligence* § 103, p. 645).

<sup>27</sup> Cramer v. Slater, 146 Idaho 868, 875, 204 P.3d 508, 515 (2009) (citing Newberry v. Martens, 142 Idaho 284, 288, 127 P.3d 187, 191 (2005)).

<sup>28</sup> Newberry, 142 Idaho at 288, 127 P.3d at 191.

<sup>29</sup> Cramer, 146 Idaho at 875, 204 P.3d at 515 (quoting Newberry, 142 Idaho at 288, 127 P.3d at 191).

<sup>30</sup> *See* Eller v. Idaho State Police, 165 Idaho 147, 153-54, 443 P.3d 161, 167-68 (2019).

<sup>31</sup> Idaho Code §§ 6-923, 33-5204(5).

<sup>32</sup> Idaho Code § 6-926(1).

## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

August 13, 2020

The Honorable John Gannon  
Idaho House of Representatives  
Idaho State Capitol  
700 West Jefferson Street, Room EG63  
Boise, Idaho 83702  
VIA EMAIL: [jgannon@house.idaho.gov](mailto:jgannon@house.idaho.gov)

Re: Request for AG analysis

Dear Representative Gannon:

I am responding to your questions concerning the impact of the 2019 novel coronavirus (“COVID-19”) pandemic and the Americans with Disabilities Act (“ADA”). The application of the ADA to the Idaho Legislature is uncertain. At the outset, it is difficult to determine whether the Idaho Legislature meets the definition of employer. Additionally, each legislator is independently elected, and does not have an identifiable employer. But there is also an argument that a legislator with a qualifying disability under the ADA may be able to seek an accommodation under other provisions of the ADA that apply to the general public. In the abstract, it is impossible to provide a legally certain answer because ADA inquiries are extremely fact-intensive inquiries. Further, what constitutes a reasonable accommodation for one person may not be a reasonable accommodation for another. As a result, the determination of what constitutes a reasonable accommodation can only be made on a case-by-case basis that takes into account each requester’s particular disability(ies). The best legal answer this office can offer is that it is prepared to assist the Idaho Legislature in evaluating any ADA requests for accommodation if asked.

### **I. Application of The Americans With Disabilities Act Is Uncertain.**

*A. The Legislature As An Employer Is Legally Uncertain.*

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The primary question under the ADA is whether elected legislators are employees, and if they are employees, who is their employer? Employment protections are contained in Title I. The Equal Employment Opportunity Commission ("EEOC") authors a technical guide concerning enforcement of the ADA. With regard to elected officials, the technical guide takes the position that elected officials are likely considered employees under the ADA. This conclusion is based on the fact that both Title VII and the ADEA (Age Discrimination in Employment Act) specifically exempt elected officials from the definition of employee, while the ADA does not exempt them. But this conclusion is legally uncertain.

Resolution of this question is more difficult because, if the elected House members are employees, then the question is: who is their employer? To implement the changes that you propose (requiring masks or remote participation) would require a change in existing House rules. But if one considers the House their employer, the House may not meet the requirements of an employer ("a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or proceeding calendar year"). 42 U.S.C. § 12111(5). A typical legislative session lasts approximately 80 days, which using the ADA definition is approximately 11 weeks of work. Including the sporadic out of session work does not equate to "each working day in each of 20 or more calendar weeks." It is likely that the House is not an employer.

This analysis is complicated based on the definitions because House members are each distinct elected officials. There is no supervisor; although the House uses a Speaker, the Speaker's authority exists through the acquiescence of the House. Similarly, the Speaker does not pay members, and could not otherwise be considered their employer.

If a determination were made that legislators are employees, then the employer (assuming one could be identified) is required to engage in an interactive process to determine what reasonable accommodations can be made to allow them to perform the essential functions of their jobs. An employer is only entitled to deny a reasonable accommodation if it is an undue hardship. The undue hardship analysis is complex and difficult to establish in the abstract

and in actual application. The interactive process typically involves a discussion with the employee to determine what is being requested, and usually involves seeking further information from the employee's medical provider if the employer wishes to verify or further understand the medical condition at issue and obtain input from the medical provider on what reasonable accommodations would assist the employee in performing the essential functions of their job. The employer then typically has an internal meeting to determine what it can provide and whether the requested accommodations are reasonable or constitute an undue hardship. The employee is not entitled to the specific accommodation requested if the employer can identify an equally (or more) effective accommodation that allows the employee to perform the essential functions of the position. Failure to engage in the interactive process is itself a violation of the ADA in the Ninth Circuit and can subject an employer to a damage claim, as well as injunctive relief.

However, to qualify for Title I protections, an individual must have an ADA-qualifying disability. In the context of COVID-19, that could be a variety of things—either physical conditions that make the individuals at high risk, or anxiety/depression related to COVID-19. Different physical or mental health conditions may merit different reasonable accommodations. If the person does not have a qualifying disability, they may have other remedies they can request, but they are not entitled to a reasonable accommodation under the ADA. It should also be noted, however, that with the 2009 amendments to the ADA, Congress made clear that employers should not spend an undue amount of time on determining whether someone has a “qualifying disability,” but instead should focus on the ability to grant the requested accommodation(s).

### *B. ADA – Title II Access to Public Services.*

Although Title I of the ADA may be uncertain, Title II of the ADA, which pertains to the public's ability to access public services, appears applicable. The EEOC takes the position in the above-referenced technical guide that even if elected officials are not considered employees, they would be entitled to request accommodations under Title II of the ADA.

Title II provides:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

The Ninth Circuit held that facially neutral policies may violate Title II when such policies unduly burden disabled persons, even when the policies are consistently enforced. See McGary v. City of Portland, 386 F.3d 1259, 1265 (9th Cir. 2004). Examples given by the Court in McGary of facially neutral policies that unduly burdened disabled individuals were the PGA banning the use of golf carts in certain tournaments (unduly burdening golfers with mobility impairments); and Hawaii's policy of quarantining all incoming animals, including guide dogs, for 120 days (unduly burdening the visually impaired). See id.

In McGary, a man with AIDS sued the City of Portland ("City") after it cited him for nuisance abatement because he failed to clean up debris in his yard within 15 days after City officials notified him to do so. Id. at 1260-61. He had been in the hospital with meningitis and requested the City grant him additional time to clean up his yard, but the City denied his request. Id. The plaintiff raised several claims against the City, including a failure to reasonably accommodate him in violation of Title II of the ADA. Id. at 1261, 1264. The City argued he could not establish discrimination because the plaintiff could not establish he was treated any differently than an able-bodied person, *i.e.*, the City treated the disabled and able-bodied equally because it refused to grant anyone an extension. Id. at 1265. The Ninth Circuit did not find this a viable defense, and concluded the plaintiff need not establish he was treated differently in order to establish a claim for failure to reasonably accommodate. Id. at 1266. The Ninth Circuit concluded that modifications to municipal code enforcement fell under Title II's provisions. Id. at 1269.

The U.S. Department of Justice (“DOJ”) administers Title II of the ADA. With regard to Title II accommodations, the DOJ’s ADA Update: A Primer for State and Local Governments, states that the ADA allows and may require different treatment of a person with disabilities in situations where such treatment is necessary in order for a person with a disability to participate in a civic activity. U.S. DEP’T OF JUSTICE, CIV. RIGHTS DIV., DISABILITY RIGHTS SEC., ADA UPDATE: A PRIMER FOR STATE AND LOCAL GOVERNMENTS (Jun. 2015), at 3, [https://www.ada.gov/regs2010/titleII\\_2010/titleII\\_primer.pdf](https://www.ada.gov/regs2010/titleII_2010/titleII_primer.pdf) (“DOJ Guidance”). As you noted in your email, a specific example given in the DOJ Guidance is if a city council member has a disability that prevents her from attending city council meetings in person, then delivering papers to her home and allowing her to participate by telephone or videoconferencing would enable her to carry out her duties. See id. The DOJ Guidance goes on to state that only “reasonable” modifications are required. Id. at 3-4. Any modification that would result in a “fundamental alteration,” meaning a change in the essential nature of the entity’s programs or services, is not required. Id. at 4. As previously noted, reasonable accommodation determinations must take into account the individual requester’s situation. What constitutes a reasonable accommodation for one disability, may not constitute a reasonable accommodation for someone with a different disability.

*C. The Respective Chamber Should Carefully Consider Requests for Accommodation Under the ADA.*

With regard to both Title I and Title II of the ADA, if legislators provide evidence they have either a physical or mental disability and that their medical professionals advise them they cannot safely attend in person as currently planned because of that disability, then the applicable chamber should examine the requested accommodations and determine whether the requested accommodation or any equally effective alternative accommodations would enable the legislator to perform the essential functions of her position (for purposes of Title I) or enable her to participate in the services, programs or activities of the Legislature (for purposes of Title II). This analysis will necessarily include consideration of the individual’s disabilities and tailoring of the reasonable accommodation to the individual’s limitations. Under Title I, the requested accommodation can be denied if it is unreasonable or



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would constitute an undue hardship. Under Title II, the chamber only has to implement reasonable modifications. The question of whether a requested accommodation constitutes a “fundamental alteration” under Title II is going to be a fact-intensive inquiry. A claim brought under either section would likely be fact-intensive and therefore likely difficult to prevail upon in summary judgment.

### **II. Conclusion**

Recognizing that this office cannot offer a definitive legal answer at this time with regard to the ADA questions, this office will be available should the need arise to evaluate a request for accommodation, whether it constitutes an undue hardship, its reasonableness, and other legal issues at the request of the Legislature. Specifically, the determination of whether ZOOM is an acceptable alternative will depend on the numerous factors discussed within this letter.

I hope that you find this analysis helpful.

Sincerely,

BRIAN KANE  
Assistant Chief Deputy

## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

August 13, 2020

The Honorable Ilana Rubel  
Idaho House of Representatives  
Idaho State Capitol  
700 W. Jefferson Street, Room E329  
Boise, ID 83702  
VIA EMAIL: [irubel@house.idaho.gov](mailto:irubel@house.idaho.gov)

Re: Request for AG analysis – Our File No. 20-70562

Dear Representative Rubel:

I am responding to your questions concerning the impact of the 2019 novel coronavirus (“COVID-19”) pandemic on use of the Capitol Building. Within your inquiry, you have posed two questions, which are answered in turn below. The questions asked are:

1. Do public health orders of public health districts or cities apply within the Capitol Building; and
2. Can an elected Idaho State Representative request an accommodation under the ADA from the Idaho House of Representatives?

It appears that the adoption of title 67, chapter 16, Idaho Code, operates to exempt the Capitol Building from ordinances and certain public health orders issued by the City of Boise. However, as explained in greater detail below, the State of Idaho has not exempted itself from public health orders issued by public health districts, therefore the public spaces within the Capitol Building are likely subject to these orders.<sup>1</sup> Public health districts and cities are legally distinct political subdivisions of the State. But under article III, section 9 of the Idaho Constitution, the Legislature retains plenary authority over its chambers, meetings rooms, and offices and is therefore free to make its own determination as to what safety protocols to implement, if any, for the course of its proceedings. Similarly, constitutional officers are vested with executive authority within their office spaces in the Capitol Building and maintain the discretion to determine what safety protocols, if any, are to be observed within their executive office spaces.

The application of the Americans with Disabilities Act (“ADA”) to the Idaho Legislature is uncertain. At the outset, it is difficult to determine whether the Idaho Legislature meets the definition of employer. Additionally, each legislator is independently elected, and does not have an identifiable employer. But there is also an argument that a legislator with a qualifying disability under the ADA may be able to seek an accommodation under other provisions of the ADA that apply to the general public. In the abstract, it is impossible to provide a legally certain answer because ADA inquiries are extremely fact intensive inquiries. The best legal answer this office can offer is that it is prepared to assist the Idaho Legislature in evaluating any ADA requests for accommodation if asked.

**I. The Idaho Legislature Has Not Exempted the State or State Property From Certain Public Health Orders**

***A. The Governor’s Orders and Director of the Department of Health and Welfare’s Orders Are Applicable to the Capitol Building***

Within Idaho, public health responsibilities have been assigned at differing levels of government. At the State level, both the Governor and the Director of the Department of Health and Welfare (“IDHW”) have authority to issue public health orders or proclamations under Idaho Code sections 46-1008 and 56-1003(7), respectively. To date, Idaho has addressed the COVID-19 pandemic through orders issued by the Governor and the Director of IDHW. At this time, the Governor’s Stay Healthy Order dated May 30, 2020 (the “May 30 Order”) is in effect until August 21, 2020. See OFFICE OF THE GOVERNOR, PROCLAMATION (Aug. 7, 2020); *and see* STATE OF IDAHO, IDAHO DEP’T OF HEALTH & WELFARE, STAY HEALTHY ORDER (May 30, 2020). Neither State property nor the Capitol Building are exempted from this order.

***B. Idaho Code Title 67, Chapter 16 Likely Operates to Preempt City Health Orders from Application to the Capitol Building***

Cities have authority to issue public health orders. Under article XII, section 2 of the Idaho Constitution, cities have the authority as follows:

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Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws.

Although this general power is not absolute when it involves regulation of State property, the Idaho Legislature has further expressly granted cities the authority over public health issues through Idaho Code sections 50-304 and 50-606. See Michael C. Moore, *The Idaho Constitution and Local Governments – Selected Topics*, 31 IDAHO LAW REV. 417, 429-34 (1995) (local jurisdictions cannot regulate in conflict with state law or in areas preempted by state law). Notably, the Legislature has not exempted the State, State property, or the Capitol Building from application of these public health measures. But the Idaho Legislature may have preempted local regulations and ordinances in a more general fashion.

“Municipal corporations which enjoy a direct grant of power from the Idaho Constitution are, however, limited in certain respects. The city cannot act in an area which is so completely covered by general law as to indicate that it is a matter of state concern.” Caesar v. State, 101 Idaho 158, 161, 610 P.2d 517, 520 (1980). In Caesar, the Idaho Supreme Court considered the Legislature’s intent to occupy the field of activity concerning the building and maintenance of State facilities. The court held:

Since the purpose of Title 67, Chapter 23, as expressly stated in I.C. s 67-2311 was “to render all public buildings now or hereafter owned or maintained by the state of Idaho, or any official, department, board, commission or agency thereof reasonably free from hazards to the general public,” we deem that the legislature intended to allocate this police power to the state in its concern for the safety of the general public.

...

Taken as a whole, these statutes indicate that the area of state-owned buildings is completely covered by the general law and may not be subjected to an ordinance which is purely local in nature.

Id. at 161-62, 610 P.2d at 520-21.

A similar intent to allocate power exists with respect to hazards arising from the activity of persons or natural hazards such as the COVID-19 pandemic. Control of the Capitol Building and its grounds is governed by Idaho Code title 67, chapter 16. The purpose of the chapter is “[t]o establish a statute to comprehensively govern all aspects of the use, control, security, operation, and maintenance of the capitol building and its grounds.” Idaho Code § 67-1601(2)(a). The Legislature intended to preempt local regulation of the Capitol Building. In addition to the specific allocation of control over use, security, maintenance, and operation, the Legislature has established general laws governing public health. When implemented through a health order, these general laws also preempt the authority granted to local governments under Idaho Constitution article XII, section 2.

Although local city ordinances and orders may be inapplicable to the Capitol Building, the Legislature has not adopted any statutes exempting other State property from local public health orders.

*C. Public Health District Orders Do Not Appear to Have Been Preempted Nor Exempted From Application to the Capitol Building*

Idaho Code title 39, chapter 4 enacts a general system of public health districts throughout the state. These districts are to “operate and be recognized not as state agencies or departments, but as governmental entities whose creation has been authorized by the state, much in the manner as other single purpose districts.” Idaho Code § 39-401. Each public health district’s jurisdiction includes multiple counties. Idaho Code § 39-408. The Capitol Building is located in District No. 4, commonly known as Central District Health.

Districts are granted “the same authority, responsibility, powers, and duties in relation to the right of quarantine within the public health district as does the state.” Idaho Code § 39-415. Additionally, the districts are expressly authorized: “to do all things required for the preservation and protection of the public health and preventative health.” Idaho Code § 39-414(2). In accordance with its statutory powers and duties, on July 14, 2020, Central District Health imposed

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an order of quarantine. Central District Health updated the order on August 11, 2020 (the “CDH Order”).

The CDH Order prohibits gatherings of 50 persons or more,<sup>2</sup> requires a six-foot physical distancing between persons not residing within the same household, and provides that every person must wear a face covering over the person’s nose and mouth when a six-foot physical distance cannot be maintained, with limited exceptions as specified in the CDH Order. CDH Order, Restrictions, at 2-3 ¶¶ 2, 3, 4 (exceptions at 3 ¶ 4(B)). The CDH Order specifically includes government offices. *Id.* at 2-3 ¶ 4. In addition to the statutory authority granted to the Legislature, the Governor and Director’s May 30 Order provides that “[t]o decrease the spread of COVID-19, the cities, counties and public health districts of the State of Idaho may enact more stringent public health orders than those set out in this Order.” May 30 Order at 5 ¶ 11.

The Governor or Director of IDHW have the authority to issue an order exempting the public areas of the Capitol Building from the CDH Order, or to impose their own order within the public spaces of the Capitol Building.

*D. The Legislature and Constitutional Officers have plenary constitutional authority over their respective chambers, offices, meeting rooms, and personnel management.*

Article II, section 1 of the Idaho Constitution limits the ability of separate branches of government to exercise authority over coordinate branches:

Section 1. DEPARTMENTS OF GOVERNMENT. The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

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This means that management decisions within each branch of government are left to the respective authority of that separate and coordinate branch of government. The Legislature cannot dictate the management of the Governor's office, nor can the Governor dictate the management of Legislative business. In terms of discretion over the conduct and management of their respective offices, each branch is afforded its distinct discretion within the boundaries of its Capitol Building office space. Idaho Code § 67-1602.

Article III, section 9 of the Idaho Constitution provides:

POWERS OF EACH HOUSE. Each house when assembled shall choose its own officers; judge of the election, qualifications and returns of its own members, determine its own rules of proceeding, and sit upon its own adjournments; but neither house shall, without the concurrence of the other, adjourn for more than three days, nor to any other place than that in which it may be sitting.

This provision gives the Idaho Legislature absolute authority over its workspaces and proceedings. In essence, each house has the discretion to identify and implement the safety protocols it deems necessary to conduct its proceedings within its respective chamber, offices, and committee rooms. PAUL MASON, NAT'L CONFERENCE OF STATE LEGISLATURES, ET AL., MASON'S MANUAL OF LEGISLATIVE PROCEDURE, § 805(5). Although the Legislature and the constitutional officers have authority over the management and safety of their respective offices, chambers, and meeting rooms, the public areas of the Capitol Building are likely subject to the CDH Order until that order is rescinded, superseded by the Governor or Director IDHW, or exempted by the Idaho Legislature.

### **II. Application of the Americans with Disabilities Act Is Uncertain**

#### *A. The Legislature As An Employer Is Legally Uncertain*

The primary question under the ADA is whether elected legislators are employees, and if they are employees, who is their

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employer? Employment protections are contained in Title I. The Equal Employment Opportunity Commission (“EEOC”) authors a technical guide concerning enforcement of the ADA. With regard to elected officials, the technical guide takes the position that elected officials are *likely* considered employees under the ADA. (Emphasis added.) This conclusion is based on the fact that both Title VII and the ADEA (Age Discrimination in Employment Act) specifically exempt elected officials from the definition of employee, while the ADA does not exempt them. But this conclusion is legally uncertain.

Resolution of this question is more difficult because, if the elected House members are employees, then the question is; who is their employer? To implement the changes that you propose (requiring masks or remote participation) would require a change in existing House rules. But if one considers the House their employer, the House may not meet the requirements of an employer (“a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or proceeding calendar year”). 42 U.S.C. § 12111(5). A typical legislative session lasts approximately 80 days, which using the ADA definition is approximately 11 weeks of work. Including the sporadic out of session work does not equate to “each working day in each of 20 or more calendar weeks.” It is likely that the House is not an employer.

This analysis is complicated based on the definitions because House members are each distinct elected officials. There is no supervisor; although the House uses a Speaker, the Speaker’s authority exists through the acquiescence of the House. Similarly, the Speaker does not pay members, and could not otherwise be considered their employer.

If a determination were made that legislators are employees, then the employer (assuming one could be identified) is required to engage in an interactive process to determine what reasonable accommodations can be made to allow them to perform the essential functions of their jobs. An employer is only entitled to deny a reasonable accommodation if it is an undue hardship. The undue hardship analysis is complex and difficult to establish in the abstract and in actual application. The interactive process typically involves a discussion with the employee to determine what is being requested,



and usually involves seeking further information from the employee's medical provider if the employer wishes to verify or further understand the medical condition at issue and obtain input from the medical provider on what reasonable accommodations would assist the employee in performing the essential functions of their job. The employer then typically has an internal meeting to determine what it can provide and whether the requested accommodations are reasonable or constitute an undue hardship. The employee is not entitled to the specific accommodation requested if the employer can identify an equally (or more) effective accommodation that allows the employee to perform the essential functions of the position. Failure to engage in the interactive process is itself a violation of the ADA in the Ninth Circuit and can subject an employer to a damage claim, as well as injunctive relief.

However, to qualify for Title I protections, an individual must have an ADA-qualifying disability. In the context of COVID-19, that could be a variety of things—either physical conditions that make the individuals at high risk, or anxiety/depression related to COVID-19. If the person does not have a qualifying disability, they may have other remedies they can request, but they are not entitled to a reasonable accommodation under the ADA. It should also be noted, however, that with the 2009 amendments to the ADA, Congress made clear that employers should not spend an undue amount of time on determining whether someone has a “qualifying disability,” but instead should focus on the ability to grant the requested accommodation(s).

#### *B. ADA – Title II Access to Public Services*

Although Title I of the ADA may be uncertain, Title II of the ADA, which pertains to the public's ability to access public services appears applicable. The EEOC takes the position in the above-referenced technical guide that even if elected officials are not considered employees, they would be entitled to request accommodations under Title II of the ADA.

Title II provides:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such

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disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C.A. § 12132.

The Ninth Circuit held that facially neutral policies may violate Title II when such policies unduly burden disabled persons, even when the policies are consistently enforced. See McGary v. City of Portland, 386 F.3d 1259, 1265 (9th Cir. 2004). Examples given by the Court in McGary of facially neutral policies that unduly burdened disabled individuals were the PGA banning the use of golf carts in certain tournaments (unduly burdening golfers with mobility impairments); and Hawaii's policy of quarantining all incoming animals, including guide dogs, for 120 days (unduly burdening the visually impaired). See id. In McGary, a man with AIDS sued the City of Portland ("City") after it cited him for nuisance abatement because he failed to clean up debris in his yard within 15 days after City officials notified him to do so. Id. at 1260-61. He had been in the hospital with meningitis and requested the City grant him additional time to clean up his yard, but the City denied his request. Id. The plaintiff raised several claims against the City, including a failure to reasonably accommodate him in violation of Title II of the ADA. Id. at 1261, 1264. The City argued he could not establish discrimination because the plaintiff could not establish he was treated any differently than an able-bodied person, *i.e.*, the City treated the disabled and able-bodied equally because it refused to grant anyone an extension. Id. at 1265. The Ninth Circuit did not find this a viable defense, and concluded the Plaintiff need not establish he was treated differently in order to establish a claim for failure to reasonably accommodate. Id. at 1266. The Ninth Circuit concluded that modifications to municipal code enforcement fell under Title II's provisions. Id. at 1269.

The U.S. Department of Justice ("DOJ") administers Title II of the ADA. With regard to Title II accommodations, the DOJ's ADA Update: A Primer for State and Local Governments, states that the ADA allows and may require different treatment of a person with disabilities in situations where such treatment is necessary in order for a person with a disability to participate in a civic activity. U.S. DEP'T OF JUSTICE,

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CIV. RIGHTS DIV., DISABILITY RIGHTS SEC., ADA UPDATE: A PRIMER FOR STATE AND LOCAL GOVERNMENTS (Jun. 2015), at 3, [https://www.ada.gov/regs2010/titleII\\_2010/titleII\\_primer.pdf](https://www.ada.gov/regs2010/titleII_2010/titleII_primer.pdf) (“DOJ Guidance”). A specific example given in the DOJ Guidance is if a city council member has a disability that prevents her from attending city council meetings in person, then delivering papers to her home and allowing her to participate by telephone or videoconferencing would enable her to carry out her duties. See *id.* The DOJ Guidance goes on to state that only “reasonable” modifications are required. *Id.* at 3-4. Any modification that would result in a “fundamental alteration,” meaning a change in the essential nature of the entity’s programs or services, is not required. *Id.* at 4.

### *C. The Respective Chamber Should Carefully Consider Requests for Accommodation Under the ADA*

With regard to both Title I and Title II of the ADA, if legislators provide evidence they have either a physical or mental disability and that their medical professionals advise them they cannot safely attend in person as currently planned because of that disability, then the applicable chamber should examine the requested accommodations and determine whether the requested accommodation or any equally effective alternative accommodations would enable the legislator to perform the essential functions of her position (for purposes of Title I) or enable her to participate in the services, programs or activities of the Legislature (for purposes of Title II). Under Title I, the requested accommodation can be denied if it is unreasonable or would constitute an undue hardship. Under Title II, the chamber only has to implement reasonable modifications. The question of whether a requested accommodation constitutes a “fundamental alteration” under Title II is going to be a fact-intensive inquiry. A claim brought under either section would likely be fact-intensive and therefore likely difficult to prevail upon in summary judgment.

### **III. Conclusion**

Recognizing that this office cannot offer a definitive legal answer at this time with regard to the ADA questions, this office will be available should the need arise to evaluate a request for accommodation, whether it constitutes an undue hardship, its

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reasonableness, and other legal issues at the request of the Legislature. With regard to compliance with the Governor, Director of IDHW, and public health district orders, it is likely that they apply within the public spaces of the Capitol Building, while specific constitutional officers and each chamber of the Legislature has authority over their respective chambers, offices, meeting rooms, and other areas.

I hope that you find this analysis helpful.

Sincerely,

BRIAN KANE  
Assistant Chief Deputy

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<sup>1</sup> Under article IV, section 5 of the Idaho Constitution, and Idaho Code section 46-1008, the Governor has the authority to issue an executive order or proclamation that could supersede any orders issued by the Idaho Department of Health and Welfare, a public health district, or a city.

<sup>2</sup> The CDH Order restricts social gatherings to ten persons or fewer and other gatherings, including governmental activities, to fifty persons or fewer. See CDH Order, Restrictions, at 2 ¶ 2.

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August 17, 2020

The Honorable Lori Den Hartog  
Senator, Idaho State Senate  
Idaho State Capitol  
P. O. Box 83720  
Boise, ID 83720  
VIA EMAIL: [Idenhartog@senate.idaho.gov](mailto:Idenhartog@senate.idaho.gov)

Re: Request for AG analysis

Dear Senator Den Hartog:

You have asked this office to analyze the impact of the U.S. Supreme Court's decision in Espinoza v. Montana Department of Revenue, 140 S. Ct. 2246, 207 L. Ed 2d 679 (2020), on article IX, section 5 of the Idaho Constitution (Idaho's Blaine Amendment referred to herein as "Idaho's 'no-aid' provision").

The Espinoza case concerned a scholarship program established by the Montana Legislature. The Montana Supreme Court determined that Montana's no-aid provision barred private religious schools from receiving scholarships. The U.S. Supreme Court answered "whether the Free Exercise Clause precluded the Montana Supreme Court from applying Montana's no-aid provision to bar religious schools from the scholarship program."<sup>1</sup>

The U.S. Supreme Court held that by applying the no-aid provision to prohibit a religious school from obtaining scholarships solely because it was a religious school required the law to be analyzed under the strictest scrutiny. Montana was then forced to show that it was advancing an interest of the highest order (a compelling interest). Montana also had to show that the application of the no-aid provision to bar the private religious school from receiving scholarships was narrowly tailored to the state's compelling interest. In short, Montana had to show that applying the no-aid provision to the scholarship program survived strict scrutiny, and the U.S. Supreme Court held it did not.

## **SUMMARY CONCLUSION OF ESPINOZA'S EFFECT ON ENFORCEMENT OF IDAHO'S BLAINE AMENDMENT**

Regarding Idaho's no-aid provision, it has not been found to be unconstitutional in all situations. But if Idaho adopts a law that gives a government benefit and then uses the no-aid provision to deny a church or other religious entity that government benefit *solely* because the church is a church or the religious entity is a religious entity, then Espinoza could require that the law be reviewed under strict scrutiny. Idaho would be forced to demonstrate a compelling interest and show that its act of applying the no-aid provision was narrowly tailored to the compelling interest. If Idaho could not make both showings, then the no-aid provision would be held unconstitutional as applied to whatever government benefit was at issue. Whether strict scrutiny would be applied will depend on the specifics of that law.

The Espinoza opinion also identified circumstances where a no-aid law could be applied constitutionally. Espinoza discussed an earlier Supreme Court case where a Washington scholarship program had prohibited scholarships from being used by students to prepare for the ministry, but had allowed scholarships to be used at a religious school generally. The Court held that the Washington program was constitutional because (1) there was a "historic and substantial" state interest in not funding training of the clergy, and (2) Washington had narrowly focused the no-aid provision to bar funding for a certain field of study.

## **DISCUSSION**

This analysis will address the background of the Montana law at issue in Espinoza, key points from the Espinoza decision, and conclude by explaining Espinoza's application to Idaho's no-aid provision.

### **I. Montana's law at issue in Espinoza.**

The Montana Legislature had established a tax credit for taxpayers who donated to certain student scholarship organizations.<sup>2</sup> The scholarship organizations were then permitted to use the donations

to award scholarships for children's tuition at qualified private schools under a statutory framework.<sup>3</sup>

The Montana Legislature required that this scholarship program comply with Montana's "no-aid" provision.<sup>4</sup> That provision provides:

**Aid prohibited to sectarian schools.** (1) The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.

Mont. Const. art. X, § 6(1). This provision is similar to Idaho's.<sup>5</sup> The Montana Department of Revenue then promulgated an administrative rule that prohibited families from using the scholarships at religious schools.<sup>6</sup>

The lawsuit began when three mothers of children attending a qualifying, private Christian school sued the Montana Department of Revenue.<sup>7</sup> (One mother's child had received scholarships, and the other two had children who were eligible for and planned to apply for scholarships.<sup>8</sup>) As a result of the no-aid policy, the scholarship would not be permitted to go to the private Christian school. After the trial court sided with the mothers and enjoined the administrative rule, the case went to the Montana Supreme Court.<sup>9</sup> The Montana Supreme Court reversed, but decided to invalidate the entire scholarship because the program could not be squared with the no-aid provision.<sup>10</sup>

## **II. The key points from the Supreme Court's decision in Espinoza.**

The U.S. Supreme Court first remarked that there was no dispute that the scholarship program was permissible under the Establishment Clause of the First Amendment.<sup>11</sup> Thus the question was whether the no-aid provision as applied to the scholarship program violated the Free Exercise Clause.<sup>12</sup>

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To answer this question, the U.S. Supreme Court turned back to the Trinity Lutheran<sup>13</sup> decision where it held that “disqualifying otherwise eligible recipients from a public benefit ‘solely because of their religious character’ imposes ‘a penalty on the free exercise of religion that triggers the most exacting scrutiny.’”<sup>14</sup>

The U.S. Supreme Court concluded that Montana’s no-aid provision, when applied to the scholarship program, had two impacts that caused it to fall under Trinity Lutheran’s principle and require that the law be analyzed under strict scrutiny:<sup>15</sup>

1. It prohibited private religious schools from public benefits “solely because of the religious character of the schools.”
2. It prohibited parents from being able to use the scholarships at private religious schools of their choice, “again solely because of the religious character of the school.”

The Espinoza opinion reinforces the Supreme Court’s earlier decision in Trinity Lutheran that a public benefit that excludes religious schools from the benefit solely because the schools are religious will be examined under strict scrutiny.<sup>16</sup> To satisfy strict scrutiny, the government’s action must advance interests of the highest order and be narrowly tailored to those interests.<sup>17</sup>

In Espinoza, the no-aid provision, when applied to the scholarship program, barred religious schools from a government benefit (the scholarship program) solely because they were religious schools.<sup>18</sup> Thus, strict scrutiny applied.<sup>19</sup> Montana did not show both a compelling interest and a narrowly tailored application of the no-aid provision. Montana’s claimed interest in creating greater separation of church and state was not compelling where it infringed free exercise; infringement of First Amendment rights did not promote religious freedom; and public education was not safeguarded by the application of the no-aid provision, as the provision only required religious schools to bear the weight.<sup>20</sup>

The Supreme Court did distinguish its prior decision in Locke, which upheld Washington’s scholarship program, even though the Washington program prevented a student from using a scholarship to obtain a degree in theology.<sup>21</sup> (Washington had a no-aid provision and



a specific statute applying that provision to the program.<sup>22</sup>) Washington had permitted scholarships to be used at private schools, including private religious schools, but had not permitted the scholarships to be used toward devotional theology degrees.<sup>23</sup> In Locke, the Court upheld the program because Washington had zeroed-in on a “particular ‘essentially religious’ course of instruction at a religious school.”<sup>24</sup> In addition, there was a historic state interest in not funding the training of clergy.<sup>25</sup>

The Locke decision was not applicable to Montana’s scholarship program. Unlike Locke: (i) Montana did not “zero in” on a particular essentially religious course of instruction, and (ii) there was no “historic and substantial” state interest in disqualifying religious schools from government aid.<sup>26</sup>

One additional point should be noted. The U.S. Supreme Court had to work from the premise that Montana’s scholarship program “qualified as ‘aid’ prohibited under the Montana Constitution.”<sup>27</sup> This is because the Montana Supreme Court had interpreted aid under state law. Although Montana interpreted its no-aid provision to apply to the scholarship program does not mean that other states would reach the same conclusion. As the Supreme Court pointed out, “many States today—including those with no-aid provisions—provide support to religious schools through vouchers, scholarships, tax credits, and other measures. According to petitioners, 20 of 37 States with no-aid provisions allow religious options in publicly funded scholarship programs, and almost all allow religious options in tax credit programs.”<sup>28</sup>

### **III. Analyzing Espinoza’s impact on Idaho’s no-aid provision.**

Idaho’s no-aid provision is similar to Montana’s, and provides:

SECTARIAN APPROPRIATIONS PROHIBITED.  
Neither the legislature nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian or religious society, or for any sectarian or religious purpose, or to help support or

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sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever; nor shall any grant or donation of land, money or other personal property ever be made by the state, or any such public corporation, to any church or for any sectarian or religious purpose; provided, however, that a health facilities authority, as specifically authorized and empowered by law, may finance or refinance any private, not for profit, health facilities owned or operated by any church or sectarian religious society, through loans, leases, or other transactions.

Idaho Const. art. IX, § 5. Idaho's no-aid provision has been amended one time (in 1980) since its original incorporation in the Idaho Constitution adopted in 1890.

The provision has been infrequently analyzed by the Idaho Supreme Court. In the one case decided post-amendment, the Idaho Supreme Court held that the no-aid provision was preempted by the Individuals with Disabilities Education Act in the situation before it.<sup>29</sup> Prior to the amendment, the Idaho Supreme Court concluded that the no-aid provision prevented the Idaho Health Facilities Authority from acting upon an agreement with a hospital to issue bond anticipation notes that would be repaid.<sup>30</sup> And in another, the Idaho Supreme Court concluded that the no-aid provision prohibited a school district from providing transportation to students of parochial schools.<sup>31</sup> In two other cases, Idaho's no-aid provision was not analyzed in great detail.<sup>32</sup>

This office has previously addressed or analyzed the impact of Idaho's no-aid provision in multiple Opinions of the Attorney General.<sup>33</sup> Most recently, this office answered several questions related to the impact of Trinity Lutheran in an Opinion from 2018.<sup>34</sup>

With respect to Idaho's no-aid provision, the U.S. Supreme Court in Espinoza did not decide whether *all* no-aid provisions were constitutional, either on their face or as applied in a particular situation. And the U.S. Supreme Court did not address Idaho's no-aid provision, much less even cite it. Instead, the U.S. Supreme Court decided

whether Montana's no-aid provision was unconstitutional *as applied* to the scholarship program that Montana had crafted.<sup>35</sup> Nonetheless, there are some points that can be made with respect to Idaho's no-aid provision.

*First*, Idaho's no-aid provision has not yet been ruled or found to be facially unconstitutional. The U.S. Supreme Court in the Trinity Lutheran decision expressly said it was not addressing in that case whether no-aid provisions fall within the scope of the rule "that 'a law targeting religious beliefs as such is never permissible.'"<sup>36</sup> And the Supreme Court's decision in Espinoza only addressed the Montana no-aid provision and only held it was unconstitutional as applied to the particular scholarship program.

*Second*, the Espinoza opinion makes clear that there may be situations in which Idaho's no-aid provision, as applied to a particular government benefit, would be subject to strict scrutiny review. For example, if Idaho applies the no-aid provision to prohibit a religious entity from receiving a government benefit solely because the religious entity is a religious entity, then a court considering a Free Exercise Clause challenge to such action would be able to analogize the situation before it to that before the U.S. Supreme Court in Trinity Lutheran and Espinoza. If the case was controlled by Trinity Lutheran and Espinoza, then the court would be required to apply strict scrutiny analysis—rather than rational basis review<sup>37</sup>—and determine whether the State's action furthers a compelling government interest and whether the State's action is narrowly tailored to that interest.

*Third*, both Trinity Lutheran and Espinoza involved discrimination based upon the religious character of the institution—the fact that it was a religious school—or what the Supreme Court calls "religious status." The Supreme Court rejected Montana's characterization that it was discriminating against religious *uses* of government aid—*i.e.*, the Christian school using the money for religious classes.<sup>38</sup> The Supreme Court also made clear that it had not yet decided that something other than strict scrutiny would apply to discrimination against a religious *use* of government benefits. Some members of the Supreme Court even questioned whether there was "a meaningful distinction between discrimination based on use or conduct and that based on status."<sup>39</sup> Practically, this means that if Idaho ever

has a public benefit that discriminates against a religious entity's *use* of the benefit, and such discrimination is challenged in court, then Idaho may need to be prepared to show that the law would survive strict scrutiny analysis.

*Fourth*, the U.S. Supreme Court's discussion of Locke appears to indicate that there are situations in which no-aid provisions can be upheld as constitutional in some circumstances. The Espinoza opinion distanced the situation in Montana from Locke in two "critical ways." First, Washington's scholarship program in Locke had zeroed-in on and discriminated against a particular "essentially religious" course of instruction at a religious school, but had permitted scholarships to be used at "pervasively religious schools."<sup>40</sup> Second, there was a "historic and substantial" state interest that had existed since the founding era in not funding the training of clergy.<sup>41</sup> Outside of Locke, the Supreme Court also noted that many states, including those with no-aid provisions, had provided some kind of support to religious schools.

*Fifth*, the fact that Idaho's no-aid provision has been amended in the last half century will likely not matter, or not matter much, to a court when determining its constitutionality. Although Montana had pointed out that many states had adopted no-aid provisions and that Montana had re-adopted its own in the 1970s, the Supreme Court was unconvinced that there was a historical and substantial tradition against aiding religious schools, like there was in Locke in aiding clergy.<sup>42</sup> Justice Alito's concurrence offered the most thorough response to the claim in Espinoza that the re-adoption or re-enactment of the Montana no-aid provision in the 1970s had "cleansed [the provision] of its bigoted past," but the majority opinion did not confront the argument head-on.<sup>43</sup>

## CONCLUSION

In summary, the Espinoza opinion reiterated the concepts of Trinity Lutheran when a no-aid provision was applied to discriminate against a religious entity based on the fact that it was a religious entity. The Idaho no-aid provision has not yet been ruled or found to be unconstitutional. However, if the State passes legislation that prohibits a benefit to a religious institution, that law may need to satisfy strict scrutiny standards if challenged in court. Whether strict scrutiny would be applied will depend upon the specifics of that legislation.

## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

Please contact me with any questions.

Sincerely,

BRIAN V. CHURCH  
Deputy Attorney General

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<sup>1</sup> Espinoza, 140 S. Ct. at 2254.

<sup>2</sup> Mont. Code Ann. §§ 15-30-3101, *et seq.*

<sup>3</sup> Mont. Code Ann. § 15-30-3103.

<sup>4</sup> Mont. Code Ann. 15-30-3101.

<sup>5</sup> For comparison, Idaho's art. IX, § 5 reads:

Section 5. SECTARIAN APPROPRIATIONS PROHIBITED. Neither the legislature nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian or religious society, or for any sectarian or religious purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever; nor shall any grant or donation of land, money or other personal property ever be made by the state, or any such public corporation, to any church or for any sectarian or religious purpose; provided, however, that a health facilities authority, as specifically authorized and empowered by law, may finance or refinance any private, not for profit, health facilities owned or operated by any church or sectarian religious society, through loans, leases, or other transactions.

<sup>6</sup> Mont. Admin. R. 42.4.802(1)(a) (2015).

<sup>7</sup> Espinoza, 140 S. Ct. at 2252.

<sup>8</sup> Id.

<sup>9</sup> Id. at 2252-53.

<sup>10</sup> Id. at 2253.

<sup>11</sup> Id. at 2254.

<sup>12</sup> Id.

<sup>13</sup> Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 198 L. Ed. 2d 551 (2017).

<sup>14</sup> Espinoza, 140 S. Ct. at 2255 (quoting Trinity Lutheran, 137 S. Ct. at 2021).

- <sup>15</sup> Id.
- <sup>16</sup> Trinity Lutheran, 137 S. Ct. at 2021-22.
- <sup>17</sup> Espinoza, 140 S. Ct. at 2260 (citation omitted).
- <sup>18</sup> Id. at 2255.
- <sup>19</sup> Id. at 2260.
- <sup>20</sup> Id. at 2260-61.
- <sup>21</sup> Id. at 2257 (discussing Locke v. Davey, 540 U.S. 712, 124 S. Ct. 1307, 158 L. Ed. 2d 1 (2004)).
- <sup>22</sup> Locke, 540 U.S. at 715-16.
- <sup>23</sup> Espinoza, 140 S. Ct. at 2257.
- <sup>24</sup> Id.
- <sup>25</sup> Id. at 2258.
- <sup>26</sup> Id. at 2257-58.
- <sup>27</sup> Id. at 2254.
- <sup>28</sup> Id. at 2259.
- <sup>29</sup> Doolittle ex rel. Doolittle v. Meridian Jt. Sch. Dist. No. 2, 128 Idaho 805, 813, 919 P.2d 334, 342 (1996). Cf. Hoppock ex rel. Hoppock v. Twin Falls Sch. Dist. No. 411, 772 F. Supp. 1160 (D. Idaho 1991) (concluding that Equal Access Act preempted application of Idaho's no-aid provision in that setting).
- <sup>30</sup> Bd. of Cty. Comm'rs of Twin Falls Cty. v. Idaho Health Facilities Auth., 96 Idaho 498, 509, 531 P.2d 588, 599 (1974).
- <sup>31</sup> Epeldi v. Engelking, 94 Idaho 390, 398, 488 P.2d 860, 868 (1971).
- <sup>32</sup> State v. Hansen, 101 Idaho 350, 612 P.2d 1197 (1980); Pike v. State Bd. of Land Comm'rs, 19 Idaho 268, 113 P. 447 (1911).
- <sup>33</sup> E.g., 1978 Idaho Att'y Gen. Ann. Rpt. 74; 1989 Idaho Att'y. Gen. Ann. Rpt. 42; 1997 Idaho Att'y Gen. Ann. Rpt. 13; 2018 Idaho Att'y Gen. Ann. Rpt. 5. *See also* Informal Guideline (Feb. 7, 1992), 1992 Idaho Att'y Gen. Ann. Rpt. 54.
- <sup>34</sup> 2018 Idaho Att'y Gen. Ann. Rpt. 5.
- <sup>35</sup> E.g., Espinoza, 140 S. Ct. at 2256. *See also id.* at 2278 (Ginsburg, J., with Kagan, J., dissenting) ("this Court's majority accepts—that the provision is unconstitutional as applied").
- <sup>36</sup> Trinity Lutheran, 137 S. Ct. at 2024 n.4 (citations omitted). *See also* Ronald D. Rotunda & John E. Nowack, 6 TREATISE ON CONST. L. § 21.17 (May 2020 Westlaw ed.).
- <sup>37</sup> E.g., Ricks v State Contractors Bd., 164 Idaho 689, 700, 435 P.3d 1, 12 (Ct. App. 2018) (applying rational basis review to claim regarding requirement of listing Social Security Number on application), *writ of certiorari pending to U.S. Supreme Court*.
- <sup>38</sup> Espinoza, 140 S. Ct. at 2256.
- <sup>39</sup> Id. at 2257.
- <sup>40</sup> Id.
- <sup>41</sup> Id. at 2257-58.
- <sup>42</sup> Id. at 2259.

<sup>43</sup> Id. at 2273 (Alito, J., concurring).

## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

August 20, 2020

The Honorable Brent Hill  
President Pro Tempore  
Idaho State Senate  
Idaho State Capitol  
700 W. Jefferson Street  
Boise, Idaho 83702  
VIA EMAIL: [bhill@senate.idaho.gov](mailto:bhill@senate.idaho.gov)

The Honorable Todd Lakey  
Idaho State Senate  
Idaho State Capitol  
700 W. Jefferson Street  
Boise, Idaho 83702  
VIA EMAIL: [tlakey@senate.idaho.gov](mailto:tlakey@senate.idaho.gov)

Re: Request for AG Analysis

Dear Mr. Pro Tem and Senator Lakey:

This e-mail is in response to your inquiry regarding the Governor's Proclamation calling for an extraordinary session. Specifically you have asked whether the Legislature is bound to only consider the RSs identified within the proclamation, or is bound by the subjects identified within the RSs. As explained below, the Legislature has the authority to legislate on the subjects identified within the RSs and Proclamation.

### **The Governor Identifies the Purposes and Subjects of the Extraordinary Legislative Session.**

Article IV, section 9 provides:

The governor may, on extraordinary occasions, convene the legislature by proclamation, stating the purposes for which he has convened it; but when so convened it shall have no power to legislate on any subjects other than those specified in the proclamation; but may provide for



## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

the expenses of the session and other matters incidental thereto. He may also, by proclamation, convene the senate in extraordinary session for the transaction of executive business.

Within his proclamation, the Governor identified the following purposes for the convening of the Legislature:

To consider the passage of RS28046 regarding absentee voting during the pandemic, RS28045 regarding in person polling locations during the pandemic, and RS28049 regarding civil liability....

Governor's Proclamation, at 2 (Aug. 19, 2020). Although specific RSs are identified, the **subjects** of those RSs are also identified. This call allows the Idaho Legislature to address these subjects in any manner it sees fit. "RS #" is short for "Routing Slip #." This routing slip is a proposed piece of legislation that has not been introduced into either chamber of the Legislature. The only way for an RS to be introduced is through a print hearing within a germane committee. Under article IV, section 9 of the Idaho Constitution, the Governor's Proclamation's reference to specific RS #s are best interpreted as suggestions by the Governor as to how the Legislature could address the subjects identified in the Proclamation. The Legislature is not bound to them, nor reduced to a simple yes or no vote on only those RS #s. Under article IV, section 9, the Legislature still retains its authority and processes under article III, even though the subjects of those processes may be limited by the article IV, section 9 Proclamation.

### **The Legislature is Vested with the Authority to Address the Purposes and Subjects Identified by the Governor.**

This conclusion is reinforced by article III, section 1 of the Idaho Constitution which vests the legislative power of the State in the Senate and House of Representatives. The Governor exercises the executive authority of identifying the timing and purpose(s) of an extraordinary session of the Legislature, but article IV, section 9 conveys no legislative authority upon the Governor. That authority remains wholly with the Idaho Legislature through the Senate and House of Representatives.

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Absent a constitutional grant of legislative authority to the Governor, article II, section 1 prevents the executive branch from exercising any power properly belonging to the legislative branch. Interpreting article IV, section 9's authority to authorize the Governor to limit the Legislature to a specific piece of legislation would likely violate article II, section 1 as well as improperly invade the province of article III, section 1. The Legislature has the ability to propose its own legislation<sup>1</sup> as long that legislation falls within the purpose and subjects of the Governor's Proclamation.

Importantly, all other aspects associated with the legislative process remain in place for purposes of an extraordinary session. If the Governor disagrees with the legislation adopted to address the purpose and subject of the Proclamation, the Governor retains his ability to veto that legislation under article IV, section 10. Equally, the Legislature retains its ability to override a gubernatorial veto.

As explained above, the Governor identifies the purpose and subject for the extraordinary session. The Governor may also propose a potential piece of legislation to address the identified subject, but the Legislature is not bound to only the Governor's proposal. The Legislature is only bound to addressing the subjects identified within the Proclamation. The Legislature may fulfill the call of the Governor's Proclamation through its independent legislative authority under article III of the Idaho Constitution.

I hope that you find this analysis helpful.

Sincerely,

BRIAN KANE  
Assistant Chief Deputy

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<sup>1</sup> Routing slips are administrative tools for legislators and the Legislative Services Office to track and organize legislative ideas that may or may not become actual pieces of legislation. An RS is not a piece of legislation and will not become one unless it is printed through a committee and assigned a bill number. Legally, an RS has no status.

## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

August 25, 2020

The Honorable Brent Hill  
President Pro Tempore  
Idaho State Senate  
700 W. Jefferson Street, Room W331  
Boise, Idaho 83702  
VIA EMAIL: [bhill@senate.idaho.gov](mailto:bhill@senate.idaho.gov)

Re: Request for AG Analysis

Dear Mr. Pro Tem:

This letter is in response to your inquiry regarding the authority of cities and public health districts. Specifically, you have asked whether city and public health district's health order authority is reliant upon a Governor's Declaration of Emergency under Idaho Code sections 46-1008 or 46-601?<sup>1</sup> As explained below, cities and public health districts have their own independent authority to issue public health orders and do not require a Governor's executive order or proclamation or an order of quarantine issued by the Director of the Department of Health and Welfare.

### **Public Health Districts Are Independently Empowered to Protect Public Health**

Under Idaho law, the state has been divided into seven public health districts. Idaho Code § 39-408. Each of these public health districts has the statutorily designated legal authority to both issue health measures and orders of quarantine. There is no question that the Legislature has provided ample authority for public health districts to address the pandemic within their jurisdictions, and this authority is not confined to any requirement for an executive emergency declaration or order of quarantine.<sup>2</sup> Under Idaho Code section 39-414(2), health districts have the authority to:

To do all things required for the preservation and protection of the public health and preventive health, and such other things delegated by the director of the

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state department of health and welfare or the director of the department of environmental quality and this shall be authority for the director(s) to so delegate.

Recognizing that public health districts are authorized “[t]o do all things required for the preservation and protection of the public health and preventative health...,” the districts have the independent ability to adopt measures designed to both prevent and address the pandemic. Nothing within this grant of authority suggests that it may only be exercised upon the issuance of a Governor’s declaration of emergency or the Director’s order of quarantine. These provisions recognize the independent discretionary authority of the public health districts.

This independent authority is reinforced by Idaho Code section 39-415, which provides public health districts with equivalent authority to that of the Director of the Department of Health and Welfare to issue orders of quarantine:

QUARANTINE. The district board shall have the same authority, responsibility, powers, and duties in relation to the right of quarantine within the public health district as does the state.

Public health districts thus have independent authority to adopt measures necessary for the preservation and protection of public and preventative health along with all of the quarantine authority assigned to the State. The State’s quarantine authority is found in Idaho Code section 56-1003(7):

The director, under rules adopted by the board of health and welfare, shall have the power to impose and enforce orders of isolation and quarantine to protect the public from the spread of infectious or communicable diseases or from contamination from chemical or biological agents, whether naturally occurring or propagated by criminal or terrorist act.

(a) An order of isolation or quarantine issued pursuant to this section shall be a final agency action

for purposes of judicial review. However, this shall not prevent the director from reconsidering, amending or withdrawing the order. Judicial review of orders of isolation or quarantine shall be de novo. The court may affirm, reverse or modify the order and shall affirm the order if it appears by a preponderance of the evidence that the order is reasonably necessary to protect the public from a substantial and immediate danger of the spread of an infectious or communicable disease or from contamination by a chemical or biological agent.

(b) If the director has reasonable cause to believe a chemical or biological agent has been released in an identifiable place, including a building or structure, an order of quarantine may be imposed to prevent the movement of persons into or out of that place, for a limited period of time, for the purpose of determining whether a person or persons at that place have been contaminated with a chemical or biological agent which may create a substantial and immediate danger to the public.

(c) Any person who violates an order of isolation or quarantine shall be guilty of a misdemeanor.

Based upon Idaho Code section 39-415, it appears that the entirety of this provision, along with the rules promulgated by the Board of Health and Welfare are incorporated into the authority of the public health districts. This legislative delegation of authority, combined with Idaho Code section 39-414(2)'s direction that local public health districts "do all things required for the preservation and protection of the public health and preventative health," operate to authorize local public health districts to take any necessary measures to address the COVID-19 pandemic. Those measures properly adopted have the force of law and are not reliant on any external exercise of power or authority.

**Cities Have Independent Authority to Adopt Any Necessary Public Health Ordinances**

Idaho's Constitution also provides city governments with a broad grant of police power. Article XII, section 2 provides:

**LOCAL POLICE REGULATIONS AUTHORIZED.** Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws.

This provision provides cities with independent constitutional authority to enact provisions designed to protect the health, safety, and welfare of their citizens, unless the Legislature has proscribed such regulations. In this instance, the Idaho Legislature has specifically authorized cities to address situations requiring protection of the public health.

Idaho Code section 50-304 directs:

**PRESERVATION OF PUBLIC HEALTH.** Cities may establish a board of health and prescribe its powers and duties; pass all ordinances and make all regulations necessary to preserve the public health; prevent the introduction of contagious diseases into the city; make quarantine laws for that purpose and enforce the same within five (5) miles of the city.

This grant of authority is both express and broad. In particular, the direction to pass all ordinances necessary to preserve the public health along with the direction to prevent the introduction of contagious diseases within the city enables Idaho cities to directly address public health issues before and after it enters a city.

Mayors have the authority to enforce these measures. Idaho Code section 50-606 provides:

**POLICE POWERS OF MAYOR.** The mayor shall have such jurisdiction as may be vested in him by ordinance

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over all places within five (5) miles of the corporate limits of the city, for the enforcement of any health or quarantine ordinance and regulation thereof, and shall have jurisdiction in all matters vested in him by ordinance, except taxation, within one (1) mile of the corporate limits of said city and over such properties as may be owned by the city without the corporate limits.

When the city council and mayor's authority are combined, the independent discretionary authority of cities to respond to both the threat and the presence of a public health issue does not require the issuance of a Governor emergency declaration or Director's order of quarantine.

Under Idaho's constitution and statutes, political subdivisions within Idaho are granted independent discretionary authority to address public health issues. This authority is overlapping and concurrent, which serves as a powerful check and balance to ensure public health decisions are made to the appropriate level of government.

Sincerely,

BRIAN KANE  
Assistant Chief Deputy

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<sup>1</sup> The Governor's emergency authority flows from article IV, sections 4 and 5 of the Idaho Constitution, where supreme executive authority is vested in the office as well as assigned to the Governor the authority of Commander In Chief of the Idaho National Guard. The combination of these two grants of authority affirmatively place the Governor as the executive officer in times of emergency.

<sup>2</sup> An order of quarantine issues from the Director of the Department of Health and Welfare. Idaho Code § 56-1003(7). As explained within this letter, public health districts have the same authority as the Director to issue orders of quarantine. Idaho Code § 39-415.

## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

September 24, 2020

Matt Tobeck  
Local Government Policy Analyst  
Idaho Freedom Foundation  
802 W. Bannock Street, Suite 405  
Boise, Idaho 83702  
VIA EMAIL: [Matt@IdahoFreedom.org](mailto:Matt@IdahoFreedom.org)

Re: Open Meetings Law Investigations – Central District  
Health Board of Health – Our File No. 20-70935

Dear Mr. Tobeck:

Thank you for your letter of September 2, 2020, expressing the Idaho Freedom Foundation's concerns about this office's approach to open meetings law compliance. Within the letter, you complain about the manner in which this office addressed recent open meeting complaints against the Central District Health Board of Health ("Board"), which were referred to this office by the Ada County Prosecutor.

Each of the complaints referenced in your letter were thoroughly investigated by this office. In your letter, you do not seem to have any concerns regarding the investigation process used by this office. Rather, your concerns appear focused on this office's enforcement methods at the conclusion of those investigations. More specifically, you seem to suggest that enforcement of Idaho's Open Meetings Law is only achieved through the imposition of civil penalties.

This office's enforcement of Idaho's Open Meetings Law is much broader than merely seeking to impose civil penalties upon what are largely part-time, volunteer board or commission members. Enforcement by this office focuses heavily on education, training, and corrective action with the goal of increasing transparency and public access. In this regard, the law and this office focus on encouraging compliance with the Open Meetings Law. It is essential to note that most of Idaho's government is comprised of ordinary citizens stepping up to volunteer on behalf of their fellow citizens to act in the best



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interests of the State of Idaho. Idaho Code section 74-208(7) carefully balances the requirements of the law with a non-technician's familiarity of the law by permitting Idaho's citizen volunteer boards, commissions, and other units of government to recognize, admit, and correct their mistakes under the Open Meetings Law.

In the matters referenced in your letter, this office's efforts resulted in the Board taking action to address and correct the substance of each complaint.<sup>1</sup> Additionally, as part of this office's enforcement of the Open Meetings Law, the Board, its staff, and its legal counsel all participated in an open meetings training session provided by staff from this office where the substance of each of these complaints was discussed. In short, through the investigation and enforcement efforts of this office, the Board has corrected its internal processes for developing and posting meeting notices, as well as the manner in which it provides for in-person meeting attendance by the public during an ongoing pandemic.

I agree that Idaho's Open Meeting Laws are an important foundational element of government. The best outcome for the State of Idaho and its citizens is ongoing compliance with the law. I hope that you will agree that the cure provision in Idaho Code section 74-208(7) along with training in the law will help to ensure that governmental entities at all levels of Idaho's government comply with the law.

Sincerely,

BRIAN KANE  
Assistant Chief Deputy

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<sup>1</sup> It is essential to note that in each of the scenarios complained of, the public was never excluded or unable to observe the conduct of the meeting. In fact, each of the meetings in which a complaint was made is still accessible in its entirety for public review at <https://www.youtube.com/user/dfotsch/videos> (last visited Sept. 17, 2020).

## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

October 14, 2020

Chair Betty Ann Nettleton  
Central District Health Board  
707 N. Armstrong Pl.  
Boise, ID 83704  
VIA EMAIL: [ba-nettleton@hotmail.com](mailto:ba-nettleton@hotmail.com)

Re: Request for opinion on authority over public health  
district personnel decisions

Dear Chair Nettleton:

On September 23, you requested an opinion from the Attorney General's Office about possible conflicts in laws for the public health districts and the State Division of Human Resources ("DHR"). In particular, you note public health districts must act "in conformance" or "in compliance" with the personnel system established in Idaho Code sections 67-5301, *et seq.*, but that the statute applies only to state entities and employees, which do not include the public health districts. You also note the public health districts are partially funded by the Legislature, but it is unclear whether this acts as a grant of implied power in the executive branch over public health district personnel decisions. You follow with specific questions now restated and answered with your initial observations in mind.

**Question No. 1: Is it constitutional to legislatively create an independent public body corporate and politic under the Idaho Constitution, while simultaneously relegating some power over the direction of the body to the State? In other words, is there such a thing as a hybrid political entity, both independent for some purposes and under State control for other purposes?**

Answer: Yes. The Idaho Constitution empowers the Legislature to enact laws. Idaho Const. art. III, § 1. Those laws are constrained under the Idaho Constitution, in that no law may abridge constitutionally declared rights, for example: equal protection under the law, religious liberty, freedom from cruel and unusual punishment. Idaho Const. art. I, §§ 1-23. Also, no law may permit a department of

## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

government—defined as the legislative, executive and judicial departments—to “exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.” Idaho Const. art. II, § 1. However, nothing in the Idaho Constitution prohibits the Legislature from creating a political entity that is charged with defined powers and duties, but that is otherwise statutorily restricted.

Independent bodies corporate and politic exist throughout Idaho government as legislatively created entities. Generally, these entities are created to insulate the State or a political subdivision from liability or responsibility, but the specific parameters of these entities are within the Legislature’s discretion. Bd. of Cty. Comm’rs of Twin Falls Cty. v. Idaho Health Facilities Auth., 96 Idaho 498, 531 P.2d 588 (1974). Independent bodies corporate and politic have characteristics of a private corporation, but are not wholly state agencies either. Id. at 507, 531 P.2d at 597. Structurally, the defining elements of an independent body corporate and politic are an absence of private parties with the right to control or manage it; the inability of private parties to change the foundational structure and public purpose of the body; and the inability of private parties to change the underlying law creating the entity—that authority lies solely with the Legislature. Id. Recognizing that independent bodies corporate and politic are created by the Legislature, the Legislature necessarily retains the authority to define their legal scope and purpose. In sum, the ability of the Legislature to create an independent body corporate and politic requires that legislative oversight of the body be retained, otherwise the entity runs the risk of violating article III, section 19’s prohibition on creating corporations.

Stated another way, the Idaho Constitution does not permit a legislatively created political entity, such as public health districts, to be wholly independent of legislative or state oversight. The extent to which the applicability of state laws to the public health districts amounts to “state control” or a “relegation of power” is addressed in answer to Question No. 2.

As you note, public health districts are not state agencies, their employees are not classified state employees, and the State’s personnel system was created for classified state employees. But

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neither are they private corporations. One searching for the law that applies Idaho's personnel system to public district health employees will not find it in the personnel system law, but must look to Idaho Code sections 39-401 and -410. Although this is confusing, it does not present a conflict in the laws.

Importantly, nothing in the personnel law precludes the Legislature from requiring its later application to employees of hybrid political entities. Nor does the Legislature's inclusion of such provision in the public health district law conflict with the policy or intent of the personnel act. In chapter 53, title 67, Idaho Code, the Legislature established DHR in the Office of the Governor, "to administer a personnel system . . . for classified Idaho employees" whereby such employees "shall be examined, selected, retained and promoted on the basis of merit and their performance of duties, thus effecting economy and efficiency in the administration of state government." Idaho Code § 67-5301. The Legislature declared:

the goal of a total compensation system for state employees shall be to fund a competitive employee compensation and benefit package that will attract qualified applicants to the work force; retain employees who have a commitment to public service excellence; motivate employees to maintain high standards of productivity; and reward employees for outstanding performance.

Idaho Code § 67-5309A(1). To this end, the Legislature outlined a compensation plan requiring establishment of benchmark job classifications, salary administration and budget plans; and linking pay advancement with performance and market changes. Idaho Code § 67-5309B(1), (2), (3). "Notwithstanding any other provision of Idaho Code," the Legislature declared its policy "that all classified employees of like classification and pay grade allocation shall be treated in a substantially similar manner with reference to personnel benefits." Idaho Code § 67-5309B(8).

The intent of the act is to implement a broadly applicable system to support equal treatment of classified state employees. Requiring that the public health districts comply with the state personnel system

ensures the same policies implemented for classified state employees are also provided to public health district employees.

**Question No. 2: Assuming that the creation of such an entity is constitutional, does the executive branch, acting under the above-mentioned statutes, have the power to override the personnel decisions of district boards, both as to the various executive directors and as to other employees? Put another way, can a district board “comply with” the state personnel system without executive branch interference with salary and benefit decisions?**

Answer: Nothing in chapter 4, title 39, Idaho Code, or chapter 53, title 67, Idaho Code, provides for the executive branch to “override” personnel decisions of public health district boards as to executive directors or employees. The Legislature specifically provided that the district health director shall have and exercise the power and duty:

[w]ith the approval of the district board to . . . [f]ix the rate of pay and appoint, promote, demote, and separate such employees and to perform such other personnel actions as are needed from time to time in conformance with the requirements of chapter 53, title 67, Idaho Code.

Idaho Code § 39-413(4)(b).

The Legislature established an administrator of DHR to administer the personnel system. Idaho Code § 67-5308(1). The DHR administrator’s powers and duties include employing persons as necessary to fulfill his or her duties to administer the personnel system. Id. The statute does not assign to the DHR administrator nor to DHR, the power or duty to make discrete employment decisions for and within each department throughout the state. Under section 67-5302, “appointing authority” is defined as “the officer, board, commission, person or group of persons authorized by statute or lawfully delegated authority to make appointments or to employ personnel in any department.” Idaho Code § 67-5302(3). Under section 39-413(4), set forth above, the appointing authority for the public health districts is the district health director, along with the district board.

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The DHR administrator has the power and authority to adopt rules for the administration of the personnel system. Idaho Code § 67-5309. DHR rules are at IDAPA 15.04.01. Rule 8 provides, “[t]hese rules apply to Public Health Districts even though specific references are to state employment.” IDAPA 15.04.01.008. The public health districts must comply with DHR rules, thus their personnel decisions—including salary and benefit decisions—are constrained by requisite compliance with DHR rules. Thus, DHR rules could be construed as “state control” over, or a “relegation of power” from the public health districts to DHR.

For example, Rule 21 prohibits discrimination “in regards to appointments, promotions, demotions, separations, transfers, compensation, or other terms, conditions, or privileges of employment because of race, national origin, color, sex, age, religion, disability, or veteran status (unless under other than honorable conditions).” IDAPA 15.04.01.021. To the extent a public health district director or board would seek to promote or provide privileges of employment based on sex, race or age, this would be prohibited and thus “interfered with” by this “executive branch” rule.

**Question No. 3: Assuming that the creation of such an entity is not constitutional, does the legislative direction that the districts conform or comply with state statutes applicable to state classified employees have any effect?**

Answer: Because the answer to Question No. 1 was that creation of the described hybrid entity is constitutional, this question is not addressed.

**Question No. 4: Does legislative appropriation of state funds to the public health districts grant the power to the executive branch to control the districts’ use of such funds as to personnel decisions?**

Answer: No. The appropriation of state funds does not create tacit unspecified power by the executive branch over the public health districts’ use of state funds in personnel decisions.

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As already discussed, the Legislature gave the district health director the power and duty, with the district board's approval, to make personnel decisions, so long as they conform to the personnel system act. Idaho Code § 39-413(4)(b). Nothing in the public health district law makes an exception to that power, based on legislative appropriation of state funds for the public health districts.

Under section 39-422, the Legislature established a special public health district fund in the State Treasury, within which there are seven divisions, one for each of the seven public health districts. Idaho Code § 39-422(1). "Each division within the fund will be under the exclusive control of its respective district board of health and no moneys shall be withdrawn from such division of the fund unless authorized by the district board of health or its authorized agent." Id. The district boards must submit annual budgets to their budget committees, which must be "agreed upon and approved by a majority of the budget committee." Idaho Code § 39-423. The act also requires the public health districts to submit annual requests "to the legislature for money to be used to match funds contributed by the counties pursuant to section 31-862, Idaho Code, for the maintenance and operation of district health departments." Idaho Code § 39-425(1). Nothing in these provisions ties state funding to control over personnel decisions as set forth in section 39-413(4).

I hope you find this analysis helpful.

Sincerely,

DAPHNE HUANG  
Deputy Attorney General  
Health and Human Services Division

## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

October 27, 2020

Christopher D. Boyd  
Adams County Prosecuting Attorney  
Adams County Courthouse  
P.O. Box 604  
Council, Idaho 83612  
VIA EMAIL: [prosecutor@co.adams.id.us](mailto:prosecutor@co.adams.id.us)

Re: Request for AG analysis – Our File No. 20-71421

Dear Mr. Boyd:

This letter is in response to your recent inquiry regarding the appropriate interpretation of Idaho Code section 18-2318 and its prohibition on electioneering at the polls. As explained below, Idaho Code section 18-2318 most likely prohibits active electioneering efforts at the polls, as opposed to passive electioneering, which would include wearing a t-shirt or button supporting a candidate or position.

### **Idaho Code Section 18-2318 Prohibits Active Electioneering.**

Idaho Code section 18-2318 states:

**ELECTIONEERING AT POLLS.** (1) On the day of any primary, general or special election, no person may, within a polling place, or any building in which an election is being held, or within one hundred (100) feet thereof:

- (a) Do any electioneering;
- (b) Circulate cards or handbills of any kind;
- (c) Solicit signatures to any kind of petition; or
- (d) Engage in any practice which interferes with the freedom of voters to exercise their franchise or disrupts the administration of the polling place.



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(2) No person may obstruct the doors or entries to a building in which a polling place is located or prevent free access to and from any polling place.

(3) Any election officer, sheriff, constable or other peace officer is hereby authorized, and it is hereby made the duty of such officer, to arrest any person violating the provisions of subsections (1) and (2) of this section, and such offender shall be punished by a fine of not less than twenty-five dollars (\$25.00) nor exceeding one thousand dollars (\$1,000).

In reading through this provision, the statute lists four types of prohibited conduct. Paragraphs (b) through (d) are descriptive in the conduct that is regulated and include actions that are prohibited (circulate, solicit, engage, interfere, disrupt). Paragraph (a) is a general prohibition that individuals refrain from doing “any electioneering.” Electioneering is undefined, but it appears that it includes an action be taken in furtherance of the activity. “Electioneering,” standing alone, does not appear to be defined in Idaho Code.

Black’s Law Dictionary defines “electioneering” as “[t]he practice or an instance of trying, usually within established rules, to influence the outcome of election by distributing pamphlets, making speeches, door-to-door canvassing, etc.” *Electioneering*, Black’s Law Dictionary (11th ed. 2019). This definition seems to confirm that there is an active and intentional component required for “electioneering.”

The term electioneering does appear in Idaho’s campaign finance law, but its appearance and subsequent definition is in conjunction with the word “communication.” That definition reads as follows:

“Electioneering communication” means any communication broadcast by television or radio, printed in a newspaper or on a billboard, directly mailed or delivered by hand to personal residences, or telephone calls made to personal residences, or otherwise distributed that:

## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

- (i) Unambiguously refers to any candidate; and
- (ii) Is broadcasted, printed, mailed, delivered, made or distributed within thirty (30) days before a primary election or sixty (60) days before a general election; and
- (iii) Is broadcasted to, printed in a newspaper, distributed to, mailed to or delivered by hand to, telephone calls made to, or otherwise distributed to an audience that includes members of the electorate for such public office.<sup>1</sup>

Idaho Code § 67-6602(7)(a).

It appears clear that electioneering as used in Idaho Code section 18-2318 has a different meaning than that used for “electioneering communication” in Idaho Code section 67-6602(7) given the use of the modifier “communication.” That said, the definition of “electioneering communication” is helpful to understand the meaning of “electioneering” because it again references “electioneering” as having an active and intentional component (broadcast, printed, mailed, delivered, called, and distributed).

### **Idaho Code Section 18-2318 Does Not Prohibit Apparel and Buttons Passively Worn.**

A button or t-shirt worn into a polling place in a passive manner absent some other conduct does not appear to rise to the level of conduct which falls within the ambit of Idaho Code section 18-2318. If a voter appears at the poll wearing a shirt or button with election related slogans, graphics, or the like, and simply goes about their business to vote without interfering with anyone else, making a statement, or any other active conduct related to their message, this office recommends that they be allowed to vote without any discussion of the issue.

If a voter appears at the polls and attempts to engage in active conduct, such as making a speech or waving their shirt as a flag or otherwise interferes with the voters, election workers, or conduct of the election, this office recommends that the sheriff’s office be contacted for an investigation under Idaho Code section 18-2318.

**There May be Constitutional Issues if Idaho Code Section 18-2318 is Interpreted to Ban Political Apparel.**

The above interpretation of “electioneering” avoids constitutional issues that could be present if Idaho Code section 18-2318 were interpreted to ban the passive wearing of apparel.

Idaho Code section 18-2318 regulates political speech falling within the protection of the First Amendment. This statutory provision regulates speech within polling places and within 100 feet of a polling place or building in which the election is being held.

A polling place qualifies as a nonpublic forum. It is, at least on Election Day, a government-controlled property set aside for the sole purpose of voting. The space is “a special enclave, subject to greater restriction.” Int’l Soc’y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680, 112 S. Ct. 2701, 2706, 120 L. Ed. 2d 541 (1992).

Because Idaho Code section 18-2318, in its application to polling places, regulates speech in a nonpublic forum and does not make any distinction as to viewpoint, the sole question as to whether the statute is constitutional is whether the restriction is “reasonable in light of the purpose served by the forum”: voting.<sup>2</sup> Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806, 105 S. Ct. 3439, 3451, 87 L. Ed. 2d 567 (1985).

If Idaho Code section 18-2318 were interpreted to encompass passive electioneering activities such as apparel and button wearing, there could be constitutional issues. In Minnesota Voters Alliance v. Mansky, 138 S. Ct. 1986, 201 L. Ed. 2d 201 (2018), the United States Supreme Court found that a Minnesota statute which was more specific than Idaho Code section 18-2318—that banned “political” apparel in polling locations—was so expansive that it was incapable of reasoned application. Id. at 1892. In contrast, as interpreted above, Idaho Code section 18-2318 likely can be defended as constitutional with regard to its application to active electioneering efforts.

Based on the above, this office recommends that election officials not interfere with voters wearing buttons or apparel that may

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contain political messages unless the voter engages in some active effort as contemplated by Idaho Code section 18-2318.

I hope you find this analysis helpful.

Sincerely,

BRIAN KANE  
Assistant Chief Deputy

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<sup>1</sup> This definition continues on with exceptions, but none are relevant to this inquiry.

<sup>2</sup> The U.S. Supreme Court, in a plurality opinion, has suggested that a more stringent test may apply to the public sidewalks and streets surrounding a polling place that may fall within the 100 feet surrounding a polling place. This analysis will confine itself to the application of Idaho Code section 18-2318 within a polling place. See Burson v. Freeman, 504 U.S. 191, 196-97, 196 n.2, 112 S. Ct. 1846, 1850, 1850 n.2, 119 L. Ed. 2d 5 (1992) (plurality).

## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

November 17, 2020

The Honorable Bryan Zollinger  
Idaho House of Representatives  
Idaho State Capitol  
700 W. Jefferson Street, Room EG50  
Boise, ID 83702  
VIA EMAIL: [bnz@eidaholaw.com](mailto:bnz@eidaholaw.com)

Re: Request for AG Analysis regarding National Association  
of Charter School Authorizers – Our File No. 20-71674

Dear Representative Zollinger:

This letter is in response to your July 7, 2020 and November 10, 2020 inquiries concerning actions allegedly taken by representatives of the National Association of Charter School Authorizers (NACSA).

### **Questions Presented**

1. Do the facts alleged in your July 7, 2020 inquiry present a potential and actionable violation of Idaho law?
2. What statutory amendments or new language might the Idaho Legislature consider to make offers of this type more clearly illegal and the ethics codes more enforceable?
3. Is there a model act or statute from another state which makes such conduct clearly prohibited enforceable as unlawful and felonious?

### **Brief Answer**

1. Private citizens submitted nearly identical inquiries to three different State entities, each of which responded they did not have jurisdiction to investigate or otherwise take action against NACSA. This Office likewise does not have jurisdiction to investigate or take legal action against NACSA.
2. The Legislature could take a variety of actions to address any concerns with the facts stated in your inquiries.

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3. This Office has not examined the laws of the other 49 states, but there may be statutes in other states that pertain to the facts described in your inquiries.

### **Analysis**

#### **A. The Office of the Attorney General represents the state entities previously contacted about this matter and has no jurisdiction to take action under the statutes identified.**

As evidenced in the attachments to your November 10 inquiry, private citizens filed petitions with three state entities: the Department of Administration, the Idaho Personnel Commission, and the Idaho Board of Education, mentioning the same facts and statutes referenced in your July 7 inquiry. As also noted in the attachments to your November 10 inquiry, each of the three entities concluded it had no jurisdiction to conduct an investigation or take further action against NACSA. This office represents each of these three entities and has reviewed the responses of each of these entities for consistency with their respective jurisdiction and authority. At this time, this office cannot identify any reason to second guess the findings and responses of these entities.

This office similarly lacks jurisdiction to take action under either of the laws cited in your July 7 inquiry. The Ethics in Government Act ("Act") provides for a civil penalty against a public official who fails to disclose a conflict of interest. Idaho Code § 74-406. The Act does not confer jurisdiction on this office to impose the penalty or otherwise commence a civil action to seek a penalty. With regard to Idaho Code section 18-1356, the Idaho Code places the responsibility for filing actions concerning felony and misdemeanor criminal violations on the county prosecutor. See Idaho Code § 31-2227.

This office did note that the State Board of Education's letter dated August 26, 2020 explains the NACSA study at issue was funded by the U.S. Department of Education, not the Idaho Public Charter School Commission. This fact, as well as the fact that Ms. Baysinger did not solicit or otherwise accept the offer to apply for the NACSA position, support the conclusion that Ms. Baysinger did not violate Idaho Code sections 18-1356 or 74-404. Neither of the statutes cited in your letter provide for legal action against NACSA for notifying Ms.

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Baysinger of an employment opportunity or against Ms. Baysinger for receiving notification of an employment opportunity.

**B. The Legislature could amend the Idaho Code in a variety of ways to address the facts described in your letter.**

You also inquired whether the Legislature could amend Idaho law to address the facts described in your letter. The short answer is yes. Approaches to statutory amendments differ, depending on the specific issue the Legislature wishes to address. Amendments could address the offering of employment to a public official, the failure to disclose such offers, the acceptance of such offers, limitations on outside employment, a requirement to declare a conflict and recuse oneself from any decisions that relate to the other employer, and/or other issues not detailed in this letter. One specific area where the Legislature could choose to act that may limit offers such as this is in the area of “revolving door legislation.” The National Conference of State Legislatures has a comprehensive collection of state approaches to this issue, which can be found through this link: <https://www.ncsl.org/research/ethics/50-state-table-revolving-door-prohibitions.aspx>. Based on the events that you have described above, it appears that some version of revolving door legislation would likely best address the problem you are trying to solve.

**C. There may be other states with statutes that address the facts you described.**

As noted above, there are a multitude of statutory amendments that the Legislature could adopt in response to the facts discussed in your letter. If after reviewing the options referenced above, you would like assistance in tailoring a statute for Idaho and more specific situations, please let me know.

I hope you find this analysis useful.

Sincerely,

BRIAN KANE  
Assistant Chief Deputy

## SELECTED ADVISORY LETTERS OF THE ATTORNEY GENERAL

November 23, 2020

Senator Mark Harris  
1619 8-Mile Creek Road  
Soda Springs, Idaho 83276

Re: Land Exchanges, Grazing Preferences, and Water Rights

Dear Senator Harris:

I have been asked to respond to the questions you posed regarding the effect a pending land exchange might have on certain grazing and water rights. I appreciate the opportunity to address your concerns.

### **I. QUESTIONS PRESENTED AND SHORT ANSWERS**

#### **1. Is the land acquired by exchange different under the law than the land that was originally granted to the endowment?**

**Short Answer:** No. The land that the State will receive as a result of the exchange will become endowment land—specifically, public schools endowment land.

#### **2. “Grazing Preference”**

##### **a. May the State continue to honor the terms if grazing preference rights, on the former BLM-administered lands under the authority of Idaho Code § 58-138(2), by allowing the rancher to hold a state grazing lease in perpetuity, with no expiration date, so long as the rancher abides by state grazing regulations?**

**Short Answer:** No. Once the exchange is completed, the land will no longer be federal land because upon exchange, the land will become state endowment land under the authority of the State Board of Land Commissioners (“Land Board”). The grazing preference exists



only in connection with federal grazing permits on federal land. Once a federal grazing permit is extinguished, the grazing preference is extinguished as well. Federal courts have also uniformly held that there is no compensable property interest in the grazing preference. In addition, because the acquired lands will be state endowment lands, they are subject to the applicable constitutional, statutory, and administrative rule provisions, including the Land Board's constitutional obligations to maximize the long term financial return to endowment beneficiaries, and to hold public auctions for disposals (sales and leases) of endowment lands.

- b. If it is not legally possible to honor the grazing preference, is it then the responsibility of the State to fully compensate the permittee for the value of his grazing preference right which would have been "taken" since he would now be subject to a 10-year lease term on the newly acquired state land?**

**Short Answer:** No. Courts have consistently held that the grazing preference is not a compensable property right, thus there is no "takings" claim.

### **3. Water Rights**

- a. May the rancher continue to hold the stockwater rights in his name following the exchange, assuming he is grazing on the newly-acquired state land?**

**Short Answer:** Yes. Any appurtenant stockwater rights that are held by a rancher will continue to be held by the rancher.<sup>1</sup>

- b. If he no longer is the lessee on the newly-acquired state land, would he be entitled to compensation for the loss of the ability to use his stockwater rights?**

**Short Answer:** No. The rancher will not automatically lose the water right if he or she is no longer the lessee. The fact that he or she no longer has physical access to the water or the right to graze cattle on the lands does not constitute a taking of the water right.

**c. If so, who would be required to compensate the rancher, the State or the new lessee on the state land?**

**Short Answer:** The rancher will not be entitled to compensation for the water right because it will remain in his or her name unless forfeited for non-use. The new lessee will be required to compensate the former lessee for any improvements associated with the water right. The rancher may be able to negotiate use of his stockwater right with a new lessee.

**II. THE OWYHEE LAND EXCHANGE AND THE NEW STATUS OF THE LANDS EXCHANGED**

The Owyhee Land Exchange is nearing completion after several years, and would involve the value-for-value exchange of 23,878.16 acres of state endowment land for 31,030.66 acres of federal lands managed by the Bureau of Land Management ("BLM"). As part of its constitutional responsibilities regarding the management of state endowment lands, the State Board of Land Commissioners ("Land Board") has pursued opportunities to "block up" endowment lands and eliminate some of the "checkerboard" land ownership that resulted from the various federal land grants that were made to Idaho at or near statehood.

In answer to the first question set forth above, upon completion of the Owyhee Land Exchange, the lands that the State receives from the Federal Government will become endowment lands under the authority of the Land Board. Specifically, because the lands that are being exchanged **to** the Federal Government are public school endowment lands, the lands received **from** the Federal Government will have that same designation. All legal requirements applicable to endowment lands will apply equally to the newly-acquired lands.

A brief discussion of the constitutional requirements applicable to endowment lands is useful to provide a backdrop for the remainder of this analysis. Article IX, section 8 of the Idaho Constitution sets forth requirements regarding endowment lands, and provides in pertinent part:

It shall be the duty of the state board of land commissioners to provide for the location, protection,

sale or rental of all the lands heretofore, or which may hereafter be granted to or acquired by the state by or from the general government, under such regulations as may be prescribed by law, and in such manner as will secure the **maximum long term financial return** to the institution to which granted or to the state if not specifically granted; provided, that no state lands shall be sold for less than the appraised price. . . . The legislature shall, at the earliest practicable period, provide by law that the general grants of land made by congress to the state shall be judiciously located and carefully preserved and held in trust, **subject to disposal at public auction** for the use and benefit of the respective object for which said grants of land were made, and the legislature shall provide for the sale of said lands from time to time and for the sale of timber on all state lands and for the faithful application of the proceeds thereof in accordance with the terms of said grants[.]

Idaho Const. art. IX, § 8 (emphasis added).

One of the most critical components of article IX, section 8 is the public auction requirement, which forms sideboards around the Land Board's decision-making authority regarding endowment lands. Nearly a century ago, in East Side Blaine County Livestock Association v. State Board of Land Commissioners, 34 Idaho 807, 198 P. 760 (1921), the court emphasized that fulfilling the constitutional obligations requires competitive bidding:

The dominant purpose of [article IX, sections 7 and 8] and of the statutes enacted thereunder is that the state shall receive the greatest possible amount for the lease of school lands for the benefit of school funds, and for this reason **competitive bidding is made mandatory**. . . . The provisions of the Constitution and statutes above referred to made it the duty of the State Board of Land Commissioners, under the facts and circumstances of this case, to offer the lease of said lands at auction to the highest bidder, and the Board, in

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refusing to do so, failed in the performance of an act which the law enjoins as a duty resulting from its official position. In refusing to do so, its action ran counter to the provisions of the Constitution and statutes.

34 Idaho at 814-15, 198 P. at 763 (emphasis added). More recently, the court again acknowledged the Land Board's discretion, but further held that "[a]rticle IX, § 8 requires that the State consider only the 'maximum long term financial return' to the schools in the leasing of school endowment public grazing lands." Idaho Watersheds Project v. State Bd. of Land Comm'rs, 133 Idaho 64, 67, 982 P.2d 367, 370 (1999).

Those cases recognize that public auctions are important in maximizing long-term financial return, in addition to being constitutionally required. The most recent Idaho Supreme Court case regarding endowment leasing, Wasden v. State Board of Land Commissioners, 153 Idaho 190, 280 P.3d 693 (2012), provided further guidance regarding the public auction requirement, and its effect on the ability of lessees to hold a lease perpetually, or with a right to renew. Significantly, the court held that Idaho Code section 58-310A (which exempted cottage site leases from the public auction requirement) violated article IX, section 8 of the Idaho Constitution. It first found that a lease is a "disposal," and that the public auction requirement therefore applies to leases:

The language of Article IX, § 8, unambiguously requires that any disposal of endowment land must be at public auction. "Disposal," as this Court has indicated and as is apparent from the context of Article IX, § 8, means any lease or sale. Thus, Article IX, § 8 requires public auctions for leases of endowment lands.

Wasden, 153 Idaho at 198, 280 P.3d at 701.

The effect of the public auction requirement, and the court's holdings in Wasden, is that lessees of endowment land may not hold leases in perpetuity. At the end of a lease's term, the lease must be advertised, applications taken, and an auction held.<sup>2</sup> That said, the Idaho Department of Lands ("IDL") plans to honor the terms of federal

grazing permits by issuing state Land Use Permits (“LUPs”) to the current federal permittees. The LUPs will be issued for the same number of years remaining on the federal permits, which have a maximum term of ten years. If the term of the remaining federal permit is less than five years, the permittee will be offered the option of a five-year permit. LUPs will be billed to the former federal permittee at the rate applicable to all endowment lands, currently \$7.32/AUM. Upon expiration of the LUPs, the subject lands will be offered for lease at public auction, in accordance with article IX, section 8 of the Idaho Constitution.

### **III. THE GRAZING PREFERENCE**

#### **A. Taylor Grazing Act History and Background**

In order to respond to your questions regarding the grazing preference, a history of the Taylor Grazing Act and related regulations is helpful. Prior to 1934, federal public lands were considered “open range,” open to uncontrolled grazing, which led to severe degradation of the public lands. In 1934, Congress passed the Taylor Grazing Act (“TGA”) “to preserve the land and its resources from destruction or unnecessary injury[.]” 43 U.S.C. § 315a. Congress provided for the issuance of grazing permits under the supervision of the Secretary of the Interior, authorizing the Secretary to identify lands “chiefly valuable for grazing and raising forage crops,” 43 U.S.C. § 315, to place these lands in “grazing districts,” *id.*, and to issue permits within the districts or grant leases outside the districts to “settlers, residents, and other stock owners” to graze livestock, see *id.* §§ 315, 315b, 315m. The TGA provides that grazing privileges “shall be adequately safeguarded” by the Secretary of the Interior, but also provides that the Act “shall not create any right, title, interest, or estate in or to the [public] lands.” *Id.* § 315b.

The TGA “delegated to the Interior Department an enormous administrative task. To administer the [TGA], the Department needed to determine the bounds of the public range, create grazing districts, determine their grazing capacity, and divide that capacity among applicants.” Pub. Lands Council v. Babbitt, 529 U.S. 728, 734, 120 S. Ct. 1815, 1819, 146 L. Ed. 2d 753 (2000). At the time of the TGA’s passage, the number of applicants exceeded the amount of grazing

land available to accommodate them. Therefore, the Department of the Interior instituted a detailed adjudication process, guided by the direction in section 3 of the TGA that “[p]reference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them[.]” Taylor Grazing Act, Pub. L. No. 73-482, § 3, 48 Stat. 1269, 1270-71 (1934) (codified at 43 U.S.C. § 315b).

The regulations adopted after passage of the TGA employed the term “grazing preference” to mean “the total number of animal unit months [“AUMs”] of livestock grazing on public lands apportioned and attached to base property owned or controlled by a permittee or lessee.” 43 C.F.R. § 4100.0-5 (1994). “Base property” was defined to mean:

(1) Land that has the capability to produce crops or forage that can be used to support authorized livestock for a specified period of the year, or (2) water that is suitable for consumption by livestock and is available and accessible, to the authorized livestock when the public lands are used for livestock grazing.

43 C.F.R. § 4100.0-5 (1994). Preference in issuance of grazing permits was given to applicants who owned or controlled land or water that was capable of “serv[ing] as a base for a livestock operation which utilizes public lands within a grazing district” or was “contiguous land, or noncontiguous land when no applicant owns or controls contiguous land, used in conjunction with a livestock operation which utilizes public lands outside a grazing district.” 43 C.F.R. § 4110.2-1(a)(1), (2) (1994).

The “grazing preference” was specified in all grazing permits or leases issued by the Secretary, id. § 4110.2-2(a); was attached to base property, id. § 4110.2-2(b); and was transferable with the base property upon application and approval, id. § 4110.2-3. In short, the term “grazing preference,” prior to adoption of new regulations in 1995, afforded individual owners of base property a right to graze a set number of AUMs on designated federal public lands attached to the

base property, and such right carried over as new permits were issued to the holder of the grazing preference.

In 1995, the Department of the Interior adopted regulations that essentially divided the “grazing preference” into two parts, with the first part consisting of a priority position against others for purposes of permit renewal, and the second part consisting of the term “permitted use,” defined as “the forage [expressed in AUMs] allocated by, or under the guidance of, an applicable land use plan for livestock grazing in an allotment under a permit or lease[.]” 43 C.F.R. § 4100.0-5 (1995).<sup>3</sup> Like the “grazing preference” in the previous rules, “permitted use” is specified in permits as a designated amount of forage expressed in AUMs, *id.* § 4110.2-2(a), and is transferable with the base property in whole or in part upon application and approval, *id.* § 4110.2-3.

Ranchers were concerned that because the number of AUMs was no longer included in their grazing preference, but instead was allocated as a permitted use under the guidance of an “applicable land use plan,” the security of their grazing privileges was substantially reduced “because such plans were easily changed.” CONG. RSCH. SERV., RS20453, FEDERAL GRAZING REGULATIONS: PUBLIC LANDS COUNCIL V. BABBIT (Nov. 20, 2003), at 5. Several groups representing ranchers challenged the 1995 regulations, and were initially successful in obtaining a district court judgment that replacement of the regulatory term “grazing preference” with the term “permitted use” violated the Taylor Grazing Act. Pub. Lands Council v. U.S. Dep’t of Interior Sec’y, 929 F. Supp. 1436 (D. Wyo. 1996). However, the Tenth Circuit reversed the district court, concluding that the regulation regarding grazing preferences and permitted uses did not exceed the Secretary’s authority. Pub. Lands Council v. Babbitt, 154 F.3d 1160 (10th Cir. 1998), *amended and superseded on reh’g*, 167 F.3d 1287 (10th Cir. 1999). The Supreme Court granted certiorari, and affirmed. Pub. Lands Council v. Babbitt, 529 U.S. 728, 120 S. Ct. 1815, 146 L. Ed. 2d 753 (2000). The Court viewed the differences between the pre-1995 “grazing preference” and the post-1995 “permitted use” as “relatively small,” *id.* at 744, because “the pre-1995 AUM system that the ranchers seek to ‘safeguard’ did not offer them anything like absolute security . . . the Secretary has always had the statutory authority under the Taylor Act and later FLPMA . . . to cancel, modify, or decline to renew individual permits, including [after FLPMA] the power to do so

pursuant to the adoption of a land use plan,” so that “the ranchers’ diminishment-of-security point is at best a matter of degree.” Id. at 742 (emphasis omitted).

Under current regulations, once the Secretary issues a favorable grazing decision regarding an individual applicant, the applicant receives a ten-year permit which specifies the maximum number of livestock, measured in AUMs, that the permittee is entitled to place in a grazing district. With certain exceptions, all permits must specify “grazing preference,” which is attached to base property owned or controlled by the permittee or lessee.” 43 C.F.R. § 4110.0-5 (1995). The holder of a grazing preference no longer has the right to graze a specified number of AUMs, but rather has “a superior or priority position against others for the purpose of receiving a grazing permit or lease.” Id.

“Permitted use may be cancelled in whole or in part.” 43 C.F.R. § 4110.4-2(a)(2) (1995). Cancellations can be made by agreement, by an authorized officer “based upon the level of available forage,” or “[w]hen public lands are disposed of or devoted to a public purpose which precludes livestock grazing[.]” 43 C.F.R. § 4110.4-2(b) (1995). If public lands are to be disposed of, the holder of the grazing preference must be given “2 years’ prior notification ... before their grazing permit or grazing lease and grazing preference may be canceled.” Id. Upon cancellation, the permittee is entitled to compensation for the fair market value of permittee-owned range improvements, but no provision is made for compensation of the value of the grazing preference itself. Id.

## **B. Grazing Permits versus Grazing Preference**

### **1. Federal Laws and Regulations**

In answering your questions regarding the grazing preference, it is important to first emphasize the difference between federal grazing permits and federal grazing preferences. A grazing permit grants the holder the right to graze livestock on federal lands for a set period, usually ten years. It is well established that the “grazing permits are merely a license to use the land rather than an irrevocable right of the permit-holder.” Hage v. United States, 51 Fed. Cl. 570, 586 (Fed. Cl.



2002). See *also* Pub. Lands Council, 529 U.S. at 743 (citation omitted) (“The Secretary has consistently reserved the authority to cancel or modify grazing permits[.]”).

On the other hand, a grazing preference gives the holder a priority position in the procurement of grazing permits. The right is attached to the holder’s “base property” and substantially increases the value of the base property. Grazing preferences are perpetual, unless the BLM takes specific action to cancel them. 43 C.F.R. § 4110.4-2(a)(2) (1995).

Generally speaking, both grazing permits and grazing preferences are creatures of federal law, and federal courts have uniformly held that even though they have value to the holders, and may enhance the market value of the base properties to which they are attached, they are **not** compensable property rights. The issue was squarely presented in United States v. Fuller, 409 U.S. 488, 93 S. Ct. 801, 35 L. Ed. 2d 16 (1973), which addressed the United States’s condemnation of a portion of a cattle ranch, which served as the base property for a grazing preference on over 31,000 acres of federal public land. The Court, in upholding denial of plaintiffs’ motion to include the value of the grazing preference in the condemnation proceeding, relied on two principles: first, the general principle that the government is not required to compensate a condemnee for elements of value that the government specifically conferred on the condemnee, 409 U.S. at 492-94; and second, that Congress, in passing the TGA, did not intend to create compensable property rights, given that section 3 of the Act provides that the issuance of grazing permits “shall not create any right, title, interest, or estate in or to the [public] lands,” *id.* at 489 (quoting 43 U.S.C. § 315b). See *also* Alves v. United States, 133 F.3d 1454, 1457 (Fed. Cir. 1998) (when government condemns base property, “[w]hat is compensable is the fee interest only, divorced from other governmentally-created rights or privileges appurtenant to the fee”).

Another important aspect of grazing preference is their interrelationship with grazing permits. The sole value of a grazing preference is that it allows the owner of a “base property” to “obtain a grazing permit over all other applicants so long as the owner meets all requirements for a permit.” Corrigan v. Bernhardt, No. 1:18-CV-512-BLW, 2019 WL 2717970, at \*1 (D. Idaho Jun. 27, 2019). If there is no

federal grazing permit, the grazing preference is meaningless—it cannot exist independently of the permit. Corrigan v. BLM, IBLA No. 2016-175, 190 IBLA 371, 387-88 (2017). See also Corrigan v. Bernhardt, No. 1:18-CV-512-BLW, 2020 WL 930490, at \*3 (D. Idaho Feb. 26, 2020) (“[T]he preference disappears at the same moment the permit disappears[.]”). “[W]hen a grazing permit is canceled or expires, the associated grazing preference and permitted use are automatically and simultaneously extinguished.” Corrigan, 190 IBLA at 373. Because grazing preferences are tied to grazing permits, and are simply a “relative priority position” to obtain a permit, id. at 387, they are not “property [r]ights or indefinite entitlements; such would be in direct contravention of the TGA’s mandate that a grazing permit does ‘not create any right, title, interest or estate in or to the lands,’” id. at 385 (citations omitted).

## **2. Idaho Code sections 25-901 and 25-902**

As noted above, in 1995, the Department of the Interior adopted regulations substantially modifying the grazing preference. Under the previous regulations, in addition to owning or controlling base property used in a livestock operation, permit applicants were required to “be engaged in the livestock business[.]” 43 C.F.R. § 4110.1 (1994). In order to make such determinations, the Department of the Interior instituted a detailed “adjudication” process, which required applicants to demonstrate that they owned “base property” (either land or water rights) in or near a grazing district, that they were dependent on the public lands for grazing, and that their land or water was situated so as to require the use of public rangeland for “economic” livestock operations. The adjudication process determined the number of AUMs allowed to the holder of the preference and attached to the designated base property.

The adjudication process defining the number of AUMs attached to a grazing preference, and limiting grazing preferences to those engaged in the livestock business, was substantially altered in the 1995 regulations. See 43 C.F.R. § 4110.1 (1995). The new rule was devised to “clarify that mortgage insurers, natural resource conservation organizations, and private parties whose primary source of income is not the livestock business, but who meet the [other criteria], are qualified for a grazing permit or lease.” Department Hearings and

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Appellate Procedures; Cooperative Relations; Grazing Administration—Exclusive of Alaska, 60 Fed. Reg. 9894, 9901 (1995). The new regulations also altered the definition of “base property,” see 43 C.F.R. § 4100.0-5 (1995), to “clarify that base property must be capable of serving as a base for livestock operations but it need not actually be in use for livestock production,” 60 Fed. Reg. at 9901. The 1995 regulations also separated the determination of allowable AUMs from the grazing preference, instead determining allowable AUMs as each permit was issued, using the guidance provided by land use plans. The 1995 regulations were challenged by livestock interest groups, but such challenges were ultimately unsuccessful. The 1995 regulations were ultimately upheld in Public Lands Council, 529 U.S. at 744.

While the challenges to the 1995 rules were working their way through the federal courts, the Idaho Legislature enacted chapter 9, title 25, Idaho Code. Chapter 9 purports to do two things: first, citing the adjudication of grazing preferences that occurred after adoption of the TGA, the Legislature declared such adjudicated grazing preference rights to be “an appurtenance of the base property through which the grazing preference is maintained.” Idaho Code § 25-901.

Chapter 9, title 25, Idaho Code, does **not** purport to alter federal statutes and regulations defining and implementing federal grazing preferences. Rather, it redefines state-based property rights in ***privately-owned base properties*** to include adjudicated federal grazing preferences as an appurtenance. It is within the Legislature’s authority to determine what constitutes real property within Idaho. See, e.g., Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972) (property rights “are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law”). Generally, Idaho defines real property to include:

1. Lands, possessory rights to land, ditch and water rights, and mining claims, both lode and placer.
2. That which is affixed to land.
3. That which is appurtenant to land.

Idaho Code § 55-101.

Facially, Idaho Code sections 25-901 and 25-902 have a limited application. The first three sentences of section 25-901 are simply a recitation of facts regarding the origin of grazing preferences and ranchers' reliance on them. The only operative language in section 25-901 is found in the last sentence, which provides that "a grazing preference right shall be considered ***an appurtenance of the base property*** through which the grazing preference is maintained," but such operative language is tied to the need to provide "assurance that the appurtenant grazing preference rights will be transferred to the new base property owner," when "[l]ivestock ranches are bought, sold, traded and inherited[.]" Idaho Code § 25-901 (emphasis added). Likewise, section 25-902 follows up by declaring that when base property is conveyed to another person "with the view of receiving benefit of grazing under the appurtenant preference right," the new owner cannot be deprived of the grazing preference "without just compensation."

By its terms, the operative language in Idaho Code sections 25-901 and 25-902 is limited to defining the appurtenant rights that transfer with a conveyance of base property. Aside from the limited circumstance of a conveyance of base property, the statutes have no application.

### C. Analysis of Your Questions

You first asked whether the State may or must "continue to honor the terms if grazing preference rights, on the former BLM administered lands under the authority of I.C. 58-138 (2) (sic), by allowing the rancher to hold a state grazing lease in perpetuity, with no expiration date, so long as the rancher abides by state grazing regulations?" As set forth above, the federal grazing preference has no application absent a federal grazing permit. When the exchange is completed, the license granted to federal permittees by virtue of their federal grazing permit will no longer exist, and the grazing preference will not apply. Moreover, federal grazing preference rights do not give a federal permittee the right to hold a federal permit in perpetuity—it only grants a preference as against others in obtaining a federal grazing permit. Finally, Idaho Code sections 25-901 and 25-902 apply only to the transfer of privately-owned base properties, and do not apply to transfers of federal lands.

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Idaho Code section 58-138(2), which you cite in your letter, provides that “the state board of land commissioners, may, in its discretion, . . . grant or allow such reservations, restrictions, easements or such other impairment to title as may be ***in the state’s best interest.***” (Emphasis added.) In Idaho Watersheds Project, 133 Idaho at 67, 982 P.2d at 370, however, the court found that the Land Board’s overriding role is as a fiduciary to the endowment beneficiaries, and it may only consider what is in the beneficiaries’ best interest to the exclusion of all other considerations. Given the constitutional requirement for public auctions, and the requirement to maximize the long-term financial return to the endowment beneficiaries, a court would be unlikely to find that Idaho Code section 58-138(2) provides authorization for the Land Board to allow perpetual grazing leases on lands acquired from the federal government.

You also then asked “if it is not legally possible to honor the grazing preference, is it then the responsibility of the state to fully compensate the permittee for the value of his grazing preference right which would have been ‘taken’ since he would now be subject to a 10 year lease term on the newly acquired state land?” As set forth above in Section II.A and B.1, the federal grazing preference is not a compensable property right. Therefore, neither the State nor the Federal Government has the responsibility to provide compensation when federal lands come into state ownership.

### **IV. WATER RIGHTS**

The answers to your questions regarding water rights on the lands that will be acquired by the State are perhaps more straightforward. If a rancher who is currently a federal permittee holds a water right used on those lands in his or her own name, the rancher will continue to hold that water right when the lands are transferred to the State and the rancher is issued an LUP and/or a state grazing lease.

At the end of the LUP’s term, IDL will undertake the lease application and auction process to lease the land. The holder of the LUP may certainly apply to lease the land. If he or she acquires the lease at the auction, there is no effect on the water rights. If the lessee is ***not*** the successful applicant, he or she will not automatically lose the water right, nor is the water right automatically extinguished or

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transferred to the new lessee. The new lessee may apply for a new water right in their own name, or may rely upon the provisions of Idaho Code section 42-113, which do not require a permit for stockwater use below certain amounts. The original water right will remain in the rancher's name. The rancher may sell his water right to the new lessee. Under very limited circumstances, it might also be possible for the rancher to apply to the Idaho Department of Water Resources to transfer the water right to a new location, so long as such transfer did not involve physically diverting water from the endowment lands, under the process and standards set forth in Idaho Code section 42-222 and the related administrative rules, and in so doing, preserve the priority date of the water right for the future. In the absence of a sale or transfer, it is possible that the water right could eventually be extinguished by forfeiture.<sup>4</sup>

If the rancher does not hold the lease to the lands, he or she will not be able to use the water. However, neither the State nor the new lessee is required to compensate the rancher for the loss of access to the water because a water right does not give one the right to trespass over the lands of another. Joyce Livestock Co. v. United States, 144 Idaho 1, 19, 156 P.3d 502, 520 (2007) ("Ownership of a water right does not include the right to trespass upon the land of another in order to access the water."); Lemmon v. Hardy, 95 Idaho 778, 519 P.2d 1168 (1974). The new lessee will be required to compensate the rancher for the value of any improvements associated with the water right such as tanks, piping, and other diversion structures. See IDAPA 20.03.14.100 through .102.

I hope you find this information helpful and I appreciate the opportunity to respond to your questions.

Sincerely,

DARRELL G. EARLY  
Chief, Natural Resources Division

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<sup>1</sup> See Section I of this memo for a discussion of the Land Use Permits that will be issued to former federal permittees.

<sup>2</sup> Under the Idaho Department of Land's Lease Application and Auction Process, if there is only one applicant for a lease at the end of the application period, the auction is deemed complete at that point, and the lease

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is awarded to the lone applicant. If there are two or more applicants, a public auction is advertised and held.

<sup>3</sup> BLM's grazing regulations were substantially amended in 2006, but the amendments were enjoined in Western Watersheds Project v. Kraayenbrink, 538 F. Supp. 2d 1302 (D. Idaho 2008), *aff'd*, 832 F.3d 472 (9th Cir. 2011). All citations here are to the preceding amendments adopted in 1995, as published at 60 Fed. Reg. 9894 (Feb. 22, 1995), which remain in effect.

<sup>4</sup> It is important to note that forfeiture of private water rights does not occur automatically. A forfeiture proceeding may be initiated with a lawsuit in district court. A forfeiture proceeding can also be initiated before the Idaho Department of Water Resources pursuant to Idaho Code section 42-224. In both cases, forfeiture must be proven by clear and convincing evidence pursuant to Idaho Code section 42-222(2).

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December 17, 2020

Senator Scott Grow  
Idaho Senate Capitol Building  
Boise, ID 83720  
VIA EMAIL: [sgrow@senate.idaho.gov](mailto:sgrow@senate.idaho.gov)

Re: Possible Modifications to Proposed Constitutional Amendment to Article III of the Idaho Constitution by the Addition of New Section 30

Dear Senator Grow:

This letter follows up on my December 11, 2020 comments in regard to the draft Constitutional Amendment Proposal (“Proposed Amendment”) to article III of the Idaho Constitution, which would add a new section, section 30. The two main concerns or problems identified in the previous letter will be briefly stated, followed by suggestions as to how they might be rectified.

### First Issue:

Section 2(1) of the Proposed Amendment states that the possession (etc.) “of psychoactive drugs *shall not be permitted* in the state of Idaho *unless*” such drugs are Federal Drug Administration (“FDA”) approved, doctor prescribed and pharmacy dispensed. (Emphases added.) The highlighted wording strongly suggests that if a psychoactive drug (defined as any Schedule I, II, and III drugs) does receive FDA approval, it would be “permitted” in Idaho on that basis alone—without regard to its legality under the Idaho Code. However, it appears that the intent of the Proposed Amendment is to make FDA approval an *additional* requirement or prerequisite that must be met before any psychoactive drug can be “permitted” in Idaho under Idaho’s statutes.<sup>1</sup>

Assuming that is the case, the following language, or language of similar import, is proposed as a modification of the relevant part of Section 2(1):



- (1) Other than as permitted pursuant to Title 37, Idaho Code Sections 2716(c), (d)(1) and (d)(2), the production, manufacture, transportation, sale, delivery, dispensing, distribution, possession, or use of psychoactive drugs shall not be permitted in the state of Idaho unless, and to the extent, such drugs are made permissible under Title 37, Chapter 27, of the Idaho Code, and are also: . . .

Second Issue:

The Proposed Amendment defines “psychoactive drug” as “any amount of any of the Schedule I, II, or III controlled substances *identified in the 2021 version of Title 37, Idaho Code . . .*” (Emphasis added.) There are two potential problems resulting from specifically referencing the 2021 version of title 37, but it is possible neither problem may interfere with the intent behind referencing the 2021 version of the code.

By freezing the definition of “psychoactive drug” to the 2021 version of the Idaho Code, any new drug placed in Schedule I, II or III thereafter would not be within the scope of the constitutional provision, but subject only to statutory regulation. The fact that the drug would only be subject to statutory regulation does not necessarily mean the drug would be legal. Further, the new drug would have to be classified somewhere other than in Schedule I to be permitted in Idaho at all, and would likely have FDA approval for an accepted medical use.<sup>2</sup>

Another potential problem is that a drug classified as a Schedule I, II or III controlled substance in the 2021 Idaho Code would be unable to be re-classified as an over-the-counter drug. Assuming there are drugs in those Schedules that would otherwise qualify for over-the-counter designation, they would “not be permitted in the state of Idaho unless” they are statutorily legalized (see First Issue), and also “(a) [a]pproved by the [FDA] . . . and [are] also: (i) proscribed, dispensed, or administered to a patient by a licensed prescriber or practitioner, and (ii) [p]ossessed and used as prescribed[.]”<sup>3</sup> Prop. Amend. Section 2(1)(a). The latter two requirements would preclude the drugs from becoming over-the-counter drugs. The only discernable way this problem would be resolved is to eliminate the prescription

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requirements of subsections (i) and (ii) of Proposed Amendment Section 2(a).

The above proposals or suggestions are hopefully helpful in preparing this legislation. If you have any questions, please do not hesitate to contact me.

Sincerely,

JOHN MCKINNEY  
Deputy Attorney General

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<sup>1</sup> Section 1(e) is a legislative finding that “[t]he legalization of illicit psychoactive drugs that have not been approved by the FDA would be harmful to Idaho citizens[.]”

<sup>2</sup> Schedule II and III controlled substances may be “dispensed only pursuant to a valid prescription drug order.” Idaho Code § 37-2722(b)-(c); see 21 C.F.R. § 1306.11(a) (“A pharmacist may dispense directly a controlled substance listed in Schedule II that is a prescription drug as determined under section 503 of the Federal Food, Drug, and Cosmetic Act[.]”). Schedule I drugs are not permitted in Idaho because they have no accepted medical use, and may not be prescribed, dispensed or administered for such use. See Idaho Code § 37-2722(a); U.S. Dep’t of Justice, Drug Enforcement Agency, Diversion Control Division, *Controlled Substances Schedules*, <https://www.deadiversion.usdoj.gov/schedules/> (“Substances in this schedule have no currently accepted medical use in the United States, a lack of accepted safety for use under medical supervision, and a high potential for abuse.”).

<sup>3</sup> The other three alternatives of Section 2 are also incompatible with “over-the-counter” access of a drug: (b) a drug that is part of a “phase 1 clinical investigation related to an investigational new drug application . . . in effect with FDA[.]” (c) an “investigational drug . . . provided to an eligible patient pursuant to Idaho’s Right to Try Act[.]” and (d) a drug “documented and held in evidence by law enforcement[.]”

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Because the Idaho Rangeland Resource Commission does not appear to be a regulatory or occupational licensing agency, there do not appear to be any federal anti-trust issues such as those raised in <u>North Carolina State Board of Dental Examiners. ...</u>	3/5/20	117
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The Legislature is authorized to convene a single annual session per year on a date determined by the Legislature (or if no date is determined, on the second Monday in January). All other sessions of the Legislature must be convened by the		

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Governor. Idaho Code section 67-422 requires that in the event of an “attack,” the Governor is required to call the Legislature into special session within 90 days of the attack, or the Legislature is required to call itself into special session if the Governor fails to issue the call for a special session. ....	6/12/20	140
With regard to both Title I and Title II of the ADA, if legislators provide evidence they have either a physical or mental disability and that their medical professionals advise them they cannot safely attend in person as currently planned because of that disability, then the applicable chamber should examine the requested accommodations and determine whether the requested accommodation or any equally effective alternative accommodations would enable the legislator to perform the essential functions of her position (for purposes of Title I) or enable her to participate in the services, programs or activities of the Legislature (for purposes of Title II). ....	8/13/20	164
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A city may form a LID to make and pay for infrastructure improvements without being a public utility. The mechanism by which a city

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The analysis will turn on a jury's determination of whether the fence in question obstructed, blocked or otherwise interfered with another's access to one of the categories of public land, and whether the		

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Unless the landowner is willing to grant a full public access across their land, any legal right to cross that land will be narrowly construed and limited to the terms and conditions of the instrument granting a right of access. Access to state endowment land for a specific purpose, such as to manage state land and state resources, or to haul timber or minerals, does not allow the use of that easement or right of access for other purposes, and does not grant a right to the public to use any such right of access.....	4/13/20	134
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