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

June 29, 2021

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

Re: Certificate of Review
Proposed Initiative Adding Chapter 35 to Title 37, Idaho Code, to Legalize the Private Possession, Use, and Transfer of Three Ounces or Less of Marijuana by Persons at Least Twenty-One Years of Age

Dear Secretary of State Denney:

An initiative petition was filed with your office on June 3, 2021. 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

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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 "Personal Adult Marijuana Decriminalization Act" (hereafter "Act") and is denominated as Idaho Code sections 37-3501, *et seq.*[1] The Act seeks to amend title 37, Idaho Code, by adding a new chapter 35, which decriminalizes the possession and use of three ounces or less of marijuana on private property by persons at least 21 years of age, and protects such persons from arrest, prosecution, property forfeiture, discrimination, and other criminal and civil penalties under Idaho law.

1. Section 1 of the Proposed Act

Section 1 begins with the creation of a new section in title 37 of the Idaho Code and an identification of the short title of the Act.

a. Prop. I.C. § 37-3502

Prop. I.C. § 37-3502 is a "Definitions" section, which defines marijuana "for the purposes of this Chapter" differently than the general controlled substances definition of marijuana set forth in Idaho Code section 37-2701(t). Although those differences are likely irrelevant here, they should nonetheless be noted. The Act's definition of marijuana, *see* Prop. I.C. § 37-3502(1), does not have an exception for hemp, while the newest rendition of Idaho Code section 37-2701(t), effective April 16, 2021, excludes hemp (or industrial hemp) possessed, grown, transported, etc., under the State Plan authorized by the federal 2018 Farm Bill[2] from "marijuana." Additionally, Idaho Code section 37-2701(t) defines marijuana without referencing tetrahydrocannabinol ("THC"),[3] while the Act provides that a substance containing any THC is deemed to be marijuana. In short, the marijuana referenced in the Act is different from the marijuana defined in the general controlled substances provisions.

The Act next defines "personal amount of marijuana" "[w]ith respect to a person who is at least twenty-one (21) years of age" as three ounces of marijuana. Prop. I.C. § 37-3502(2). "Personal use of marijuana" means, with respect to the same age limitation,

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[1] References to "proposed" I.C. §§ 37-3501, *et seq.*, will read, "Prop. I.C. § 37-3501," etc.

[2] Pub. L. No. 115-334, §§ 10101-10116, codified at 7 U.S.C. §§ 1639o-1639s.

[3] While not defining substances containing THC as marijuana, Idaho Code section 37-2701(t) does create a presumption that any substance that contains any THC is "marijuana." Under a separate statutory provision, Idaho Code section 37-2705(d)(27), any substance containing any quantity of THC is an illegal schedule 1 hallucinogenic substance in its own right.

"possession and usage of a personal amount of marijuana for ingestion by any means," possession and use that "occurs on and within private property," and "[w]ith permission of the property owner." Prop. I.C. § 37-3502(3)(a)(i)-(iii).

b. Prop. I.C. § 37-3503

Prop. I.C. § 37-3503 ("Limitations") sets out actions that are *not* protected or immunized from criminal or civil sanction by the Act. They are: (1) conduct that is negligent or constitutes professional malpractice under the influence of marijuana; (2) possession or "engaging in the personal use" of marijuana while on a school bus or in a correctional facility; (3) smoking or vaping marijuana (a) on "any form of public transportation," (b) on "the grounds of any licensed daycare, preschool, primary or secondary school," and (c) "where tobacco smoking is prohibited;" (4) operating, navigating, or being in actual physical control of any motor vehicle, aircraft, train, motorboat, etc., while under while under the influence of marijuana; (5) extractions of marijuana by using certain solvents; (6) using marijuana in a way unauthorized under the Act; and (7) cultivating live marijuana plants of any size or development. Prop. I.C. § 37-3503(8) is a statement that nothing in the Act requires (a) "[a]ny person or establishment" in possession of property to "allow a guest, client, customer, or other visitor to smoke marijuana on or in that property" and (b) a "licensed daycare, preschool, primary or secondary school to allow the personal use of marijuana on its property." Several of the above limitations warrant further discussion.

Subsection (2) of Prop. I.C. § 37-3503 precludes the "personal use of marijuana" on a school bus and a correctional facility. However, "personal use of marijuana" is specifically defined, in part, as possession and usage of marijuana that "occurs on and within *private* property." *See* Prop. I.C. § 37-3502(3)(a)(ii) (emphasis added). Therefore, it is impossible to have "personal" use of marijuana on a public school bus or a public correctional facility. It is recommended that the word "personal" be excised from Prop. I.C. § 37-3503(2).

Next, the following exception in Prop. I.C. § 37-3503(4) is problematic; it states:

> [E]xcept a person *may not be considered* to be under the influence of marijuana because of the presence of *metabolites or components of marijuana that appear in insufficient concentration to cause impairment.*

(Emphasis added.) The italicized language in the quotation above of Prop. I.C. § 37-3503(4) makes the provision subject to constitutional challenge due to vagueness. The provision does not explain or define what level of "metabolites or components of marijuana that appear in insufficient concentration" may "cause impairment."

Further, determining, based on metabolite level,[4] whether someone was under the influence of marijuana at the time they were operating a motor vehicle is extremely difficult. *See* State v. Stark, 157 Idaho 29, 33, 333 P.3d 844, 848 (Ct. App. 2013) (citation omitted) ("A blood test indicating the presence of Carboxy-THC shows nothing more than past marijuana use."). However, as explained in State v. Morin, metabolite test results, although not decisive, can be relevant in proving a marijuana-based DUI offense:

> [A]lthough, as we held in Stark, carboxy-THC standing alone, is not sufficient to prove that marijuana use was the cause of intoxication, carboxy-THC evidence is relevant when combined with other evidence indicating the driver's recent marijuana use. The Idaho Rules of Evidence do not require that any particular piece of evidence completely prove the proponent's case. Rather, evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." I.R.E. 401. Evidence that carboxy-THC was found in an impaired person's bloodstream makes it more likely that marijuana use caused the impairment.

158 Idaho 622, 629, 349 P.3d 1213, 1220 (Ct. App. 2015). *See* Stark, 157 Idaho at 31, 333 P.3d at 846.

Prop. I.C. § 37-3503(4) may improperly deny the State its ability to present evidence by automatically excluding metabolite test results that, even though insufficient "standing alone" to prove marijuana intoxication, would be relevant when combined with other evidence of such intoxication. *See* State v. Stewart, 161 Idaho 235, 237, 384 P.3d 999, 1001 (Ct. App. 2016) (citation omitted) ("Evidence that is relevant to a material and disputed issue concerning the crime charged is generally admissible."); I.R.E. 401. Therefore, it is recommended that the "exception" language of Prop. I.C. § 37-3503(4) be removed or modified to make clear that, consistent with current law, driving or operating a motor vehicle under the influence of marijuana may not be proved solely by the mere presence of metabolites or components of marijuana.

Prop. I.C. § 37-3503(4) may also conflict with other state and federal regulations that govern the employment of certain types of workers, such as commercial vehicle operators.

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[4] In State v. Morin, 158 Idaho 622, 624, 349 P.3d 1213, 1215 (Ct. App. 2015), the Court explained that "Carboxy–THC is an inactive metabolite of marijuana that has no pharmacological effects and is, therefore, not a cause of intoxication." "Rather, it can be detected in a blood sample for at least ten days and up to a month after a person uses marijuana, long after the person ceases to be intoxicated." Id.

c. Prop. I.C. § 37-3504

The "Facility Restrictions" set out in Prop. I.C. § 37-3504 do not pose any legal concerns until the last provision. Subsection (1) states that nursing and intermediate care facilities, hospices, hospitals, or "other type[s] of residential care or assisted living facilit[ies] *may* adopt reasonable restrictions on the personal use of marijuana by their residents or a person receiving impatient services[.]" (Emphasis added.) Those restrictions include: (a) not storing or maintaining the "person's supply of marijuana;" (b) that the facility, caregivers, and hospice agencies "are not responsible for providing the marijuana for persons;" (c) that marijuana "is consumed by a method other than smoking;" and (d) that marijuana is consumed only in specified areas. Prop. I.C. § 37-3504(1)(a)-(d).

Prop. I.C. § 37-3504(3), however, appears to conflict with Prop. I.C. § 37-3502(3)(a)(ii)-(iii), which defines "personal use of marijuana" as, in part, the possession and use of marijuana on and within private property occurring "[w]ith permission of the property owner." Prop. I.C. § 37-3504(3) appears to contradict the definition of "personal use of marijuana" by requiring certain private property owners to allow (*i.e.*, not unreasonably limit) the "personal use of marijuana;" it reads:

> A facility listed in subsection (1) may not *unreasonably* limit a person's access to or personal use of marijuana as allowed under this Chapter *unless* failing to do so would cause the facility to lose a monetary or licensing-related benefit under federal law or regulations.

Prop. I.C. § 37-3504(3) (emphases added). Prop. I.C. § 37-3504(3) inversely suggests that a facility may "unreasonably" limit marijuana use if not doing so "would cause the facility to lose a monetary or licensing-related benefit under federal law or regulations." Prop. I.C. § 37-3504(3) may invite a constitutional challenge based on vagueness with regard to what constitutes an "unreasonable limitation" on "a person's access to or personal use of marijuana." It may also invite an equal protection challenge based on restricting the private property rights of certain property owners and not others. In short, consideration should be given to fully excising Prop. I.C. § 37-3504(3) from the proposed initiative petition.

d. Prop. I.C. § 37-3505

Prop. I.C. § 37-3505 ("Protections for the Personal Use of Marijuana") states in subsection (1) that persons (a) engaged in the personal use of marijuana as allowed by the Act, (b) offering or providing "a personal amount of marijuana" to others at least 21 years of age, or (c) transporting a personal amount of marijuana "from a jurisdiction where the marijuana was legally purchased" are "not subject to arrest, prosecution, or penalty in any manner, or denial of any right or privilege, including any civil penalty or disciplinary

action by a court, or occupational or professional licensing board or bureau[.]" Prop. I.C. § 37-3505(1)(a)-(c). The above proposed statutory provisions present several concerns.

Prop. I.C. § 37-3505(1)'s provisions would impact existing court orders prohibiting the possession and use of marijuana; existing contractual agreements in regard to employees' use of controlled substances in, or affecting, the workplace; and existing occupational or professional licensing board orders, statutes, and regulations that prohibit licensees from using marijuana. Finally, the phrase "any right or privilege" could be challenged as unconstitutionally vague due to the provision's effect on existing court orders and contracts.

As a practical matter, Prop. I.C. § 37-3505(1)(a)-(c) would, on its face, allow a series of "personal amount of marijuana" sales and deliveries to be made as long as each transaction involved three ounces or less. The provision allows persons at least 21 years of age to engage in "[o]ffering or providing a personal amount of marijuana" to others at least 21 years of age. Id. Such solicitations and/or deliveries could take place in a variety of settings such as bars, restaurants, stores, motels, and universities—with the permission of the property owners. Prop. I.C. § 37-3502(3)(a)(iii).

Assuming compliance with the other provisions of Prop. I.C. § 37-3505(1), subsection (1)(c) authorizes "[t]ransporting a personal amount of marijuana from a jurisdiction where the marijuana was legally purchased." The problem with that subsection is that, as discussed in Section B below, marijuana possession (etc.) is not legal under current federal law. Therefore, it is recommended that the last part of subsection (1)(c) be amended to read "legally purchased under state law."

Prop. I.C. § 37-3505(2) states:

> There is a presumption in criminal, civil, and administrative court proceedings that a person is engaged in the personal use of marijuana pursuant to this Chapter if the person is in possession [of] an amount of marijuana that does not exceed the personal amount.

Although the presumption of Prop. I.C. § 37-3505(2) is likely intended to apply only to persons at least 21 years of age, it does not read that way. As a result, persons younger than 21 could use the presumption—most notably in criminal cases for misdemeanor possession of marijuana. If that is not the intention of the author(s) of the Act, it is recommended that a 21-year age restriction be added.

Prop. I.C. § 37-3505(3) protects holders of professional or occupational licenses from discipline for "providing advice or services" related to "marijuana activities" allowed under the Act, and prohibits the denial of such licenses based on prior employment related to such activities.

Prop. I.C. § 37-3505(4) prohibits persons from being arrested, prosecuted, or penalized "in any manner" or "denied any right or privilege" (etc.) for (a) providing or selling drug paraphernalia for the personal use of marijuana by persons at least 21 years of age; (b) being in the presence or vicinity of persons using marijuana under the Act; (c) assisting persons at least 21 years of age with administering marijuana under the Act; and (d) allowing a person's property to be used for acts that are "exempt from criminal penalties" under the Act. Similar to subsection (1), subsection (4) would impact Idaho's criminal and civil courts' ability to issue orders prohibiting the conduct allowed under this subsection; may conflict with existing Idaho employment law and/or contractual agreements in regard to employees' use of controlled substances in, or affecting, the workplace; may conflict with orders, statutes, and regulations of professional licensing boards; and the phrase "any right or privilege" could be challenged as unconstitutionally vague. The term "administering" in Prop. I.C. § 37-3505(4)(c) could also be challenged as unconstitutionally vague.

Prop. I.C. § 37-3505(5) prohibits the seizure or forfeiture of property otherwise subject to seizure under state or local law if that property was used in "any activity permitted under this Chapter[.]" The provision does not apply if "the basis for the forfeiture is *unrelated* to the personal use of marijuana." (Emphasis added.) That exception is subject to constitutional challenge based on the ambiguity of what "unrelated" means. For example, a house used for trafficking large amounts of marijuana could also have residents who use marijuana in accordance with the Act. Whether a seizure of the house based on trafficking in marijuana would be considered "unrelated to the personal use of marijuana" would be subject to conjecture. It is recommended that the last part of the exception be modified to read (or similarly read), "This subsection does not prevent civil or criminal forfeiture if the legal basis for the forfeiture is not the personal use of marijuana as authorized under this Chapter."

Prop. I.C. § 37-3505(6) states that the "odor of marijuana does not constitute probable cause or reasonable suspicion, nor may it be used to support the search of a person or property of a person." Such a provision would be unprecedented in carving out an exception to consideration of the "totality of circumstances" that has been the hallmark for determining whether there is reasonable suspicion for a temporary detention under Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), or probable cause for an arrest or issuance of a search warrant. *See* State v. Pachosa, 160 Idaho 35, 39, 368 P.3d 655, 659 (2016) (citation omitted) ("To determine whether such reasonable articulable suspicion existed, courts must examine the totality of the circumstances which were known to the officer before the detention occurred."); State v. Finnicum, 147 Idaho 137, 140, 206 P.3d 501, 504 (Ct. App. 2009) (citation omitted) ("The probable cause determination "depends upon the totality of the circumstances and the assessment of probabilities in the particular factual context."). As a practical matter, this provision would make policing *illegal* marijuana, including violations not otherwise protected by the Act

such as marijuana trafficking, more difficult by eliminating the odor of marijuana as a factor to be considered in developing reasonable suspicion and probable cause.

e. Prop. I.C. § 37-3506

Under the heading "Discrimination Prohibited," Prop. I.C. § 37-3506(1) states:

> Except as provided in 37-3503 and 37-3504, no school, landlord, nursing facility, intermediate care facility, hospice house, hospital, or other type of residential care or assisted living facility may refuse to enroll, admit, or lease to[,] and may not otherwise penalize a person for engaging in conduct allowed under this Chapter, *unless doing so would violate federal law* or regulations or cause [such entities] to lose a monetary or licensing-related benefit under federal law.

(Emphasis added.) The obvious problem with the above provision is that marijuana possession and use is currently prohibited by federal law. Therefore, the entire provision is rendered futile unless and until marijuana is legalized under federal law. Also, this provision is internally inconsistent with the requirement that the "personal use of marijuana" be done with "permission of the property owner." Prop. I.C. § 37-3502(3)(a)(iii). If such permission were denied, the property owner would be in violation of the anti-discrimination provision of Prop. I.C. § 37-3506(1). The different treatment for different types of private property owners could give rise to constitutional equal protection challenges.

Prop. I.C. § 37-3506(2) states that employers are not required to allow marijuana to be ingested in the workplace, or to allow employees to work while under the influence of marijuana. The subsection has a caveat similar to the one discussed above with regard to Prop. I.C. § 37-3503(4) (operating motor vehicles (etc.) while under the influence of marijuana), which is:

> [P]rovided that an employee shall not be considered to be under the influence of marijuana because of the presence of *metabolites or components of cannabis that appear in insufficient concentration to cause impairment.*

(Emphasis added.) The italicized language in the quotation above of Prop. I.C. § 37-3506(2) makes the provision subject to constitutional challenge due to vagueness. The provision does not explain or define what level of "metabolites or components of cannabis that appear in insufficient concentration" may "cause impairment." Also, subsection (2) may conflict with existing Idaho employment law and/or contractual agreements in regard to employees' use of controlled substances in, or affecting, the workplace and may also interfere with existing employment contracts. The provision may also conflict with other

state and federal regulations that govern the employment of certain types of workers, such as commercial vehicle operators.

Under subsection (3) of Prop. I.C. § 37-3506, the use of marijuana authorized by the Act does not constitute the "use of an illicit substance or otherwise disqualify a person from receiving medical care," including organ and tissue transplants. This section interferes with the professional judgment of medical professionals and could result in the override of a valid and appropriate exercise of medical judgment. This could subject medical professionals to potential malpractice claims by requiring them to perform transplants that would not otherwise be considered medically appropriate.

Prop. I.C. § 37-3506(4) states that a person "shall not be denied custody of or visitation rights or parenting time with a minor" for conduct allowed under the Act. Subsection (4) would preclude family law courts from intervening when a custodian's use of marijuana pursuant to the Act nonetheless negatively affects children. This could prevent courts from issuing orders designed for the protection of children in a variety of situations, including, but not limited to, when the parent leaves marijuana readily accessible to children or is not properly caring for their children.

Prop. I.C. § 37-3506(5) precludes state and local agencies from restricting or infringing upon a person's right to own or possess a firearm or obtain a firearm certification for conduct allowed under the Act. This may conflict with existing federal laws and regulations related to the possession and use of firearms.

Prop. I.C. § 37-3506(6) prohibits schools, landlords, and employers from being penalized or denied a benefit for "enrolling, leasing to, or employing" a person engaged in conduct under the Act. For the reasons stated previously herein, this provision may conflict with state and federal regulations concerning employment and licensing of certain individuals. It may also conflict with existing contracts and leases. It may also give rise to constitutional equal protection challenges because of the different treatment accorded to different types of employers and property owners.

2. Section 2 of the Proposed Act

Section 2 of the Act, "Severability," provides that if any provision of the Act is declared invalid, the remaining portions of the Act remain valid.

3. Section 3 of the Proposed Act

Section 3 of the Act proposes amendments to existing provisions of the Idaho Controlled Substances Act. The proposed amendments, for the most part, except the activities permitted in the new title 37, chapter 35 from the Controlled Substances Act's prohibitions. However, three of the modifications to related statutes warrant comment.

First, the Act seeks to amend Idaho Code section 37-2732(k) (restitution for costs of law enforcement investigations) by excising the words "or misdemeanor" from its initial qualifying phrase which currently reads, "Upon conviction of a felony or misdemeanor violation under this chapter[.]" As a result, Idaho Code section 37-2732(k) would allow courts to "order restitution for costs incurred by law enforcement agencies in investigating" violations *only* in cases resulting in felony convictions.[5] That modification sweeps far more broadly than the stated purpose of the Act and would prohibit recovery in non-marijuana misdemeanor cases. Moreover, because the proposed modification to Idaho Code section 37-2732(k) is unrelated to the Act, it likely violates the single-subject rule of article III, section 16 of the Idaho Constitution, which states:

> UNITY OF SUBJECT AND TITLE. *Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title*; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title.

(Emphasis added.) It is recommended that this modification be removed from the proposed initiative petition.

The second matter to note in Section 3 is that it modifies Idaho Code section 37-2732C(a) by excluding conduct authorized by the Act from its provisions. That statute makes it "unlawful for any person on a public roadway, on a public conveyance, on public property or on private property open to the public, to use or be under the influence of any controlled substance specified" in certain subsections, which includes Idaho Code section 37-2705(d)(27), "tetrahydrocannabinols," the psychoactive ingredient in marijuana. By excluding marijuana use "as authorized by Chapter 35, Title 37," the modification allows persons to become intoxicated from using marijuana and be in the described public areas. By its own terms, however, Prop. I.C. § 37-3503(4) specifically states it does not authorize someone to operate any motor vehicle, aircraft, train, motorboat, or other motorized form of transport while under the influence of marijuana. To eliminate the conflict between these two sections, it is recommended that the proposed amendment to Idaho Code section 37-2732C(a) be removed from the proposed initiative petition.

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[5] There are misdemeanor drug offenses that do not involve marijuana, such as possession of psilocybin. *See* Idaho Code §§ 37-2705(d)(25), 37-2732(c)(3).

4. Section 4 of the Proposed Act

The proposed amendment to Idaho Code section 63-4202(2)(a) would change the identified quantity of marijuana from 42 ½ grams to 86 grams. This section of the Idaho Code imposes an illegal drug tax on certain amounts of controlled substances. The amendment proposes 86 grams, which equates to approximately 3.033 ounces. We note only that the amendment results in an amount that is slightly more than the 3 ounce personal use limit contained in Prop. I.C. § 37-3502.

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

The United States Congress "has classified marijuana as a Schedule I drug, 21 U.S.C. § 812(c), and federal law prohibits its manufacture, distribution, and possession, 21 U.S.C. § 841(a)(1)." Emerald Steel Fabricators, Inc. v. Bureau of Lab. & Indus., 230 P.3d 518, 527 (Or. 2010). However, Idaho is free to enforce its own laws, just as the federal government is free to do the same. *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 (2001), the United States Supreme Court made clear that prosecutions under the federal Controlled Substances Act are not subject to a "medical necessity defense," even though a 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 Act here would not affect the ability of the federal government to prosecute marijuana-related crimes under federal laws.

In short, Idaho is free to pass and enforce its own laws creating or negating criminal liability relative to marijuana. But, 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), contrary to the plaintiff's contention that, because he was authorized under state law to use marijuana for medical purposes, he was illegally denied housing. The Ninth Circuit explained:

> The district court properly rejected the Plaintiffs' attempt to assert the medical necessity defense. *See Raich v. Gonzales*, 500 F.3d 850, 861 (9th Cir.2007) (stating that the defense may be considered only when the medical marijuana user has been charged and faces criminal prosecution). The Fair Housing Act, Americans with Disabilities Act, and Rehabilitation Act all expressly exclude illegal drug use, and AHA did not have a duty to reasonably accommodate Assenberg's medical marijuana use. *See* 42 U.S.C. §§ 3602(h), 12210(a); 29 U.S.C. § 705(20)(C)(i).
>
> AHA did not violate the Department of Housing and Urban Development's ("HUD") policy by automatically terminating the Plaintiffs' lease based on Assenberg's drug use without considering factors HUD listed in its September 24, 1999 memo. . . .
>
> Because the Plaintiffs' eviction is substantiated by Assenberg's illegal drug use, we need not address his claim . . . whether AHA offered a reasonable accommodation.
>
> The district court properly dismissed Assenberg's state law claims. Washington law requires only "reasonable" accommodation. [Citation omitted.] Requiring public housing authorities to violate federal law would not be reasonable.

Id. at 644. *See* Eccleston v. City of Waterbury, No. 3:19-cv-1614 (SRU), 2021 WL 1090754, at *8 (D. Conn. Mar. 22, 2021) (quoting Kamakeeaina v. Armstrong Produce, Ltd., No. 18-cv-00480-DKW-RT, 2019 WL 2019 at *15 (D. Haw. Mar. 22, 2019) ("Courts that have considered ADA claims for failure to accommodate medical marijuana use have relied on the CSA's classification of marijuana as a Schedule I illegal substance to conclude that 'using marijuana is not a reasonable accommodation.'"); The Kind & Compassionate v. City of Long Beach, 205 Cal. Rptr. 3d 723, 733 (Cal. App. 2d Dist. 2016) ("The claim fails on the same basis as plaintiffs' other disability discrimination claims: there is no right to convenient access to marijuana."). 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, 230 P.3d at 520.

In sum, the provisions of the initiative, Prop. I.C. §§ 37-3501, *et seq.*, cannot interfere or otherwise have an effect on federal laws, criminal or civil, which rely, in whole or in part, on marijuana being illegal under the Federal Controlled Substances Act.

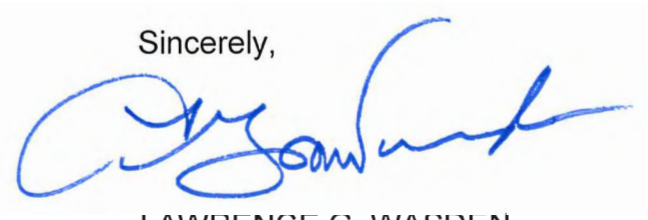
C. Other Recommended Revisions or Alterations

Apart from the legal and non-legal problems previously discussed or noted, there are no other recommended revisions or alterations.

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 Russ Belville, Idaho Citizens Coalition, 304 W. Logan St., Caldwell, ID 83605.

Sincerely,



LAWRENCE G. WASDEN
Attorney General

Analysis by:

John C. McKinney
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