IDAHO ATTORNEY GENERAL'S ANNUAL REPORT

OPINIONS

CERTIFICATES OF REVIEW

AND

SELECTED ADVISORY LETTERS

FOR THE YEAR

2021

Lawrence G. Wasden
Attorney General

This volume should be cited as:

2021 Idaho Att'y Gen. Ann. Rpt.

Thus, the Official Opinion 21-1 is found at:

2021 Idaho Att'y Gen. Ann. Rpt. 5

Similarly, the Certificate of Review of April 29, 2021 is found at:

2021 Idaho Att'y Gen. Ann. Rpt. 19

The Advisory Letter of January 11, 2021 is found at:

2021 Idaho Att'y Gen. Ann. Rpt. 107

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Lawrence G. Wasden
Attorney General

INTRODUCTION

My Fellow Idahoans:

Thank you for your interest in Idaho's legal matters! I am honored once again to share with you highlights of my office's work in 2021.

Since my first election as Idaho's attorney general in 2002, my goal has been to establish and maintain an office that provides accurate and objective legal advice that defends Idaho's laws and sovereignty while adhering to the Rule of Law. This has been my commitment to Idaho citizens over my five terms and remains my guiding principle.

In 2021, the Consumer Protection Division obtained over $7 million in consumer restitution. This amounts to $7.25 for each taxpayer dollar appropriated for consumer operations. Idaho received more than $22 million from tobacco companies stemming from the 1998 Tobacco Master Settlement Agreement. Idaho's Master Settlement Agreement payments total more than a half billion dollars to date. The Consumer Protection Division also facilitated Idaho's participation in three opioid settlements that will result in $119 million in opioid abatement for state, regional and local government.

My office filed three different lawsuits over federal vaccine mandates for private employers, healthcare workers and federal contractors. My office continued to litigate against Google and Facebook. We allege these companies engaged in anticompetitive conduct.

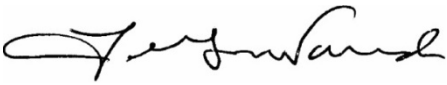
Attorneys assigned to the Department of Health and Welfare recouped nearly $15.3 million in Medicaid estate recovery. This is a 68 percent increase over the previous year, which itself was a record high.

The Internet Crimes Against Children Unit received more than 1,500 cybertips and opened 815 investigations in 2021. The unit's work resulted in 58 arrests. ICAC also instituted a new statewide training program to provide more local police and prosecutors with the skills necessary to pursue these specialized cases. The unit trained more than 100 law enforcement officers in Nampa, Pocatello, Meridian and Coeur d'Alene.

In January, we co-hosted with Idahoans for Openness in Government a virtual event titled “IDOG: Open Meetings in the Pandemic”. The event drew hundreds of citizens, journalists and public officials to learn the ins and outs of properly holding a public meeting during the COVID-19 pandemic. Since 2004, my office has hosted nearly 50 trainings on Idaho’s open meetings and public records laws.

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 again for your interest in our work.



LAWRENCE G. WASDEN
Attorney General

OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN
ATTORNEY GENERAL
2021
STAFF ROSTER

ADMINISTRATION

Brian Kane	Sherman Furey / Nicole McKay	Janet Carter	Kimi White	Kara Holcomb
Chief Deputy	Chief of Staff	Executive Assistant	Paralegal	Administrative Assistant

DIVISION CHIEFS

Robyn Lockett, Administration & Budget
Steven Olsen, Civil Litigation
Colleen Zahn / Mark Kubinski, Criminal Law
Andrew Snook, State General Counsel & Fair Hearings
Brett DeLange, Consumer Protection
Nicole McKay / Chelsea Kidney, Health & Human Services
Darrell Early, Natural Resources

DEPUTY ATTORNEYS GENERAL

Robert Adelson	Andres Figueroa Jr	Amber Kauffman	Stephanie Nemore	Matthew Shriver
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Katylyn Devries	Edward Jewell	Peter Mommer	John Shackelford	Jeremy Younggren
Adam Dingeldein	Kacey Jones	Owen Moroney	Erick Shaner	Scott Zanzig
Thomas Donovan	Kenneth Jorgensen	David Morse	Karen Sheehan	
Merritt Dublin				

INVESTIGATORS

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

PARALEGALS

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Tammie Cooley	Rebecca Ihli	Angela O'Brien	Stephanie Sze	Colleen Young
Suzy Cooley	Rita Jensen			

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Renee Ashton	Marilyn Gerhard	Sally Lunnen	Sara Pallante	Carla Shupe
Kelly Bassin	Leslie Gottsch	Maureen Maneck	Emily Paniccia	Rebekah Skriletz
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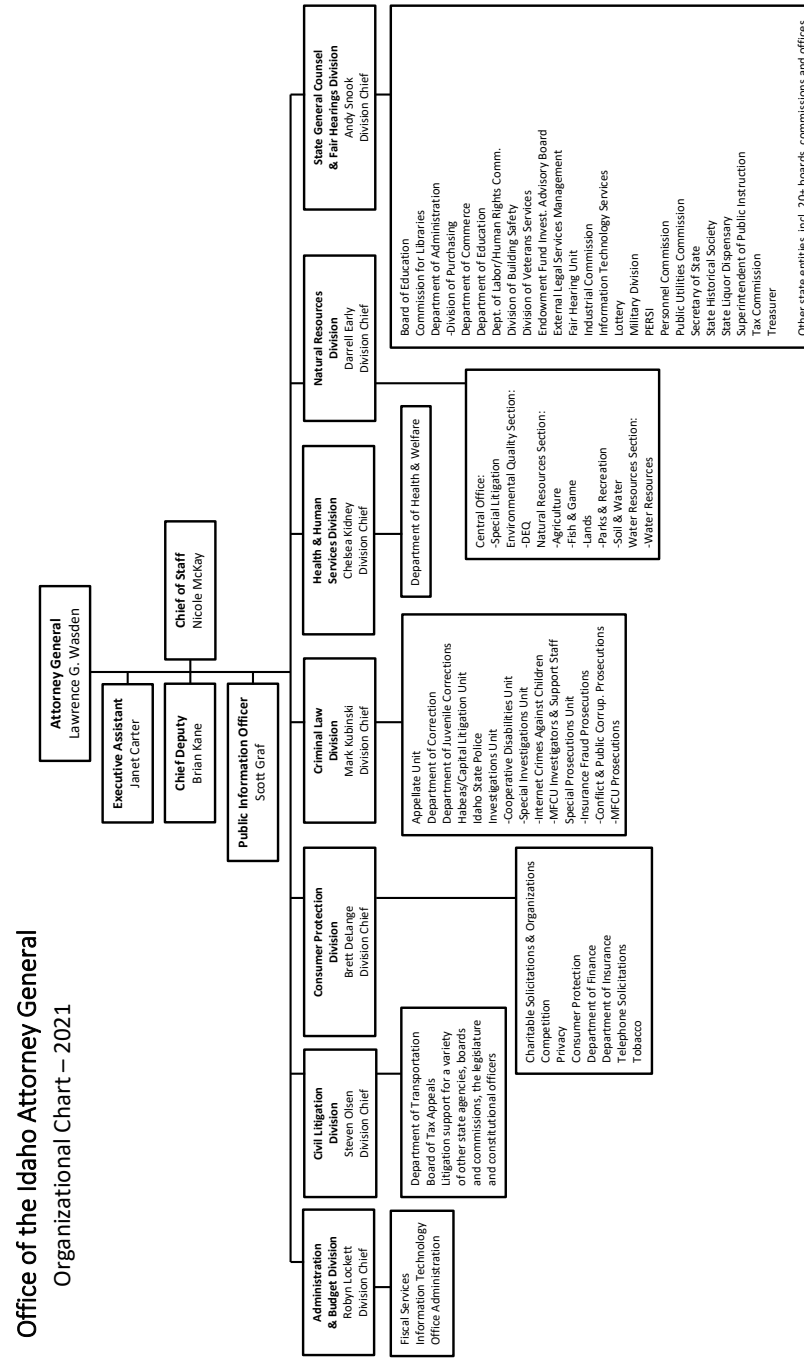
Patrick Donnellon	Kara Lansberry	Eric Nielsen	Rebekah Serrato	Rebecca Wills
Deborah Forgy	Ana Lara			


Office of the Idaho Attorney General
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Attorney General
Lawrence G. Wasden
Executive Assistant
Janet Carter
Chief Deputy
Brian Kane
Chief of Staff
Nicole McKay
Public Information Officer
Scott Graf
Administration & Budget Division
Robyn Lockett
Division Chief
Fiscal Services
Information Technology
Office Administration
Civil Litigation Division
Steven Olsen
Division Chief
Department of Transportation
Board of Tax Appeals
Litigation support for a variety of other state agencies, boards and commissions, the legislature and constitutional officers
Consumer Protection Division
Brett DeLange
Division Chief
Charitable Solicitations & Organizations
Competition
Privacy
Consumer Protection
Department of Finance
Department of Insurance
Telephone Solicitations
Tobacco
Criminal Law Division
Mark Kubinski
Division Chief
Appellate Unit
Department of Correction
Department of Juvenile Corrections
Habeas/Capital Litigation Unit
Idaho State Police
Investigations Unit
-Cooperative Disabilities Unit
-Special Investigations Unit
-Internet Crimes Against Children
-MFCU Investigators & Support Staff
Special Prosecutions Unit
-Insurance Fraud Prosecutions
-Conflict & Public Corrup. Prosecutions
-MFCU Prosecutions
Health & Human Services Division
Chelsea Kidney
Division Chief
Department of Health & Welfare
Natural Resources Division
Darrell Early
Division Chief
Central Office:
-Special Litigation
Environmental Quality Section:
-DEQ
Natural Resources Section:
-Agriculture
-Fish & Game
-Lands
-Parks & Recreation
-Soil & Water
Water Resources Section:
-Water Resources
State General Counsel & Fair Hearings Division
Andy Snook
Division Chief
Board of Education
Commission for Libraries
Department of Administration
-Division of Purchasing
Department of Commerce
Department of Education
Dept. of Labor/Human Rights Comm.
Division of Building Safety
Division of Veterans Services
Endowment Fund Invest. Advisory Board
External Legal Services Management
Fair Hearing Unit
Industrial Commission
Information Technology Services
Lottery
Military Division
PERSI
Personnel Commission
Public Utilities Commission
Secretary of State
State Historical Society
State Liquor Dispensary
Superintendent of Public Instruction
Tax Commission
Treasurer
Other state entities, incl. 20+ boards, commissions and offices.

OFFICIAL OPINIONS
OF
THE ATTORNEY GENERAL
FOR THE YEAR 2021

LAWRENCE G. WASDEN

ATTORNEY GENERAL
STATE OF IDAHO

ATTORNEY GENERAL OPINION NO. 21-1

TO: The Honorable Brandon Mitchell
Idaho State Representative
P.O. Box 8897
Moscow, Idaho 83843

Per Request for Attorney General's Opinion Regarding House Bill 562 (2020)

This letter responds to your request for legal guidance regarding the effects of amendments to the homestead property tax exemption—Idaho Code section 63-602G—by House Bill 562, 65th Legislature, 2d Regular Session (Idaho 2020).

QUESTIONS PRESENTED

1. Do the amendments in House Bill 562 allow individuals to claim the homestead exemption at any time during the year?

2. Do the changes to the homestead exemption by House Bill 562 subject the exemption to any type of proration?

CONCLUSION

For the reasons discussed in detail below, Idaho's law regarding the canons of statutory construction and interpretation dictate that individuals can claim the full homestead exemption—not subject to proration—at any time during the year.

ANALYSIS

A. The Homestead Exemption's Incorporation of the Definition of "Primary Dwelling Place" Found in Idaho Code Section 63-701(8) Does Not Impose an April 15 Deadline Where House Bill 562 Explicitly Removed This Same Requirement From the Exemption

In matters of statutory interpretation, the Idaho Supreme Court has long held that while "[s]tatutory interpretation begins with the literal language of the statute. Provisions should not be read in isolation, but must be interpreted in the context of the entire document." Estate of Stahl v. Idaho State Tax Comm'n, 162 Idaho 558, 562, 401 P.3d 136, 140 (2017) (quoting State v. Schulz, 151 Idaho 863, 866, 264 P.3d 970, 973 (2011)). See also Idaho Code § 73-113. Where ambiguity exists in a statute or a conflict exists between provisions of law, statutory interpretation is necessary. "The object of statutory interpretation is to give effect to legislative intent." State v. Doe, 147 Idaho 326, 328, 208 P.3d 730, 732 (2009) (citation omitted). When interpreting statutes, "[c]onstructions that would lead to absurd or unreasonably harsh results are disfavored." Saint Alphonsus Reg'l Med. Ctr. v. Gooding County, 159 Idaho 84, 89, 356 P.3d 377, 382 (2015) (quoting Spencer v. Kootenai County, 145 Idaho 448, 455, 180 P.3d 487, 494 (2008)). Further, when construing a statute, it must be given "an interpretation **that will not render it a nullity**, and effect must be given to all the words of the statute if possible, **so that none will be void**, superfluous, or redundant." Bonner County v. Cunningham, 156 Idaho 291, 295, 323 P.3d 1252, 1256 (Ct. App. 2014) (emphasis added) (citing State v. Mercer, 143 Idaho 108, 109, 138 P.3d 308, 309 (2006)). Finally, when resolving statutory conflicts: "**the more recent expression of legislative intent prevails**." Mickelsen v. City of Rexburg, 101 Idaho 305, 307, 612 P.2d 542, 544 (1980) (emphasis added).

House Bill 562 sought to remove the April 15 deadline from the homestead exemption in Idaho Code section 63-602G. According to the statement of purpose: "This legislation simply removes the April 15 date, so a homeowner can apply and receive the homeowner's exemption at any point in the year." Revised Statement of Purpose & Fiscal Note, H.B. 562, 65th Leg., 2d Reg. Sess. (Idaho 2020). This purpose is clearly reflected by reviewing the strikethrough, amended version of the requirement to qualify for the homestead exemption: "The homestead is owner-occupied and used as the primary dwelling place of the owner as of January 1, provided that in the event the homestead is owner-occupied after January 1 but before April 15, the owner of the property is entitled to the exemption." H.B. 562, 65th Leg., 2d Reg. Sess., 2020 Idaho Sess. Laws 727.

It has been argued that the April 15 deadline remains relevant for administration of this exemption because House Bill 562 maintained the requirement that the homestead be a "primary dwelling place." Primary dwelling place is defined in a separate statute—Idaho Code section 63-701(8)—that retains the April 15 deadline for applications for property tax reduction. Because of the reference to this definition, it has been argued that any application for the homestead exemption must still comply with the April 15 deadline that the Legislature clearly intended to remove. This view is inconsistent with application of the statutory interpretation principles set forth above. First, such a view would render the entirety of the amendment—the very stated purpose of the Bill—a nullity. Accordingly, such a result would violate the tenet that it is "incumbent…to give a statute an interpretation which will not render it a nullity." State v. Beard, 135 Idaho 641, 646, 22 P.3d 116, 121 (Ct. App. 2001) (quoting State v. Nelson, 119 Idaho 444, 447, 807 P.2d 1282, 1285 (Ct. App. 1991)). Second, the explicit removal of the April 15 deadline by House Bill 562 and the deadline being found in the related definition in Idaho Code section 63-701(8) arguably results in a conflict. As such, House Bill 562's removal of the deadline controls as the latest pronouncement of the Legislature. Finally, when a statute is ambiguous, "[t]he object of statutory interpretation is to give effect to legislative intent." Doe, 147 Idaho at 328, 208 P.3d at 732 (citation omitted). "[S]tatutory language is ambiguous where reasonable minds might differ or be uncertain as to its meaning." City of Idaho Falls v. H-K Contractors, Inc., 163 Idaho 579, 582, 416 P.3d 951, 954 (2018) (internal quotations marks omitted) (quoting Payette River Prop. Owners Ass'n v. Bd. of Comm'rs of Valley Cty., 132 Idaho 551, 557, 976 P.2d 477, 483 (1999)). The legislative intent for House Bill 562 is clearly stated: the Bill "removes the April 15 date, so a homeowner can apply and receive the homeowner's exemption at any point in the year." Revised Statement of Purpose & Fiscal Note, H.B. 562. Thus, any construction to the contrary would violate the most central tenet of statutory interpretation—to interpret consistent with the legislative purpose. Accordingly, any interpretation that maintains the April 15 deadline for application of the exemption is not supported by Idaho's law regarding statutory interpretation and construction.

B. The Plain Language of House Bill 562 Provides No Legal Basis for Prorating the Homestead Exemption

Aside from removing the April 15 deadline, House Bill 562 made one other substantive change to the homestead exemption. House Bill 562 modified subsection (4) by adding the following underlined language: "The exemption allowed by this section shall be effective upon the date of the application and must be taken before the reduction in taxes provided by sections 63-701 through 63-710, Idaho Code, is applied." 2020 Idaho Sess. Laws 728. It has been argued that the Bill's use of the added phrase "effective upon the date of the application" requires proration of the homestead exemption. For example, under this view, if an application is filed on July 1 of a tax year, that property should receive the homestead exemption for only the second half of the year. Arguably, this argument is supported by a single line in the Bill's fiscal note regarding a lesser effect on the budgets of taxing districts for applications made later in the year.[1] However, as outlined above, "[s]tatutory interpretation begins with the literal language of the statute." Estate of Stahl, 162 Idaho at 562, 401 P.3d at 140 (quoting Schultz, 151 Idaho at 866, 264 P.2d at 973)). Additionally, statutory interpretation does not allow for "insert[ing] words into a statute…." Saint Alphonsus, 159 Idaho at 89, 356 P.3d at 382 (citations omitted). "The most fundamental premise" of interpreting statutory provisions is the "**assum[ption] that the legislature meant what it said**." Verska v. Saint Alphonsus Reg'l Med. Ctr., 151 Idaho 889, 894, 265 P.3d 502, 507 (2011) (emphasis added) (citations omitted). House Bill 562 does not speak to or mention prorating the exemption nor does it provide any guidance on how to accomplish proration—unlike other exemptions that do contemplate a form of proration. See Idaho Code §§ 63-602X(1), 63-602Y(1). Instead, the plain language of the exemption as amended by House Bill 562 provides that the "exemption allowed by this section shall be effective upon the date of the application…." Idaho Code § 63-602G(4).

Today, the exemption allowed by this section is "the first one hundred twenty-five thousand dollars ($125,000) of the market value for assessment purposes of the homestead…or fifty percent (50%) of the market value…." Idaho Code § 63-602G(1). To read proration of this exemption into this statute would violate the tenets of statutory interpretation discussed above because doing so would not provide the

applicant with the full "exemption allowed by this section." Idaho Code § 63-602G(4). Thus, it appears that in full context, this provision is consistent with the stated legislative purpose of the Bill: "a homeowner can apply and receive the homeowner's exemption at any point in the year." Revised Statement of Purpose & Fiscal Note, H.B. 562. Through this lens, the words "effective upon the date of the application" seem to simply indicate the intent that homeowners can qualify for this exemption at any time during the year. This conclusion is bolstered by the fact that the previous version of the homestead exemption also had no provision indicating proration, even though a homeowner could file for the exemption as late as April 15. Additionally, the property tax exemptions subject to proration have different proration formulas and selecting one with no Legislative guidance would simply be creating a method out of whole cloth. As such, where proration is not mentioned or indicated by the exemption statute, there is no statutory basis for prorating the exemption in the plain language of the statute.

It has also been argued that this interpretation—applying full exemption to homesteads for applications made anytime during the year—also impermissibly inserts words into the statute because the Bill does not specify that it relates back to January 1 of the tax year in question. This argument ignores the basic scheme of property tax in Idaho. January 1 is the relevant date for all property tax questions in Idaho: "All real, personal and operating property subject to property taxation must be assessed annually at market value for assessment purposes as of 12:01 a.m. of the first day of January[.]" Idaho Code § 63-205(1). The homestead exemption applies to a qualifying property "[f]or each tax year…." Idaho Code § 63-602G(1). Before House Bill 562, no language existed to specifically revert the homestead exemption to January 1 of the tax year at issue. Under the prior version of the exemption, if a taxpayer filed an application on April 15, the property qualified for the full amount of the exemption for the year without any language specifically directing any relation back to January 1. Because no such language specifically directing relation back was necessary before House Bill 562, no such language is needed now to effectuate the full amount of an exemption after House Bill 562.

Applying the full exemption at any point in the year simply recognizes that property tax exemptions apply for the entirety of the year unless that exemption specifically and explicitly provides

differently. See Idaho Code §§ 63-602X(1), 63-602Y(1). This presumption that exemptions apply for the full year is not the impermissible addition of words to the language of the Bill, but rather the well-documented canon of construction that statutes on the same subject, or in pari materia, "**be construed together** to effect legislative intent." City of Sandpoint v. Sandpoint Indep. Highway Dist., 139 Idaho 65, 69, 72 P.3d 905, 909 (2003) (emphasis added) (citation omitted). Finally, it should be observed that even if this portion of the statute were found to be ambiguous, it would be interpreted to accomplish the stated legislative purpose that "a homeowner can apply and receive the homeowner's exemption at any point in the year." Revised Statement of Purpose & Fiscal Note, H.B. 562. Applying proration or partial exemption would not accomplish this stated legislative goal.

CONCLUSION

For the reasons detailed above, Idaho's law regarding statutory construction and interpretation dictate that individuals can claim the full homestead exemption—not subject to proration—at any time during the year.

AUTHORITIES CONSIDERED

1. Idaho Code:

§ 63-205(1).
§ 63-602G.
§ 63-602G(1).
§ 63-602G(4).
§ 63-602X(1).
§ 63-602Y(1).
§ 63-701(8).
§ 73-113.

2. Idaho Session Laws:

2020 Idaho Sess. Laws 727.

3. Idaho Cases:

City of Idaho Falls v. H-K Contractors, Inc., 163 Idaho 579, 416 P.3d 951 (2018).
City of Sandpoint v. Sandpoint Indep. Highway Dist., 139 Idaho 65, 72 P.3d 905 (2003).
Estate of Stahl v. Idaho State Tax Comm'n, 162 Idaho 558, 401 P.3d 136 (2017).
Mickelsen v. City of Rexburg, 101 Idaho 305, 612 P.2d 542 (1980).
Payette River Prop. Owners Ass'n v. Bd. of Comm'rs of Valley Cty., 132 Idaho 551, 976 P.2d 477 (1999).
Saint Alphonsus Reg'l Med. Ctr. v. Gooding County, 159 Idaho 84, 356 P.3d 377 (2015).
Spencer v. Kootenai County, 145 Idaho 448, 180 P.3d 487 (2008).
State v. Beard, 135 Idaho 641, 22 P.3d 116 (Ct. App. 2001).
State v. Doe, 147 Idaho 326, 208 P.3d 730 (2009).
State v. Mercer, 143 Idaho 108, 138 P.3d 308 (2006).
State v. Nelson, 119 Idaho 444, 807 P.2d 1282 (Ct. App. 1991).
State v. Schulz, 151 Idaho 863, 264 P.3d 970 (2011).
Verska v. Saint Alphonsus Reg'l Med. Ctr., 151 Idaho 889, 265 P.3d 502 (2011).

4. Other Authorities:

Revised Statement of Purpose & Fiscal Note, H.B. 562, 65th Leg., 2d Reg. Sess. (2020).

Dated this 27th day of October, 2021.

LAWRENCE G. WASDEN
Attorney General

Analysis By:

KOLBY K. REDDISH
Deputy Attorney General

BRETTON D. JARVIS
Deputy Attorney General

PHIL N. SKINNER
Deputy Attorney General

BRIAN P. KANE
Chief Deputy Attorney General

[1] This single line from the fiscal note provides: "The fiscal impact to a taxing district decreases the further away from April 15 that the property is purchased if it becomes a primary residence." Revised Statement of Purpose & Fiscal Note, H.B. 562. While this statement would be true if proration were used, it also inexplicably ties the impact to April 15—a date which the Bill removed entirely from the homestead exemption. In other words, if proration were to be required by the Bill, there is no support for beginning proration on April 16 rather than on January 2 of the tax year at issue. Alternatively, this line of the fiscal note could be referencing the fact that only for properties that apply later in the year, after April 15, are tax cancellations necessary to effectuate the exemption.

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and

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2021

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ATTORNEY GENERAL'S CERTIFICATES OF REVIEW FOR THE YEAR 2021

LAWRENCE G. WASDEN

ATTORNEY GENERAL
STATE OF IDAHO

April 29, 2021

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

Re: Certificate of Review
Proposed Initiative Repealing Idaho Code § 34-1805 and Enacting New Idaho Code § 34-1805

Dear Secretary of State Denney:

An initiative petition was filed on April 7, 2021, proposing to repeal and replace Idaho Code section 34-1805 with a new Idaho Code section 34-1805. The proposed initiative completely eliminates the existing geographic signature requirement, but keeps the current 6% total signature requirement.

Pursuant to Idaho Code section 34-1809, this office has reviewed the petition and 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 petitioner is free to accept or reject them in whole or in part. This office offers no opinion with regard to the policy issues raised by the proposed initiative or the potential revenue impact to the State budget from likely litigation over the initiative's validity.

BALLOT TITLE

Following the filing of the proposed initiative, if petitioner decides to proceed with sponsorship, 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, petitioner may submit proposed titles for

consideration. Any proposed titles should be consistent with the above standard.

MATTER OF FORM

Section 1 of the proposed initiative contains a descriptive statement that identifies the initiative as "The Idaho Initiative Act."[1] Section 2 repeals Idaho Code section 34-1805, extant at the time of vote on the proposed measure. Section 3 amends title 34, chapter 18, Idaho Code, by enacting a new Idaho Code section 34-1805. Section 4 provides that should the proposed initiative pass at the November 8, 2022 General Election, then it will enter into full force and effect on or after January 1, 2023.

SUMMARY OF INITIATIVE AND MATTERS OF SUBSTANTIVE IMPORT

I. Summary of Proposed Initiative.

The proposed initiative is discrete. It amends title 34, chapter 18, Idaho Code, by repealing Idaho Code section 34-1805 and replacing it with a revised Idaho Code section 34-1805.

Title 34, chapter 18, Idaho Code, establishes the processes by which the people may enact initiatives and conduct referendums in Idaho. Section 34-1805 identifies the total number of required signatures for final filing and consideration. Before April 17, 2021, initiative proponents were required to collect a certain percentage of signatures, equaling or greater than 6% of the qualified electors at the time of the last general election from at least 18 legislative districts. If those requirements were met, then the total number of signatures collected must have been equal to or greater than 6% of the qualified electors of the state of Idaho at the time of the last general election.

On April 17, 2021, Governor Little signed Senate Bill 1110, 66th Legislature, 1st Regular Session ("S.B. 1110"), into law. The bill contained an emergency clause and it became law that same date. Based upon S.B. 1110's enactment, Idaho Code section 34-1805 now requires initiative proponents to collect a certain percentage of signatures, equaling at least 6% of the qualified electors at the time of

the last general election from all 35 legislative districts in the state of Idaho.

The proposed initiative eliminates the geographic signature requirement. It decreases the number of legislative districts from which signatures of legal voters must be obtained in order to qualify a measure for the ballot from 35 districts to zero. The proposed initiative does not alter the total number of signatures that must be collected, which must be equal to or greater than 6% of the qualified electors of the state of Idaho at the time of the last general election.

II. Matters of Substantive Import.

A. The Legal Standards Governing the Imposition of Conditions on the Enactment of Initiatives and Referendums Stem from the Idaho and U.S. Constitutions.

The proposed initiative measure would impose a lesser burden on the legal framework for how the people may enact initiatives and pass referendums in Idaho. While the overall framework would be largely unchanged from the current framework in place under title 34, chapter 18, Idaho Code, a discussion of the legal standards governing this framework is required to analyze whether the changes in the proposal would be legally permissible.

There is no federal right to initiate legislation or to hold referendums.[2] That said, restrictions on qualifying an initiative or referendum for the ballot may directly or indirectly impact core political speech and thereby violate the First Amendment of the U.S. Constitution.[3] Restrictions related to qualifying an initiative or referendum for the ballot may also violate the Equal Protection Clause of the U.S. Constitution.[4] However, the analysis begins under Idaho's Constitution.

Idaho lawmakers passed Senate Joint Resolution 12 in 1911, which was a resolution to amend the Idaho Constitution to authorize an initiative and referendum process for its citizens.[5] Idaho voters approved the constitutional amendment at the general election in 1912.[6]

Article III, section 1 is the relevant provision of the Idaho Constitution governing the right of the citizenry to enact law via initiative. After the provision was ratified in 1912, it provided, in pertinent part, the following:

> The people reserve to themselves the power to propose laws, and enact the same at the polls independent of the legislature. This power is known as the initiative, and legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, initiate any desired legislation and cause the same to be submitted to the vote of the people at a general election for their approval or rejection provided that legislation thus submitted shall require the approval of a number of voters equal to a majority of the aggregate vote cast for the office of the governor at such general election to be adopted.[7]

The foregoing provision provides the language of the constitutional section as it read after the 1912 amendment, with the underlined clause showing the language deleted by a 1980 amendment to the Idaho Constitution, which has been the only change made to Idaho's constitutional provisions regarding initiatives and referenda since 1912.[8]

Idaho courts have determined that the right of the people to initiate laws and hold referendums is not self-operating.[9] This right "can only be exercised 'under such conditions and in such manner as may be provided by acts of the legislature.'"[10] The Legislature could not agree upon the "conditions" or "manner" of the initiative (and referendum) process until 1933, which is currently codified at title 34, chapter 18, Idaho Code.[11] When Idaho Code section 34-1805 was enacted, it required that a petition "have affixed 'signatures of legal voters equal in number to not less than ten per cent (10%) of the electors of the state based upon the aggregate vote cast for governor at the general election next preceding the filing of such initiative…petition.'"[12]

In Dredge Mining Control—Yes!, Inc. v. Cenarrusa ("Dredge"), the Idaho Supreme Court examined the "conditions" and "manner" that

the Legislature may establish for the exercise of the right to initiate laws without violating the right to initiate itself.[13] The court analyzed whether the 10% signature requirement in then-Idaho Code section 34-1805 was a permissible condition on the right to initiate laws.[14]

The trial court upheld the requirement, concluding "[t]he legislative procedures outlined in Chapter 18 of Title 34, Idaho Code, are not unreasonable and must be complied with. While they may be cumbersome they are nevertheless workable[.]"[15] The appellants challenged the trial court's conclusion, arguing the certification of the signatures by the clerks of the district courts was "a practical impossibility" and "unworkable" under Idaho voter registration laws, raising concerns about the clerks' ability to verify signatures.[16]

The Idaho Supreme Court concluded the "statutory scheme set up by the legislature, although restrictive and perhaps cumbersome, is reasonable and workable."[17] It identified work-arounds to the concerns appellants raised about the ability of clerks to verify signatures and noted that no signatures in the lower court case had been rejected for lack of genuineness.[18] Ultimately, "the provisions of the law enacted by the legislature pertaining to the initiative procedures are reasonable."[19]

Thus, under the standard established by the Idaho Supreme Court, the "conditions" and "manner" established for the exercise of the right to initiate and hold referendums must be "reasonable and workable" to avoid violating the rights contained in article III, section 1 of the Idaho Constitution, although they may be "restrictive and perhaps cumbersome."[20]

The Legislature next revised the "conditions" and "manner" of the signature percentage requirement in 1997.[21] The 10% total signature requirement was reduced to 6%, but a geographic distribution requirement was added to require signatures from 22 counties equal to and not less than 6% of the qualified electors at the time of the last general election in each of those 22 counties.[22]

While not challenged under the reasonable and workable test, the geographic distribution requirement was challenged in Idaho Coalition United for Bears v. Cenarrusa ("ICUB") based upon the 14th Amendment's Equal Protection Clause.[23] "Voting is a fundamental right

subject to equal protection guarantees under the Fourteenth Amendment."[24] When a state gives its citizens the right to enact laws by initiative and hold referendums, "it subjects itself to the requirements of the Equal Protection Clause."[25] Laws governing the process may not engage in impermissible vote dilution nor may they discriminate against an identifiable class of voters.[26]

The district court in ICUB found the geographic distribution requirement unconstitutional because it gave rural voters preferential treatment:

> Because over 60% of Idaho's population resides in just 9 of the State's 44 counties, it is easy to envision a situation where ¾ of Idaho's voters sign a petition but fail to get it on the ballot because they could not collect 6% of the vote in the rural counties.[27]

The Ninth Circuit Court of Appeals affirmed the district court's decision in 2003 on Equal Protection grounds.[28] In so ruling, the Ninth Circuit found that the geographic percentage distribution requirement based upon counties of uneven population violated the Equal Protection Clause because it allocated "equal power to counties of unequal population."[29] The Ninth Circuit did note, however, that Idaho's geographic distributional requirement could be saved by basing it on existing state legislative districts (i.e., districts that were equipopulous).[30] And that the purposes underlying a geographic distributional requirement could be accomplished through these legislative districts by "simply increasing the statewide percentage of signatures required—from six to twelve percent or to any other percentage Idaho deemed desirable."[31] The stated purposes underlying the geographic distributional requirement were: requiring a modicum of statewide support; preventing a long and confusing list of initiatives appearing on the ballot; protecting against fraud; informing the electorate; ensuring the "integrity" of the ballot process; and promoting "grassroots direct legislation efforts."[32]

The Idaho Legislature amended Idaho Code section 34-1805 again in 2007.[33] The geographic distribution requirement was completely removed, but the total signature percentage requirement remained the same at 6%.[34] Six years later, the Idaho Legislature re-

imposed a geographic distribution requirement based upon equipopulous legislative districts.[35] The signature percentage requirement remained the same, but it required 6% of "the qualified electors at the time of the last general election in each of at least eighteen (18) legislative districts; provided however, the total number of signatures shall be equal to or greater than six percent (6%) of the qualified electors of the state at the time of the last general election."[36] This is the law that was in effect until April 17, 2021, when Governor Little signed S.B. 1110. The potential effect of S.B. 1110 on this proposed initiative is discussed further below.

It is worth noting that Idaho Code section 34-1805 was recently challenged in federal court again on Equal Protection grounds.[37] Like the proposed initiative here, the plaintiff sought to invalidate the geographic distribution requirement entirely in section 34-1805.[38] The court noted that this matter had not been litigated extensively, but found numerous cases on point in the Ninth Circuit and other federal circuits to conclude that the plaintiff did not have a redressable cause of action.[39] The court relied heavily on ICUB, which explicitly supported geographic distribution requirements for signature gathering if based upon equipopulous legislative districts.[40]

With regard to the First Amendment, "[t]he [U.S.] Supreme Court has identified at least two ways in which restrictions on the initiative process can severely burden 'core political speech.'"[41] First, a restriction could "restrict one-on-one communication between petition circulators and voters."[42] Second, it could make it less likely that a proponent of a measure could gather the necessary signatures to place an initiative on the ballot, thereby "'limiting their ability to make the matter the focus of statewide discussion.'"[43]

In analyzing First Amendment concerns related to initiative and referendum procedures, the court will first ask whether the law imposes a "severe burden" on a plaintiff's rights.[44] Laws imposing severe burdens must be "narrowly tailored and advance a compelling state interest."[45] "Lesser burdens … trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions."[46]

B. Laws Setting the Conditions and Manner Governing How the Rights of Initiative and Referendum May be Exercised Are Likely a Proper Subject for Initiative.

While article III of the Idaho Constitution expressly gives the Legislature the power to control the conditions and manner by which the right to initiate laws may be exercised, this is likely a proper subject for an initiative.[47] Generally, where the Legislature may legislate, the people may initiate.[48]

The Idaho Supreme Court has previously found that a power explicitly granted to the Legislature may be exercised by the people under the right to initiate laws. In Rudeen v. Cenarrusa, the court upheld the Idaho Term Limits Act Initiative of 1994, which limited multi-term incumbents' right to ballot access.[49] The court upheld the initiated laws as a valid exercise of the power vested in the Legislature and the people of Idaho granted by the combination of article III, section 1, and article VI, section 4 of the Idaho Constitution.[50]

Article VI, section 4 of the Idaho Constitution provides "*[t]he legislature* may prescribe qualifications, limitations, and conditions for the right of suffrage, additional to those prescribed in this article, but shall never annul any of the provisions in this article contained."[51] The Rudeen Court interpreted this provision as granting the people, as well as the Legislature, authority to add limitations to the right of suffrage.[52] Despite the fact that the provision specifically named the Legislature as the authorized entity, the court concluded that the authority extended to the people under the right of initiative, upholding the initiative under articles III and VI of the Idaho Constitution.[53]

The reverse is also true. In Westerberg, the Idaho Supreme Court held the people may not enact a lottery through the initiative process when the Legislature is prohibited from so doing.[54] Westerberg indicates that any restrictions on the Legislature's ability to set the conditions and manner for the exercise of the right of initiative also apply when the people set the conditions and manner for the exercise of the initiative.

A reviewing court would therefore likely find that the people may set the conditions and manner for the exercise of the right of initiative

via initiative as long as the procedure established by the people complies with the constitutional standards discussed above.

C. The Requirement that Petitioners Gather Signatures of 6% of the Qualified Electors without Any Geographic Limitations to Put an Initiative Measure or Referendum on the Ballot is Likely Constitutional.

As discussed above, until April 17, 2021, Idaho Code section 34-1805 required that initiative and referendum petitioners collect:

> the signatures of legal voters equal in number to not less than six percent (6%) of the qualified electors at the time of the last general election in each of at least eighteen (18) legislative districts; provided however, the total number of signatures shall be equal to or greater than six percent (6%) of the qualified electors of the state at the time of the last general election.

In light of S.B. 1110's passage, initiative proponents must now collect signatures from all 35 legislative districts. The proposed initiative seeks to eliminate the need to collect signatures on a geographic basis. The total number of signatures to be collected is equal to or greater than 6% of the qualified electors of the state at the time of the last general election.

As noted above, Dredge has already addressed whether total signature percentage requirements are permissible conditions and manners in the initiative process and it found that a 10% total signature requirement was a permissible condition on the right to initiate laws.[55] At that time, there was no geographic distribution requirement. As the trial court in Dredge concluded, "[t]he legislative procedures outlined in Chapter 18 of Title 34, Idaho Code, are not unreasonable and must be complied with. While they may be cumbersome they are nevertheless workable[.]"[56] Considering that the total signature requirement is proposed to be less, at 6%, a similar outcome would likely be reached should the proposed initiative be challenged.

Signature-gathering requirements that meet this standard are also likely to survive First Amendment scrutiny. Under First

Amendment jurisprudence, as long as ballot access restrictions do not "significantly inhibit the ability of initiative proponents to place initiatives on the ballot,"[57] they will be upheld as long as the rule furthers "an important regulatory interest."[58] A ballot access restriction works a significant inhibition when "reasonably diligent" initiative proponents are unable to qualify an initiative for the ballot as a result of the restrictions.[59] Again, by removing the geographic distribution requirement, the burdens imposed are less than current law.

As for eliminating the legislative district requirement, the Ninth Circuit Court of Appeals has approved a requirement that initiative proponents collect signatures from a certain number of registered voters in *all* of the state's congressional districts.[60] Other courts have similarly approved geographic distribution requirements.[61] However, the Ninth Circuit has not held that geographic distribution requirements *are* required.

Instead, the elimination of the geographic distribution requirements becomes more of a policy consideration. As noted in ICUB, the policy considerations underlying a geographic requirement were: requiring a modicum of statewide support; preventing a long and confusing list of initiatives appearing on the ballot; protecting against fraud; informing the electorate; ensuring the "integrity" of the ballot process; and promoting "grassroots direct legislation efforts."[62] Finally, the court in Isbelle concluded its opinion by noting the effect of striking the geographic distribution requirement as plaintiff intended:

> In fact, were the Court to strike down Section 34-1805, it would likely mean that those who wanted to place initiatives on the ballot would focus solely on the most populous areas of the state (to increase the chances of garnering the greatest number of total signatures) and leave less populous areas with little to no input on important issues. Idaho Code 34-1805 ensures that ballot initiatives brought in Idaho enjoy broad support—not in the magnitude of the number of signatures, but in the breadth of where those signatures come from.[63]

Based on the above precedent, it is likely that the signature-gathering requirements for initiatives would be upheld as constitutional

against a facial challenge individually and in the aggregate. It is unlikely that a reviewing court would find that the elimination of a geographic signature requirement to be unreasonable or even required. Therefore, it is unlikely that these changes would constitute a violation of the Idaho Constitution, Equal Protection Clause or the First Amendment under the standards discussed above.

D. The Proposed Ballot Initiative Will Need to Meet the Signature Requirements for All 35 Legislative Districts Enacted by the Governor on April 17, 2021.

Idaho Code section 34-1805 was amended by S.B. 1110 on April 17, 2021, when the Governor signed the bill, which contained an emergency clause. Based upon the signed bill, it now requires initiative proponents to collect a certain percentage of signatures, equaling or greater than 6% of the qualified electors at the time of the last general election from all 35 legislative districts in the state of Idaho.

At this point in time, the proposed initiative, which was submitted to the Secretary of State on April 7, 2021, is currently undergoing the certificate of review process outlined in Idaho Code section 34-1809(1). Ballot titles have not been issued under Idaho Code section 34-1809(2). Under Idaho Code section 34-1802(1), no petition may be circulated until the Secretary of State issues the ballot title to the initiative sponsors. In sum, although submitted, the proposed initiative has not met the statutory procedural requirements for circulation.

It appears that the petitioner has an inchoate right, which is "a right that has not fully developed, matured, or vested."[64] This scenario is similar to Matter of Hidden Springs Trout Ranch, Inc.,[65] where the appellant had filed an application for a water appropriation permit.[66] While that application was pending, the Legislature amended the statute to add a fifth criteria.[67] The district court held that the amendment applied to the appellant, who appealed, contending that applying the amendment to a pending application was a retroactive application of the statute as amended.[68] The Idaho Supreme Court disagreed: "[w]e do not find that the mere initiation of the statutory process for water appropriation immediately grants the applicant vested rights in the water. The applicant gains but an inchoate right upon filing

of the application which may ripen into a vested interest following proper statutory adherence."[69] It found that "at the time the legislation in question was enacted, the status of the appellant had progressed no further than that of an applicant with a pending application. Appellant therefore possessed no vested right which could be interfered with by application of the legislation."[70] The Idaho Supreme Court then upheld the district court's holding that the statutory amendment adding a fifth criteria to consider when reviewing the appellant's application for a permit applied to the consideration of that application.[71]

This office's reading of the statutory requirements for an initiative petition are similar to that of the water permit, namely that because the initiative petition is pending review by the Attorney General, ballot titles must still be prepared and the petition has not yet been approved for circulation, the initiative "right" has not yet been perfected.

Courts in other states have similarly held that the right to place an initiative on the ballot is not a "vested right" protected from changes in statutory law.[72] In Committee for Better Health Care for All Colorado Citizens, the plaintiff filed its proposed initiative with the appropriate office on May 5, 1989.[73] On June 7, 1989, the Initiative Title Setting Board met and established the title, submission clause and a summary pursuant to the then-effective statute.[74] On June 10, 1989, amendments to the statutory scheme regulating the initiative process became effective.[75] Then the plaintiffs began collecting signatures.[76] After a number of signatures were rejected by the Secretary of State, plaintiffs attempted to exercise a curative process available under the previous statutory scheme.[77] The court approved the Secretary's application of the amended statutory scheme to all events that transpired after June 7, 1989, concluding that the plaintiffs did not have vested rights in the procedural and remedial measures available under the prior statutory scheme.[78]

The Idaho Legislature implemented S.B. 1110 with an emergency clause. The Governor signed S.B. 1110 into law on April 17, 2021. The above case law demonstrates that the signature requirements in S.B. 1110 now apply to all events that occur after April 17, 2021, the effective date of S.B. 1110.

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 copy of this Certificate of Review, deposited in the U.S. Mail to Luke Mayville, 419 W. Union St. Boise, Idaho 83702.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

Robert A. Berry
Deputy Attorney General

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[1] While not included in the title, the proposed initiative would also apply to referendums.

[2] Angle v. Miller, 673 F.3d 1122, 1127-28, 1133 (9th Cir. 2012) (citations omitted).

[3] See id. at 1132-33 (citations omitted).

[4] Id. at 1127-28.

[5] See Kristin M. Ford, Initiative & Referendum Process in Idaho: A Research Guide, 26 Legal Reference Servs. Q. 79, 80 (2007) ("Research Guide"); S.J. Res. 12, 11th Leg, 1911 Idaho Sess. Laws 786 (ratified Nov. 5, 1912).

[6] Ford, Research Guide, 26 Legal Reference Servs. Q., at 80; Westerberg v. Andrus, 114 Idaho 401, 402-03, 757 P.2d 664, 665-66 (1988).

[7] Westerberg, 114 Idaho at 402-03, 575 P.2d at 665-66 (emphasis added).

[8] See Ford, Research Guide, 26 Legal Reference Servs. Q., at 81; S.J. Res. No. 112, 45th Leg., 2nd Reg. Sess., 1980 Idaho Sess. Laws 1028 (ratified Nov. 4, 1980).

[9] See Johnson v. Diefendorf, 56 Idaho 620, 636, 57 P.2d 1068, 1075 (1936) (holding the right of referendum also provided in article III, section 1 is not self-operating, but rather its exercise is dependent upon the statutory scheme enacted by the Legislature).

[10] Westerberg, 114 Idaho at 404, 757 P.2d at 667 (emphasis omitted) (quoting Luker v. Curtis, 64 Idaho 703, 707-08, 136 P.2d 978, 980 (1943)).

[11] See id. (citing Luker, 64 Idaho at 708, 136 P.2d at 980). See also H.B. 186, 22nd Leg., 1933 Idaho Sess. Laws 431.

[12] Dredge Mining Control-Yes!, Inc. v. Cenarrusa, 92 Idaho 480, 481, 445 P.2d 655, 656 (1968) (quoting Idaho Code § 34-1805 (1933)).

[13] See generally id.

[14] Id. at 481-84, 455 P.2d at 656-59.

[15] Id. at 483, 455 P.2d at 658.

[16] Id. The trial court had interpreted "legal voters" to mean registered electors and the Idaho Supreme Court upheld this conclusion. See id. at 482, 455 P.2d at 657.

[17] Id. at 484, 455 P.2d at 659 (citations omitted).

[18] Id.

[19] Id.

[20] Id. (citations omitted).

[21] H.B. 265, 54th Leg., 1st Reg. Sess., 1997 Idaho Sess. Laws 756, 759.

[22] Id.

[23] 234 F. Supp. 2d 1159, 1160-62 (D. Idaho 2001).

[24] Idaho Coal. United for Bears v. Cenarrusa, 342 F.3d 1073, 1076 (9th Cir. 2003) (citation omitted).

[25] Id. at 1077 n.7 (citation omitted).

[26] Angle, 673 F.3d at 1128-29.

[27] ICUB, 234 F. Supp. 2d. at 1165.

[28] See ICUB, 342 F.3d at 1074.

[29] Id. at 1078.

[30] Id.

[31] Id. at 1079.

[32] Id. at 1078-79.

[33] H.B. 214, 59th Leg., 1st Reg. Sess., 2007 Idaho Sess. Laws 619, 622.

[34] Id.

[35] S.B. 1108, 62nd Leg., 1st Reg. Sess., 2013 Idaho Sess. Laws 503, 504.

[36] Id.

[37] Isbelle v. Denney, No. 1:19-cv-00093-DCN, 2020 WL 2841886 (D. Idaho Jun. 1, 2020).

[38] Id. at *1 & n.1, *3.

[39] Id. at *3.

[40] Id. at *4.

[41] Angle, 673 F.3d at 1132 (quoting Meyer v. Grant, 486 U.S. 414, 422, 108 S. Ct. 1886, 1892, 100 L. Ed. 2d 425 (1988)).

[42] Id. (citation omitted).

[43] Id. (quoting Meyer, 486 U.S. at 423).

[44] Id.

[45] Id. (citation omitted).

[46] Id. (emphasis and citation omitted); Burdick v. Takushi, 504 U.S. 428, 433-34, 112 S. Ct. 2059, 2063-64, 119 L. Ed. 2d 245 (1992).

[47] See Idaho Const. art. III, § 1 ("legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, initiate any desired legislation").

[48] See City of Boise v. Keep the Commandments Coal., 143 Idaho 254, 256, 141 P.3d 1123, 1125 (2006) ("If a subject is legislative in nature, it is appropriate for action by initiative.").

[49] Rudeen v. Cenarrusa, 136 Idaho 560, 38 P.3d 598 (2001).

[50] Id. at 567-68, 38 P.3d at 605-06.

[51] (Emphasis added.)

[52] Rudeen, 136 Idaho at 567, 38 P.3d at 605.

[53] Id. at 567-68, 38 P.3d at 605-06.

[54] Westerberg, 114 Idaho at 406, 757 P.2d at 669.

[55] Dredge, 92 Idaho at 481, 484, 445 P.2d at 656, 659.

[56] Id. at 483, 455 P.2d at 658.

[57] Angle, 673 F.3d at 1133.

[58] Id. at 1134-35 (citation omitted).

[59] Id. at 1133-34.

[60] Id. at 1135-36.

[61] See Libertarian Party v. Bond, 764 F.2d 538, 543 (8th Cir. 1985) (requirement that signatures be obtained from either all, or at least one-half, of Missouri's nine congressional districts and that party obtain signatures of at least one or two percent, respectively, of votes cast for governor in last gubernatorial election to place party's name on ballot was not overly burdensome); Moritt v. Governor of N.Y., 366 N.E.2d 1285, 1287 (N.Y. Ct. App. 1977) (upheld requirement of 20,000 signatures with at least 100 signatures from each district for statewide office).

[62] ICUB, 342 F.3d at 1078-79.

[63] Isbelle, 2020 WL 2841886, at *5.

[64] Schoorl v. Lankford, 161 Idaho 628, 631, 389 P.3d 173, 176 (2017) (alteration and citation omitted).

[65] 102 Idaho 623, 636 P.2d 745 (1981).

[66] Id. at 623-24, 636 P.2d at 745-46.

[67] Id.

[68] Id. at 624, 636 P.2d at 746.

[69] Id. at 625, 636 P.2d at 747.

[70] Id.

[71] Id.

[72] See Comm. for Better Health Care for All Colo. Citizens v. Meyer, 830 P.2d 884, 891 (Colo. 1992); Jacober v. Bd. of Comm'rs of City of Covington, 607 S.W.2d 126, 128 (Ky. Ct. App. 1980).

[73] Id. at 887.

[74] Id.
[75] Id.
[76] Id.
[77] Id. at 888.
[78] Id. at 891.

May 18, 2021

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

Re: Certificate of Review
Proposed Referendum Petition, S.B. 1110, 2021 Idaho Session Laws Chapter 255

Dear Secretary of State Denney:

A proposed referendum petition was filed with your office on April 26, 2021. Pursuant to Idaho Code section 34-1809, this office has reviewed the petition and prepared the following advisory comments. Under the review statute, the Attorney General's recommendations are "advisory only." The petitioner is free to "accept or reject them in whole or in part." Due to the available resources and limited time for performing the review, 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 referendum. This office offers no opinion with regard to the policy issues raised by the proposed referendum.

BALLOT TITLE

Following the filing of the proposed referendum, if petitioner decides to proceed with sponsorship, 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 referendum, petitioner may submit proposed titles for consideration. Any proposed titles should be consistent with the above standard.

MATTER OF SUBSTANTIVE IMPORT

The referendum petition addresses Senate Bill 1110, 66th Legislature, 1st Regular Session, Idaho Session Laws Chapter 255 (2021) (codified as amended at Idaho Code section 34-1805), which passed both the House of Representatives and the Senate and was signed into law by the Governor on April 17, 2021. Pursuant to Idaho Code section 34-1803, Senate Bill 1110 is a proper subject of the proposed referendum. Due to the inclusion of an emergency clause, Senate Bill 1110 became immediately effective on April 17, 2021, when the Act was signed into law by the Governor and will continue in effect until a majority of the voters approve of the referendum petition at an election on the referendum, if one is held.

The cover letter requested guidance in regard to the language necessary to comply with the Idaho Code section 34-1803B and the removal of signatures. Guidance is found at Idaho Code section 34-1803B(3), which provides that "[e]ach signature page of an initiative or referendum petition shall state that any person signing a petition may remove his signature pursuant to this section." Our office recommends following this subsection. Each signature page of the petition should state "Any person signing a petition may remove his signature pursuant to Idaho Code § 34-1803B."

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 copy of this Certificate of Review, deposited in the U.S. Mail to Jim Jones, 3151 N. 24th, Boise, Idaho 83702.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

Robert A. Berry
Deputy Attorney General

May 26, 2021

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

Re: Certificate of Review
Proposed Initiative Relating to the Quality Education Act

Dear Secretary of State Denney:

An initiative petition was filed with your office on April 29, 2021. Pursuant to Idaho Code section 34-1809, this office has reviewed the petition and 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 or reject them in whole or in part." This office offers no opinion with regard to the policy issues raised by the proposed initiative. The opinions expressed in this review are limited to those potentially affecting the legality of the 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

I. Summary of the Proposed Initiative.

The proposed initiative presents amendments to code sections

found in Idaho Code title 63 (hereinafter "Tax Code") and proposes a new section to be added to Idaho Code title 33 (hereinafter "Education Code"). The amendments to the Tax Code would replace the recently adopted changes to Idaho Code section 63-3024 with amendments to the prior version of Idaho Code section 63-3024, ultimately resulting in an increase on the individual income tax rate on amounts earned in excess of $250,000 a year and in an increase on the tax rate on the income earned by corporations. The proposed new section of the Education Code, along with a further amendment to the Tax Code, creates and appropriates money to a new "quality education fund." The money for this fund is to come from tax revenue the State receives as a result of the increased tax rates. Each section of the initiative will be described in turn.

A. Section 1 of the Initiative States the Initiative's Title.

Section 1 of the initiative states that the initiative shall be referred to as "The Quality Education Act."

B. Section 2 of the Initiative Proposes an Amendment to Idaho's Individual Income Tax Rate.

Section 2 of the initiative proposes an amendment to Idaho Code section 63-3024, the section of Idaho Code which defines individual income tax rates. However, the 2021 Legislature, through House Bill 380, updated Idaho Code section 63-3024. The newly adopted legislation reduces the number of brackets from seven to five and makes changes to the dollar threshold and the tax percentage associated with each respective bracket. The amendments proposed in the initiative refer to and amend the brackets from the prior version of Idaho Code section 63-3024.

Section 2 also contains an amendment to Idaho Code section 63-3024(a) for adjusting the "new" eighth bracket for inflation. This adjustment mirrors the language already in statute for adjusting the other brackets for inflation; however, it differs in what base year is used for the adjustment. Where the other seven brackets are adjusted using a base year of 1998, the initiative specifies that the base year for the eighth bracket is 2024.

C. Section 3 of the Initiative Proposes an Amendment to Idaho's Corporate Income Tax Rate.

The third section of the initiative seeks to increase Idaho's corporate income tax rate. This section of code was also amended with House Bill 380 this year with a retroactive date of January 1, 2021. Under the newly amended law, Idaho Code section 63-3025(1) establishes a tax rate on corporate income of 6.5%. The initiative proposes amending this rate to 8%.

D. Section 4 of the Initiative Proposes an Amendment to How Income Tax Revenue is Distributed and Appropriates Tax Revenue to the Quality Education Fund.

The fourth section of the initiative proposes an amendment to Idaho Code section 63-3067(2). This code section states how tax revenue received by the State is to be distributed by the Idaho State Tax Commission. As it presently stands, all money, except for revenue received from the withholding of lottery winnings "received by the state[,] ... shall be deposited ... and become a part of the general account [fund] under the custody of the state treasurer." Idaho Code § 63-3067(2). Revenue received from the withholding of lottery winnings is to be distributed such that half is deposited in the "public school income fund" and the other half is used for "county juvenile probation services." Idaho Code § 63-3067(1).

Section 4 proposes to amend this section by adding a second exception for distributing received revenue. The amendment proposes that the additional revenue received as a result of increasing the individual income tax rate and corporate income tax rate should not be distributed to the general account, but should be distributed to a new fund: the Quality Education Fund.

E. Section 5 of the Initiative Proposes the Creation of a New "Quality Education Fund."

The fifth section of the initiative proposes that a brand new section be added to the Education Code. This section, titled "Quality Education Fund—Rulemaking-Definitions," proposes the creation of a

new continuously appropriated fund that is to be "expended by" the State Board of Education. Money for this fund is to come from "legislative transfers or appropriations, from the sales tax account, from the state income tax, the state franchise tax, and from any other governmental or private sources."

The purpose of the fund is to allow the State to "invest in betterment of public schools in Idaho[.]" It proposes to achieve this goal by allowing the State Board of Education to use the money in the Quality Education Fund to:

- Reduce class sizes;
- Prevent class size increases;
- Provide current and adequate classroom materials, such as textbooks and supplies;
- Provide career technical education;
- Provide full-day kindergarten;
- Provide art programs;
- Provide music programs;
- Provide drama programs;
- Provide support for English language learners;
- Provide enhanced instruction in civics, American history, and government; and
- Provide special education services.

In addition to these specifically enumerated actions, the State Board of Education is also given the open-ended instruction of "including, attracting and retaining highly qualified teachers" and "attracting and retaining counselors and school psychologists[.]" The State Board of Education is to achieve this goal by taking actions "including but not limited to ... providing competitive salaries, offering continuing education opportunities, and providing support for new educators[.]" The money in the fund expressly may not be used to "pay superintendents', principals' or other administrators' salaries or other compensation."

The money in the Quality Education Fund is to be distributed in a manner similar to the distribution of money held in the School District Building Account. See Idaho Code § 33-905(2). The money in the

Quality Education Fund is to be distributed from the fund to school districts and public charter schools "not later than August 31[.]" The money is distributed to each school district and public charter school in proportion to their average daily attendance of the district (or charter school) as compared to the total average daily state-wide attendance. The distribution section also contains a special provision for schools of the deaf and the blind. For the purpose of distribution, such schools are treated as if each were a separate school district.

The Quality Education Fund is intended as a supplement to—and not a replacement of—the typical "K-12 public school support[.]" The money in the fund is meant to "augment" the "state's general account appropriation[.]"

Finally, the State Board of Education is tasked with "promulgat[ing] rules to implement the provisions of this section."

F. Section 6 of the Initiative is a Severability Clause.

The sixth section of the initiative states that the provisions of the initiative are "severable ... if any provision of [the] initiative ... is ... invalid[.]"

G. Section 7 of the Initiative States the Effective Date.

The seventh section of the initiative states that the initiative's effective date is January 1, 2023.

II. Substantive Analysis.

A. There is a Risk that the Initiative Violates the Single-Subject Rule of the Idaho Constitution.

Because the initiative seeks to both raise income tax rates and create a new fund to promote education in Idaho, there is a risk that the initiative violates the single-subject rule set forth in article III, section 16 of Idaho Constitution. That section states:

> 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.

Idaho Const. art. III, § 16. The Idaho Court of Appeals, in interpreting this provision, has found that a bill (or initiative) may make several changes to law so long as each of the changes relate back to the same "general subject." Cheney v. Smith, 108 Idaho 209, 210, 697 P.2d 1223, 1224 (Ct. App. 1985), abrogated on other grounds by Beco Constr. Co. v. J-U-B Eng'rs, Inc., 149 Idaho 294, 233 P.3d 1216 (2010). In particular, so long as all of the portions of the initiative "fall[] within [the] subject" and "are germane to" and "not incongruous with" the subject, then the initiative does not violate the single-subject rule. Id.

For the present initiative, there is nothing particularly incongruous about an income tax rate increase and a new fund for promoting education being put forth in the same initiative. However, these two policies are also not obviously germane to one another. The proposed initiative does connect the two policy changes by specifying that any additional revenue received from the income tax rate increases be used for the promotion of education in Idaho. However, there is a risk that this connection is not substantial enough for the initiative to survive if it is challenged in court on the single-subject rule. See, e.g., Idaho Watersheds Project v. State Bd. of Land Comm'rs, 133 Idaho 55, 60, 982 P.2d 358, 363 (1999) (finding that a constitutional amendment that made two adjustments related to school endowment land violated a similar single-subject rule controlling constitutional amendments).

B. The Initiative Fails to Incorporate the Legislature's Recently Adopted Changes to Idaho Code Section 63-3024.

The initiative fails to incorporate the Legislature's most recently adopted changes to Idaho Code section 63-3024. In the 2021 legislative session, the Legislature adopted changes to Idaho Code section 63-3024 reducing the number of tax brackets from seven to five. See House Bill 380, 66th Leg., 1st Reg. Sess., 2021 Idaho Sess. Laws Ch. 342. The new legislation also changes the income thresholds and taxing percentages associated with each bracket. These changes were

adopted with a retroactive effective date of January 1, 2021. Id.

Should the initiative pass without incorporating the newly adopted language of Idaho Code section 63-3024(a), the seven tax brackets and the amendments proposed thereto referenced in the initiative would replace the more recently adopted five tax brackets and their respective income thresholds and tax percentages. See State v. Finch, 79 Idaho 275, 280, 315 P.2d 529, 530 (1957).

Additionally, in the 2021 legislative session, the Legislature created a new code provision, Idaho Code section 63-3026B. See House Bill 317, 66th Leg., 1st Reg. Sess., 2021 Idaho Sess. Laws Ch. 239. This provision allows partnerships to elect to pay as the taxpayer at the corporate rate instead of requiring taxpayers to pass tax liability on through to individuals. This new provision was made retroactive to January 1, 2021. Id.

If the initiative passes without addressing the new ability of partnerships to pay tax directly instead of passing the tax liability through, that class of taxpayers would be exempt from the distribution requirements set forth in the initiative.

C. The Initiative Does Not Match the Structure of Idaho Code Section 63-3067.

In its current form, the structure of Idaho Code section 63-3067 follows this pattern: (1) the exception to the general distribution of income tax revenue and (2) the general distribution of the remaining portion of income tax revenue. In its proposed amendment to Idaho Code section 63-3067, the initiative proposes to add a further exception to the general distribution of income tax revenue. In doing so, it proposes changing the structure of Idaho Code section 63-3067 to: (1) an exception to the general distribution, (2) the general distribution of the remaining portion, and (3) another exception to the general distribution. The initiative would better match the current statutory structure if it were to list its proposed exception to the general distribution of income tax revenue immediately following the first exception to the distribution of the revenue.

D. The Initiative Overlaps with Other Education Statutes.

Some of what the initiative seeks to accomplish overlaps with statutes that already exist. Specifically, Idaho Code has provisions addressing the following:

- Managing class size (Idaho Code § 33-1004(6)(g));
- Providing suitable classroom materials, such as textbooks and supplies (Idaho Code § 33-512(3));
- Providing career technical education (Idaho Code §§ 33-1635, 33-1002G);
- Providing special education services (Idaho Code § 33-2001 et. seq.);
- Providing support to English language learners (Idaho Code § 33-1617); and
- Compensating teachers (Idaho Code §§ 33-1004A through 33-1004J).

Apart from stating that the Quality Education Fund is intended to be a supplementary source of funding for the State's education system, the initiative does not address these overlapping provisions. It is unknown how an additional source of revenue will affect the application of these overlapping provisions.

E. The Initiative's Provision that the Quality Education Fund Supplement, and Not Replace, General Account Appropriations May Be Ineffective.

The initiative appears intended to stop the Legislature from offsetting any increase in education spending due to the Quality Education Fund with a reduction in general account appropriations; however, this provision may be ineffective. The initiative seeks an overall increase in education spending in Idaho. To this end, it states that the Quality Education Fund is to "augment and not replace K-12 public school support[.]" Proposed Idaho Code § 33-911(3). It continues by stating that money from the Quality Education Fund is to be provided in addition to the State's general account appropriation "and not in place of any part of that appropriation." Id.

The difficulty with this provision is in determining whether the money from the Quality Education Fund takes the place of any part of an appropriation. Appropriations are made by the Legislature on a year-to-year basis based on detailed reports, budget requests, and statutory frameworks. See Idaho Code § 33-1001, *et. seq.* Each year, the appropriation is a separate act of the Legislature and not necessarily related to the appropriation made the year before. It is difficult to compare year-to-year appropriation amounts and it may be difficult to determine whether any year-to-year decrease in an appropriation is caused by the Quality Education Fund.

Additionally, the plain language of the initiative may make the supplementary provision difficult to enforce. Because this provision does not call for any year-to-year comparison of appropriated amounts, it is possible that the requirements of the provision are satisfied so long as the Legislature appropriates any amount of revenue from the general account in addition to the Quality Education Fund.

III. Recommended Revisions, Alterations, Suggestions, and Miscellaneous Issues.

In addition to the comments already made in this certificate of review, the following are recommended revisions, alterations, suggestions, and miscellaneous issues for Section 2 of the initiative:

- It may be helpful to incorporate the most recent version of Idaho Code section 63-3024(a)—specifically, the new tax brackets.

- In the amendment to the paragraph following the enumeration of the tax bracket and rates, the initiative states, "the state tax commission shall provide an adjustment factor for the bracket amount by multiplying the bracket amount by the percentage (the consumer price index for the calendar year immediately preceding the calendar year to which the adjusted bracket will apply divided by the consumer price index for calendar year 2024)." It is unclear whether the term "percentage" is synonymous with the term "adjustment factor" mentioned earlier in the sentence. If they are not synonymous, it might

be helpful to include a definition for "adjustment factor." Assuming these two terms are synonymous, the proposed amendment could be changed as follows: "the state tax commission shall provide an adjustment factor for the bracket amount by multiplying the bracket amount by the adjustment factor. The adjustment factor is calculated by dividing the consumer price index for the calendar year 2024 by the consumer price index for the calendar year immediately preceding the calendar year to which the adjusted bracket will apply."

The following are recommended revisions, alterations, suggestions, and miscellaneous issues for Section 4 of the initiative:

- In the amendment to subsection (2) of Idaho Code section 63-3067, the initiative includes several clauses. While the sentence may not be grammatically incorrect, it could be revised for greater clarity as follows: "[F]rom each single individual or married individual filing separately reporting Idaho taxable income" to "[F]rom each single individual or married individual filing separately and reporting Idaho taxable income" or "[F]rom each single individual or married individual filing separately, reporting Idaho taxable income."

- In the same paragraph, the amendment uses the phrase "individuals treated as filing a joint return under section 63-3024(b)." Idaho Code section 63-3024(b) currently states:

> In case a joint return is filed by husband and wife pursuant to the provisions of section 63-3031, Idaho Code, the tax imposed by this section shall be twice the tax which would be imposed on one-half (1/2) of the aggregate Idaho taxable income. For the purposes of this section, a return of a *surviving spouse*, as defined in section 2(a) of the Internal Revenue Code, and a *head of household*, as defined in section 2(b) of the Internal Revenue Code, *shall be treated as a joint return* and the tax imposed shall be twice the tax which would be imposed on one-half (1/2)

of the Idaho taxable income.

(Emphasis added.) It is assumed the intent of the amendment is to include married individuals filing jointly ("joint return … filed by husband and wife") as well as the "surviving spouse" and "head of household" mentioned in the second sentence of Idaho Code section 63-3024(b). If this assumption is correct, the language in the amendment should be changed from "individuals treated as filing a joint return under section 63-3024(b)" to "individuals filing a joint return or individuals treated as filing a joint return under section 63-3024(b)."

- In the same paragraph, the initiative uses the term "as follows:" after which follows the three proposed distribution practices separated by colons. For clarity and ease of reading, the drafters may consider separating the three proposed distribution practices with semicolons, separate lettered paragraphs, or both. For example:

> (a) From each single individual or married individual filing separately reporting Idaho taxable income that equals or exceeds the highest tax bracket starting figure, including any inflation adjustment provided in section 63-3024 (a), Idaho Code, thirty-six percent (36%) of the section 63-3024, Idaho Code, income tax (net of allowed tax credits and excluding recapture tax) in excess of the tax adjustment base amount;
>
> (b) From individuals treated as filing a joint return under section 63-3024(b), Idaho Code, reporting Idaho taxable income that equals or exceeds two (2) times the highest tax bracket starting figure, including any inflation adjustment provided in section 63-3024(a), Idaho Code, thirty-six percent (36%) of the section 63-3024, Idaho Code, income tax (net of allowed tax credits and excluding recapture tax) in excess of two (2) times the tax adjustment base amount; and
>
> (c) From corporations, other than S corporations, reporting Idaho taxable income, thirteen

percent (13%) of the section 63-3025 or 63-3025A, Idaho Code, income or franchise tax (net of allowed tax credits and excluding recapture tax).

- The phrase "tax adjustment base amount" is awkwardly defined. Specifically, the defined phrase is used in the definition of the phrase: "For purposes of determining the distribution to the education fund, the 'tax adjustment base amount' means the tax adjustment base amount for the highest tax bracket contained in section 63-3024(a), Idaho Code." Perhaps use a definition that avoids using the defined term in the definition. The following definition may capture the intent: "For purposes of determining the distribution to the education fund, the 'tax adjustment base amount' means the cumulative tax amount of all proceedings brackets described in the highest tax bracket of section 63-3024(a), Idaho Code."

- The initiative does not take into account the recently passed Idaho Code section 63-3026B. Tailoring the language of the initiative to include this provision may not be too difficult as the intent of section 63-3026B is to tax partnerships that elect to be treated as the taxpayer as if they were corporations. The following phrase could be adjusted to accommodate this legislative change: "and from corporations, other than S corporations, reporting Idaho taxable income, thirteen percent (13%)" to "and from any entity that has made the election to be an affected business entity under 63-3026B, Idaho Code, or corporations, other than S corporations that have not made the election to be an affected business entity under 63-3026B, reporting Idaho taxable income, thirteen percent (13%)."

The following are recommended revisions, alterations, suggestions, and miscellaneous issues for Section 5 of the initiative:

- In proposed Idaho Code section 33-911(1), the final sentence lacks an Oxford comma. That sentence presently states, "providing enhanced instruction in civics, American history and government[.]" The sentence should be,

"providing enhanced instruction in civics, American history, and government."

- In proposed Idaho Code section 33-911(2), the final sentence contains language that could be ambiguous. That sentence presently states, "Moneys from the fund shall not be used to pay superintendents', principals', or other administrators' salaries or other compensation." The phrase "or other compensation" creates two possible interpretations to this sentence. This sentence could be interpreted that moneys from the fund shall not be used to pay either the salaries or other compensation of superintendents, principals, or other administrators. It is assumed this is the intended interpretation since proposed Idaho Code section 33-911(1) specifically allows the fund to be used for compensatory purposes. However, this sentence could also be interpreted that moneys from the fund shall not be used to pay either (1) superintendents', principals', or other administrators' salaries, or (2) other compensation. In this interpretation, the phrase "or other compensation" stands alone and does not modify the phrase "superintendents', principals', or other administrators' salaries." In other words, the term "other compensation" would paint a broad stroke and would inhibit the fund from being used to compensate anyone. Again, this interpretation contradicts the language in proposed Idaho Code section 33-911(1). This ambiguity can be remedied by changing the last sentence from "Moneys from the fund shall not be used to pay superintendents', principals', or other administrators' salaries or other compensation" to "Moneys from the fund shall not be used to pay the salaries of, or otherwise compensate, superintendents, principals, and other administrators."

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 Certification of Review, deposited in the

U.S. Mail to Ashley Prince, Reclaim Idaho, 1424 S. Loveland St., Boise, ID 83705.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

Adam Warr
Deputy Attorney General

June 2, 2021

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

RE: Certificate of Review
Proposed Initiative Amending the Minimum Wage Law, Title 44, Chapter 15, Idaho Code, to Increase the Minimum Wage Rate for Employees and the Minimum Direct Wage Rate for Tipped Employees; to Strike Provisions that Allow Lower Minimum Wage Rates for New Employees Under 20 Years of Age; and to Expressly Authorize Counties and Cities to Establish Higher Minimum Wage Rates

Dear Secretary of State Denney:

An initiative petition was filed with your office on May 5, 2021. Pursuant to Idaho Code section 34-1809, this office 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 review, we did not communicate directly with the petitioners as part of the review process. This office offers no opinion with regard to the policy issues raised by the proposed initiative or the potential revenue impact to the State budget from litigation that could ensue over the initiative's validity.

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 FORM

The proposed initiative would amend the Minimum Wage Law, Idaho Code sections 44-1501, et seq. ("Minimum Wage Law"), and has two sections. Section 1 is merely a short title. Section 2 is, for the most part, in the proper legislative format for showing amendments to statutory provisions. Two minor corrections relating to format are recommended:

1. The initiative, in two instances, adds to Idaho Code section 44-1502(1), along with other text, the language "until June 30, 2023." Although the initiative underlines "June 30, 2023," it neglects to underline the word "until." All text added to a statute by an initiative should be underlined. To correct this, this language in the initiative should be changed to read "until June 30, 2023."

2. The language of the initiative striking the first sentence of the existing text of Idaho Code section 44-1502(3) omits the word "not" that currently precedes the phrase "less than four dollars and twenty-five cents ($4.25) an hour." To correct this, the stricken text of the first sentence of Idaho Code section 44-1502(3) should be amended to read: "~~In lieu of the rate prescribed by subsection (1) of this section, an employer may pay an employee who has not attained twenty (20) years of age a wage which is not less than four dollars and twenty-five cents ($4.25) an hour during the first ninety (90) consecutive calendar days after such employee is initially employed.~~"

SUMMARY OF INITIATIVE AND MATTERS OF SUBSTANTIVE IMPORT

I. Summary of Proposed Initiative

The proposed initiative amends the Minimum Wage Law by adding and striking language from Idaho Code section 44-1502 to increase the State's general minimum wage above the rate established

by the federal Fair Labor Standards Act of 1938 ("FLSA").[1] In doing so, the initiative effects four significant changes to Idaho Code section 44-1502.

First, the initiative increases annually the minimum wage rate applicable to most non-exempt employees beginning July 1, 2023 until July 1, 2025, when the minimum wage will be $12.00 per hour. For 2026 and subsequent years, it establishes a formula to annually increase the minimum wage rate using any increase in the cost of living according to a specified federal consumer price index.

Second, the initiative increases annually the minimum hourly direct wage rate for tipped employees beginning July 1, 2023 until July 1, 2025, when the minimum direct wage for tipped employees will be $8.50 per hour. For 2026 and subsequent years, it provides that the minimum direct wage rate for tipped employees shall not be less than the minimum hourly wage rate minus $3.90.

Third, the initiative removes provisions of the statute establishing a minimum hourly wage of $4.25 for employees under 20 years of age during their initial 90 days of employment.

Fourth, the initiative removes language from the statute that now prohibits political subdivisions of the state of Idaho from establishing minimum wage rates higher than those specified by Idaho Code section 44-1502(4) and adds language authorizing counties and municipal corporations to establish and enforce minimum wages rates higher than those set by the statute.

Each of these changes is discussed more fully below.

A. Increasing the General Minimum Wage Rate

The proposed initiative amends Idaho Code section 44-1502(1) to increase over a three-year period Idaho's current minimum hourly wage rate of $7.25 to $12.00 an hour on July 1, 2025. The minimum wage rate would increase to $9.50 per hour on July 1, 2023; to $11.00 per hour on July 1, 2024; and to $12.00 per hour on July 1, 2025.

Further, under the proposed initiative, beginning July 1, 2026, and each year that follows, the minimum wage rate would increase if there was an increase in the cost of living as established by the United States Department of Labor's consumer price index for Urban Wage Earners and Clerical Workers (CPI-W, non-seasonally adjusted, U.S. City average) or a "successor index." The statute would be further amended to provide in a new subsection 44-1502(1)(e) that "[t]he new minimum wage shall be calculated by adding the existing minimum wage to the rise in the cost of living multiplied by the existing minimum wage and rounded to the nearest multiple of five cents."

B. Increasing the Minimum Direct Wage Rate for Tipped Employees

The proposed initiative would increase the minimum amount of direct wages that employers must pay to tipped employees from the current rate of $3.35 to $8.50 per hour on July 1, 2025, in three successive years, as follows: to $5.50 per hour on July 1, 2023; to $7.00 per hour on July 1, 2024; and to $8.50 per hour on July 1, 2025. Beginning July 1, 2026, the minimum direct wages payable to tipped employees would be the minimum wage rate for un-tipped employees less $3.90.

C. Removing the Lower Minimum Wage Rate for New Employees Under 20 Years of Age

Idaho Code section 44-1502(3) currently allows employers, subject to restrictions, to pay employees under 20 years of age an hourly wage of $4.25 per hour during their initial 90 days of employment.[2] The initiative would strike this language, which would require that these younger new employees be paid the existing minimum wage.

D. Adding Language to Allow Counties and Cities to Establish Higher Minimum Wage Rates

As currently written, Idaho Code section 44-1502(4) expressly forbids political subdivisions from enacting higher minimum wage laws: "No political subdivision of this state, as defined by section 6-902, Idaho Code, shall establish by ordinance or other action minimum wages

higher than the minimum wages provided in this section." The initiative would reverse this by striking the existing language and expressly authorizing local governments to set higher minimum wage rates. The initiative would replace the existing language with this language added to subsection (3) of the amended statute: "Counties named in Chapter 1 of Title 31, Idaho Code, and municipal corporations governed by Title 50, Idaho Code, may establish and enforce minimum wage laws higher than the minimum wages provided in this section."

II. Substantive Analysis

The first issue is whether the higher minimum wage rates[3] set by the proposed initiative would be lawful under the FLSA. Even though the initiative's minimum wage rates are higher than the minimum wages under the FLSA, they nonetheless would be lawful under the FLSA because that Federal law does not preempt state minimum wage laws. The FLSA contains a savings clause specifically authorizing states to set higher minimum wage standards: "No provision of [the FLSA] or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under [the FLSA]...."[4] As a result, states are free to adopt and enforce minimum wage rates and overtime rules that afford greater protections for workers than does the FLSA.[5] Currently, 30 states have minimum wage rates that are higher than those of the FLSA.[6]

Proposed Idaho Code section 44-1502(3) in Section 2 of the initiative authorizes counties and municipal corporations to establish minimum wage rates higher than the minimum wage rates. This gives rise to the question whether a county or city could lawfully establish higher minimum wage rates under this proposed subsection. The answer is yes. Article XII, section 2 of the Idaho Constitution grants police power to counties and cities:

> 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.

Article XII, section 2 grants police power to counties and cities, but with an important limitation: the exercise of those powers cannot be in conflict "with the general laws." Here, initiative provisions would not conflict with the general laws because Idaho Code section 44-1502 is the general law and, as amended by the initiative, would expressly authorize the exercise of police powers relating to minimum wage rates.

In sum, the proposed amendments to the Minimum Wage Law do not appear to be unlawful under either State or Federal law.

III. Recommended Revisions, Alterations, Suggestions, and Miscellaneous Issues

In addition to the comments already made in this certificate for review, the following are recommended revisions, alterations, suggestions, and miscellaneous issues for Section 2 of the proposed initiative:

1. The first sentence of subsection (1) of Idaho Code section 44-1502 currently uses the pronoun "his"; if the statute is amended, to be consistent with current drafting guidance, this pronoun should be changed to "its."[7]

2. The beginning language of subsection (1) of Idaho Code section 44-1502 of the proposed initiative, which reads "Except as hereinafter otherwise provided in this section," incorrectly refers to "this section"; because the exemptions from the minimum wage requirements are not found in section 44-1502 itself, but rather, are found in other sections of the chapter codifying the Minimum Wage Law, this added language should read "Except as hereinafter otherwise provided in this chapter."

3. It should be noted that the proposed initiative, with regard to minimum wage rates beginning July 1, 2026 to be determined using a statutory formula and the increase of the cost of living under a federal consumer price index, does not designate a State agency to make these calculations and provide notice of what any new annual minimum wage rate would be. That could prove problematic.

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 Petitioners via a copy of this Certificate of Review, deposited in the U.S. Mail to Chris Stroh, P.O. Box 9573, Boise, ID 83707.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

Douglas A. Werth
Lead Deputy Attorney General

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[1] 29 U.S.C. §§ 201-219.

[2] These provisions mirror those of the FLSA. See 29 U.S.C. § 206(g)(1).

[3] Currently, the general minimum wage rate under Idaho's Minimum Wage Law is $7.25, which is identical to the minimum wage rate under the FLSA. Idaho Code section 44-1502(3) currently allows employers to pay a minimum wage of not less than $4.25 an hour to new employees who are under 20 years of age during the first 90 consecutive calendar days after initial employment. Idaho Code section 44-1502(2) currently differs from FLSA minimum wage rates in its treatment of tipped employees. The minimum amount of direct wages that employers must pay to tipped employees under Idaho law is $3.35 an hour, which exceeds the FLSA's minimum direct wage rate of $2.13 an hour. See 29 C.F.R. § 531.59.

[4] 29 U.S.C. § 218(a).

[5] The Second Circuit Court of Appeals reached a similar conclusion in Shahriar v. Smith & Wollensky Restaurant Group, Inc., 659 F.3d 234 (2d Cir. 2011):

> [T]he FLSA's "savings clause" [29 U.S.C. § 218(a)] makes clear that states may enact wage laws that are more protective than those that are provided in the act. … We have held that this clause demonstrates Congress' intent to allow state wage laws to co-exist with the FLSA by permitting explicitly, for example, states to mandate greater overtime benefits than the FLSA.

Id. at 247-48 (first citing Overnite Transp. Co. v. Tianti, 926 F.2d 220, 221-22 (2d Cir. 1991) (rejecting the argument that the FLSA preempts state wage laws); then citing Ervin v. OS Rest. Servs., Inc., 632 F.3d 971, 997 (7th Cir. 2011) (same); and then citing Williamson v. Gen. Dynamics Corp., 208 F.3d 1144, 1151 (9th Cir. 2000)).

[6] See U.S. Dep't of Labor, Wage & Hour Div., State Minimum Wage Laws, (updated May 1, 2021), https://www.dol.gov/agencies/whd/minimum-wage/state.

[7] Legis. Servs. Office, Res. & Legis. Branch, Legislation Drafting Manual (Concise Version) (Rev. May 2017) at 32, https://legislature.idaho.gov/wp-content/uploads/research/draftingmanual.pdf ("Avoid using gender specific words. The Idaho Code provides that the masculine includes the feminine. If you must use a gender specific word, use the masculine unless the context requires using 'she.'").

June 2, 2021

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

RE: Certificate of Review
Proposed Initiative Amending the Minimum Wage Law, Title 44, Chapter 15, Idaho Code, to Increase the Minimum Wage Rate for Employees and the Minimum Direct Wage Rate for Tipped Employees; to Strike Provisions that Allow Lower Minimum Wage Rates for New Employees Under 20 Years of Age; and to Expressly Authorize Counties and Cities to Establish Higher Minimum Wage Rates

Dear Secretary of State Denney:

An initiative petition was filed with your office on May 5, 2021. Pursuant to Idaho Code section 34-1809, this office 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 review, we did not communicate directly with the petitioners as part of the review process. This office offers no opinion with regard to the policy issues raised by the proposed initiative or the potential revenue impact to the State budget from litigation that could ensue over the initiative's validity.

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argumentative and without creating prejudice for or against the measure. While our office prepares titles for the initiative, petitioners may submit proposed titles for consideration. Any proposed titles should be consistent with the standard set forth above.

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The proposed initiative would amend the Minimum Wage Law, Idaho Code sections 44-1501, et seq. ("Minimum Wage Law"), and has two sections. Section 1 is merely a short title. Section 2 is, for the most part, in the proper legislative format for showing amendments to statutory provisions. Two minor corrections relating to format are recommended:

1. The initiative, in two instances, adds to Idaho Code section 44-1502(1), along with other text, the language "until June 30, 2023." Although the initiative underlines "June 30, 2023," it neglects to underline the word "until." All text added to a statute by an initiative should be underlined. To correct this, this language in the initiative should be changed to read "until June 30, 2023."

2. The language of the initiative striking the first sentence of the existing text of Idaho Code section 44-1502(3) omits the word "not" that currently precedes the phrase "less than four dollars and twenty-five cents ($4.25) an hour." To correct this, the stricken text of the first sentence of Idaho Code section 44-1502(3) should be amended to read: "~~In lieu of the rate prescribed by subsection (1) of this section, an employer may pay an employee who has not attained twenty (20) years of age a wage which is not less than four dollars and twenty-five cents ($4.25) an hour during the first ninety (90) consecutive calendar days after such employee is initially employed.~~"

SUMMARY OF INITIATIVE AND MATTERS OF SUBSTANTIVE IMPORT

I. Summary of Proposed Initiative

The proposed initiative amends the Minimum Wage Law by adding and striking language from Idaho Code section 44-1502 to increase the State's general minimum wage above the rate established

by the federal Fair Labor Standards Act of 1938 ("FLSA").[1] In doing so, the initiative effects four significant changes to Idaho Code section 44-1502.

First, the initiative increases annually the minimum wage rate applicable to most non-exempt employees beginning July 1, 2023 until July 1, 2026, when the minimum wage will be $13.00 per hour. For 2027 and subsequent years, it establishes a formula to annually increase the minimum wage rate using any increase in the cost of living according to a specified federal consumer price index.

Second, the initiative increases annually the minimum hourly direct wage rate for tipped employees beginning July 1, 2023 until July 1, 2026, when the minimum direct wage for tipped employees will be $10.00 per hour. For 2027 and subsequent years, it provides that the minimum direct wage rate for tipped employees shall not be less than the minimum hourly wage rate minus $3.90.

Third, the initiative removes provisions of the statute establishing a minimum hourly wage of $4.25 for employees under 20 years of age during their initial 90 days of employment.

Fourth, the initiative removes language from the statute that now prohibits political subdivisions of the state of Idaho from establishing minimum wage rates higher than those specified by Idaho Code section 44-1502(4) and adds language authorizing counties and municipal corporations to establish and enforce minimum wages rates higher than those set by the statute.

Each of these changes is discussed more fully below.

A. Increasing the General Minimum Wage Rate

The proposed initiative amends Idaho Code section 44-1502(1) to increase over a four-year period Idaho's current minimum hourly wage rate of $7.25 to $13.00 an hour on July 1, 2026. The minimum wage rate would increase to $9.50 per hour on July 1, 2023; to $11.00 per hour on July 1, 2024; to $12.50 per hour on July 1, 2025; and to $13.00 per hour on July 1, 2026.

Further, under the proposed initiative, beginning July 1, 2027, and each year that follows, the minimum wage rate would increase if there was an increase in the cost of living as established by the United States Department of Labor's consumer price index for Urban Wage Earners and Clerical Workers (CPI-W, non-seasonally adjusted, U.S. City average) or a "successor index." The statute would be further amended to provide in a new subsection 44-1502(1)(e) that "[t]he new minimum wage shall be calculated by adding the existing minimum wage to the rise in the cost of living multiplied by the existing minimum wage and rounded to the nearest multiple of five cents."

B. Increasing the Minimum Direct Wage Rate for Tipped Employees

The proposed initiative would increase the minimum amount of direct wages that employers must pay to tipped employees from the current rate of $3.35 to $10.00 per hour on July 1, 2026, in four successive years, as follows: to $5.50 per hour on July 1, 2023; to $7.00 per hour on July 1, 2024; to $8.50 per hour on July 1, 2025; and to $10.00 per hour on July 1, 2026. Beginning July 1, 2027, the minimum direct wages payable to tipped employees would be the minimum wage rate for un-tipped employees less $3.90.

C. Removing the Lower Minimum Wage Rate for New Employees Under 20 Years of Age

Idaho Code section 44-1502(3) currently allows employers, subject to restrictions, to pay employees under 20 years of age an hourly wage of $4.25 per hour during their initial 90 days of employment.[2] The initiative would strike this language, which would require that these younger new employees be paid the existing minimum wage.

D. Adding Language to Allow Counties and Cities to Establish Higher Minimum Wage Rates

As currently written, Idaho Code section 44-1502(4) expressly forbids political subdivisions from enacting higher minimum wage laws: "No political subdivision of this state, as defined by section 6-902, Idaho Code, shall establish by ordinance or other action minimum wages

higher than the minimum wages provided in this section." The initiative would reverse this by striking the existing language and expressly authorizing local governments to set higher minimum wage rates. The initiative would replace the existing language with this language added to subsection (3) of the amended statute: "Counties named in Chapter 1 of Title 31, Idaho Code, and municipal corporations governed by Title 50, Idaho Code, may establish and enforce minimum wage laws higher than the minimum wages provided in this section."

II. Substantive Analysis

The first issue is whether the higher minimum wage rates[3] set by the proposed initiative would be lawful under the FLSA. Even though the initiative's minimum wage rates are higher than the minimum wages under the FLSA, they nonetheless would be lawful under the FLSA because that Federal law does not preempt state minimum wage laws. The FLSA contains a savings clause specifically authorizing states to set higher minimum wage standards: "No provision of [the FLSA] or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under [the FLSA]...."[4] As a result, states are free to adopt and enforce minimum wage rates and overtime rules that afford greater protections for workers than does the FLSA.[5] Currently, 30 states have minimum wage rates that are higher than those of the FLSA.[6]

Proposed Idaho Code section 44-1502(3) in Section 2 of the initiative authorizes counties and municipal corporations to establish minimum wage rates higher than the minimum wage rates in Idaho Code section 44-1502. This gives rise to the question whether a county or city could lawfully establish higher minimum wage rates under this proposed subsection. The answer is yes. Article XII, section 2 of the Idaho Constitution grants police power to counties and cities:

> 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.

Article XII, section 2 grants police power to counties and cities, but with an important limitation: the exercise of those powers cannot be in conflict "with the general laws." Here, initiative provisions would not conflict with the general laws because Idaho Code section 44-1502 is the general law and, as amended by the initiative, would expressly authorize the exercise of police powers relating to minimum wage rates.

In sum, the proposed amendments to the Minimum Wage Law do not appear to be unlawful under either State or Federal law.

III. Recommended Revisions, Alterations, Suggestions, and Miscellaneous Issues

In addition to the comments already made in this certificate for review, the following are recommended revisions, alterations, suggestions, and miscellaneous issues for Section 2 of the proposed initiative:

1. The first sentence of subsection (1) of Idaho Code section 44-1502 currently uses the pronoun "his"; if the statute is amended, to be consistent with current drafting guidance, this pronoun should be changed to "its."[7]

2. The beginning language of subsection (1) of Idaho Code section 44-1502 of the proposed initiative, which reads "Except as hereinafter otherwise provided in this section," incorrectly refers to "this section"; because the exemptions from the minimum wage requirements are not found in section 44-1502 itself, but rather, are found in other sections of the chapter codifying the Minimum Wage Law, this added language should read "Except as hereinafter otherwise provided in this chapter."

3. It should be noted that the proposed initiative, with regard to minimum wage rates beginning July 1, 2027 to be determined using a statutory formula and the increase of the cost of living under a federal consumer price index, does not designate a State agency to make these calculations and provide notice of what any new annual minimum wage rate would be. That could prove problematic.

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 Petitioners via a copy of this Certificate of Review, deposited in the U.S. Mail to Chris Stroh, P.O. Box 9573, Boise, ID 83707.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

Douglas A. Werth
Lead Deputy Attorney General

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[1] 29 U.S.C. §§ 201-219.

[2] These provisions mirror those of the FLSA. See 29 U.S.C. § 206(g)(1).

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[4] 29 U.S.C. § 218(a).

[5] The Second Circuit Court of Appeals reached a similar conclusion in Shahriar v. Smith & Wollensky Restaurant Group, Inc., 659 F.3d 234 (2d Cir. 2011):

> [T]he FLSA's "savings clause" [29 U.S.C. § 218(a)] makes clear that states may enact wage laws that are more protective than those that are provided in the act. … We have held that this clause demonstrates Congress' intent to allow state wage laws to co-exist with the FLSA by permitting explicitly, for example, states to mandate greater overtime benefits than the FLSA.

Id. at 247-48 (first citing Overnite Transp. Co. v. Tianti, 926 F.2d 220, 221-22 (2d Cir.1991) (rejecting the argument that the FLSA preempts state wage laws); then citing Ervin v. OS Rest. Servs., Inc., 632 F.3d 971, 997 (7th Cir. 2011) (same); and then citing Williamson v. Gen. Dynamics Corp., 208 F.3d 1144, 1151 (9th Cir. 2000)).

[6] See U.S. Dep't of Labor, Wage & Hour Div., State Minimum Wage Laws (updated May 1, 2021), https://www.dol.gov/agencies/whd/minimum-wage/state.

[7] Legis. Servs. Office, Res. & Legis. Branch, Legislation Drafting Manual (Concise Version) (Rev. May 2017) at 32, https://legislature.idaho.gov/wp-content/uploads/research/draftingmanual.pdf ("Avoid using gender specific words. The Idaho Code provides that the masculine includes the feminine. If you must use a gender specific word, use the masculine unless the context requires using 'she.'").

June 2, 2021

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

RE: Certificate of Review
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Analysis by:

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[7] Legis. Servs. Office, Res. & Legis. Branch, Legislation Drafting Manual (Concise Version) (Rev. May 2017) at 32, https://legislature.idaho.gov/wp-content/uploads/research/draftingmanual.pdf ("Avoid using gender specific words. The Idaho Code provides that the masculine includes the feminine. If you must use a gender specific word, use the masculine unless the context requires using 'she.'").

June 2, 2021

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Idaho Secretary of State
Statehouse
VIA HAND DELIVERY

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First, the initiative increases annually the minimum wage rate applicable to most non-exempt employees beginning July 1, 2023 until July 1, 2027, when the minimum wage will be $15.00 per hour. For 2028 and subsequent years, it establishes a formula to annually increase the minimum wage rate using any increase in the cost of living according to a specified federal consumer price index.

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Each of these changes is discussed more fully below.

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Further, under the proposed initiative, beginning July 1, 2028, and each year that follows, the minimum wage rate would increase if there was an increase in the cost of living as established by the United States Department of Labor's consumer price index for Urban Wage Earners and Clerical Workers (CPI-W, non-seasonally adjusted, U.S. City average) or a "successor index." The statute would be further amended to provide in a new subsection 44-1502(1)(e) that "[t]he new minimum wage shall be calculated by adding the existing minimum wage to the rise in the cost of living multiplied by the existing minimum wage and rounded to the nearest multiple of five cents."

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The proposed initiative would increase the minimum amount of direct wages that employers must pay to tipped employees from the current rate of $3.35 to $11.50 per hour on July 1, 2027, in five successive years, as follows: to $5.50 per hour on July 1, 2023; to $7.00 per hour on July 1, 2024; to $8.50 per hour on July 1, 2025; to $10.00 per hour on July 1, 2026; and to $11.50 per hour on July 1, 2027. Beginning July 1, 2028, the minimum direct wages payable to tipped employees would be the minimum wage rate for un-tipped employees less $3.90.

C. Removing the Lower Minimum Wage Rate for New Employees Under 20 Years of Age

Idaho Code section 44-1502(3) currently allows employers, subject to restrictions, to pay employees under 20 years of age an hourly wage of $4.25 per hour during their initial 90 days of employment.[2] The initiative would strike this language, which would require that these younger new employees be paid the existing minimum wage.

D. Adding Language to Allow Counties and Cities to Establish Higher Minimum Wage Rates

As currently written, Idaho Code section 44-1502(4) expressly forbids political subdivisions from enacting higher minimum wage laws: "No political subdivision of this state, as defined by section 6-902, Idaho

Code, shall establish by ordinance or other action minimum wages higher than the minimum wages provided in this section." The initiative would reverse this by striking the existing language and expressly authorizing local governments to set higher minimum wage rates. The initiative would replace the existing language with this language added to subsection (3) of the amended statute: "Counties named in Chapter 1 of Title 31, Idaho Code, and municipal corporations governed by Title 50, Idaho Code, may establish and enforce minimum wage laws higher than the minimum wages provided in this section."

II. Substantive Analysis

The first issue is whether the higher minimum wage rates[3] set by the proposed initiative would be lawful under the FLSA. Even though the initiative's minimum wage rates are higher than the minimum wages under the FLSA, they nonetheless would be lawful under the FLSA because that Federal law does not preempt state minimum wage laws. The FLSA contains a savings clause specifically authorizing states to set higher minimum wage standards: "No provision of [the FLSA] or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under [the FLSA]...."[4] As a result, states are free to adopt and enforce minimum wage rates and overtime rules that afford greater protections for workers than does the FLSA.[5] Currently, 30 states have minimum wage rates that are higher than those of the FLSA.[6]

Proposed Idaho Code section 44-1502(3) in Section 2 of the initiative authorizes counties and municipal corporations to establish minimum wage rates higher than the minimum wage rates in Idaho Code section 44-1502. This gives rise to the question whether a county or city could lawfully establish higher minimum wage rates under this proposed subsection. The answer is yes. Article XII, section 2 of the Idaho Constitution grants police power to counties and cities:

> 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.

Article XII, section 2 grants police power to counties and cities, but with an important limitation: the exercise of those powers cannot be in conflict "with the general laws." Here, initiative provisions would not conflict with the general laws because Idaho Code section 44-1502 is the general law and, as amended by the initiative, would expressly authorize the exercise of police powers relating to minimum wage rates.

In sum, the proposed amendments to the Minimum Wage Law do not appear to be unlawful under either State or Federal law.

III. Recommended Revisions, Alterations, Suggestions, and Miscellaneous Issues

In addition to the comments already made in this certificate for review, the following are recommended revisions, alterations, suggestions, and miscellaneous issues for Section 2 of the proposed initiative:

1. The first sentence of subsection (1) of Idaho Code section 44-1502 currently uses the pronoun "his"; if the statute is amended, to be consistent with current drafting guidance, this pronoun should be changed to "its."[7]

2. The beginning language of subsection (1) of Idaho Code section 44-1502 of the proposed initiative, which reads "Except as hereinafter otherwise provided in this section," incorrectly refers to "this section"; because the exemptions from the minimum wage requirements are not found in section 44-1502 itself, but rather, are found in other sections of the chapter codifying the Minimum Wage Law, this added language should read "Except as hereinafter otherwise provided in this chapter."

3. It should be noted that the proposed initiative, with regard to minimum wage rates beginning July 1, 2027 to be determined using a statutory formula and the increase of the cost of living under a federal consumer price index, does not designate a State agency to make these calculations and provide notice of what any new annual minimum wage rate would be. That could prove problematic.

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 Petitioners via a copy of this Certificate of Review, deposited in the U.S. Mail to Chris Stroh, P.O. Box 9573, Boise, ID 83707.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

Douglas A. Werth
Lead Deputy Attorney General

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[1] 29 U.S.C. §§ 201-219.

[2] These provisions mirror those of the FLSA. See 29 U.S.C. § 206(g)(1).

[3] Currently, the general minimum wage rate under Idaho's Minimum Wage Law is $7.25, which is identical to the minimum wage rate under the FLSA. Idaho Code section 44-1502(3) currently allows employers to pay a minimum wage of not less than $4.25 an hour to new employees who are under 20 years of age during the first 90 consecutive calendar days after initial employment. Idaho Code section 44-1502(2) currently differs from FLSA minimum wage rates in its treatment of tipped employees. The minimum amount of direct wages that employers must pay to tipped employees under Idaho law is $3.35 an hour, which exceeds the FLSA's minimum direct wage rate of $2.13 an hour. See 29 C.F.R. § 531.59.

[4] 29 U.S.C. § 218(a).

[5] The Second Circuit Court of Appeals reached a similar conclusion in Shahriar v. Smith & Wollensky Restaurant Group, Inc., 659 F.3d 234 (2d Cir. 2011):

> [T]he FLSA's "savings clause" [29 U.S.C. § 218(a)] makes clear that states may enact wage laws that are more protective than those that are provided in the act. … We have held that this clause demonstrates Congress' intent to allow state wage laws to co-exist with the FLSA by permitting

> explicitly, for example, states to mandate greater overtime benefits than the FLSA.

Id. at 247-48 (first citing Overnite Transp. Co. v. Tianti, 926 F.2d 220, 221-22 (2d Cir.1991) (rejecting the argument that the FLSA preempts state wage laws); then citing Ervin v. OS Rest. Servs., Inc., 632 F.3d 971, 997 (7th Cir. 2011) (same); and then citing Williamson v. Gen. Dynamics Corp., 208 F.3d 1144, 1151 (9th Cir. 2000)).

[6] See U.S. Dep't of Labor, Wage & Hour Div., State Minimum Wage Laws (updated May 1, 2021), https://www.dol.gov/agencies/whd/minimum-wage/state.

[7] Legis. Servs. Office, Res. & Legis. Branch, Legislation Drafting Manual (Concise Version) (Rev. May 2017) at 32, https://legislature.idaho.gov/wp-content/uploads/research/draftingmanual.pdf ("Avoid using gender specific words. The Idaho Code provides that the masculine includes the feminine. If you must use a gender specific word, use the masculine unless the context requires using 'she.'").

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 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, "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 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 at 629, 349 P.3d at 1220. 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.

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) through (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. <u>Prop. I.C. § 37-3505</u>

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) through (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 <u>legal</u> basis for the forfeiture is <u>not the personal use of marijuana as authorized under this Chapter</u>."

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 Idaho 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. Idaho Code section 37-2732C(a) 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.

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, 490-95, 121 S. Ct. 1711, 1717-20, 149 L. Ed. 722 (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 1320032, 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. Ct. 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
Deputy Attorney General

[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.

[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.

[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).

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ATTORNEY GENERAL'S SELECTED ADVISORY LETTERS FOR THE YEAR 2021

LAWRENCE G. WASDEN

ATTORNEY GENERAL
STATE OF IDAHO

January 11, 2021

The Honorable John Gannon
Idaho House of Representatives
Idaho State Capitol
700 West Jefferson Street
Boise, Idaho 83702
VIA EMAIL: jgannon@house.idaho.gov

Re: Request for AG analysis

Dear Representative Gannon:

This letter is in response to your inquiry regarding the ability of the Legislature to regulate its proceedings by statute. As explained below, the Legislature's ability to regulate its proceedings by statute, while permissible, is of limited effect and likely to be legally confusing.[1] This limited effectiveness is due to article III, section 9 of the Idaho Constitution, which authorizes:

> 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.)

The bolded portion above expressly authorizes each house to determine its rules of proceedings. This means that at any time, either chamber could suspend, ignore, amend, or repeal compliance with a statute purporting to direct its proceedings. This authority is specifically reserved to each chamber. Further, such issues are not subject to review by the court. Beitelspacher v. Risch, 105 Idaho 605, 606, 671 P.2d 1068, 1069 (1983). The constitutional right of a legislature to control its own procedure cannot be withdrawn or restricted by statute.

Statutes can only control as long as they do not conflict with the rules of the legislative chamber. National Conference of State Legislatures, Mason's Manual of Legislative Procedure (2020 ed.) §§ 1 ¶ 3; 3 ¶ 2. Importantly, the legislative body may at any time through a variety of parliamentary procedures decide to not follow its own rules, and such determination is not subject to judicial review. Mason's § 3 ¶ 7.

Although the Legislature may regulate its conduct by statute, it is important to understand how limited such regulation may be because either chamber may at any time alter, ignore, or otherwise render the statute inapplicable. A legislative chamber's interpretation and application of its rules, by statute or otherwise, is not reviewable by the judiciary. Beitelspacher, 105 Idaho at 606, 671 P.2d at 1069.

I hope that you find this analysis helpful.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

[1] It is also worth noting that the Governor has the power to veto a statute. See Idaho Const. art. IV, § 10. Thus, if the Legislature were to regulate legislative proceedings by statute, it would suggest that the Governor has some measure of control over how the Legislature conducts its proceedings. This could run afoul of the constitutional provision discussed above as well as the Idaho Constitution's separation of powers. See Idaho Const. art. II, § 1.

January 19, 2021

The Honorable Ilana Rubel
Idaho House of Representatives
Idaho State Capitol
700 W. Jefferson Street
Boise, Idaho 83702
VIA EMAIL: irubel@house.idaho.gov

Re: Request for response whether Idaho law requires unattended or unwitnessed deaths to be referred to coroner

Dear Representative Rubel:

On January 14, you asked whether Idaho law allows for remote declarations of death or if an unattended or unwitnessed death must be referred to the coroner. Under Idaho's statute regarding registration of deaths, section 39-260, Idaho Code, referral to the coroner may be required depending on the cause of death. Generally, where an attending or recently attending medical professional with access to the deceased's medical history can certify the death was due to natural causes, referral to the coroner is not required.

"The person in charge of interment . . . shall be responsible for obtaining and filing the certificate [of death]." Idaho Code § 39-260(1). That person shall obtain required information to complete the death certificate, including medical data. Idaho Code § 39-260(1)(b).

> Except as otherwise provided, **medical data shall be supplied by the physician, physician assistant or advanced practice registered nurse who attended the deceased during the last illness, who shall certify to the cause of death according to his best knowledge, information and belief within seventy-two (72) hours from time of death.** In the absence of the attending physician, physician assistant or advanced practice registered nurse or with said person's approval **the certificate may be completed and signed by said**

> **person's associate, who must be a physician, physician assistant or advanced practice registered nurse, the chief medical officer of the institution in which death occurred, or the physician who performed an autopsy upon the decedent, provided such individual has access to the medical history of the case, views the deceased at or after death, and death is due to natural causes.**

Id. (emphasis added).

The person in charge of interment must refer a case to the coroner for investigation and certification as to cause of death in the following circumstances:

> (a) When no physician, physician assistant or advanced practice registered nurse was in attendance during the last illness of the deceased;
> (b) When the circumstances suggest that the death occurred as a result of other than natural causes; or
> (c) When death is due to natural causes and the physician, physician assistant or advanced practice registered nurse who attended the deceased during the last illness or said person's designated associate who must be a physician, physician assistant or advanced practice registered nurse, is not available or is physically incapable of signing.

Idaho Code § 39-260(2).

Thus, the relevant considerations in determining whether a referral to the coroner is required are: (1) whether the death was due to natural causes; (2) whether a physician, physician assistant or advanced practice registered nurse who attended the deceased at time of death, during the last illness, or after death, determines the death was due to natural causes; and (3) whether the determining medical professional is available and capable of signing the certification as to the cause of death. If the answer to these considerations is yes, the case need not be referred to the coroner. If the answer to any of these considerations is no, referral to the coroner is necessary.

I hope you find this helpful. If you have further questions, please contact Brian Kane.

Sincerely,

DAPHNE HUANG
Deputy Attorney General

January 27, 2021

The Honorable Fred Martin
Idaho State Senate
Idaho State Capitol
700 W. Jefferson Street
Boise, Idaho 83702
VIA EMAIL: fmartin@senate.idaho.gov

Re: Request for AG analysis

Dear Senator Martin:

This letter is in response to your inquiry regarding House Concurrent Resolution 2, 66th Legislature, 1st Regular Session (2021) ("H.C.R. 2"). Specifically, you have asked whether the Legislature has the authority to alter an emergency declaration of the Governor through a concurrent resolution. As explained in greater detail below, the Legislature only possesses the authority granted to it through Idaho's Constitution. Legislative authority under article III of the Idaho Constitution is exercised through the constitutional requirements for lawmaking, and a concurrent resolution does not meet the constitutional requirements for lawmaking.

Article III Sets Forth the Requirements for Legislative Branch Authority.

Idaho Code section 46-1008(2) provides that the Legislature has the authority to terminate a state of disaster emergency by concurrent resolution. But this office can identify no portion of the Idaho Constitution that allows this legislative claim of authority.

Article III, section 1 of the Idaho Constitution vests the legislative power of the state within a senate and a house of representatives. In order to legislate, both chambers must vote upon and pass legislation. Idaho Const. art. III, § 15. All bills passed by the Legislature must be presented to the Governor for his signature or disapproval. Idaho Const. art. IV, § 10. If the Governor disapproves and returns the bill, the Legislature may override the Governor through

a two-thirds vote of the members in each house. Id. Any legislation that does not meet these requirements is not law, unless a specific exception is provided for within the Constitution. Idaho Power Co. v. State, By and Through Dep't of Water Res., 104 Idaho 570, 574, 661 P.2d 736, 740 (1983). "Legislative action by resolution is not a 'law' in that context." Id. (first citing Griffith v. Van Deusen, 31 Idaho 136, 169 P. 929 (1917) (requirements of legislative action to bind State); and then citing Balderston v. Brady, 17 Idaho 567, 107 P. 493 (1910) (joint resolution is not a law of the State because it is not enacted in the manner provided for enactment of a law)).

Resolutions of the Legislature Have No Legal Effect Unless Authorized by the Constitution.

In Mead v. Arnell, 117 Idaho 660, 668, 791 P.2d 410, 418 (1990), the Court held that the Legislature was authorized to reject administrative rules because the rules were created by way of a delegation of its lawmaking authority set forth in the Idaho Constitution. This authority has since been placed in the Idaho Constitution in article III, section 29, wherein legislative approval or rejection of a rule is not subject to gubernatorial veto. Similarly, legislative action regarding constitutional amendments may occur through resolutions because article XX, section 1 directs that upon a two-thirds vote of each house, voting separately, the Legislature has the duty to submit the proposed amendment to the electorate. In short, when the Legislature is authorized to act by concurrent resolution without presentment to the Governor, such authority is provided for within the Idaho Constitution.

This conclusion is reinforced by the case law cited above, as well as the bounds the Idaho Supreme Court set on its holding in Mead:

> This holding should not be deemed to apply to any situations, set of facts or possible application other than the rejection of an administrative rule or regulation that has been promulgated pursuant to legislatively delegated authority.

Id. at 668, 791 P.2d at 418. The Governor's authority to issue executive orders or proclamations is not a delegated power of the Legislature.

The Governor's authority to issue executive orders and declarations arises from article IV, section 5 of the Idaho Constitution:

> SUPREME EXECUTIVE POWER VESTED IN GOVERNOR. The supreme executive power of the state is vested in the governor, who shall see that the laws are faithfully executed.[1]

Although there is no Idaho case law on the Governor's authority to issue executive orders, reference to the law surrounding Article II, Section 1 of the United States Constitution demonstrates that the Governor's authority under article IV, section 4 of the Idaho Constitution is highly analogous to a president's authority under Article II, Section 1 of the United States Constitution. A president's executive order can be overridden through Congress's passage of a law subject to the president's veto. A similar process is likely required by Idaho's Constitution. Any legislative override of an executive order or emergency declaration must comply with the lawmaking requirements of Idaho's Constitution.[2]

Concurrent Resolutions Are of Limited Effect.

As explained above, unless the Idaho Constitution provides for the use of a concurrent resolution not presented to the Governor, legislative vehicles that do not comply fully with article III, section 15 and article IV, section 10 of the Idaho Constitution cannot be considered to have legal effect other than stating a policy preference of the Legislature, or of the chamber that has adopted it.

I hope that you find this analysis helpful.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

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[1] The Governor's authority is reinforced by article IV, section 4 of the Idaho Constitution:

> GOVERNOR IS COMMANDER OF MILITIA. The governor shall be commander-in-chief of the military forces of the state, except when they shall be called into actual service of the

> United States. He shall have power to call the militia to execute the laws, to suppress insurrection, or to repel invasion.

See also McConnel v. Gallet, 51 Idaho 386, 6 P.2d 143, 144 (1931) (recognizing that when the Governor orders the National Guard to respond, the State must pay the necessary expenses incident to the response).

[2] It is important to note that the scope of the Governor's authority to declare and respond to emergencies, while arising from article IV of the Idaho Constitution, is largely undefined. The Legislature likely has authority to establish reasonable boundaries, but care must be taken that such boundaries do not render the Governor's ability to identify, declare, and respond to emergencies unworkable. The Legislature may not prevent a constitutional officer from performing his constitutional duties. Wright v. Callahan, 61 Idaho 167, 178, 99 P.2d 961, 965 (1940).

January 28, 2021

The Honorable Lauren Necochea
Idaho House of Representative
Idaho State Capitol
700 W. Jefferson Street
Boise, Idaho 83702
VIA EMAIL: lnecochea@house.idaho.gov

Re: Request for AG analysis

Dear Representative Necochea:

This letter is in response to your inquiry regarding Senate Concurrent Resolution 101, 66th Legislature, 1st Regular Session (2021) ("S.C.R. 101"). Specifically, you have asked: (1) whether it is constitutional for the Legislature to end an emergency declaration of the Governor through a concurrent resolution; and (2) whether S.C.R. 101 allows the State to maintain access to federal disaster funding. Each question will be addressed in turn.

1. Is it constitutional for the Legislature to end an emergency declaration of the Governor through a concurrent resolution?

As explained in greater detail below, the Legislature only possesses the authority granted to it through Idaho's Constitution. Legislative authority under article III of the Idaho Constitution is exercised through the constitutional requirements for lawmaking, and a concurrent resolution does not meet the constitutional requirements for lawmaking.

a. Article III Sets Forth the Requirements for Legislative Branch Authority.

Idaho Code section 46-1008(2) provides that the Legislature has the authority to terminate a state of disaster emergency by concurrent resolution. But this office can identify no portion of the Idaho Constitution that allows this legislative claim of authority.

Article III, section 1 of the Idaho Constitution vests the legislative power of the state within a senate and a house of representatives. In order to legislate, both chambers must vote upon and pass legislation. Idaho Const. art. III, § 15. All bills passed by the Legislature must be presented to the Governor for his signature or disapproval. Idaho Const. art. IV, § 10. If the Governor disapproves and returns the bill, the Legislature may override the Governor through a two-thirds vote of the members in each house. Id. Any legislation that does not meet these requirements is not law, unless a specific exception is provided for within the Constitution. Idaho Power Co. v. State, By and Through Dept. of Water Res., 104 Idaho 570, 574, 661 P.2d 736, 740 (1983). "Legislative action by resolution is not a 'law' in that context." Id. (first citing Griffith v. Van Deusen, 31 Idaho 136, 169 P. 929 (1917) (requirements of legislative action to bind State); and then citing Balderston v. Brady, 17 Idaho 567, 107 P. 493 (1910) (joint resolution is not a law of the State because it is not enacted in the manner provided for enactment of a law)).

b. Resolutions of the Legislature Have No Legal Effect Unless Authorized by the Constitution.

In Mead v. Arnell, 117 Idaho 660, 668, 761 P.2d 410, 418 (1990), the Court held that the Legislature was authorized to reject administrative rules because the rules were created by way of a delegation of its lawmaking authority set forth in the Idaho Constitution. This authority has since been placed in the Idaho Constitution in article III, section 29, wherein legislative approval or rejection of a rule is not subject to gubernatorial veto. Similarly, legislative action regarding constitutional amendments may occur through resolutions because article XX, section 1 directs that upon a two-thirds vote of each house, voting separately, the Legislature has the duty to submit the proposed amendment to the electorate. In short, when the Legislature is authorized to act by concurrent resolution without presentment to the Governor, such authority is provided for within the Idaho Constitution.

This conclusion is reinforced by the case law cited above, as well as the bounds the Idaho Supreme Court set on its holding in Mead:

> This holding should not be deemed to apply to any situations, set of facts or possible application other than

> the rejection of an administrative rule or regulation that has been promulgated pursuant to legislatively delegated authority.

Id. at 668, 791 P.2d at 418. The Governor's authority to issue executive orders or proclamations is not a delegated power of the Legislature.

The Governor's authority to issue executive orders and declarations arises from article IV, section 5 of the Idaho Constitution:

> SUPREME EXECUTIVE POWER VESTED IN GOVERNOR. The supreme executive power of the state is vested in the governor, who shall see that the laws are faithfully executed.[1]

Although there is no Idaho case law on the Governor's authority to issue executive orders, reference to the law surrounding Article II, Section 1 of the United States Constitution demonstrates that the Governor's authority under article IV, section 4 of the Idaho Constitution is highly analogous to a president's authority under article II, section 1 of the Idaho Constitution. A president's executive order can be overridden through Congress's passage of a law subject to the president's veto. A similar process is likely required by Idaho's Constitution. Any legislative override of an executive order or emergency declaration must comply with the lawmaking requirements of Idaho's Constitution.[2]

c. Concurrent Resolutions Are of Limited Effect.

As explained above, unless the Idaho Constitution provides for the use of a concurrent resolution not presented to the Governor, legislative vehicles that do not comply fully with article III, section 15 and article IV, section 10 of the Idaho Constitution cannot be considered to have legal effect other than stating a policy preference of the Legislature, or of the chamber that has adopted it.

2. Does S.C.R. 101 allow the State to maintain access to federal disaster funding?

No. Idaho Code section 46-1008(2) requires the Governor to issue an executive order to end the state of disaster emergency upon adoption of the concurrent resolution. Once said executive order is issued, the State would no longer qualify for federal aid under the Stafford Act.

a. Active State Declaration Required to Qualify for Federal Aid.

The Robert T. Stafford Disaster Relief and Emergency Assistance Act ("Stafford Act")—the federal law governing presidentially declared disasters—requires a state to have a declared disaster in place to qualify for federal aid. 42 U.S.C.A. § 5170(a). The Stafford Act specifically states that "[a]s part of [a presidential disaster declaration], *and as a prerequisite to major disaster assistance* under this chapter*,* the Governor shall take appropriate response action under State law and direct execution of the State's emergency plan." Id. (emphasis added). The appropriate State response action and the execution of Idaho's state emergency plan is triggered by the Governor's proclamation of a state of disaster emergency.

> An executive order or proclamation of a state of disaster emergency shall activate the disaster response and recovery aspects of the state, local and intergovernmental disaster emergency plans applicable to the political subdivision or area in question and be authority for the deployment and use of any forces to which the plan or plans apply and for use or distribution of any supplies, equipment, and materials and facilities assembled, stockpiled, or arranged to be made available pursuant to this act or any other provision of law relating to disaster emergencies.

Idaho Code § 46-1008(3) (2021) (emphasis added). If the declared state of disaster emergency is terminated by concurrent resolution, the State would no longer be eligible for federal disaster aid.

b. S.C.R. 101's Savings Provision is of No Effect.

As a side note, the savings provision in S.C.R. 101 is beyond statutory authority; and even if permitted, the savings provision does not allow Idaho to continue receiving federal aid after termination of the emergency disaster.

S.C.R. 101 states:

> The Governor may make or maintain declarations only to the extent required to continue to receive Federal Emergency Management Agency funding arising out of novel coronavirus or COVID-19 but may not use any such declaration to impose restrictions on the citizens of the State of Idaho.

However, Idaho Code section 46-1008(2) (2021) only gives the Legislature authority to "terminate a state of disaster emergency" and nothing more. Thus, the Legislature's attempt to limit present and future gubernatorial declarations goes above and beyond what is authorized in code. And as discussed at length above, the State would still be disqualified from receiving federal disaster aid if the Legislature terminates the state of disaster emergency.

3. Conclusion.

In sum, the Idaho Constitution does not appear to authorize the Legislature to end the state of disaster emergency via concurrent resolution. Nor does S.C.R. 101 allow Idaho to maintain access to federal disaster funds upon termination of the state of disaster emergency. The Stafford Act requires an active, state-declared disaster in order to receive aid from the federal government and S.C.R. 101's savings clause does not rectify this problem. If the Legislature terminates the state of disaster emergency by concurrent resolution, access to federal funds would likewise terminate.

I hope that you find this analysis helpful.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

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[1] The Governor's authority is reinforced by article IV, section 4 of the Idaho Constitution:

> GOVERNOR IS COMMANDER OF MILITIA. The governor shall be commander-in-chief of the military forces of the state, except when they shall be called into actual service of the United States. He shall have power to call the militia to execute the laws, to suppress insurrection, or to repel invasion.

See also McConnel v. Gallet, 51 Idaho 386, 6 P.2d 143, 144 (1931) (recognizing that when the Governor orders the National Guard to respond, the State must pay the necessary expenses incident to the response).

[2] It is important to note that the scope of the Governor's authority to declare and respond to emergencies, while arising from article IV of the Idaho Constitution, is largely undefined. The Legislature likely has authority to establish reasonable boundaries, but care must be taken that such boundaries do not render the Governor's ability to identify, declare, and respond to emergencies unworkable. The Legislature may not prevent a constitutional officer from performing his constitutional duties. Wright v. Callahan, 61 Idaho 167, 178, 99 P.2d 961, 965 (1940).

January 28, 2021

The Honorable John Vander Woude
Idaho House of Representatives
5311 Ridgewood Road
Nampa, Idaho 83687
VIA EMAIL: johnvw_236@msn.com

Re: Per Request for Attorney General's Opinion

Dear Representative Vander Woude:

You have requested that this office respond to questions related to DRELB092, a proposed amendment to Idaho Code section 39-5713 of the Prevention of Minors' Access to Tobacco Products or Electronic Smoking Devices ("Minors' Access Act"), chapter 57, title 39, Idaho Code. The proposed amendment is as follows:

> 39-5713. Local Ordinances Prohibited. No local unit of government may adopt or enforce requirements for the regulation, marketing, or sale of tobacco products or electronic smoking devices that are more restrictive than or in addition to this chapter. No local unit of government may impose or enforce a tax or fee on tobacco products of electronic smoking devices. This subsection shall not be construed to prevent a local unit of government from regulating the public use of tobacco products or electronic smoking devices.

Thus, the proposed amendment contains three distinct provisions: (1) a prohibition against local government adopting or enforcing requirements that are more restrictive than, or in addition to, the Minors' Access Act; (2) a prohibition against local government units taxing the tobacco products of electronic smoking devices; and (3) a statement that the subsection not be construed to prevent a local government from "regulating the public use of tobacco products or electronic smoking devices."

Question 1: You have asked whether the proposed amendment would "impact the provisions of the Clean Indoor Air Act" (Idaho Code §§ 39-5501, et seq.). Yes, one provision of the Clean Indoor Air Act would be impacted.

The Clean Indoor Air Act is a short chapter to "regulate smoking in public places" for the protection of the public health. Idaho Code § 39-5501. Its intent is to protect public health from the harms of secondhand smoke. Id. For example, the Act prohibits smoking in public places and outside designated smoking areas in certain public places, including buses and elevators. See, e.g., Idaho Code §§ 39-5503, 39-5505, 39-5510. Under the Act, smoking "includes the possession of any lighted tobacco product in any form." Idaho Code § 39-5502(9).

As a threshold matter, the Clean Indoor Air Act does not appear to specifically regulate any local unit of government relative to anything within the provisions of its chapters. Idaho Code §§ 39-5501, et seq. To the extent the Clean Indoor Air Act does not govern local government units, this proposed amendment to the Minors' Access Act does not appear to generally impact the provisions of the Clean Indoor Air Act.

However, one provision of the Clean Indoor Air Act pertains to local government units. Section 39-5511, Idaho Code, provides: "Nothing in this chapter shall be interpreted to prevent local, county or municipal governments from adopting ordinances or regulations more restrictive than the provisions contained herein." Thus, local governmental units *are* permitted to be more restrictive in their ordinances or regulations regarding the regulation of smoking in public places than the Clean Indoor Air Act.

In reviewing the language of the proposed amendments to the Minors' Access Act, it is apparent that a local government would be prohibited from "adopt[ing] . . . requirements for the regulation . . . of tobacco products . . . in addition to" the Minors' Access Act. Thus, the proposed amendments would seem to undercut the ability of a local government to enact a restriction regarding smoking in public places under the authority granted in the Clean Indoor Air Act. Said another way, if a local governmental unit were to adopt a more restrictive

regulation regarding smoking in public under the Clean Indoor Air Act, this would seemingly fall within the prohibition of the proposed amendment against adopting requirements for the regulation of tobacco products in addition to the Minors' Access Act.

To the extent the drafters of the proposed amendment do not wish to impact a local government's ability to adopt more restrictive regulations under the Clean Indoor Air Act, the prohibition in the proposed amendment to the Minors' Access Act should be narrowed.

We also note that the third provision of the proposed amendment presents some issues of statutory interpretation. The third sentence of the amendment provides that the subsection is not to be construed to prevent local governmental units from "regulating the public use of tobacco products or electronic smoking devices." This "carve-out" is a large one that perhaps cancels the first sentence of the proposed amendment. On the one hand, the first sentence prohibits local governmental units from adopting or enforcing requirements "for the regulation" of tobacco products or electronic smoking devices that are "in addition to" the Minors' Access Act. And yet, on the other hand, the third sentence indicates that local governmental units are *not* to be prevented from "regulating" the public use of those same products. It is unclear why a local governmental unit should be prohibited from adopting or enforcing regulations of tobacco products or electronic smoking devices in addition to the Minors' Access Act in the first instance, and yet, in the second instance, be told that they are not prevented from "regulating" the public use of those same items.

Last, it seems likely that the third sentence in the proposed amendment is actually intended to specifically protect a local government's authority to regulate smoking in public places under the Clean Indoor Air Act. However, as explained above, that third sentence is overly broad and insufficiently vague. It should be narrowed. If the purpose of the third sentence is to leave alone the Clean Indoor Air Act, one solution would be to have that third sentence refer directly to the affected section of the Clean Indoor Air Act (e.g., "This subsection shall not be construed to prevent a local unit of government from regulating the public use of tobacco products or electronic smoking devices pursuant to Idaho Code § 39-5511").

Question 2: You also asked whether changing the definition of "minor" in Idaho Code section 39-5702 to "a person under twenty-one (21) years of age" would change the definition of minor in any other area of Idaho Code? Yes, changing the definition of "minor" here would change one other section of Idaho Code.

As a general matter, by its own language, the definitions provided in Idaho Code section 39-5702 only apply to the terms in chapter 57, title 39. That section provides that "[t]he terms *used in this chapter* are defined as follows[.]" Id. (emphasis added). Therefore, the definitions provided are limited to those terms in chapter 57, title 39. Thus, another instance of the term "minor" elsewhere in Idaho Code would be affected by a change to the definition of "minor" in section 39-5702, Idaho Code, only if that other section specifically incorporated section 39-5702 by reference.

A search of Idaho Code does show one instance where section 39-5702, Idaho Code, *is* incorporated by reference. The Tobacco Master Settlement Agreement Complementary Act (Idaho Code §§ 39-8401, et seq.) does specifically incorporate section 39-5702(6), Idaho Code, as follows: "'Minor' has the same meaning as that term is defined in section 39-5702(6), Idaho Code." Idaho Code § 39-8421(4). (In turn, the Master Settlement Agreement Complementary Act otherwise uses the term "minor" only once; it requires a cigarette rolling machine operator to certify that the "location where the cigarette rolling machine is situated prohibits minors from entering the premises[.]" Idaho Code § 39-8423(1)(e)(ii).)

Sincerely,

DAVID B. YOUNG
Deputy Attorney General

February 2, 2021

The Honorable Fred Martin
Idaho State Senate
Idaho State Capitol
700 W. Jefferson Street
Boise, Idaho 83702
VIA EMAIL: fmartin@senate.idaho.gov

Re: Request for legislation review of S.C.R. 103

Dear Senator Martin:

This letter is in response to your recent inquiry regarding Senate Concurrent Resolution 103, 66th Legislature, 1st Regular Session (Idaho 2021) ("S.C.R. 103"). Specifically, you ask:

(1) Is the December 30, 2020 "Stay Healthy Order" issued by the Governor and the IDHW Director a "rule" subject to rejection by concurrent resolution of the Idaho Legislature; and
(2) Would SCR103 have any legal effect if passed by the Idaho Senate and House?

As explained in greater detail below, an order issued under article IV, section 5 of the Idaho Constitution and Idaho Code section 56-1003(7) is a not a rule promulgated under chapter 52 of title 67 and it is not subject to review by the Idaho Legislature via concurrent resolution. Idaho's constitution limits the Legislature to only reviewing rules "to ensure it is consistent with the legislative intent of the statute that the rule was written to interpret, prescribe, implement or enforce." Idaho Const. art. III, § 29. Idaho's constitution does not provide for legislative review of agency orders, nor do Idaho statutes claim such authority on behalf of the Legislature. Under Idaho Code sections 56-1003(7)(a) and 67-5270, agency orders are subject to judicial review. Finally, if the review is intended to analyze whether a rule has been promulgated properly under chapter 52 of title 67, then Idaho Code section 67-5231 directs that such rule can be contested administratively or judicially. No mechanism is made for legislative review of the propriety of promulgated rules (or orders). Legislative review is

constitutionally limited to legislative intent. See Idaho Const. art. III, § 29.

Agency Rules and Orders are Defined by Statutes, Not Concurrent Resolutions.

S.C.R. 103 seeks to reclassify the order issued by the Governor and the Director of the Department of Health and Welfare ("Director") as a rule through the use of the following language:

> WHEREAS, the order of isolation issued by the Governor and the Director is an order of general applicability affecting citizens and businesses throughout Idaho, regardless of their exposure to COVID-19; and
>
> WHEREAS, as an order of general applicability, the order of isolation is in essence an administrative rule to be promulgated pursuant to the Idaho Administrative Procedure Act, Chapter 52, Title 67, Idaho Code; and
>
> WHEREAS, proper procedures under the Administrative Procedure Act were not followed in the promulgation of the order of isolation; and
>
> WHEREAS, the Legislature has the authority to reject any rule as provided by law pursuant to Section 29, Article III, of the Constitution of the State of Idaho. . . .

SCR 103 at 1:30-40. The above text attempts to conflate the Governor and Director's order with a rule by providing a legislative assessment of the order.[1] The first two "Whereas" clauses identify the order as being of general applicability and therefore "in essence an administrative rule" that should have been promulgated under Idaho's Administrative Procedure Act. S.C.R. 103 then claims constitutional authority to reject any rule as provided by law. As outlined below, S.C.R. 103's rhetoric[2] fails to match Idaho's constitutional and legal framework for issuance and review of the order.

The Governor and Director's Order Was Issued Under Article IV, Section 5 of the Idaho Constitution and Chapter 10 of Title 56 of the Idaho Code.

S.C.R. 103 claims that the order was not issued properly under chapter 52 of title 67. That is incorrect because, in addition to the Governor's authority under article IV, section 5, the order was issued under Idaho Code section 56-1003(7), which expressly states:

> **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.

(Emphasis added.) As highlighted above, the Director has the authority to issue orders of isolation and quarantine under this provision. The limiting factor on the Director's authority is that he must issue the order under the Rules of the Board of Health and Welfare. This provision does not require the Director to comply with the requirements of title 67, chapter 52, or any other procedural requirements than what the Board of Health and Welfare has promulgated. The Board of Health and Welfare has promulgated the rules under the Division of Public Health–Bureau of Communicable Disease Prevention, at IDAPA 16.02.10—Idaho Reportable Diseases. IDAPA 16.02.10.08 and 16.02.10.09 provide for both orders of quarantine and isolation as required by Idaho Code section 56-1003(7).

Chapter 52 of Title 67 Defines Rules and Orders.

Idaho Code section 67-5201(19) defines a rule as:

> "Rule" means the whole or a part of an agency statement of general applicability that has been promulgated in compliance with the provisions of this chapter and that implements, interprets, or prescribes:
>
> (a) Law or policy; or
>
> (b) The procedure or practice requirements of an agency. The term includes the amendment, repeal, or suspension of an existing rule, but does not include:
>
> (i) Statements concerning only the internal management or internal personnel policies of an agency and not affecting private rights of the public or procedures available to the public; or
>
> (ii) Declaratory rulings issued pursuant to section 67-5232, Idaho Code; or
>
> (iii) Intra-agency memoranda; or
>
> (iv) Any written statements given by an agency which pertain to an interpretation of a rule or to the documentation of compliance with a rule.

An order is defined in Idaho Code section 67-5201(12) as:

> "Order" means an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons.

A rule requires the following: (1) An agency statement of general applicability; (2) promulgated in compliance with the provisions of chapter 52, title 67; and (3) implements, interprets or prescribes law or policy or procedure or practice requirements of an agency. Assuming arguendo that the order is an agency statement of general applicability implementing, interpreting or prescribing law or policy, the order is not issued under the authority in chapter 52 of title 67. It is worth noting that Idaho Code section 67-5247 would permit such an order if Idaho Code section 56-1003(7) did not authorize it. But orders issued under Idaho Code section 67-5247 are subject to judicial, not legislative review.

Idaho Code Section 56-1003(7) Specifically Refers to an Order.

As mentioned above, in addition to the Governor's authority under article IV, section 5, the order was issued under Idaho Code section 56-1003(7), which provides the express basis for issuance of the order. More specifically, the express language of Idaho Code section 56-1003(7) labels the action of the Director as an order (shall have the power to impose and enforce orders of isolation and quarantine). But S.C.R. 103 seeks to redefine the order under chapter 52 of title 67. This office can find no authority for the Legislature to reclassify a rule or an order of an agency. Both constitutionally and statutorily, the Legislature is confined to only reviewing rules for consistency with legislative intent.

Legislative Review of Rules is Constitutionally Limited.

As mentioned above, article III, section 29 of the Idaho Constitution limits legislative review of rules only to ensure consistency with the legislative intent of the underlying statute authorizing the rule. Article III, section 29 provides no basis for reviewing a rule for compliance with the requirements of chapter 52, title 67. Idaho Code section 67-5291 also reads consistently with article III, section 29 in limiting legislative review to legislative intent.[3]

The Legislature Has Specifically Provided for Review of Improperly Promulgated Rules, as well as Orders Issued Under Idaho Code Section 56-1003(7). Neither Includes Legislative Review and Rejection.

As S.C.R. 103 acknowledges, the order was issued under Idaho Code section 56-1003(7).[4] That provision expressly sets forth the procedure for challenge of an order:

> 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.

Idaho Code § 56-1003(7)(a) (emphasis added.) Idaho Code section 56-1003(7)(a) makes it clear that an order can be challenged in court. No provision is made within this section for any other challenge or review of an order. Legislative review of rules is found within Idaho Code section 67-5291, is limited to consistency with legislative intent, and contains no cross-reference to Idaho Code section 56-1003(7).

Similarly, a rule that is not promulgated in accordance with the provisions of chapter 52 of title 67 is subject to judicial review. Idaho Code section 67-5231(2) specifically provides:

> **A proceeding, either administrative or judicial, to contest any rule on the ground of noncompliance with the procedural requirements of this chapter** must be commenced within two (2) years from the effective date of the rule.

(Emphasis added.)

S.C.R. 103 couches its authority to review the order by identifying the order as a rule that was issued by not following the proper procedures under the Administrative Procedure Act (chapter 52, title 67). If one assumes that this was a rule not promulgated in accordance with the Administrative Procedure Act, then it could be challenged under Idaho Code section 67-5231(2). Legislative review is for consistency "with the legislative intent of the statute that the rule was written to interpret, prescribe, implement or enforce." Idaho Const., art. III, § 29; Idaho Code § 67-5291. The order is not interpreting, prescribing, implementing, or enforcing the Administrative Procedure Act. The order is declaring, implementing, and enforcing the provisions of Idaho Code section 56-1003(7) and IDAPA 16.02.10.065.08 and .09. Under the Idaho Constitution, if the Legislature had the authority to review an order issued under Idaho Code section 56-1003(7), article IV, section 5, or even Idaho Code section 67-5247 (Emergency Orders under APA), the Legislature would only have the authority to review to ensure consistency with legislative intent of the underlying statute, not to ensure compliance with the Administrative Procedure Act. That review process is solely done through administrative proceedings and the judiciary through judicial review. See Idaho Code § 67-5231.

The Conclusion Within the Letter Addressed to Senator Martin on January 27, 2021 Remains the Same.

On January 27, 2021, this office delivered to you a letter analyzing the limited effect of concurrent resolutions as legally binding enactments of the Legislature. Article III, section 29 likely authorizes the use of concurrent resolutions to review administrative rules as provided for by law and permitted by the Idaho Constitution, but not subject to gubernatorial veto. Since presentment is not required under article III, section 29, a concurrent resolution is a permissible legislative vehicle for rules review. However, as outlined above, the December 30, 2020 "Stay Healthy Order" is not a rule under title 67, chapter 52. Therefore, the Legislature has only two alternatives to challenge or overturn the order: (1) The Legislature can seek judicial review, or (2) it can enact a law setting aside the order. The conclusion in the January

27, 2021 letter from this office to you remains the same; a concurrent resolution will have no legal effect.

I hope you find this analysis helpful.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

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[1] It is worth noting that S.C.R. 103 only recognizes that the order was issued under Idaho Code section 56-1003(7), but the order was issued by the Governor and the Director under article IV, section 5 and Idaho Code section 56-1007(3). This omission from S.C.R. 103 may be legally significant because the Governor is not considered an agency under Idaho Code section 67-5201(2):

> "Agency" means each state board, commission, department or officer authorized by law to make rules or to determine contested cases, but **does not include the legislative or judicial branches, executive officers listed in section 1, article IV, of the constitution of the state of Idaho in the exercise of powers derived directly and exclusively from the constitution, the state militia or the state board of correction.**

(Emphasis added.)

Thus, assuming the Legislature possesses the authority to review the Director's order as an administrative rule under article III, section 29, the Legislature may not be able to review the Governor's order under the same provision because he is exempt from the definition of "agency" through his exercise of article IV, section 5 authority.

[2] The wording of S.C.R. 103 is somewhat confusing as well. For example, S.C.R. 103 refers to the Centers for Disease Control and the federal Department of Health and Human Services definitions of quarantine and isolation, even though the Idaho Legislature has defined those terms in Idaho Code section 56-1001(4) (Isolation) and (8) (Quarantine). In other words, S.C.R. 103 appears to be relying on the Governor's and Director's reliance on state law instead of federal law as a basis to challenge the validity of the order. This is confusing because the Legislature has furnished the definitions that S.C.R. 103 appears to be either overlooking, or refuting.

[3] Specifically, article III, section 29 states:

> LEGISLATIVE RESPONSE TO ADMINISTRATIVE RULES. **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. Legislative approval or rejection of a rule is not subject to gubernatorial veto under section 10, article IV, of the constitution of the state of Idaho.

(Emphasis added.)

Idaho Code section 67-5291(1) states:

> 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.

(Emphasis added.)

[4] Although not acknowledged in S.C.R. 103, the order was issued pursuant to both the Governor's constitutional authority in article IV, section 5 and the Director's statutory authority in Idaho Code section 56-1003(7).

February 9, 2021

The Honorable Fred Wood
Idaho House of Representatives
Idaho State Capitol
700 W. Jefferson Street
Boise, Idaho 83702
VIA EMAIL: fwood@house.idaho.gov

Re: Request for AG analysis on vaccinations for adults and children

Dear Representative Wood:

You asked whether vaccinations are optional or required for adults and children. **No Idaho law requires adult vaccinations.** Although records of immunization are required for a child to attend preschool through grade 12, Idaho law allows an exception from this requirement for any child whose parent or guardian provides a written objection. Idaho Code §§ 39-4801, -4802. **A parent may object in writing to vaccinating their child in Idaho for any reason. This means that Idaho's vaccination law is a recommendation only and no legal action can be taken by the State or any other public entity for a refusal to vaccinate.**

Idaho's immunization law establishes an immunization registry that specifically recognizes the purposes to "make immunizations readily available to every Idaho citizen that desires to have their child immunized," and "recognize[s] and respect[s] the rights of parents and guardians to make health care decisions for their children[.]" Idaho Code § 39-4803(a), (c). The goal of increasing the "voluntary immunization rate in Idaho to the maximum extent possible without mandating such immunizations" in section 39-4803(b), is furthered by requiring parents to provide immunization records for their child to attend preschool through grade 12 in section 39-4801. But, consistent with the voluntariness of immunizations, section 39-4802 exempts any child from immunization if their parent or guardian submits a written objection for health, safety, religious, *or any other grounds*.

Publicly available information from the Idaho Department of Health and Welfare's ("IDHW")[1] and the National Vaccine Information Center's[2] websites reflect the availability and safety of vaccines in Idaho, and how and why vaccines advance public health. The sites also clearly inform that Idaho law provides for exemptions from vaccination. Notably, the most recent update to IDHW's blog emphasizes Idahoans' choice with respect to vaccines, saying, "All Idahoans who choose to get the COVID-19 vaccination will be able to do so."[3]

More broadly, case law in the United States supports that states likely have the legal authority to enforce a mandatory vaccination rule except for those who have a medical exemption. The United States Supreme Court addressed the validity of a state law requiring all adult inhabitants in Cambridge, Massachusetts to get a smallpox vaccine or be fined in Jacobson v. Massachusetts, 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905). The Court affirmed the law's constitutionality, explaining that an individual's liberty rights under the U.S. Constitution are not absolute and the mandatory vaccination law was necessary to promote public health and safety. See id. at 35-38. Courts have consistently affirmed the reasoning in Jacobson and rejected challenges to the use of States' police power to protect the public health. See Zucht v. King, 260 U.S. 174, 43 S. Ct. 24, 67 L. Ed. 194 (1922); Whitlow v. California, 203 F. Supp. 3d 1079 (S.D. Cal. 2016).

Private employment is governed by private contracts between the employer and employee. As a matter of private contract, private employers have significant flexibility to mandate vaccinations. Healthcare facilities frequently require that employees be vaccinated for hepatitis B, influenza, MMR, varicella, tetanus, diphtheria, and pertussis.

Ultimately, although United States Supreme Court caselaw supports the authority of States to require vaccinations through exercise of police powers for public health and safety, **there is no mandate in Idaho for adults or children to be vaccinated.** The only law in Idaho addressing immunization concerns school-age children and provides for broad exemptions from immunization.

I hope you find this helpful. If you have further questions, please do not hesitate to contact me.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

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[1] See Immunizations: Information and resources about vaccination coverage, Idaho Dep't of Health & Welfare, https://healthandwelfare.idaho.gov/services-programs/children-families/child-and-adolescent-immunization.

[2] See Idaho State Vaccination Requirements, Nat'l Vaccine Information Ctr., https://www.nvic.org/Vaccine-Laws/state-vaccine-requirements/idaho.aspx.

[3] See IDHWMedia, All Idahoans who choose to get the COVID-19 vaccination will be able to do so: A reminder from DHW Director Dave Jeppesen, DHWVoice (Feb. 5, 2021), https://dhwblog.com/.

February 10, 2021

The Honorable Caroline Nilsson Troy
Idaho House of Representatives
Idaho State Capitol
700 W. Jefferson Street
Boise, Idaho 83702
VIA EMAIL: cntroy@house.idaho.gov

Re: Draft Legislation to Amend Idaho Code section 6-321

Dear Representative Troy:

You requested assistance with amending the language of Idaho Code section 6-321 to address two issues: (1) protecting tenants' security deposits from bankruptcy, and (2) recovering tenants' security deposits through civil, rather than criminal, actions. This letter suggests ways to address those concerns and provides example language incorporating the suggestions discussed.

First, because your amendment covers only agents of residential property owners, but excludes certain *types* of agents, it is helpful to define within paragraph (4) the scope of the term "agent" or the more commonly used term—"property manager"—and consistently use that term throughout the paragraph.

Second, to help prevent property managers from depleting security deposits and giving tenants a better chance to recover their deposits in a bankruptcy, you can do several things, including (a) requiring the property manager to place security deposits into a trust account, separate and apart from the manager's daily operating account; (b) provide receipts of the deposits to tenants; (c) account for the deposits to property owners; and (d) make a tenant's claim to a security deposit under this section superior to any other creditor of the property manager, including a trustee in bankruptcy.

Third, to allow tenants or property owners to enforce deviations of the new requirements through civil actions, you may (a) allow damaged tenants or property owners to sue under a breach of contract

theory, (b) include language authorizing a private cause of action against noncompliant property managers, or (c) include language making a violation of the paragraph also a violation of the Idaho Consumer Protection Act, title 48, chapter 6, Idaho Code. This would allow private persons to file an action under Idaho Code section 48-608 and recover damages and their attorney's fees, and would authorize the Attorney General to act under Idaho Code section 48-606 when he has reason to believe a property manager's repeated failure to comply with the new requirements establishes a pattern or practice of deceptive conduct.

For your consideration, the following example includes the suggested language discussed throughout this letter.

> 6-321. SECURITY DEPOSITS. (1) Amounts deposited by a tenant with a landlord for any purpose other than the payment of rent shall be deemed security deposits. Upon termination of a lease or rental agreement and surrender of the premises by the tenant all amounts held by the landlord as a security deposit shall be refunded to the tenant, except amounts necessary to cover the contingencies specified in the deposit arrangement. The landlord shall not retain any part of a security deposit to cover normal wear and tear. "Normal wear and tear" means that deterioration which occurs based upon the use for which the rental unit is intended and without negligence, carelessness, accident, or misuse or abuse of the premises or contents by the tenant or members of his household, or their invitees or guests.
> (2) Refunds shall be made within twenty-one (21) days if no time is fixed by agreement, and in any event, within thirty (30) days after surrender of the premises by the tenant. Any refunds in an amount less than the full amount deposited by the tenant shall be accompanied by a signed statement itemizing the amounts lawfully retained by the landlord, the purpose for the amounts retained, and a detailed list of expenditures made from the deposit.
> (3) If security deposits have been made as to a particular rental or lease property, and the property changes

ownership during a tenancy, the new owner shall be liable for refund of the deposits.

(4) As used in this paragraph only, the term "property manager" means a person who agrees to manage residential rental property on behalf of a residential property owner. The term excludes a property owner, a person holding a license issued under chapter 20, title 54, Idaho Code, or a nonprofit business corporation organized under chapter 30, title 30, Idaho Code.[1] A property manager shall promptly deposit into a trust account any security deposit the property manager receives. The trust account shall be maintained separately from the property manager's other accounts at a federally-insured financial institution located in Idaho. Unless otherwise agreed in writing between the property manager and the property owner, the property manager shall be entitled to receipt of any interest paid on such trust account deposits. The property manager shall provide the tenant with a written receipt for the security deposit and written notice of the name, physical and mailing addresses, and telephone number of the financial institution where the tenant's security deposit is held. If during the tenant's tenancy the tenant's security deposit is transferred to another financial institution, the property manager shall promptly inform the tenant in writing of the new financial institution's name, physical and mailing addresses, and telephone number. A property manager shall promptly transfer a tenant's security deposit into the trust account of a successor property manager, and the successor property manager shall promptly inform the tenant in writing of the name, physical and mailing addresses, and telephone number of the new financial institution holding the tenant's security deposit.

(5) A property manager's failure to comply with the requirements of paragraph (4) of this section shall constitute an unlawful and deceptive act or practice in trade or commerce under the provisions of the Idaho consumer protection act, chapter 6, title 48, Idaho Code.

> (6) A tenant's claim to a security deposit under this section shall be prior to that of any creditor of the landlord or the landlord's agent, including a trustee in bankruptcy or a receiver, even if the security deposit is commingled.

If you would rather include a private cause of action in paragraph (5) that does not include the Idaho Consumer Protection Act, you may want to consider the following:

> (5) A tenant or residential property owner who incurs damages as a result of a property manager's failure to comply with the requirements of paragraph (4) may bring an action against the property manager to recover actual damages or $5,000, whichever is greater. Costs shall be allowed to the prevailing party unless the court otherwise directs. In any action brought by a tenant or residential property owner under this paragraph, the court shall award, in addition to the relief provided in this paragraph, reasonable attorney's fees to the plaintiff if he prevails.

I hope this information is helpful to you. Please call me at 208-334-4135 or email me at stephanie.guyon@ag.idaho.gov if you have further questions.

Sincerely,

STEPHANIE N. GUYON
Deputy Attorney General
Consumer Protection
Division

[1] Please note the suggested definition of "property manager" does not list within its exclusions the following phrase from your language: "managers who have common members or principals of the property owner entity." It is unclear what this exclusion is intended to encompass.

February 10, 2021

The Honorable Fred Wood
Idaho House of Representatives
Idaho State Capitol
700 W. Jefferson Street
Boise, Idaho 83702
VIA EMAIL: fwood@house.idaho.gov

Re: Request for AG analysis

Dear Representative Wood:

You asked about the effect of the Emergency Use Authorization ("EUA") on States' ability to mandate vaccinations. The federal law providing for EUAs grants the Secretary of Health and Human Services ("HHS") discretion to act in furtherance of protecting public health. Although there are no explicit provisions in the EUA law prohibiting a vaccine mandate, the law implies that EUA vaccines would not be mandated by outlining the Secretary's power to require notice of the right to refuse them.

The Federal Food, Drug and Cosmetics Act ("Act") authorizes medical products for use in emergencies before receiving approval from the U.S. Food and Drug Administration ("FDA"). 21 U.S.C. § 360bbb-3. This "EUA" provision gives the HHS Secretary the authority and duty to establish conditions the Secretary deems necessary and appropriate to protect public health, including advising of the option to refuse a vaccine, or of consequences of such refusal. 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III). There is no explicit provision in the Act prohibiting a mandate of emergency authorized vaccines.

Consistent with the absence of an explicit prohibition against a vaccine mandate, Congress gave the President of the United States the power to waive notice of the right to refuse EUA authorized vaccines if such notice is deemed contrary to national security. 10 U.S.C. § 1107a. Thus, rather than statutorily proscribing actions, Congress has granted to the HHS Secretary and President powers to take necessary and appropriate action to protect the public health and national security.

The FDA, in guidance documents, appears to interpret the EUA provision as requiring the HHS Secretary to disclose the right to refuse vaccines or the consequences of refusal.[1] However, any deference to agency interpretation would likely be owed to the HHS Secretary (the head of the agency charged with implementing the provision), not the FDA. We are unaware of any guidance or interpretation from the HHS Secretary addressing the EUA provision or finding a basis to establish consequences for refusal. Ultimately, there remains some ambiguity in the law about whether consequences for refusal, or other similar "mandate" could be authorized or imposed. Given that the Pfizer and Moderna COVID-19 vaccines have yet to be approved by the FDA, and their consequent safety risks, there is reason for pause in mandating the EUA vaccines.

Also, because the EUA vaccines are necessarily temporary in nature, focus on the legal implications of the EUA provision in tailoring or responding to legislation may be misplaced, or shortly rendered moot. Once the vaccines are approved by the FDA, the question whether vaccinations can be mandated will remain. Assuming the COVID-19 vaccines will eventually be approved by the FDA, longstanding United States Supreme Court precedent supports that states have authority to mandate vaccines except for those with a medical exemption. **Idaho has no law mandating vaccines for adults, and school age children may claim an exemption for medical, religious, or any other reason.** Idaho Code § 39-4802.

In 1905, amidst a smallpox breakout, the United States Supreme Court addressed the validity of a state law requiring all adult inhabitants in Cambridge, Massachusetts to get a smallpox vaccine or be fined, in Jacobson v. Massachusetts, 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905). The Court affirmed the law's constitutionality, explaining that an individual's liberty rights under the U.S. Constitution are not absolute and the mandatory vaccination law was necessary to promote public health and safety. See id. at 35-38. Courts have consistently affirmed the reasoning in Jacobson and rejected challenges to the use of States' police power to protect the public health. See Zucht v. King, 260 U.S. 174, 43 S. Ct. 24, 67 L. Ed. 194 (1922); Whitlow v. California, 203 F. Supp. 3d 1079 (S.D. Cal. 2016).

Of course, the fact that States may have the legal authority to mandate vaccines is only one of many considerations in assessing the appropriateness of imposing a mandate. To the extent a mandate may fail to achieve the desired outcome—ensuring protection of public health—the relevant policy decision-makers may choose not to pursue a mandate. This raises the question whether the State may be required by the Federal government to mandate vaccines.

The Tenth Amendment to the United States Constitution prohibits Congress from requiring the States to implement Federal directives. See Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1476, 200 L. Ed. 2d 854 (2018) (limiting Congress's ability "to command a state government to enact *state* regulation"). Accordingly, Congress could not require the States to pass mandatory vaccination laws. However, Congress is not prevented from providing incentives—through federal grants—for States to enact laws addressing vaccinations.

I hope you find this helpful. If you have further questions, please do not hesitate to contact me.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

[1] See U.S. Food & Drug Admin. et al., OMB Control No. 0910-0595, Emergency Use Authorization of Medical Products and Related Authorities: Guidance for Industry and Other Stakeholders (Jan. 2017), https://www.fda.gov/regulatory-information/search-fda-guidance-documents/emergency-use-authorization-medical-products-and-related-authorities.

February 11, 2021

The Honorable Greg Chaney
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The Honorable Brook Green
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Idaho State Capitol
700 W. Jefferson Street
Boise, Idaho 83702
bgreen@house.idaho.gov

Re: Request for legislation review

Dear Representatives Chaney and Green:

You requested an analysis of potential legislation prohibiting targeted residential picketing. You provided the proposed text of the bill and a legal memorandum containing citations to law and similar statutes in other jurisdictions.

SHORT ANSWER

Residential picketing laws like the proposed bill are generally constitutional, despite the fact that they may limit some First Amendment speech. However, the Ninth Circuit is suspicious of a 300-foot buffer zone. The law would be more easily defensible if it mirrored other previously upheld laws that prohibit picketing at the target residence and the adjacent houses.

DISCUSSION

The proposed legislation would make it a misdemeanor to picket or demonstrate within 300 feet of the residence of the person at whom the demonstration is targeted. The prohibition applies only to demonstrations made with the intent to harass, annoy, or alarm the target of the demonstration. Laws prohibiting demonstrations and picketing on public streets and sidewalks implicate the First Amendment because such laws limit speech in a traditional public forum.[1] Nevertheless, even with regard to such protected speech, "[t]he state may . . . enforce regulations of the time, place, and manner

of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[2]

In general, laws that prohibit picketing targeted at a particular residence are permissible, so long as they apply to all demonstrations, and they do not make exceptions for certain topics of speech or target certain topics of speech.[3] The proposed legislation does not make exceptions or target any certain topics of speech, and therefore fits in the category of generally constitutional residential picketing laws.

However, the 300-foot buffer zone in the proposed legislation creates a potential constitutional problem. In Klein v. San Diego County, the Ninth Circuit Court of Appeals upheld a challenge to a residential picketing law that contained a 300-foot buffer zone, but identified potential issues with the buffer zone that could come up in a future case.[4] The court in Klein determined that the law was facially constitutional—meaning that it would be constitutional for the government to enforce the law in *some* situations, so the whole law need not be struck down. But the court strongly suggested that in future cases, it is possible that the law in Klein could be unconstitutional *as applied* to a future set of facts. Klein explained some of its concerns, and they revolve around the 300-foot buffer zone.

First, it stated that the 300-foot buffer zone is larger than the buffer zone in statutes that other courts had upheld. Klein notes that other courts had upheld a law with a 50-foot buffer zone and allowed picketing on the sidewalk across the street,[5] and a law prohibiting picketing in front of the target house or its immediate left and right neighbors while permitting picketing on the sidewalk across the street.[6] Klein also notes that other courts had found that buffer zones of 200 feet[7] and 300 feet[8] were too large. In some circumstances, a blanket 300-foot buffer zone could be found to be impermissibly overbroad as applied to the facts at hand.

Second, the Klein court took issue with the "one-size-fits-all approach to residential picketing, which in some cases will allow picketing directly in front of the targeted home if the home is situated on a large lot, but will put the picketers several lots away from the targeted audience if the residence is situated on a small lot."[9] This

appears to be a side-effect of a large, set buffer zone. Depending on how dense the residential neighborhood is, how small the lots are, and the shape of streets, a 300-foot blanket buffer zone could require protesters to protest several lots away from the target residence or on a different street altogether. Further, the set 300-foot buffer zone could inhibit other free speech activities, such as "general marching through residential neighborhoods, or even walking a route in front of an entire block of houses."[10] A case could come along in which a court would find the proposed legislation overbroad as applied to the facts at hand because of a set 300-foot buffer zone.

Third, the Klein court observed that the law "does not consider more limited restrictions, such as limitations on the number of picketers, the time of day, or the duration of picketing."[11] Under this consideration, a court could determine that using a large, set buffer zone could be overly restrictive when other alternatives are available. For example, the Supreme Court stated in a case regarding picketing at the homes of health care professionals who performed abortions, "The record before us does not contain sufficient justification for this broad a ban on picketing; it appears that a limitation on the time, duration of picketing, and number of pickets outside a smaller zone could have accomplished the desired result."[12]

You provided a list of other states' residential picketing laws. None of these laws included a set buffer zone measured in feet. Instead, they prohibit demonstrating in front of "or about" a particular residence, or in front of the target residence and its immediate neighbors on the left and right.[13] The Arizona statute, which prohibits demonstrating "before or about the residence or dwelling place of an individual," was found constitutional by Arizona appellate courts.[14] The Eighth Circuit Court of Appeals held that a law prohibiting picketing the targeted residence or the adjacent houses was a narrowly tailored zone, aimed at protecting the residents of the target residence.[15] It appears that, while the 300-foot set buffer zone is constitutionally suspect in some circumstances, the "before or about the residence" and "target house and adjacent neighbors" formulations are more easily defensible.

With regard to buffer zones measured in feet, Klein recognized that a 50-foot buffer zone has been found to be constitutional.[16]

Further, a federal court in the Central District of California has upheld both a facial and an as-applied challenge against a residential picketing law that created a 100-foot buffer zone, but allowed for the possibility that the plaintiff could amend the complaint and possibly make allegations to succeed on the as-applied challenge.[17]

Based on these cases, it appears that the best way to avoid constitutional concerns over the buffer zone would be to replace the 300-foot buffer zone with a prohibition on picketing or demonstrating on the street or sidewalk in front of the target house and the adjacent houses. In many situations, this results in a larger zone than a set 50-foot set buffer zone, and it does not open itself up to potential challenge like a larger buffer zone. However, to be consistent with other laws that have been upheld, it would likely need to allow picketing on the sidewalk across the street.

I hope you find this analysis helpful.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

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[1] Frisby v. Schultz, 487 U.S. 474, 479-81, 108 S. Ct. 2495, 2499-2501, 101 L. Ed. 2d 420 (1988).

[2] Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45, 103 S. Ct. 948, 955, 74 L. Ed. 2d 794 (1983) (citations omitted).

[3] See George L. Blum, J.D., Annotation, Validity, Construction, and Operation of Statute or Regulation Forbidding, Regulating or Limiting Peaceful Residential Picketing, 113 A.L.R.5th 1 (2003). A common issue in such cases is exceptions for labor-based picketing, or specifically prohibiting abortion-based demonstrations at residences. Laws that exempt or target specific issues like these are not content-neutral and are constitutionally problematic.

[4] Klein v. San Diego County, 463 F.3d 1029, 1035-36 (9th Cir. 2006).

[5] See id. (citing Thorburn v. Austin, 231 F.3d 1114, 1120 (8th Cir. 2000)).

[6] See id. (citing Douglas v. Brownell, 88 F.3d 1511, 1520-21 (8th Cir. 1996)).

[7] See id. (citing Kirkeby v. Furness, 92 F.3d 655, 660 (8th Cir. 1996)).

[8] See id. (citing Murray v. Lawson, 649 A.2d 1253, 1266-67 (N.J. 1994)).

[9] Id. at 1036.

[10] Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 775, 114 S. Ct. 2516, 2530, 129 L. Ed. 2d 563 (1994) (citation and alteration omitted). This is a concern brought up in Supreme Court decisions, but it may not be as large of a concern here, where the proposed legislation only prohibits conduct done "with the intent to harass, annoy, or alarm another person." Nevertheless, with the right set of facts, a plaintiff could make this an issue in a lawsuit against the legislation.

[11] Klein, 463 F.3d at 1036.

[12] Madsen, 512 U.S. at 775.

[13] Ariz. Rev. Stat. § 13-2909(A), (B); Colo. Rev. Stat. § 18-9-108.5; 720 Ill. Comp. Stat. 5/21.1-2, 1-3; N.C. Gen. Stat. § 14-277.4A(a)-(e); Va. Code § 18.2-419.

[14] State v. Baldwin, 908 P.2d 483, 485 (Ariz. Ct. App. 1995), corrected (Jan. 10, 1996).

[15] Douglas v. Brownell, 88 F.3d 1511, 1519-20 (8th Cir. 1996).

[16] Klein, 463 F.3d at 1035-36 (citing Thorburn, 231 F.3d at 1120).

[17] Ashmore v. Regents of the Univ. of Cal., No. CV 10-09050 AHM (AGRX), 2011 WL 6258460, at *9-11 (C.D. Cal. Dec. 15, 2011).

February 12, 2021

The Honorable Marc Gibbs
Idaho House of Representatives
Capitol Building
Boise, ID 83720
VIA EMAIL: mgibbs@house.idaho.gov

Re: Questions relating to H.B. 89

Dear Representative Gibbs:

This letter is in response to your February 8, 2021, email concerning House Bill 89, 66th Legislature, 1st Regular Session (2021) ("H.B. 89").

I. QUESTIONS PRESENTED

1. Can a school board declare that employees can't carry guns on school property as part of terms of their employment?

2. Is the status of the gun free zone a federal designation, and can Idaho repeal it?

II. BRIEF ANSWERS

1. Yes. The United States Supreme Court has explained that a prohibition against carrying guns on school premises is a reasonable restriction under the Second Amendment.

2. Federal law defines a "school zone" and the State of Idaho is likely preempted from repealing that designation. We also note that federal law likely preempts any Idaho law authorizing school board employees to discharge a firearm in a school zone.

III. ANALYSIS

1. School boards can, as a term of employment, require that employees not carry guns on school grounds.

The Second Amendment does not prevent a school board from adopting a rule prohibiting its employees from carrying guns on school grounds. The United States Supreme Court held "the right secured by the Second Amendment is not unlimited." District of Columbia v. Heller, 554 U.S. 570, 626, 128 S. Ct. 2783, 2816, 171 L. Ed. 2d 637 (2008). The Court acknowledged that laws forbidding the carrying of firearms in sensitive places such as schools and government buildings are permissible under the Second Amendment. Id. at 626-27. This premise also applies to lawfully adopted school board policies.

2. Federal law defines a "school zone" and Idaho is likely preempted from repealing that designation.

Your question concerning an attempt to repeal the designation of a school zone under federal law requires us to look at several sections of federal law. The 1990 Gun Free School Zones Act makes it unlawful for any individual to knowingly possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone if that firearm has moved in or that otherwise affected interstate or foreign commerce.[1] 18 U.S.C. § 922(q)(2)(A). A "school zone" is defined as in, or on the grounds of, a public, parochial or private school or within 1,000 feet of such a school. 18 U.S.C. § 921(a)(25). "School" is defined as a school that "provides elementary or secondary education, as determined under State law." 18 U.S.C. § 921(a)(26).

The Act does not preempt or prevent a State or local government from enacting a statute establishing gun free school zones as provided in the Act. 18 U.S.C. § 922(q)(4). However, a state law purporting to repeal the definition of school zone would not be establishing a gun free school zone. As a result, the exception in section 922(q)(4) would not authorize a state statute repealing the definition of school zone.

A later subsection of the federal firearms code specifically addresses the effect of federal statutes such as section 922 on state laws:

> No provision of this chapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the

> exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.

18 U.S.C. § 927. The enactment of a state statute repealing the federal definitions of "school zone" and "school" would create "a direct and positive conflict" between the state and federal laws such "that the two cannot be reconciled or consistently stand together" and as such, pursuant to 18 U.S.C. § 927, the federal statutes would preempt the contrary and conflicting state law. Any state law purporting to repeal the federal definitions would likely be unenforceable.

3. Federal law would likely also preempt an Idaho law authorizing licensed individuals to discharge a firearm in a school zone.

We also note that the federal statute likely also preempts that portion of H.B. 89 authorizing school board employees to discharge a firearm in a school zone. It appears, however, that the federal law would allow an individual who is lawfully issued an enhanced concealed carry permit to possess a firearm in a school zone. The Act includes several exceptions to the prohibition on possessing a firearm in a school zone, including:

> (ii) if the individual possessing the firearm is licensed to do so by the State in which the school zone is located or a political subdivision of the State, and the law of the State or political subdivision requires that, before an individual obtains such a license, the law enforcement authorities of the State of political subdivision verify that the individual is qualified under law to receive the license[.]

18 U.S.C. § 922(q)(2)(B)(ii). This exception would allow a school board employee who holds a lawfully issued enhanced concealed carry permit to possess a firearm on school grounds without violating the federal statute. Compare 18 U.S.C. § 922(q)(2)(B)(ii), with Idaho Code § 18-3302K.[2]

While the Act permits someone with a license to *possess* a firearm in a school zone, the law generally does not allow that person to *discharge* or *attempt to discharge* the firearm in a school zone:

> (3)(A) Except as provided in subparagraph (B), it shall be unlawful for any person, knowingly or with reckless disregard for the safety of another, to discharge or attempt to discharge a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the person knows is a school zone.
> (B) Subparagraph (A) does not apply to the discharge of a firearm—
> (i) on private property not part of school grounds;
> (ii) as part of a program approved by a school in the school zone, by an individual who is participating in the program;
> (iii) by an individual in accordance with a contract entered into between a school in a school zone and the individual or an employer of the individual; or
> (iv) by a law enforcement officer acting in his or her official capacity.

18 U.S.C. § 922(q)(3). This section of the Act prohibits a school employee from discharging a firearm in a school zone except in certain limited circumstances. The element of "knowingly" only requires that the employee have "knowledge of the facts that constitute the offense." Bryan v. United States, 524 U.S. 184, 193, 118 S. Ct. 1939, 1946, 141 L. Ed. 2d 197 (1998). To establish a violation, the government must only prove the employee knew he was discharging or attempting to discharge a firearm and that he was in a school zone when doing so. The above-identified exceptions would generally not apply unless a school board authorized the employee to use a firearm on school grounds or the employee was a law enforcement officer. In the absence of school board permission or law enforcement status, federal law likely prohibits the employee from discharging or attempting to discharge the firearm on school grounds.

H.B. 89 purports to override the federal law and authorize individuals holding an enhanced concealed carry permit to discharge

or attempt to discharge a firearm on school grounds, even if otherwise prohibited by the employing school board. If passed, H.B. 89 would create "a direct and positive conflict" between the state and federal laws such "that the two cannot be reconciled or consistently stand together" and as such, pursuant to 18 U.S.C. § 927, federal law would likely preempt that portion of H.B. 89 authorizing school board employees to discharge a firearm on school grounds.

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

[1] The interstate commerce element can be established in several ways. It is most commonly established when a firearm has crossed state lines (usually because it was manufactured in another state or country) or includes parts that have crossed state lines.

[2] Compliance with federal law, however, would not excuse an employee from also complying with the employing school board's policies, including any policy prohibiting the employee from carrying a firearm on school property.

February 22, 2021

The Honorable Kevin Andrus
Idaho House of Representatives
Idaho State Capitol
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Boise, Idaho 83702
VIA EMAIL: kandrus@house.idaho.gov

Re: Inquiry Regarding Draft DRKAG035 - Idaho Racing ADW, et al.

Dear Representative Andrus:

This letter is in response to your inquiry concerning bill draft DRKAG035 (2021) pertaining to advance deposit wagering ("ADW"), anticompetitive or deceptive practices, and Idaho Code section 18-3809.

I. QUESTIONS PRESENTED

Can the emergency provision in section 4 of DRKAG035 retroactively change the penalty for offenses listed in Idaho Code section 18-3809 from misdemeanor to felony penalties?

II. BRIEF ANSWER

No. The United States and Idaho Constitutions' prohibition against ex post facto laws prohibit application of the proposed felony penalty to offenses that were committed before the effective date of the draft bill's provisions.

In addition, the ex post facto prohibitions could apply to retroactive application of the proposed changes on page 4, ll. 17-19 regarding unlicensed out-of-state ADW providers, and the proposed changes on page 5, ll. 9-24 regarding anticompetitive or deceptive practices. Retroactive application of the proposed changes on page 4, ll. 28-37 could pose other legal and logistical challenges. Reviewing the language of DRKAG035 revealed other concerns related to

vagueness, duplicative language, and potential creation of an unintended exemption in Idaho Code section 18-3809. Those issues are more fully discussed below.

1. The ex post facto clauses prohibit retroactive application of penalties.

Ex post facto laws are prohibited by Article I, Section 9, Clause 3 of the United States Constitution and by article I, section 16 of the Idaho Constitution. An ex post facto law is a statute that: (1) retroactively punishes acts that were not crimes when they were committed; (2) increases the punishment for a crime after it was committed; or (3) takes away a defense to a crime that was available according to law at the time the crime was committed. Ex post facto prohibitions not only apply to criminal law statutes, but also to statutes that are "punitive" in nature.

Draft bill DRKAG035 contains an emergency provision that, if enacted, would make the proposed amendments retroactive to January 1, 2020, including an amendment to Idaho Code section 18-3809 that changes statutory violations from misdemeanors to felonies. This change would increase the punishment after crimes were committed, thus appearing to violate the ex post facto clauses of the Idaho and U.S. Constitutions. Both constitutions require that the new felony penalty apply to violations that occur on or after the date of the bill's effective date.

Retroactive application of the proposed changes on page 4, ll. 17-19 could also violate ex post facto prohibitions. The new language expands the criminal conduct of unlicensed out-of-state ADW "conducted by a person with a provider" to unlicensed out-of-state ADW "conducted with or offered to an Idaho resident by a provider[.]" "Offering" unlicensed out-of-state ADW to Idaho residents is not expressly prohibited under the current statute. Any retroactive enforcement based on the new statutory restriction against "offering" unlicensed out-of-state ADW would punish conduct that was not a crime when it occurred and would therefore also appear to violate the ex post facto clauses.[1]

Moreover, the new language on page 4, ll. 17-19 is unclear as to whether the bettor, the unlicensed out-of-state ADW provider, or both can be held criminally liable for unlicensed out-of-state ADW wagering. If the courts were to interpret the new language to add a culpable party not previously included, then ex post facto prohibition would bar prosecuting the additional party for acts that occurred prior to the bill's effective date.[2]

The proposed changes on page 5, ll. 9-24, from "[a]ny agreement to charge" to "[c]harging" on l. 9 may also run afoul of ex post facto prohibitions if applied retroactively. "Any agreement to charge" necessarily requires two or more parties, whereas "[c]harging" involves conduct by a single party. Though Idaho Code section 54-2512(12) is not expressly designated as a criminal statute, Idaho Code section 54-2509(1) generally criminalizes violations of the Idaho Racing Act (including Idaho Code section 54-2512) as misdemeanors. Also, courts could construe Idaho Code section 54-2512 as a punitive statute due to its existing penalties of license suspension, revocation, and a civil penalty of $10,000 per occurrence. If a court concluded that Idaho Code section 54-2512 is also subject to ex post facto prohibitions, those clauses would appear to prohibit retroactive criminal enforcement of Idaho Code section 54-2512(12)(a) for charging excessive fees without evidence of an agreement to do so.

Application of the retroactivity provision to the new retention/distribution of funds language on page 4, ll. 28-37 does not present ex post facto concerns, but we note that the existing and proposed language on page 4, ll. 28-30 presents practical difficulties with retroactive application. This is due to the fact that moneys that have previously been disbursed or released from ADW accounts held by the Racing Commission are no longer "held" and thus cannot be "retained" retroactively. Any attempt to retroactively "claw back" previously distributed funds could result in litigation concerning whether previously distributed moneys and fees could legally be recovered from private entities for reallocation and redistribution.

2. The draft bill contains vague language that could make it difficult to implement Idaho Code section 54-2512(10).

On page 4, l. 27, the term "advanced deposit wagering accounts" is not currently defined in statute or administrative rule. The "source market fee" in Idaho Code section 54-2512(10) is specific to out-of-state ADW providers and relates to ADW. As such, the source market fee is a type of ADW money. It is unclear whether the term "advanced deposit wagering accounts" as used in the draft bill refers only to accounts where the Racing Commission receives and disburses source market fees, mixed accounts that include both source market fees and other monies related to advanced deposit wagering, or accounts that contain only other moneys related to advanced deposit wagering. Because the new language grants 10% of the moneys in the "advanced deposit wagering accounts" to the Racing Commission, the amount of that 10% can vary depending on which accounts are encompassed by the term.

If the term refers solely to source market fee accounts, Idaho Code section 54-2512(10) would authorize the Racing Commission to receive an additional 5% from the remaining 90%. It is unclear whether the drafter's intent was to allow the Commission to retain more than 10% of the source market fees.

The proposed language is also unclear concerning when the Commission retains the 10%. It could be retained either on a monthly basis as ADW source market fees are paid to the Racing Commission, or it could be retained at the time of annual distribution of the source market fee.

On page 4, l. 29, "live racing administration" is undefined and could lead to differing interpretations over what the Racing Commission can use the retained monies for. For example, "live racing administration" could be interpreted to include paying general overhead of the Racing Commission, including salaries, office space, etc., despite the Racing Commission also using those same resources to regulate simulcasting. If the intent of the retained 10% language is to cover expenditures incurred specifically for live horse racing, such as veterinary costs or payment of racing stewards attending live meets, more specific language should be added to clarify that intent.

3. Some proposed changes appear duplicative of existing statutory language.

The introductory language to Idaho Code section 54-2512(12) provides that "[n]o licensee shall engage in any anticompetitive or deceptive practices in the process of contracting for the right to send any interstate simulcast signal to a licensed facility in Idaho."[3] The draft bill proposes to add new language to Idaho Code section 54-2512(12)(a) and (c) referencing licensed Idaho simulcast facilities.[4] However, the existing statutory language in Idaho Code section 54-2512(1) through (4) and (12) already makes it clear the prohibition against anticompetitive or deceptive practices applies to licensed Idaho facilities. As such, the proposed changes to Idaho Code section 54-2512(12)(a) and (c) appear duplicative of existing language.

The existing language of Idaho Code section 54-2512(8) provides that pari-mutuel systems conducted at race meets in compliance with the chapter and the Racing Commission's rules are not unlawful, "notwithstanding" any other Idaho statute that would conflict in that regard. In order for a pari-mutuel system to be lawfully conducted, the providers must be licensed appropriately under chapter 25, title 54, Idaho Code, and its implementing regulations. The draft bill proposes to add new language to Idaho Code section 18-3809 to provide an exception for chapter 25, title 54, Idaho Code, licensees that "provide advance deposit wagering to bettors located in Idaho".[5] The draft bill also proposes new language to add an exception to Idaho Code section 18-3809 for those "licensed pursuant to chapter 25, title 54, Idaho Code".[6] The existing language in Idaho Code section 54-2512(8) appears to already protect compliant licensees from prosecution under Idaho Code section 18-3809. The draft bill's proposed additions to Idaho Code section 18-3809 concerning licensees therefore appear unnecessary. In fact, the language requiring that the licensee "provides advance deposit wagering" creates an additional requirement to exempt licensees from Idaho Code section 18-3809. ADW is optional and Idaho law does not require that simulcast and live horse racing licensees offer ADW. The draft language would potentially expose live race or simulcast licensees that allow pari-mutuel betting only on their licensed premises, but do not offer ADW, to liability under Idaho Code section 18-3809.

4. The draft bill also appears to create a broad exemption from liability under Idaho Code section 18-3809.

In addition to the issues above, the proposed language on page 5, ll. 37-38, 40 appears to create a broad exemption from liability under Idaho Code section 18-3809 solely based upon one's status as a license holder, regardless of the purpose of the license. Pursuant to its regulatory authority under chapter 25, title 54, Idaho Code, the Racing Commission licenses a multitude of different individuals and entities, especially for live racing. Under IDAPA 11.04.03 et seq., these licensees include, but are not limited to, concession stand employees, exercise persons, horse groomers, jocks room custodians, valets, and veterinarian assistants. Under the second proposed exception to Idaho Code section 18-3809, all of these people, by virtue of holding a license issued under chapter 25, title 54, would arguably be allowed to engage in the prohibited activities even though their licenses did not allow them to provide simulcast racing or engage in ADW. To prevent this from happening, the draft bill should either: (1) eliminate the proposed exception language entirely and instead rely on the existing exemption contained in Idaho Code section 54-2512(8); or (2) insert more specific language outlining the scope or limits of those individuals' permitted conduct.

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

[1] Past acts of offering unlicensed out-of-state ADW might still be prohibited under Idaho Code section 54-2512(10) combined with Idaho Code sections 18-204, 18-406, or 18-1701 as aiding and abetting, attempting, or conspiring to conduct unlicensed out-of-state ADW.

[2] Similar to note 1 above, that party might still be criminally liable under current Idaho laws that prohibit conspiring, attempting or aiding and abetting another in conducting unlicensed out-of-state ADW.

[3] Reflected on page 5, ll. 4-6.

[4] Page 5, ll. 10-11, 23-24.
[5] Page 5, ll. 37-38.
[6] Page 5, l. 40.

February 26, 2021

The Honorable Ilana Rubel
Idaho House of Representatives
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VIA EMAIL: irubel@house.idaho.gov

Re: Request for legislation review of House Bill 223

Dear Representative Rubel:

You requested identification of concerns with House Bill 223, 66th Legislature, 1st Regular Session (Idaho 2021) ("H.B. 223"), legislation regarding prohibitions to certain ballot collection activities that would add a new section, Idaho Code section 18-2324. You have further requested that the analysis reflect how this bill relates to other ballot collection and delivery bills in recent decisions from Montana and Arizona.

H.B. 223 appears to be a neutral and generally applicable voting law. It appears similar to Arizona's statute, but while H.B. 223 allows for fewer "non-official" persons to convey or collect ballots, this is offset by allowing for six ballots to be conveyed or collected at a time. As explained below, H.B. 223's outcome will not be determined by the Montana case, but will instead be determined by Brnovich, which is set for hearing before the United State Supreme Court next week, on March 2, 2021.

OVERVIEW OF H.B. 223

H.B. 223 prohibits the knowing collection or conveyance of another voter's voted or unvoted ballot subject to certain exceptions. It does not apply to (a) an election official in the performance of his official duties; (b) a United States postal service worker or other individual authorized by law to transmit United States mail in the performance of his official duties; (c) an employee or contractor of a parcel delivery business in all states within the United States in performance of his

official duties; or (d) an individual related to the voter by adoption, marriage, or blood within the second degree of consanguinity, if authorized by the voter to convey the voter's ballot. If collection or conveyance is made by a "related individual," then only six ballots may be collected or conveyed "at a time."

ANALYSIS

The likely constitutionality of H.B. 223 under the Voting Rights Act will be determined by the outcome of the Arizona matter, Brnovich v. Democratic National Committee, which is set for hearing on March 2, 2021, before the United States Supreme Court (Nos. 19-1257, 19-1258), and not the recent Montana case, Driscoll v. Stapleton, 473 P.3d 386 (Mont. 2020).

There are two main components at issue in Brnovich, but only one is salient to the concerns raised by H.B. 223; namely, whether a ballot-collection law permitting only certain persons to handle another person's completed early ballot is lawful or whether it violates § 2 of the Voting Rights Act of 1965 ("VRA"), 52 U.S.C. § 10301.

The at-issue Arizona law is similar to H.B. 223:

> H. A person who knowingly collects voted or unvoted early ballots from another person is guilty of a class 6 felony. An election official, a United States postal service worker or any other person who is allowed by law to transmit United States mail is deemed not to have collected an early ballot if the official, worker or other person is engaged in official duties.
>
> I. Subsection H of this section does not apply to:
>
> 1. An election held by a special taxing district formed pursuant to title 48 for the purpose of protecting or providing services to agricultural lands or crops and that is authorized to conduct elections pursuant to title 48.
>
> 2. A family member, household member or caregiver of the voter. For the purposes of this paragraph:

> (a) "Caregiver" means a person who provides medical or health care assistance to the voter in a residence, nursing care institution, hospice facility, assisted living center, assisted living facility, assisted living home, residential care institution, adult day health care facility or adult foster care home.
> (b) "Collects" means to gain possession or control of an early ballot.
> (c) "Family member" means a person who is related to the voter by blood, marriage, adoption or legal guardianship.
> (d) "Household member" means a person who resides at the same residence as the voter.

Ariz. Rev. Stat. § 15-1005(H), (I). Subsection I of Arizona's law is similar to subsections (2)(a) through (c) of H.B. 223 that allow "official" type election or mail persons to handle ballots. These provisions do not appear problematic; rather, as in Brnovich, the main concern appears to be "non-official" persons handling ballots.

The class of individuals who may be considered "non-official" in H.B. 223 is smaller. Arizona's statute is broader as it allows "household members" and "caregivers" to assist in the collection or conveyance of a ballot. Its definition of "family member" is also broader since there is no limitation on blood relation (i.e., second degree of consanguinity in Idaho) and it allows for a "legal guardian" to become a family member.

The other main difference is that the plain language of H.B. 223 appears ambiguous as to whether it requires some form of verification at the time of collection or conveyance since this requirement is phrased in the present tense, "if authorized by the voter to convey the voter's ballot." (Emphasis added.) And such a requirement appears further corroborated by the language that only six ballots may be collected or conveyed at a time. Arizona's statute does not require this verification, but this is likely due to the fact that it only allows one ballot to be collected or conveyed at a time, thus requiring many more trips than contemplated by H.B. 223.

The final comparison between H.B. 223 and Arizona's statute is that both result in a felony if there is a violation. H.B. 223 is consistent

with other existing Idaho statutes that result in felonies for election law violations. See Idaho Code §§ 18-2306, 18-2309, 18-2310, 18-2311, 18-2316, 34-1114, 34-1714, 34-1801A, 34-1821. Similar to H.B. 223, practically all of these statutes contain a scienter requirement of "knowing" or "willful." This aspect of H.B. 223 does not appear to be of concern.

Notwithstanding the smaller class of individuals who may be considered as "non-official" individuals, H.B. 223 appears to be a neutral and generally applicable voting law. It does not draw a line by minority voter status, but allows a qualified elector the opportunity to participate in the election process. The test for determining whether such a law is viable or violates § 2 of the VRA will be decided in Brnovich. In general terms, a statute violates § 2 of the VRA when a state's election system as a whole offers minority voters fewer opportunities than other members to participate in the electoral process and that such a challenged system itself causes the unequal opportunity. While there appears to currently be little record on this for H.B. 223, Circuit courts are currently split on the requisite showing to prove such a violation.

The Montana Supreme Court decision (Driscoll) does not squarely address these concerns and is not binding on Idaho. The procedural and evidentiary posture of both matters is also quite different. Driscoll was decided following a preliminary injunction hearing, unlike Brnovich, which was decided after ten days of trial.

Similar to H.B. 223, ballots could be collected in Montana only by certain persons, including election officials, postal workers, or the voter's family members, household members, caregivers, or acquaintances. With the exception of election officials and postal workers, these enumerated individuals were limited to collecting and conveying up to six ballots during an election cycle; had to sign a registry upon delivery of the ballots; and provide their name, address, phone number, relationship to each voter, the voter's name, and the voter's address. Driscoll, 473 P.3d at 389. The allegations concerned constitutional violations against the right to vote, speak, associate, and to due process, but failed to truly elaborate on these legal theories and failed to address the VRA. Id. at 388.

Only one of five factors had to be proven to obtain injunctive relief. Id. at 391. Given this standard, the Montana Supreme Court found "that, for purposes of resolving the instant preliminary injunction dispute, the level of scrutiny is not dispositive[.]" Id. at 393. The Montana Supreme Court then upheld the finding by the district court. Id. at 394. It did so by noting that Native American voters had come to rely on "ballot-collection services", which would be exacerbated by Montana's ballot collection law. Id. at 393. This finding was not borne out by actual injury, but by its possibility. Id. at 394.

The standard to obtain injunctive relief in a federal court in Idaho on election matters is different than Montana. See, e.g., Mem. Decision & Order, Reclaim Idaho v. Little, No. 1:20-cv-00268-BLW (D. Idaho Jun. 26, 2020). The legal analysis provided by the Montana Supreme Court is also not controlling since it fails to address the potential vehicle by which H.B. 223 could be challenged through § 2 of the VRA.

In summary, H.B. 223 appears similar to Arizona's ballot collection statute. While it allows for fewer "non-official" individuals to convey or collect ballots, it allows for such individuals to convey more ballots at six at a time. H.B. 223 appears neutral and generally applicable. Given the lack of clarity on the requisite proof and Circuit split, the main concern appears to be how the United States Supreme Court will decide Brnovich. Should the United States Supreme Court reverse the Ninth Circuit and uphold the district court's decision in Brnovich, then there should be few concerns with H.B. 223.

I hope you find this analysis helpful.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

March 1, 2021

The Honorable Melissa Wintrow
Idaho State Senate
Idaho State Capitol
700 W. Jefferson Street
Boise, Idaho 83702
VIA EMAIL: mwintrow@senate.idaho.gov

Re: Request for AG analysis regarding H.B. 154

Dear Senator Wintrow:

The following is provided in response to your email dated February 25, 2021, wherein you seek clarity on the legal effect of House Bill 154, 66th Legislature, 1st Regular Session (2021) ("H.B. 154"), which proposes to amend Idaho Code section 39-116B. You posed the following four questions:

1. Does the phrase in proposed subsection 8, lines 12 and 13, "the conditions in subsection (1) of this section are no longer met within that airshed", mean that a county must show 3 consecutive years of "ambient concentration design values equal to or above eighty-five percent (85%) of a national ambient air quality standard" to opt out of testing? See Idaho Code § 39-116B(1).

2. Or, does the proposed phrase enable a county to opt out of emissions testing if they can show one year of "ambient concentration design values equal to or above eighty-five percent (85%) of a national ambient air quality standard"?

3. Would a county that opted out of emissions testing after one year "ambient concentration design values equal to or above eighty-five percent (85%) of a national ambient air quality standard" expose their commission, the state, or other parties to increased regulation or threat of enforcement actions under the federal Clean Air Act?

4. Finally, are there other issues with this proposed statute that would conflict with state or federal law, or complicate management and/or consistency of Idaho statutes with provisions of the Clean Air Act, management of non-attainment areas, or other provisions to protect air quality?

I. CONCLUSIONS

In regard to questions 1 and 2, the first sentence of subsection (8) would allow a county by majority vote to opt out of the vehicle inspection and maintenance ("I&M") program in the unincorporated portions of the county if in any one year the design value for the airshed fell below 85% of a national ambient air quality standard ("NAAQS"). This is because subsection (1) provides for a 3-year consecutive year design value at or above 85%, and if the design value fell below 85% for 1 year, the 3 consecutive years would not be met.

In regard to question 3, the answer depends upon the applicability of other federal authorities to the airshed. For example, currently Ada County is subject to emissions testing under a federally-enforceable carbon monoxide maintenance plan pursuant to the Clean Air Act, and pursuant to Idaho Code section 39-116B due to ozone ambient concentrations above 85% of the NAAQS. Thus, if Ada County opted out of the program under Idaho Code section 39-116B due to an Ozone annual design value below 85%, it would still be subject to a program under the carbon monoxide maintenance plan under the Clean Air Act. Canyon County, in contrast, is not subject to the carbon monoxide maintenance plan under the Clean Air Act. Therefore, if it opted out, it would no longer be subject to an I&M program under state law and there is no federal requirement applicable to it.

In regard to question 4, there are at least two places where the new subsection (8) conflicts with other provisions of Idaho Code section 39-116B. First, subsection (1)(a) and (b) allows the Board of Environmental Quality ("Board") to require an I&M program in any county or city within an airshed that has 3 consecutive years equal to or exceeding the 85% design criteria. The second sentence of the new

subsection (1), however, states that the Board cannot require a county to re-implement I&M unless there has been effectively four consecutive years of exceedances.

> Provided, however, that if the conditions in subsection (1) of this section are subsequently again met **and maintained for one (1) year**, any board of county commissioners of a county within the airshed that has opted out of the inspection and maintenance program shall be notified by the board and shall be required to comply with the provisions of this section.

H.B. 154 § 1, at 3:15-19 (emphasis added). This second sentence is therefore in conflict with Idaho Code section 39-116B(1)(a).

Next, Idaho Code section 39-116B(6) requires that every five years, the Director of the Department of Environmental Equality ("Director") recommend to the Legislature whether the program should be continued, modified or terminated. H.B. 154 grants the county the authority to terminate the program within a year. Accordingly, the first sentence of the new subsection (8) conflicts with the intent of subsection (6), which vested that decision in the Director and the Legislature.

This would not conflict with federal law. Idaho Code section 39-116B only applies in "attainment or unclassified" areas where the vehicle inspection and maintenance is not a requirement of federal law.

II. VEHICLE INSPECTION AND MAINTENANCE REQUIREMENTS IN IDAHO

To understand this issue, it is important to understand that there are two different legal bases for I&M programs in Idaho; one is based on the federal Clean Air Act and the other is solely a creature of state law.

A. Federal Clean Air Act I&M Requirements

Idaho was designated a Nonattainment Area ("NAA") for carbon monoxide in 1978. The Idaho Department of Environmental Equality ("DEQ") submitted Air Quality Improvement Plans to the United States Environmental Protection Agency ("EPA") in 1980, 1984, and 1994. In 2001, DEQ submitted a request to EPA to re-designate the NAA to attainment under section 107D of the Clean Air Act. In that submittal, DEQ noted that Ada County had not measured an exceedance of the carbon monoxide NAAQS since 1991. The submittal included a maintenance plan as required by the Clean Air Act that included a vehicle inspection and maintenance program as a control measure applicable to Ada County. EPA approved the maintenance plan and re-designated Idaho as "attainment" as part of the federally approved State Implementation Plan ("SIP") in 2002. As required under the Clean Air Act, a second ten-year maintenance plan, which continued the Ada County I&M program, was submitted to EPA and approved in 2012. In 2023, DEQ will conduct the required analysis to determine whether to remove the vehicle and inspection and maintenance plan from the federally enforceable SIP and submit a request to EPA to do so, if appropriate. In the meantime, I&M is federally required in Ada County and is federally enforceable.

B. Idaho Code section 39-116B

In 2007, the Treasure Valley Air Quality Council, submitted a plan to the Legislature in accordance with Idaho Code section 39-6706(5) to proactively address the problem of deteriorating air quality in the Treasure Valley. The intention was to take proactive measures to prevent the Treasure Valley from being designated as non-attainment by the EPA, which would have significant ramifications for industry, construction, and transportation. The plan recommended that a vehicle emissions testing program be established in Ada and Canyon Counties. In 2008, Idaho Code section 39-116B was enacted by the Legislature. The air quality in the Treasure Valley met the requirements in Idaho Code section 39-116B(1) due to three consecutive years of high ozone (a NAAQS pollutant) concentrations and because vehicles are one of the top two sources contributing to those concentrations. As authorized under Idaho Code section 39-116B(3), Ada County and its

cities entered into a joint exercise of powers agreement with DEQ, wherein continuance of the program under the federal carbon monoxide maintenance plan discussed above was deemed by DEQ to ensure compliance with Idaho Code section 39-116B. Canyon County and its cities, however, did not enter a joint exercise of powers agreement; therefore, DEQ implemented an I&M program in Canyon County and its cities through a contractor.

Currently, Idaho Code section 39-116B(5) requires DEQ to review the results of the program annually, and Idaho Code section 39-116B(6) requires that the Director review the air quality data every five years and make a recommendation to the Legislature as to whether the program should be continued, modified or terminated. The next report will be in 2023, two years from now. This provides DEQ and the Legislature the ability to assess trends in air quality data to meet the intent of the statute—to proactively address deterioration of air quality in the Treasure Valley.

III. ANALYSIS

Idaho Code section 39-116B, as it currently stands, provides the Board with authority to require a vehicle I&M program applicable to both counties and cities in an airshed that meets or exceeds 85% of the NAAQS design criteria for 3 consecutive years. The rules of the Board are subject to legislative review pursuant to Idaho Code section 67-5291. Once implemented by rule, the program is reviewed annually by DEQ to, among other things, estimate the emission reductions obtained as a result of the program. Idaho Code § 39-116B(5). Every five years, DEQ evaluates the air quality data and makes recommendations to the Legislature on whether to continue, modify or terminate the program.

H.B. 154 will provide a county the ability to opt out of an I&M program with a single year of data showing that the airshed is below the 85% design criteria, without DEQ or legislative analysis and review of whether that data point is a result of a healthy air quality trend or is simply an outlier. For example, the Treasure Valley could experience a single year when ambient air quality is better than normal due to less

vehicle travel due to events such as a spike in gas prices, a recession, or a pandemic. Weather also plays an important role in ozone formation, so an unusually cool summer could impact it as well.

If "normal" conditions resume the following year, then the program will not automatically be implemented. Rather Idaho Code section 39-116B(1), as amended by H.B. 154, will require the design value be at or above 85% for effectively 4 consecutive years. If during that extended period concentrations exceed the NAAQS, there is a strong likelihood the Treasure Valley could be designated a non-attainment area under the Clean Air Act resulting in additional scrutiny and emission reductions under federal regulation for industry, construction, and transportation projects. Thus, H.B. 154 appears to change the intent of the legislation passed by the Legislature which was to proactively address air quality in order to prevent federal regulation.

Additionally, if a county opted out, then IDAPA 58.01.01.517.02 would require revision, as it currently lists Ada and Canyon Counties and the Cities of Boise, Eagle, Garden City, Meridian, Kuna, Star, Caldwell, Greenleaf, Melba, Middleton, Nampa, Notus, Parma, and Wilder as subject to the program. It does not appear that H.B. 154 allows a city to opt out of the program. Idaho Code section 39-116B(2)(a) requires that counties and cities within the airshed will be subject to the program. Under the plain language of the statute, cities and counties are treated separately. Therefore, if a county opted out under the language proposed in H.B. 154, the cities within that county would still be subject to the program. This may be difficult for the Division of Motor Vehicles ("DMV") to sort out which vehicle registrations are within city limits and which are located in an unincorporated area.

IV. CONCLUSION

Under H.B. 154, if an airshed subject to Idaho Code section 39-116B's vehicle inspection and maintenance program experiences a year where air quality is below the 85% design criteria in subsection (1), a county by majority vote could opt out of the program. The bill does not provide cities with the option to opt out. The bill does not affect the federally required program in Ada County and its cities. The bill does appear to conflict with the intent of Idaho Code section 39-116B,

to proactively protect an area from becoming a non-attainment area using a sufficient set of data to do so.

I hope you find this analysis helpful.

Sincerely,

LISA CARLSON
Deputy Attorney General
Section Chief, Environmental
Quality Section

March 4, 2021

Megan O'Dowd
Lyons O'Dowd
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Coeur D'Alene, ID 83816
VIA EMAIL: megan@lyonsodowd.com

Dear Ms. O'Dowd:

Our office has reviewed the letter and complaint that you provided. The question posed is whether the restrictions of electioneering activities contained within Idaho Code section 18-2318 negate the Coeur d'Alene School District's ("District") ability to otherwise control its premises pursuant to Idaho Code section 33-512(11) and to control and own real property as a body corporate pursuant to Idaho Code section 33-301.

Idaho law requires schools to provide their premises as polling locations. However, public schools are not traditional public forums. Schools may control their property while it is being used as a polling place, and may exclude individuals from school property not involved in the voting process. Schools may also prohibit individuals from engaging in electioneering or other similar communications within 100 feet of school property where that school is a polling place.

A. The scope of the 100-foot requirement may extend from the boundaries of the "polling place" or from a building.

As a starting point, "all 50 states limit access to the areas in or around polling places" to some degree. Burson v. Freeman, 504 U.S. 191, 206, 112 S. Ct. 1846, 1855, 119 L. Ed. 2d 5 (1992). "[T]his widespread and time-tested consensus demonstrates that some restricted zone is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud." Id.

Plaintiffs' Complaint appears to misread the plain language of Idaho Code section 18-2318. Section 2318 contains two locations: "polling place" and "building." Plaintiffs' submission equates the 100-

foot parameter to a physical structure—i.e., building. It does not account for "polling place." The school district's interpretation suggests a somewhat broader parameter through its use of "polling place."

"Interpretation of a statute begins with the statute's literal words." Saint Alphonsus Reg'l Med. Ctr. v. Gooding County, 159 Idaho 84, 86, 356 P.3d 377, 379 (2015). Section 18-2318(1) provides as follows:

> (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.

"Polling place" and "building" must have different meanings. See Saint Alphonsus, 159 Idaho at 87, 356 P.3d at 379 ("The Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant."). "Building" is not defined in chapter 23, title 18, Idaho Code, and so its ordinary meaning should be given effect. Under this construct, it appears that section 18-2318 prohibits electioneering: (1) in any building in which an election is being held, or (2) electioneering within 100 feet of any building in which an election is being held. In other words, a 100-foot parameter would extend from the building where an election is being held.

By contrast, "polling place" appears to provide for a slightly broader parameter. Statutes that are in pari materia must be construed together to effect legislative intent and statutes are in pari materia when they relate to the same subject. Saint Alphonsus Reg'l Med. Ctr. v. Elmore County, 158 Idaho 648, 653, 350 P.3d 1025, 1030 (2015). Chapter 23, title 18, Idaho Code does not define "polling place"; however, a definition for "polling place" is provided in Idaho Code section 34-302. Under this section, a board of county commissioners shall designate a suitable polling place for each election precinct. It

further provides that "[p]ublic school facilities shall be made available to the board as precinct polling places." Id.

Based upon records that have been obtained, it appears that the Kootenai County Commissioners complied with Idaho Code section 34-302 and designated polling places for the November 2020 general election. Hayden Meadows School, which is the subject of the complaint, was designated as the polling place for Precinct #13. The question then becomes the scope of Hayden Meadows School's designation and whether this designation means a building at Hayden Meadows School or something more. The answer again is found in Idaho Code section 34-302, which says it applies to "public school facilities."

Under several different Idaho Code sections, "public school facilities" refers to the following:

> [P]ublic school facilities mean the physical plant of improved or unimproved real property owned or operated by a school district, including school buildings, administration buildings, playgrounds, athletic fields, etc., used by schoolchildren or school district personnel in the normal course of providing a general, uniform and thorough system of public, free common schools, but does not include areas, buildings or parts of buildings closed from or not used in the normal course of providing a general, uniform and thorough system of public, free common schools.

Idaho Code § 33-804A(1). A similar definition for "public school facilities" is found in Idaho Code section 33-1613(1). Accordingly, the definition of polling place when it is a public school facility is broader than a building where an election is being held, but encompasses the physical plant of improved or unimproved real property owned or operated by a school district. One further note is that even without this further clarification of "public school facilities," there is no limitation that the polling place is limited to a particular structure at Hayden Meadows School in the designation. Accordingly, under this construct, it appears that section 18-2318 also prohibits electioneering: (1) within a polling place, or (2) electioneering within 100 feet of a polling place.

In applying these constructions to the facts alleged in the Complaint, it appears that the District may create a 100-foot parameter around the at-issue polling place, Hayden Meadows School. The 100-foot parameter could be set at the school's property boundaries and not just around a building used for election purposes on the property. No one would be allowed to electioneer on that property or within 100 feet of that property's boundary. This appears to address the issues raised about whether section 18-2318 abrogates the District's authority to control its property or activities thereon. Finally, it appears that the affiant, Bob Brooke, was violating Idaho Code section 18-2318 when he averred that he was handing out sample ballots at Hayden Meadows School.

B. School districts may control their property and are typically nonpublic forums.

Regardless of the analysis above, school districts may prohibit individuals from being present in non-voting areas of a school's property.

"Public schools are not deemed public forums unless the 'school authorities have "by policy or by practice" opened those facilities 'for indiscriminate use by the general public.'" Embry v. Lewis, 215 F.3d 884, 888 (10th Cir. 2000) (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267, 108 S. Ct. 562, 568, 98 L. Ed. 2d 592 (1998)). And "[g]overnment ownership of the school property does not automatically open that property to the public." Id. (citation omitted). Embry has been favorably cited in the United States District Court of Idaho. Zeyen v. Pocatello/Chubbuck Sch. Dist. 25, No. 4:16-cv-00458-DCN, 2018 WL 222053, at *8 (D. Idaho May 15, 2018).

"Access to a nonpublic forum can be restricted, provided the restrictions are reasonable and are not an effort to suppress opposing viewpoints." Embry, 215 F.3d at 889. As noted in your memorandum, Idaho Code section 33-512(11) allows public schools to control their property, which includes the need to ensure that a school district's educational processes and operations are not disrupted. As found in Embry, providing for elections on school property does not open the entire property to electioneering. "Despite the designation of the school building as a polling place . . ., the balance of the school remained a

nonpublic forum, except for those portions of the school that were necessarily opened for voting purposes." Id. at 888. Accordingly, even though individuals were beyond an electioneering parameter line, they could not electioneer on school property. Id. The school's decision to exclude individuals engaging in electioneering from school property was upheld, because "school officials have broad discretion in restricting visitors on school property to protect the safety and welfare of the school children." Id. at 889.

In summary, Idaho Code section 18-2318 does not mandate that all public-school properties used as polling places allow for electioneering activities so long as such activities occur outside of 100 feet from the polling place. The District retains its authority and control over its property on election day. While it must allow individuals the right and ability to vote, the District has the ability to remove all individuals from District property that are engaging in electioneering activities: (1) within 100 feet of a polling place, and (2) where individuals are present on school property that is not related to voting.

I hope you find this analysis helpful.

Sincerely,

ROBERT A. BERRY
Deputy Attorney General

March 9, 2021

The Honorable Laurie Lickley
Idaho House of Representatives
Idaho State Capitol
700 W. Jefferson Street
Boise, ID 83702
VIA EMAIL: llickley@house.idaho.gov

Re: Analysis of H.B. 122

Dear Representative Lickley:

This letter is in response to your March 9, 2021, email concerning House Bill 122, 66th Legislature, 1st Regular Session (2021) ("H.B. 122").

I. BRIEF ANSWERS

1. The 1990 Gun Free School Zones Act likely preempts portions of H.B. 122.

2. H.B. 122 provides extremely broad, and perhaps absolute, immunity from suit for claims arising out of the lawful carrying, possession, use, or nonuse of a deadly weapon by a school employee on school property.

II. ANALYSIS

1. Federal law likely preempts that portion of H.B. 122 that authorizes licensed individuals to discharge a firearm in a school zone.

The 1990 Gun Free School Zones Act ("Act") makes it unlawful for any individual to knowingly possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone if that firearm has moved in or that otherwise affected interstate or foreign commerce.[1] 18 U.S.C. § 922(q)(2)(A). A "school zone" is defined as in, or on the grounds of, a public, parochial or private school

or within 1,000 feet of such a school. 18 U.S.C. § 921(a)(25). "School" is defined as a school that "provides elementary or secondary education, as determined under State law." 18 U.S.C. § 921(a)(26). The federal firearms code specifically addresses the effect of federal statutes such as § 922 on state laws:

> No provision of this chapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.

18 U.S.C. § 927.

The Act generally prohibits an individual from possessing a firearm in a school zone. The Act does, however, include several exceptions to the prohibition on possessing a firearm in a school zone, including:

> (ii) if the individual possessing the firearm is licensed to do so by the State in which the school zone is located or a political subdivision of the State, and the law of the State or political subdivision requires that, before an individual obtains such a license, the law enforcement authorities of the State of political subdivision verify that the individual is qualified under law to receive the license[.]

18 U.S.C. § 922(q)(2)(B)(ii). This exception would allow a school board employee who holds a lawfully issued enhanced concealed carry permit to possess a firearm on school grounds without violating the federal statute. Compare 18 U.S.C. § 922(q)(2)(B)(ii), with Idaho Code § 18-3302K.[2]

While the Act permits someone with a license to possess a firearm in a school zone, the law generally does not allow that person to discharge or attempt to discharge the firearm in a school zone:

> (3)(A) Except as provided in subparagraph (B), it shall be unlawful for any person, knowingly or with reckless disregard for the safety of another, to discharge or attempt to discharge a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the person knows is a school zone.
>
> (B) Subparagraph (A) does not apply to the discharge of a firearm—
>
> (i) on private property not part of school grounds;
> (ii) as part of a program approved by a school in the school zone, by an individual who is participating in the program;
> (iii) by an individual in accordance with a contract entered into between a school in a school zone and the individual or an employer of the individual; or
> (iv) by a law enforcement officer acting in his or her official capacity.

18 U.S.C. § 922(q)(3). This section of the Act prohibits a school employee from discharging a firearm in a school zone except in certain limited circumstances. The element of "knowingly" only requires that the employee have "knowledge of the facts that constitute the offense." Bryan v. United States, 524 U.S. 184, 193, 118 S. Ct. 1939, 1946, 141 L. Ed. 2d 197 (1998). To establish a violation, the government must only prove the employee knew he was discharging or attempting to discharge a firearm and that he was in a school zone when doing so. The exceptions identified above would generally not apply unless a school board authorized the employee to use a firearm on school grounds or the employee was a law enforcement officer. In the absence of school board permission or law enforcement status, federal law likely prohibits the employee from discharging or attempting to discharge the firearm on school grounds.

H.B. 122 purports to override the federal law and authorize individuals holding an enhanced concealed carry permit to discharge or attempt to discharge a firearm on school grounds, even if otherwise prohibited by the employing school board. If passed, H.B. 122 would create "a direct and positive conflict" between the state and federal laws

such "that the two cannot be reconciled or consistently stand together" and as such, pursuant to 18 U.S.C. § 927, federal law would likely preempt that portion of H.B. 122 authorizing school board employees to discharge a firearm on school grounds.

2. <u>H.B. 122 potentially provides absolute immunity from suit.</u>

H.B. 122 proposes a new subsection (8) to Idaho Code section 18-3302D, which provides schools, school districts, and school employees with potentially absolute immunity from suit:

> No action, but for reckless, willful, and wanton behavior, shall lie or be maintained for civil damages in any court of this state against a school, school district, or school employee where the claim arises out of the lawful carrying, possession, use, or nonuse of a deadly weapon by a school employee on school property who does so without the consent of the board in accordance with subsection (4)(h) of this section.

H.B. 122 § 2, at 3:49-4:4.

It appears the *intent* of the provision is to provide immunity for all claims except for those alleging the school employee acted in a reckless, willful, and wanton manner. The *language* of the bill, however, states, "[n]o action, but for reckless, willful, and wanton behavior," will lie. If applied as written, the immunity provides immunity from suit except for claims for "reckless, willful, and wanton behavior." Idaho does not recognize such a claim, however. As a result, it is possible a court could conclude the section provides immunity from all claims, including those where the school employee acted in a reckless, willful, and wanton manner.

If the intent of the provision is to provide immunity from all suits except those where the employee acted in a reckless, willful, and wanton manner, then the provision could be reworded in a manner similar to the language of Idaho Code section 6-904A, which provides immunity to governmental entities and their employees who are acting in the course and scope of their employment and without reckless, willful, and wanton conduct.

We also note that the reckless, willful, and wanton exception to immunity sets an extremely high bar. The standard is defined in Idaho Code section 6-904C(2):

> "Reckless, willful and wanton conduct" is present only when a person intentionally and knowingly does or fails to do an act creating unreasonable risk of harm to another, and which involves a high degree of probability that such harm will result.

In order to meet this standard, the specific harm that occurred must have been, "manifest or ostensible, and highly likely to occur." Hunter v. State, Dep't of Corr., Div. of Prob. & Parole, 138 Idaho 44, 49, 57 P.3d 755, 760 (2002) (citations omitted). This is a much higher standard than negligence. Adopting immunity for all except those who act in a reckless, willful, and wanton manner would extend liability to those who negligently carry, possess, use or fail to use a deadly weapon.

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

[1] The interstate commerce element can be established in several ways. It is most commonly established when a firearm has crossed state lines (usually because it was manufactured in another state or country) or includes parts that have crossed state lines.

[2] Compliance with federal law, however, would not excuse an employee from also complying with the employing school board's policies, including any policy prohibiting the employee from carrying a firearm on school property.

March 9, 2021

Brady Hall
General Counsel
Office of the Governor
State of Idaho
P.O. Box 83720
Boise, Idaho 83720
VIA EMAIL: brady.hall@gov.idaho.gov

Re: Request for legislation review of DRKMF451

Dear Mr. Hall:

This letter is in response to your inquiry about the draft tax bill you provided ("the draft"). Specifically, you asked whether the draft meets the "one subject" requirement of Idaho Constitution, article III, section 16. It is impossible to predict for sure how an Idaho appellate court would rule on this issue, but a reasonable defense can be advanced that it meets the one-subject requirement.

The relevant part of article III, section 16, provides: "Unity of subject and title. — Every act shall embrace but one subject and matters properly connected therewith…." An act is in harmony with article III, section 16, if it "has but one general subject, object, or purpose, and all of its provisions are germane to the general subject and have a necessary connection therewith." Cole v. Fruitland Canning Ass'n, Inc., 64 Idaho 505, 511, 134 P.2d 603, 606 (1943). Similarly, where all the provisions of an act are "relate[d] to and have a natural connection with the same subject they may be united in one statute." Lyons v. Bottolfsen, 61 Idaho 281, 288-89, 101 P.2d 1, 4 (1940). The provisions of an act do not need to relate directly to the same subject. Rather, "if the provisions relate directly *or indirectly* to the same subject, have a natural connection therewith, and are not foreign to the subject expressed in the title, they may be united." Utah Power & Light Co. v. Pfost, 286 U.S. 165, 188, 52 S. Ct. 548, 554, 76 L. Ed. 1038 (1932) (emphasis added).

The purpose behind the "one-subject" requirement is "to prevent the inclusion in title and act of two or more subjects diverse in their nature and having no necessary connection[.]" Utah Power & Light Co., 286 U.S. at 188. Courts disregard "mere verbal inaccuracies, resolve doubts in favor of validity, and hold that, in order to warrant the setting aside of enactments for failure to comply with the rule, the violation must be substantial and plain." Id. at 187. The purpose of this rule is to "prevent the inclusion of incongruous and unrelated matters…and to guard against inadvertence, stealth and fraud in legislation." Id. A review of Idaho case law shows that the majority of cases examining legislation and the one-subject requirement have upheld the enactment.

1. The Draft Bill at Issue

The draft appears to terminate use of the tax relief fund of Idaho Code section 57-811 and, in so doing, use the money in the fund for permissible purposes. The tax relief fund was created a few years ago as a place for various sales tax money remitted by out of state sellers to go. The "[m]oneys in the fund are intended to fund future tax relief statutes enacted by the legislature and may be expended pursuant to appropriation." Idaho Code § 57-811. This bill appears to act on that option to cash out the fund for future tax relief statutes.

The draft directs all money in the tax relief fund to be moved out to the general fund. The draft lowers the individual and corporate income tax rates. It then amends sales tax code to stop putting the sales tax remittances into the tax relief fund that have been directed there for the past few years. See Idaho Code § 63-3620F. By amending the statute to no longer direct money into the tax relief fund, those funds will be distributed just the same as all other sales tax funds in Idaho, with the excess, by default, going to the general fund. See Idaho Code § 63-3638(15). In relation to the increased flow of sales tax money to be distributed, the bill increases the amount of sales tax money currently being directed into the transportation expansion and congestion mitigation fund. See Idaho Code § 63-3638(16). Lastly, the bill modifies the transportation expansion and congestion mitigation fund statute to create a new process for moneys from this transportation fund to be used by local units of government in Idaho. See Idaho Code § 40-720.

2. "But One Subject"

Article III, section 16 requires "but one subject," but allows for "matters properly connected therewith." Here, each section of the draft deals directly with one core subject: *cleaning out and ending the use of the tax relief fund and using the money therein for purposes permitted, and intended, when the fund was created*. The draft clears out the fund, reduces income tax rates, redirects sales tax money that had been going into the fund, increases the amount of sales tax money going into the transportation expansion and congestion mitigation fund, and then provides new opportunities for the transportation expansion and congestion mitigation fund to be used by local units of government. An act is in harmony with article III, section 16, if it "has but one general subject, object, or purpose, and all of its provisions are germane to the general subject, and have a necessary connection therewith[.]" Cole, 64 Idaho at 511, 134 P.2d at 606.

The draft is potentially vulnerable to attack, but in the end is most likely defensible as all fitting under the one subject of: wrapping up the tax relief fund and enacting tax relief provisions permitted by the fund. The most likely constitutional challenge would be that this "tax bill" contains amendments to the transportation title of Idaho Code. A challenge based on article III, section 16 could be advanced by claiming that the draft embraces two subjects; the first being ending the tax relief fund and redirecting those funds to permissible tax relief purposes, and the second subject being the amendments to the permissible use of the transportation expansion and mitigation fund found in the transportation title of Idaho Code. But the legislation could reasonably be defended by arguing that all the provisions in the draft are connected to the purpose of the legislation; and that directing extra sales tax money to the transportation expansion and congestion mitigation fund and amending the transportation title of Idaho Code to expand the permissible use of that transportation fund is a tax relief provision because the money to fund these transportation projects would have to come from somewhere else if this fund was not available to pay for them.

3. Am. Federation of Labor v. Langley and the "Unity of Purpose" Standard

While Idaho courts do not seem inclined to take an overly wooden approach to the one-subject requirement, the Idaho Supreme Court has indicated that an act cannot merely have *something to do with* a particular topic; the act must have a common or unified "purpose" to be accomplished. Am. Fed'n of Labor v. Langley, 66 Idaho 763, 769, 168 P.2d 831, 834 (1946). Moreover, that "unity of purpose" must be "disclosed" directly or indirectly. Id.

In Langley, the Idaho Supreme Court struck down an act dealing entirely with one subject: labor unions. At first blush, the act would seem to fit the "one-subject" requirement as all the provisions pertained to labor unions. However, even though the provisions of the act all dealt with one general topic, the court held that the act failed constitutional analysis as the act did not indicate "what the *core* is, about which the legislative structure was designed to form a perfect accordant edifice." Id. (emphasis added).

Instead, each provision of the labor union act "revolve[d] in its own orbit, and whether gravitating about a central theme or pole star," the court could not say, "because the statue does not disclose any *clear and unified scheme*." Id. (emphasis added). In other words, it is probably not good enough for an act to merely pertain to one topic; the statute must disclose some sort of unified purpose or theme.

In the case at hand, it is worth asking: "What is the purpose or theme of this draft tax bill?" A review of the sections of the draft reveals that there might be more than just one single obvious "unity of purpose" or theme. The draft modifies sales tax distribution, lowers income tax rates, and adjusts the amount of money going to and the use of the transportation expansion and congestion mitigation fund. In the end, it is arguable that there is more than one core or purpose in the bill, and as such, its provisions could face a legal challenge as being insufficiently related.

It is important to note that the Langley case may be somewhat of an aberration in the Idaho Supreme Court's jurisprudence. The Langley decision was issued in 1946; in the nearly 70 years since then, the Idaho Supreme Court has never once cited to Langley or its particular standards regarding a "central theme" or "pole star" or a "clear and unified scheme." Langley, 66 Idaho at 769, 168 P.2d at 834. Instead, the cases since then have continued to follow the more flexible standard requiring merely that an act's provisions be sufficiently "related" or "germane" to its subject. See e.g., Sons & Daughters of Idaho, Inc. v. Idaho Lottery Comm'n, 144 Idaho 23, 32, 156 P.3d 524, 533 (2007). And several cases merely dismiss the constitutional concern without any detailed analysis at all. See, e.g., Kinsela v. State, Dep't of Fin., 117 Idaho 632, 633, 790 P.2d 1388, 1389 (1990).

4. Conclusion

It does not seem that draft tax bill obviously violates the "one-subject" requirement of article III, section 16, Idaho Constitution. The provisions of draft are all directly or indirectly related to the one subject of wrapping up the tax relief fund and using those moneys for permissible purposes (i.e., tax relief statutes). The specific provisions of the draft, however, contain a variety of tax provisions in one bill, creating some concern that it might not satisfy the "clear and unified scheme" requirement applied in Langley. But as shown above, Langley has not been relied upon by the court in recent challenges under article III, section 16. Instead, the court has adopted a more flexible standard to uphold legislation under article III, section 16. Although a challenge could be mounted to the draft, this office can provide a plausible defense under article III, section 16, recognizing that the Idaho Supreme Court could within its discretion apply Langley thereby making such a defense more challenging.

I hope that you find this analysis helpful.

Sincerely,

BRIAN KANE
Chief Deputy

March 10, 2021

The Honorable C. Scott Grow
Idaho State Senate
Idaho State Capitol
P.O. Box 83720
Boise, ID 83720-0081
VIA EMAIL: sgrow@senate.idaho.gov

Re: Inquiry Concerning House Bill 126 and House Joint Resolution 4

Dear Senator Grow:

This letter is in response to your recent inquiry concerning House Bill 126 ("H.B. 126")[1] and House Joint Resolution 4 ("H.J.R. 4").[2] Specifically, you have asked the following questions, each of which presupposes that both H.B. 126 and H.J.R. 4 will become law:

1. Would CBD products derived from industrial hemp be legal?

2. Could a future legislature schedule a CBD product containing 0.3% THC or less by a simple majority vote?

3. Could a future legislature schedule a CBD product containing THC by simply removing the narrowing language in 37-2701(t)(1) prior to the legal definition of industrial hemp in 37-2701?

Each of your questions are briefly addressed individually below. And, similar to your questions, this analysis presupposes that both H.B. 126 and H.J.R. 4 will become law.[3]

1. Industrial hemp derivative products are encompassed within the definition of "industrial hemp" in H.B. 126.

H.B. 126 defines "industrial hemp" or "hemp" as:

> [T]he plant species Cannabis sativa L. and any part of that plant, including the seeds thereof **and all derivatives**, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a measured total delta-9 tetrahydrocannabinol concentration of not more than three-tenths of one percent (0.3%) on a dry weight or volume basis[.]

See H.B. 126 § 2, at 7:1-6 (emphasis added). Thus, a CBD product could potentially be legally derived from industrial hemp so long as the derivative product is within the parameters of industrial hemp. Specifically, any industrial hemp derivative products would be subject to the 0.3% THC threshold. In addition, "a license granted under the provisions of the 2014 farm bill, the 2018 farm bill … or the approved state plan for the state of Idaho" would be required to possess, develop or transport any industrial hemp derivative products. See id. at 6:45-50. Also worth noting is that any industrial hemp derivative product intended for human cosmetic use or human consumption would be subject to oversight by the U.S. Food and Drug Administration ("FDA"). Further, while industrial hemp and its derivatives would be legal, such products, depending on their nature and intended use, may require additional action to be scheduled for purposes of Idaho's Uniform Controlled Substances Act.

2. The legislative votes needed to schedule a particular CBD product containing any THC would need to be considered on a case-by-case basis.

As discussed above, H.B. 126 legalizes industrial hemp and its derivatives, provided an appropriate license has been obtained and the THC content does not exceed 0.3%. However, it is important to distinguish between a legal industrial hemp product and a scheduled product under Idaho's Uniform Controlled Substances Act.

H.J.R. 4 provides that the removal of any substance from schedules I or II of Idaho's controlled substance schedules requires a two-thirds vote of both chambers of the legislature. H.J.R. 4 § 2, at 1:34-41. However, without a specific product to consider, it is difficult to determine if scheduling a CBD product containing any amount of THC would constitute a removal of a substance from schedule I,

requiring a two-thirds vote of both chambers, or an addition to a schedule, requiring only a simple majority vote of both chambers and the absence of a governor's veto.

Factors to consider in determining whether scheduling a particular CBD product or substance, particularly one containing THC, constitutes a removal or an addition would include, but not be limited to, the following:

- Is the product or substance a legal derivative of industrial hemp as discussed above?
- Has the product or substance been approved by the FDA?
- Has the product or substance been scheduled in the federal controlled substance schedules by the U.S. Drug Enforcement Agency ("DEA")?
- If the product or substance has been scheduled by the DEA, were there any corresponding changes to existing definitions or other schedules in federal law?
- If Idaho were to schedule the product or substance, would corresponding changes be needed to the definitions or other schedules in Idaho's Uniform Controlled Substances Act, particularly to the definition for marijuana?

Depending on the answers to the above or other similar questions, a product or substance proposed as an addition to Idaho's controlled substance schedules may arguably be a removal, or partial removal, of a substance from schedules I or II, which would require a two-thirds vote from both chambers of the legislature. This could be particularly true in scenarios involving CBD products or substances containing THC where advocates propose the scheduling is an addition while opponents may claim it is actually a removal, or partial removal, of marijuana from schedule I. In such instances a judicial determination may be required to identify whether scheduling the product or substance at issue is an addition or removal, which would in turn dictate the number of legislative votes needed to schedule the product or substance. However, if future legislation receives a two-thirds vote or more of both chambers, it would moot the question whether the legislation required a simple majority or two-thirds approval by both chambers.

3. Striking the initial sentence in Idaho Code section 37-2701(t)(1), as it would exist if H.B. 126 became law, would not legalize other CBD products.

In the event H.B. 126 becomes law, Idaho Code section 37-2701(t)(1) would read, in relevant part, as follows:

> ["Marijuana," or "marihuana," does not include:] Industrial hemp or hemp possessed, grown, transported, farmed, produced, processed, or possessed by any other entity engaged in hauling, transporting, delivering, or otherwise moving hemp in interstate or intrastate commerce pursuant to a license granted under the provisions of the 2014 farm bill, the 2018 farm bill, 7 CFR 990.1 et seq., or the approved state plan for the state of Idaho. "Industrial hemp" or "hemp" means the plant species Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a measured total delta-9 tetrahydrocannabinol concentration of not more than three-tenths of one percent (0.3%) on a dry weight or volume basis that shall determine the total delta-9 tetrahydrocannabinol (THC) concentration, including both delta-9 tetrahydrocannabinol and delta-9 tetrahydrocannabinolic acid (THCA) evaluated by decarboxylation during analysis, or by measuring each compound and calculating the total percentage of delta-9 tetrahydrocannabinol if the THCA was decarboxylated, which must not exceed three-tenths of one percent (0.3%).

H.B. 126 § 2, at 6:45-7:12. Striking the first sentence of the language above would not appear to legalize any other CBD products. Rather, striking the referenced language would only appear to remove the requirement for a license "under the provisions of the 2014 farm bill, the 2018 farm bill, 7 CFR 990.1 et seq., or the approved state plan for the state of Idaho," which would likely be inconsistent with the federal requirements set forth in the 2014 and 2018 farm bills. Scheduling

additional CBD products containing THC in the future will most likely require the legislature to amend the definitions, controlled substance schedules, or both within Idaho's Uniform Controlled Substances Act in a manner consistent with H.J.R. 4.

I hope you find this analysis helpful.

Sincerely,

ANDREW J. SNOOK
Division Chief
Contracts & Administrative
Law Division

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[1] H.B. 126, 66th Leg., 1st Reg. Sess. (Idaho 2021). "The purpose of this legislation is to legalize the production, processing, research, and transportation of industrial hemp in the state. Industrial hemp is now legal in 49 states, two territories, and more than 40 tribal areas. This legislation will allow Idaho farmers the opportunity to produce industrial hemp if they so choose." Statement of Purpose, H.B. 126, 66th Leg., 1st Reg. Sess. (Idaho 2021).

[2] H.J.R. 4, 66th Leg., 1st Reg. Sess. (Idaho 2021). "The purpose of this proposed constitutional amendment is to prohibit the legalization of controlled substances unless approved by two-thirds (2/3) of the Idaho legislature." Statement of Purpose, H.J.R. 4, 66th Leg., Reg. Sess. (Idaho 2021).

[3] Please note this presumption is for discussion purposes only and is not intended to opine on the likelihood or merits of either H.B. 126 or H.J.R. 4 becoming law.

March 10, 2021

The Honorable Jim Addis
Idaho House of Representatives
Idaho State Capitol
700 W. Jefferson Street
Boise, Idaho 83702
VIA EMAIL: jaddis@house.idaho.gov

Re: 2020 House Bill 562

Dear Representative Addis:

You requested guidance on the legal effect of amendments to the homestead property tax exemption by House Bill 562, 65th Legislature, 2nd Regular Session (Idaho 2020) ("H.B. 562"). I have identified your two questions to be:

- Do the amendments in H.B. 562 allow individuals to claim the homestead exemption at any time during the year?

    - Yes. In light of the amendment in H.B. 562, individuals can claim the homestead exemption at any point during the year for which the exemption is claimed. While the homestead exemption incorporates the definition of "primary dwelling place" from Idaho Code section 63-701(8)—and this definition retains an April 15 deadline—this reference and H.B. 562's direct and explicit removal of the same application deadline results in a conflict. The Idaho Supreme Court has specifically directed when reconciling statutory conflicts that "the more recent expression of legislative intent prevails." Mickelsen v. City of Rexburg, 101 Idaho 305, 307, 612 P.2d 542, 544 (1980). Accordingly, H.B. 562's removal of the April 15 application deadline controls and individuals may apply for the homestead exemption at any time during the year for which the exemption is claimed.

- Do the changes to the homestead exemption by H.B. 562 subject the exemption to proration?

    - No. There is no language in the exemption indicating that the exemption is subject to proration. As the Idaho Supreme Court has explained, statutory interpretation does not typically allow the interpreter "to insert words into a statute…." Saint Alphonsus Reg'l Med. Ctr. v. Gooding County, 159 Idaho 84, 89, 356 P.3d 377, 382 (2015). As such, where proration is not mentioned or indicated by the exemption statute, there is no statutory basis for prorating the exemption.

A more thorough examination of these issues is presented below.

A. The homestead exemption's incorporation of the definition of "primary dwelling place" found in Idaho Code section 63-701(8) does not impose an April 15 deadline where H.B. 562 explicitly removed this same requirement from the exemption.

In matters of statutory interpretation, the Idaho Supreme Court has long held that while "[s]tatutory interpretation begins with the literal language of the statute. **Provisions should not be read in isolation, but must be interpreted in the context of the entire document**." Estate of Stahl v. Idaho State Tax Comm'n, 162 Idaho 558, 562, 401 P.3d 136, 140 (2017) (quoting State v. Schulz, 151 Idaho 863, 866, 264 P.3d 970, 973 (2011)) (emphasis added). Where ambiguity exists in a statute or a conflict exists between provisions of law, statutory interpretation is necessary. "The object of statutory interpretation is to give effect to legislative intent." State v. Doe, 147 Idaho 326, 328, 208 P.3d 730, 732 (2009). When interpreting statutes, "[c]onstructions that would lead to absurd or unreasonably harsh results are disfavored." Saint Alphonsus Reg'l Med. Ctr., 159 Idaho at 89, 356 P.3d at 382 (quoting Spencer v. Kootenai County, 145 Idaho 448, 455, 180 P.3d 487, 494 (2008)). Further, when construing a statute, it must be given an interpretation that will not render it a nullity, and "effect must be given to all the words of the statute if possible, **so that none will be void**, superfluous, or redundant." State v. Mercer, 143 Idaho 108, 109, 138

P.3d 308, 309 (2006) (emphasis added) (citation omitted). Finally, when resolving statutory conflicts: "the more recent expression of legislative intent prevails." Mickelsen, 101 Idaho at 307, 612 P.2d at 544.

H.B. 562 sought to remove the April 15 deadline from the homestead exemption in Idaho Code section 63-602G. According to the statement of purpose: "This legislation simply removes the April 15 date, so a homeowner can apply and receive the homeowner's exemption at any point in the year." Revised Statement of Purpose, H.B. 562, 65th Leg., 2nd Reg. Sess. (Idaho 2020). It is true that H.B. 562 did maintain a reference to Idaho Code section 63-701(8)'s definition of "primary dwelling place" that retains this April 15 deadline date. However, applying the statutory interpretation principles illustrated above leads to the conclusion that referencing this definition does not somehow defeat the clearly expressed intent of the Legislature to remove the April 15 application deadline for the exemption. As the most recent enactment, H.B. 562's removal of the deadline controls the conflict between the two provisions. Additionally, the canons of construction regarding ambiguous statutes make clear that reading H.B. 562 such that the April 15 application deadline remains would render the Bill null and void. Such an interpretation is not supported by Idaho's law regarding statutory construction outlined above.

B. The plain language of H.B. 562 provides no legal basis for prorating the homestead exemption.

H.B. 562 does not speak to or mention prorating the exemption. As outlined above, the exemption as amended by H.B. 562 provides that the "exemption allowed by this section shall be effective upon the date of the application…." Idaho Code § 63-602G(4). The exemption allowed by this section is "the first one hundred thousand dollars ($100,000) of the market value for assessment purposes of the homestead…or fifty percent (50%) of the market value…." Idaho Code § 63-602G(1). Statutory interpretation does not allow for "insert[ing] words into a statute…." Saint Alphonsus, 159 Idaho at 89, 356 P.3d at 382. "The most fundamental premise" of interpreting statutory provisions is the "**assum[ption] that the legislature meant what it said**." Verska v. Saint Alphonsus Reg'l Med. Ctr., 151 Idaho 889, 894,

265 P.3d 502, 507 (2011) (emphasis added). To read proration of the exemption into this statute would violate these tenets. As such, where proration is not mentioned or indicated by the exemption statute, there is no statutory basis for prorating the exemption.

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

Sincerely,

KOLBY K. REDDISH
Deputy Attorney General

March 16, 2021

The Honorable Ilana Rubel
Idaho House of Representatives
Idaho State Capitol
P.O. Box 83720
Boise, ID 83720-0081
VIA EMAIL: irubel@house.idaho.gov

Re: House Joint Resolution 4 and Idaho's Right to Try Act

Dear Representative Rubel:

This letter is in response to your inquiry regarding whether House Joint Resolution 4, 66th Legislature, 1st Regular Session (2021) ("H.J.R. 4"), if it becomes law, will prevent terminally ill patients from accessing future investigational drugs under Idaho's Right to Try Act ("RTA"). As discussed below, whether a successful H.J.R. 4 will affect access to investigational drugs under the RTA will depend on the investigational drug at issue and its status as a controlled substance in Idaho.

H.J.R. 4, in relevant part, provides:

> A **controlled substance**, or any mixture thereof, can be removed from schedule I or schedule II of the Idaho uniform controlled substances act as it existed on July 1, 2021, or made lawful for purposes of the production, manufacture, transportation, sale, delivery, dispensing, administering, distribution, possession, or use thereof, only if such removal or lawfulness is approved by at least two-thirds (2/3) of all members of each of the two (2) houses of the legislature, voting separately, and enacted into law, the vote not being subject to the majority vote provisions of section 15 of this article.

H.J.R. 4 § 2, at 1:34-2:2. Under Idaho's Uniform Controlled Substances Act, "'[c]ontrolled substance' means a drug, substance or immediate precursor in schedules I through VI[.]" Idaho Code § 37-2701(e).

The RTA is intended to "provide the opportunity for terminally ill patients to have access to certain investigational treatments[.]" Idaho Code § 39-9402. Specifically, the RTA states "[a]n **eligible patient** may request, and a manufacturer may make available to an eligible patient under the supervision of the patient's treating physician, the manufacturer's **investigational drug, biological product or device**[.]" Idaho Code § 39-9404(1) (emphasis added). "Eligible patient" is limited to individuals with a terminal illness. Idaho Code § 39-9403(1). In addition, "investigational drug, biological product or device" is defined as:

> [A] drug, biological product or device that has successfully completed phase 1 of a clinical trial but has not yet been approved for general use by the United States food and drug administration and remains under investigation in a United States food and drug administration-approved clinical trial.

Idaho Code § 39-9403(2).

As stated above, H.J.R. 4's scope is limited to the removal of drugs from schedules I or II or making drugs from schedules I or II lawful for other purposes, as those schedules and purposes exist on July 1, 2021. Also, the RTA specifically concerns investigational drugs that have completed phase 1 of a clinical trial, but have not been approved for general use by the U.S. Food and Drug Administration. See Idaho Code § 39-9403(2). Given the number of factors involved with H.J.R. 4 and the RTA, numerous potential outcomes are possible when analyzing whether HJR4 will affect a terminally ill patient's access to any future investigational drug under the RTA. Such outcomes include, but may not be limited to, the following:

- Access to an investigational drug not on Idaho's controlled substance schedules would not be affected by H.J.R. 4 since H.J.R. 4's scope is limited to drugs on schedules I and II. This would likely be the case for many new drugs that have yet to be approved by the U.S. Food and Drug Administration or federally scheduled by the U.S. Drug Enforcement Administration.

- Access to an investigational drug on schedules III through VI of Idaho's controlled substance schedules would also not be affected by H.J.R. 4 since H.J.R. 4's scope is limited to the removal or lawfulness of drugs on schedules I and II.

- Access to an investigational drug on schedule II of Idaho's controlled substance schedules would also likely not be affected by H.J.R. 4, unless use of the drug in the clinical trial required the drug to be rescheduled or made lawful for a purpose not already allowed for schedule II controlled substances.

- Access to an investigational drug on schedule I of Idaho's controlled substance schedules likely would be affected by H.J.R. 4 because schedule I drugs have no lawful use, and to become lawful for any purpose, including a clinical trial in Idaho, would require a two-thirds vote of both chambers of the legislature.

In the event H.J.R. 4 becomes law, a case by case analysis would be required to determine if use of any particular investigational drug under the RTA requires any prior action by the legislature in order to be lawful.

I hope you find this analysis helpful.

Sincerely,

ANDREW J. SNOOK
Division Chief
Contracts & Administrative
Law Division

March 16, 2021

The Honorable Lance W. Clow
Idaho House of Representatives
Idaho State Capitol
700 W. Jefferson Street
Boise, Idaho 83702
VIA EMAIL: lclow@house.idaho.gov

Re: Unsolicited Texts and Robocalls from Idaho Freedom Action

Dear Representative Clow:

Last week, you and I discussed problems you were having with caller ID spoofing, unwanted political action calls, and unsolicited political action text messages. This letter summarizes the details that you provided to me about each of these activities and discusses the state and federal laws the Attorney General's Office enforces that may govern this conduct.

Caller ID Spoofing

In my March 10th emails to you and Glenn Harris, I discussed caller ID spoofing and suggested ways you could handle the constituent calls you were receiving. While you mentioned a constituent reported your phone number was used in conjunction with an IRS tax scam call, you did not indicate that constituents identified a specific organization as the source of the caller ID spoofing. If I am mistaken and you do have information about an organization engaging in caller ID spoofing, please let me know.

Political Action Robocalls

You indicated verbally to me that persons reported they received unsolicited calls from callers purportedly with "Idaho Freedom Action" and were told during the call to press "1" to be transferred to "Representative Clow." When call recipients did so, they were connected to your office. It is unclear whether these calls, however,

were robocalls or calls from live persons and what specifically was said at the beginning of the call.

Idaho Code section 48-1003C governs calls made using an automatic dialing announcing device. Basically, these are computers that quickly and efficiently select and dial phone numbers for the purpose of disseminating a prerecorded voice message.

Using an auto-dialer in Idaho is not unlawful. Rather, a person who uses an auto-dialer to disseminate his or her message ("the caller") must include three disclosures at the beginning of the recording: (1) the name of the person for whom the message is being made, (2) the purpose of the message, and (3) the contact information of the caller.

The Attorney General's Office enforces Idaho Code section 48-1003C, which is part of the Idaho Telephone Solicitation Act ("ITSA"). Under the ITSA, if the Attorney General has a reason to believe that a person has violated the ITSA, the Attorney General may file a civil action and ask that the court to order the defendant to pay a civil penalty of up to $5,000 for each violation of the law, as well as the Attorney General's reasonable fees and investigative expenses.

Presently, our office does not have a reason to believe that Idaho Freedom Action violated Idaho Code section 48-1003C. Specifically, we need to know: (a) whether the calls that persons received are robocalls, (b) whether the calls include the required disclosures, and (c) whether the calls may have originated from Idaho Freedom Action. A transcript or recording of the call would help us determine what action we can take under the ITSA. Accordingly, please encourage those who contact you to file a complaint with our office at www.ag.idaho.gov.

Assuming Idaho Freedom Action is making robocalls to cell phones within Idaho, it does not appear they violate the FCC's rules against unsolicited robocalls to cell phones. The federal Telephone Consumer Protection Act contains specific rules that require call recipients to give at least verbal consent to receive robocalls to their cell phones. However, the rules apply to interstate and international calls, not intrastate calls.

Political Action Robotexts

The redacted text message you forwarded to me on March 12th reads:

> Your tax dollars training students to hate America. Colleges and universities are attacking our law enforcement, the second amendment, and free speech and it's destroying our country. Idaho legislators can stop this now by ending tax dollars for political agendas on our college campuses. Press 1 now or any time in this call if you'd like to be patched through to your representative XXXXXXXXXXX to tell her its time Idaho stops funding radical political agendas with your tax dollars. Paid for by Idaho Freedom Action 208-258-2280.

Idaho law does not prohibit non-commercial text messages like the one Idaho Freedom Action is distributing. Idaho Code section 48-1003C only applies to prerecorded or synthesized voice messages sent via an auto-dialer, and, while federal law prohibits non-commercial robotexts sent without the recipient's consent, the law does not apply to intrastate texts.

Idaho Freedom Foundation's I.R.C. § 501(c)(3) Status

You correctly note that the phone number in the text message—208-258-2280—belongs to Idaho Freedom Foundation, Inc., an I.R.C. § 501(c)(3) nonprofit corporation. Idaho Freedom Action provides that number on its Facebook page, and both entities share the same physical address in Boise. Whether Idaho Freedom Foundation is in any way jeopardizing its status as a public charity, however, is a question for the IRS, not the Attorney General's Office. Individuals with concerns about Idaho Freedom Foundation's activities should submit IRS Form 13909 (Tax-Exempt Organization Complaint), available on the IRS's website at www.irs.gov.

I hope this information is helpful to you. Do not hesitate to forward me any additional evidence you receive regarding the issues discussed in this letter. Also, please refer constituents to our website

at www.ag.idaho.gov to file a complaint about unwanted robocalls. I also am available to speak with persons who have questions about applicable state and federal laws, as well as the Attorney General's enforcement authority under those laws.

Sincerely,

STEPHANIE N. GUYON
Deputy Attorney General

March 30, 2021

The Honorable Caroline Nilsson Troy
Idaho House of Representatives
Idaho State Capitol
700 W. Jefferson Street
Boise, Idaho 83702
VIA EMAIL: cntroy@house.idaho.gov

Re: H.B. 315

Dear Representative Troy:

You have asked the Office of the Attorney General the following question: "Would 'moneys received by the state of Idaho pursuant to settlements and judgments obtained by the state relating to opioids,' as proposed Idaho Code section 57-825(1)(a) is worded, apply to or cover any moneys paid or directed to local Idaho governmental entities pursuant to settlements and judgments relating to opioids?" The short answer is no.

Merriam-Webster defines "receive" as "to come into possession of." Receive, Webster's Ninth New Collegiate Dictionary (9th ed. 1989). This definition has been used by courts in a variety of circumstances. See, e.g., United States v. Olander, 572 F.3d 764, 769 (9th Cir. 2009); El-Amin v, Bodenstein, No. 02 C 50308, 2003 WL 291897, at *1 (N.D. Ill. Jan. 9, 2003). Black's Law Dictionary (11th ed. 2019) defines "receive" the same way. Thus, the only settlement moneys which House Bill 315, 66th Legislature, 1st Regular Session (2021) ("H.B. 315"), covers are those opioid settlement moneys that the State of Idaho comes into possession of.

There is no way to view or understand moneys to be paid or directed to a local governmental unit settling its respective opioid claims as coming into the possession of the State; there is no legal or lexical meaning of the word "receive" such that H.B. 315 would cover settlement moneys directed or paid to a local government unit. Thus, H.B. 315 has no impact and simply does not apply or cover any opioid settlement moneys paid or directed to local governmental units.

If I can answer any other questions, please call me at 208-334-4114 or email me at brett.delange@ag.idaho.gov.

Sincerely,

BRETT DELANGE
Deputy Attorney General
Consumer Protection Division

April 1, 2021

Lisa M. Carlson
Holland & Hart, LLP
800 W. Main Street, Ste. 1750
Boise, Idaho 83702
VIA EMAIL: lcarlson@hollandhart.com

Re: Request for AG analysis

Dear Ms. Carlson:

Our office has reviewed the letter you sent regarding campaign finance reporting obligations. The question posed is the reporting obligations specific to hospital district board trustees in relation to Idaho's Sunshine Laws (Idaho Code §§ 67-6601, *et seq.*). In answer to the question, hospital district board trustee candidates are subject to Idaho's Sunshine Laws, but appear exempt from filing reports with the Secretary of State until that candidate meets the $500 threshold requirement.

A. Hospital district trustee candidates are subject to Idaho's Sunshine Laws

Idaho's Sunshine Laws apply to a "local government office," which "means any publicly elected office for any political subdivision of the state or special district that is not a legislative, judicial, statewide, or federal office." Idaho Code § 67-6602(16). Hospital districts are not a political subdivision of the state, and are not a legislative, judicial, statewide or federal office. See Idaho Code §§ 39-1319, -1320. Hospital districts are generally confined to and organized by a single county, but may be organized within the boundaries of one or more counties. Idaho Code §§ 39-1320, 39-1321. Based upon these statutory provisions, it appears that a hospital district meets the definition of a local government office and the Idaho Supreme Court has made the same observation that hospital districts, much like fire districts and library districts, are special districts. See Greater Boise

Auditorium Dist. v. Royal Inn of Boise, 106 Idaho 884, 888, 684 P.2d 286, 290 (1984).

Given that hospital districts qualify as a special district under Idaho's Sunshine Laws, then any candidate for a hospital district board trustee position is subject to the Idaho's Sunshine Law requirements. This is because the position is one for public office and public office includes a local government office. Idaho Code § 67-6602(1), (22).

B. Idaho's Sunshine Laws have not always been applicable to local governmental offices, such as hospital district trustee candidates, but now apply when the $500 threshold limit is met

The Sunshine Laws were amended in 2019. See 2019 Idaho Sess. Laws ch. 288 (S.B. 1113). The amendments were based upon 2018 Senate Concurrent Resolution 143, 64th Legislature, 2nd Regular Session (Idaho 2018), charging the Campaign Finance Reform Legislative Committee to study the campaign finance and disclosure laws, and to report its findings, recommendations and propose legislation at the next legislative session. A copy of the Final Report of the Campaign Finance Reform Legislative Interim Committee (2018) ("Report") may be found at the following address online: https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2018/interim/FinalReport_cfr_FINALREPORTCFRWG.pdf.

One focus in the discussions by the Committee centered upon extending campaign finance reporting requirements to all local elections if that candidate received or spent more than $500. See Report at 2. These discussions led to the enactment of a new section 67-6608, after repealing then-Idaho Code section 67-6608.

As you note, current Idaho Code section 67-6608 exempts political treasurers for a candidate of local government office from filing reports under section 67-6607 until that candidate expends or receives contributions in the amount of $500 or more dollars. The question

posed regarding section 67-6609 and its interactions with sections 67-6607 and 67-6608 is more nuanced but may be answered through principles of statutory construction. Saint Alphonsus Reg'l Med. Ctr. v. Elmore County, 158 Idaho 648, 652-53, 350 P.3d 1025, 1029-30 (2015).

Idaho Code section 67-6609 provides as follows: "If no contribution is received or expenditure made by or on behalf of a candidate or political committee during a period described in section 67-6607, Idaho Code, the political treasurer for the candidate or political committee shall file with the secretary of state, at the time required by such section of this act for the period, a statement to that effect."

This provision does not limit the type of candidate or political committee subject to Idaho Code section 67-6609. As such, the plain meaning of candidate or political committee under section 67-6602 applies, and as discussed above, a candidate for a hospital trustee position meets the definition of candidate. However, the latter clause determines the periods when a report must be filed and uses section 67-6607 as the statute to determine such periods.

Turning to Idaho Code section 67-6607, the first filing report must "cover the period beginning with the first contribution, expenditure, or encumbrance[.]" Idaho Code § 67-6607(2). It appears then that section 67-6607 is triggered when there is any contribution or expenditure regardless of value. Under the plain language of section 67-6609, that would require any candidate, including a candidate for local government office, to file a report at any time there is a receipt of value, including under $500. Such an interpretation, however, renders section 67-6608's exclusion for reporting and filing by a local governmental office candidate until $500 is reached void and meaningless, which is contrary to statutory construction. See Nelson v. Evans, 166 Idaho 815, 820, 464 P.3d 301, 306 (2020) ("It should be noted that the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant."). In short, section 67-6608 exempts reporting for a specific type of candidate until a specific amount of value is reached. In this case, a candidate for hospital district board trustee is not subject to Idaho's Sunshine Laws until that candidate meets the $500 threshold requirement.

Finally, given the above, there does not appear to be any need to create a campaign finance account with the Secretary of State until the $500 threshold is met.

I hope you find this analysis helpful.

Sincerely,

BRIAN KANE
Chief Deputy

April 20, 2021

The Honorable Doug Okuniewicz
Idaho House of Representatives
Idaho State Capitol
P.O. Box 83720
Boise, ID 83720-0038
VIA EMAIL: dougo@house.idaho.gov

Re: DMV Out-of-County Resident Considerations

Dear Representative Okuniewicz:

You have asked whether a county's Department of Motor Vehicles ("DMV") office can give priority to its own county residents when providing vehicle licensing and registration services. As you have noted, so doing may potentially delay service to non-county residents.

SHORT ANSWER

While the Idaho Transportation Department ("ITD") encourages each of its county DMV partners to treat all customers with respect and fairness, there does not appear to be any specific legal prohibition against a county's DMV office giving initial preference to its own county residents.

ANALYSIS

Title 49 of Idaho Code governs vehicle registration and licensing. Therein, section 49-206 specifies that these provisions and fees must be applied uniformly across the State:

> The provisions of this title shall be applicable and uniform throughout the state in all political subdivisions and municipalities and no local authority shall enact or enforce any ordinance on a matter covered by the provisions of this chapter unless expressly authorized.

Idaho Code § 49-206. The uniformity required by this statute means that all licenses and registrations are actually issued by the State of Idaho, rather than by individual counties or cities. This statutory provision does not appear to address timeliness or delay related to non-county residents. Furthermore, no such direct reference has been located elsewhere in title 49 or in the Idaho Code in general.

Idaho residents may use the DMV registration services in any Idaho county in accordance with section 49-401B:

> Every owner of a vehicle registered by a county assessor shall give his physical domicile residence address or the business physical principal address to the assessor so that the proper county can be entered upon the registration. Failure to do so shall be unlawful. The department shall then attribute the registration, and all fees to be apportioned to the highway distribution account, to the county of residence regardless of the county in which the registration occurred. . . . For the purposes of vehicle registration, a person is an actual and permanent resident of the county in which he has his principal residence or domicile. A principal residence or domicile shall not be a person's workplace, vacation, or part-time residence.

Idaho Code § 49-401B(5) (emphasis added) (the omitted language pertains to specific fees for State parks, recreation, and other items). As can be seen, this statute does not address timing for county or non-county residents.

As an aside, it seems likely that Idaho residents would go to another county's DMV facilities for their own convenience and/or because their own county's DMV is quite busy. Based on anecdotal reports, this provision has meant that some adjacent-county DMV facilities near more populous counties may get significant overflow from non-county residents.

In accordance with Idaho Code sections 49-205 and 49-314 (and elsewhere), a county's assessor, sheriff, and other local appointees are designated as agents of the ITD for licensing and

registration services. Again, this means that such vehicle-related documents are actually issued by the State of Idaho. But similarly, such agency designations do not specifically prohibit county-resident priority.

A search for Idaho case law interpreting or applying any of the above Idaho Code provisions has not found anything applicable. Consequently, there does not appear to be any specific restriction on whether a county can initially serve its own residents.

CONCLUSION

The ITD asks that all county DMV offices be cooperative and provide good service for vehicle licensing and registration. Some counties have chosen to prioritize county residents, and while the ITD discourages such, it does not have authority to actually prohibit this preference.

Sincerely,

GARY D. LUKE
Deputy Attorney General
Idaho Transportation
Department

April 29, 2021

Eric Milstead, Director
Idaho Legislative Services Office
P.O. Box 83720
Boise, Idaho 83720-0054
VIA EMAIL: emilstead@lso.idaho.gov

Re: Request for legislation review of H.B. 376

Dear Mr. Milstead:

This letter is in response to your questions regarding the constitutionality of House Bill 376, 66th Legislature, 1st Regular Session (2021) ("H.B. 376") under the Idaho Constitution and what the possible implications are if the bill were to be found unconstitutional. In short, it appears that a reviewing court could find H.B. 376 constitutional; although, H.B. 376 should be amended to include a reference to each of the acts whose effective date is amended so that they are clearly identified in the legislation. If a court were to find H.B. 376 unconstitutional, and the Idaho Legislature does not adjourn sine die by May 2, 2021, some 200 bills, including appropriations bills to fund parts of the state government, would not take effect on July 1, 2021.

A. Background

The Legislature has passed—and the Governor has signed—approximately 200 bills this session that do not contain an emergency clause and, therefore, will not become effective on July 1, 2021 if the Legislature does not adjourn sine die by May 2, 2021. This is because article III, section 22 of the Idaho Constitution provides that "[n]o act shall take effect until sixty days from the end of the session at which the same shall have been passed, except in case of emergency, which emergency shall be declared in the preamble or in the body of the law," and Idaho Code section 67-510 states "[n]o act shall take effect until July 1 of the year of the regular session or sixty (60) days from the end of the session at which the same shall have been passed, whichever date occurs last, except in case of emergency, which emergency shall be declared in the preamble or body of the law."

It appears that the Legislature may not adjourn sine die by May 2, 2021. Thus, in an attempt to render the bills in question effective on July 1, 2021, the House has passed H.B. 376, which purports to amend all acts or section of acts that have been enacted by the First Regular Session of the Sixth-sixth Idaho Legislature and signed into law or allowed to become law that would have otherwise become effective July 1, 2021, to have the act or section of the act become effective July 1, 2021, and to have a declaration of emergency deemed incorporated into the title of the bill and preamble or the body of the law, as applicable. H.B. 376 would not affect the acts or sections of acts enacted this session that have an effective date stated in the bill. H.B. 376 contains an emergency clause, making it effective upon its passage and approval.

B. An amendatory act is likely necessary to change the effective date of the approximately 200 bills that have already become law this session.

While the effective date of a bill is not codified in Idaho Code, it is part of the bill. The Idaho Constitution is clear that every word in a bill is an integral part of the bill that is passed. See Idaho Const. art. III, § 15 (stating that a bill may not be "put upon its final passage until the same, with the amendments, thereto, shall have been printed for the use of the members; nor shall any bill become a law unless the same shall have been read on three several days in each house previous to the final vote thereon" in most circumstances; and requiring that on final passage, all bills "shall be read at length, section by section"); Tarr v. W. Loan & Sav. Co., 15 Idaho 741, 754, 99 P. 1049, 1053 (1909) (interpreting article III, section 15 as meaning that the bill must be read "from the beginning to the end without abridgment or omission"). This includes the section of a bill establishing its effective date and whether an emergency has been declared to exist.

From a practical perspective, it also makes sense that effective dates are an integral part of the law that is enacted. For example, it is likely that the legislators and the Governor would consider a budget bill that has an effective date of two years into the future differently than a budget bill whose effective date or lack thereof indicates that it will become effective the year it is enacted in deciding whether to vote for the bill or veto it, as applicable.

Thus, it is likely that a reviewing court would conclude that the effective dates, or lack thereof, of each of the acts referenced in H.B. 376 are part of each law. To amend their effective dates, a new bill must be passed that includes a clear reference to each of the acts whose effective date is to be changed.

C. H.B. 376 could be found constitutional pursuant to article III, section 18.

Article III, section 18 prohibits any act from being amended "by mere reference to its title, . . . the section as amended shall be set forth and published at full length." Idaho Const. art. III, § 18. See also Golconda Lead Mines v. Neill, 82 Idaho 96, 99, 350 P.2d 221, 222 (1960). It appears that a reviewing court would likely interpret H.B. 376 consistent with its stated intent to amend the acts in question, that is, as an amendment, because it works an "addition to the statute of which it is amendatory" and "an alteration or change of something proposed in a bill or established as law." Golconda Lead Mines, 82 Idaho at 100, 350 P.2d at 223 (citation omitted). Article III, section 18 therefore likely applies to H.B. 376.

The Idaho Supreme Court's discussion of the background behind article III, section 18 in Noble v. Bragaw, 12 Idaho 265, 85 P. 903 (1906), is highly instructive in understanding how to apply the provision. In Noble, the court recognized that, in certain circumstances, wholescale amendments can be constitutional when "[t]here can be no doubt in regard to the effect of the act under consideration[.]" Id. at 277, 85 P. at 906. Thus, the court held that a 1905 session law that repealed the sections of the sheep inspection law of 1901 that created the office of sheep inspector and deputy sheep inspectors, but continued in force the remainder of the act of 1901 and required certain officials provided for in the 1905 session law to carry out the duties of the officials from the 1901 act by reference to the 1901 act without explicitly setting out those duties again in the 1905 act, did not violate article III, section 18. Id. at 279, 85 P. at 907. The court's interpretation of article III, section 18 was narrow and its interpretative touchstone was pragmatic, as the court referenced concerns with an interpretation of article III, section 18 that would require re-enacting and re-publishing large portions of the whole code of laws, which would create confusion in and of itself. Id. at 278-79, 85 P. at 906-07.

In Kerner v. Johnson, 99 Idaho 433, 583 P.2d 360 (1978), the court quoted Noble as identifying the following purpose of article III, section 18:

> "This constitutional provision must receive a reasonable construction, with a view to give it effect. The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws. An amendatory act which purports only to insert certain words, or to substitute one phrase for another in an act or section, which was only referred to, but not published, was well calculated to mislead the careless as to its effect, and was, perhaps, sometimes drawn in that form for that express purpose. Endless confusion was thus introduced into the law, and the constitution wisely prohibited such legislation. But an act complete in itself is not within the mischief designed to be remedied by this provision, and cannot be held to be prohibited by it without violating its plain intent."

Kerner, 99 Idaho at 453, 583 P.2d at 380 (quoting Noble, 12 Idaho at 277, 85 P. at 906).

Applying this analysis to H.B. 376, a reviewing court could find that H.B. 376 is constitutional: (1) as it addresses the pragmatic concern of the Legislature's inability to re-enact and re-publish over 200 acts and the confusion that could result, and (2) H.B. 376's changes to the original acts are not likely to generate confusion. That said, H.B. 376 would be less likely to be subject to a charge of confusion if it explicitly identified every act intended to be amended.

Following the rationale of another Idaho Supreme Court decision, a reviewing court may also conclude that H.B. 376 passes scrutiny under article III, section 18 because the addition of an emergency clause and effective date is simply supplementary to the original acts, that H.B. 376 is complete as to its purpose, and that it

does not alter or change a word of the original acts. See State v. Pasta, 44 Idaho 671, 678, 258 P. 1075, 1077 (1927).

D. H.B. 376 could be found constitutional under article III, section 16 of the Idaho Constitution.

Article III, section 16 of the Idaho Constitution provides, in pertinent part, "[e]very act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title[.]" This provision can be broken down into two separate requirements: (1) the legislative act many only embrace one subject and matters properly connected therewith and (2) that subject must be expressed in the title.

The purpose of the first requirement is "'to prohibit the practice of bringing together into one bill subjects diverse in their nature, and having no necessary connection . . . . (and) to avoid improper influences which may result from an intermingling in one and the same bill such things as have no proper relation to each other.'" Standlee v. State, 96 Idaho 849, 853, 538 P.2d 778, 782 (1975) (quoting State v. Banks, 37 Idaho 27, 32-33, 215 P. 468, 469 (1923)). "[T]here must be a common object, and that all parts of a statute relate to and tend to support and accomplish the indicated object." Am. Fed'n of Lab. v. Langley, 66 Idaho 763, 767, 168 P.2d 831, 833 (1946).

It could be a close question as to whether H.B. 376 runs afoul of article III, section 16. A reviewing court could look to the disparate subject matter of each of the acts and sections of acts covered by H.B. 376 and find this constitutional provision violated. American Federation of Labor, which held that a provision of an act prohibiting union officials from entering agricultural premises for the purposes of collecting dues or other union activity was too unrelated from another provision setting out a union reporting requirement, suggests such an outcome. 66 Idaho at 770, 168 P.2d at 834. However, it appears more likely that a reviewing court would conclude that the object or subject matter of H.B. 376 for the purposes of article III, section 16's requirements is setting an effective date for a group of acts and sections of acts that would otherwise not become effective on July 1, 2021, and that it would therefore find sufficient unanimity of purpose, particularly in light of the Legislature's broad discretion to set effective dates via emergency

clauses. See Johnson v. Diefendorf, 56 Idaho 620, 635-36, 57 P.2d 1068, 1074-75 (1936) (discussing article 3, section 22 of the Idaho Constitution).

The second part of article III, section 16 states that the subject of every act "shall be expressed in the title" and if the subject is not expressed, "such act shall be void only as to so much thereof as shall not be embraced in the title." This requirement is designed "to prevent fraud and deception in the enactment of laws and to provide reasonable notice to the legislators and the public of the general intent and subject matter of an act." Kerner, 99 Idaho at 452, 583 P.2d at 379 (citation omitted). See Golconda Lead Mines, 82 Idaho at 102, 350 P.2d at 224. Article 3, section 16 "does not require the heading of a bill to track every provision of the text, or vice versa." Cheney v. Smith, 108 Idaho 209, 210, 697 P.2d 1223, 1224 (Ct. App. 1985), abrogated on other grounds by BECO Constr. Co. v. J-U-B Eng'rs Inc., 149 Idaho 294, 233 P.3d 1216 (2010).

"To warrant the nullification of a statute because its subject or object is not expressed in its title, the violation must not only be substantial, but plain, clear, manifest and unmistakable." Golconda Lead Mines, 82 Idaho at 103, 350 P.2d at 224-25 (citations omitted). The key question is whether "a legislator or a member of the public could be misled." Id. at 103, 350 P.2d at 225. The title need only apprise of the purpose of the act and of the means by which the purpose will be accomplished. Id. The decision in Johnson is instructive. There, the Idaho Supreme Court concluded that the title of an act was insufficient as to the section of the act that included a requirement that dealers be licensed and that their licenses be revoked for violation of the sales tax law under article III, section 16 because the title expressed "[t]he purpose of the legislature to provided [sic] for a tax on the retail purchase of certain commodities," but it did not indicate a "legislative intention to require a wholesale or retail dealer to procure a license in order to conduct his business." Johnson, 56 Idaho at 626, 57 P.2d at 1070.

Here, the title of H.B. 376 is "Relating to Acts or Sections of Acts Enacted by the First Regular Session of the Sixty-sixth Idaho Legislature; Providing Clarification for Effective Dates for Certain Acts or Sections of Acts Enacted by the First Regular Session of the Sixty-

sixth Idaho Legislature; and Declaring an Emergency." It appears that a reviewing court could find that this title is sufficiently clear to apprise the public and the legislators of the purpose of the act and the means by which it is accomplished; although, it would be preferable if the acts or sections of acts to which H.B. 376 pertains were more clearly identified in the title.

E. If a court determines H.B. 376 is unconstitutional, there could be implications for those 200 bills that were originally passed this session without emergency clauses.

If H.B. 376 is found unconstitutional and the Idaho Legislature does not adjourn sine die by May 2, 2021, the approximately 200 bills that were originally passed this session without emergency clauses would not become effective until 60 days after the Legislature finally adjourns sine die. See Idaho Const. art. III, § 22; Idaho Code § 67-510. This includes appropriations bills, meaning that there could be funding issues for parts of state government as early as June 12, 2021.

I hope this letter answers your questions. Please contact me with any questions or concerns.

Sincerely,

BRIAN KANE
Chief Deputy

April 29, 2021

The Honorable Ilana Rubel
Idaho House of Representatives
Idaho State Capitol
700 W. Jefferson Street
Boise, Idaho 83702
VIA EMAIL: irubel@house.idaho.gov

Re: Request for legislation review of RS28952

Dear Representative Rubel:

This letter serves as a response to your inquiry regarding the potential effects of the Legislature recessing pursuant to RS28952 (2021). RS28952 is a proposed concurrent resolution, which would resolve to recess the First Regular Session of the Sixth-sixth Idaho Legislature subject to the call of the Speaker of the House of Representatives and the President Pro Tempore of the Senate no later than September 1, 2021.

In brief, adjournment pursuant to RS28952 would likely be a recessed adjournment, rather than adjournment sine die, and could impact a variety of circumstances, such as the procedure for the Governor to veto a bill, the effective date of legislation already passed, the expiration or effective dates of Idaho's administrative rules, and court deadlines for attorney legislators. The possible impacts of RS28952 are discussed further below.

A. RS28952 would likely put the Legislature into a recessed adjournment, rather than adjournment sine die.

It appears that the Legislature would be in a recessed adjournment, as opposed to adjournment sine die, under RS28952. Whether the Legislature is adjourned sine die—as opposed to in a recessed adjournment—depends on the intent of the adjournment. Sine die means "[w]ith no day being assigned (as for resumption of a meeting or hearing)." Sine die, Black's Law Dictionary (11th ed. 2019). RS28952 notes that "the members of the First Regular Session of the

Sixty-sixth Idaho legislature . . . shall recess subject to the call of the Speaker of the House of Representatives and the President Pro Tempore of the Senate no later than September 1, 2021." As worded, the Legislature appears to be intending to return and has assigned a return date of no later than September 1, 2021. In light of the assigned return deadline, RS28952 appears to indicate that the adjournment would not be sine die. This is further supported by the statement in RS28952 that this particular Legislature will return.

B. The Governor likely would need to issue any vetoes within five days of a bill's presentment to him.

Should the Legislature recess under RS28952, then any veto by the Governor is likely due within five days of a bill's presentment to him.

Idaho Constitution article IV, section 10 provides that:

> Any bill which shall not be returned by the governor to the legislature within five days (Sundays excepted) after it shall have been presented to him, shall become a law in like manner as if he had signed it, unless the legislature shall, by adjournment, prevent its return, in which case it shall be filed, with his objections, in the office of the secretary of state within ten days after such adjournment (Sundays excepted) or become a law.

Id.

Idaho Code provides further guidance with respect to (1) the timeframe for returning a bill during an adjournment that is not sine die and (2) the consequences for the Governor's untimely return of a bill. Specifically, Idaho Code section 67-504 provides:

> If, on the day the governor desires to return a bill without his approval and with his objections thereto to the house in which it originated, that house has adjourned for the day (but not for the session), he may deliver the bill with his message to the presiding officer, clerk, or any member of such house, and such delivery is as effectual

> as though returned in open session, if the governor, on the first day the house is again in session, by message notifies it of such delivery, and of the time when, and the person to whom, such delivery was made.

Id. (emphasis added). See also Coeur d'Alene Tribe v. Denney, 161 Idaho 508, 518-19, 387 P.3d 761, 771-72 (2015).

If the Legislative recesses under RS28952, it would be a recess with a fixed time and expiration date, as discussed above, requiring any vetoes to be returned by the Governor within five days. Coeur d'Alene Tribe, 161 Idaho at 518, 387 P.3d at 771.

C. The issue of whether Legislators receive per diem payments should be addressed in the resolution.

Article III, section 23 of the Idaho Constitution says the Legislature "shall have no authority to establish the rate of its compensation and expenses by law." Instead, legislative pay and reimbursement for expenditures are set by the Citizens' Committee on Legislative Compensation. Idaho Code § 67-406.

On October 27, 2020, the Citizen's Committee on Legislative Compensation ("Committee") issued its Report,[1] setting the rate of compensation for members of the Sixty-sixth Idaho Legislature in accordance with Idaho Code section 67-406(a) and (b) ("Report"). The rate of compensation concerns the period commencing December 1, 2020 through November 30, 2022.

The Committee determined how reimbursement would be handled for vouchered expenses and unvouchered expenses. Depending upon a member's primary residence and distance from the Statehouse, that member receives unvouchered expenses in the amount of $139 or equal to that of the federal per diem rate for each day of the regular session. (Report § II.) A similar arrangement exists for vouchered expenses. (Id. § III.) Should the Legislature pass a concurrent resolution and adjourn "to a day certain for more than three days, no unvouchered expense allowance shall be payable to any member of the Legislature for the time period during such temporary adjournment without the approval of the Senate Pro Tem or the

Speaker of the House." (Report § II(5).) It is the same for vouchered expenses. (Id. § III(8).)

The proposed concurrent resolution is set to last longer than three days with a potential expiration date of September 1, 2021, so the Senate Pro Tem or Speaker of the House will have the authority to approve whether vouchered and unvouchered expenses are payable during this recessed time. The resolution is silent as to whether the Senate Pro Tem or the Speaker of the House would be able to approve of any per diem payments, leaving the matter to the discretion of the Senate Pro Tem and the Speaker of the House. It may be desirable to clarify the authority of the Senate Pro Tem or Speaker of the House to approve any per diem payments in the proposed Concurrent Resolution.

D. Should the Legislature recess under RS28952, the effective date of legislation already passed this session will extend beyond July 1, unless that legislation has an emergency clause.

Should the proposed Concurrent Resolution pass, it would have an impact on the effective date of acts that have already passed this session. Article III, section 22 provides that "[n]o act shall take effect until sixty days from the end of the session at which the same shall have been passed, except in case of emergency, which emergency shall be declared in the preamble or in the body of the law." Idaho Code section 67-510 also speaks to when acts become effective: "[n]o act shall take effect until July 1 of the year of the regular session or sixty (60) days from the end of the session at which the same shall have been passed, whichever date occurs last, except in case of emergency, which emergency shall be declared in the preamble or body of the law." (Emphasis added.)

RS28952 provides that the Legislature may return no later than September 1, 2021. As such, it is likely that the session will not end by July 1, and no acts will become effective on that date, except for those that already became effective due to the inclusion of an emergency clause. If the Legislature returns on September 1, 2021, acts will become effective sixty days from the end of the session, unless they contain an emergency clause.

E. A recess pursuant to RS28952 would have minimal impacts on Referendums.

The impact of RS28952 on the referendum rights of Idaho's citizens is likely minimal. Idaho Code section 34-1803 governs the manner in which referendums may occur:

> Referendum petitions with the requisite number of signatures attached shall be filed with the secretary of state not more than sixty (60) days after the final adjournment of the session of the state legislature which passed on the bill on which the referendum is demanded. All elections on measures referred to the people of the state shall be had at the biennial regular election. Any measure so referred to the people shall take effect and become a law when it is approved by a majority of the votes cast thereon, and not otherwise.

Id.; Idaho State AFL-CIO v. Leroy, 110 Idaho 691, 697, 718 P.2d 1129, 1135 (1986).

There are two key dates within section 34-1803. The first is the time in which a referendum petition must be filed, which is 60 days after the Legislature's final adjournment. The second is the time when the election may occur, which is at the biennial regular election. Any recess should not have an effect on the referendum's placement on the ballot at the next biennial election of 2022. The only effect a recess may have is that the circulation of signatures will be later in the year, likely occurring sometime in the fall or winter.

F. Idaho's administrative rules will automatically expire on July 1, 2021.

Should the Legislature not approve Idaho's administrative rules prior to recessing under RS28952, then the rules will automatically expire on July 1, 2021:

> Notwithstanding any other provision of this chapter to the contrary, every 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. Extended rules shall then continue to expire annually on July 1 of each succeeding year unless extended by statute in each such succeeding year.

Idaho Code § 67-5292(1). Idaho agencies would likely then be required to adopt temporary rules in accordance with Idaho Code section 67-5226.

Should the Legislature approve any of Idaho's administrative rules prior July 1, 2021, the effective date of some rules may be delayed until the Legislature adjourns sine die, unless agencies adopted temporary rules under Idaho Code section 67-5226. *See* Idaho Code § 67-5224(5) ("Except as set forth in sections 67-5226 and 67-5228, Idaho Code, a pending rule shall become final and effective upon the conclusion of the legislative session at which the rule was submitted to the legislature for review, or as 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. A rule which is final and effective may be applied retroactively, as provided in the rule.").

G. An extended recess under RS28952 may cause confusion for courts and Attorney Legislators.

Idaho Rule of Civil Procedure 5.1 provides that, except when ordered by the court in specific circumstances of emergency, irreparable harm or undue prejudice, (a) "[w]hen an attorney is serving as a legislator while the legislature is in general or special session, the attorney is not required to appear at any trial or other proceeding," and (b) "[t]he time within which the attorney would normally be required to file any pleading or other paper is extended for a period of ten days following adjournment of the session of the legislature."

Similarly, Idaho Rule of Family Law Procedure 205(G) (2020) provides in pertinent part, except when ordered by the court in circumstances of emergency, irreparable harm or undue prejudice, that:

> During such time as any attorney shall be serving as a legislator or legislative attache while the legislature is in general or special session, the attorney shall not be required to attend in court at any trial or other proceeding, and in any pending matter in which the attorney appears as attorney of record, the time within which the attorney would normally be required to file any pleading or other paper shall be extended for a period of ten days following adjournment of such session of the legislature . . . .

There may be confusion for both courts and parties represented by Attorney Legislators as to whether and how these rules apply during the long recess contemplated by RS28952.

I hope this answers your question. Should you have any additional questions or concerns, please contact me.

Sincerely,

BRIAN KANE
Chief Deputy

[1] The Report of the Citizens' Committee on Legislative Compensation (Oct. 27, 2020) is available at: https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2020/interim/FinalReport_comp_LegComp2020Report.pdf.

May 10, 2021

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Re: Requested Analysis of House Bill 220

Dear Mr. Hall:

This letter is in response to your recent request for an analysis of House Bill 220.[1] Specifically, you asked about constitutional issues raised by House Bill 220. It is difficult to assess the constitutionality of House Bill 220 with any degree of certainty as it largely rests on an unsettled area of law.

You also asked about the effect House Bill 220 will have for state entities generally and for specific entities. Proposed Idaho Code section 18-8703 will likely affect the future contracts of state entities, in particular the Idaho Department of Health and Welfare ("IDHW"). However, to what extent proposed Idaho Code section 18-8703 will affect the future contracts of state entities is unknown. In addition, Idaho Code section 18-8706 may affect health care programs offered at Idaho's public higher education institutions.

A. Overview of House Bill 220.

House Bill 220 creates a new chapter 87 in title 18 of the Idaho Code to be known as the "No Public Funds for Abortion Act." If enacted into law, House Bill 220 would add sections 18-8701 through 18-8712 to the Idaho Code. Those new sections generally prohibit the following:

1) Any public entity[2] from entering into any contract or commercial transaction with an abortion provider or any affiliate of an abortion provider, except this prohibition does not apply to a

contract or commercial transaction that is subject to a federal law related to Medicaid or a hospital. Proposed Idaho Code § 18-8703.

2) Any health care facility owned or operated by a public entity from entering into any contract or commercial transaction with any health care provider or facility under the terms of which the provider or facility agrees to provide, perform, or induce an abortion. Proposed Idaho Code § 18-8704(1).

3) The use of public funds made available by a public entity and distributed by any institution, board, commission, department, agency, official, or employee of a public entity in any way to provide, perform, or induce an abortion; assist in the provision or performance of an abortion; promote abortion; counsel in favor of abortion; refer for abortion; or provide facilities for an abortion or for training to provide or perform an abortion. Proposed Idaho Code § 18-8705(1).

4) Any person, agency, organization, or other party that receives funds authorized by a public entity from using those funds to perform or promote abortion, provide counseling in favor of abortion, make referral for abortion, or provide facilities for abortion or for training to provide or perform abortion. Proposed Idaho Code § 18-8705(2).

5) Any fund or committee authorized by Idaho Code for the special protection of women or children from being authorized to use or distribute public funds for payment for abortion, abortion referrals, abortion counseling, or abortion-related medical or social services. Proposed Idaho Code § 18-8705(3).

6) The use of tuition and fees paid to a public institution of higher education in any way to pay for any abortion, provide or perform an abortion, provide counseling in favor of an abortion, make a referral for abortion, or provide facilities for an abortion or for training to provide or perform abortion. Proposed Idaho Code § 18-8706.

7) Any facility operated at a public institution of higher learning or by a public school district or any employee of a such an institution or a public school, acting within the scope of employment, from providing or performing an abortion, counseling in favor of an abortion, referring for an abortion, or dispensing a drug classified as emergency contraception by the FDA unless the drug is dispensed in the case of rape. Proposed Idaho Code § 18-8707(1), (2).

8) The State Department of Education, State Board of Education, or other state agencies and local units of administration from using state funds to provide or procure an abortion or distribute drugs classified as emergency contraception by the FDA unless the drug is dispensed in the case of rape. Proposed Idaho Code § 18-8707(3).

9) The use of any public institution, facility, equipment, or other physical asset owned, leased, or controlled by a public entity for the purpose of providing, performing, or participating in an abortion. Proposed Idaho Code § 18-8708(1).

10) Any public institution or facility from leasing, selling, or permitting the subleasing of its facilities or property to any physician or health care facility for use in the provision or performance of abortion. Proposed Idaho Code § 18-8708(2).

The prohibitions in numbers 2, 3, 4, 5, 9, and 10 above do not apply to: an abortion performed when the life of the mother is endangered by a physical disorder, illness, or injury; a hospital; or a contract or commercial transaction that is subject to a federal law related to Medicaid. Proposed Idaho Code §§ 18-8704(1)–(2), 18-8705(4), 18-8708(3).

An intentional violation of this new chapter 87 by a public officer or employee would be considered a misuse of public monies punishable under Idaho Code section 18-5702 as either a misdemeanor or a felony depending on the circumstances. Further, House Bill 220 contains an emergency clause making it effective upon approval.

B. The law is unsettled as to whether the State can prohibit all funding to abortion providers and their affiliates for non-abortion related services.

It is well settled that the State of Idaho can prohibit the use of public funds to provide or support abortions. See, e.g., Maher v. Roe, 432 U.S. 464, 97 S. Ct. 2376, 53 L. Ed. 2d 484 (1977). Consistent with this, Idaho Code section 56-209c prohibits funds available to the IDHW from being used to pay for abortions except to save the life of the mother or in the case of rape or incest.

The U.S. Supreme Court has also found it constitutional for the government to require title X grant recipients with abortion-related practices to adequately segregate abortion-related activities from their non-abortion-related activities. Rust v. Sullivan, 500 U.S. 173, 203, 111 S. Ct. 1759, 1777-78, 114 L. Ed. 2d 233 (1991). In Rust, the Court explained, "[t]he Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected and may validly choose to fund childbirth over abortion[.]" Id. at 201.

Under Rust, proposed Idaho Code sections 18-8703 and 18-8706 through 18-8708 may be problematic because they do not allow referral for an abortion if the mother's life is in danger. The existence of a safety mechanism that allowed for referral to an abortion provider in the event of a medical emergency was a consideration for the Court in its decision upholding the regulations in Rust. Rust, 500 U.S. at 195.

Setting that consideration aside, the proposed law goes beyond the measure approved in Rust by withholding funding from abortion providers and affiliates of abortion providers for non-abortion related services and prohibiting contracts and commercial transactions unrelated to abortion with those entities, subject to limited exceptions.

It is legally unsettled as to whether the State can constitutionally withhold funding for non-abortion related services from those who provide abortions or their affiliates. As evidenced by the cases below, courts have reached differing conclusions both as to the ultimate outcome of whether such withholding is permissible and as to which legal test to apply to claims brought by abortion providers against such laws.

Some courts have held that such laws violate the U.S. Constitution under a variety of rationales:

- Planned Parenthood of Sw. & Cent. Fla. v. Philip, 194 F. Supp. 3d 1213, 1220 (N.D. Fla. 2016) (finding state law that prohibited funding for abortion providers for services wholly unrelated to abortion likely violated the unconstitutional conditions doctrine, which prohibits the government from prohibiting indirectly—by withholding public funds—what it cannot constitutionally prohibit directly).

- Planned Parenthood of Cent. N.C. v. Cansler, 877 F. Supp. 2d 310, 320-21 (M.D.N.C. 2012) (holding state law that prohibited an abortion provider from receiving state funding for non-abortion related services was a violation of the provider's constitutional rights under the First and Fourteenth Amendments).

- Planned Parenthood Ass'n of Utah v. Herbert, 828 F.3d 1245, 1258-63 (10th Cir. 2016) (holding that an abortion provider was likely to succeed on its argument that a directive to stop passing along federal funds the provider used to carry out certain programs was an unconstitutional condition under the First Amendment).

Other courts have held that a similar law does not violate the U.S. Constitution:

- Planned Parenthood of Greater Ohio v. Hodges, 917 F.3d 908 (6th Cir. 2019) (en banc) (holding state law prohibiting its health department from disbursing federal funding to entities that provided nontherapeutic abortions in addition to other non-abortion related health care services and to their affiliates did not violate the Fourteenth Amendment under the unconstitutional conditions doctrine).

- Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health, 699 F.3d 962, 981 (7th Cir. 2012) (holding state law that prohibited public funding for abortion providers even for

unrelated services did not impose an unconstitutional condition on abortion providers). 988

Notably, the Sixth Circuit's en banc decision in Hodges suggests that such a funding prohibition might violate the Due Process Clause of the U.S. Constitution as an undue burden on a woman's right to obtain an abortion because it could potentially cause abortion providers to stop providing abortions in order to secure federal funding for their non-abortion services. Hodges, 917 F.3d at 916. However, the Sixth Circuit concluded that such a challenge was premature because the abortion providers in that case testified that they would continue providing abortions even without federal funding. Id. The Sixth Circuit's conclusion in Hodges shows that even the legal framework that would apply to a challenge to House Bill 220 is unsettled.

Another possible challenge to House Bill 220 under the U.S. Constitution could come in the form of an Equal Protection Clause challenge. A non-hospital abortion provider could argue that House Bill 220 treats it differently from other similarly situated federal grant recipients, such as hospitals, without adequate justification. It is unclear what standard of review a court would apply to such a challenge. The U.S. Supreme Court has consistently held that some objectives underlying state laws, "such as 'a bare . . . desire to harm a politically unpopular group,' are not legitimate state interests" and thus likely unconstitutional. Lawrence v. Texas, 539 U.S. 558, 580, 123 S. Ct. 2472, 2485, 156 L. Ed. 2d 508 (2003) (O'Connor, J., concurring) (citations omitted). When a law exhibits such a desire to harm a politically unpopular group, courts will apply a more searching form of rational basis review to strike down such laws under the Equal Protection Clause. See id. That said, a court might apply only the standard rational basis review to House Bill 220, meaning that it would be upheld if rationally related to a legitimate state interest. See City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313 (1985).

C. The law may allow the State to prevent the use of public facilities and assets to provide abortions.

Subject to limited exceptions, proposed Idaho Code section 18-8708 prohibits the use of public institutions, facilities, equipment, and assets for the purpose of providing, performing, or participating in abortion. It also prohibits a public institution or facility from leasing, selling, or permitting the subleasing of its facilities or properties for the provision or performance of abortions.

The U.S. Supreme Court has upheld a state ban on the use of public employees and facilities for the performance or assistance of nontherapeutic abortions. Webster v. Reprod. Health Servs., 492 U.S. 490, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989). The Court in Webster concluded that the rationale that allowed the state to refuse to fund abortions extended to allow the state to ban the use of public facilities and employees to perform abortions. Webster, 492 U.S. at 509-10. The Court's decision in Webster likely establishes the constitutionality of proposed Idaho Code section 18-8708 if a Due Process Clause challenge were brought.

Again, however, there is the possibility of an Equal Protection Clause challenge based on proposed Idaho Code section 18-8708 treating hospitals where abortions are performed differently than non-hospital abortion providers. The success or failure of such a challenge will depend on the State's justification for treating these two groups differently.

D. House Bill 220 likely does not impair existing contractual obligations.

The U.S. Constitution and Idaho Constitution protect existing contractual rights. See U.S. Const. art. 1, § 10; Idaho Const. art. 1, § 16. These constitutional provisions protect "only those contractual obligations already in existence at the time the disputed law is enacted." Lindstrom v. Dist. Bd. of Health Panhandle Dist. 1, 109 Idaho 956, 961, 712 P.2d 657, 662 (1985). See also Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241, 98 S. Ct. 2716, 2720-21, 57 L. Ed. 2d 727 (1978). A law violates these constitutional provisions when the challenged legislative enactment: (1) operates as a substantial impairment of a contractual relationship, and (2) is not reasonable and necessary to advance a legitimate public purpose. CDA Dairy Queen,

Inc. v. State Ins. Fund, 154 Idaho 379, 387-88, 299 P.3d 186, 194-95 (2013).

House Bill 220 likely does not impair existing contractual obligations because it is not expressly or impliedly retroactive. "[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." Guzman v. Piercy, 155 Idaho 928, 938, 318 P.3d 918, 928 (2014) (quoting Kent v. Idaho Pub. Utils. Comm'n, 93 Idaho 618, 621, 469 P.2d 745, 748 (1970)). Further, Idaho Code section 73-101 states that no part of the Idaho Code "is retroactive, unless expressly so declared."

Unlike the law in the CDA Dairy Queen case that the Idaho Supreme Court found impaired existing contractual obligations, House Bill 220 does not contain a retroactivity clause. See CDA Dairy Queen, Inc., 154 Idaho at 382, 299 P.3d at 189; S.B. 1166, 60th Leg., 1st Reg. Sess. (Idaho 2009). Further, the provisions of House Bill 220 that apply to contracts, proposed Idaho Code sections 18-8703 and 18-8704, do not clearly imply that the Legislature intends those sections to be applied retroactively to existing contractual obligations. The operative language in both sections prohibits public entities from "enter[ing] into any contract or commercial transaction." Thus, House Bill 220 likely does not impair existing contractual obligations because the bill is not expressly or impliedly retroactive.

E. Potential effects of House Bill 220.

Proposed Idaho Code section 18-8703(1) prohibits state entities from entering into any contract or commercial transaction with any abortion provider or any affiliate of an abortion provider, even if the contract or transaction is unrelated to abortion. Under proposed Idaho Code section 18-8703(2), this prohibition does not apply to a contract or commercial transaction that is subject to a federal law related to Medicaid or a hospital.

State entities likely contract for non-abortion services with non-hospital abortion providers and the affiliates of non-hospital abortion providers. The extent that state entities enter into these type of contracts and the extent that these contracts are subject to a federal

law related to Medicaid is unknown. However, it is likely that proposed Idaho Code section 18-8703 will affect the future contracts of state entities, in particular IDHW.

Proposed Idaho Code section 18-8706 prohibits the use of tuition and fees paid to a public institution of higher education "for training to provide or perform abortion." Idaho Code section 18-8706 may affect health care programs offered at Idaho's public higher education institutions. Programs to train nurses, physician assistants, pharmacists, and medical doctors offered at Idaho's public higher education institutions may cover training related to abortion.

I hope you find this analysis helpful.

Sincerely,

SPENCER HOLM
Deputy Attorney General

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[1] H.B. 220, 66th Leg., 1st Reg. Sess. (Idaho 2021).

[2] As used in this letter, the term "public entity" means the state, a county, a city, a public health district, a public school district, or any local political subdivision or agency thereof.

May 13, 2021

The Honorable Chuck Winder
President Pro Tempore
Idaho State Senate
Idaho State Capitol
700 W. Jefferson Street
Boise, Idaho 83702
VIA HAND DELIVERY

The Honorable Scott Bedke
Speaker of the House
Idaho House of Representatives
Idaho State Capitol
700 W. Jefferson Street
Boise, Idaho 83702
VIA HAND DELIVERY

Re: Request for AG analysis regarding the recess of the Idaho Legislature

Dear Pro Tem Winder and Speaker Bedke:

This letter is in response to your recent inquiry regarding a scenario where the Senate adjourns sine die and the House is unable to adjourn sine die due to the lack of a majority. It is important to note that this scenario is unique and without precedent in Idaho. At the federal level, the United States Congress has had one chamber not concur in adjournment in order to block recess appointments (2007 and 2012). It appears that if one chamber recesses while the other adjourns sine die, then the adjournment could be considered invalid because it has not been concurred in by the other chamber. In sum, one interpretation could be that both chambers are considered to be in an extended recess pending concurrence for adjournment purposes. It is also difficult to ascertain how either chamber could be legally forced back into session and required to take legislative action. Recognizing the uncertainty of these circumstances, the below analysis offers an assessment regarding the outcome of the actions of the House and Senate.

A. Absent Concurrence in Adjournment, the Default May Be an Extended Recess

In place of the House adjourning sine die, you have asked whether the House may recess open ended, or to a date certain. The House likely has the authority to recess, but that authority is contingent

on the Senate's concurrence. Similarly, if the Senate adjourns sine die, but the House does not concur in that adjournment, then the Senate's adjournment is likely limited by the House's nonconcurrence. With both chambers agreeing in some fashion to not being in session, the likely default result is that both chambers would be considered in recess. It appears that these activities are governed by article III, section 9 of the Idaho Constitution, which requires:

> 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 is similar to a provision in the United States Constitution. See U.S. Const. art. I, § 5, cl. 4. The requirement for concurrence in lengthy adjournments is an element of bicameralism; the Founders were worried that the will of one House might be thwarted by the other's mischievous absence. In this case, although the two chambers may not be agreeing on the vehicle to absent themselves, they are agreeing to not be in session, thus the concern regarding mischief does not appear to be applicable. But there is no concurrence as to adjournment, because the House is recessing.

Based upon the House's lack of concurrence, the Senate's adjournment sine die may be of limited legal effect. When the House returns, if it does not adjourn sine die, then the Senate will likely have three days in which to return. This office is unaware of the mechanism for how either chamber compels the attendance of the other. For example, the Senate may be able to comply with the requirement to return under article III, section 10 with a smaller number adjourning from day to day.

B. The Chambers May Need to Address Issues Raised by the Lack of Adjournment Sine Die

Administratively, given the finality of the Senate adjourning sine die, Senators are likely no longer paid per diem or other legislative entitlements unless otherwise provided for by the Citizen's Committee and through the Senate's approval process for interim work. Senate interim committees and senators assigned to joint interim committees likely have no impediments to their requirements for interim work. If the House recesses, it may need to address its member's eligibility for unvouchered and vouchered expenses. The Citizens' Committee on Legislative Compensation added the following language to its 2020 report:

> If the Legislature, by passage of a concurrent resolution, adjourns to a day certain for more than three days, no unvouchered expense allowance shall be payable to any member of the Legislature for the time period during such temporary adjournment without the approval of the Senate Pro Tem or the Speaker of the House.

Report of the Citizens' Committee on Legislative Compensation (Oct. 27, 2020) at 3 ¶ III.8, https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2020/interim/FinalReport_comp_LegComp2020Report.pdf.

This means that the House may need to specifically address through the appropriate legislative vehicle within the House that these expenses will not be paid unless approved by the Speaker. The citizen's committee contemplated that this would be addressed through a concurrent resolution, but given the unique nature of the circumstances, adoption of a limitation on payment of these expenses by the Chamber in recess appears consistent with the Citizens' Committee on Legislative Compensation.

It is essential to note that the scenario currently presented is unique and unprecedented in Idaho. The Legislature's decision to pursue this course of action causes risk which could result in a reviewing court concluding differently.

I hope you find this analysis helpful.

Sincerely,

BRIAN KANE
Chief Deputy

May 28, 2021

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Re: Acting Governor's Authority

Dear Mr. Hall:

You asked for an analysis of three issues. This letter identifies, then addresses the issues, starting with the second, then third, and ending with the first.

Issue 2: Does the acting Governor's EO exceed the constitutional or statutory powers entrusted to the Governor?

The Governor's executive order authority is outlined in Idaho Code section 67-802, which states:

> The supreme executive power of the state is vested by section 5, article IV, of the constitution of the state of Idaho, in the governor, who is expressly charged with the duty of seeing that the laws are faithfully executed. In order that he may exercise a portion of the authority so vested, the governor is authorized and empowered to implement and exercise those powers and perform those duties by issuing executive orders from time to time which shall have the force and effect of law when issued in accordance with this section and within the limits imposed by the constitution and laws of this state.

This statute makes clear that an executive order can only be issued to ensure "that the laws are faithfully executed."

The executive order at hand has been issued to prohibit the state and its political subdivisions from having a mask mandate. As there is no law prohibiting such mandates, acting Governor McGeachin has exceeded the executive order authority granted her under Idaho Code section 67-802. This executive order does not seek to ensure laws are faithfully executed. Oddly, it seems to have been issued in an effort to undermine the existing authorities of the state and its political subdivisions to issue mask mandates. This executive order appears to run counter to both the Idaho Constitution and the Governor's statutory executive order authority.

There are other provisions of Code that grant the Governor executive order authority in specific circumstances. One such provision, and the only one that may be applicable to this situation, is found in Idaho Code section 46-1008, which grants the Governor authority to issue executive orders to proclaim a disaster emergency. Executive orders issued under this authority, however, must "indicate the nature of the disaster, the area or areas threatened, the area subject to the proclamation, and the conditions which are causing the disaster." Idaho Code § 46-1008(2). This has not been done with this executive order. Furthermore, there is no mention of an emergency other than to reference the proclamation that was issued in March of 2020. Thus, it seems clear this emergency order was not intended to be issued as an emergency proclamation.

Issue 3: Does the acting Governor's EO impermissibly interfere or encroach upon the Legislature's powers to legislate and make policy for the state of Idaho?

While the Constitution vests the Governor with supreme executive power within the state, article III, section 1 of the Idaho Constitution vests the legislative power of the State to a senate and a house of representatives. As noted above, there is no existing law prohibiting mask mandates. Thus, rather than ensuring that an existing law is faithfully executed, the acting Governor's executive order prohibiting mask mandates has the effect of creating a law through executive order. This likely encroaches on the lawmaking power of the Legislature and violates the separation of powers between the executive and legislative branches. See Idaho Const. art. III, § 1.

Issue 1: Does the acting Governor's EO violate or conflict with any statutory or constitutional provisions entrusting public health decisions to cities, counties, public health districts, school districts or other local governmental entities?

The public health districts have the power to "do all things required" to protect the public health. Specifically:

> The district board of health shall have and may exercise the following powers and duties:
>
> (1) To administer and enforce all state and district health laws, regulations, and standards.
>
> (2) 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 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.

Idaho Code § 39-414. Under this authority, the public health districts have issued mask mandates. Similarly, school districts have the express statutory authority to protect the morals and health of their pupils. Idaho Code § 33-512(4), (7). And cities are specifically authorized to preserve public health and prevent the introduction of contagious diseases into the city. Idaho Code §§ 50-304, 50-606. In sum, the Idaho Legislature has specifically legislated authority for these local governmental entities to take the necessary precautions to protect the public health of their respective constituencies. Under the executive order, it does not appear that any circumstances or authority has been cited for the substitution of an executive order to displace these specifically legislated allocations of local authority.

As stated above, the Governor has the power to issue executive orders to exercise a portion of his constitutional authority to see "that the laws [of Idaho] are faithfully executed." Idaho Code § 67-802. The acting Governor's action to prohibit mask mandates, potentially contrary to existing orders of local government entities, encroaches upon the express statutory authority of local government entities and likely exceeds the Governor's authority in statute and Idaho's constitution.

I hope you find this helpful. If you have further questions, please do not hesitate to contact me.

Sincerely,

BRIAN KANE
Chief Deputy

June 24, 2021

The Honorable Muffy Davis
Idaho House of Representative
Idaho State Capitol
700 W. Jefferson Street
Boise, Idaho 83702
VIA EMAIL: mdavis@house.idaho.gov

Re: Idaho Code section 67-6539 (Local Regulation of Short-Term Rentals)

Dear Representative Davis:

This letter responds to your June 21, 2021, email requesting information about local governments' ability to regulate short-term rentals under Idaho Code section 67-6539. Peter Lahaderne, the Sun Valley constituent who contacted you, expresses concern that short-term vacation rentals are displacing affordable rental housing in Blaine County and specifically asks if Idaho Code section 67-6539 allows localities to place annual time limits on vacation rentals.

Effective in 2018, Idaho Code section 67-6539 was enacted in conjunction with the Short-term Rental and Vacation Rental Act, title 63, chapter 18, Idaho Code ("Act"). The purpose of the Act, as explained in Idaho Code section 63-1802, is to: (a) promote access to short-term vacation rentals,[1] (b) preserve personal property rights, (c) promote property owner access to advertising platforms, and (d) enhance local tax revenue by permitting platforms to assume tax collection and remittance responsibilities.

Subsection (1) of section 67-6539 restricts counties and cities from enacting or enforcing ordinances that have "the express or practical effect of prohibiting short-term rentals or vacation rentals in the county or city." Subsection (2) eliminates a locality's ability to "regulate the operation of a short-term rental marketplace," which is defined in Idaho Code section 63-1803(5) as "a person that provides a platform through which a lodging operator, or the authorized agent of

the lodging operator, offers a short-term rental or vacation rental to an occupant."

Idaho Code section 67-6539(1), however, does allow counties and cities to pass reasonable regulations to protect the public's health, safety, and general welfare. For example, Valley County requires all short-term rentals to meet specific use, sanitation, parking, reporting, and inspection requirements. See Valley County Ordinance ("VCO") No. 20-10 (2020). Failure to obtain a permit or violation of the ordinance constitutes an infraction, and, after three infraction citations, the violator is subject to additional enforcement. See VCO No. 9-4-9-C (2020).

Sandpoint also requires permits and inspections for short term vacation rentals. See Sandpoint City Code ("SCC"), title 3, chapter 12. Additionally, short-term vacation rental owners must designate a local representative who permanently resides within 20 vehicular miles of the city's limits who the police may contact when necessary. See SCC § 3-12-4-A.2.g.(1).

Like Valley County and Sandpoint, McCall's short-term rental operators must adhere to certain parking, occupancy, noise, and safety mandates. McCall City Code ("MCC") § 3.13.09. Operators must have a business license, and the property manager's contact information must be provided to all property owners within 300 feet of the short-term vacation rental. See MCC § 3.13.09.A.6.

Coeur d'Alene allows a duplex or multi-family property to designate only one unit as a short-term vacation rental and requires a responsible party to respond within 60 minutes to complaints. See City of Coeur d'Alene Ordinance ("CCO") ch. 17.08. The city also has permit, occupancy, posting, sanitation, storage, and advertising restrictions. See CCO § 17.08.1040.

Mr. Lahaderne specifically asks whether Idaho Code section 67-6539 allows localities to regulate short-term vacation rentals to 30 days per year.[2] The county or city would need to establish that such a regulation protects the public's health, safety, and general welfare. Otherwise, it is unlikely the restriction would meet the "reasonable regulation" standard under Idaho Code section 67-6539.

If you have additional questions or want to discuss this issue further, please call me at 208-334-4135 or email me at stephanie.guyon@ag.idaho.gov.

Sincerely,

STEPHANIE N. GUYON
Deputy Attorney General
Consumer Protection
Division

[1] Idaho Code section 63-1803(4) defines "short-term rental" and "vacation rental" as "any individually or collectively owned single-family house or dwelling unit or any unit or group of units in a condominium, cooperative or timeshare, or owner-occupied residential home that is offered for a fee and for thirty (30) days or less." Property used for any retail, restaurant, banquet space, event center or another similar use is excluded from this definition.

[2] It does not appear that Blaine County or Sun Valley have comprehensive ordinances governing short-term vacation rentals.

August 20, 2021

Brady Hall
General Counsel
Office of the Governor
State of Idaho
P.O. Box 83720
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VIA EMAIL: brady.hall@gov.idaho.gov

Re: Supplemental Analysis of House Bill 220

Dear Mr. Hall:

This letter is a supplement to this office's prior analysis concerning House Bill 220,[1] the No Public Funds for Abortion Act (the "Act"), provided to you on May 10, 2021. A copy of the May 10 analysis is attached for reference. This supplemental analysis addresses potential legal issues and offers guidance on how to address those issues in the following categories: 1) application of the Act to state agency contracts; 2) federal preemption; 3) conflicts with existing state law; 4) criminal penalties; and 5) state agency compliance. As discussed herein, the Act contains a number of ambiguities, which lead to significant uncertainty on when and how the Act's requirement and prohibitions apply to public agency contracts and public agency contracting officials.

1. Application of the Act to Idaho State Agency Contracts

Despite the inclusion of a definition section (Idaho Code § 18-8702), a lack of clarity in the Act's terms and language creates considerable uncertainty as to how it will be interpreted and applied.

a. Ambiguous, overly broad, and undefined key terms create uncertainty in the scope and application of the Act

Idaho Code section 18-8703 (the "Contract Prohibition") applies to any public entity "contract" or "commercial transactions." The

Contract Prohibition further provides that no Idaho public agency may enter into a contract or commercial transaction with an "abortion provider" or an "affiliate" of an abortion provider unless the provider is within one of the listed exceptions.[2]

1) "Contract" undefined

The term "contract" is not defined for purposes of the Act. The Idaho Court of Appeals has recognized that "[a] contract is 'a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.'" Atwood v. W. Constr., Inc., 129 Idaho 234, 238, 923 P.2d 479, 483 (Ct. App. 1996) (quoting Restatement, 2d, Contracts § 1 (1981)).

2) "Commercial transaction" undefined

The term "commercial transaction" is also not defined for purposes of the Act. The legislature has defined "commercial transaction" for the purposes of attorney fee awards to mean all transactions except transactions for personal or household purposes. Idaho Code § 12-120(3). This definition is consistent with the Uniform Commercial Code, which governs transactions that are not consumer transactions. A consumer transaction is one that is primarily for personal, family or household purposes. See Idaho Code §§ 28-1-201(11) (definition of "consumer"), 28-9-102(26) (definition of "consumer transaction"). An Idaho agency is not entering a transaction for personal or household purposes; however, Idaho agencies are also not engaged in commercial activity.

The term "transaction" likely implies that it includes acts broader than entering a contract. See transaction, Black's Law Dictionary, 6th ed. 1991 ("An act, agreement or several acts or agreements between or among parties whereby a cause of action or alteration of legal rights occur. . . . It is a broader term than "contract."). The vague and undefined nature of the phrase "commercial transaction" arguably raises concerns that state employees could be subject to criminal prosecution for any arrangement with a party outside of their employer and entered as part of the employee's routine job duties.

3) Vague and overly broad definition of "affiliate"

The Act defines "Affiliate" as:

> an organization that owns or controls or is owned or controlled, in whole or in part, by the other; is related by shareholdings or other means of control; or is a subsidiary, parent, or sibling corporation.

Idaho Code § 18-8702(2). The Act does not provide any additional clarification as to the meaning of "control." As a result, it is uncertain whether the Act intends "control" to be solely in the context of common ownership or if it extends to contractual relationships where one party arguably exercises some level of control over the other pursuant to the terms of a contract.

If the Legislature intended the term "affiliate" to be interpreted broadly, to include links beyond common control or ownership, such an interpretation creates a number of challenges for Idaho's public agencies. If interpreted to include even a scintilla of control or ownership, it is foreseeable that many contractors, even outside the medical profession, could be interpreted as being affiliated with an abortion provider. For example, major corporations, such as Amazon, Microsoft, and IBM, likely have some degree of ownership in, or contracts with, companies or health systems that could be considered "abortion providers" under the Act, which would prevent Idaho's public agencies from contracting or conducting commercial contractions with those major corporations.

4) Ambiguity of the exception for "a contract or commercial transaction that is subject to a federal law related to [M]edicaid"

The Act provides that the government-contract prohibition does not apply to a contract or commercial transaction "that is subject to a federal law related to [M]edicaid." Idaho Code § 18-8703(2). But it is unclear how broadly the exemption will be interpreted. For example, are federal laws—e.g., the Health Insurance Portability and Accountability Act ("HIPAA") or the Affordable Care Act ("ACA")—to which government contracts are subject "related to Medicaid"? The answer to this question could impact a number of programs within the Idaho Department of Health and Welfare ("IDHW") that receive

Medicaid funding to contract with providers who (may perform or) be affiliated with providers who perform abortions. It is unclear whether the exemption would apply to permit IDHW to maintain provider contracts that would otherwise be prohibited under the Act, where a path for Medicaid reimbursement exists.

5) Broad definition of public funds

The Act defines "Public Funds" as:

> the funds of every political subdivision of the state wherein taxes are levied or fees are collected for any purpose and also refers to:
>
> (a) The revenue or money of a government, state, or municipal corporation;
>
> (b) The bonds, stocks, or other securities of a national or state government; and
>
> (c) Government spending for acquisition of goods and services for current use to directly satisfy individual or collective needs of the members of the community.

Idaho Code § 18-8702(5). Based on the inclusion of references to both national and state governments, public funds for purposes of the Act should be interpreted to include both federal funds received by public entities and state funds appropriated by the Legislature or collected pursuant to statute. However, while not addressed in the Act, to avoid potential constitutional issues on the limitation of speech, it is arguable that the prohibited use of public funds must relate to the good or service purchased through a contract, commercial transaction, or acquired with the grant. For example, if a public entity contract acquires school curricula, the procurement of such curricula falls under the Act's broad contracting prohibition. However, once the payment to the vendor is separated into payment of overhead and profit, the vendor's choice to use their profit for any purpose is no longer the use of the state's funds.

6) No definition for "abortion provider"

The Act does not specifically define the term "Abortion Provider." However, both "abortion" and "health care provider" are defined as:

> (1) "Abortion" means the act of using or prescribing any instrument, medicine, drug, or any other substance, device, or means with the intent to terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child. Such use, prescription, or means is not an abortion if done with the intent to save the life or preserve the health of the unborn child, remove a dead unborn child caused by spontaneous abortion, or remove an ectopic pregnancy.
>
> …
>
> (4) "Health care provider" means any person or individual who may be or is asked to participate in any way in any health care service. This includes but is not limited to doctors, nurse practitioners, physician assistants, nurses, nurses' aides, allied health professionals, medical assistants, hospital employees, clinic employees, nursing home employees, pharmacists, pharmacy technicians and employees, medical school faculty and students, nursing school faculty and students, psychology and counseling faculty and students, medical researchers, laboratory technicians, counselors, social workers, or any other person who facilitates or participates in the provision of health care services to any person.

Idaho Code § 18-8702(1), (4). Based on the definition of "health care provider" meaning "any person or individual who may be or is asked to participate in any health care service in any way," a reasonable conclusion would be to apply that same definition of "health care provider" to an abortion provider. Thus, an "abortion provider" is likely to be interpreted as any person or individual who may be or is asked to participate in performing abortions in any way.

Notably, there is an inconsistency in the Act between the broad contracting restriction prohibiting Idaho's public agencies from contracting with abortion providers or affiliates of abortion providers for any purpose, and the narrower restriction on the use of public funds for abortion or abortion-related services and activities. If the latter restriction were included in the former contracting prohibition, public entities likely would not be facing the possibility of violating the Act when potentially contracting with an abortion provider affiliate for goods and services not relating to health care or abortions or abortion-related services or activities.

b. Application to Contract Modifications

It is unclear whether the Act applies to amendments or renewals of existing contracts. The Contract Prohibition provides that "[t]he state . . . may not enter into any contract or commercial transaction with an abortion provider or an affiliate of an abortion provider." Idaho Code § 18-8703 (emphasis added). The plain language of the statute addresses the formation of the agreement and not subsequent modifications to the agreement.

The terms "extension" and "renewal," which are not addressed in the Act, are used interchangeably by some contract drafters. However, the context and intent of the parties can result in different legal meanings.

> The term "renewal" has multiple meanings. A renewal is "[t]he re-creation of a legal relationship or the replacement of an old contract with a new contract, as opposed to the mere extension of a previous relationship or contract." Black's Law Dictionary 1410 (9th ed. 2009). This definition of renewal includes an entirely new contract. This Court has noted, however, that renewal "is frequently used as synonymous with extension." Womble v. Walker, 181 Tenn. 246, 181 S.W.2d 5, 8 (1944) (internal quotation marks omitted). When used in the sense of a contract extension, a renewal is a contract for an additional period of time with the same terms and obligations as a prior contract and does not confer new obligations or rights. Cf. Womble,

181 S.W.2d at 8 (discussing renewal of a lease); Brewer v. Vanguard Ins. Co., 614 S.W.2d 360, 363 (Tenn. Ct. App. 1980) (discussing renewal of an insurance contract).

BSG, LLC v. Check Velocity, Inc., 395 S.W.3d 90 (Tenn. 2012). A term in the original contract allowing for continuation of the contract, regardless of the terminology used, is accepted at the time the original contract is formed. It is akin to an option preserved by the parties at the time of contracting and is not a new contract. See Womble, 181 S.W. 2d at 8 (lease and option to purchase were "separate but not severable because they were supported by unseparated consideration"); Savage v. State, 453 P.2d 613, 620 (Wash. Ct. App. 1969) ("The contract before us clearly provides for an extension of the duration of the purchase agreement rather than a renewal and execution of a new contract."). Where a contract is continued in accordance with provisions for such continuation, it is not "entered" at that time. Applying the Contract Prohibition to a pre-existing contractually-provided extension would also implicate the state and federal constitutional provisions concerning the impairment of contracts discussed in greater detail in the May 10 response. For these reasons, the Contract Prohibition does not apply to an extension of the term of an agreement provided for by the terms of the original agreement.

A contract amendment is generally considered a modification of a contract previously entered between the parties changing one or more provisions of the agreement upon mutual assent and an exchange of consideration. An amendment is not a new contract if it is a continuation of the work provided for in the original contract. See 41 U.S.C. § 3105 (defining a new contract for the purposes of Federal procurement policy). An amendment does not establish a new contract triggering the Contract Prohibition.[3]

2. Potential Preemption of the Act by Federal Law

The Act presents instances where federal law may preempt a broad interpretation of the Act. Two instances, discussed below, are the ACA's provisions concerning health insurance and federally-established grant programs. Under the Supremacy Clause, Article VI, clause 2 of the United States Constitution, the laws, treaties and

constitution of the United States "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Accordingly, courts "must not give effect to state laws that conflict with federal laws." Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 324, 135 S. Ct. 1378, 1383, 191 L. Ed. 2d 471 (2015) (citation omitted). "The preemption of state law is not to be readily inferred." Christian v. Mason, 148 Idaho 149, 152, 219 P.3d 473, 476 (2009) (quoting In re Estate of Mundell, 124 Idaho 152, 153, 857 P.2d 631, 632 (1993)). A state law may be preempted (1) "if Congress has shown the intent to occupy a given field" and the state law intrudes into that field; or (2) absent field-preemption but where the state law conflicts with a federal law, to the extent of the conflict. Id.

To find that a state law has been preempted, a court must find the law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Id. (quoting Mundell, 124 Idaho at 153, 857 P.2d at 632). Stated another way, to find preemption, the court must find the state law "is directly contrary to the congressional intent behind a federal statute[.]" Id. Importantly, the United States Supreme Court has held that the Supremacy Clause does not itself create a cause of action nor provide a source of federal rights. Armstrong, 575 U.S. at 324-25. Further, courts' equitable powers to enjoin state action in conflict with federal law are subject to statutory limitations—that is, limitations expressed or implied by Congress. Id. at 327.

a. The Federal Affordable Care Act

The ACA, passed in 2010, was enacted to extend health insurance coverage nationwide by expanding private and public insurance through health benefit exchanges. The ACA provides, "Nothing in this title shall be construed to preempt any State law that does not prevent the application of the provisions of this title." 42 U.S.C. § 18041(d) (2012). The Eighth Circuit narrowly held that three provisions in Missouri law imposing limits on federal health exchanges under the ACA were preempted, noting that only the state law provisions "that 'hinder or impede' the implementation of the ACA run afoul of the Supremacy Clause." St. Louis Effort for AIDS v. Huff, 782 F.3d 1016, 1022 (8th Cir. 2015) (citation omitted).

Among the ACA's various requirements are mandatory coverages for health insurance policies. Notably, policies must cover contraceptives such as inter-uterine devices (IUDs), hormonal contraception, and preventative emergency contraception under the ACA. However, the ACA does not require coverage for abortion-inducing emergency contraception. It seems unlikely, though not impossible, that a court would find a drug or device used or prescribed "with the intent to terminate a clinically diagnosable pregnancy" includes such contraceptives, and especially preventative emergency contraception. Given that these health insurance policies subject to the ACA are procured by state and local governments for their employees, Idaho public agencies may face a conflict between obtaining health insurance policies that comply with the ACA and with the contract prohibition set forth in the Act. See Idaho Code § 18-8703.

Despite the Eighth Circuit's narrow construction of the ACA's preemption clause, and the requirement in Armstrong that preemption requires that a state law be "directly contrary to the congressional intent behind a federal statute," see Christian, 148 Idaho at 152, 219 P.3d at 476, it is possible the ACA preempts the Act for purposes of certain health care coverages. If the Act hinders or impedes implementation of the ACA in extending health insurance coverage or coverage of birth control and emergency contraceptives, it is contrary to Congress's intent. Conversely, there is no preemption if the Act's provisions prohibiting contracts only indirectly impact the expansion of health insurance, including the coverage of birth control and emergency contraceptives within the coverage of ACA regulated plans.

b. Federal grant program terms

Absent an impediment to the implementation of a federal law, the Supremacy Clause does not preempt state laws that merely impact state agencies' receipt of federal grant funding. Even where a federal law may provide for federal grant money to state programs, the effect of the Act's prohibition against certain contracts would arguably be indirect. Additionally, the impact of the Act on federal grants may be minimized by the Act's own exemptions concerning hospitals and contracts or commercial transactions subject to federal law related to Medicaid. See Idaho Code § 18-8705.[4] Moreover, while federal grant funds likely meet the Act's definition of "public funds," it's unclear under

the Act whether a grant agreement constitutes a contract or commercial transition.[5] Notably, Idaho's Division of Purchasing does not consider agreements that only serve to administer funding through a State grant program or a sub-grant of federal funding, subject to the Idaho State Procurement Act.

3. Conflicts With Idaho's Managed Care Reform Act

The definitions within the Act could create conflicts with Idaho's Managed Care Reform Act ("MCRA"). The MCRA was enacted "to eliminate legal barriers to the establishment of managed care plans which provide readily available, accessible and quality health care to their members and to encourage their development as an optional method of health care delivery." Idaho Code § 41-3902. That provision continues, "The state of Idaho must have reasonable assurance that organizations offering managed care plans within this state are financially and administratively sound and responsive to the needs of their members, and that such organizations are, in fact, able to deliver the benefits which they offer." Id.

A "managed care plan" is:

> a contract of coverage given to an individual, family or group of covered individuals pursuant to which a member is entitled to receive a defined set of health care benefits through an organized system of health care providers in exchange for defined consideration and which requires the member to use, or creates financial incentives for the member to use, health care providers owned, managed, employed by or under contract with the managed care organization.

Idaho Code § 41-3903(15). A "managed care organization" ("MCO") is defined as "a public or private person or organization which offers a managed care plan." Idaho Code § 41-3903(14). It is unclear what the term "public" means in this definition, and the MCRA offers no further clarification. In the complex field of managed healthcare, "MCO" often broadly describes the various types of managed care arrangements or health plans to finance and deliver healthcare.[6] As used in section 41-3903(14), a "public MCO" could mean those healthcare plans offered

to public-sector employees by their employer. In this context, although a public MCO would provide healthcare plans to government employees, the MCO itself is not the government, but an entity contracting with the government.

Idaho Code section 41-3927 requires MCOs to accept and enroll any qualified, willing provider into its network. The Idaho Supreme Court has found that the purpose of the "willing provider" statute is "to preserve, to the maximum extent possible, the right of a patient to select his own treatment provider, subject only to the provider's willingness and ability to comply with the basic requirements of the managed care plan." Idaho Cardiology Assocs., P.A. v. Idaho Physicians Network, Inc., 141 Idaho 223, 227-28, 108 P.3d 370, 374-75 (2005). Under this reasoning, an MCO may not fail to enroll a willing provider on the basis that such provider performs abortions. If the Act prohibited an MCO from enrolling a willing provider on such basis, it would conflict with the willing provider statute. The Act could be seen to avoid this conflict: it prohibits a government entity from contracting with abortion providers or their affiliates; it does not prohibit an MCO for a government employer from contracting with abortion providers.[7]

"[W]here two statutes conflict, courts should apply the more recent and more specifically applicable statute." Eller v. Idaho State Police, 165 Idaho 147, 154, 443 P.3d 161, 168 (2019) (citations omitted). Where the Act and MCRA may conflict, the Act is clearly the more recent, but not clearly the more specific. "A basic tenet of statutory construction is that the more specific statute or section addressing the issue controls over the statute that is more general." Id. at 155, 443 P.3d at 169 (citations omitted). The situation in which a conflict might exist is an indirect application of the Act—where a government employer contracts with an MCO that is affiliated with an abortion provider by virtue of having enrolled the provider in the MCO's network. Arguably, the indirectness of this application of the Act (to prohibit the government's contract with an MCO) makes it less specific than the application of the MCRA requiring the MCO to enroll the provider. But absent case law on point, it is difficult to predict what conclusion a court would reach.

4. The Criminal Provision: Idaho Code section 18-8709

a. Interpretation and application of the Act's criminal penalties

The Act prohibits the use of public resources for abortions and abortion-related services. Section 18-8709 states: "Any intentional violation of the provisions of this chapter by a public officer or public employee shall be considered a misuse of public moneys punishable under section 18-5702, Idaho Code." The misuse of public funds statute, Idaho Code section 18-5702, already criminalizes the use of public funds in certain prohibited ways, and it has withstood various challenges in court. See, e.g., State v. Olsen, 161 Idaho 385, 388-90, 386 P.3d 908, 911-13 (2016). Section 18-8709 simply adds abortions and abortion-related services to the list of prohibited uses of public resources. Assuming the restrictions in the Act are upheld in court, the crime codified at section 18-8709 would also likely be upheld.

Section 18-8709's use of the phrase "intentional violation" raises the question of what intent a prosecutor would have to prove to impose the criminal penalty. Idaho law requires every crime to include "a union, or joint operation, of act and intent, or criminal negligence." Idaho Code § 18-114. The phrase "intentional violation" indicates the statute requires a criminal intent, as opposed to criminal negligence or recklessness. But the question remains whether the intent required is a general criminal intent or a specific criminal intent. "A general criminal intent requirement is satisfied if it is shown that the defendant knowingly performed the proscribed acts, but a specific intent requirement refers to that state of mind which in part defines the crime and is an element thereof." State v. Stiffler, 117 Idaho 405, 406, 788 P.2d 220, 221 (1990) (citation omitted). The Idaho Supreme Court determines whether a crime requires proof of a specific intent by reviewing the language and purpose of the criminal statute. See State v. Sterrett, 35 Idaho 580, 583, 207 P. 1071, 1072 (1922).

At first blush, the language of section 18-8709 is ambiguous. The phrase "intentional violation" could refer to an intentional act that results in a violation of the Act, such as a public officer who intentionally contracts with an abortion provider. That would make section 18-8709 a general intent crime. But the phrase could also refer to a deliberate or planned violation of the law, which would require proof that the public officer knew about section 18-8709 and intended to violate it. That

would make section 18-8709 a specific intent crime. As the Idaho Supreme Court has explained, however, a reference to intent in the criminal context generally "mean[s] not an intent to commit a crime, but is merely the intent knowingly to perform the interdicted act." State v. Booton, 85 Idaho 51, 56, 375 P.2d 536, 538-39 (1962).

The purpose of the Act most likely supports a general-intent interpretation. The purpose of the Act is to "ensure[] taxpayer dollars do not support the abortion industry[.]" Statement of Purpose, H.B. 220, 66th Leg., 1st Reg. Sess. (Idaho 2021). Reading a specific intent requirement into the statute would be inconsistent with this stated purpose. Taxpayer dollars spent on abortion would "support the abortion industry," id., regardless of whether the public official or employee who authorized the expenditure specifically intended to violate the Act.

This general-intent interpretation of section 18-8709 is also consistent with the misuse of public funds statute, which the Legislature chose to expressly reference in section 18-8709. Section 18-8709 states that a violation of the Act "shall be considered a misuse of public moneys punishable under section 18-5702, Idaho Code." And the Idaho Supreme Court has held that the misuse of public funds is a general intent crime. See State v. Taylor, 59 Idaho 724, 738, 87 P.2d 454, 460-61 (1939).

Thus, for the criminal penalty described in section 18-8709 to apply, a public official or employee must have intended to perform an act prohibited by the Act—negligence or recklessness is insufficient. But the public official or employee does not also need to intend to violate the Act. This means a public official or employee who intentionally enters into a contract or commercial transaction with an abortion provider or affiliate of a provider, authorizes the use of public funds for an abortion, or otherwise intentionally engages in conduct that violates the Act has satisfied the intent requirement. See Idaho Code § 18-8705. This is so regardless of whether he or she also acted with the specific intent to violate the Act. The criminal penalty would likely not apply to a public official who engaged in conduct, but did not realize the conduct would relate to abortion, such as entering into a contract without knowledge or reason to believe the other party was an abortion provider or an affiliate of an abortion provider.

Thus, if a public official contracts with an organization that is an affiliate of an abortion provider, but the public official does not know the organization is an affiliate of an abortion provider, the public official has not committed a crime. He lacks the requisite intent to contract with an affiliate of an abortion provider. That remains true even if the public official's ignorance traces back to a negligent or reckless omission of the public official's due diligence. The public official's negligence or recklessness does not rise to the level of an intentional violation and thus would not constitute a crime under sections 18-5702, 18-8703, and 18-8709. However, ignorance may not always work as a defense. If a public officer or employee purposefully avoids knowledge of whether an organization is an abortion affiliate with the intent to sidestep the Act, a court may find the purposeful avoidance of information sufficient to satisfy the "intentional violation" language of section 18-8709.

b. State contracting officials and related employees are potentially subject to criminal charges under the Act

Section 18-8709 imposes a criminal penalty on any public officer or public employee who intentionally violates the Act. It thus criminalizes the use of public funds to support the abortion industry in a variety of ways, including entering into contracts with abortion providers and their affiliates (Idaho Code § 18-8703); contracting for abortion procedures (Idaho Code § 18-8704); expending public funds on abortion-related services or promotions (Idaho Code § 18-8705); expending money from tuition or fees on abortion-related services (Idaho Code § 18-8706); using school-based health clinics to train for or provide abortion-related services (Idaho Code § 18-8707); and using public facilities or assets for abortion-related services (Idaho Code § 18-8708).

The Act does not define "public officer" or "public employee." However, the plain meaning of those phrases suggests section 18-8709 could apply to any employee or official of the State or any of its political subdivisions. The public officers and employees most readily able to commit the crime created by section 18-8709 are those public officials and employees who (1) sign contracts on behalf of the entity for whom they work, (2) play a role in the disbursement of public funds, (3) play a role in the disbursement of funds collected from tuition and

fees, (4) preside over or teach in school-based health clinics, or (5) preside over public facilities or assets that might be used for abortion related services. But criminal liability is not limited to those individuals.

For purposes of criminal liability, Idaho law does not distinguish between individuals who directly commit a crime and those who merely assist in its commission. Idaho Code § 18-204. The aider and abettor has not committed a crime, however, unless he or she also has the requisite criminal intent. See State v. Wilson, 165 Idaho 64, 67, 438 P.3d 302, 305 (2019). For example, a public official who helps negotiate a contract with an abortion provider could be prosecuted just the same as the public official who signs his or her name on the contract, so long as the official who helped negotiate the deal had the intent to contract with an abortion provider or an abortion provider affiliate.

Similarly, Idaho law punishes as a separate crime the agreement or conspiracy to violate any state criminal law, which would include section 18-8709. See Idaho Code § 18-1701. To prove a conspiracy, the State must prove the agreement to commit a crime and an overt act in furtherance of the conspiracy. See id. For example, if a group of public officials agrees to contract with an abortion provider and one of the public officials signs a contract with the abortion provider, all of the public officials could be prosecuted for the crime of conspiring to violate section 18-8709.

5. State agencies' efforts to comply with the Act

Thus far, this office has not provided any state agencies with a proposed contract term specific to the Act. This is primarily because the requirements of the Act are agency responsibilities and not the responsibility of contractors. The result of a contract or commercial transaction entered in violation of the Act is a criminal penalty for the public official entering, or potentially involved with entering, the contract or commercial transaction. The Act does not expressly state such contracts or commercial transactions are void or voidable or otherwise impose any penalty on the contractor.

Ideally, state agencies will postpone entering into new contracts or renewals (if possible) until a consistent path forward is established

by the Governor's Office. However, if time is of the essence, this office has advised state agencies to use a written acknowledgment process, separate from the actual contract, in an effort to comply with the Act. A sample acknowledgement is as follows:

> Dear VENDOR,
>
> The Idaho Legislature recently enacted the No Public Funds for Abortion Act (House Bill No. 220), effective May 10, 2021 ("NFAA"). See https://legislature.idaho.gov/sessioninfo/2021/legislation/H0220/. In an effort to ensure the [AGENCY] ("AGENCY") is compliant with the NFAA, the [AGENCY] is requesting that you acknowledge your receipt of the following:
>
> > The State of Idaho, including the [AGENCY], is subject to the No Public Funds for Abortion Act, Idaho Code title 18, chapter 87 (the "Act") and State employees who intentionally violate the provisions of the Act are subject to criminal prosecution. The State requests that vendors disclose, unless within one of the exemptions provided in the Act, if it or an affiliate is or becomes, during the term of a contract, an abortion provider and if it will use state facilities or public funds to provide, perform, participate in, promote or induce, assist, counsel in favor, refer or train a person for an abortion related activity. Please refer to the Act for definitions of the terms used in this section.
>
> Please acknowledge your receipt of this request and provide any information that is relevant to the [AGENCY'S] obligations under the NFAA to me along with your acknowledgment.
>
> Sincerely,
>
> NAME

Some state agencies have expressed a desire to include a specific term within their contracts to address the requirements and constraints imposed by the Act. As stated and set forth above, this office has advised state agencies to use a written acknowledgment process rather than an actual contract term. Any state agencies considering the use of a contract term specific to the Act will need to carefully consider other contract terms, such as termination, remedies, warranties, indemnification, insurance, and third-party beneficiaries. State agencies and their counsel will also need to consider whether such a term conflicts with any of the agency's statutes, rules, or funding requirements. If a contract term is ultimately utilized by a state agency, this office recommends using the following template term as a starting point for developing an appropriate term based on the needs and circumstances of the state agency:

> **No Public Funds for Abortion Act**. [Agency] is subject to the No Public Funds for Abortion Act, Idaho Code title 18, chapter 87 (the "Act"). In furtherance of [Agency's] compliance with the Act, [Contractor] represents and warrants that, except as exempted under the Act, [Contractor]:
>
> i. Is not an abortion provider or an affiliate of an abortion provider under the provisions of Idaho Code sections 18-8903 to -8905; and
> ii. Will not use funds received under this Agreement for any abortion-related activities as prohibited by Idaho Code section 18-8905.
>
> The warranty provided in this section is continuing. [Contractor] shall notify [Agency] if it is unable to represent subsections i. and ii. above at any time during the term of this Agreement. Notwithstanding any other provision of this Agreement, [Agency] may terminate the Agreement if [Contractor] is unable or unwilling to make the above representations. Upon any such termination, all affected future rights and liabilities of the parties shall thereupon cease, and [Agency] shall not be liable for any penalty, expense, or liability, or for general, special,

incidental, consequential or other damages resulting therefrom.

Consistency among agencies in their approach to the Act will be critical. Without a coordinated effort, the State could have agencies taking different approaches, which will likely have varying degrees of success and could create issues for other agencies. A consistent approach could also provide a path for state employees that, if diligently and honestly followed, would help protect them from criminal prosecution. The State's coordinated response to the Act could potentially include executive action by the Governor to establish a consistent path for state agencies to enter contracts and commercial transactions given that the Act is now law.

The Governor's Office and state agencies will also need to coordinate with the Office of Risk Management on some very important issues, such as: potentially providing a state official charged under the Act with a criminal defense; potentially covering any criminal restitution ordered against a state official convicted of violating the Act; and potentially attempting to recover any of the preceding costs from a contractor if the contractor is determined to have misrepresented not being an abortion provider or an affiliate of an abortion provider.

Ultimately, there is considerable uncertainty about how the Act will be implemented and applied to Idaho's state agencies in the conduct of state business, and how it may impact public employees in criminal contexts.

I hope you find this response helpful. If you have further questions, please do not hesitate to contact me.

Sincerely,

BRIAN KANE
Chief Deputy

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[1] H.B. 220, 66th Leg., Reg. Sess. (Idaho 2021).

[2] The listed exceptions include: (1) a contract or commercial transaction with a hospital; and (2) a contract or commercial transaction that is "subject to a federal law related to Medicaid." Idaho Code § 18-8703(2). See also footnote 1 above.

[3] An "amendment" could potentially be considered to create a new contract when both creates and exercises an option to extend not included in the underlying contract. In such a scenario, the Act could apply to the amended contract.

[4] Under the Act, sections 18-8703, -8704, -8705, and -8708 provide that the Act shall not apply to hospitals (as defined in section 39-1301) or to "a contract or commercial transaction that is subject to a federal law related to Medicaid." However, contracts or commercial transactions with affiliates of hospitals are not excepted from the Act. Also, the Act is unclear with regard to the scope of the phrase "subject to federal law related to Medicaid."

[5] See additional discussion in section 3.a. of this supplemental response.

[6] See https://cookchildrens.org/education/Documents/School%20Nurses/Managed%20Care%20101.pdf.

[7] A more remote interpretation could be that if an MCO is deemed "an affiliate" of an abortion provider by virtue of having enrolled the provider in its healthcare network, then the government employer would be prohibited from contracting with the MCO under section 18-8703(1) of the Act, which would be inconsistent with the MCRA's willing provider provision.

August 31, 2021

The Honorable Colin Nash
Idaho House of Representatives
Idaho State Capitol
700 W. Jefferson Street
Boise, Idaho 83702
VIA EMAIL: cnash@house.idaho.gov

Re: Requiring COVID-19 Vaccine for Receipt of Public Benefits

Dear Representative Nash:

On August 25, 2021, you requested an analysis of whether: (1) the State of Idaho could require that recipients of public benefits, such as Medicaid, be vaccinated for COVID-19 as a condition of the receipt of these benefits; and (2) whether the State of Idaho could charge a co-pay for Medicaid services and waive that co-pay if the Medicaid recipient is vaccinated. The following analysis will be limited to Medicaid. If you have concerns or questions regarding other public assistance programs, please let me know.

As a preliminary matter it should be noted that the State of Idaho has accepted an additional 6.2% of Medicaid funding from the federal government, the receipt of which prohibits the State of Idaho from making Medicaid eligibility more restrictive during the COVID-19 Public Health Emergency ("PHE").[1] Therefore, if the proposed COVID-19 vaccine mandate for Medicaid recipients was sought and granted during the PHE, the State of Idaho would lose this additional Medicaid funding. Due to this conflict, the question of imposing a COVID-19 vaccine mandate for Medicaid recipients will only be analyzed in the context of imposing this condition after the PHE has ended.

As a general note, any changes to Medicaid eligibility (such as a mandatory COVID-19 vaccine) or changes in cost-sharing (such as waiving a copay) would require an amendment of Idaho's Medicaid state plan or the grant of a waiver, which is subject to approval by the Health and Human Services ("HHS") Secretary. An application and

approval process are required, and the approval or denial of such a request is subject to the broad discretion of HHS.

Regarding a COVID-19 vaccine mandate for Medicaid recipients, it is not clear that imposing this requirement would be permissible under federal law. It is also not clear that HHS would approve this requirement even if it was permissible because the federal government has avoided imposing a vaccine mandate for Medicaid recipients thus far. It is not clear that such a waiver would survive a legal challenge if granted by HHS because it would likely result in an appreciable decrease in the number of Medicaid eligible individuals in the state of Idaho. Lastly, exceptions to the vaccine requirement would need to be included for religious and medical reasons in order to comply with other laws.

Regarding waiving a co-pay for Medicaid recipients who have received the COVID-19 vaccine, the State of Idaho has waived Medicaid copays during the PHE.[2] Therefore, this question will only be analyzed in the context of enacting the copay waiver for Medicaid recipients who have received the COVID-19 vaccine after the PHE has ended. It may be difficult to justify this waiver if the PHE has ended. It is not clear that such a waiver would have much effect in application because copays may only be charged for certain Medicaid recipients in limited circumstances, and the population affected by such a waiver may be very small. Lastly, it is not clear that HHS would approve such a waiver even if it is permissible.

I. Mandatory Vaccines for Medicaid Recipients.

The Medicaid program is a cooperative program entered into between the federal government and participating states. Harris v. McRae, 448 U.S. 297, 308, 100 S. Ct. 2671, 2683, 65 L. Ed. 2d 784 (1980). The purpose of this program is to assist states in furnishing healthcare to needy persons. Id. Under the Medicaid program, the State of Idaho makes legislation and rules which are submitted to the Secretary of HHS for approval. In re Estate of Wiggins, 155 Idaho 116, 119, 306 P.3d 201, 204 (2013). 42 U.S.C. § 1396a(a) through (b) provides that states participating in the Medicaid program are required to submit state plans to HHS for approval. States are limited to

administering the Medicaid program pursuant to state plans approved by HHS. See id.

On August 18, 2021, the Centers for Medicare and Medicaid Services ("CMS") announced that new emergency regulations will be published that require all Medicaid and Medicare participating nursing homes to require vaccines for staff.[3] Current and proposed federal regulations do not require Medicaid recipients to receive a COVID-19 vaccine. The Idaho Medicaid state plans currently in effect do not require vaccinations in order for applicants to receive Medicaid benefits.[4] If the State of Idaho wished to require that Medicaid recipients receive the COVID-19 vaccine as a condition of benefits, the State of Idaho would need to submit a state plan amendment to HHS for approval. The question then becomes whether HHS has the authority to approve a state plan with this requirement.

HHS authority is a creature of statute, and authority to approve or deny a state plan is limited to that authority provided by statute. 42 U.S.C. § 1396a(b) provides that HHS "shall" approve any state plan which meets the criteria set forth in Section 1396a(a). The conditions set forth in subsection (a) do not require vaccines for Medicaid recipients, nor do these conditions require that a state plan not mandate vaccines for Medicaid recipients. See 42 U.S.C. § 1396a(a). HHS is expressly prohibited from approving a plan which: (1) sets an age requirement of more than 65 years; (2) sets a residence requirement, which excludes an individual residing in the state; and (3) citizenship requirements, which excludes any citizen of the United States. 42 U.S.C. § 1396a(b). Therefore, the United States Code is silent as to whether HHS may approve a state plan which requires COVID-19 vaccines for Medicaid recipients. However, it appears unlikely that a state plan could be approved under § 1396a(b) if the plan mandated vaccines for Medicaid recipients because it would likely result in not allowing Medicaid coverage to certain persons required to be covered by the state plan.[5]

If it is not permissible for HHS to approve a state plan mandating COVID-19 vaccines for Medicaid recipients, the remaining option for mandating COVID-19 vaccines for Medicaid recipients would be for the State of Idaho to request a state plan waiver to implement this condition of coverage. HHS has broad authority to grant approval of state plans

which are "experimental, pilot, or demonstration projects" and which are "likely to assist in promoting the objectives of" Medicaid. 42 U.S.C. § 1315(a). State plans approved under § 1315(a) have become known as "waivers."

In Stewart v. Azar and Gresham v. Azar, Medicaid recipients challenged state work requirements for Medicaid approved by HHS as a waiver. The D.C. District Court and D.C. Circuit Court of Appeals struck down these work requirements. Stewart v. Azar, 366 F. Supp. 3d 125 (D.D.C. 2019); Gresham v. Azar, 950 F.3d 93 (D.C. Cir. 2020). The premise of these decisions was that imposing a work requirement resulted in fewer individuals within these states (Kentucky and Arkansas) being eligible for coverage, which is contrary to the purpose of Medicaid, and contrary to HHS's authority to approve state plan waivers. See Stewart, 366 F. Supp. 3d at 139-40; Gresham, 950 F.3d at 99-100. Thus, it is likely that a state plan amendment will be struck down if the waiver results in an appreciable reduction in the number of eligible Medicaid participants compared to the previous state plan.[6]

If the State of Idaho submitted a state plan waiver to HHS for approval, which included a COVID-19 vaccine mandate, such a plan would likely need to contain exceptions to the mandate, such as religious or medical grounds for refusing the vaccine, in order to comply with other state and federal laws.[7] It should also be noted Medicaid provides medical assistance to minors as well as adults. A COVID-19 vaccine has not yet been approved for minors less than 12 years old. Requiring a COVID-19 vaccine for minor Medicaid recipients 12 to 18 years old may also result in additional obstacles because a minor's parent or guardian must consent to vaccination on behalf of the minor.[8] If a state plan waiver is pursued, the best course of action may be to only require COVID-19 vaccinations for adults. If a COVID-19 vaccine mandate was approved by HHS through a state plan waiver request, it is likely that this approval would be challenged by individuals excluded from Medicaid who would otherwise be eligible. It appears likely that HHS approval of such a waiver would be struck down if it resulted in an appreciable decrease in the number of Medicaid eligible individuals within the state of Idaho.[9]

II. Waiver of Medicaid Copay for Vaccinated Medicaid Recipients.

States have the discretion to include in a state plan that certain Medicaid recipients pay enrollment fees, premiums, and copays in limited circumstances. 42 U.S.C. § 1396a(a)(14); 42 C.F.R. § 447.52. Under the state plan approved for Idaho currently, certain Medicaid recipients are required to pay a copay in limited circumstances: (1) chiropractic care; (2) doctor and healthcare provider visits; (3) occupational therapy; (4) physical therapy; (5) podiatry; (6) speech therapy; (7) vision; and (8) use of emergency services in non-emergency circumstances.[10] IDAPA § 16.03.08; IDAPA 16.03.09.165. The number of Medicaid recipients paying a copay for Medicaid eligible services in the state of Idaho is not likely to be very high because the State of Idaho may only charge a copay for certain Medicaid recipients in limited circumstances. See 42 U.S.C. § 1396(a)(14). The amount of the copay is quite small, $3.65. IDAPA 16.03.18.310.02.

On March 23, 2020, Governor Little issued a proclamation confirming the suspension of Medicaid copays for the state of Idaho during the PHE. If the State of Idaho wished to waive copays for Medicaid recipients that have been vaccinated after the PHE has ended, the State of Idaho would need to submit a state plan amendment or waiver request to HHS for approval. A waiver request may be the best course of action because of the broad discretion granted to HHS to approve waivers. If challenged in court, HHS could argue that the copay waiver for Medicaid recipients that have received the COVID-19 vaccine promotes the goals of Medicaid because the waiver promotes the health of the Medicaid participant. It also appears that waiving the existing copay for vaccinated Medicaid recipients would not result in a denial of coverage to currently eligible Medicaid recipients.[11]

However, it should be noted that HHS has broad authority to approve or deny Medicaid waiver requests, and that HHS may not approve the copay waiver even if it is permissible. As discussed in the preceding section, HHS appears to prefer placing the burden of stopping the spread of COVID-19 on Medicaid providers and facilities. Since the copay waiver is an incentive and not a mandate, it is not clear

whether HHS would approve a copay waiver for Medicaid recipients who have been vaccinated for COVID-19 as a state plan waiver.

There is another species of waiver known as "innovation" waivers granted through section 1332 of the Affordable Care Act[12] ("ACA") subject to joint approval of the Secretary of the Department of Treasury ("SDT") and HHS. However, an innovation waiver is prohibited under section 6008 during the PHE due to Idaho's receipt of additional funding for the Medicaid program through the FFCRA. Approval of an innovation waiver requires that HHS and SDT determine that the waiver: (1) will provide coverage that is at least as comprehensive as the coverage provided without the waiver; (2) provide coverage and cost-sharing protections against excessive out-of-pocket spending that are at least as affordable as without the waiver; (3) provide coverage to at least a comparable number of residents as without the waiver; and (4) will not increase the federal deficit. 42 U.S.C. § 18052(b)(1). The proposed waiver of existing copays for Medicaid recipients that have received the COVID-19 vaccine would appear to meet these standards. However, it is not clear that the proposed waiver would be consistent with the purpose of section 1332.[13] It is not clear that a request for an innovation waiver to waive copays for Medicaid recipients who have been vaccinated for COVID-19 would be granted.

I hope you find this analysis helpful. If you have further questions, please contact Brian Kane.

Sincerely,

JEREMY C. YOUNGGREN
Deputy Attorney General

[1] Section 6008(a) of the Families First Coronavirus Response Act ("FFCRA") has authorized an additional 6.2% in Medicaid funding from the federal government to the states. Pub. L. No. 116-127, § 6008(a), 134 Stat. 208 (2020). Receipt of this additional funding requires that states not amend a state Medicaid plan during the PHE if the amendment imposes eligibility standards that are more restrictive than the eligibility standards in effect on January 1, 2020. FFCRA § 6008(b). The State of Idaho has accepted these additional funds. Imposing a COVID-19 vaccine mandate for Medicaid

recipients would fall within this prohibition. This prohibition extends until the last day of the calendar quarter in which the PHE ends. FFCRA § 6008(a).

[2] See Office of the Governor, State of Idaho, Proclamation (Mar. 23, 2020), https://coronavirus.idaho.gov/wp-content/uploads/sites/127/2020/03/proclamation_agency-rules_032320.pdf (accessed Aug. 30, 2021).

[3] Press Release, Centers for Medicare & Medicaid Services, Biden-Harris Administration Takes Additional Action to Protect America's Nursing Home Residents from COVID-19 (Aug. 18, 2021), https://www.cms.gov/newsroom/press-releases/biden-harris-administration-takes-additional-action-protect-americas-nursing-home-residents-covid-19.

[4] See Idaho Dep't of Health & Welfare, Health Plans, https://publicdocuments.dhw.idaho.gov/WebLink/Browse.aspx?id=11462&dbid=0&repo=PUBLIC-DOCUMENTS&cr=1 (accessed Aug. 25, 2021).

[5] 42 U.S.C. § 1396a(a)(10) requires that the state plan provide coverage for all individuals who meet certain criteria such as income and disability, regardless of vaccine status. It should be noted that this subsection of § 1396a was amended by the American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9811, 135 Stat. 208. Congress had the opportunity to amend this statute to require COVID-19 vaccines for Medicaid recipient and did not do so. This suggests that Congress did not intend for COVID-19 vaccines to be mandatory for Medicaid recipients.

[6] It should be noted that Idaho submitted a state plan waiver request to institute a work program, and it has not been approved by HHS. Medicaid, State Waivers List, https://www.medicaid.gov/medicaid/section-1115-demo/demonstration-and-waiver-list/index.html (accessed Aug. 26, 2021).

[7] For example, Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e et seq., and the Americans with Disabilities Act, 42 U.S.C. §§ 12111 et seq. (the "ADA"), which in practice would require exemptions from the COVID-19 vaccine for religious and medical reasons.

[8] Mandating a COVID-19 vaccine in order to receive Medicaid benefits may be difficult to justify with respect to minors because minors lack free agency regarding healthcare decisions and any financial impact is borne by the guardian or parents.

[9] The work requirement waiver in Kentucky that was struck down would have resulted in coverage loss to 95,000 per HHS. See Stewart, 366 F. Supp. 3d at 140. However, amici arguing on behalf of the harmed Medicaid recipients argued that the work requirement would have result in coverage loss to between 175,000 to 297,500 Kentuckians. Id.

[10] Idaho Health Plan English Accessed August 25, 2021.

[11] The waiver would also appear to not violate the "comparability" clause in 42 U.S.C. § 1396a(a)(30)(A) because this clause only requires Medicaid services to be available to Medicaid recipients to the same extent such services are available to non-Medicaid individuals in the same

geographic area. A copay would not affect the comparability clause unless the copay is so high as to render the service unavailable to a Medicaid recipient. Waiving a copay would appear to comply with the comparability clause. For individuals currently paying a copay who are not vaccinated and do not wish to be vaccinated, their Medicaid benefits would remain unchanged.

[12] Pub. L. No. 111-148, § 1332, 124 Stat. 203 (codified at 42 U.S.C. § 18052).

[13] Guidance published by CMS suggests that the purpose of innovative waiver program is "pursue innovative strategies for providing residents with access to high quality, affordable health insurance while retaining the basis protections of the ACA. Centers for Medicare & Medicaid Services, Section 1332: State Innovation Waivers, https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section_1332_State_Innovation_Waivers- (accessed Aug. 27, 2021).

September 24, 2021

The Honorable Wendy Horman
Idaho House of Representatives
Idaho State Capitol
700 W. Jefferson Street
Boise, Idaho 83702
VIA EMAIL: wendyhorman@house.idaho.gov

Re: Education Funding Inquiry

Dear Representative Horman:

You asked a question of our office regarding federal education funding and whether the State would still be required to comply with the provisions of an act, even if the State no longer received federal funding under the applicable act:

> My question is specifically around K12 federal title funds. Our massive surplus is leading some, including me, to wonder if we refused the $260ish million in title funds, could we make our own decisions around special education and learning environments for students in poverty, learning English etc. Or would the Equal Protection Clause or other federal law say it wouldn't matter if we refused the money, we would still have to comply.

Research thus far indicates that if the State of Idaho opts not to receive federal financial assistance under federal legislation enacted under the U.S. Constitution's Spending Clause[1] power to which there are attached conditions, then the State is not required to abide by the conditions specific to that federal legislation. But with any rejection of federal funding, care must be exercised to ensure the avoidance of unintended consequences because the rejection of federal funding rarely results in a clean severing.

First, legislative funding of Idaho's education system has been the subject of litigation over the last three decades. That litigation has

focused on article IX, section 1 of the Idaho Constitution. Because it is not yet clear what actions the Legislature would take with respect to federal funding and what actions the Legislature would take regarding funding of Idaho's education system, our office is unable to analyze or advise at this time as to whether such changes could lead to the possibility of litigation under article IX, section 1 of the Idaho Constitution.

Second, if there are any components of federal funding from the U.S. Department of Education that will continue to be received by the State, the State must provide assurances that it will comply with certain requirements regarding "handicapped" students, as that term is defined in the applicable regulations. Such requirements are found in regulations promulgated under Section 504 of the Rehabilitation Act, and as will be noted below, are distinct from the requirements of the Individuals with Disabilities Education Act. With the limited amount of time, our office was not able to examine the other agencies or departments from which the Idaho State Department of Education currently receives funding to determine if there are similar requirements under regulations promulgated by those agencies or departments under Section 504 of the Rehabilitation Act, or if there are other regulations that apply that are of concern.

DISCUSSION

Idaho receives federal funding for education from a wide variety of sources, including multiple federal agencies.[2] Your question referenced "K12 federal title funds," which I interpret to refer to the federal grants awarded under the various titles of the Elementary and Secondary Education Act ("ESEA"), as amended by the Every Student Success Act ("ESSA"). Your question also referenced "special education," which I interpret to refer to the Individuals with Disabilities Education Act ("IDEA"). However, it was not clear what the Legislature would consider doing with respect to other sources of federal funding, or what the impacts of such changes would be. Based on your email, this analysis generally focuses its research on the U.S. Department of Education and its regulations implementing Section 504 of the Rehabilitation Act, 34 C.F.R. sections 104.1 through 104.61.

A. Spending Clause Power

The IDEA and ESSA were enacted under the U.S. Congress's Spending Clause power. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 295, 126 S. Ct. 2455, 2458, 165 L. Ed. 2d 526 (2006) (hereafter "Arlington") ("Congress enacted the IDEA pursuant to the Spending Clause."); cf. Connecticut v. Spellings, 453 F. Supp. 2d 459, 469 (D. Conn. 2006) (explaining that the now-former No Child Left Behind Act, which like the ESSA amended the ESEA, was enacted under the Spending Clause).

The Arlington case is instructive on the general applicability of conditions that attach to federal Spending Clause legislation. In Arlington, the Court explained that the U.S. Congress could attach conditions to a state's acceptance of federal funds, but that those conditions "must be set out 'unambiguously'". Arlington, 548 U.S. at 296 (citations omitted). The Court further described that legislation enacted under the Spending Clause "'is much in the nature of a contract,' and therefore, to be bound by 'federally imposed conditions,' recipients of federal funds must accept them 'voluntarily and knowingly.'" Id. (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17, 101 S. Ct. 1531, 1540, 67 L. Ed. 2d 694 (1981)) (remaining citation omitted). "States cannot knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain.'" Id. (quoting Pennhurst, 451 U.S. at 17).

A state is thus granted the option of choosing to comply with the conditions that attach to specific legislation in exchange for the federal funds. See, e.g., Jim C. v. United States, 235 F.3d 1079, 1082 (8th Cir. 2000) ("The choice is up to the State: either give up federal aid to education, or agree that the Department of Education can be sued under Section 504. We think the Spending Clause allows Congress to present States with this sort of choice."). Indeed, when it comes to Spending Clause legislation, "the residents of the State retain the ultimate decision as to whether or not the State will comply" with the conditions. New York v. United States, 505 U.S. 144, 168, 112 S. Ct. 2408, 2424, 120 L. Ed. 2d 120 (1992). "If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant." Id.

Applying this authority, if the State opts out of funding under the ESEA / ESSA or under the IDEA, then the conditions in the applicable legislation would no longer attach, as there is no acceptance by the State of the "terms" of the federal financial aid. A state that does not accept funds provided by a specific act cannot be said to "voluntarily and knowingly" accept them. See Arlington 548 U.S. at 296.

However, this analysis requires additional important considerations under federal and state law.

B. State Law

Under article IX, section 1 of the Idaho Constitution, "it shall be the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools." That provision was the subject of litigation in the last 30 years, known as the ISEEO cases beginning with Idaho Schools for Equal Educational Opportunity v. Evans, 123 Idaho 573, 850 P.2d 724 (1993) ("ISEEO I").

Although your question refers to Idaho's current budget surplus and wishes to know if Idaho could make its own choices, it is not apparent what changes would occur if the State were to opt out of federal funding, and specifically how this would impact the funding of Idaho schools.[3] Without an understanding of the particular changes that would be envisioned by the Legislature, it is hard to analyze whether such changes or actions could present the possibility of litigation under article IX, section 1 of the Idaho Constitution.

C. Federal Law

At the federal level, there are requirements separate from the ESEA / ESSA and IDEA that may require important assurances for students with a disability. Federal agencies are authorized to promulgate regulations "that implement the requirements concerning treatment of disabled individuals contained in § 504 [of the Rehabilitation Act]." Mark H. v. Lemahieu, 513 F.3d 922, 929 (9th Cir. 2008). The U.S. Department of Education maintains such regulations at 34 C.F.R. sections 104.1 through 104.61 (otherwise known as Part 104) ("DOE Regulations"). Such regulations apply "to each recipient of Federal financial assistance from the Department of Education and to

the program or activity that receives such assistance." 34 C.F.R. § 104.2. "Program or activity" is broadly defined to mean:

> [A]ll of the operations of—
> (1)(i) A department…or other instrumentality of a State or local government; or
> (ii) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government….

34 C.F.R. § 104.3(k). And 34 C.F.R section 104.5(a) requires an applicant for federal financial assistance "to which this part applies shall submit an assurance…that the program or activity will be operated in compliance with this part."

There are multiple subparts to Part 104, including those addressing employment practices (subpart B), accessibility of facilities (subpart C), and preschool and K-12 education (subpart D). Subpart D has some requirements that should be considered. DOE Regulation requires a recipient "that operates a public elementary or secondary education program" to annually identify and locate every qualified handicapped persons and take appropriate steps to notify the person and parents of the duty. 34 C.F.R. § 104.32. Another DOE Regulation requires that a "free appropriate public education" be provided "to each qualified handicapped person[.]" 34 C.F.R. § 104.33(a). This includes, as part of appropriate education,

> the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34 [education setting], 104.35 [evaluation and placement], and 104.36 [procedural safeguards].

34 C.F.R. § 104.33(b).

If the State continues to receive federal financial assistance from the U.S. Department of Education, then the DOE Regulations require that the State will still have to provide assurances consistent with Part 104 regarding the education of students with a disability and the other topics addressed by the other subparts of Part 104. These requirements, because they are traced to the authority to promulgate regulations implementing Section 504 of the Rehabilitation Act, are tied to a State's receipt of federal financial assistance from the U.S. Department of Education. And thus, even if the State opts out of the ESSA or IDEA funding, but continues to receive federal financial assistance from the U.S. Department of Education, the State will be subject to DOE Regulations, including those mentioned above.[4]

I hope that you find this analysis helpful. If you would like to discuss any of this content in more detail, please contact Chief Deputy Brian Kane.

Sincerely,

BRIAN CHURCH
Deputy Attorney General

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[1] The Spending Clause is in Article 1, section 8, clause 1 of the United States Constitution and reads: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States[.]"

[2] Pages 84 through 88 of the fiscal year 2023 budget request from the Idaho State Department of Education contains the "Federal Funds Inventory Form." This inventory references federal funding from the National Center for Education Statistics, the U.S. Department of Agriculture, the U.S. Department of Interior Bureau of Indian Affairs, the U.S. Department of Education, the U.S. Department of the Treasury, and the U.S. Department of Health and Human Services. The fiscal year 2023 budget request is available at: https://dfm.idaho.gov/publications/exec/budget/fy2023/requests/education/education_department-of.pdf.

[3] One critically important consideration is the sustainability of funding in lieu of an opt-out. As you identified, the State currently has a large surplus, but what happens in a non-surplus, or even a shortfall year? In opting out, the State may be accepting a funding responsibility that carries with it significant legal ramifications.

[4] If the other agencies or departments from whom the State accepts federal funding have regulations implementing Section 504, then those regulations could likewise contain requirements that continue to apply to the State so long as it receives federal financial assistance from the respective agency or department.

September 27, 2021

Committee on Federalism
Idaho State Capitol
700 W. Jefferson Street
Boise, ID 83702
VIA EMAIL

Re: A.E. v. Little (CARES Act Unemployment Insurance Litigation)

Dear Committee:

You requested an update on the A.E. v. Little matter, litigation pending in state court about Idaho's participation in special federal unemployment insurance programs first offered under the CARES Act. The primary issue is whether state law required Idaho to participate in these federal programs until they expired on September 6, 2021. The Attorney General's Office, on behalf of Governor Little and Director Revier of the Department of Labor, has argued that state law does not require participation. An Idaho trial court held a hearing last week, and has not yet issued a decision.

By way of background, in March 2020, the federal government passed the CARES Act, a stimulus bill intended to address the economic downturn caused by the global COVID-19 pandemic. Pertinent here, the CARES Act funded three special unemployment insurance programs. These were optional programs, as each State had to decide whether to participate by executing an agreement with the U.S. Department of Labor and each State could end participation at any time by terminating the agreement with 30 days' written notice. The federal government funded the programs until September 6, 2021, but in May 2021 Governor Little announced that Idaho would end participation in June 2021.

In late August, Idaho Legal Aid, on behalf of several individual plaintiffs, sued Governor Little and Director Revier in state court. They alleged that the decision to end early Idaho's participation in the CARES Act unemployment insurance programs violated Idaho Code

section 72-1341, a law that says the "director [of the Idaho Department of Labor] shall cooperate with the United States department of labor, and is directed to take such action as may be necessary to secure to Idaho all advantages under [certain] federal laws[.]" The plaintiffs asked the court for a preliminary and permanent injunction ordering Governor Little and Director Revier to have Idaho re-join the programs and to facilitate retroactive payment of benefits to those Idahoans that were otherwise eligible after June 19, 2021, when Idaho stopped participating in the programs.

The State opposed the plaintiffs' request, arguing that their claims were procedurally deficient and failed on the merits. As to the merits, the State argued that Idaho Code section 72-1341 does not apply. The law mentions only "the director," but Governor Little—not Director Revier—issued the notice of termination ending early Idaho's participation in the CARES Act programs and is the only person with the power to rescind the notice so that Idaho could re-join the programs. The State further argued that even if Idaho Code section 72-1341 applies, it does not require Idaho to participate in the programs. The law says only that Director Revier needs to secure all "advantages" to Idaho. The programs, however, are no longer advantageous to Idaho as the State's strong economy, low unemployment rate, and dire labor shortage mean it is more advantageous for Idaho as a whole if the State encourages Idahoans to return to work rather than to continue to receive unemployment benefits.

As to procedure, the State argued that: (1) the plaintiffs failed to exhaust their administrative remedies; (2) the plaintiffs raise a political question that the courts cannot decide, as Governor Little had discretion to make a policy decision about how to balance an individual's need for benefits with the State's need for more workers; (3) the claims are barred by sovereign immunity to the extent that the plaintiffs seek money damages; (4) the plaintiffs lack standing to assert claims on behalf of the approximately 14,000 to 17,000 Idahoans that might be eligible for benefits, but are not party to the lawsuit; and (5) the claims are barred by the doctrines of unclean hands and laches, as plaintiffs delayed bringing suit until well after the May 11 announcement that Idaho would end early its participation in the programs.

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

Sincerely,

BRIAN KANE
Chief Deputy

October 5, 2021

The Honorable Melissa Wintrow
Idaho Senate
Idaho State Capitol
700 W. Jefferson Street
Boise, Idaho 87302
VIA EMAIL: mwintrow@senate.idaho.gov

Re: Request for Legal Analysis

Dear Senator Wintrow:

You requested an analysis of whether the Lieutenant Governor (1) has authority under the Idaho Constitution or Idaho Code, or both, to convene the Education Task Force; and, if not, (2) whether the State is responsible for paying attorney fees awarded as a result of litigation arising from the Lieutenant Governor's Office's response to a public records request regarding the Education Task Force.

I. SHORT ANSWER

Question 1: The Idaho Constitution does not appear to prohibit the Lieutenant Governor from convening the Education Task Force. The question thus becomes whether the Lieutenant Governor has statutory authority to act independently of the Governor in an investigatory capacity. Based on the facts as understood by this office, it appears that there is a plausible argument the Legislature has provided the Lieutenant Governor the authority to convene the task force in the absence of evidence that the Governor instructed her to disband the task force. See Idaho Code § 67-809(1).

Question 2: Yes, the State of Idaho is likely responsible for paying the attorney fees award. In the case of Idaho Press Club v. McGeachin, fees were awarded against the Respondent, i.e., against the office of the Lieutenant Governor. There does not appear to be a mechanism by which the State can avoid paying such fees based on whether the public official was acting outside of their constitutional or statutory authority. In any case, it appears that the conduct at issue—

responding to a public records request—was indisputably within the Lieutenant Governor's constitutional and statutory authority.

II. RELEVANT FACTS

This question appears to arise out of the convening of the Education Task Force by Lieutenant Governor Janice McGeachin in early April 2021.[1] The purpose of creating the Education Task Force was "to examine indoctrination in Idaho education and to protect our young people from the scourge of critical race theory, socialism, communism, and Marxism."[2] To date, the task force has held four meetings and, at its most recent meeting, adopted six recommendations for proposed action, such as changes to Idaho Code, action by the State Board of Education ("State Board") and State Department of Education, banning the use of federal grant money for certain purposes, inviting House and Senate education committee members to work with the task force to develop policies for the next legislative session, and submitting written testimony to the State Board about a policy the State Board is considering.[3] It is unclear whether the task force will take further action or what form that action might take.[4] It is the understanding of this office that, to date, the Governor's Office has not instructed the Lieutenant Governor to disband the task force.

Litigation—in the form of a lawsuit against the Lieutenant Governor in her official capacity—arose related to the Lieutenant Governor's Office's response to public records requests for materials related to the Education Task Force.[5] In late August, the Fourth Judicial District Court for Ada County ruled against the Lieutenant Governor, and, among other things, awarded costs and attorney fees to the Petitioner and imposed a civil penalty of $750 against the Respondent.[6]

III. DISCUSSION

A. Based on the facts available, a reviewing court would likely find the Lieutenant Governor was acting within her authority to convene the Education Task Force.

Idaho's Constitution is silent as to whether the Lieutenant Governor may convene an investigatory committee. However, the Lieutenant Governor likely has constitutional authority to convene an

investigatory committee as long as such action does not interfere with the Governor's constitutional role. It is a closer question as to whether the Lieutenant Governor has statutory authority to convene the Education Task Force in the absence of express authorization from the Governor. With the limited facts on hand, it appears that a reviewing court could conclude that the Lieutenant Governor acted within her constitutional and statutory authority in convening the task force given that the Governor has not directed her to disband the task force and given the limited action taken by the task force thus far.

1. Idaho's Constitution likely does not prohibit the Lieutenant Governor from convening the Education Task Force unless such action interferes with the Governor's constitutional authority.

Idaho's Constitution is silent as to whether the Lieutenant Governor has the authority to convene an investigatory committee such as the Education Task Force. Article IV of Idaho's Constitution sets out what are arguably the core responsibilities of the Lieutenant Governor: acting as president of the Senate,[7] and acting as acting Governor under limited circumstances.[8] This conclusion is reinforced by the discussions during Idaho's Constitution Convention in 1889, where the question of whether to create or maintain certain executive positions—including lieutenant governor, auditor, and attorney general—was debated.[9] Debating the role of lieutenant governor, it was noted:

> The office of lieutenant governor, while considered as a sort of figure-head, is necessary, unless we change the whole line of succession in regard to the office of governor when it becomes vacant[.] . . . The lieutenant governor derives no salary from the state treasury, except when he is in actual service as presiding officer of the senate[.] . . . I think the office is a necessary one, and the committee unanimously believed so, or they would not have so reported it.[10]

The initial floor debate acknowledged that the lieutenant governor would be invaluable to assume the role of governor if necessary, yet saved the State money by only earning an income when called on to act as president of the Senate or as acting governor.[11] The

Idaho Constitution reflected this view by setting per diem pay only to be received during sessions of the legislature for the lieutenant governor.[12] Notably, however, the Framers of Idaho's Constitution also foresaw a possible expansion of the lieutenant governor's role with article IV, section 19, which included authority for the legislature to "diminish or increase the compensation of any officers named."[13]

Thus, it appears from these provisions that the Lieutenant Governor is constitutionally limited from taking action that would prevent her from exercising her core constitutional roles of acting as president of the Senate or as acting governor when necessary. It also appears that the office of lieutenant governor was conceived of as having a limited role, but one which could be expanded by the legislature.

Additional insight as to the constitutional authority of the Lieutenant Governor is provided by article IV, section 1 of the Idaho Constitution, which establishes the constitutional officers making up Idaho's executive branch,[14] and vests "supreme executive power of the state … in the governor."[15] Pursuant to this power, the Governor is tasked with ensuring the laws of Idaho are faithfully executed.[16] Black's Law Dictionary defines "supreme power" as "[t]he highest authority in a state, all other powers in it being inferior thereto."[17]

This is consistent with the very title the Founders assigned to the office. At the time Idaho's Constitution was adopted, Webster's dictionary defined "lieutenant" as "[a]n officer, either civil or military, who supplies the place of a superior in his place[,]" and further defined "lieutenant-governor" in its American usage as "an officer of a State being next in rank to the governor, and, in case of death or resignation of the latter, himself acting as governor."[18] Similarly, Black's Law Dictionary defined "lieutenant governor" in its American usage as "[a]n officer of a state sometimes charged with special duties, but chiefly important as the deputy or substitute of the governor, acting in the place of the governor upon the latter's death, resignation, or disability."[19] The definition of "lieutenant governor" has remained substantially the same in Black's Law Dictionary and in Merriam-Webster.[20]

It follows that the Lieutenant Governor is constitutionally subordinate to the Governor and may not possess or exercise more

power than the Governor; nor may the Lieutenant Governor take action that interferes with the Governor's duty to ensure that the laws are faithfully executed or the Governor's authority as the "supreme executive power." It does not appear that convening the Education Task Force has prevented the Lieutenant Governor from carrying out her core constitutional functions; therefore, the Lieutenant Governor's constitutional subordination to the Governor appears to be the only potential constitutional check on her authority to convene the Education Task Force.

It does not appear that the Lieutenant Governor's convening of the Education Task Force exceeds her authority as a subordinate officer to the Governor. To date, it appears that the Education Task Force has only engaged in fact gathering and adopting proposals setting out recommended action. Based on the facts available, it does not appear that these actions have interfered with the Governor's authority to ensure the law is faithfully executed nor do they appear to have interfered with the Governor's "supreme executive power." Notably, it does not appear that the Governor has ever directed the Lieutenant Governor to disband the Education Task Force. It is possible that the Governor's silence on this matter could be construed as implicit acceptance of the Lieutenant Governor's actions, particularly given that a multitude of actions are taken to carry out the functions of the Executive Branch each day without the Governor's explicit sign-off on each action.

2. The Legislature may have granted the Lieutenant Governor the power to convene the Education Task Force.

The Idaho Constitution vests the power to make law to the Legislature, which may expand duties of an executive officer by legislation, but may not limit those duties prescribed by the Idaho Constitution.[21] In light of the discussion above, the question becomes whether the Legislature has expanded the duties of the Lieutenant Governor to include convening the Education Task Force.

The Legislature has provided a general framing of the Lieutenant Governor's role under title 67, chapter 8, Idaho Code.[22] Idaho Code section 67-809(1) states:

> The lieutenant governor shall perform on a day to day basis such duties in and for the government of this state as the governor may from time to time direct. The lieutenant governor shall perform such additional duties as the governor may deem necessary and desirable to promote the improvement of state government and the development of the human, natural and industrial resources of this state. At the written direction of the governor, the lieutenant governor may represent the state in negotiations, compacts, hearings and other matters dealing with the states or the federal government. He shall cooperate with all state and local governmental agencies to promote and encourage the orderly development of the resources of Idaho.[23]

The language provided in section 67-809(1) indicates that there are certain duties that must be performed by the Lieutenant Governor.[24] Notably, Idaho Code section 67-809(1) contemplates that the Lieutenant Governor must perform such day to day duties in and for the government of the state as the Governor directs. Further, should the Governor deem it necessary and desirable, the Lieutenant Governor must perform additional duties to promote the improvement of state government and the development of the resources of the state. Idaho Code section 67-809(1) is very clear that the Governor has the ability to direct the duties and responsibilities of the Lieutenant Governor and affirmatively establishes the Lieutenant Governor as a subordinate officer to the Governor. The discretion and independence of the Lieutenant Governor is cabined by the authority of the Governor.

In deciding whether convening the Education Task Force falls within section 67-809(1), a reviewing court would likely therefore ask whether the convening of the Education Task Force was "direct[ed]" by the Governor or "deem[ed] necessary" by the Governor. In defining "direct,"[25] "deems,"[26] and "necessary,"[27] and applying the terms as used in the statute, it appears that the Lieutenant Governor's authority under section 67-809(1) may be limited to taking actions that the Governor has authorized or delegated. With the exception of the single sentence requiring certain duties be assigned in writing, Idaho Code section 67-809(1) is silent as to how the Governor's authorization is dispensed. In this regard, the authority does not necessarily need to

be in the affirmative—in other words, the Lieutenant Governor may take initiative, and absent gubernatorial opposition, authority could be assumed.

This inference is supported by the fact that legislation expanding the duties of the Lieutenant Governor began appearing in the middle of the Twentieth Century. In 1949, legislation established duties of completing essential clerical work following adjournment of the legislative session to be handled by the Lieutenant Governor, as president of the Senate, and the Speaker of the House of Representatives; "authoriz[ing] and empower[ing]" them to hire necessary help to complete such duties.[28] These duties were expanded to include preparing the Senate and House chambers prior to any regular session of the Legislature in 1959; then subsequently being amended to include section 67-809(1)'s primary language.[29]

The legislative intent in amending section 67-809 in 1967 to include the language[30] quoted above can be inferred from the Idaho Legislative Council on State Government's ("Council") 1965-66 governmental restructuring recommendations.[31] The Council's goal was to reorganize the administrative agencies through restructuring the Executive Branch to ensure efficiency in State government, to ensure that governors were executing their constitutional powers, and to balance legislative and executive powers regarding administrative processes.[32] Inferences can be drawn based on the recommendations from the Council in 1966; the 1967 Legislature provided an avenue for the Governor to delegate duties, as he sees fit, to the Lieutenant Governor.

The Governor has not expressly authorized the convening of the Education Task Force. But the Lieutenant Governor has convened the task force, collected public comment, held several meetings, and issued recommendations without any objection from the Governor. This could be interpreted as both tacit approval and as consistent with the Governor's signing of House Bill 377[33] into law.

It is also possible that the Lieutenant Governor could argue that she has statutory authority outside of that set out by section 67-809(1). The court could reach this result by concluding that section 67-809(1) sets out actions that the Lieutenant Governor must perform if the

Governor assigns them to her, but that it is not the exclusive universe of the Lieutenant Governor's statutory authority.

Under this argument, the Legislature has given the Lieutenant Governor the inherent flexibility to take on additional duties beyond those "direct[ed]" or "deem[ed] necessary and desirable" by the Governor, as long as those additional duties do not prevent the Lieutenant Governor from carrying out her express statutory duties to assist the Governor or conflict with the constitutional limits on the position, based on the statutory authorization to employ staff, pay for work throughout the year, and legislative appropriation.[34] This inference seems plausible given that the Governor is not required to delegate any duties to the Lieutenant Governor and therefore, one could foresee a circumstance where the Lieutenant Governor had staff, time, and appropriations to work to benefit the Executive Branch, but nothing to do when the Legislature was not in session. It would seem contrary to legislative intent to have the Lieutenant Governor and staff sit inactive for the majority of the year if the Governor did not expressly delegate a task. Under this interpretation, the Lieutenant Governor would still be limited by her constitutional subordination to the Governor, including the requirement to cease any activity he deems unnecessary or undesirable to state government.

Under this alternative interpretation, absent any evidence that convening the task force prevented the Lieutenant Governor from performing her other express and implied constitutional and statutory duties and any evidence that the Governor directed her to disband the task force, it is likely that a reviewing court would conclude the Lieutenant Governor was acting within her statutory authority in convening the task force.

Ultimately, no court has yet addressed the question of the Lieutenant Governor's statutory and constitutional powers in the state of Idaho. However, were this to go to litigation, it appears that there is a plausible argument that the Lieutenant Governor was acting within her constitutional and statutory authority in convening the task force under either interpretation of section 67-809(1) based on the understanding that the Governor has not directed her to disband the task force, the limited nature of the task force's actions, and the understanding that this task force did not prevent the Lieutenant

Governor from performing her other statutory and constitutional responsibilities.[35]

B. The State of Idaho is likely responsible for paying an attorney fee award resulting from the Public Records Act litigation against the Lieutenant Governor.

The State of Idaho is likely responsible for paying attorney fees awarded under the Public Records Act against the Lieutenant Governor in her official capacity.

The Public Records Act provides that a court must award costs and reasonable attorney fees to the requesting party upon a finding that the public official's refusal to provide the public records was frivolous, and allows the court to impose an additional monetary penalty if the court finds the official's refusal was deliberate and in bad faith.[36] The penalty provision is directed to the public official;[37] by implication and without clear language to the contrary, it appears that such penalty is assessed to the office that official holds, as opposed to the official in their individual capacity.[38] In contrast, the attorney fees provision in the Public Records Act does not expressly assess attorney fees against the public official like the penalty mentioned before; it only indicates that the non-prevailing party must pay those fees upon a finding by the court.[39] The Legislature could have provided express language requiring that the official pay the attorney fees in their individual capacity—as it has in other portions of the Code—but it did not.[40]

Specific to the award of attorney fees by Judge Hippler to the Idaho Press Club, Inc. in the matter of Idaho Press Club, Inc., Judge Hippler awarded attorney's fees to the prevailing party against the Respondent: Lieutenant Governor McGeachin, in her official capacity as Lieutenant Governor.[41] Thus, it is apparent that the court did not award fees against Lieutenant Governor McGeachin personally. And there does not appear to be any mechanism by which the State could decline to pay an award of fees under the Public Records Act against an official in their official capacity on the grounds that the official was acting outside their constitutional or statutory authority with the conduct that gave rise to the fee award.

Regardless of whether the Lieutenant Governor had authority to convene the task force, it seems likely that the Lieutenant Governor was acting within her authority with regard to the conduct that gave rise to the fee award. Responding to the public records request *is* indisputably within a public official's duties.

Please reach out to our office with any further questions regarding this analysis.

Sincerely,

BRIAN KANE
Chief Deputy

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[1] Press Release, Office of the Idaho Lt. Governor, Idaho Lt. Governor Assembling Task Force to Examine Indoctrination in Idaho Educ. Based on Critical Race Theory, Socialism, Communism, and Marxism (Apr. 8, 2021) (on file with the Idaho Lt. Governor's Office), https://lgo.idaho.gov/press-release-idaho-lt-governor-assembling-task-force/.

[2] Id.

[3] Blake Jones, Indoctrination task force calls on Legislature to make slew of changes, Idaho Ed News (Aug. 26, 2021), https://www.idahoednews.org/news/indoctrination-task-force-calls-on-legislature-to-make-slew-of-changes/.

[4] Id. ("With its scheduled meetings complete, the task force will now work to forward and make more specific its 'broad' policy goals, McGeachin said.").

[5] See Mem. Decision & Order on Def.'s Mots. to Strike & Dismiss and on Pet. at 2-8, Idaho Press Club, Inc. v. McGeachin, No. CV01-21-11095 (Ada County D. Ct. Aug. 26, 2021).

[6] Id. at 26.

[7] See generally Idaho Const. art. IV, § 13 (exercising such role by presiding over the Senate and casting the tie-breaking vote therein); see also Idaho Code § 67-805A(1) and (2).

[8] See generally Idaho Const. art. IV, § 12 (providing that "[i]n case of the failure to qualify, the impeachment, or conviction of treason, felony, or other infamous crime of the governor, or his death, removal from office, resignation, absence from the state, or inability to discharge the powers and duties of his office, the powers, duties and emoluments of the office for the residue of the term, or until the disability shall cease, shall devolve upon the lieutenant governor").

[9] 1 Proceedings & Debates of the Const. Convention of Idaho, 1889, at 412 (I.W. Hart ed., 1912) (statement of William J. McConnell, delegate,

arguing Article IV, section 1, "I think for a term of years at least we could easily dispense with either of these officers, namely the lieutenant governor, state auditor or attorney general"); Sweeney v. Otter, 119 Idaho 135, 142, 804 P.2d 308, 315 (1990).

[10] 1 Proceedings & Debates at 412 (statement of George Ainslie, delegate).

[11] Id. at 414 (statement of John S. Gray, delegate) ("The likelihood is, if the governor holds his position, that all the duties [the Lieutenant Governor] will have to perform is that of president of the senate; and that is the only pay he gets….").

[12] Idaho Const. art. IV, § 19 (am. 1928, 1994; repealed 1998). Article IV, section 19 included authority for the Legislature to "diminish or increase the compensation of any officers named," which occurred in 1921 when the Legislature provided appropriation of salary to the lieutenant governor. 1921 Idaho Sess. Laws 363.

[13] This expansion occurred in 1921 when the Legislature provided appropriation of salary to the lieutenant governor. 1921 Idaho Sess. Laws 363.

[14] Idaho Const. art. IV, § 1.

[15] Idaho Const. art. IV, § 5.

[16] Idaho Const. art. IV, § 5. Idaho's Constitution also expressly provides the Governor with investigative authority, as Idaho's Constitution states that he "may, at any time he deems it necessary, appoint a committee to investigate and report to him upon the condition of any … state institution." See Idaho Const. art. IV, § 8. The Constitution does not state that the Governor's investigative power is exclusive to the office.

[17] Supreme power, Black's Law Dictionary (6th ed. 1990). See State v. Clausen, 246 P. 403, 405 (Wash. 1928).

[18] Lieutenant and lieutenant-governor, Webster's Complete Dictionary of the English Language (1758-1843), at 771.

[19] Lieutenant Governor, Black's Law Dictionary (1st ed. 1891).

[20] Lieutenant Governor, Black's Law Dictionary (4th ed. 1968); Black's Law Dictionary (6th ed. 1990) (amending the definition from, "An officer of a state," to "An **elected** officer of a state" (emphasis added)); lieutenant governor, Merriam-Webster, https://www.merriam-webster.com/dictionary/lieutenant%20governor (last visited Sept. 16, 2021) ("a deputy or subordinate governor: such as…an elected official serving as deputy to the governor of an American state").

[21] Idaho Const. art. III, § 1. See generally Mead v. Arnell, 117 Idaho 660, 667, 791 P.2d 410, 417 (1990).

[22] In addition, but not relevant here, Idaho Code section 67-805A provides that the Lieutenant Governor shall serve as gubernatorial successor, and Idaho Code section 63-3706 provides that the Lieutenant Governor shall appoint two members of the Senate to the Multistate Tax Compact Advisory Committee.

[23] Idaho Code § 67-809(1) (am. 2009).

[24] See Idaho Code § 67-809(2).

[25] "Direct" means "to regulate the activities or course of[.]" Direct, 3.a, Merriam-Webster, https://www.merriam-webster.com/dictionary/direct (last visited Sept. 14, 2021).

[26] "Deems" means "to come to think or judge; to have an opinion[.]" Deem, Merriam-Webster, https://www.merriam-webster.com/dictionary/deem (last visited Sept. 14, 2021).

[27] "Necessary" means "absolutely needed[.]" Necessary, 1, Merriam-Webster, https://www.merriam-webster.com/dictionary/necessary (last visited Sept. 14, 2021).

[28] 1949 Idaho Sess. Laws 413-15.

[29] Idaho Code § 67-809 (1949) amended by Idaho Code § 67-809(1) (1967); 1959 Idaho Sess. Laws 103 (codified as amended at Idaho Code § 67-809); 1967 Idaho Sess. Laws 685-86 (codified as amended at Idaho Code § 67-810) amended by 1967 Idaho Sess. Laws 1218-19 (codified as amended at Idaho Code § 67-809).

[30] Idaho Code section 67-809(1) has been amended five times since 1967; most notably in 1984 when subsection (1) was amended to remove the lieutenant governor's Senate and House pre-session preparation duties, and clarified the expense allowance amount for the lieutenant governor. See 1984 Idaho Sess. Laws 499-500 (codified as amended at Idaho Code section 67-809(1)-(4)).

[31] See generally Committee Minutes, Idaho Legislative Council on State Government (1966).

[32] Id.

[33] H.B. 377, 66th Leg., 1st Reg. Sess. (Idaho 2021).

[34] Idaho Code section 67-810 provides that "[t]he lieutenant-governor is authorized to employ such necessary help in the performance of his official duties as shall be necessary, and the cost and expense thereof shall be paid out of the regular appropriation for the lieutenant-governor."

[35] It should also be noted that in the case of a dispute between the Governor and the Lieutenant Governor over the Lieutenant Governor's authority, in the absence of direct evidence of the Governor's direction, it could be considered a political transaction within the Executive Branch.

[36] Idaho Code §§ 74-116, 74-117.

[37] Idaho Code section 74-117 provides "[i]f the court finds that a public official has deliberately and in bad faith improperly refused a legitimate request for inspection or copying, a civil penalty shall be assessed **against the public official** in the amount not to exceed one thousand dollars ($1,000), which shall be paid into the general account." (Emphasis added.)

[38] Coeur d'Alene Tribe v. Denney, 161 Idaho 508, 525, 387 P.3d 761, 778 (2015) ("A suit against a state official in his or her official capacity is not a

suit against the official but rather a suite against the official's office.") (citation and alteration omitted).

[39] Idaho Code § 74-116(2) ("In any such action, the court shall award reasonable costs and attorney fees to the prevailing party or parties, if it finds that the request or refusal to provide records was frivolously pursued.").

[40] The Idaho Tort Claims Act, for example, provides that an official could liable for their own costs and attorney fees if they were acting outside the scope of their employment. Idaho Code § 6-903(3).

[41] See Mem. Decision & Order on Def.'s Mots. to Strike & Dismiss and on Pet. at 26, Idaho Press Club, Inc., No. CV01-21-11095.

October 6, 2021

White, Peterson, Gigray & Nichols, P.A
Legal Counsel for the Board of Commissioners
of Canyon Highway District No. 4
Canyon Park at the Idaho Center
5700 E. Franklin Rd., Suite 200
Nampa, ID 83687-7901

Re: Question Concerning Non-Compensated Public Officials

Dear Mr. Gigray and Mr. Kiiha:

This letter responds to your September 1, 2021 inquiry concerning whether Commissioner Randy Wood can qualify as a non-compensated public official under Idaho Code section 74-510 if he elects not to be compensated for his work as a commissioner on the Canyon Highway District No. 4 Board of Commissioners ("Board"). This letter addresses your question by first providing a brief answer and then offering further discussion.

BACKGROUND

Randy Wood is a newly elected Commissioner to Subdistrict No. 2 of Canyon Highway District No. 4, and owns 90% of outstanding shares in Nampa Paving and Asphalt Co. Canyon Highway District No. 4 provides compensation to its Commissioners per its Policy 3.1.8. We assume for purposes of this analysis, based on the language of the policy, that the commissioners do not receive any salary or fee as compensation for their service on the Board other than the compensation explicitly stated in Policy 3.1.8.

According to the information provided in your letter, a change in language to Policy 3.1.8 and 3.1.8.1 has been or is being proposed, which would allow commissioners to elect whether to receive compensation, and such election would take effect October 1 of each yearly period. This analysis is based on the proposed version of the policy.

QUESTION PRESENTED

Can Commissioner Randy Wood qualify as a "non-compensated public official" pursuant to Idaho Code section 74-510 if he declines the receipt of any salary or fees for his services on the Board and he follows the procedural requirements of Idaho Code section 18-1361[A]?

BRIEF ANSWER

No, unless the Board sets his salary at zero dollars. Assuming Canyon Highway District No. 4 adopts the proposed policies you provided to us, Commissioner Wood could choose not to receive any compensation for his service on the Board. His decision not to receive any compensation, standing alone, would not make him a non-compensated public official. If—and only if—a zero dollar salary is actually fixed by the Board pursuant to Idaho Code section 40-1314, would Commissioner Wood be a non-compensated public official pursuant to Idaho Code section 74-510. As such, Commissioner Wood could have an interest in a contract made by the Board without violating Idaho Code section 18-1359(1)(d), so long as he strictly observes the requirements in Idaho Code section 18-1361A.

ANALYSIS

Idaho law generally prohibits a public official who sits as a board member from having any interest in a contract entered into by that board. See Idaho Code § 18 1359(1)(d). But a non-compensated public official who sits as a board member is not prohibited from having an interest in a contract entered into by that board if he follows the procedures outlined in Idaho Code section 18-1361A. See Idaho Code § 74-510. A non-compensated public official is any official who "receives no salary or fee as compensation for his service on [a] board." Id. See Idaho Code § 18-1361A.

The board of highway district commissioners must fix annual salaries of the commissioners. Idaho Code § 40-1314. The statute sets no minimum or maximum for these salaries, and the board has discretion as to the amount to be paid. Therefore, the board has discretion to fix a board member's annual salary at zero dollars.

The proposed policies of Canyon Highway District No. 4 allow Board commission members to elect not to receive compensation for their service. According to the policies you provided, the salaries of the highway district commissioners for Canyon Highway District No. 4 are set annually on October 1. See Policy 3.1.8. Further, proposed changes to the policy state that a commissioner must choose in writing, prior to the budget being entered, whether he will elect to receive compensation for the upcoming budget year. (Policy 3.1.8 currently does not provide this option, but per your letter, a change to the policy allowing the option has been proposed).

Therefore, were Commissioner Wood to decline compensation for his service on the Board pursuant to the Board's proposed policy, and the Board voted to fix his salary at zero dollars, he would be considered a non-compensated public official beginning October 1 of each annual period for which the Board fixed his salary at zero dollars. As a non-compensated public official for a given period, Commissioner Wood could have an interest in contracts made or entered into with the Board without violating Idaho Code section 18-1359(1)(d), so long as he complied with the requirements listed in Idaho Code section 18-1361A.

We note that Commissioner Wood would lose his status as a non-compensated public official if, in a future year, the Board voted to provide Commissioner Wood any "salary or fee as compensation for his service on [the] board." Idaho Code § 74-510. This could cause an immediate violation of Idaho Code section 18 1359(1)(d) if, for example, Commissioner Wood had an interest in an ongoing contract made by the Board.

We also caution that Idaho's public corruption statutes are intended to inject public confidence into governmental transactions and that governmental entities should exercise great care in scenarios such as these. The above analysis should not be read as an endorsement of the contemplated action—only a legal analysis. If the proposed change to policy is implemented, a consideration should be made as to whether—even if legal—the public will view transactions such as these as proper.

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

Sincerely,

HAYLEE P. MILLS
Deputy Attorney General

October 7, 2021

The Honorable Laurie Lickley
Idaho House of Representatives
Idaho State Capitol
700 W. Jefferson Street
Boise, ID 83702
VIA EMAIL: llickley@house.idaho.gov

Re: Meaning of "Absence from the State" in Article IV, Section 12

Dear Representative Lickley:

You have requested an analysis of whether the interpretation of article IV, section 12 of the Idaho Constitution expressed in a letter sent by Governor Little to Lieutenant Governor McGeachin on July 29, 2021 is correct. The Governor's letter is based on his understanding that the phrase "absence from the state" in article IV, section 12 means physical absence combined with an inability to perform the duties of governor, which I refer to here as "effective absence." The question is whether "absence from the state" means: (1) pure physical absence from the state of any distance or duration, or (2) effective absence.

As discussed further below, although this is a close question, the Governor's interpretation is reasonable. A reviewing court could conclude that "absence from the state" as used in article IV, section 12 means effective absence based on the language of article IV, section 12 and language in other provisions of article IV; the law that was in effect at the time article IV, section 12 was adopted; the historical context; and the need to avoid absurd results. That said, this is a close question, as demonstrated by the fact that the states that have addressed similar language appear to be split as to whether "absence from the state" means effective or physical absence.

I. BACKGROUND

In the letter in question, Governor Little informed Lieutenant Governor McGeachin that he would be temporarily out of the state of

Idaho on July 29, 2021 related to travel to attend an event. Governor Little wrote that his time outside of Idaho would be "brief and will not at all hinder my ability to perform any official duties as Idaho's elected Governor." The Governor wrote, "I am not aware of any official business that will require your services in an acting Governor capacity. Thus, you are not authorized to act as Governor during my brief time out of state." Governor Little continued, "[i]n the event my absence renders me unable to carry out the duties of the office, my staff will notify you immediately."

Article IV, section 12 sets out the circumstances under which the powers, duties, and obligations of the governor devolve to the lieutenant governor. It provides in full:

> In case of the failure to qualify, the impeachment, or conviction of treason, felony, or other infamous crime of the governor, or his death, removal from office, resignation, absence from the state, or inability to discharge the powers and duties of his office, the powers, duties and emoluments of the office for the residue of the term, or until the disability shall cease, shall devolve upon the lieutenant governor.

Idaho Const. art. IV, § 12. The Governor's July 29, 2021 letter therefore interprets "absence from the state" in article IV, section 12 to mean effective absence.

II. ANALYSIS

A reviewing court could agree with the Governor's interpretation and interpret "absence from the state" to mean effective absence. A court could reach this conclusion by first recognizing that the plain language of article IV, section 12 is ambiguous because: (1) related provisions in article IV do not provide complete clarity as to the intended meaning of "absence from the state"; (2) the dictionary definitions of the key terms "absence" and "disability" could support physical or effective absence interpretations; (3) the principles of statutory interpretation applied to the plain language of article IV, section 12 could support physical or effective absence interpretations; and (4) the relevant law that was in effect at the time article IV, section 12 was adopted

demonstrates ambiguity as to the Framers' intent. After finding the plain language ambiguous, a court could look to the comments made at the Constitutional Convention, the historical context of the provision, and the need to avoid absurd results to conclude that "absence from the state" means effective absence. As noted above, this is a close question, and courts in other states that have addressed similar language are split on effective absence versus physical absence interpretations.

A. It is possible, but unlikely, that the plain language of article IV, section 12 could be found to clearly express the intent that "absence from the state" means effective absence based on language in article IV.

"When interpreting constitutional provisions, the fundamental object is to ascertain the intent of the drafters by reading the words as written, employing their natural and ordinary meaning, and construing them to fulfill the intent of the drafters." State v. Winkler, 167 Idaho 527, 531, 473 P.3d 796, 800 (2020) (quotation marks and citation omitted). "Where the constitutional provision is clear and unambiguous, the expressed intent of the drafters must be given effect." Id. (quotation marks and citation omitted). "A constitutional provision is ambiguous where reasonable minds might differ or be uncertain as to its meaning." Id. (quotation marks and citation omitted).

The term "absence from the state" in article IV, section 12 of Idaho's Constitution is not defined nor does it have an immediately apparent meaning in that section, as discussed further below. However, a reviewing court could look to related provisions in article IV to conclude that "absence from the state" has a clear meaning. See Winkler, 167 Idaho at 531, 473 P.3d at 800 (looking for any other language within the pertinent article that made the term "pardon" in the Idaho Constitution immediately clear to determine whether the term was ambiguous).

Article IV, section 14 could be read as providing the necessary clarification as to the meaning of "absence from the state." Article IV, section 14 establishes both when the president pro tempore becomes acting governor and when the speaker of the house assumes the position. It provides, in full:

> In case of the failure to qualify in his office, death, resignation, absence from the state, impeachment, conviction of treason, felony or other infamous crime, or disqualification from any cause, of both governor and lieutenant governor, the duties of the governor shall devolve upon the president of the senate pro tempore, until such disqualification of either the governor or lieutenant governor be removed, or the vacancy filled; and if the president of the senate, for any of the above named causes, **shall become incapable of performing the duties of governor**, the same shall devolve upon the speaker of the house.

Idaho Const. art. IV, § 14 (emphasis added). The disqualifications stated in this provision are substantially the same as those stated in section 12, including the phrase "absence from the state." Yet, section 14 provides additional information as to the phrase's meaning with its conclusion as to when the duties devolve from the president of the senate to the speaker of the house. Under section 14, this devolution comes when the president of the senate "for any of the above named causes, shall become incapable of performing the duties of governor[.]" See id. In other words, section 14 arguably provides insight into the Framers' intent with the enumerated causes in section 12: that they would be events that would render the governor incapable of performing the duties of governor. Given that the phrase "absence from the state" is a disqualifier in sections 12 and 14, it should be read consistently across the sections. Ratzlaf v. United States, 510 U.S. 135, 143, 114 S. Ct. 655, 660, 126 L. Ed. 2d 615 (1994). Thus, a court could conclude that the gloss provided in section 14 should be read to apply to section 12 to establish that "absence from the state" means effective absence.[1]

That said, the following contrary arguments could be made based on the language of section 14: (1) the Framers should be presumed to have intentionally not included this language in section 12 because it is not present in section 12, so section 12 should not be read in light of section 14; (2) the Framers could have intended to treat devolution to the speaker of the house differently from devolution to the lieutenant governor or the president of the senate pro tempore because the speaker of the house holds a different position; and (3) the Framers

could have intended physical absence from the state to be a legal disqualification from performing the duties of governor. If a court were to agree with these arguments, it could conclude that section 14 does not clarify the plain language of section 12.[2]

Separately, a court could conclude that article IV, section 13 sheds necessary light on the meaning of the phrase "absence from the state" because section 13 treats "absence" as something different from the disqualifications stated in section 12. Article IV, section 13, which establishes the circumstances in which the president pro tempore becomes acting governor, states:

> In case of the absence or disqualification of the lieutenant governor from any cause which applies to the governor, or when he shall hold the office of governor, then the president pro tempore of the senate shall perform the duties of the lieutenant governor until the vacancy is filled or the disability removed.

Because "absence" in this provision is treated as something different than the disqualifications stated in article IV, section 12, this could be read as suggesting that pure physical absence is something that is different from "absence from the state" under article IV, section 12.

However, again, there are flaws with this argument. The phrase in section 13 is "absence," rather than "absence from the state." A court could find this difference significant enough to trigger the canon of interpretation that the drafters are presumed to have intended different meanings when they used different words.

On the whole, any potential clarity provided by sections 13 and 14 for a plain language reading of "absence from the state" in section 12 could fail based on the contrary arguments identified above.

Separately, a court could conclude that article IV, section 5 provides the necessary clarity as to the meaning of "absence from the state" because it provides that "[t]he supreme executive power of the state is vested in the governor, who shall see that the laws are faithfully executed." A court could conclude that interpreting "absence from the state" to mean that supreme executive power transfers to the lieutenant

governor to potentially effect a different policy vision every time the governor momentarily leaves the state is inconsistent with plain meaning of article IV, section 5. In other words, a court could conclude that a physical absence interpretation defeats the governor's supreme executive power and the lieutenant governor's constitutional subordination to the governor, particularly in light of the governor's express direction that the lieutenant governor was not authorized to act in his absence.

That said, a court could find any potential clarity outweighed by the ambiguity inherent in the dictionary definitions of the relevant terms, in the overall construction of section 12, and in the law that was in effect at the time section 12 was drafted, as discussed below.

B. A reviewing court could find the plain language of article IV, section 12 ambiguous as to the meaning of "absence from the state."

A court would likely look to the dictionary definitions of key terms, to principles of statutory interpretation, and to the law that was in effect at the time article IV, section 12 was adopted in order to understand what the Framers meant by "absence from the state." A court could conclude that all three sources demonstrate that the plain language is ambiguous as to whether the Framers meant effective or physical absence.

1. The dictionary definitions of "absence" and "disability" could be found ambiguous.

In reviewing the plain language, the "Court begins with the dictionary definitions of disputed words or phrases contained in the [provision]." State v. Clark, 168 Idaho 503, 508, 484 P.3d 187, 192 (2021). These words are given their plain, usual, and ordinary meaning, while construing the statute as a whole. State v. Hart, 135 Idaho 827, 829, 25 P.3d 850, 852 (2001). Pertinent to your question, article IV, section 12 provides that "the powers, duties and emoluments of the office [of governor] … devolve upon the lieutenant governor" "in case of the" governor's "absence from the state" "for the residue of the term, or until the disability shall cease[.]" Thus, there are two key terms to be defined: "absence" and "disability."

This is because the term "disability" arguably has some modifying effect on the meaning of the term "absence" as it is key to understanding when the devolution to the lieutenant governor on the grounds of "absence" ends (assuming the governor is not absent from the state for the remainder of his term). The lieutenant governor assumes the role of governor either (1) for the residue of the term or (2) until the disability shall cease. It seems fairly straightforward that the absence of the governor from the state would not result in the lieutenant governor assuming the office of governor for the "residue of the term," thus "absence from the state" must pair with "until the disability shall cease." In simplest terms, interpreting "absence from the state," must necessarily include an interpretation of "until the **disability** shall cease."

Looking at the definition of "absence" as it was understood at the time article IV, section 12 was adopted, the version of Webster's Complete Dictionary of the English Language published in 1886 defined "absence" as (1) "[a] state of being absent or withdrawn from a place or from companionship"; (2) "[w]ant; destitution"; and (3) "inattention to things present; heedlessness." Absence, Webster's Complete Dictionary of the English Language (1886), https://archive.org/details/websterscomplete00webs/page/n9/mode/2up.

The definition of "absence" has not changed much over time. Currently, Merriam-Webster offers three substantially similar definitions for "absence": (1) "a state or condition in which something is expected, wanted, or looked for is not present or does not exist: a state or condition in which something is absent"; (2) "a failure to be present at a usual or expected place: the state of being absent" or "the period of time that one is absent"; or (3) "inattention to present surroundings or occurrences—usually used in the phrase *absence of mind*." Absence, Merriam-Webster, https://www.merriam-webster.com/dictionary/absence (last visited Aug. 5, 2021).

Of all of these definitions, only one definition from each dictionary clearly applies to physical place. The other definitions of absence apply to something other than physical presence or non-presence, such as when absence refers to the non-presence of a less tangible concept, such as in the phrase "in the absence of reform

[=without reform], progress will be slow," which is offered by Merriam-Webster to explain its first definition. Id.

Here, the word "absence" in article IV, section 12 applies to "from the state." But, having established that absence can have a meaning that encompasses more than the lack of physical presence, what does it mean for the governor to be absent from the state? Does absence mean solely a lack of physical presence in the state? Or does it mean that the governor is absent from the state when the state or condition of having a governor does not exist for the State, i.e., that he is physically absent *and* unable to discharge his duties because of his absence?

Turning to the definition of "disability," it does not resolve this ambiguity. The relevant edition of Webster's Complete Dictionary of the English Language defined "disability" as (1) "[s]tate of being disabled; deprivation of ability; want of competent physical or intellectual power, means, opportunity, and the like; incapacity; incompetency" or (2) "[w]ant of legal qualification; legal incapacity or incompetency." Disability, Webster's Complete Dictionary of the English Language (1886), https://archive.org/details/websterscomplete00webs/page/n9/mode/2up.

Currently, Merriam-Webster provides three potentially relevant definitions for "disability": (1) "a physical, mental, cognitive, or developmental condition that impairs, interferes with, or limits a person's ability to engage in certain tasks or actions or participate in typical daily activities and interactions"; (2) "a disqualification, restriction or disadvantage"; and (3) "lack of legal qualification to do something." Disability, Merriam-Webster, https://www.merriam-webster.com/dictionary/disability (last visited Aug. 5, 2021).

Again, there is ambiguity. Does disability mean inability to govern, meaning that the position of governor devolves to the lieutenant governor until the condition or restriction that has impaired the governor's ability to perform his tasks as governor has ceased? In that case, it would suggest that "absence from the state" turns on both the governor's physical absence and his inability to perform his duties as governor. Or does disability mean solely the cessation of the lack of

legal qualification to act as governor, which could apply to physical or effective absence?

Looking outside of the confines of section 12, other provisions of article IV suggest that disability may have been intended to mean temporary disqualification, as opposed to a permanent disqualification for the remainder of the governor's term. See Idaho Const. art. IV, § 13 ("In case of the absence or **disqualification** of the lieutenant governor from any cause which applies to the governor, or when he shall hold the office of governor, then the president pro tempore of the senate shall perform the duties of the lieutenant governor until the vacancy is filled or the disability removed." (Emphasis added.)); Idaho Const. art. IV, § 14 ("In case of…absence from the state, … or disqualification from any cause, of both governor and lieutenant governor, the duties of the governor shall devolve upon the president of the senate pro tempore, until **such disqualification** of either the governor or the lieutenant governor be removed, or the vacancy filled…. (Emphasis added.)). However, even understanding "disability" to mean temporary disqualification does not clear up the ambiguity as to the meaning of "absence from the state." This interpretation of "disability" could be applicable to both physical absence and effective absence.

2. Principles of statutory interpretation could be found ambiguous as to whether the Framers meant effective or physical absence.

The command of plain language reading that one must give meaning to all the words in a provision could be understood to raise further ambiguity. Clark, 168 Idaho at 508, 484 P.3d at 192 (plain language reading "includes giving effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant." (Quotation marks omitted.)). Article IV, section 12 uses a disjunctive to add the final clause "inability to discharge the powers and duties of his office" to the list of enumerated events that trigger devolution to the lieutenant governor, suggesting that the final clause may have been intended to set out a different cause for devolution.

Applying the principle of interpretation that every word and phrase must be given independent meaning, "inability to discharge the powers and duties of his office" could be read to have a different

meaning than the preceding "failure to qualify," "impeachment," "conviction for treason, felony, or other infamous crime," "death," "removal from office, resignation," and "absence from the state." An effective absence interpretation could arguably violate this principle because "absence from the state" would not have independent meaning: events that trigger this exclusion would also fall within the exclusion "inability to discharge the powers and duties of office." Thus, there would be no need to have the "absence from the state" exclusion at all. The principle of giving effect to all the words and provisions in a statute could therefore support interpreting "absence from the state" to mean physical absence.

That said, there is a flaw in the application of this principle to section 12 because it also applies to the other enumerated causes of devolution in section 12, such as death and removal from office. Yet, death and removal from office clearly would also render the governor unable to discharge the powers and duties of his office. But death is still enumerated separately from "inability to discharge the powers and duties of his office" in section 12.

Ultimately, although the enumerated causes of devolution have independent meaning, the Idaho Supreme Court requires that provisions be construed as a whole. Hart, 135 Idaho at 829, 25 P.3d at 852; Hoskins v. Howard, 132 Idaho 311, 315, 971 P.2d 1135, 1139 (1998). Another principle could be found better suited to understand what the Framers meant by "absence from the state."[3] The legal maxim of noscitur a sociis could be applied to understand "absence from the state" and the other enumerated disqualifications by reading them in context together and with the phrase "or inability to discharge the powers and duties of his office". "The legal maxim noscitur a sociis…means 'a word is known by the company it keeps.'" Chandler's-Boise LLC, 162 Idaho at 453, 398 P.3d at 186 (citation omitted). Applying this principle here, the phrase "inability to discharge the powers and duties of his office" and the other enumerated causes, such as death and removal from office, wherein the governor is implicitly or explicitly unable to discharge his duties, provide necessary context to understand "absence from the state." Based on the context of the other causes, "absence from the state" could be read as an absence that renders the governor unable to perform the duties of governor. Thus, based on the legal maxim noscitur a sociis, "absence from the state"

could be understood to mean a circumstance where the governor is unable to discharge his duties as governor. This reading would support an effective absence interpretation.

3. The law that was in effect when the Constitution was drafted is unlikely to provide clarity as to whether the Framers meant effective or physical absence.

"[T]he law that was in effect when the Constitution was drafted" is another source one can apply to understand of the meaning of article IV, section 12. Nate v. Denney, 166 Idaho 801, 804, 464 P.3d 287, 290 (2017). In Nate, the Idaho Supreme Court compared the relevant provisions of the Organic Act of the Territory of Idaho against the relevant provision of the Idaho Constitution to understand its meaning. Id. at 804-08, 398 P.3d at 290-94. Relevant to article IV, section 12, section 3 of the Organic Act provided in pertinent part:

> Secretary of territory—Term of office—Powers and duties.— … [I]n case of the death, removal, resignation, or absence of the governor from the territory, the secretary shall be, and he is hereby, authorized and required to execute and perform all the powers and duties of the governor during such vacancy or absence, or until another governor shall be duly appointed and qualified to fill such vacancy.

Pub. L. No. 37-96, § 3, 12 Stat. 808, 809 (1863).

Comparing section 3 of the Organic Act against Idaho's Constitution, there is a notable difference in the causes of devolution to the secretary under the Organic Act versus devolution to the lieutenant governor under article IV, section 12. Under the Organic Act, only "death, removal, resignation or absence of the governor from the territory" triggered devolution to the secretary. Id. Article IV, section 12 added additional causes for devolution: failure to qualify, impeachment, conviction of treason, felony, or other infamous crime, or inability to discharge the duties of office. The addition of the final phrase in section 12 could suggest that section 12 was only intended to articulate causes that render the governor unable to perform the duties of his office under the principle of maxim noscitur a sociis, as discussed above. This

argument is supported by the contrast with the articulated causes of devolution in the Organic Act. This would support an effective absence interpretation. However, a physical absence interpretation could also be supported by the addition of inability to discharge the duties of office in section 12: the Framers could have understood absence in the Organic Act and in section 12 to mean something other than inability to discharge the duties of office and therefore added "inability to discharge the powers and duties of office" to section 12.

It must also be noted that the triggers to terminate the devolution of the governor's powers and duties are different in the Organic Act versus article IV, section 12. Under section 3 of the Organic Act, three of the causes would permanently cause devolution as they would cause a "vacancy" that would need to be filled. Id. However, upon the governor's "absence" there would only be a temporary devolution, and the secretary would only be acting governor "during such…absence." Id. But the Framers used different language to terminate a temporary devolution under section 12 on the grounds of absence. Under section 12, devolution on the grounds of "absence from the state" terminates when "the disability shall cease." Idaho Const. art. IV, § 12.

It is notable that the Framers used different language to terminate devolution in the event of an absence under the Idaho Constitution from what was used in the Organic Act. The Framers could have continued to use "during such vacancy or absence" and added other language to address the cessation of an inability to govern; instead, they chose to use "until the disability shall cease." This change in the language could be understood to mean that the Framers intended "absence from the state" in section 12 to have a different meaning from the absence contained in the Organic Act, one that encompassed the inability to govern. This reading would support an effective absence interpretation. In the alternative, as discussed above, the Framers could have understood "disability" as used in section 12 to mean legal disqualification and intended it to cover all of the temporary causes of devolution in section 12. This interpretation could support an effective or physical absence reading.

In light of the above, a court could conclude that ambiguity exists in the dictionary definitions of the terms, the possible plain language readings of section 12 using principles of statutory

interpretation, and in light of the law at the time section 12 was adopted. Based on these linguistic uncertainties, it seems likely that a reviewing court would find the phrase "absence from the state" ambiguous.

C. If article IV, section 12 is found ambiguous, statutory construction is required and could cause a court to conclude that "absence from the state" means effective absence.

If a court found article IV, section 12 ambiguous as to the meaning of "absence from the state," the court would look to the principles of statutory construction to ascertain the meaning of the disqualification. "[T]he ordinary rules of statutory construction" apply to interpreting constitutional provisions. Moon v. Inv. Bd., 97 Idaho 595, 596, 548 P.2d 861, 862 (1976). "Where the language of a constitutional provision is ambiguous, the debates from the constitutional convention may be resorted to for the purpose of interpretation." Winkler, 167 Idaho at 531, 473 P.3d at 800 (citation omitted). One should also look to the "context of the time in which" the provision was adopted. Id. (citation omitted).

1. While at times contradictory, the debates from the constitutional convention and other provisions of the original constitution could be read to suggest that "absence from the state" was intended to mean effective absence.

Article IV, section 12 of the Idaho Constitution was adopted at the 1889 constitutional convention. The only amendments offered were to insert the word "treason" and the word "other" between "or" and "infamous." 1 Proceedings & Debates of the Const. Convention of Idaho, 1889, at 421 (I.W. Hart ed., 1912). These discussions are unenlightening for the purposes of this question. However, in the discussion of article IV, section 1, as to the number of executive officers proposed, John S. Gray offered the following debate:

> Mr. GRAY. I hardly see the force of the objection to the number of officers we have here. We considered that they are necessary. The lieutenant governor has been mentioned by the chairman of the committee. We have

> this benefit, that we would not have in the event we did not have that office: The likelihood is, if the governor holds his position, that all the duties he will have to perform is that of president of the senate; and that is the only pay he gets—is for that service, but in the event of the governor's death, or **absence from his post**, then there is some sort of positive person to take his position; and we think it is a very important clause in it, when it costs the state nothing in the event that does not happen, to have the succession of the office provided for. We can easily see of how much benefit it might be, supposing that we might suddenly lose the governor **or for some reason he should be disqualified to perform his duties**.

Id. at 414 (statement of John S. Gray, delegate) (emphasis added).

Similarly, in the debate over an amendment to article IV, section 19 regarding compensation for the lieutenant governor while acting governor, J. W. Poe stated: "Now, this amendment is to the effect that if at any time the governor should be absent from the state **and** unable to perform the duties of governor, then by virtue of his office [the lieutenant governor] would act as governor."[4] 2 Proceedings & Debates of the Const. Convention of Idaho, 1889, at 1324 (I.W. Hart ed., 1912) (statement of J. W. Poe, delegate) (emphasis added).

Thus, both Mr. Poe and Mr. Gray appear to have understood "absence from the state" to mean effective absence. In contrast, W. B. Heyburn indicated the opposite understanding, speaking of a salary for the lieutenant governor "if the governor is absent **or** unable to act and conduct his duties[.]" Id. at 1329 (emphasis added).

It must also be noted that the 1889 constitutional convention also adopted former article IV, section 19, which repeal was ratified at the general election on November 3, 1998. In pertinent part, the originally adopted provision stated: "Provided, however, the legislature may provide for the payment of actual and necessary expenses to the governor, lieutenant-governor, secretary of state, attorney general, and superintendent of public instruction, while **traveling within the state** in the performance of official duty." Idaho Const. art. IV, § 19 (repealed)

(emphasis added). This provision could be read as indicating that the constitutional convention viewed the governor as only conducting official business while within the state, which would support a physical absence construction.[5]

That said, the same convention also adopted article V, section 27, which, as originally adopted, provided "the legislature may provide for the payment of actual and necessary expenses of the governor, secretary of state, attorney general, and superintendent of public instruction incurred while in the performance of official duty." This provision, which does not include the "within the state" caveat of article IV, section 19, suggests that the convention did foresee the named officials leaving the state in the exercise of their official duties.

On the whole, while there is evidence in the constitutional convention debates that would support both the physical and the effective absence interpretations, a court could conclude that the majority of the delegates who issued comments bearing on this question understood that the lieutenant governor would only become acting governor upon the governor's effective absence, which would support the effective absence interpretation.

2. A court could conclude that the historical context suggests that "absence from the state" was intended to mean effective absence.

The historical context in which article IV, section 12 was drafted must also be considered.[6] Prior to the adoption of Idaho's Constitution, Idaho was governed by territorial governors, who were resented and viewed as carpetbaggers. Donald Crowley & Florence Heffron, The Idaho State Constitution: A Reference Guide 4 (1994). At least one territorial governor never set foot in the territory. Id.

In addition, at the time of the constitutional convention, Idaho's territorial railroads were the only method for significant travel, despite Idaho's diverse and difficult geography. Dennis C. Colson, Idaho's Constitution: The Tie that Binds 130-32 (1991). The convention delegates recognized the difficulty of traveling. 2 Proceedings & Debates at 1552 (discussing the possibility of having to travel by rail, on the back of a mule, or on snowshoes to get to court). Related to the

difficulty of traveling in 1889, one can also assume that travel required more time and was associated with lengthier and more complete absences from the state than in the modern world. Contrary to the numerous methods of remote communication available today, telegram and physical mail was the order of the day.[7] 2 Proceedings & Debates at 1693, 1811, 1929.

In light of this historical background, it could reasonably be inferred that the convention delegates understood that a governor's "absence from the state" would necessarily prevent him from fulfilling his duties. Given the realities of travel and communication technologies in 1889, when the governor was absent from the state in 1889, the convention delegates could reasonably have understood that the governor was simply unable to fulfill his duties in the same way as when he was present in the state. But see State ex rel. Warmoth v. Graham, 26 La. Ann. 568, 569 (La. 1874) ("The mere absence, at Pass Christian, within a few hours' run of the Capital, could not, by any possibility, affect the public interest."). They therefore could have understood the governor's absence from the state to mean effective absence.

3. Interpreting "absence from the state" as meaning effective absence could be found necessary to avoid absurdity.

Ultimately, a court could resolve any ambiguity as to the meaning of "absence from the state" by the need to construe the constitutional provision to avoid absurdity. Any construction of a constitutional provision that would render it absurd and defeat the intent of the drafters is to be avoided. See State ex rel. Idaho State Park Bd. v. City of Boise, 95 Idaho 380, 383, 509 P.2d 1301, 1304 (1973) (rejecting alternative constructions of the constitutional language as they "would be patently absurd and would defeat the constitutional intent as delineated by the proceedings and debates of the constitutional convention"); State v. McKie, 163 Idaho 675, 678, 417 P.3d 1001, 1004 (Ct. App. 2018), review denied (May 23, 2018) ("Constructions of an ambiguous statute that would lead to an absurd result are disfavored.").

It would be absurd for the mere physical absence of the governor from the state to trigger the devolution of his duties to the

lieutenant governor. Given the technologies available in this day and age, there is no impediment to the governor performing his duties remotely. Such a rule would require that the "movements of the [g]overnor should be watched, with the view that the [l]ieutenant [g]overnor or [president pro tempore] should slip into his seat, the moment he stepped across the borders of the State." Warmoth, 26 La. Ann. at 570.

It would also mean that the governor could not act as governor outside of the state. But the Constitution vests "[t]he supreme executive power of the state" in the governor. Idaho Const. art. IV, § 5. Thus, under Idaho Code section 67-802(4), the governor "is the sole official organ of communication between the government of this state and the government of any other state or territory, or of the United States." If the governor were unable to act as governor outside the state, he would be unable to carry out this function via in-person meetings and conferences with other governments. This would be an absurd result.

Further, an interpretation of "absence from the state" as meaning physical absence only would subject the state to whiplash policy changes when the lieutenant governor becomes acting governor. It is not unusual in Idaho politics for the voters to elect a governor from one political party and a lieutenant governor from the other party. Crowley & Heffron, at 108. Thus, during a brief absence, the lieutenant governor could issue executive orders with different policy objectives. The people of Idaho could not be guaranteed the execution of the policy choices of the individual they elected solely because the quirks of Idaho's geography, population centers, and airport locations, which cause the governor to have to temporarily travel out-of-state to execute his duties as Idaho's governor.

These concerns led the Nevada Supreme Court to adopt the effective absence rule. Quoting a 1872 decision, the court wrote "to accept 'strict' absence forced one to 'reflect upon the possible consequences of such a construction of the Constitution, upon the disgraceful tricks, strifes and exhibitions, which might be entailed upon the people of the State[.]'" Sawyer v. First Jud. Dist. Ct. in and for Ormsby County, 410 P.2d 748, 750 (Nev. 1966) (quoting People ex rel. Tennant v. Parker, 3 Neb. 409 (1873)). The court gave great weight to "the citizens'…right to realize the *unintruded* policies of the individual

they placed in that office." Id. (emphasis added). See also State ex rel. Meyers v. Reeves, 78 P.2d 590, 512-13 (Wash. 1938) (Geraghty, J., concurring) ("Under present-day conditions, no good reason exists for a rule that would confine the [g]overnor to the limits of the state or permit him to cross the state line only at the risk of a disruption of his policies.").

On a related note, if "absence from the state" were interpreted to mean pure physical absence, the governor's staff would never quite know who their boss was when the governor was out of the office. Staffers would have to constantly monitor the governor's location to know whether they should follow instructions given to them by the lieutenant governor or the governor. A staffer could never be quite certain whether to follow the governor's telephoned[8] or emailed instructions or the lieutenant governor's contrary contemporaneous instruction when the governor was traveling. The lieutenant governor could even fire the governor's staff when the governor was temporarily out of the state, even if he was just out of state for 30 minutes. Such outcomes would be inconsistent with the lieutenant governor's constitutional role as the governor's subordinate. See Idaho Const. art. IV, § 5 ("The supreme executive power of the state is vested in the governor, who shall see that the laws are faithfully executed.").

Finally, a physical absence rule could lead to absurdity in terms of the compensation afforded to the lieutenant governor while acting as governor. Article IV, section 12 states that the lieutenant governor is entitled to the "emoluments" of the governor while acting as governor, and Idaho Code section 67-809(2) provides that the lieutenant governor will receive the difference between the daily salaries of lieutenant governor and the governor in addition to the salary of the lieutenant governor when acting as governor. If the lieutenant governor were acting governor every time the governor was physically absent from the state, such as when the governor stopped over in Spokane for a half hour in the process of traveling to a location in Idaho, there would be absurdity in the lieutenant's governor's compensation.

Considering the debates at the constitutional convention, the historical context of when article IV, section 12 was drafted, and the need to interpret "absence from the state" to avoid absurdity, a court

could conclude that the canons of construction compel the conclusion that "absence from the state" means effective absence.

D. States with similar constitutional provisions are split as to whether "absence from the state" means effective absence or pure physical absence.

It appears the states to have interpreted similar constitutional provisions that contain the phrase "absence from the state" are split as to whether "absence from the state" means effective absence or mere physical absence.[9] Half of the states identified as having addressed this question directly have concluded that "absence from the state" means effective absence. State ex rel. Ashcroft v. Blunt, 813 S.W.2d 849, 852-53 (Mo. 1991) (en banc) (reaffirming adoption of the rule that "the power of [g]overnor devolves upon the [l]ieutenant [g]overnor in the [g]overnor's absence only when such absence effectively debilitates or prevents the [g]overnor from executing the duties of his office"); Sawyer, 410 P.2d at 749 (following the "overwhelming majority of states" that have concluded that absence means effective absence "i.e., an absence which is measured by the state's *need* at a given moment for a particular act by the official then physically not present"); In re An Act Concerning Alcoholic Beverages, 31 A.2d 837, 840-41 (N.J. 1943) (holding that absence from the state means "an absence such as will injuriously affect the public interest and does not include a mere temporary absence" (quotation marks omitted)); Johnson v. Johnson, 3 N.W.2d 414, 415 (Neb. 1942) ("[M]ere temporary absence from the state for the performance of official duty or for recreation or for business of a personal nature not interfering with the interests of the public does not vacate the office of governor and instate the lieutenant governor therein with all the powers, duties and emoluments thereof."); Warmoth, 26 La. Ann. at 569 (interpreting "absence from the state" to mean when the governor's absence is "such as would affect injuriously the public interest").

The other half of the states identified as having addressed this question directly have concluded that "absence from the state" means pure physical absence from the state, of any duration or distance. See Bratsenis v. Rice, 438 A.2d 789, 791 (Conn. 1981) ("We decline to conclude that absence implies anything other than physical absence.")[10]; In re Governorship, 603 P.2d 1357, 1362 (Cal. 1979) (in

bank) (concluding that "constitutional and legislative history, contemporaneous interpretation and historical practice, and considerations of public policy, namely the need for certainty in effectuating executive decisions, support the" interpretation that "absence from the state" "must be given its literal, common meaning of physical nonpresence"); Walls v. Hall, 154 S.W.2d 573, 577 (Ark. 1941) ("It is our view that 'absence from the state' … means out of the state for any period of time."); Montgomery v. Cleveland, 98 So. 111, 114 (Miss. 1923) ("[W]henever the [g]overnor is beyond the confines of the state he is absent from the state, and he cannot perform the duties of his office during such absence, and the functions of the office are vested in the [l]ieutenant [g]overnor."); Ex parte Crump, 135 P. 428, 436 (Okla. Crim. App. 1913) ("[T]he plain intention of the framers of the Constitution and the people in adopting it was to provide that in [the governor's] absence from the state for any purpose or for any period of time, however short, his constitutional functions shall devolve upon the [l]ieutenant [g]overnor as acting [g]overnor.").

Finally, one prominent legal treatise has concluded that absence means effective absence. See 38 Am. Jur. 2d, Governor § 12 ("Generally, the term 'absence' means effective absence from the state and that is an absence which is measured by the state's need at any given moment for a particular act by the official then physically not present.").

III. CONCLUSION

In short, while this is a close legal question, as demonstrated by the split between the states that have addressed this question, a reviewing court could conclude that Governor Little's interpretation of "absence from the state" in article IV, section 12 of Idaho's Constitution as expressed in his July 29, 2021 letter is correct and that "absence from the state" means effective absence, not physical absence.

I hope you find this analysis helpful.

Sincerely,

BRIAN KANE
Chief Deputy

[1] A term appearing in several places in a statutory text is generally read the same way each time it appears. See Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 479, 112 S. Ct. 2589, 2596, 120 L. Ed. 2d 379 (1992). It is essential to construe a single formulation here because otherwise Idaho could have one set of circumstances under which a lieutenant governor could assume the office of governor and a second set of slightly different circumstances under which the president pro tem or speaker assumes the role of governor if the lieutenant governor is unable to govern.

[2] But as observed above, such a conclusion would be contrary to the generally accepted rules of statutory construction. If individuated interpretation were necessary, there would need to be a congruent compelling argument for such interpretation. In the preparation of this analysis, no such compelling reasoning could be identified.

[3] In Clark, the Idaho Supreme Court repeated its prior precedent in describing this command as (1) a principle of statutory interpretation to be applied in determining whether the language of a provision is unambiguous and (2) as something different from the rules or canons of statutory construction, which may be applied only if the language is ambiguous. 168 Idaho at 508, 484 P.3d at 192. However, there appears to be confusion as to whether other principles of statutory interpretation, such as the maxim noscitur a sociis, are canons of construction that are only applied to ambiguous text or whether they are principles of statutory interpretation that are applied to determine whether the text is ambiguous. For example, in State v. Schulz, which was quoted in Clark in support of the relevant discussion, the court applied the maxim noscitur a sociis to a phrase that the court described as "ambiguous" to conclude that the statute was unambiguous. 151 Idaho 863, 867, 264 P.3d 970, 974 (2011); see also Chandler's-Boise LLC v. Idaho State Tax Comm'n, 162 Idaho 447, 452-53, 398 P.3d 180, 185-86 (2017) (looking to the maxim noscitur a sociis to support a plain language reading of a statute). In contrast, in ABK, LLC v. Mid-Century Ins. Co., the Idaho Supreme Court refused to apply the doctrine of noscitur a sociis to a question of contract interpretation because it was a canon of construction "to be used to assist in contract interpretation only where an ambiguity exists." 166 Idaho 92, 100, 454 P.3d 1175, 1184 (2019). For the purposes of this letter, I will assume that the Court will look to principles of statutory interpretation such as noscitur a sociis to understand the plain language of article IV, section 12 prior to concluding the provision is ambiguous based on its use of the doctrine in statutory interpretation cases.

[4] The committee later rejected this amendment based on the provision in article IV, section 12 stating that the emoluments of the governor pass to the lieutenant governor when he is acting governor. 2 Proceedings & Debates at 1324-29.

[5] In 1994, the people ratified an amendment to this provision that removed the phrase "within the state"; thus, from 1994 until its repeal in 1998, article IV, section 19 stated, "the legislature may provide for the payment of actual and necessary expenses to these officers while traveling in the performance of official duty."

[6] The Idaho Supreme Court has not viewed the past interpretations or practice of officials under a constitutional provision as controlling its interpretation of that provision. See Nate, 166 Idaho at 810-11, 464 P.3d at 296-97 (an over 50-year history of legislators routinely presenting bills to governors after adjournment, with no apparent objection from those governors, and an almost 39-year history of governors untimely vetoing laws without objection from legislators cannot change the constitutional requirements that bills be presented to the governor prior to adjournment sine die). Thus, it is unlikely that the court would give weight to a past practice of lieutenant governors acting as governor when the governor was temporarily out of the state nor is it likely that the court would give weight to Idaho Code section 67-805A(2), which provides that the lieutenant governor performs the duties of acting governor in the case of the governor's "temporary absence from the state" "until the governor returns to the state." This statute appears to suffer from the assumption that the governor is physically unable to perform his job duties while out of state.

[7] It was not until 1915 that the first coast-to-coast telephone call was completed.

[8] Or even video-conferenced instructions whereby the staffer and the governor could physically see one another on a screen within a single room. Facetime, Zoom, WebEx, and others have made face-to-face access from virtually anywhere a reality.

[9] See, e.g., Ark. Const. amend. 6, § 4 ("In case of the impeachment of the Governor, or his removal from office, death, inability to discharge the powers and duties of the said office, resignation or absence from the State, the powers and duties of the office, shall devolve upon the Lieutenant Governor for the residue of the term, or until the disability shall cease. But when the Governor shall, with the consent of the Legislature, be out of the State, in time of war, at the head of a military force thereof, he shall continue commander-in-chief of all the military force of the State.") (eff. Sept. 14, 1914); Cal. Const. art. V, § 10 ("The Lieutenant Governor shall act as Governor during the impeachment, absence from the State, or other temporary disability of the Governor…."); Conn. Const. art. IV, § 18 ("In case of the inability of the governor to exercise the powers and perform the duties of his office, or in case of his impeachment or of his absence from the state, the lieutenant-governor shall exercise the powers and authority and perform the duties appertaining to the office of the governor until the disability is removed or, if the governor is impeached, he is acquitted, or if absent, he has returned.") (eff. Dec. 30, 1965); La. Const. art. 53 ("In case of impeachment of the Governor, his removal from

office, death, refusal or inability to qualify or to discharge the powers and duties of his office, resignation, or absence from the State, the powers and duties of the office shall devolve upon the Lieutenant Governor, for the residue of the term, or until the Governor, absent or impeached, shall return or be acquitted, or the disability be removed….") (eff. Apr. 1868); Mo. Const. art. IV, § 11(a) ("On the death, conviction or impeachment, or resignation of the governor, the lieutenant governor shall become governor for the remainder of the term. … On the failure to qualify, absence from the state or other disability of the governor, the powers, duties and emoluments of the governor shall devolve upon the lieutenant governor for the remainder of the term or until the disability is removed."); Neb. Const. art. V, § 16 ("In case of the death, impeachment and notice thereof to the accused, failure to qualify, resignation, absence from the State, or other disability of the Governor, the powers, duties and emoluments of the office for the residue of the term or until the disability shall be removed, shall devolve upon the lieutenant-governor.") (eff. Oct. 12, 1875); Okla. Const. art. 6, § 16 ("In case of impeachment of the Governor, or of his death, failure to qualify, resignation, removal from the State, or inability to discharge the powers and duties of the office, the said office, with its compensation, shall devolve upon the Lieutenant Governor for the residue of the term or until the disability shall be removed.").

[10] As demonstrated in footnote 9, Connecticut's relevant constitutional provision had notably different language than Idaho's, and had a far more apparent physical absence meaning.

October 28, 2021

The Honorable John Gannon
Idaho House of Representatives
Idaho State Capitol
700 West Jefferson Street
Boise, Idaho 83702
VIA EMAIL: jgannon@house.idaho.gov

Re: Property Tax Rebate by Cities

Dear Representative Gannon:

You requested guidance on whether a city in Idaho has the legal authority to develop a property tax rebate program that mirrors the requirements and amount exempted under the current "Circuit Breaker" program or whether legislation would be required. The Idaho Constitution, relevant provisions of Idaho Code, and relevant case law suggest that cities do not currently have the authority to create such a program and such authority can only be granted to cities through legislation.

Idaho is a Dillon's Rule state. According to the Idaho Supreme Court, that means that a city may only exercise powers granted to it.

> Idaho has long recognized the proposition that a municipal corporation, as a creature of the state, possesses and exercises only those powers either expressly or impliedly granted to it. Sandpoint Water & Light Co. v. City of Sandpoint, 31 Idaho 498, 503, 173 P. 972, 973 (1918); Boise Dev. Co. v. Boise City, 30 Idaho 675, 688, 167 P. 1032, 1034-35 (1917). This position, also known as "Dillon's Rule," has been generally recognized as the prevailing view in Idaho. Moore, "Powers and Authorities of Idaho Cities: Home Rule or Legislative Control?", 14 Idaho L.Rev. 143, 147, n. 18 (1977) (for cases supporting this view). Thus, under Dillon's Rule, a municipal corporation may exercise only those powers granted to it by either the

> state constitution or the legislature and the legislature has absolute power to change, modify or destroy those powers at its discretion. State v. Steunenberg, 5 Idaho 1, 4, 45 P. 462, 463 (1896).

Caesar v. State, 101 Idaho 158, 160, 610 P.2d 517, 519 (1980). So, in responding to your request, it is necessary to review the constitutional and statutory provision regarding the powers—both general and specific to taxation—that are granted to cities.

In terms of general powers granted to cities, article XII, section 1 of the Idaho Constitution provides that "[the] legislature shall provide by general laws for the incorporation, organization and classification of the cities and towns, in proportion to the population, which laws may be altered, amended, or repealed by the general laws." The Legislature has granted certain powers to cities in Idaho Code section 50-301:

> Cities…shall be bodies corporate and politic; may sue and be sued; contract and be contracted with; accept grants-in-aid and gifts of property, both real and personal, in the name of the city; acquire, hold, lease, and convey property, real and personal; have a common seal, which they may change and alter at pleasure; may erect buildings or structures of any kind, needful for the uses or purposes of the city; and exercise all powers and perform all functions of local self-government in city affairs as are not specifically prohibited by or in conflict with the general laws or the constitution of the state of Idaho.

As far as specific taxing authority is concerned, article VII, section 6 of the Idaho Constitution says that "[the] legislature shall not impose taxes for the purpose of any county, city, town, or other municipal corporation, but may by law invest in the corporate authorities thereof, respectively, the power to assess and collect taxes for all purposes of such corporation." The Legislature has authorized cities to levy for a number of purposes. For example, Idaho Code section 50-235 says "[the] city council of each city is hereby empowered to levy taxes for general revenue purposes…." So, the Idaho Constitution

grants the Legislature authority to make laws that both allow for the creation of cities and invest in cities the power to tax. In turn, the Legislature has given cities several powers, including the power to levy taxes.

In contrast, both the Idaho Constitution and Idaho Code are silent regarding a city's authority to issue a tax rebate equal to the "Circuit Breaker." Notably, similar mechanisms are provided for at both the state and county levels. Idaho Code title 63, chapter 7 outlines property tax relief at the state level, including the "Circuit Breaker" program. Likewise, county commissioners have discretion to cancel property taxes for reason of undue hardship. Idaho Code § 63-711. But there are currently no statutory provisions that allow for cities to provide a property tax rebate that mirrors the "Circuit Breaker" program.

Although there is no current statutory provision allowing cities to provide a property tax rebate that matches the "Circuit Breaker" program, historically, a similar provision has existed. From the days of the Idaho Territorial Government until 1974—before the amendment and addition of the current property tax relief program—there was a "Widow's Exemption" that exempted a certain amount from property taxes for qualifying residents over 65. 1974 Idaho Sess. Laws, ch. 228. Although it was removed in 1974, a reference to this "Widow's Exemption" lingered in Idaho Code until December 31, 2020. Before that date, if a special assessment was levied by a city on a property qualifying for a "Widow's Exemption" and the assessment was not paid within three years, then the special assessment could be cancelled on that property. Idaho Code § 50-1008 (am. 2020). So, until 1974 (and maybe even through 2020), cities had the option of granting additional property relief to a class of people similar to the beneficiaries of the current "Circuit Breaker" program. But, as the law now stands, cities have no such authority in Idaho.

In short, Idaho follows the Dillon's Rule tradition requiring that a city only exercise authority it has been granted. Neither the Idaho Constitution nor the Legislature have granted cities the authority to develop a property tax rebate program that matches the "Circuit

Breaker" program. For any city to develop such a program would require legislation.

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

Sincerely,

BRETTON D. JARVIS
Deputy Attorney General

December 17, 2021

Representative Brandon Mitchell
Idaho House of Representatives
Idaho State Capitol
P.O. Box 83720
Boise, ID 83720-0038
VIA EMAIL: bmitchell@house.idaho.gov

RE: Deciphering H.B. 317 – The SALT Workaround Bill

Dear Representative Mitchell:

You requested guidance on the language of H.B. 317, 66th Legislature, 1st Regular Session (Idaho 2021) ("H.B. 317"), which is now found in Idaho Code section 63-3026B. This law is nicknamed the "SALT workaround bill." "SALT" is an acronym that stands for "state and local tax." About 20 states have enacted laws very similar to this.

Historically, individual taxpayers that itemized deductions on their federal income tax return could deduct 100% of their state property taxes as well as either state income tax or sales tax. However, the Tax Cuts and Jobs Act of 2017[1] implemented a new federal tax rule (known as the "SALT limitation") that limits an individual's state and local tax deduction to $10,000 for tax years 2018 through 2025. Several states have responded with laws providing a work around for members of pass-through entities. Under Idaho's H.B. 317, partnerships, LLCs, and S-corps can elect to pay income tax at the entity level, which is just an expense that is deducted from the business's overall federal taxable income, ultimately reducing each owner's distributive share of income and avoiding the $10,000 limit at the individual level (the $10,000 limit only applies to individuals, not business entities). The members receive a credit for their share of the taxes paid that they can claim on their Idaho return. The Internal Revenue Service issued Notice 2020-75 confirming that the use of these state SALT workaround laws is valid.

Breaking down the mechanics of H.B. 317 (i.e., Idaho Code § 63-3026B)

1. If an entity wishes to make the election to pay tax at the entity level, they do so by informing the Idaho State Tax Commission of their election with their timely filed original return. See Idaho Code § 63-3026B(2)(c).
2. The election must be signed by all members of the entity or by an officer, manager, or member that has been authorized to make the election on behalf of all the members. See Idaho Code § 63-3026B(2)(d).
3. An entity that makes the election is labeled an "affected business entity." See Idaho Code § 63-3026B(1)(a). The statute repeatedly refers to the "affected business entity" throughout the various subsections.
4. The affected business entity must pay the tax (the Idaho corporate tax rate applies) at any point before the fifteenth day of the fourth month after the close of the taxable year. See Idaho Code § 63-3026B(3). Note, timing of the payment matters for the deduction. If an affected business entity (which happens to be a calendar year filer) wants to be able to deduct the tax payment from their 2021 income, they need to make the payment by December 31, 2021. If they wait and make the payment with their tax return and the election on April 15, 2022, then they will deduct the tax payment from their 2022 taxable income.
5. Members still report, on their federal and state tax returns, their share of the income that passes through to them from the entity. But they can claim a credit for the tax paid by the entity equal to the amount of their share of ownership in the entity multiplied by the tax paid by the affected business entity. The credit is available to individual and corporate members of the affected business entity. See Idaho Code § 63-3026B(8), (9). Example: the affected business entity pays $10,000 in tax to Idaho under this new section, a 25% owner of the partnership can claim a credit of $2,500 on their Idaho tax return.
6. If a member of the affected business entity is a nonresident individual and has no other Idaho source income besides the income from the affected business entity, then they are not required to file an Idaho return. See Idaho Code § 63-3026B(6). There is no requirement in this scenario for them to file an Idaho return and claim the credit for the tax paid.

7. If the credit exceeds the member's Idaho tax liability, the excess is refundable. See Idaho Code § 63-3026B(8)(a), (9).

If any of your constituents have further questions, please encourage them to contact Tom Shaner, Tax Research Manager in the Taxpayer Resources Unit at the Idaho State Tax Commission. Tom is very knowledgeable and has been fielding questions daily from tax practitioners about this SALT workaround law. He can be reached at: tom.shaner@tax.idaho.gov or (208) 334-7518. He manages the group that is in charge of forms and instructions. All of these issues are very much on their radar. They are working on forms and instructions currently for these affected business entities.

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

Sincerely,

PHIL N. SKINNER
Lead Deputy Attorney General

[1] Pub. L. No. 115-97, 131 Stat. 2054 (codified as amended in scattered sections of 26 U.S.C.).

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and

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