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TWIN FALLS COUNTY
PROSECUTING ATTORNEY

GRANT P. LOEBS

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TWIN FALLS, IDAHO 83303-0126

RECEIVED

2015 SEP -8 AM 11:47

TWIN FALLS
COUNTY CLERK

September 3, 2015

Kristina Glascock, Twin Falls County Clerk
Twin Falls County Mail

Re: Certificate of Review
Proposed Initiative Related to Banning of Refugee Centers

Dear Twin Falls County Clerk:

An initiative petition was sent to my office on August 25, 2015. Pursuant to Idaho Code § 31-717, this office has reviewed the petition and has prepared the following.

Given the strict statutory timeframe within which this office must review the petition, this review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the statute, these recommendations are "advisory" only and the petitioner may accept or reject them in whole or in part. The opinions expressed in this review address only the legality of the initiative and are not exhaustive. The Prosecuting Attorney offers no opinion with regard to the policy issues raised by the proposed initiative.

Should the petitioner wish to proceed with his sponsorship of this referendum, the Prosecuting Attorney, pursuant to statute, will prepare ballot titles upon the filing of the ballot measure with the County Clerk for assignment of ballot title. Ballot titles shall be prepared in accordance with Idaho Code § 34-1809.

I. Matters of Substantive Import

A. Introduction

The initiative seeks to declare "Refugee Centers" public nuisances under Twin Falls County Code and prohibit the operation of a "Refugee Center, as described by the Federal Refugee Act of 1980 §96-212 US CODE as amended (Wilson-Fish amendment as part of the Fiscal Year 1985 Continuing Resolution on Appropriations)" "within the unincorporated areas of the County of Twin Falls." The initiative seeks to bar the Twin Falls County Commissioners from repealing the

initiative or taking any actions that would lead to its repeal for a period of one year. The initiative seeks to require any commissioner who attempts to repeal the initiative to forfeit his office and potentially face criminal penalties. Additionally, the initiative seeks to provide for enforcement of the initiative and criminal penalties for violation.¹

B. The Initiative is Unconstitutional.

Local governments cannot affect the immigration policies of the United States. The federal government has plenary Constitutional authority over naturalization and immigration. U.S. Const. art. I, § 8, cl. 4. *Toll v. Moreno*, 458 U.S. 1, 10 (1982). Idaho's Constitution properly declares the Constitution of the United States the supreme law of the land. Idaho Const. art I §3. The Supremacy Clause of the United States Constitution provides "This Constitution, and the laws of the United States which shall be made in pursuance thereof... shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." U.S. Const. Art. VI, §2. State law that conflicts with federal law is, therefore, "without effect." *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543, 172 L.Ed.2d 398 (2008). Under the Preemption Clause, it is "clear that federal law is as much the law of the several States as are the laws passed by their legislatures." *Haywood v. Drown*, 129 S. Ct. 2108, 2114, 173 L.Ed.2d 920 (2009). "Preemption doctrine stems from the Supremacy Clause of the United States Constitution and invalidates any state law that contradicts or interferes with any Act of Congress." *Hayfield Northern Railroad Co., Inc. v. Chicago and Northwestern Transp. Co.*, 467 U.S. 622 627, 104 S. Ct. 2610 (1984). Implied field preemption exists where "the scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Id.* (quoting *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982)), *Arizona Contractors Ass'n, Inc. v. Napolitano*, CV07-1355PHXNVNW, 2007 WL 4570303, at 8 (D. Ariz. Dec. 21, 2007).

The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens. *See, Toll v. Moreno*, 458 U.S. 1, 10, 102 S.Ct. 2977, 73 L.Ed.2d 563 (1982); *see generally* S. Legomsky & C. Rodríguez, *Immigration and Refugee Law and Policy* 115-132 (5th ed. 2009). This authority rests, in part, on the national government's constitutional power to "establish a uniform Rule of Naturalization," U.S. Const. art. I, § 8, cl. 4, and its inherent power as sovereign to control and conduct relations with foreign nations, *see, Toll, supra*, at 10, 102 S.Ct. 2977 (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318, 57 S.Ct. 216, 81 L.Ed. 255 (1936)), *Arizona v. U.S.*, 132 S. Ct. 2492, 2498 (2012).

¹ Beyond the scope of this review is whether this ordinance could be interpreted as an ordinance in violation of the Civil Rights Act of 1964 or the Fair Housing Act based on its prohibitions being hostile to individuals of different national origin than the proponents of the initiative. This could be a possible avenue of attack, however based on the limited time available to review these matters, this office can only recognize it as a potential issue at this point.

The Refugee Act of 1980, an Act to amend the Immigration and Nationality Act, created the Federal Refugee Resettlement Program. PL 96-212 (S 643), PL 96-212, MARCH 17, 1980, 94 Stat 102. The Refugee Act was established to respond to the urgent needs of refugees and promote resettlement. *Id.* It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States. *See, Chy Lung v. Freeman*, 92 U.S. 275, 279-280, 23 L. Ed. 550 (1876); see also *The Federalist* No. 3, p. 39 (C. Rossiter ed. 2003) (J. Jay). From this, it flows logically that if it is fundamental that these issues be dealt with by one sovereign rather than fifty, then further requiring conference with innumerable local entities is equally impermissible.

Contrary to what the initiative suggests, the Refugee Act does not clearly define "Refugee Center," therefore the proposed initiative is potentially overbroad, vague, and/or open to the interpretation that no refugee may be resettled in Twin Falls County by any person, which clearly contradicts the Refugee Act. This initiative clearly and plainly contradicts and interferes with the Refugee Act which promotes and provides for the orderly resettlement of Refugees. This initiative appears to be an effort to nullify the purpose of the Refugee Act. Attempted nullification of federal law has been repeatedly rejected. *See, Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958).

C. The Initiative is likely an Unlawful Exercise of Police Powers Granted to Counties by the Idaho Constitution.

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. Idaho Const. art. XII, § 2. So long as the actions of local governing boards are not unreasonable, that is, arbitrary, capricious, or discriminatory, and bear a substantial relationship to the public health, safety, morals, and general welfare, local governing boards act within their constitutional authority. *Ciszek v. Kootenai County Bd. of Com'rs*, 2011, 254 P.3d 24, 151 Idaho 123, rehearing denied. Governmental power to interfere with general rights of landowner restricting character of use of property through zoning regulation is not unlimited, and other questions aside, restriction cannot be imposed if it does not bear a substantial relation to public health, safety, morals, or general welfare. Idaho Const. art. 12, § 2. *Dawson Enterprises, Inc. v. Blaine County*, 98 Idaho 506, 567 P.2d 1257 (1977).

The proposed initiative declares a "Refugee Center" a public nuisance² and prohibits such centers from being established in the County of Twin Falls. The initiative does not state a clear explanation as to why the prohibition of refugee resettlement in the county is necessary for the general welfare. Enforcement of the provisions of this

² This declaration could also pose due process problems since the affected entity has not been offered notice and a meaningful opportunity to respond and no standards for identifying and correcting the complained of nuisance have been offered or referenced.

proposed initiative would invite prolonged litigation regarding why its provisions are not "arbitrary, capricious, and/or discriminatory."

D. The Initiative's Section 3 "attempt to repeal" is Contrary to Law.

The initiative proposes to prohibit the Board of County Commissioners of Twin Falls County from repealing its provisions. An ordinance enacted by initiative petition is on "equal footing" with an ordinance passed by the legislative body of the county—the Twin Falls County Board of County Commissioners. *See, Luker v. Curtis*, 64 Idaho 703 (1943). One legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature. *Fletcher v. Peck*, 6 Cranch 87, 135 (1810). Clearly a Board of County Commissioners, elected by the county citizens, has the power to enact or repeal county ordinances. I.C. § 31-714. Any attempt by the initiative to criminally punish county commissioners for performing their necessary duties or remove them from office for doing so is clearly contrary to law.

E. The Initiative Calls for a May 3, 2016, Election, which is Contrary to Law.

County ordinances must not conflict with the general laws. Idaho Const. art. XII, § 2. Idaho Code states there shall be no more than two elections conducted in any county in any calendar year, with certain exceptions outlined in Idaho Code, and shall be held on the third Tuesday in May of each year; and the Tuesday following the first Monday in November of each year. I.C. § 34-106. Initiative, referendum, bond, levy and other ballot question elections conducted by any political subdivision shall be held on the nearest date authorized above which falls more than sixty days after the clerk of the political subdivision orders such election shall be held. Elections shall be held in May and November of even-numbered years. In the event the Petitioner is able to gather the requisite number of signatures on the petition, Idaho Code does not allow for an election on May 3, 2016. Therefore, the proposed initiative conflicts with the general laws. In the event the initiative gathers the requisite signatures, the County Clerk will schedule the election as provided by law.

II. Recommended Revisions or Alterations

There are no alterations or revision to this initiative that would render it constitutional and/or legal.

III. 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 Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Rick Martin, 1164 East 3600 North, Buhl, Idaho 83316.

Sincerely,

A handwritten signature in black ink, appearing to read "Grant Loeb", with a stylized, sweeping flourish extending to the right.

Grant P. Loeb
Twin Falls County Prosecuting Attorney