STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

RAÚL R. LABRADOR

September 16, 2024

VIA HAND DELIVERY
The Honorable Phil McGrane
Idaho Secretary of State
Statehouse

RE: Certificate of Review
Proposed Initiative for Adding a New Section to Title 39, Idaho Code, Providing for a Right to Reproductive Freedom and Privacy (fetal viability).[1]

Dear Secretary of State McGrane:

An initiative petition was filed on August 16, 2024, proposing to amend title 39 of the Idaho Code. 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 legal or constitutional issue that may present problems. This letter therefore addresses only those matters of substance that are "deemed necessary and appropriate" to address at this time and does not address or catalogue all problems of substance or of form that the proposed initiative may pose under federal or Idaho law. Idaho Code § 34-1809(1)(a). Further, under the review statute, the Attorney General's recommendations are "advisory only," and the petitioners are free to "accept or reject them in whole or in part." *Id.* § 34-1809(1)(b). 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.

[1] This proposed initiative petition was submitted at the same time as three other petitions, all submitted by the same petitioner. Because each proposed initiative is similar in subject matter and intent, they will be distinguished using the following naming convention: Right to Reproductive Freedom and Privacy (fetal viability); Right to Reproductive Freedom and Privacy (24 weeks); Right to Reproductive Freedom and Privacy (20 weeks); and Right to Abortion Under Certain Circumstances.

MATTERS OF SUBSTANTIVE IMPORT

I. Summary of the Proposed Initiative

The proposed initiative seeks to add to Idaho law, by statute, a right to "reproductive freedom and privacy." The initiative proposes a new statute, section 39-801, that would significantly change abortion law in Idaho, granting a right to abortion for any reason "prior to fetal viability." Additionally, the initiative would institute a right to "reproductive freedom and privacy." Broadly speaking, the initiative would: 1) remove any restrictions on abortion before the point of "fetal viability;" 2) exempt from criminal liability any abortion performed in the case of a "medical emergency;" and 3) attempt to place restrictions broadly on future legislation or regulation regarding abortion and "reproductive freedom and privacy."

1. Removing Restrictions on Abortion Before "Fetal Viability"

The proposed initiative would alter Idaho laws by providing a right to abortion for any reason "prior to fetal viability." Pet. § 39-801(2). The initiative defines "fetal viability" as "the point in a pregnancy when…the fetus has a significant likelihood of sustained survival outside of the uterus without the application of extraordinary medical measures." *Id.* § 39-801(5)c. Terms within this definition, such as "significant likelihood of sustained survival" or "extraordinary medical measures" are not defined.

The initiative proposes a right to "reproductive freedom and privacy," which includes the right to "abortion care."[2] *Id.* § 39-801(1)a. The initiative says, "the state shall not infringe, burden, or prohibit abortion care prior to fetal viability." *Id.* § 39-801(2)a.

2. Exemption for Abortions Performed for "Medical Emergencies"

The proposed initiative would also change current Idaho law regarding abortion by providing for an exemption from criminal liability for abortions performed "in cases of medical emergency." *Id.* § 39-801(2)b. The initiative defines a "medical emergency," as a physical medical condition warranting abortion to save the pregnant person's life, avoid placing the pregnant person's health "in serious jeopardy;" avoid "serious impairment to a bodily function," or avoid serious dysfunction of any bodily organ or part." *Id.* § 39-801(5)(f). The proposed initiative notes that this definition of "medical emergency" is "intended to be interpreted consistent with the definition provided in title 42, U.S. code, chapter 7, section 1395dd(e)(1)." *Id.* This federal statute is commonly referred to as the Emergency Medical Treatment and Labor Act ("EMTALA").

This exemption for abortions performed "in cases of a medical emergency" kicks in after "fetal viability." In short, the proposed initiative sets up a framework wherein abortion 1) cannot be "prohibited" *before* "fetal viability," 2) can be "regulated" *after* "fetal viability," and

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[2] The proposed initiative defines "abortion care" synonymously with "abortion." Pet. § 39-801(5)a.

3) can *never* be "regulated" or prohibited in cases of "medical emergency," as defined by the initiative.

3. Restrictions on Future Regulation of Abortion and "Reproductive Freedom and Privacy"

In addition to the specific provisions that change current abortion law in Idaho, the proposed initiative also provides for a broad "right to reproductive freedom and privacy." Pet. § 39-801(1)a. The initiative provides a non-exhaustive list of eight "reproductive decisions" included in the right to "reproductive freedom and privacy." The "reproductive decisions" the initiative lists out are decisions on:

i. Pregnancy;
ii. Contraception;
iii. Fertility Treatment;
iv. Prenatal and Postpartum care;
v. Childbirth;
vi. Continuing one's own pregnancy;
vii. Miscarriage care; and,
viii. Abortion care

Id. The initiative provides definitions for "Contraception," "Fertility Treatment," "Miscarriage care," and "Abortion care," but it does not define the other four listed "reproductive decisions." *Id.* § 39-801(5).

After setting forth this "right to reproductive freedom and privacy," the proposed initiative articulates limitations on the State's ability to regulate that right. The proposed initiative uses language commonly associated with fundamental constitutional rights when describing its proposed "right to reproductive freedom and privacy." *See* Planned Parenthood Great Nw. v. State, 171 Idaho 374, 413, 522 P.3d 1132, 1171 (2023) (citing Benton v. Maryland, 395 U.S. 784, 794 (1969) (discussing Fifth Amendment right against Double Jeopardy)). For example, the proposed initiative states that "[t]he state shall not directly or indirectly infringe…the right to reproductive freedom…unless justified by a compelling state interest achieved by the least restrictive means." Pet. § 39-801(2). The proposed initiative defines the appropriate "compelling interest" as regulating this right for "the purpose of improving or maintaining the health of an individual seeking care." Pet. § 39-801(3).

II. Analysis of the Proposed Initiative's Subsections

The matters of substantive import are addressed below, with each of the pertinent substantive subsections discussed in turn.

1. *Subsection (1)* – No Discussion of "Privacy"

In subsection (1) there is a lack of specificity regarding "privacy." The proposed initiative speaks of "reproductive freedom *and* privacy," but the non-exhaustive list of "reproductive decisions" covered by this right seems to deal entirely with freedom (freedom to make those decisions). There is nothing in subsection (1) that relates, on its face, to privacy. There is no explicit "right to privacy" contained within the Idaho Constitution, as there is in other states. Therefore, the drafters may want to include additional details as to what a "right to privacy" entails so as to avoid confusion and ambiguity.

2. *Subsections (2) and (3)* - Ordinary Legislation Cannot Bind Future Legislation or Regulation

The "right to reproductive freedom and privacy" set forth in the initiative would limit the State's authority to regulate abortion. Pet. § 39-801(2)-(3). However, this attempt to treat the "right to reproductive freedom and privacy" as a fundamental constitutional right and restrict future regulation of abortion violates the principle of legislative authority: ordinary statutes cannot bind or curtail the legislative authority of a future legislature. This principle was recently articulated and re-affirmed in the Idaho Supreme Court's Planned Parenthood decision. *See* Planned Parenthood, 171 Idaho at 452-53.

In Planned Parenthood, plaintiffs/petitioners argued that the Defense of Life & Heartbeat Acts were invalid because they conflicted with the Idaho Human Rights Act. *See id.* at 452-53. The Idaho Supreme Court rejected that argument because "no present legislature can bind a future legislature through ordinary legislation." *Id.* at 453 (citing State v. Gallet, 36 Idaho 178, 179, 209 P. 723, 724 (1922)). The Court went on to note that the legislature, therefore, "may enact any law not expressly or inferentially prohibited by the state or federal constitutions." *Id.* (cleaned up). The Idaho Supreme Court concluded that because the Human Rights Act was enacted as "ordinary legislation," it cannot restrict a future legislature's ability to regulate abortion, even if the Human Rights Act purported to do so (something the Court did not decide and did not need to decide).

The proposed initiative here is a proposal to amend the Idaho Code. In other words, if passed through the ballot initiative process, it would constitute "ordinary legislation." As such, the initiative cannot bind future legislatures, or a future attempt to amend the law through a future initiative petition and cannot restrict the Idaho legislature's future regulation of abortion. This squarely conflicts with the initiative, which reads: "The state shall not directly or indirectly infringe, burden, or prohibit in any way any person's voluntary exercise of the right to reproductive freedom and privacy…unless justified by a compelling state interest achieved by the least restrictive means." Pet. § 39-801(2). Moreover, the initiative seeks to bind future legislation even further by dictating that the only compelling interest the state can consider when regulating abortion is "improving or maintaining the health of an individual seeking care." *Id.* § 39-801(3). Under clear Idaho Supreme Court precedent, such an attempt to restrict future legislation impermissible.

3. *Subsection (4)* – Does Not Specifically Address Existing Idaho Law

Subsection (4) provides that "[t]he provisions of this section are intended to control over any other section of Idaho Code and are to be liberally construed in favor of reproductive freedom and privacy." Pet. § 39-801(4). However, the initiative does not specifically address current laws in Idaho regulating abortion, which leaves open questions as to how the initiative would be incorporated into current law. For example, it is unclear what laws and definitions control when the proposed initiative is silent on an issue.

4. *Subsection (5)* – Definitions

"Medical Emergency" - The proposed initiative contains inconsistent and potentially confusing language borrowed from federal law. As noted above, the initiative specifically references EMTALA in its definition of "medical emergency" and borrows much of its language from that law, noting that "medical emergency" should be interpreted consistent with the definition in EMTALA. Pet. § 39-801(6)d.

This is problematic for a couple reasons. First, EMTALA does not itself contain a definition of "medical emergency," nor does it mention abortion at all. Second, while the initiative borrows much of the language from EMTALA, there are places where the two significantly differ, leading to confusion.

EMTALA uses the term "emergency medical condition," and defines that term without reference to whether or when abortion is necessary or warranted. Indeed, EMTALA does not mention or even allude to abortion. Rather it imposes a requirement for hospitals, regardless of a patient's ability to pay, to 1) stabilize and 2) treat or transfer patients who present to their emergency departments with an "emergency medical condition." 42 U.S.C. § 1395dd.

In contrast, within the proposed initiative, the definition of "medical emergency" specifically includes abortion. The definition itself sets forth a standard for when an abortion is "warrant[ed]." Pet. § 39-801(6)d. Under that standard, abortion is warranted "[t]o save the pregnant patient's life," or when a "delay may" cause various medical complications. *Id.*

Finally, the standard for classifying a medical condition as an "emergency" is different in EMTALA than the standard proposed by the initiative. EMTALA provides that a medical emergency is one that, in the absence of immediate medical attention, "*could reasonably be expected to result in*" various medical complications. *Id.* (emphasis added). In contrast, the proposed initiative defines a "medical emergency" as a situation where delay in medical care "*may*" lead to various medical complications. The contrast in standards—"could reasonably be expected to result in" versus "may" lead to—presents a situation that may result in confusion about which standard should apply. Again, this confusion could be avoided by simply removing the reference to EMTALA.

5. Potential Conflict with Right to Life

One issue that may be a concern is whether the initiative's proposed "right to reproductive freedom and privacy" conflicts with an unborn child's right to life. Within the initiative's proposed "right to reproductive freedom and privacy," there is a right to "abortion care." *Id.* § 39-801(1)a.viii. This right to abortion is inherently in conflict with the life of the unborn child (the "fetus"). This raises the further issue of whether the proposed right may conflict with the unborn child's right to life, and thus be declared unconstitutional.

The constitutional legal protections of an unborn child have not been expressly addressed in Idaho. But an unborn child's "inalienable right to life" was one of the earliest justifications for Idaho's early laws criminalizing abortions. *See* Planned Parenthood, 171 Idaho at 426 (quoting an address by Dr. J.H. Lyons from the year 1907 in which he discussed the "immorality of voluntary abortion…based on the unborn child's 'inalienable right' to life by the 'mere fact of its existence' as a 'human being'"). Further, Idaho law also currently recognizes that "preborn children have interests in life, health, and well-being." *See* Idaho Code § 18-8802(1).

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 Melanie Folwell, P.O Box 6902, Boise, ID 83702.

Sincerely,

RAÚL R. LABRADOR
Attorney General

Analysis by:

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