



**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 Abortion Under Certain Circumstances.<sup>1</sup>

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.

---

<sup>1</sup> 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 abortion that, except in certain circumstances, cannot be limited by the State. The initiative proposes a new statute, section 39-801, that would 1) create a statutory right to abortion and purport to limit the State's ability to "infringe, burden, or prohibit" that right to abortion; and 2) override the enforcement of current laws that criminalize abortion.

#### 1. "Right to Abortion"

The initiative proposes to establish, by statute, a "person's...right to abortion." Pet. § 39-801(2). The initiative says: "The state shall not directly or indirectly infringe, burden, or prohibit in any way any person's voluntary exercise of the right to abortion as described in this section." *Id.* The initiative notes that its provisions are "intended to control over any other section of the Idaho Code and are to be liberally construed in favor of a right to abortion." *Id.* § 39-801(5).

#### 2. Limiting State Regulation of Abortion

The proposed initiative seeks to limit the State's ability to regulate abortion. It uses language commonly associated with fundamental constitutional rights when describing its proposed "right to abortion." *Id.* § 39-801(2); *see Planned Parenthood Great Nw. v. State*, 171 Idaho 374, 413, 522 P.3d 1131, 1172 (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 abortion...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 abortion for "the purpose of improving or maintaining the health of an individual seeking care." *Id.* § 39-801(3).

#### 3. Override Enforcement of Idaho's Current Abortion Laws

The proposed initiative would override the enforcement of Idaho's current abortion laws by exempting certain abortions from punishment under current Idaho law. The initiative notes: "Notwithstanding any other provision of law, abortion care<sup>2</sup> shall provide no basis for a violation of the provisions of title 18, Idaho Code, by any person in any of the following instances." Pet. § 39-801(1). The instances include: circumstances where abortion is necessary to maintain the mother's physical health or life, as determined by the attending physician, *id.* § 39-801(1)a; cases where "the fetus is unlikely to survive outside the womb without

---

<sup>2</sup> The proposed initiative defines "abortion" and "abortion care" synonymously. Pet. § 39-801((6)a.

extraordinary medical intervention,” *id.* § 39-801(1)b; and cases of rape or incest, *id.* at § 39-801(1)c.

The exemptions for cases of rape or incest only apply while “the pregnancy has not achieved fetal viability,” and not thereafter. *Id.* The proposed initiative defines “fetal viability” as “the point in a pregnancy when in the good faith judgment of an attending health care professional and based on the particular facts of the case known to the health care professional at the time, the fetus has a significant likelihood of sustained survival outside of the uterus, without the application of extraordinary medical measures.” *Id.*

## 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) - Does Not Specifically Address Existing Idaho Law

The proposed 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, many of the provisions in subsection (1) of the initiative overlap with provisions in Idaho’s current abortion laws (exceptions in cases of rape and incest, etc.).

Additionally, there is an apparent conflict between subsection (1) and subsections (2)—(5). Subsection (1) contains a handful of provisions exempting abortion from criminal liability under certain circumstances (in the case of a medical emergency, when pregnancy is unlikely to result in a live birth, etc.). In contrast, subsections (2)—(5) propose a “right to abortion.” This right seems to override the more limited exemptions for abortion in subsection (1). In other words, given the right to abortion articulated in subsections (2)—(5), the more limited exemptions for abortion in subsection (1) would appear to be superfluous.

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

The “right to abortion” set forth in the initiative purports to limit the State’s authority to regulate abortion. Pet. § 39-801(2)-(3). However, this attempt to treat the “right to abortion” 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 abortion...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 is impermissible.

### **3. Subsection (4) – Typographical Error**

There is a clear typographical error in subsection (4). In § 39-801(4)d, the initiative states: “A health care professional’s of conscience pursuant to section 18-611, Idaho Code, shall be preserved.” From context and from reference to Idaho Code section 18-611, it appears that the word “freedom” was unintentionally omitted. The above subsection should read: “A health care professional’s *freedom* of conscience... .”

### **4. Subsection (6) – Definitions**

**“Medical Emergency”** - The proposed initiative contains inconsistent and potentially confusing language borrowed from federal law. The initiative specifically references title 42, U.S. code, chapter 7, section 1395dd(e)(1), which is commonly known as the Emergency Medical Treatment and Active Labor Act (EMTALA). The initiative defines “medical emergency” by reference to EMTALA 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 abortion” conflicts with an unborn child’s right to life. In certain provisions, the proposed initiative utilizes the concept of “fetal viability,” and therefore recognizes the inherent conflict between a “right to abortion” and the life of the unborn child (the “fetus”). This raises the further issues of whether the proposed “right to abortion,” 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:**

James E. M. Craig, Division Chief  
Civil Litigation and Constitutional Defense