



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
RAÚL R. LABRADOR

December 20, 2024

VIA HAND DELIVERY

The Honorable Phil McGrane
Idaho Secretary of State
Statehouse

RE: Certificate of Review
Re-submitted Proposed Initiative for Adding a New Section to Title 39,
Idaho Code, Providing for a Right to Reproductive Freedom and Privacy.

Dear Secretary of State McGrane:

An initiative petition that was previously submitted on August 15, 2024, has been re-submitted on November 21, 2024, still proposing to amend title 39 of the Idaho Code, with some revisions to the original submission. Pursuant to Idaho Code § 34-1809, this office has reviewed the re-submitted 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.

MATTERS OF SUBSTANTIVE IMPORT

I. Summary and History of Re-submission of Proposed Initiative

As noted above, this proposed initiative is a re-submission of a previously submitted proposed initiative. This office reviewed the previously submitted initiative—identified as “Right to Reproductive Freedom and Privacy (fetal viability)”—and provided a certificate of review with advisory comments on September 16, 2024. Thereafter, the petitioners revised the proposed initiative and then submitted it and requested the assignment of ballot titles on October 7, 2024. This office responded on October 22, 2024, in accordance with Idaho Code § 34-1809 and provided a short and a long ballot title for the proposed initiative. Petitioners now submit the proposed initiative, effectively re-starting the process, beginning again with the certificate of review. A summary and section by section analysis of the new proposed initiative follows.

The proposed initiative seeks to add to Idaho law, by statute, 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;” 3) create a “right of privacy in making personal decisions about reproductive health care in consultation with a health care provider;” and 4) attempt to place restrictions broadly on future legislation or regulation regarding abortion and “reproductive freedom and privacy.”

1. “Statement of Purpose”

The proposed initiative’s “statement of purpose” sets forth petitioners’ general view of the proposed initiative: that it “recognizes that reproductive health care choices...are deeply private matters that should be decided by a person in consultation with their health care provider.” Pet. § 39-802. And relatedly, that “[t]he act supports a person’s right to reproductive freedom and privacy...and secures a person’s right to make their own health care decisions without government interference.” *Id.*

2. Removing Restrictions on Abortion Before “Fetal Viability”

The proposed initiative would alter Idaho laws by providing a right to abortion for any reason “up to fetal viability.” Pet. §39-803(1). 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 extraordinary medical measures.” *Id.* § 39-803(5)d. Terms within this definition, such as “significant likelihood of sustained survival” or “extraordinary medical measures” are not defined.

3. 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 medical emergencies.” *Id.* § 39-803(1). 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.* at § 39-803(5)(g).

This exemption for abortions performed “in medical emergencies” kicks in after “fetal viability.” In short, the proposed initiative sets up a framework wherein abortion 1) cannot be “regulated” *before* “fetal viability,” 2) can be “regulated” *after* “fetal viability,” and 3) can *never* be “regulated” or prohibited in cases of “medical emergencies,” as defined by the initiative, regardless of whether it is before or after fetal viability.

4. 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. § 39-803(2)a. The initiative provides a non-exhaustive list of six “reproductive decisions” included in the right to “reproductive freedom and privacy.” The “reproductive decisions” the initiative lists out are decisions on:

- i. Abortion;
- ii. Childbirth care;
- iii. Contraception;
- iv. Fertility treatment;
- v. Miscarriage care; and
- vi. Prenatal, pregnancy, and postpartum care.

Id. The initiative provides definitions for all of the above-listed “reproductive decisions.” *Id.* § 39-803(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, 414, 522 P.3d 1132, 1172 (2023) (citing *Benton v. Maryland*, 395 U.S. 784, 794, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969) (discussing Fifth Amendment right against Double Jeopardy)). For example, the proposed initiative states that “[t]he right to reproductive freedom

and privacy shall not be burdened, interfered with, discriminated against, deprived, or prohibited by the state...unless such state action is narrowly tailored to improve or maintain the health of the person seeking reproductive care through the least restrictive means.” Pet. § 39-803(2)c.

The proposed initiative also creates a proposed “right to privacy in making personal decisions about reproductive health care in consultation with a health care provider.” *Id.* § 39-803(2)b. This “right of privacy” is not described any further.

5. “Financial Obligation” Statement

The proposed initiative includes a provision stating: “[t]his act does not create a financial obligation on the state, its agencies, or their programs to pay for, fund, or subsidize the reproductive health care protected by this act.” *Id.* § 39-803(4)(b). In their letter included with the proposed initiative, the petitioners requested that an “official fiscal impact statement for the Initiative from the Division of Financial Management be issued to reflect the” information in the financial obligation statement.

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 (2)b* – No Discussion of “Privacy” and Potential Conflict with Fundamental Rights Protected by the Idaho and U.S. Constitutions

In subsection (2)b there is a lack of specificity regarding “privacy.” The proposed initiative speaks of “a right of privacy,” but the non-exhaustive list of “reproductive decisions” in subsection (2)a seems to deal entirely with freedom (freedom to make those decisions).

Further, the “right of privacy in making personal decisions about reproductive health care in consultation with a health care provider” in subsection (2)b is vague and unclear in its meaning. Depending on how broadly it is interpreted, a right to privacy in making personal decisions about reproductive health care could conflict with fundamental rights recognized by the U.S. Supreme Court. For example, if this right of privacy in making personal decisions about reproductive health care is interpreted as including a right for minor children to make their own reproductive health care decisions without the involvement or consent of their parents, it would likely conflict with the parents’ fundamental right to make health care decisions for their children. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 66 (2000) (“[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”); Idaho Code § 32-1015(2) (“Parents have the fundamental right

and duty to make decisions concerning the furnishing of health care services to the minor child.”) To the extent this “right to privacy in making personal health care decisions” conflicts with fundamental rights protected by the U.S. and Idaho Constitutions, it could be found to be unconstitutional.

Notably, there is no explicit “right to privacy” contained within the Idaho Constitution, as there is in other states, where the “right to privacy” is often interpreted expansively by their courts.

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 attempt to limit the State’s authority to regulate abortion and the other rights included within the right to reproductive freedom and privacy. Pet. § 39-803(2)-(3). However, this attempt to treat the “right to reproductive freedom and privacy” as a fundamental 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.” *Planned Parenthood*, 171 Idaho at 453 (citing *State v. Gallet*, 36 Idaho 178, 179 (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 right to reproductive freedom and privacy shall not be burdened, interfered with, discriminated against, deprived, or prohibited by the state...unless such state action is narrowly tailored...through the least restrictive means.” Pet. §39-803(2)c. Moreover, the initiative seeks to bind future legislation even further by dictating that state regulation is only permissible if it is “narrowly

tailored to improve or maintain the health of the person seeking reproductive health care.” *Id.* Under clear Idaho Supreme Court precedent, such an attempt to restrict future legislation is impermissible.

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

Subsection (4) provides that “[t]he provisions of this act are to be liberally construed in favor of reproductive freedom and privacy and are intended to control over any other section of Idaho Code.” Pet. § 39-803(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. 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.” *Id.* §39-803(1). 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,



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Attorney General

Analysis by:

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