

IN THE SUPREME COURT OF THE STATE OF IDAHO

IDAHOANS UNITED FOR WOMEN
AND FAMILIES,

Petitioner,

vs.

RAÚL R. LABRADOR, in his official
capacity as the Idaho Attorney General;
PHIL MCGRANE, in his official capacity
as the Idaho Secretary of State; LORI
WOLFF, in her official capacity as the
Administrator of the Idaho Division of
Financial Management; and the IDAHO
DIVISION OF FINANCIAL
MANAGEMENT,

Respondents.

Docket No. 52636-2025

**RESPONSE BRIEF OF RAÚL R. LABRADOR
TO VERIFIED PETITION**

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INTRODUCTION

When reviewing ballot titles, it is not the Court’s job to find “another way or the best way” to draft them. *See Matter of Writ of Prohibition Entitled Ballot Title Challenge Oral Argument Requested (“Buchin v. Lance”)*, 128 Idaho 266, 270, 912 P.2d 634, 638 (1995). As all parties agree, ballot titles are reviewed only for substantial compliance with the statute—the Court limits itself to asking whether the Attorney General acted in “good faith” and whether he satisfied the statute’s “general purpose” of fairly informing voters. *In re Termination of Parental Rts. of Doe*, 155 Idaho 896, 901, 318 P.3d 886, 891 (2014) (citing Black’s Law Dictionary 1566 (9th ed. 2009)); *Am. C.L. Union, Idaho Chapter v. Echobawke*, 124 Idaho 147, 151, 857 P.2d 626, 630 (1993) (statute’s purpose is to acquaint voters with the initiative’s “distinctive characteristics”).

The Attorney General’s ballot titles easily vault those hurdles. With the short title—“Measure establishing a right to abortion up to fetus viability and to make reproductive decisions regarding one’s own body”—the Attorney General (1) successfully advises voters of the initiative’s chief change to Idaho law, i.e., the right to abortion until viability; and (2) accurately summarizes the remainder of the initiative’s many provisions under the heading of “reproductive decisions regarding one’s own body.” *See Folwell Decl., Ex. F at 3.* To ensure he accomplished these purposes without prejudicing voters, the Attorney General built the ballot title almost entirely out of the initiative’s own words.

With its petition, Idahoans United raises nothing but quibbles: the shades of meaning contained in “fetus” vs. “fetal,” plus a judgment call regarding which of the initiative’s characteristics should be expressly named in the short title and which can be implicitly named in the category of “reproductive decisions.” Idahoans United is wrong on every point, but even if it were right it would not matter—not one of its complaints, if true, would bring the ballot titles out of substantial compliance.

STATEMENT OF THE CASE

In Idaho, initiative sponsors largely control their own initiatives. They draft their initiative text, turn it in for review, and, if they can gather enough signatures, ultimately decide whether to submit the initiative for inclusion on the ballot. Idaho Code § 34-1802. They develop their own messaging and recruit and train (and sometimes pay) the signature gatherers who will take the initiative petitions from door to door and tell Idahoans what the initiative means and why they ought to support it.

But they do not get to choose their own ballot titles, and for good reason. As the Legislature found when it enacted Idaho’s initiative statute, “[I]here have been incidents of fraudulent and misleading practices in soliciting and obtaining signatures on initiative or referendum petitions” Idaho Code § 34-1801.

To ensure voters who sign or vote for petitions have a fair chance to understand what they are supporting, the Legislature required “true and impartial” ballot titles to be printed on every petition, every official voter pamphlet, and every ballot. *Id.* § 34-1809(2). And because the sponsors of an initiative are the last people who could be

“impartial” about it, the Legislature chose someone else to draft the titles; that is, it chose the same lawyer who advises the Legislature itself when it considers new legislation. *See id.* § 67-1401(6). And it specifically instructed him not to bias the ballot titles—not against an initiative and not in its favor. *Id.* § 34-1809(2)(e).

In August 2024, Idahoans United submitted four initiatives for review. Craig Decl., Exs. A–D. Each initiative proposed expanding access to abortion, ranging from a right to abortion until 20 weeks’ gestational age to a right to abortion at any stage of pregnancy. *Id.* After receiving the Attorney General’s certificates of review, Idahoans United finally settled on the current version.

Named “the Reproductive Freedom and Privacy Act,” the initiative text is 1,226 words long. *See* Folwell Decl., Ex. C. It contains three new code sections, five subsections, and 33 lower-level subdivisions. *Id.* Its significant features include:

- a right to abortion until the fetus is “viable”;
- an unconventional definition of “viability” that applies only when a fetus is likely to survive “without extraordinary medical measures”;
- rights to contraception, fertility treatment, miscarriage care, and “[p]renatal, pregnancy, and postpartum care”;
- a right to privacy in reproductive health care decisions;
- a “least restrictive means” test for state actions burdening the rights provided in the initiative;

- protections for individuals providing reproductive care;
- protections for individuals providing advice or assistance with regard to reproductive care;
- a right to abortion in cases of medical emergency;
- a lengthy definition of “medical emergency”;
- definitions for nine additional terms;
- four rules of construction, including statements about the initiative’s fiscal impact and effect on conscience rights; and
- a severability clause.

See Folwell Decl., Ex. C at 4–7.

Pursuant to his duties under Idaho Code § 34-1809, and within the permitted ten working days, the Attorney General provided ballot titles for the new initiative. *See* Folwell Decl., Ex. F at 1–3. The titles read as follows:

Short Title

Measure establishing a right to abortion up to fetus viability and to make reproductive decisions regarding one’s own body.

Long Title

The measure seeks to change Idaho’s laws by introducing a right to reproductive freedom and privacy including a right to abortion up to the point of the fetus’s ability to survive outside the womb. After fetal viability, there would be no general right to abortion except in cases of “medical emergency.” The “medical emergency” exception would

expand Idaho’s current life exception and allow abortions when pregnant women face complicating physical conditions that threaten their life or health, “including serious impairment to a bodily function” or “serious dysfunction of any bodily organ or part.”

The proposed measure codifies a right to make reproductive decisions, including contraception, fertility treatment, and prenatal and postpartum care. This includes a “right of privacy” in making these decisions. The measure seeks to prevent the state from enforcing certain abortion laws protecting the life of the unborn child. It would also impose a requirement that any restrictions on reproductive decisions, including abortion prior to fetus viability, must be “narrowly tailored to improve or maintain the health of the person seeking reproductive health care.” The measure would also prevent the state from penalizing patients, healthcare providers, or anyone who assists in exercising the proposed right.

Id. at 3.

In January, Idahoans United filed the instant petition and asked the Court to reject the Attorney General’s ballot titles. Pet. at ¶¶ 47–56. With respect to the short title, Idahoans United claims the Attorney General’s draft is “not distinctive or comprehensive” because it does not mention a right to privacy or to abortion in medical emergencies. Pet. at ¶ 48. Idahoans United also objects to the short title’s use of the words “fetus viability” instead of Idahoans United’s preferred phrase “fetal viability”—allegedly “fetus viability” is prejudicial and “not the language by which the measure is commonly referred to or spoken of.” Pet. at ¶¶ 49–50 (emphases added).

With respect to the long title, Idahoans United objects that the Attorney General used “fetal viability” in its first paragraph and “fetus viability” in the second, instead

of consistently using “fetal viability.” Pet. at ¶¶ 54–55. Idahoans United claims this inconsistent usage is “inaccurate and prejudicial and therefore violates section 34-1809(2)(d)(ii) and (e).” Pet. at ¶ 54.

ISSUES PRESENTED

1. Is the short title distinctive enough to substantially comply with § 34-1809?
2. Is the term “fetus viability” in the long and short titles common enough, and nonprejudicial enough, to substantially comply with § 34-1809?
3. If the Attorney General’s ballot titles do not substantially comply with § 34-1809, would Idahoans United’s alternative titles comply?

STANDARD OF REVIEW

The parties agree the ballot titles should be reviewed for substantial compliance. Mem. Supp. Pet. at 13. “Generally, substantial compliance does not require absolute conformity with the form prescribed in the statute, but does require a good faith attempt to comply, and that the general purpose detailed in the statute is accomplished.” *Doe*, 155 at 901, 318 P.3d at 891 (citing Black’s Law Dictionary 1566); *see Barber v. Honorof*, 116 Idaho 767, 769, 780 P.2d 89, 91 (1989) (relying on good faith to conclude that there had been substantial compliance).

ARGUMENT

Turning a 1,200-word initiative text into a 20-word “distinctive short title” is inevitably more of an art than a science. Recognizing this, the Court does not ask whether the Attorney General found “the best way” to draft the titles. *See Echobawke*,

124 Idaho at 152, 857 P.2d at 631. Instead it limits itself to asking whether the titles are in substantial compliance with the statute, and that inquiry involves only two questions: (1) did the Attorney General act in good faith; and (2) was the statute’s general purpose accomplished. *See Idahoans for Open Primaries v. Labrador*, 172 Idaho 466, 479, 533 P.3d 1262, 1275 (2023) (adopting substantial compliance standard); *Doe*, 155 Idaho at 901, 318 P.3d at 891 (requirements of substantial compliance); *see also Epperson v. Jordan*, 82 P.2d 445, 448 (Cal. 1938) (“[I]f reasonable minds may differ as to the sufficiency of the title, the title should be held to be sufficient.”).

The answer to both questions is yes: the Attorney General drafted the ballot titles in good faith, and the titles accomplish the statute’s general purpose of “acquaint[ing] prospective signers with the distinctive characteristics of the proposed measure” without being “argumentative or prejudicial.” *Echobawk*, 124 Idaho at 151, 857 P.2d at 630.

Idahoans United’s counterarguments fail. It is impossible for a 20-word title to name every important characteristic of a 1,200-word initiative, and this Court has approved at least one short title much less distinctive than the one at issue here. *See Echobawk*, 124 Idaho at 152, 857 P.2d at 631. As to the allegedly uncommon and prejudicial phrase “fetus viability,” it has been used many times by writers across the political spectrum, including in a ballot title that a prior attorney general drafted in the 1990s. *See Buchin*, 128 Idaho at 270, 912 P.2d at 638. And if the difference between

“fetus” and “fetal” is enough to bring a ballot title out of substantial compliance, then “substantial compliance” will effectively mean “de novo review.”

In fact, if “substantial compliance” is as demanding as Idahoans United needs it to be, then Idahoans United’s short title also fails the test.

I. Substantial Compliance Requires a Good-Faith Effort to Fairly Introduce Voters to the Initiative.

Section 34-1809(2) requires short titles (1) to be “[d]istinctive”; (2) not to “exceed[] twenty (20) words”; and (3) to use words “by which the measure is commonly referred to or spoken of.” Idaho Code § 34-1809(2)(d)(i). It requires long titles (called “general titles” in the statute) to “express[] in not more than two hundred (200) words the purpose of the measure.” *Id.* at § 34-1809(2)(d)(ii).

The two titles together must, “to the best of [the Attorney General’s] ability, give a true and impartial statement of the purpose of the measure and in such language that the ballot title shall not be intentionally an argument or likely to create prejudice either for or against the measure.” *Id.* at § 34-1809(2)(e). The purpose of all these requirements is to “acquaint prospective signers with the distinctive characteristics of the proposed measure,” and to do it without being “argumentative or prejudicial.” *Echobank*, 124 Idaho at 151, 857 P.2d at 630.

In deciding whether the ballot titles meet these requirements, this Court does not “sit as some type of literary editorial board” looking for “another way or the best way” to draft titles. *Ageton v. Jackley*, 878 N.W.2d 90, 96 (S.D. 2016) (first quote); *Buchin*,

128 Idaho at 270, 912 P.2d at 638 (second quote). Instead, as Idahoans United agrees, the Court should ask whether the Attorney General’s ballot titles “substantially comply” with Idaho Code § 34-1809(2). *See* Mem. Supp. Pet. at 13; *Idahoans for Open Primaries*, 172 Idaho at 479, 533 P.3d at 1275.

Substantial compliance does not require “absolute conformity” with what is prescribed in the statute. *Doe*, 155 Idaho at 901, 318 P.3d at 891. Instead, it “require[s] a good faith *attempt* to comply.” *Id.* (emphasis added) (citing Black’s Law Dictionary 1566); *Smith ex rel. Smith v. Treasure Valley Seed Co.*, 161 Idaho 107, 110, 383 P.3d 1277, 1280 (2016). It also requires “that the general purpose detailed in the statute is accomplished.” *Doe*, 155 Idaho at 901, 318 P.3d at 891 (citing Black’s Law Dictionary 1566); *Smith*, 161 Idaho at 110, 383 P.3d at 1280 (citations omitted); *White v. Ames Min. Co.*, 82 Idaho 71, 349 P.2d 550 (1960) (“This doctrine [of substantial compliance] holds good in a case where [an individual] has satisfied the intent of the statutes . . . though he has failed in some minor or technical detail.”).

For example, this Court found a mechanic’s lien claimant to be in substantial compliance even though he got the amount of his claim wrong: the statute required his lien to state the amount of his claim, but his lien stated an amount nearly 10% higher than his actual claim and 40% higher than what he was ultimately awarded. *Barber*, 116 Idaho at 769, 780 P.2d at 91. The Court still ruled for the claimant because “absolute accuracy” was not required. *Id.* The claimant would have lost the appeal if he had “abuse[d] the statutes by claiming an amount known to greatly exceed that

which is truly owing,” but he won because he had “made a good faith effort to comply with the lien statutes.” *Id.*

Other states’ courts review ballot titles under a similarly deferential standard. As the California Supreme Court explained when reviewing ballot titles in 1938, “[A]ll legitimate presumptions should be indulged in favor of the propriety of the attorney-general’s actions. Only in a clear case should a title so prepared [by the attorney general] be held insufficient.” *Epperson*, 82 P.2d at 448. “[I]f reasonable minds may differ as to the sufficiency of the title, the title should be held to be sufficient.” *Id.*

Or, as the Alaska Supreme Court said more recently, “Most of the courts that have dealt with challenges to initiative summaries utilize a deferential standard of review and refuse to invalidate a summary simply because they believe a better one could be written.” *Burgess v. Alaska Lieutenant Governor Terry Miller*, 654 P.2d 273, 276 n.7 (Alaska 1982). For instance, in Nebraska, the supreme court applies “a deferential standard” and rejects the Attorney General’s titles only if they are “insufficient or unfair.” *See Thomas v. Peterson*, 948 N.W.2d 698, 706 (Neb. 2020). In South Dakota, the supreme court refuses to “sit as some type of literary editorial board” during its “limited” review of ballot titles. *Ageton*, 878 N.W.2d at 96. In Utah, the supreme court holds “that in the creation of ballot titles, the drafter is entitled to considerable deference, and we will apply an abuse of discretion standard in conducting our review.” *Burr v. City of Orem*, 311 P.3d 1035, 1038–39 (Utah 2013).

In short, the Court defers to the Attorney General’s ballot titles even if they fall short of “absolute accuracy” or do not “absolutely conform[]” with § 34-1809. *Barber*, 116 Idaho at 769, 780 P.2d at 91 (first quote); *Doe*, 155 Idaho at 901, 318 P.3d at 891 (second quote). It is therefore not enough for Idahoans United to prove the titles are less comprehensive than they might have been, or that more common terms were available, or, generally speaking, that the ballot titles could be improved upon. It is certainly not enough to prove the titles are less attractive to voters than Idahoans United’s preferred language would be—ballot titles are supposed to be “impartial,” and Idahoans United cannot possibly be “impartial.” Titles that prejudice Idahoans in favor of the initiative are just as invalid as titles that prejudice them against it. Idaho Code § 34-1809(2)(e).

Instead, Idahoans United must prove the ballot titles were prepared in bad faith, or that they frustrate the general statutory purpose of fairly acquainting potential signers with the initiative.

II. The Short Ballot Title Is Distinctive

No fair reader, analyzing the Attorney General’s ballot titles, could conclude Idahoans United has met its burden. There is no question the titles will fairly introduce signers to the initiative.

A. The short title alerts voters to the initiative’s most important features.

The 20-word short title reads, “Measure establishing a right to abortion up to fetus viability and to make reproductive decisions regarding one’s own body.” Folwell

Decl., Ex. F at 3. This title puts front and center the initiative’s most distinctive change to Idaho law—i.e., that the initiative would largely eliminate Idaho’s protections for unborn children and permit elective abortions through most of pregnancy. *Cf. Buchin*, 128 Idaho at 272, 912 P.2d at 640 (rejecting ballot title because it did not “distinguish[] the initiative from Idaho’s existing abortion laws”). It then informs potential signers that the initiative also addresses other reproductive issues, which are then summarized in greater detail in the long title.

Nobody contends that the short title is false or misleading. Nor can they. Not only does the title “acquaint prospective signers with the distinctive characteristics of the proposed measure,” *see Echobank*, 124 Idaho at 151, 857 P.2d at 630 (cleaned up), it does the job almost entirely with the initiative’s own words:

- The title describes the initiative’s most distinctive feature as a “right to abortion,” while the initiative text describes it as a “right to make decisions about abortion.” *Compare* Folwell Decl., Ex. F at 3 *with id.*, Ex. F at 4.
- The title describes the end of the period when abortion would be permissible by using the word “viability,” and so does the initiative text. *Compare id.*, Ex. F at 3 *with id.*, Ex. F at 4. *But see infra* at 31–33, (questioning accuracy of “viability” language).

- The title summarizes the remaining matters addressed by the initiative as a “right . . . to make reproductive decisions regarding one’s own body,” and the initiative text provides a “right to make personal decisions about reproductive health care that directly impact the person’s own body.”
Compare Folwell Decl., Ex. F at 3 *with id.*, Ex. F at 4.

In these cases, the only change from the initiative’s own language is trimming words to comply with the statutory limit.

B. A 20-word title cannot include every feature of a 1,200-word initiative.

Admittedly, the Attorney General’s short title does not expressly mention every specific change to Idaho law that this measure would enact—after all, the proposed measure would give the Idaho Code three new sections, five subsections, and 33 lower-level subdivisions. If the Attorney General wanted to include even a single word to summarize each distinct provision of the statute, his short title would more than double the 20-word statutory limit.

Unsurprisingly, this Court has clarified that “distinctive” does not mean all-encompassing. *See Echobawk*, 124 Idaho at 151, 857 P.2d at 630. Instead, only the “thrust” of the initiative is necessary. *See id.*

In *Echobawk*, an initiative entitled the Idaho Citizen Alliance Initiative (ICA) was presented to the Attorney General for ballot titles. *Id.* at 148, 857 P.2d at 627. This initiative would have added seven new sections to the Idaho Code. *See id.* at 148–49, 857 P.2d at 627–28. Among other things, the proposed act mandated that: (1)

“homosexuals” were not to be given minority status; (2) same-sex marriage was against public policy; (3) school employees could not endorse homosexuality; (4) public funds would not be used to promote homosexuality; and (5) no agency could forbid the consideration of private sexual behavior in employment. *Id.* Condensing all these key characteristics, the initiative was given the extremely short title, “An act establishing state policies regarding homosexuality.” *Id.* at 149, 857 P.2d at 628.

This Court approved—it held that the short title captured the distinctive characteristic of the ICA. *See id.* at 151, 857 P.2d at 630. Although it noted that the initiative contained many characteristics, the purpose of the short title is not to capture everything (an impossible endeavor); it only needs to “expeditiously and accurately acquaint the prospective signer with what he or she is sponsoring.” *See id.* The Court noted that “there may be other acceptable ways to write the title. However, it is not our judicial role to find another way or the best way[.]” *See id.* at 152, 857 P.2d at 631.

So too here. The proposed law includes many characteristics. Among other things, the proposed measure (1) “upholds a person’s rights to make their own decisions based on their own values, health care needs, and circumstances”; (2) “supports a person’s right to reproductive freedom and privacy”; (3) “protects the confidential nature of the patient-provider relationship”; (4) “secures a person’s right to make their own health care decisions without government interference”; (5) gives people the right to “make decisions” about abortion, childbirth care, contraception, fertility treatment, miscarriage care; and prenatal, pregnancy, and postpartum care; (6)

includes a “right to privacy in making personal decision about reproductive healthcare”; (7) mandates that state actions burdening the “voluntary exercise of the right to reproductive freedom and privacy” be “narrowly tailored to improve or maintain the health of the person seeking reproductive health care through the least restrictive means”; (8) forbids state laws against assisting, facilitating, informing, referring or otherwise aiding a person in exercising the right to reproductive freedom and privacy unless the law is narrowly tailored; (9) forbids subjecting medical professionals to any professional, discipline, civil liability, or criminal liability solely on the basis that the healthcare provider assisted another person in exercising their right to reproductive freedom and privacy; and (10) allows the state to regulate abortion after the point of fetus viability, except in cases of medical emergency. *See* Folwell Decl., Ex. F at 4–7. The measure further defines a number of terms in ways that differ from definitions in existing law. For viability:

- Under existing law, viability occurs when “a fetus [is] potentially able to live outside the mother’s womb, albeit with artificial aid.” Idaho Code § 18-604(15).
- The initiative puts viability later—potentially much later—at “the point in a pregnancy when . . . the fetus has a significant likelihood of sustained survival outside of the uterus *without extraordinary medical measures.*” Folwell Decl., Ex. F at 6 (emphasis added).

Likewise, for medical emergency:

- Current law defines it as “a condition that, on the basis of the physician’s good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.” Idaho Code § 18-604(9).
- The initiative employs a different definition: “a physical medical condition that, on the basis of a physician’s good faith medical judgment, based on the facts known at the time, and determined on a case-by-case basis, complicates the physical medical condition of a pregnant patient as to warrant an abortion: (i) To protect a pregnant patient’s life; or (ii) For which a delay may: (a) Place the health of a pregnant patient in serious jeopardy; (b) Cause serious impairment to a bodily function of a pregnant patient; or (c) Cause serious dysfunction of any bodily organ or part of a pregnant patient’s body.” Folwell Decl., Ex. F at 6.

That’s a lot of distinctive characteristics—two whole pages’ worth. Most of them were inevitably going to be left out no matter what short title the Attorney General wrote, but the title successfully informs readers of the general topic they address by using the words “a right to abortion up to fetus viability and to make

reproductive decisions regarding one’s own body.” In other words, the title “expeditiously and accurately acquaint[s] the prospective signer with what he or she is sponsoring.” *See Idahoans for Open Primaries*, 172 Idaho at 482, 533 P.3d at 1278.

C. Substantial compliance does not require the titles to mention medical emergencies or privacy expressly.

Idahoans United contends the Attorney General’s short ballot title is not distinct because it allegedly failed to capture “two¹ of the three key characteristics” of the measure: it does not mention any right to abortion in medical emergencies or any right to privacy in decisions relating to reproductive health care.² *See Mem. Supp. Pet.* at 16.

Idahoans United never explains why it thinks the initiative has three key characteristics rather than two, five, or nine. Certainly the initiative itself does not say it has three key characteristics; by the Attorney General’s count above, it has at least ten significant characteristics, any or all of which might seem “key” to some voter.

Further, if the “key characteristics” have to number exactly three, then Idahoans United never explains why “medical emergencies” and “privacy” should make the cut ahead of contraception, fertility treatment, or prenatal care. Medical emergencies in particular must not have seemed like a “key characteristic” when Idahoans United

¹ The key characteristic Idahoans United concedes the Attorney General captured is “the right to make personal decisions about reproductive health care.” *Mem. Supp. Pet.* at 16.

² It is relevant to note that it took Idahoans United 40 words to clearly describe the “three chief characteristics”—far greater than what is allotted to the Attorney General under Idaho Code § 34-1809. *See Mem. Supp. Pet.* at 16.

drafted the initiative, since the initiative’s statement of purpose does not mention them, and they first appear more than 200 words into the initiative. *See* Folwell Decl., Ex. F at 4.

How was the Attorney General supposed to intuit that three—not two, not four—characteristics were “key,” and that one of the supposed “keys,” despite allegedly being crucial to include in the short title, would be omitted from the statement of purpose?

Rather than divining which specific features Idahoans United would choose to emphasize in litigation, the Attorney General chose language that would, so far as possible, cover all of them. By the initiative’s own definitions, deciding whether to abort a fetus during the mother’s medical emergency is fairly included in the title’s category of “reproductive decisions regarding one’s own body,” because the initiative expressly lists “[a]bortion” as a “personal decision[] about reproductive health care that directly impact[s] the person’s own body.” *See* Folwell Decl., Ex. F at 4.

The right to privacy is likewise included in a “right . . . to make reproductive decisions regarding one’s own body”—and this is established once again by the initiative’s own definitions. The initiative defines “the right to reproductive freedom *and privacy*” as “the right to make personal decisions about reproductive health care that directly impact the person’s own body.” *Id.* (emphasis added). Idahoans United cannot push an initiative that defines “personal decisions about reproductive health

care” to include privacy but then complain when the Attorney General uses similar language to include privacy in a ballot title.

Idahoans United contends that “[t]he short title here is like that in *In re Idaho State Federation of Labor*,” Mem. Supp. Pet. at 18, but the ballot title’s problem in that case was not that it failed to mention every member of an arbitrary list of “key characteristics.” Rather, it had missed the initiative’s single “chief characteristic.” *In re The Petition of Idaho State Fed'n of Lab. (AFL)*, 75 Idaho 367, 375, 272 P.2d 707, 711 (1954). The whole point of the *Federation of Labor* initiative—the “thrust,” as this Court later described it—was to let people work without joining a labor union. *Id.*; *Echobawke*, 124 Idaho at 151, 857 P.2d at 630. And yet the short title failed to say anything at all about unions. *AFL*, 75 Idaho at 375, 272 P.2d at 711; *Echobawke*, 124 Idaho at 151, 857 P.2d at 630. By failing to mention unions, the title left voters completely ignorant of the initiative’s legal content.

The same cannot possibly be said of the short title here, which plainly informs all voters that the initiative concerns abortion before viability and various individual reproductive decisions. As in *Echobawke*, the title successfully identifies the initiative’s “chief characteristic” and is therefore adequate, even though other significant characteristics had to be left for the long title. 124 Idaho at 151, 857 P.2d at 630.

III. The Phrase “Fetus Viability” Is Not Uncommon or Prejudicial.

The initiative would permit abortion bans only “[a]fter the point of fetal viability,” with “fetal viability” defined in terms of the fetus’s “likelihood of sustained

survival outside of the uterus without extraordinary medical measures.” Folwell Decl., Ex. F at 5, 6. In the short title, this concept is expressed as “a right to abortion up to fetus viability.” *Id.*, Ex. F at 3.

For the phrase “fetus viability” to substantially comply with § 34-1809, it needs to be a good-faith effort to “acquaint prospective signers with the distinctive characteristics of the proposed measure,” aiming to use common language and not be “argumentative or prejudicial.” *Echobawk*, 124 Idaho at 151, 857 P.2d at 630.

A. “Fetus viability” is a phrase in common use.

In *Idahoans for Open Primaries*, this Court rejected the phrase “nonparty blanket primary” because it was a “term . . . of [the Attorney General’s] own creation.” 172 Idaho at 482–83, 533 P.3d at 1278–79. It had never been used in any court decision available on Westlaw. *Id.* at 1279.

Nothing of the sort can be said about “fetus viability.” This is not the first time it is appearing in a reported case; it is not even the first time an attorney general has used it in an Idaho ballot title. In 1995, Attorney General Alan Lance promulgated a long title that described an initiative as requiring “a written statement by the physician regarding *fetus* viability.” *See Buchin*, 128 Idaho at 273, 912 P.2d at 641 (emphasis added). And while the Court ruled that Lance’s long title did not adequately explain the initiative’s purpose, no party seems to have suggested that the words “fetus viability” were part of the problem.

Courts in other states have used the phrase as well. *See, e.g., Alpha Med. Clinic v. Anderson*, 128 P.3d 364, 374 (Kan. 2006) (defining “fetus viability” as “the ability of the fetus to survive outside the womb”); *State v. Merrill*, 450 N.W.2d 318, 325 (Minn. 1990) (Kelley, J., concurring) (referring to “a fetus viability requirement”); *People v. Apodaca*, 76 Cal. App. 3d 479, 488 (Cal. Ct. App. 1978), abrogated by *People v. Davis*, 872 P.2d 591 (Cal. 1994) (referring to “the subject of fetus viability”).

Federal courts have used it, too. *See, e.g., Okpalobi v. Foster*, 244 F.3d 405, 442 n.1 (5th Cir. 2001) (Parker, J., dissenting) (referring to a State statute that required “untenable presumptions of fetus viability”); *Bossier City Med. Suite, Inc. v. City of Bossier City*, 483 F. Supp. 633, 638 (W.D. La. 1980) (noting that the State’s interest in fetal life allows the state to prohibit abortion “[a]fter fetus viability in the third trimester”); *Hamilton v. Ayers*, 458 F. Supp. 2d 1075, 1121 (E.D. Cal. 2006), *aff’d in part, rev’d in part*, 583 F.3d 1100 (9th Cir. 2009) (referring to “the law on fetus viability” on multiple occasions); *Wynn v. Scott*, 449 F. Supp. 1302, 1306 (N.D. Ill. 1978), *aff’d sub nom. Wynn v. Carey*, 599 F.2d 193 (7th Cir. 1979) (“After fetus viability, the state interest in fetal life becomes compelling[.]”).

The phrase is also regularly used in legal commentary and scholarly literature. *See, e.g.,* 10 Ohio Jur. Pl. & Pr. Forms § 123:3 (2024 ed.), *Fetus viability*; Murphy S. Klasing, *The Death of an Unborn Child: Jurisprudential Inconsistencies in Wrongful Death, Criminal Homicide, and Abortion Cases*, 22 Pepp. L. Rev. 933, 964 (1995) (law review article referencing “fetus viability”); Raquel Frenedoso da Silva, et al., *Arsenic trioxide*

exposure impairs testicular morphology in adult male mice and consequent fetus viability, J. of Toxicology & Env't Health (2017), <https://tinyurl.com/45wtkjob> (scientific journal article referencing “fetus viability”); Chenwei Zhang, *S.B. 23 Final Analysis*, Ohio Legislative Service Commission (Jul. 11, 2019), <https://tinyurl.com/2s6mnetj> (legislative analysis referencing “fetus viability”).

Moving beyond “scholars, lawyers, judges, and legislators,” *Idahoans for Open Primaries*, 172 Idaho at 481, 533 P.3d at 1277, the Court can also easily find “fetus viability” in traditional news media—not famously a pro-life industry. Idahoans United admits as much: “the Chicago Tribune, the Los Angeles Times, the Seattle Times, . . . the Washington Post,” and the Idaho Statesman have all used the term “fetus viability.” See Mem. Supp. Pet. at 22; Haws Decl. at ¶ 2. And Idahoans United could have listed many more examples. See, e.g., PBS NewsHour, *Sen. Cornyn questions Jackson about fetus viability in Supreme Court confirmation hearings*, YouTube (Mar. 23, 2022), <https://tinyurl.com/3sj4ppm9> (referencing “fetus viability” in the segment title); Amy O’Kruk, et al., *7 states vote to protect abortion rights, while efforts to expand access in Florida, Nebraska and South Dakota fail*, CNN (Nov. 6, 2024), <https://tinyurl.com/rvmspwb8> (using the phrase “fetus viability” multiple times); Joan Biskupic, *How the Supreme Court crafted its Roe v. Wade decision and what it means today*, CNN (Sept. 23, 2021), <https://tinyurl.com/mryhn7vx> (noting the Supreme Court “endorsed using fetus viability as a dividing line”); Marc Siegel, *Roe v. Wade gave women a right to choose abortion. But doctors like me have a choice, too*, USA Today (May 19, 2019),

<https://tinyurl.com/2w2bv4xf> (“Roe v. Wade established a standard of fetus viability”).

Finally, ample evidence confirms that “fetus viability” is one of the terms that ordinary people commonly use for the concept. *See, e.g.*, Craig Decl., Ex. H (Wikipedia article on the *Planned Parenthood v. Casey* decision last accessed on March 3, 2025 which uses the term “fetus viability” four times); NM Media Relations (@NMHC_News), X (Aug. 29, 2024, 7:00 PM), <https://tinyurl.com/28jvpwtz> (X post referring to the “clinical definition of fetus viability”); CityUnderTheHill, Reddit (Dec. 2, 2021, 1:40 PM), <https://tinyurl.com/4vwr9d25> (Reddit post referencing “fetus viability”); Easy Sonology, *Comment on fetus viability.*, Facebook (Sep. 29, 2014), <https://tinyurl.com/msusjsen> (Facebook post referencing “fetus viability”). Many, many more citations could be given.

In short, any good-faith effort towards “ascertaining the language used to commonly refer to the measure,” *Idahoans for Open Primaries*, 172 Idaho at 481, 533 P.3d at 1277, would conclude that “fetus viability” is used in Idaho and other states, across the political spectrum, and in all walks of life (or at least all walks of life in which people might discuss a fetus’s viability).

Idahoans United does not dispute this. The most it can argue is that “fetus viability” is not the most common term because “fetal viability” is still more common.³ But the statute does not require the Attorney General to use the most common term—only a common one. So long as the ballot titles are a good-faith effort to use common language and “accurately acquaint the prospective signer with what he is sponsoring,” *see Idahoans for Open Primaries*, 172 Idaho at 481, 533 P.3d at 1277, they substantially comply with the statute.

B. “Fetus viability” is not argumentative or prejudicial.

“Fetus viability” and “fetal viability” are obvious synonyms, and “fetus viability” has been used (see above) both outside the abortion context and by people who support abortion. But according to Idahoans United, the Attorney General can only have used “fetus viability” because he opposes abortion and “has made clear in public statements distributed for media release that he will do everything he can to protect Idaho’s current abortion laws.” Mem. Supp. Pet. at 26. With this argument, Idahoans United presumably alludes to the *Open Primaries* case, in which the Court expressed “concerns” about public statements by the Attorney General and the prior solicitor general about the need to “defeat” the initiative or the role of state attorneys general

³ It also argues that “fetus viability” is not currently used in the Idaho Code, but it fails to acknowledge that its preferred “fetal viability” is not used there, either. Mem. Supp. Pet. at 23.

in bringing about the defeat. *See Idahoans for Open Primaries*, 172 Idaho at 490, 533 P.3d at 1286.

Note the difference, however: in this case, Idahoans United’s quotations from the Attorney General do not mention the initiative itself or express any desire for the Attorney General’s office to play a role in defeating it. Some of them express little more than the Attorney General’s intent to defend the constitutionality of Idaho law. *See* Mem. Supp. Pet. at 26 (“[he] will always fight to . . . defend our state sovereignty and the rule of law”; “The people of Idaho elected me to uphold and defend our laws”). The others merely express one of the least surprising facts in Idaho politics: that the Attorney General of one of the country’s reddest states is pro-life. *See id.* (“fight to protect Life”; “[o]ur pro-life fight is far from over”; “we can offer every protection possible to the unborn”).

Yes, the Attorney General is pro-life. His five-term predecessor was pro-life. 24 State Amici Curiae Brief at 34, *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022) (No. 19-1392) (joining amicus brief asking Supreme Court to overturn *Roe*). Thirty years ago, Idaho’s last Democratic attorney general was pro-life, and his stated views on abortion—i.e., that it should be permitted only to save the life of the mother and in cases of rape or incest—closely match Idaho’s current law. Paul Dean, *The Quiet Man*, Los Angeles Times (Nov. 2, 1994, 12:00 AM), <https://tinyurl.com/325xvwhb>. If an attorney general’s political opposition to abortion means his ballot titles on

abortion initiatives should be presumed biased, then it is difficult to foresee a day when the presumption will not apply.

The Court should not entertain such a presumption. Attorneys general are elected officials, and speaking publicly on legal issues like abortion is part of the job. They should not be chilled from expressing their honest views to their constituents by the concern that, if they do so, they will be presumed incapable of impartially performing their duties. The Court should judge ballot titles by the content of their texts and not by the political opinions of their authors.

1. The expert's arguments should not be considered.

Idahoans United insists that “[t]he Attorney General’s interjection of ‘fetus’ into the common term ‘fetal viability’ is rather intentionally an argument.” Mem. Supp. Pet. at 26. But aside from the Attorney General’s personal and political opposition to abortion, Idahoans United’s only evidence for this claim is that “[t]he term ‘fetus’ is singular” and “episodic,” whereas “‘fetal’ is a more general” or “thematic” term. *Id.* at 27. According to the Petitioner’s proffered expert in something called “framing theory,” the use of episodic rather than thematic terms “engenders attributions of individual responsibility and blame toward individuals,” which will “negatively impact attitudes toward the Initiative.” *Id.* (citing Schulman Decl.).

It is not clear the expert’s testimony should be considered at all—it does not appear the Court has ever consulted expert testimony when it reviewed ballot titles, and there are good reasons why it should not start now. To begin with, there is simple

fairness: the truncated schedule requested by the Petitioner makes it difficult for the Attorney General to find and present a rebuttal expert, and the lack of an expert discovery period makes it impossible for him to investigate the expert's credentials and theories, depose her, and move to exclude her testimony if appropriate. *Cf. Weeks v. E. Idaho Health Servs.*, 143 Idaho 834, 838, 153 P.3d 1180, 1184 (2007) (noting which of the *Daubert* standards Idaho has adopted for the admissibility of expert testimony).

Then there is the further issue of the Court's jurisdiction. The Court reviews ballot titles using its authority to issue writs of certiorari, *see Idahoans for Open Primaries*, 172 Idaho at 489, 533 P.3d at 1285, and certiorari jurisdiction does not ordinarily allow courts to take new evidence. Instead, certiorari generally reviews a judicial or quasi-judicial officer's decision based on the record before him at the time the decision was made. *Cf. Union Pac. Land Res. Corp. v. Shoshone Cnty. Assessor*, 140 Idaho 528, 532, 96 P.3d 629, 633 (2004) (noting certiorari's origins as a writ to "bring up for review the record of the proceedings in the court below") (quoting Black's Law Dictionary 1605 (7th ed. 1999)).

A strict application of that rule is not possible here, since there is no formal record for the Court to review, *see Idahoans for Open Primaries*, 172 Idaho at 479, 533 P.3d at 1275 ("there is no presentation of evidence or process through which the Attorney General documents the reasons he chose to draft the ballot titles as he did"), but since the decisive question is whether the Attorney General made a good faith effort to satisfy the requirements of the statute, the evidentiary record should at least

be limited to facts the Attorney General reasonably *could have* considered when he wrote the titles. It should not be open to testimony by experts he had never heard of.

2. The expert’s arguments beg the question.

But even if the expert’s testimony is considered, it is not persuasive. Again, the expert’s theory is that “‘fetus’ is singular” and “episodic,” whereas “‘fetal’ is a more general” or “thematic” term, and consequently “fetus” focuses the reader more on matters of individual responsibility and thus biases voters against the initiative. Mem. Supp. Pet. at 27. In other words, Idahoans United argues that the use of the singular, individual word “fetus” is inherently prejudicial.

The first problem with this argument is that Idahoans United uses the word “fetus” itself, once in the initiative text and once in its proposed long title. Folwell Decl., Ex. F at 6; Pet. at ¶ 55. In fact, its proposed long title uses a second synonym for “fetal viability,” one that emphasizes the fetus’s individuality far more than “fetus viability” does: i.e., “the point of *the fetus’s* ability to survive outside the womb.” Pet. at ¶ 55 (emphasis added).

The second problem is that, even if “fetus viability” is less favorable to the Petitioner than “fetal viability,” that fact alone is not enough to make it prejudicial. Favorability is not the statutory goal—the Attorney General is supposed to draft “true and impartial” ballot titles, Idaho Code § 34-1809(2)(e), and “impartial” titles will often be less favorable to an initiative than the favorable titles the sponsors would draft for themselves.

Now for the heart of the matter: in an abortion case, is it more “true and impartial” to use language that calls attention to a fetus’s individuality? Or language that intentionally hides it? According to one famous expert on the political use of language, concrete and individual terms are more honest than abstract and general ones, which are often used to hide unpleasant truths. *See* George Orwell, *Politics and the English Language*, The Orwell Foundation (Apr. 1946), <https://tinyurl.com/bdf89tu8>. And regarding the concrete individuality of fetuses specifically, Idaho law also expresses an opinion: fetuses are individuals with a right to life—“unborn child[ren],” as they are called by multiple statutes. *See, e.g.*, Idaho Code §§ 32-102; 18-501 *et seq.* They are people, not an abstract “stage of development.” Mem. Supp. Pet. at 27.

But, ultimately, the standard of review means the Court should not decide this question. If the difference between “fetus viability” and “fetal viability” is enough to reject a ballot title—if this Court’s scrutiny is required when a two-letter change makes a noun from an adjective, even when both words are in common use and they differ at most in subtleties that require expert testimony to explain—then *Open Primaries*’ rejection of de novo review will be meaningless. *See Idahoans for Open Primaries*, 172 Idaho at 479, 533 P.3d at 1275. Contrary to *Open Primaries*’ holding, the Court comparing “fetal” to “fetus” will in fact be asking whether particular ballot titles “are the best descriptions of the Initiative” and not, as *Open Primaries* prescribes, whether the titles as drafted “fairly express the purpose of the measure.” *Id.* (cleaned up).

C. The long title is not confusing or prejudicial.

Idaho law gives the Attorney General 200 words to express “the purpose of the measure.” Idaho Code § 34-1809(2)(d)(ii). The long title should not be “argumentative or prejudicial” but, to the best of the Attorney General’s ability, should give a “true and impartial statement of the purpose of the measure.” *Buchin*, 128 Idaho at 270, 912 P.2d at 638; Idaho Code § 34-1809(2)(e). The Attorney General made a good faith effort to do just that. And the resulting long title complied with the purpose of the Act. In doing so, he substantially complied with Idaho Code § 34-1809.

Idahoans United’s only objection about the long title is that it uses the phrase “fetus viability” in its second paragraph after using “fetal viability” in the first paragraph.⁴ *See* Mem. Supp. Pet. at 27. In addition to the arguments about “fetus viability” addressed above, Idahoans United claims that “[u]sing two different terms to reference the same thing within the same document is inherently confusing,” and that confusion is inherently prejudicial because it makes voters less likely to support the initiative. Mem. Supp. Pet. at 28.

But, as argued above, “fetus viability” is both common and nonprejudicial, and no party disputes that “fetus viability” and “fetal viability” are synonyms. Common, synonymous terms are often used interchangeably or alternated in ordinary speech and

⁴ For purposes of the long title, Idahoans United cannot complain that the phrase “fetus viability” is not in common use, because by the statute’s plain text, the common-use requirement applies only to the short title. Idaho Code § 34-1809(2)(d)(i).

writing; for example, Idahoans United’s brief uses the terms “measure,” “ballot measure,” and “initiative,” all to describe the same 1,200-word legal text. *See, e.g., id.* at 32, 34, 43. Do those variations render the brief confusing and prejudicial?

And, as argued above, a court reviewing ballot titles for substantial compliance should not tolerate this kind of hair-splitting. Even if Idahoans United thinks that consistently using “fetal viability” would improve the ballot titles, it cannot be mandated because the present titles “fairly express the purpose of the measure.” *See Idahoans for Open Primaries*, 172 Idaho at 479, 533 P.3d at 1275 (cleaned up).

IV. Under Idahoans United’s Reasoning, Its Own Short Title Would Fail.

Idahoans United recommends that instead of allowing the Attorney General to fulfill his duty to draft the ballot titles, it should be allowed to write them itself. Specifically, Idahoans United proposes a new short title as follows:

Short Ballot Title

Measure establishing right to make private reproductive health care decisions, including abortion up to fetal viability and in medical emergencies.

Pet. at ¶ 51. By Idahoans United’s arguments, this ballot title should be rejected because it fails to be distinctive and would prejudice voters.

Most importantly, the title does not use words by which the initiative is commonly referred to or spoken of: although “fetal viability” is a common term, Idahoans United has redefined the term as something “fetal viability” does not ordinarily refer to. *See Folwell Decl., Ex. F* at 6.

The United States Supreme Court has defined fetal viability as “the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb.” *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 870 (1992), overruled on other grounds by *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022). The Court specifically noted that the precise time at which this occurs changes with advances in medical technology. *Id.* at 860. Neither the Supreme Court nor the State of Idaho limits these medical advances to refer only to ordinary measures. *See id.*; Idaho Code § 18-604(15). However, according to Idahoans United’s definition of fetal viability, it occurs when “the fetus has a significant likelihood of sustained survival outside of the uterus *without extraordinary medical measures.*” Folwell Decl., Ex. F at 6 (emphasis added).

It is hard to tell just how late in pregnancy this definition is satisfied because the initiative leaves “extraordinary medical measures” undefined. Does neonatal intensive care count as “extraordinary”? If so, fetal viability under the initiative’s definition will not arrive until around 34 weeks, even though “fetal viability” in common usage arrives at least ten weeks earlier. Adam Liptak, *Fetal Viability, Long an Abortion Dividing Line, Faces a Supreme Court Test*, The New York Times (Nov. 28, 2021), <https://tinyurl.com/32vsbeb5> (noting that fetal viability is around 23 weeks); Cat Bowen, *Do All Premature Babies Go To The NICU? A Pediatrician Explains*, Romper (Oct. 8, 2022), <https://tinyurl.com/2s4ayp38> (“As a matter of course, ‘all babies born at 34 weeks or less go to the NICU[.]’”). If the Court were to adopt Idahoans United’s

standard, then its own title would also fail—the common phrase in the title combined with the uncommon definition in the initiative would create far more risk of inaccuracy or prejudice than the difference between “fetus” and “fetal” possibly could.

Other key characteristics of the initiative go entirely unmentioned in Idahoans United’s proposed title. The most obvious are the initiative’s provisions regarding contraception, miscarriage care, prenatal care, and childbirth care. Folwell Decl., Ex. F at 4. If abortion in medical emergencies must be separately mentioned in the short title rather than subsumed under the right “to make reproductive decisions regarding one’s own body,” it is not clear why these other reproductive decisions do not require the same treatment.

More significantly, the initiative contains broad provisions protecting health care providers and others who participate in, assist with, or provide information about reproductive health care or abortions. Folwell Decl., Ex. F at 5. These provisions are particularly important to include in the short title because they differ from existing law. *See Buchin*, 128 Idaho at 273, 912 P.2d at 641. Presently, Idaho’s Abortion Trafficking Act prohibits certain forms of assistance with reproductive decisions (specifically, assistance with the goal of concealing an abortion from a minor’s parents), and specific statutes regulate abortion advertising and health care providers’ provision of abortions. Idaho Code §§ 18-623 (abortion trafficking provision); 18-603 (abortion advertising provision); 18-608 (regulations on the lawful provision of abortions). The initiative may implicitly narrow or repeal any of these democratically enacted laws, and yet

Idahoans United's short title says nothing about it.

Idahoans United may respond that these problems are minor, that space is limited, and that substantial compliance is all the Court requires. Idahoans United is perhaps two-thirds right: because of the 20-word cap, these sorts of problems are inevitable in most short titles. But as to substantial compliance, that is the standard the Court applies *to the Attorney General*; it is a deferential standard owed to him because he is the elected public official entrusted by law with the duty to write ballot titles.

Nobody elected Idahoans United, and nobody assigned it any role in drafting ballot titles for the initiative it sponsors. The Court's deference should run to the Attorney General's titles, not to the Petitioner's.

CONCLUSION

Perhaps not many cases are decided by the standard of review, but this one should be. If *Open Primaries* meant what it said about substantial compliance, and if the Court follows its precedents applying the substantial compliance standard, then this case can be disposed of very quickly: whatever flaws purportedly exist in the Attorney General's titles, the Petitioner has alleged nothing remotely serious enough to show he did not substantially comply with § 34-1809.

On the other hand, if the Court is willing to scrutinize ballot titles over differences like "fetus" vs. "fetal," then it will have to answer a lot more questions in this case, and it can expect to keep on answering such questions for as long as the Attorney General drafts ballot titles. If the Court gives initiative sponsors an open-

ended invitation to revise the titles that appear on petitions and ballots, then none of them with resources for a certiorari petition are going to pass it up.

But, regardless, in this case all questions come out in the Attorney General's favor. The short title is distinctive and fair, the long title is not confusing or prejudicial, and Idahoans United's petition should be denied.

DATED: March 4, 2025

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I certify that on March 4, 2025, I filed the foregoing electronically through the iCourt E-File system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notification of Service:

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