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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

IDAHOANS FOR OPEN PRIMARIES and RECLAIM IDAHO,

Petitioners,

v.

RAÚL R. LABRADOR, in his official capacity as the Idaho Attorney General, and PHIL MCGRANE, in his official capacity as the Idaho Secretary of State,

Respondents.

Case No. 50940-2023

ORIGINAL ACTION

PETITIONERS' BRIEF IN SUPPORT OF VERIFIED PETITION FOR WRITS OF CERTIORARI AND MANDAMUS

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STATEMENT OF THE CASE

A. Nature of the Case

Petitioners seek this Court's expedited review of defective ballot titles that the Idaho Attorney General has drafted for the Idaho Open Primaries Initiative. Review is proper under the Court's original jurisdiction, per Article V, section 9 of the Idaho Constitution, Idaho Code section 7-303, and I.A.R. 5, and as authorized directly by Idaho Code section 34-1809(3)(c) and Idaho Code section 7-202 (writs of review).

B. Introduction

The Idaho Open Primaries Initiative is a grassroots citizens' initiative that its proponents intend to qualify for the 2024 general election ballot. It would reform Idaho's election law by creating non-partisan open primaries with an instant run-off in general elections for certain offices.

Idaho statute tasks the Attorney General with a ministerial duty of drafting short and long ballot titles for all proposed citizens' initiatives before they can be circulated for signatures. The Attorney General's titles must "give a true and impartial statement of the purpose of the measure" and "shall not be intentionally an argument or likely to create prejudice either for or against the measure." Idaho Code § 39-1809(2)(e). In this case, the Attorney General has wholly failed to comply with his duty. He has instead expressed his public opposition to the Open Primaries Initiative and has chosen to draft titles that

are factually inaccurate, misleading, argumentative, and prejudicial. This Court should review the titles, find them infirm, and then certify the fair and objective titles that Petitioners propose here, or something similar, to the Idaho Secretary of State.

C. Statement of Facts and Course of the Proceedings

On May 2, 2023, Petitioners sent a copy of the Open Primaries Initiative petition to the Secretary of State signed by at least twenty qualified electors of the state. *See* Exhibit A. The Secretary of State's office filed the petition and immediately transmitted it to the Attorney General for the issuance of the certificate of review within twenty working days as provided in Idaho Code section 34-1809.

That same day, after receiving the Idaho Open Primaries Initiative, the Attorney General publicly released disparaging remarks about the Initiative on his Twitter social media platform. He voiced his strong opposition and desire to defeat the Initiative, stating: "Let's defeat these bad ideas coming from liberal outside groups." *See* Exhibit B. Likewise, the Attorney General 's Solicitor General Theo Wold then quickly tweeted his view that the Attorney General 's office should actively oppose the Initiative expressing the belief that: "State AGs are the strongest line of defense against the Left's national campaign to force ranked choice voting on our elections. Leave this failed idea in NYC and Oakland." *See* Exhibit C.

On May 31, 2023, the Attorney General issued his certificate of review on the Initiative. *See* Exhibit D. The Attorney General 's twelve-page certificate found a multitude of alleged deficiencies with the Initiative. Under Idaho law, the recommendations of the Attorney General are advisory only and a petitioner may accept or reject them in whole or in part. Idaho Code § 34-1809(1)(b). After a careful analysis of the certificate of review by its proponents, modifications were made to the Initiative based on the certificate of review and a revised and finalized Initiative was sent to the Secretary of State, along with an explanatory cover letter. *See* Exhibit E. The letter explained why "blanket primary" would be an inaccurate term to describe the proposed primary system because blanket primaries advance nominees of parties, citing case authority from the U.S. Supreme Court.

The Attorney General then had ten working days to craft short and long ballot titles for the initiative. Idaho Code § 34-1809(2)(a). As to the short title, the Attorney General must draft a "distinctive" title that cannot exceed twenty words, which must reflect how "the measure is commonly referred to or spoken of…" Idaho Code § 34-1809(2)(d)(i). In making the general ballot title ("long title"), the Attorney General must "give a true and impartial statement of the purpose of the measure" that is not more than two hundred words in length. Idaho Code § 34-1809(2)(d)(ii) and (e). The statute also charges the Attorney General with carefully selecting language for the ballot title

that "shall not be intentionally an argument or likely to create prejudice either for or against the measure." Idaho Code § 34-1809(2)(e). This Court has previously characterized the Attorney General's task as "ministerial," *see Girard v. Miller*, 43 P.2d 510, 55 Idaho 430 (1935), and "quasi-judicial," emphasizing the objectivity with which the duty must be approached and instructing that he must not be an advocate or an adversary. *In re The Petition of Idaho State Fed'n of Labor (AFL)*, 75 Idaho 367, 374, 272 P.2d 707 (1954).

On June 30, 2023, the statutory deadline, the Attorney General's office hand delivered the ballot titles for the Initiative to the Secretary of State, who immediately transmitted the titles to the Petitioners. *See* Exhibit F. The short ballot title drafted by the Attorney General states:

> **Measure to (1) replace voter selection of party nominees with nonparty blanket primary; (2) require ranked-choice voting for general elections.**

The long ballot title drafted by the Attorney General states:

> **This measure proposes two distinct changes to elections for most public offices.**
>
> **First, this measure would abolish Idaho's party primaries. Under current law, political parties nominate candidates through primary elections in which party members vote for a candidate to represent the party in the general election. The initiative would create a system where all candidates participate in a nonparty blanket primary and all voters vote on all candidates. The top four vote-earners for each office would advance to the general election. Candidates could list any affiliation on**

the ballot, but would not represent political parties, and need not be associated with the party they name.

Second, the measure would require ranked-choice voting for the general election. Under current law, voters may select one candidate for each office, and the candidate with the most votes wins. Instead, ranked-choice voting would require voting for each candidate on the ballot in order of preference. The votes would be counted in successive rounds for each order of preference. The candidate with the fewest votes in each round would be eliminated, and votes for that candidate in later rounds would not be counted. The candidate with the most votes in the final round would win.

In his cover letter that accompanied the ballot titles, the Attorney General threatened to sue the sponsors of the Initiative in his capacity as Attorney General if the Initiative garners sufficient support from the citizens of Idaho to qualify for the ballot, declaring his intention to use his official power as Attorney General to defeat it. *See* Exhibit F. Reiterating his strong opposition to the Initiative, as he had done on social media and in his certificate of review, he again asserted that the Initiative violates the constitutional and statutory single-subject rule and, in his unequivocal opinion, it was "ineligible for placement on the ballot."

ISSUES PRESENTED

I. The Attorney General has drafted ballot titles that are inaccurate, argumentative, and prejudicial to the Idaho Open Primaries Initiative in violation of Idaho Code section 34-1809. Therefore, this Court should review and certify the objective ballot titles proposed by the Petitioners, or a similar version, with the Secretary of State.

II. The Attorney General's deficient ballot titles have forced Petitioners to seek relief from this Court and have delayed the collection of signatures for the Idaho Open Primaries Initiative. To mitigate this harm the Court should extend the Initiative's signature collection deadline and issue a writ of mandamus to the Secretary of State so that he can prepare for the Initiative's adjusted schedule.

III. The Petitioners are entitled to recover attorney fees given that the Attorney General has failed to properly perform an official duty, forcing Petitioners to hire counsel to obtain fair ballot titles for the Idaho Open Primaries Initiative and protect this fundamental right.

STANDARD OF REVIEW

The Court has "original jurisdiction to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all writs necessary or proper to the complete exercise of its appellate jurisdiction." Idaho Const., art. V, § 9; Idaho Code § 1-203; I.A.R. 5(a). Once this Court asserts its original jurisdiction, 'it may issue writs of mandamus and/or prohibition.' *Ybarra v. Legislature by Bedke*, 166 Idaho 902, 906, 466 P.3d 421, 425 (2020).

A writ of mandamus "is not a writ of right, and this Court's choice to issue a writ is discretionary when compelled by urgent necessity." *The Associated Press v. Second Jud. Dist*., 529 P.3d 1259, 1266 (2023) *citing Hepworth Holzer, LLP v. Fourth Jud. Dist. of State*, 169 Idaho 387, 393, 496 P.3d 873, 879 (2021).

A writ of mandamus may be issued by the supreme court to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station. Idaho Code § 7-302; Idaho Code §1-203.

A writ of certiorari or review may be granted by any court when an officer is exercising judicial functions, and has exceeded their jurisdiction, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy. Idaho Code § 7-202. Like the writ of certiorari, a writ of mandamus or prohibition must be issued in

all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. Idaho Code § 7-303.

The issue before the Court is one of statewide importance and arises from the people's fundamental constitutional right to legislate directly, as set forth in Article III, § 1 of the Idaho Constitution. *Reclaim Idaho v. Denney*, 169 Idaho 406, 428, 497 P.3d 160, 182 (2021). Petitioners have no other adequate remedy at law, and need expedited relief.

LEGAL STANDARDS GOVERNING THE REVIEW OF SHORT AND LONG BALLOT TITLES

In Article III, section I of the Idaho Constitution, the people reserved for themselves "the power to propose laws, and enact the same at the polls independent of the legislature," which is known as the initiative power. This Court has found the people's right to legislate directly to be fundamental. *See Reclaim Idaho,* 169 Idaho at 428.

The Legislature has created an extensive statutory scheme to govern the citizen's right to the initiative and referendum. Idaho Code, Title 34, Chapter 18. The statutory requirements concerning ballot titles are initially directed to the Attorney General to develop ballot titles as set forth in Idaho Code sections 34-1809(2)(a), (d) and (e).

The Attorney General is given a short time – ten working days – to create both short and long ballot titles for initiatives. Idaho Code § 34-1809(2)(a). The short title must be "distinctive," no more than twenty words, and be what "the measure is

commonly referred to or spoken of." Idaho Code § 34-1809(2)(d)(i). The general or long ballot title can be no more than two hundred words and must "give a true and impartial statement of the purpose of the measure." Idaho Code § 34-1809(2)(d)(ii) and (e). The Attorney General cannot use language that is "intentionally an argument or likely to create prejudice either for or against the measure." Idaho Code § 34-1809(2)(e).

This Court has long ago determined that when the Attorney General drafts titles for initiatives or referendums, he is acting in his official capacity and completing a ministerial and "quasi-judicial" function. *In Re Idaho State Fed'n of Labor*, 75 Idaho 367, 374, 272 P.2d 707, 711 (1954); *Girard v. Miller,* 55 Idaho 430, 43 P.2d 510 (1935). The law requires that he do so as a disinterested and impartial officer. Idaho Code § 34-1908(2)(e).

The statute further providers for effectively de novo review in this Court: "[a]ny person dissatisfied with the ballot title or the short title provided by the attorney general ... may appeal to the supreme court by petition, praying for a different title and setting forth the reason why the title prepared by the attorney general is insufficient or unfair." Idaho Code § 34-1809(3).

As the Court noted in *Noh v. Cenarrusa*, 137 Idaho 798, 801,802, 53 P.3d 1217, 1220(2002), the Court has accepted jurisdiction to resolve ballot title challenges in the past on four occasions that span the course of almost ninety years: *Buchin v. Lance,* 128

Idaho 266, 912 P.2d 634 (1995); *ACLU v. Echohawk,* 124 Idaho 147, 857 P.2d 626 (1993); *In Re Idaho State Fed'n of Labor,* 75 Idaho 367, 272 P.2d 707 (1954); and *Girard v. Miller,* 55 Idaho 430, 43 P.2d 510 (1935). The *Noh* Court recognized that misleading ballot titles create a problem that requires the Court's action, as there would be no way to remedy the problem after the fact if an election on an initiative or referendum were conducted with misleading ballot titles. *Id*. at 802.

* * *

This action presents to the Court another urgent ballot title challenge that seeks fair and impartial ballot titles, which are essential to the ability of citizens to exercise their fundamental right of the initiative. Petitions need to be circulated as soon as possible for the Initiative to have any hope of qualifying for the ballot and allowing the citizens of Idaho to vote on it. *See* Declaration of Luke Mayville ("Mayville Declar."), ¶¶ 10-12.

The Petitioners have presented alternative ballot titles in their petition that cure the deficiencies of the titles the Attorney General proposes, and are in accord with the intent of Idaho Code section 34-1809. The titles give a true and impartial statement of the purpose of the measure, as the law requires. The Petitioners respectfully ask the Court to certify these titles or some close variation of them to the Secretary of State so that that petitions can be circulated.

ARGUMENT

I.

The Attorney General has drafted ballot titles that are inaccurate, argumentative, and prejudicial to the Idaho Open Primaries Initiative in violation of Idaho Code section 34-1809. Therefore, this Court should review and certify the objective ballot titles proposed by the Petitioners, or a similar version, with the Secretary of State.

A. The Attorney General's short ballot title is defective.

The short ballot title is important. As the "headline" for the ballot title, the short title informs the reader and provides context to consider the other information on the initiative petition. The law requires initiative sponsors to print the short title on every petition sheet. Idaho Code § 34-1809(2)(d)(i). Courts have found that the short title or caption is "the cornerstone for the other portions of the ballot title." *Greene v. Kulongoski*, 322 Or 169, 175, 903 P.2d 366,370 (1995). Most critically, "[t]he caption should state or describe the proposed measure's subject matter accurately[.]" *Parrish v. Rosenblum*, 365 Or. 597, 599, 450 P.3d 973,975 (2019).

1. The Attorney General's short title is misleading and likely to create prejudice against it.

Idaho Code § 34-1809(2)(e) requires that the ballots titles not be likely to create prejudice either for or against the measure. The short title contains inaccuracies that will do just that. The Attorney General's short title incorrectly states that the measure would

"*require* ranked-choice voting for general elections." This is a misleading statement, especially in the context of the long title. Section 25 of the Idaho Open Primaries Initiative contradicts this claim in plain language: "Voters are not required to rank every candidate. A ballot will be tabulated ... regardless of how many candidates the voter has ranked." The text of the initiative makes clear that voters would be allowed to rank multiple candidates, but not required to do so. If a voter decided to vote only for a single candidate, they would be free to do so.

The phrase "replace voter selection of party nominees " in the short title is also problematic as it has a negative restrictive connotation that the Initiative would restrict and limit a voter's choice. The short title indicates the Initiative would *replace* voter selection and *require* something else - a process called a "nonparty blanket primary." Both "replace voter selection" "require rank-choice voting" are loaded terms that allude to restrictions on voting. The short title fails to communicate to voters one of the major effects of the Initiative: it would open Idaho's primaries to all voters, increasing voter choice, not replacing or limiting voter selection.

2. The Attorney General's short title is not the Initiative's common name.

The Court has recognized that while the short title must be *distinctive*, it must also be a title by which it is *commonly* referred to or spoken of. *ACLU v. Echohawk*, 124 Idaho 147, 150 (1993) *quoting In Re Idaho State Fed'n of Labor*, 75 Idaho at 372, 272 P.2d at

710. (italics in original); Idaho Code § 34-1809(2)(d)(i). But the opening sentence of the Attorney General's short title describes the measure as proposing a "nonparty blanket primary"— an obscure term that is almost entirely absent from common usage.

i. The term "blanket primary" is absent from media coverage.

As set forth in the Declaration of Luke Mayville offered in support of this petition and the motion to expedite, in the Idaho media coverage and published discussion of the Initiative to date, the terms "blanket primary" and "nonparty blanket primary" have not once been used to describe the Initiative. Mayville Declar., ¶ 15. In the months since the Idahoans for Open Primaries coalition filed the Initiative, Reclaim Idaho has carefully tracked media coverage related to the Initiative, as well as opinion columns and other public statements for and against. To date, twenty-one distinct pieces of media reporting on the proposal have appeared in Idaho newspapers, on radio, and on TV news programs. Mayville Declar., ¶ 15. Five newspapers have published editorials on the Initiative. Reclaim Idaho reviewed all of these reports and editorials, and not in a single instance have the terms "blanket primary" and "nonparty blanket primary" been used to describe the Initiative. Mayville Declar., ¶ 15. In the few instances when these terms have been mentioned, they've been mentioned only in direct reference to either the Attorney General's ballot titles or his certificate of review. Mayville Declar., ¶ 15.

The terms "blanket primary" or "nonparty blanket primary" have also been absent from the public arguments Reclaim Idaho has tracked on both sides of the issue. Fifteen newspaper op-ed columns have been published—ten in favor of the Initiative and five opposed. Mayville Declar., ¶16. None of the proponents or opponents have used the terms "blanket primary" or "nonparty blanket primary" to describe the initiative. Mayville Declar., ¶16. Nor have these terms been used in public statements against the Initiative issued by Idaho Solicitor General Theo Wold, Idaho State Senator Brian Lenney, Idaho State Representative Dale Hawkins, or Chair of the Idaho Republican Party Dorothy Moon. Mayville Declar., ¶ 16.

ii. The term "blanket primary" is not used by the Secretary of State.

Meanwhile, the Idaho Secretary of State has officially designated the Initiative as the Idaho Open Primaries Act on its website, and the Secretary of State's office has at no time used the terms "blanket primary" or "nonparty blanket primary" to describe the Initiative. Mayville Declar., ¶17. Instead the Secretary of State is using its common name, perhaps to make it easier to locate on its website, which provides valuable information about Idaho's elections.[1] The name "Idaho Open Primaries Act" appeared when the Secretary of State published the full petition on its website on June 30th. Mayville Declar., ¶ 17. On the same day, the Secretary of State's office issued a

[1] *See* https://sos.idaho.gov/elections-division/ballot-initiatives/

statement on Twitter: "Supporters of the Open Primaries ballot initiative may begin collecting signatures, following review by the Idaho Attorney General's Office." Mayville Declar., ¶17. Unlike the Secretary of State's office, which has used a clear descriptive caption for the Initiative, the Attorney General chose an obscure term that is not regularly used in Idaho and does not conform with law.

iii. The Attorney General's term "blanket primary" is misleading.

Prior to the publication of the Attorney General's ballot titles, the Attorney General argued in his certificate of review that it is misleading for the Initiative proponents to use the term "open primary" asserting the correct term is "blanket primary." *See* Ex. D to Petition, p. 4. This is a trap the Attorney General set for the unwary. The Attorney General's certificate of review introduced the term "blanket primary" with reference to the use of the term by the Supreme Court in *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 445, n.1 (2008). The Court explained that the term "blanket primary" refers to a system in which "any person, regardless of party affiliation, may vote for a party's nominee." *See id.* (*citing California Democratic Party v. Jones*, 530 U.S. 567, 576, n. 6 (2000)). A blanket primary is distinct from an "open primary," in which a person may vote for any party's nominees, but must choose among that party's nominees for all offices, *ibid*., and the more traditional

"closed primary," in which "only persons who are members of the political party ... can vote on its nominee," *Id.,* at 570.

Notably, in the same footnote to the *Washington State Grange* decision that was cited in the Attorney General's certificate of review, the Court provides a definition of "blanket primary" that makes clear that the blanket primary, unlike the primary system proposed by the Idaho Open Primaries Initiative, is a process for choosing party nominees: "The term 'blanket primary' refers to a system in which 'any person, regardless of party affiliation, may vote for a party's nominee.'" *Id*.

iv. The Attorney General's use of the term "nonparty blanket primary" is misleading.

In the certificate of review, the Attorney General defines "open primaries" as "primaries that do not require voters to declare party affiliation to vote in a party's primary contest to nominate a candidate for the general election." To substantiate this definition, he cites an online article entitled "State Primary Election Types," published by the National Conference of State Legislatures (NCSL). [2] While the NCSL brief defines "open primary" in a manner similar to the Attorney General's certificate of review, the brief makes no mention of the terms "blanket primary" or "nonparty blanket primary." In fact, the brief describes Alaska's primary system (a system nearly

[2] See https://www.ncsl.org/elections-and-campaigns/state-primary-election-types.

identical to that proposed by the Idaho Open Primaries Initiative) as a "top-four open primary system."

In a more in-depth report published by NCSL entitled "Primaries: More Than One Way to Find a Nominee", the term "blanket primary" is used to describe a primary system that the Supreme Court has declared unconstitutional. [3] See *California Democratic Party v. Jones*, 530 U.S. 567(2000). In blanket primaries, all voters can vote for candidates regardless of party affiliation. But unlike the "top two" primary systems that would later be established in California and Washington, and unlike the "top four" primary system that would be established in Alaska, blanket primaries remained *partisan* in the sense that they advanced nominees of parties. Blanket primaries existed in both California and Washington prior to being invalidated by federal court decisions.

The NCSL report draws a sharp line between "blanket primary" and "top four primary" as two distinct primary types. Because blanket primaries have been ruled unconstitutional by the Supreme Court and are no longer established in any state, the term "blanket primary" is not listed on NCSL's comprehensive "State Primary Election

[3] See https://www.ncsl.org/elections-and-campaigns/primaries-more-than-one-way-to-find-a-party-nominee

Systems" table. [4] However, both "top two" and "top four" are included as primary types.

v. Titles of other state initiatives have used the term "open primary."

To date, there have been titles assigned to twelve ballot measures in ten states for open, nonpartisan primaries similar to the Idaho Open Primaries Initiative. Mayville Declar., ¶19. Ballot measures proposing top-two open primaries, in which two candidates advance from an open, nonpartisan primary, have been assigned ballot titles in Washington, California (twice), Oregon (twice), South Dakota, Florida, and Arizona. *Id*. Ballot measures proposing top-five or top-four open primaries, nearly identical to that proposed by the Idaho Open Primaries Initiative, have been assigned ballot titles in Alaska, North Dakota, Missouri, and Nevada. *Id* In the ballot titles issued for these twelve measures, the terms "blanket primary" or "nonparty blanket primary" have not appeared in a single instance. *Id.*

Previous ballot measures that most closely resemble the design of the Idaho Open Primaries Initiative are the top-four and top-five open primary measures filed in Nevada, Missouri, North Dakota, and Alaska. Mayville Declar.,¶¶ 22-26. In each of

[4] See: https://documents.ncsl.org/wwwncsl/Elections/Primary-Types-Table_2021.pdf

these four states, the officially assigned ballot titles described the proposed reform using the term "open primary" or a close variation of it.

vi. The term "instant runoff' is more accurate than "ranked choice."

The short and long ballot titles Petitioners have proposed to the Court use the term "instant runoff" in the place of "ranked-choice." While both terms are commonly used to describe the proposed reform, "instant runoff" more accurately describes the content of the initiative. "Instant runoff" is the term consistently used in the initiative text. Mayville Declar., ¶ 24 . More importantly, it is more precise than the term "ranked-choice." Ranked-choice voting is a broad term commonly used to describe an entire family of voting systems. Mayville Declar., ¶ 24. There are five variants of ranked-choice voting that have been adopted by jurisdictions and political organizations in the United States. [5] Mayville Declar., ¶ 24. The specific variant of ranked-choice voting proposed by the Idaho Open Primaries Initiative is sometimes called "single-winner ranked choice voting," but it is more commonly referred to as "instant runoff voting." Mayville Declar., ¶ 24.

[5] See (https://www.ssoar.info/ssoar/bitstream/handle/document/78800/ssoar-politicsgovernance-2021-2-santucci-Variants_of_Ranked-Choice_Voting_from.pdf?sequence=1&isAllowed=y).

3. The Attorney General's short title is not distinctive.

The Attorney General's short title is deficient because it is not distinctive. I.C. §34-1809(2)(d)(i). The Court has held that the fundamental inquiry of a short title is whether it is distinctive. *ACLU, Idaho Chapter v. Echohawk*, 124 Idaho 147, 151 (1993) *quoting In ReIdaho State Fed'n of Labor*, 75 Idaho at 373, 272 P.2d at 710. In *In Re Idaho State Fed'n of Labor*, the Court carefully studied the various definitions of "distinctive" in this context and held: "This short title must, therefore, so far as possible within ten words [now twenty words], *set forth the characteristics which distinguish this proposed measure* and expeditiously and accurately acquaint the prospective signer with what he is sponsoring." (emphasis added).

The Attorney General's short title does nothing to alert voters that the Initiative would create an open primary system and an instant runoff general election. The short title's failure to communicate to voters the very purpose or essential characteristics of the Initiative is fatal to it.

4. The Attorney General's short title is an intentional argument against the Initiative.

The law requires that the Attorney General draft a short ballot title that will not intentionally be an argument or be likely to create prejudice either for or against the measure. Idaho Code § 34-1809(2)(e). The Attorney General sets up an argument against the Initiative when he artificially divides the short title into parts (1) and (2).

The Attorney General has threatened to bring a lawsuit against the Petitioners asserting the Idaho Open Primaries Initiative violates the single-subject rule applicable to legislation. *See* Petition, Exhibit F. Gratuitously dividing the short title into two parts bolsters the lawsuit he intends to bring. There is no rationale for dividing a short title of 20 words into two separate numbered clauses. The purpose of the Initiative is a multi-part reform of the electoral system in Idaho and includes multiple policy changes that fall under the common subject of elections. The Initiative substantially amends Chapter 1, Title 34 of the Idaho Code, and contains 42 sections. Dividing the short title into two enumerated parts is unnecessary and serves only to bootstrap the single-subject challenge the Attorney General has announced he intends to litigate.

5. The short ballot title Petitioners propose for the Initiative.

A fair and objective short title that would address the concerns of Petitioners and comply with Idaho Code section 34-1809 could read:

> **An initiative to allow all Idaho voters the right to participate in open primary elections and to establish an instant runoff general election.** [6]

The Petitioners ask the Court to certify this or some similar version of it as the short title for the Idaho Open Primaries Initiative.

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[6] This short title amounts to 20 words — not including the words of the clause "An initiative to." The Court has held that the preposition clause of the short ballot title (such as "An initiative to") is not part of the restrictive word count. *In Re The Petition of Idaho State Fed'n of Labor*, 75 Idaho at 370.

B. The Attorney General's Long Ballot Title is Substantially Flawed and Unworkable.

The law requires that the long or general title assigned by the Attorney General "give a true and impartial statement of the purpose of the measure….". The long title must not exceed two hundred (200) words. Idaho Code § 34-1809(2)(d)(ii). The law also requires that in making the long ballot title, the Attorney use language that does not intentionally argue for or against the measure or create prejudice either way. Idaho Code § 34-1809. In violation of these principles, the long title is inaccurate and argumentative. It reflects the Attorney General 's vehement opposition to the Initiative and would create prejudice against it.

1. The Attorney General's long title is inaccurate and prejudicial

The long title introduces a misconception that multiple rankings in instant runoff elections equate to multiple votes by a single voter and makes the false claim that the Idaho Open Primaries Initiative requires voters to cast multiple votes in a single election. This claim is explicitly contradicted in Section 4 of the Initiative which states: "each ballot counts as a single vote for its highest-ranked active candidate." The text of the Initiative makes clear that each person casts only one vote. Voters may rank multiple candidates, but multiple rankings do not equate to multiple votes.

The long title also contains the false claim that the Initiative requires voters to rank more than one candidate — including candidates they don't support. The Attorney

General 's title states that "ranked-choice voting would require voting for each candidate on the ballot in order of preference." Section 25 of the Idaho Open Primaries Initiative contradicts this claim in plain language: "Voters are not required to rank every candidate. A ballot will be tabulated ... regardless of how many candidates the voter has ranked." The text of the initiative makes clear that voters would be allowed to rank multiple candidates, but not required to do so.

The long title prepared by the Attorney General appears to imply that votes cast for an eliminated candidate will not be counted and is ambiguous at best. The long title states once a candidate is eliminated "votes for that candidate in later rounds would not be counted." This is ambiguous as it could be construed to mean a ballot will no longer be counted once its first choice is eliminated. Section 36 of the Initiative states that when a ballot's first choice is eliminated, that ballot's vote will still count as a vote for that ballot's highest-ranked candidate who has not yet been eliminated: "In a round of tabulation, each ballot counts as a vote for its highest-ranked active candidate."

The Attorney General's long title also makes the false statement to voters that "Candidates could list any affiliation on the ballot,…and need not be associated with the party they name." Not so. Section 22 of the Initiative requires that the candidate be "registered as affiliated with the political party or political group" they list on the ballot that they are affiliated with.

Like the short title, the Attorney General's proposed long title insinuates that the Initiative includes more than one subject and therefore violates the single-subject rule. The long title states: "[t]his measure proposes *two distinct changes* to elections for most public offices." The Initiative proposes far more than two policy changes, although all the policy changes concern the subject of elections. This artificial division of the multiple amendments to Title 34 of the Idaho Code into two distinct changes does not accurately reflect the amendments the Initiative proposes. It does however, help frame the single-subject challenge the Attorney General intends to bring against it.

The long title also misleadingly uses the obscure and disfavored term "blanket primary" for the reasons already stated in the discussion *supra* concerning the short ballot title.

For all these reasons, the long title prepared by the Attorney General is insufficient and unfair and should not be certified.

2. The long ballot title Petitioners propose for the Initiative.

In light of the high number of inaccuracies and misleading statements included in the long title prepared by the Attorney General, and its use of the obscure term "blanket primary," Petitioners find it insufficient merely to revise particular words or provisions. Instead, the concerns outlined above warrant a replacement of the long title.

A fair and objective long title that would address these concerns could read:

This measure establishes a top-four open primary election in which all voters are allowed the right to participate regardless of party affiliation. Candidates for United States Congress, state legislature, elective state office, or county office will appear on the same ballot regardless of party affiliation. Candidates can list their party affiliation if they so choose, but party affiliation will not indicate an official endorsement or nomination by a party. The four candidates who receive the most votes advance to the general election. The initiative also establishes an instant runoff general election in which voters may choose one candidate or rank candidates by order of preference. After the first choices of all ballots are counted, the candidate receiving the fewest votes is eliminated. All votes for the eliminated candidate are counted toward the voter's next choice. This process repeats until only two candidates remain and the candidate receiving the highest number of votes wins.

The Petitioners ask the Court to certify this or some similar version of it as the long title for the Idaho Open Primaries Initiative, as provided by Idaho Code Section 34-1809(3)(c).

C. The Court should send certified titles directly to the Secretary of State.

In the most recent challenge to ballot titles, the Court provided the Attorney General with both a short and long title it would deem acceptable, to facilitate a decision and to expediate the decision process. *Buchin v. Lance*, 128 Idaho 266, 273 (1995). The Court could also certify the proposed titles, or some variation of them, directly to the Secretary of State as the statute contemplates as set forth in Idaho Code section 34-1809(3)(c) or follow the procedure of the Court in *Buchin v. Lance*, 128 Idaho at 273.

The Attorney General has already been given a full opportunity to exercise his duty, and took the ten full business days provided by the statute to do so. Unlike the Attorney General in *Lance*, he did not attempt in good faith to comply with the law. Instead, he has expressed his intent to use the power of his office to defeat the Initiative and deny the citizens of Idaho the right to vote on it. Petition, Exhibits B, C and F. The current Attorney General is far from the disinterested impartial officer that the legislature envisioned when it delegated this quasi-judicial function to him. A comparison of his actions with the actions of the Attorney General *In Re The Petition of Idaho State Feder'n of Labor (AFL)*, 75 Idaho 367, 375, 272 P.2d 707, 712 (1954) is telling. In *AFL*, the Attorney General filed his response to the Court indicating that he had no adversary interest in the proceeding, waived his reply brief and argument. Instead of arguing his position he indicated that "he stood ready to assist the Court." *Id*. at 370.

The only other time in the state's history that an Attorney General has so blatantly refused to cooperate in the preparation of titles for a measure occurred in 1935, in the early days.[7] *Girard v. Miller*, 43 P.2d 510 (1935). In *Girard*, the Secretary of State sued the Attorney General when he refused to provide ballot titles for a referendum. The Court would have none of it, rejecting the Attorney General's

[7] As the Court may recall, in 1933 the legislature finally passed enabling legislation, so that the constitution right could be exercised.

arguments summarily and issuing a writ of mandate, ordering him to *immediately* comply with his duties. *Id*.

The Court has recognized the pressing reality that "someone must prepare the title" of an initiative. *AFL*, 75 Idaho at 375. But it is not necessary for the Court to provide the Attorney General another chance to "do his worst" in light of his demonstrated bias against the Initiative and glaringly deficient ballot titles. Here, justice delayed is indeed justice denied. The Attorney General can sabotage the Initiative by delay just as much as he has attempted to sabotage it with bad titles. The Attorney General should not be allowed to take advantage of his own wrong. When every day counts, there is no reason to formalistically return the titles to the Attorney General, who has unequivocally expressed his intention to oppose it and to prevent the citizens of Idaho from considering it.

The Petitioners have a right to fair ballot titles, within 10 working days after the Initiative is submitted to the Secretary of State. Idaho Code § 34-1809(2)(a). The damage the Attorney General continues to cause with his defective ballot titles is compellingly described and continues to mount. Mayville Declar., ¶¶ 10-12. Moreover, the Court already has the benefit of the Attorney General's detailed defense and rationale for his ballot titles set forth in his twelve page, single spaced, certificate of review. See Petition Exhibit D. What more is there to know? The Attorney General has already explained

himself and his reasoning is flawed and biased. Under these extraordinary circumstances, the Court should certify the Petitioners' proposed titles, or modify them as it sees fit, and instruct the Secretary of State to certify them.

If the Court does return the ballot titles to the Attorney General, it should direct him to immediately prepare ballot titles consistent with the proposed titles provided by the Court to facilitate a decision and expedite the decision process. See *Girard v. Miller,* 55 Idaho 430, 43 P.2d 510 (1935); *Buchin v. Lance,* 128 Idaho 266, 912 P.2d 634 (1995). Further, the Court should retain jurisdiction to ensure the Attorney General 's compliance with the Court's order in light of his expressed intent to defeat the Initiative.

II.

The Attorney General's deficient ballot titles have forced Petitioners to seek relief from this Court and have delayed the collection of signatures for the Idaho Open Primaries Initiative. To mitigate this harm the Court should extend the Initiative's signature collection deadline and issue a writ of mandamus to the Secretary of State so that he can prepare for the Initiative's adjusted schedule.

In dereliction of his official duties, the Attorney General has prepared ballot titles that do not conform to the law. He has instead drafted titles that express his strong bias against the Initiative and his intention to use his power to defeat it. Even if the

defective ballot titles are cured by the Court, the time loss in the signature collection period may doom the initiative effort which requires the collection of approximately 100,000 signatures, to obtain the necessary 63,000 verified signatures. Mayville Declar., ¶ 8. The collection of signatures cannot begin until ballot titles have been certified. The harm caused by the delay in beginning signature collection for the Initiative is substantial and grows. Mayville Declar., ¶ 12.

To remedy this injustice, Petitioners seek an extension of the April 30, 2024 deadline for petitions to be submitted to the Secretary of State commensurate with the delay caused by this litigation. When a party is seeking equitable relief, a court is vested with discretion to determine the equities between the parties. *Lunneborg v. My Fun Life*, 163 Idaho 856, 867, 421 P.3d 187, 198 (2018)(citations omitted). A court is "granted broad discretion in fashioning equitable relief." *Id*. (citing *Rowe v. Burrup*, 95 Idaho 747, 750, 518 P.2d 1386, 1389 (1974)). Applying equitable principles requires "recourse to principles of justice to correct or supplement the law as applied to particular circumstances, [including] the judicial prevention of hardship that would otherwise ensue from the literal interpretation of a fair-minded application of a trial court's discretion." *Id*. (citing *Black's Law Dictionary*, 656 (10th ed. 2014)).

Petitioners ask the Court to issue a writ of mandamus to Secretary of State Phil McGrane, directing him as the Chief Election Officer to take all steps necessary to

prepare his office and the county clerks for an adjustment in the initiative schedule as it would apply to their duties to prepare the Initiative for the ballot.

III.

The Petitioners are entitled to recover attorney fees given that the Attorney General has failed to properly perform an official duty, forcing Petitioners to hire counsel to obtain fair ballot titles for the Idaho Open Primaries Initiative and protect this fundamental right.

The Petitioners ask the Court to award attorney fees and costs of this action against the Office of the Attorney General pursuant to Idaho Code section 12-117(1) as the Attorney General in his official capacity has acted without a reasonable basis in fact or law. Likewise, he has failed to fairly perform a duty placed on him by law and pursuant to Idaho Code section 12-121, as the Attorney General defended this action frivolously, unreasonably or without foundation, or as otherwise provided by law. Because of the Attorney General's dereliction of his duty, the Petitioners have been forced to hire counsel and seek this extraordinary relief.

CONCLUSION

The citizens' fundamental right of the Initiative is not self-executing. The Attorney General has the ministerial duty to create fair and impartial titles for the Idaho Open Primaries Initiative, as outlined in Idaho Code section 34-1809. Instead, the

Attorney General has assigned titles that prejudice the Initiative and are riddled with inaccuracies, arguments, and prejudice, in accord with his expressed intention to defeat it. He has improperly used this official duty as an opportunity to strangle the Idaho Open Primaries Initiative in its crib, blocking its circulation for signature by drafting titles that must be challenged if the Initiative is to have any hope of success. Under these extraordinary circumstances, the Attorney General has abdicated his role in the process. The Court should certify fair and impartial titles for the Idaho Open Primaries Initiative to the Secretary of State. The Court should also grant Petitioners equitable relief, to mitigate against the ongoing damage caused by the Attorney General's unlawful actions. The Court is the last hope the Initiative can be circulated with sufficient time and fair ballot titles for the people of Idaho to consider it.

Filed on this 10th day of July, 2023.

/s/*Deborah A. Ferguson*
Deborah A. Ferguson
/s/*Craig H. Durham*
Craig H. Durham

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Attorneys for Petitioners

CERTIFICATE OF SERVICE

PETITIONERS' BRIEF IN SUPPORT OF VERIFIED PETITION FOR WRITS OF CERTIORARI AND MANDAMUS has been served on the following on this 10th day of July, 2023, by filing through the Court's e-filing and serve system to:

aglabrador@ag.idaho.gov
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Attorneys for Respondents Phil McGrane and Raúl Labrador

/s/*Deborah A. Ferguson*
Deborah A. Ferguson