IN THE SUPREME COURT OF THE STATE OF IDAHO

IDAHOANS FOR OPEN PRIMARIES and RECLAIM IDAHO, Petitioners, vs. 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.	**Docket No. 50940-2023**

RESPONDENTS' BRIEF IN OPPOSITION TO VERIFIED PETITION FOR WRITS OF CERTIORARI AND MANDAMUS

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INTRODUCTION

Petitioners propose sweeping changes to the way Idahoans participate in primaries and vote in the general election. They have the right to try to do so. But voters have a right to know the truth of what is being proposed. To that end, they have entrusted the Attorney General with the duty to assign accurate titles to ballot initiatives. He did so here. Just as the law directs, the Attorney General's short and long titles acquaint voters with the purposes of the initiative and explain how the initiative differs from existing law.

Petitioners, on the other hand, want voters to think the ballot initiative is something different than what it really is. They apparently believe the initiative is more likely to succeed electorally if the titles tell voters the initiative will bring open primaries to Idaho. But that is not the primary system the initiative proposes. Idaho used to have an open primary, and the initiative's primary system is very different. At the same time, the initiative's proposed system is not novel. In fact, the United States Supreme Court has twice addressed materially identical systems and made clear that they are not an open primary. And the Attorney General has used the same terminology as the U.S. Supreme Court in assigning a ballot title here.

This Court engages in a deferential and limited review of the titles the Attorney General assigns to ballot initiatives. Here, authoritative sources guided the Attorney General's drafting, and the resulting titles are clearly within the boundaries of the duty the Attorney General is legally assigned. By contrast, Petitioners ask this Court to reject

the Attorney General's titles because they quibble with terms that Petitioners *themselves* have used to describe the initiative, and on top of that, Petitioners' titles contain language that will mislead Idaho voters. Petitioners' ballot title claims are meritless.

Before reaching the ballot title issue, however, the Court must first address Petitioners' standing to bring this action. Petitioners are not legal persons capable of maintaining a legal action. They also have no distinct, palpable injury. Both defects mean they lack standing and this Court lacks jurisdiction.

The Court should therefore dismiss the Petition or deny it on the merits.

STATEMENT OF FACTS

The only facts relevant to this petition relate to whether Petitioners have standing and whether the Attorney General supplied sufficient short and long ballot titles. Petitioners would like to make this case about issues that have nothing to do with those two legal questions. Respondents focus on the facts that matter.

A. Idaho Law on Primary and General Elections.

Idaho currently uses party primary elections to nominate party candidates for U.S. Senate, U.S. House of Representatives, statewide executive offices, the legislature, and county officers. Idaho Code § 34-703. These party nominees represent the political parties in the general election. The party candidates nominated in the primary also represent the political parties for constitutional and statutory purposes. *See, e.g.,* IDAHO CONST. art. III, § 2; Idaho Code § 34-501.

Each recognized political party has a separate primary election using a distinct

ballot that contains the names of candidates seeking the nomination of that party. Idaho Code § 34-904. Only voters who have registered as members of a political party can vote in a party's primary election unless the party allows unaffiliated voters or registered members of other political parties to also vote. *Id.* § 34-904A. The candidates who receive their party's nomination are placed on the general election ballot. *Id.* § 34-906.

Idaho law also allows party nominees to appear on the general election ballot with the name of their party. *Id.* But general election candidates who have not been nominated through a party primary may not appear on the ballot with a party designation. *Id.* When it comes to voting, the people of Idaho have made clear that "ranked choice voting" is not allowed. *See* Idaho Code § 34-903B. Voters may cast a vote for one candidate only, and the candidate with a plurality of votes is elected. *Id.* §§ 34-1203, 34-1208.

B. Ashley Prince Circulates an Initiative Petition.

Ashley Prince wanted to change all of this. Beginning on April 28, 2023, she gathered signatures from qualified electors in support of a 16-page ballot initiative. Her initiative proposed to (1) replace Idaho's current party-primary system with a nonparty-primary system and (2) implement ranked-choice voting in Idaho's general elections. Verified Pet. Ex. A. The initiative that Ms. Prince initially circulated for signatures described the new primary as an "open primary" throughout and included a proposed section naming the law "The Idaho Open Primaries Act." *Id.*

On May 2, 2023, Ms. Prince filed the ballot initiative with the Secretary of State.

Id. The Secretary of State's Office designated Ms. Prince as the initiative's sponsor and confirmed that at least 20 qualified electors had signed the initiative. *Initiatives & Constitutional Amendments*, Idaho Secretary of State's Office, https://tinyurl.com/44prndxa (last visited July 24, 2023). Pursuant to Idaho Code § 34-1804, the Secretary of State then forwarded the initiative to the Attorney General to issue a certificate of review. Declaration of Theodore J. Wold Ex. 1. In the Secretary of State's cover letter, it identified Ms. Prince as the initiative's sponsor (also referred to in the statute as the "petitioner") and provided her personal mailing address as the only contact information. *Id.*

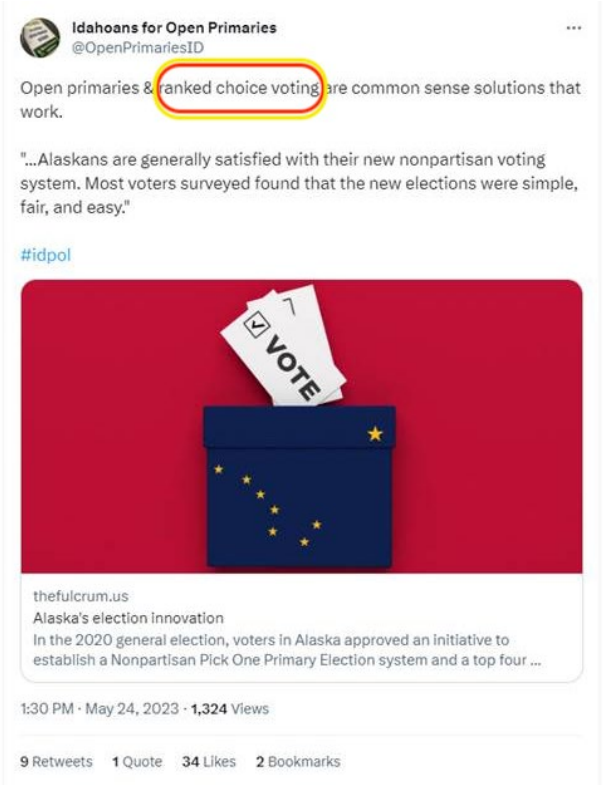
C. The Attorney General Provides a Certificate of Review.

On May 31, 2023, the Attorney General timely issued a certificate of review. Verified Pet. Ex. D. Consistent with Idaho Code § 34-1809, the Attorney General reviewed the measure for form, style, and matters of substantive import and provided his certificate of review to Ms. Prince and the Secretary of State. *Id.* The Attorney General made various recommendations, many of which Petitioners acknowledge were heeded and implemented. *Id.*; Verified Pet. Ex. E.

Three notes about the certificate of review bear mentioning. First, the Attorney General recommended addressing the initiative's misleading use of the term "open primary." The Attorney General explained that in an "open primary" system, voters do not have "to declare party affiliation to vote in a party's primary contest to nominate a candidate for the general election." Verified Pet. Ex. D, at 4. That system—by that name—was exactly what Idaho used to have not too long ago, so using "open primary"

to describe the very different system the initiative proposes would be especially confusing to Idaho voters. *See Idaho Republican Party v. Ysursa*, 765 F. Supp. 2d 1266, 1269 (D. Idaho 2011) (explaining that Idaho's pre-2011 primary election system "is an 'open primary' system"). The Attorney General also noted that the United States Supreme Court has described the initiative's system as a "blanket primary" and defined "open primary" in a distinct way. Verified Pet. Ex. D, at 4.

Second, the certificate of review described the proposed voting system for the general election as "ranked-choice voting" throughout. *Id.* The Attorney General used that term because the initiative sought to repeal Idaho Code § 34-903B, which uses the term "ranked choice voting" to describe the voting system the initiative proposed. It is also the same term Petitioners have used to publicly promote the initiative:



Wold Decl. Ex. 2.

Third, the Attorney General recommended remedying the initiative's violation of Idaho's single-subject rule. Verified Pet. Ex. D, at 6. The initiative proposed two separate and distinct changes to Idaho law that did not depend on each other in any way. *Id.* at 7. Idaho voters could support the initiative's changes to primaries and not support ranked choice voting and vice versa. *Id.* But when packaged together, the initiative forced voters to support both or neither. *Id.* That is classic logrolling, and the Attorney General wanted Ms. Prince to know about that fatal issue sooner rather than later. *Id.*

D. Ms. Prince Prepares a Revised Petition and the Attorney General Assigns a Ballot Title.

In response, Ms. Prince made substantial changes to the initiative. For example, the repeated use of "open primary"—appearing 43 times in the original initiative—was deleted and replaced with the term "top four primary." The self-assigned initiative title of "Idaho Open Primaries Act" was also removed. The bolded portion of the below disclaimer was added to mitigate the party associational problems:

> Ballots for top four primary elections shall list all candidates who have qualified pursuant to section 34-704A, Idaho Code. After each candidate's name, the ballot shall include that candidate's indicated party affiliation, if any, and the ballot shall contain a disclaimer informing the voter that a candidate's designated affiliation does not imply that the candidate is nominated or endorsed by the political party **or group or that the party or group approves of or associates with that candidate, but only that the candidate is registered as affiliated with the political party or political group**.

Verified Pet. Ex. F, § 22. The initiative was also amended to state that "[v]oters are not required to rank every candidate." *Id.* § 25; Verified Pet. ¶ 44. And the vote tabulation methodology was changed to comply with Idaho's constitutional plurality provision. Verified Pet. Ex. F, § 36. But the single-subject violation remained.

On June 15, Ms. Prince filed the modified version of the initiative with the Secretary of State for ballot title assignment. Verified Pet. Ex. E. Her cover letter took issue with the Attorney General's use of the term "blanket primary" in the certificate of review. *Id.* She suggested that the Attorney General use "top four primary" or "top four open primary" as alternatives. *Id.* Her cover letter, however, did not complain about the Attorney General's use of "ranked choice voting" or suggest using "instant runoff" to describe the initiative. *Id.*

On June 30, the Attorney General timely assigned the following short and long titles to the initiative:

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

Verified Pet. Ex. F.

E. Petitioners—Not Ms. Prince—Sue Over the Ballot Title.

Ms. Prince did not bring suit over the ballot title, nor did any of the qualified electors who signed the ballot initiative. Instead, Idahoans for Open Primaries and Reclaim Idaho filed this Petition to challenge the ballot title. Neither of them are sponsors or petitioners of the ballot initiative—they are only "Petitioners" in this Court. Ms. Prince is the only sponsor of the ballot initiative.

Idahoans for Open Primaries and Reclaim Idaho are also not "persons" under Idaho law. They have no members; they are not incorporated entities; and they cannot sign the ballot initiative, verify signatures of qualified electors, or vote for the ballot initiative at the next election. Reclaim Idaho appears to be an Idaho "political action committee," Verified Pet. ¶ 12, but it lacks any other legal status. Idahoans for Open Primaries have even less of an existence. The Verified Petition alleges that it "is a

coalition of member organizations," but it appears to be nothing more than a letterhead created for promoting the ballot initiative.

ISSUES PRESENTED

(1) Whether Petitioners have demonstrated standing to bring this suit.

(2) Whether Petitioners have carried their burden to show that the ballot titles assigned by the Attorney General are insufficient.

(3) Whether Petitioners can request mandamus to extend the statutory deadline to gather signatures and require the Secretary of State to accept untimely signatures.

(4) Whether Respondents are entitled to attorney's fees.

STANDARD OF REVIEW

Idaho law vests the Attorney General with the duty to assign short and long titles to ballot initiatives. This Court's review of the assigned ballot titles is, thus, deferential. *See Buchin v. Lance*, 128 Idaho 266, 270, 912 P.2d 634, 638 (1995). The Court will not look for "another way or the best way" to draft titles. *Id.* It will simply "examine the Attorney General's language and ask whether it expresses the 'purpose of the measure' without being argumentative or prejudicial." *Id.*

The Court's deferential review is consistent with its refusal "to prepare a short title or ballot title if that submitted by the Attorney General is incorrect." *In re Idaho State Fed'n of Lab. (AFL)*, 75 Idaho 367, 374, 272 P.2d 707, 711 (1954). It is "beyond" this Court's power to assign ballot titles. *Id.* Because the law gives that duty to the Attorney General, this Court's review of the exercise of his statutory duty is limited.

Applying an abuse of discretion standard in this context is the majority rule. Whether the title is assigned by an Attorney General, Lieutenant Governor, or some other official, most other state courts review ballot title assignments under an abuse of discretion standard. *See, e.g., Thomas v. Peterson*, 307 Neb. 89, 99, 948 N.W.2d 698, 706 (2020) (holding "that a deferential standard is to be applied to a ballot title prepared by the Attorney General and that a dissatisfied person must prove by the greater weight of the evidence that the ballot title is insufficient or unfair"); *Ageton v. Jackley*, 2016 S.D. 29, ¶ 23, 878 N.W.2d 90, 96 (applying abuse of discretion standard and noting that its review of ballot titles assigned by the Attorney General is "limited" and refusing to "sit as some type of literary editorial board"); *Burr v. City of Orem*, 2013 UT 57, ¶¶ 7-9, 311 P.3d 1035, 1038-39 (holding "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"); *Burgess v. Alaska Lieutenant Governor Terry Miller*, 654 P.2d 273, 276 n.7 (Alaska 1982) ("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."); *Epperson v. Jordan*, 12 Cal. 2d 61, 66, 82 P.2d 445, 448 (1938) ("In approaching the question as to whether the title so prepared is a proper one all 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 be held insufficient.").

Under an abuse of discretion standard, the Court asks whether the Attorney General "(1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of [his] discretion; (3) acted consistently with the legal standards applicable to the specific choices available to [him]; and (4) reached [his] decision by the exercise of reason." *Lunneborg v. My Fun Life*, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018). Petitioners ignore this standard and improperly ask the Court to assign "alternative ballot titles" without regard to the deference due the Attorney General. *See* Pet'rs' Br. 10. Petitioners bear the burden to establish that the ballot titles are insufficient.

ARGUMENT

I. Petitioners Lack Standing to Challenge the Ballot Titles.

Before the Court addresses the merits, it must assure itself of Petitioners' standing. *Taylor v. Maile,* 146 Idaho 705, 709, 201 P.3d 1282, 1286 (2009). "It is a fundamental tenet of American jurisprudence that a person wishing to invoke a court's jurisdiction must have standing." *Gallagher v. State*, 141 Idaho 665, 668, 115 P.3d 756, 759 (2005) (citation omitted). But because "there is no 'case or controversy' clause or an analogous provision in the Idaho Constitution," Idaho has adopted federal standing law. *Coeur D'Alene Tribe v. Denney*, 161 Idaho 508, 513, 387 P.3d 761, 766 (2015).

"The doctrine of standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated." *Miles v. Idaho Power Co.,* 116 Idaho 635, 641, 778 P.2d 757, 763 (1989) (citation omitted). A party does not have standing unless it "allege[s] or demonstrate[s] an injury in fact and a substantial likelihood that the judicial

relief requested will prevent or redress the claimed injury." *Id.* Consistent with the federal standard, standing "requires a showing of a 'distinct palpable injury' and 'fairly traceable causal connection between the claimed injury and the challenged conduct.'" *Coeur D'Alene Tribe*, 161 Idaho at 513, 387 P.3d at 766 (citations omitted). A "palpable injury" is "an injury that is easily perceptible, manifest, or readily visible." *Id.* "[T]he injury cannot be one suffered alike by all citizens in the jurisdiction." *Id.* The injury must instead be "peculiar or personal" and "different than that suffered by any other member of the public." *Selkirk–Priest Basin Ass'n v. State,* 128 Idaho 831, 834, 919 P.2d 1032, 1035 (1996). Petitioners cannot meet their burden to establish standing. *See Haight v. Idaho Dep't of Transp.,* 163 Idaho 383, 392, 414 P.3d 205, 214 (2018).

Petitioner Idahoans for Open Primaries is not a "person" under Idaho law. *See* Idaho Code § 73-114(1)(d); *see also Person,* Black's Law Dictionary (11th ed. 2019) ("An entity, such as a corporation, created by law and given certain legal rights and duties of a human being; a being, real or imaginary, who for the purpose of legal reasoning is treated more or less as a human being."). It is not incorporated; it has no entity status; it is not a natural person; and it does not have any members who are natural persons. It is just a letterhead and a website.[1] Without legal status or legal rights, Idahoans for Open Primaries "lacks legal personhood, and does not possess organizational standing to sue

[1] Respondents' request for attorney's fees highlights the issue. If the Court awards Respondents' their reasonable attorney's fees, it would have no way to enforce the award against a nonexistent entity.

on its own behalf." *See Young Am.'s Found. v. Stenger*, 2023 WL 3559619, at *19 (N.D.N.Y. May 19, 2023). To the extent Idahoans for Open Primaries claims to be an unincorporated association, it still lacks standing to sue. *See Am. Newspaper Guild v. MacKinnon*, 108 F. Supp. 312, 313-14 (D. Utah 1952).

Petitioner Reclaim Idaho also lacks legal capacity to sue and so lacks standing. The only facts Petitioners have provided about Reclaim Idaho is that it is a political action committee. But its status under Idaho Code § 67-6602 is insufficient to provide it with capacity to sue. Reclaim Idaho is also barred from maintaining this action because it transacts business in Idaho as a non-filing entity but has not filed an assumed business name. Idaho Code §§ 30-21-803, -810. The only time this Court has addressed Reclaim Idaho's standing, it has been with regard to whether its injuries were speculative, not with whether it is a "person" entitled to sue. *Reclaim Idaho v. Denney*, 169 Idaho 406, 422, 497 P.3d 160, 176 (2021). As far as Respondents can tell, no court has held that Reclaim Idaho has the legal capacity to sue under Idaho law.

Both Reclaim Idaho and Idahoans for Open Primaries also lack standing because they have no cognizable injury. Neither Petitioners are qualified electors in Idaho, so neither can sign the petition in support of the initiative, much less vote for it. The people of Idaho have "reserve[d] to themselves the power to propose laws, and enact the same at the polls independent of the legislature," IDAHO CONST. art. III, § 1, but Petitioners do not share in that right. Thus, any issue with the ballot titles does not harm them—they cannot vote so they cannot be misled.

Petitioners may claim that inaccurate ballot titles injure them because such titles will make it more difficult to collect signatures to qualify the initiative for the ballot. That assumes, however, that Petitioners would be harmed by the initiative failing to qualify. But since neither Petitioners can vote, whether the initiative ends up on the ballot does not impact them in any legally relevant way. Moreover, neither Petitioners are the sponsors of the initiative, so they lack any special relationship to the initiative. And neither have alleged that they have expended any resources or that they will expend any resources related to the initiative. Mr. Mayville's declaration says that Reclaim Idaho "led" past initiative campaigns, but there are no allegations that Reclaim Idaho is leading with respect to this initiative.

Petitioners have not demonstrated that they will suffer a "distinct palpable injury." *See Coeur D'Alene Tribe*, 161 Idaho at 513, 387 P.3d at 766 (citation omitted). As non-sponsors who have alleged no concrete facts suggesting that an inaccurate title would inflict peculiar injury on them, any harm they claim stemming from the ballot titles is at most "one suffered alike by all citizens in the jurisdiction." *Id.* That is not enough to confer standing.

Petitioners will not be able to get around the injury requirement by relying on Idaho Code § 34-1809(3). This Court has already held that the statute unconstitutionally attempts "to broaden this Court's jurisdiction in contravention of the separation of powers doctrine in the Idaho Constitution." *Regan v. Denney*, 165 Idaho 15, 20, 437 P.3d 15, 20 (2019) (citations omitted). The Court's analysis as to subsection (4) is equally

applicable to subsection (3). The statute also cannot create standing for mere dissatisfaction with the ballot titles. Standing "requires more than a desire to vindicate value interests." *Diamond v. Charles,* 476 U.S. 54, 66 (1986).

Nor will Petitioners be able to rely on this Court's relaxed standing doctrine, which is only available where "(1) the matter concerns a significant and distinct constitutional violation, and (2) no party could otherwise have standing to bring a claim." *Coeur D'Alene Tribe*, 161 Idaho at 514, 387 P.3d at 767. This case does not involve a significant constitutional violation, and other parties have standing to sue. *See Martin v. Camas Cnty. ex rel. Bd. Comm'rs*, 150 Idaho 508, 516, 248 P.3d 1243, 1251 (2011) (explaining that the relaxed standing exception "has only been applied where failure to find that the appellants in question had standing would have resulted in no party having standing").

The ballot initiative cases this Court has previously considered are consistent with Petitioners' lack of standing. There were qualified electors in *Buchin*, *Echohawk*, and *AFL* who sued as petitioners. The inclusion of associations or persons unable to vote as petitioners in those cases does not provide Petitioners with standing here. All it demonstrates is that at least one petitioner—the qualified electors—had standing, giving the Court jurisdiction to reach the merits. *See Camp Easton Forever, Inc. v. Inland Nw. Council Boy Scouts of Am.*, 156 Idaho 893, 898, 332 P.3d 805, 810 (2014).

Because Petitioners lack standing, the Court does not have jurisdiction to proceed. It should dismiss the Petition.

II. The Attorney General's Ballot Titles are True and Impartial Descriptions of the Two-Fold Initiative.

On the merits, Petitioners fare no better. The people of Idaho have entrusted the Attorney General with the duty to assign a short and long ballot title to proposed ballot initiatives. Idaho Code § 34-1809. That delegation and the Attorney General's quasi-judicial role form the basis for this Court's deferential review. *See Buchin*, 128 Idaho at 272, 912 P.2d at 640. There may be other ways to draft titles describing a 16-page multi-subject initiative (surely there are), but this Court does not act as an editorial board looking for "the best way" to draft the titles. *See id.* at 270, 912 P.2d at 638. The Attorney General's titles fall comfortably within the discretion that the law and this Court's precedents afford him.

A. The Attorney General's short title is distinctive and, in all ways, sufficient and proper.

Idaho law provides the Attorney General with 20 words to craft a short title that distinctively describes the ballot measure and will be used to refer to or speak of the measure. Idaho Code § 34-1809(2)(d)(i). The Attorney General complied with that directive and supplied the initiative with a short title that is "distinctive" and neither argumentative nor prejudicial. *See ACLU of Idaho v. Echohawk*, 124 Idaho 147, 151, 857 P.2d 626, 630 (1993). He selected each word in the short title with care, guided by authoritative sources, relevant case law, and the words that Petitioners themselves have used to describe the initiative. The Attorney General hewed closely to both while avoiding confusion arising from Idaho's rather recent history with an "open primary" system.

Petitioners disagree with the short title he supplied, but their own words and actions belie their complaints. The three items they take issue with in the short title—its use of (1) "nonparty blanket primary"; (2) "ranked-choice voting"; and (3) "replace" and "require"—are all terms that either they have used themselves to promote the initiative or terms courts and authorities across the country employ when discussing the same subject matter. Petitioners have failed to carry their burden. And far from proving that the short title is insufficient, Petitioners' objections to each term bolster the Attorney General's wording.

Nonparty Blanket Primary. The Attorney General chose the term "nonparty blanket primary"—not just "blanket primary," as Petitioners misleadingly argue—because that term accurately describes the initiative's proposed primary system. The defining features of the proposed system are a primary that is unitary, in which all voters participate, includes all candidates, and narrows the field for the general election. The United States Supreme Court has twice termed that system a "nonpartisan blanket primary."[2] *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 452 (2008); *see also Cal. Democratic Party v. Jones*, 530 U.S. 567, 585 (2000). The term is equally appropriate here.

[2] The Attorney General used "nonparty" rather than "nonpartisan" to avoid confusing the initiative's proposed primary system with Idaho's existing "nonpartisan" elections. This was also done to ensure the short title was "distinctive" as compared with existing law. *See Buchin*, 128 Idaho at 272, 912 P.2d at 640 ("[T]he short title should distinguish between the aspects of proposed initiative in relation to current abortion laws."). In any event, Petitioners take no issue with the Attorney General's use of term "nonparty."

In *Washington State Grange*, the Court considered Washington's primary system, which "provides that candidates for office shall be identified on the ballot by their self-designated 'party preference'; that voters may vote for any candidate; and that the top two votegetters for each office, regardless of party preference, advance to the general election." *Id.* at 444. If that sounds familiar, that is because it is the same system the ballot initiative proposes, except that the ballot initiative would advance four instead of two candidates to the general election. And the Supreme Court termed that system a "nonpartisan blanket primary." *Id.* at 452. It distinguished it from California's "partisan blanket primary," which was at issue in *Jones*. *Id.* It further distinguished Washington's system, which is materially identical to the proposed initiative, from a "closed primary" and Petitioners' preferred term "open primary." *Id.* at 445 n.1.

In *Jones*, the Court also expressly distinguished between an "open primary" and a "blanket primary." *Jones*, 530 U.S. at 576 n.6. "An open primary differs from a blanket primary in that, although as in the blanket primary any person, regardless of party affiliation, may vote for a party's nominee, his choice is limited to that party's nominees for all offices." *Id.* In an open primary, a voter "may not, for example, support a Republican nominee for Governor and a Democratic nominee for attorney general," but a voter can do so in a blanket primary. *Id.*

Nor does the term "nonparty blanket primary" imply a defect in the law. While the *Jones* Court held that California's use of a "partisan blanket primary" was

unconstitutional, it also held that a "nonpartisan blanket primary" would have addressed many of the issues. *Id.* at 585. It described the system as follows:

> [T]he State determines what qualifications it requires for a candidate to have a place on the primary ballot—which may include nomination by established parties and voter-petition requirements for independent candidates. Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election. This system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee.

Id. at 585-86. Again, that system proposed by the U.S. Supreme Court should sound familiar. It is the same system the initiative proposes.[3]

There is thus no merit to Petitioners' objections to the term "nonparty blanket primary." First, they argue that the term is "obscure" and "almost entirely absent from common usage," citing to their own usage, media reports, and the Secretary of State's website. Pet'rs' Br. 12-14. But "common usage" does not dictate the short title. It is the other way around. As this Court said in *Buchin*, the short title is the "statement by which the measure *would* be commonly referred to." *Buchin*, 128 Idaho at 269, 912 P.2d at 637 (emphasis added). Idaho law does not provide proponents of a ballot initiative and the

[3] Even the internet's favorite source, Wikipedia, describes primary elections like the one proposed by the initiative as a "nonpartisan blanket primary." *Nonpartisan blanket primary*, Wikipedia, https://tinyurl.com/yy8prrct (last edited March 5, 2023). Respondents recognize that Wikipedia can be an unreliable source, but the point is that contrary to Petitioners' claims, at least some people—Wikipedia contributors alongside Supreme Court Justices—share the Attorney General's understanding of the term blanket primary.

press with a determinative say in how a ballot initiative is officially communicated to voters.

Second, Petitioners' reliance on the publicity of the term "open primary" is also misplaced. The Secretary of State's website identifies the initiative as the "Idaho Open Primaries Act" because that *was* the name Ms. Prince assigned to the initiative. But she abandoned that term, and it now appears nowhere in the initiative. She did so in response to the Attorney General's certificate of review. And for good reason. Idaho once had an "open primary," but Judge Winmill held that it was unconstitutional. *Idaho Republican Party v. Ysursa*, 765 F. Supp. 2d 1266 (D. Idaho 2011). Judge Winmill explained "the difference between blanket and open primaries" by reiterating the definition provided in *Jones*. *Id.* at 1271. He held in 2011 the "open primary" system that Idaho had was unconstitutional, so it is unclear why Petitioners advocate for that term.

Third, they argue that the Attorney General's use of the term "blanket primary" is misleading. Pet'rs' Br. 15-16. But the Attorney General did not use the term "blanket primary." He used "nonparty blanket primary." That distinction matters. *See* Alexander Macheras, *Participation in Primary Elections and the Dispositive Election Test*, 25 B.U. PUB. INT. L.J. 399, 401-02 (2016) (noting the well-recognized differences between a "blanket primary" and a "non-partisan blanket primary"). Thus, when they cite footnote 1 from *Washington State Grange* to distinguish the initiative's primary system from a "blanket primary system," they are missing the essential point of that decision: it upheld a

nonpartisan blanket primary in that case though it had overturned a partisan blanket primary in *Jones*. The Attorney General used the correct term.

Fourth, they argue that the Attorney General's use of the term "nonparty blanket primary" is also misleading. Pet'rs' Br. at 16-17. Their main issue seems to be that because *Jones* held California's "blanket primary" system unconstitutional, any use of "blanket primary" suggests invalidity. They say that is why NCSL does not use that term. But this argument is just another instance of Petitioners' conflating terms. The Attorney General did not use the term "blanket primary." It is as simple as that.[4]

To the extent Petitioners have genuine concern regarding tainted terms, their preferred term "open primary" is no better off. In *Ysursa*, the court struck down Idaho's "open primary" as unconstitutional. *See* 765 F. Supp. 2d at 1275. Similarly, Wisconsin's "open primary" system was held unconstitutional in *Democratic Party of U.S. v. La Follette*, 450 U.S. 107, 126 (1981); *see also* Charles E. Borden, *Primary Elections*, 38 HARV. J. ON LEGIS. 263, 278 (2001) ("The blanket primary no longer exists, and the open primary appears destined to follow it into extinction.").

[4] Petitioners' argument about the term "blanket primary" is not only a misleading straw-man, but it is also wrong. The U.S. Supreme Court has identified two *types* of blanket primaries—partisan and nonpartisan. *Wash. State Grange*, 552 U.S. at 452; *Jones*, 530 U.S. at 576. To be as precise as possible, the Attorney General's titles distinguish between the two, but "blanket primary" is not inherently infirm and would have accurately categorized the primary system in the right family. By contrast, "open primary" is the wrong category altogether.

Fifth, they argue that "nonparty blanket primary" has not been used by other states to describe similar initiatives, so it should not be used here. They invoke California and Washington as two examples. But no matter the ballot titles assigned in California and Washington, the U.S. Supreme Court called them "nonpartisan blanket primaries," and many others now do so as well. *See* William B. Jackson, *A Blanket Too Short and Too Narrow: California's Nonpartisan Blanket Primary*, 23 STAN. L. & POL'Y REV. 535, 535–36 (2012) (explaining that California's Proposition 14, "the Top Two Candidates Open Primary Act," enacted "a nonpartisan blanket primary"); *id.* at 537 (noting that Washington also uses a "nonpartisan blanket primary"); Alexander R. Podkul & Elaine Kamarck, *The Primaries Project: Blanket Primaries Have Yet to Deliver*, Brookings (Oct. 10, 2014), https://tinyurl.com/nj2ckwha (describing the primaries in California and Washington as "nonpartisan blanket primary systems"); Washington State House of Representatives: Office of Program Research, *Bill Analysis: HB 1750*, State Government Operations & Accountability Committee (2005), https://tinyurl.com/86baeju4 (explaining that Initiative 872, the "People's Choice Initiative," enacted "a nonpartisan blanket primary").

Petitioners also rely on several state initiative titles that they say used a combination of "open primary" and "top-four" or "top-five" to describe the primary systems, and perhaps some initiative titles did commingle the terms and went unchallenged. But "open primary" and "top-XX primary" refer to distinct systems. Petitioners' own authority proves as much. The NCSL table that Petitioners rely on in footnote 4 of their

opening brief distinguishes "open" primaries on the one hand, and "top-two" or "top-four" primaries on the other. Not only that, but the initiative itself abandoned all use of the term "open primary" and opted instead for "top-four primary." Given that change, the Attorney General was well within his discretion to also avoid use of "open primary." His choice is consistent with other sources that have interchangeably referred to "top-two" or "top-four" and "blanket" primaries. *See, e.g., Jones*, 530 U.S. at 585 (noting that in a nonpartisan blanket primary, "the top two vote getters (or however many the State prescribes) then move on to the general election"); Brookings, *supra* (describing the California and Washington primaries as both "top two" and "nonpartisan blanket primary" systems); Michael R. Dimino, Sr., *It's My Party and I'll Do What I Want to: Political Parties, Unconstitutional Conditions, and the Freedom of Association*, 12 FIRST AMEND. L. REV. 65, 127 (2013) (The "top-two primary" is "otherwise known as the nonpartisan blanket primary.").

Last, Petitioners contend the Attorney General's short title is not distinctive. The foregoing demonstrates the short title's distinctiveness. The term "nonparty blanket primary" identifies "the characteristics which would distinguish the initiative and accurately acquaint the voter with what he or she is sponsoring." *See Buchin*, 128 Idaho at 272, 912 P.2d at 640. It is the term the United States Supreme Court and other authorities use to describe the initiative's system. Petitioners' proposed use of "open primary," on the other hand, is not distinctive. It appears nowhere in the initiative, and it describes a different system—one that Idaho had not too long ago. It is the wrong term.

Ranked-Choice Voting. The Attorney General appropriately chose the term "ranked-choice voting" because, as Petitioners admit, that term accurately describes "the proposed reform." Pet'rs' Br. 19. It is especially appropriate because that is how Idaho law describes the voting system. *See* Idaho Code § 34-903B. The Court need not spend much time with Petitioners' nitpicking here.

They concede "ranked-choice voting" is accurate and commonly used to describe the initiative's voting methodology. The Congressional Research Service uses the same term in the same way. Jimmy Balser, CONG. RSCH. SERV., LSB10837, *Ranked-Choice Voting: Legal Challenges and Considerations for Congress* (2022). And it is how Petitioners' have promoted the measure. On their website, they say the initiative will enact "Instant Runoff Voting in the general election (also called 'ranked choice voting')." *Learn More: Open Primaries Initiative*, Idahoans for Open Primaries, https://openprimariesid.org/open-primaries-initiative (last visited July 24, 2023). In their social media posts, they have referred to it as "ranked choice voting," without any mention of "instant runoff."

On top of this, the Attorney General's certificate of review noted that "ranked choice voting" means the same thing as "instant run-off." Verified Pet. Ex. D, at 1. Despite this, and the certificate's repeated use of "ranked-choice voting," Ms. Prince's cover letter submitting the initiative for title assignment does not take issue with that term. Verified Pet. Ex. E. She complained only about the term "blanket primary." *Id.*

At bottom, Petitioners want the Court to "find another way" to say the same thing. *See Echohawk*, 124 Idaho at 152, 857 P.2d at 631. That is not the "judicial role." *Id.*

Replace and Require. Petitioners also take issue with the Attorney General's choice of verbs. Pet'rs' Br. 11-12. They say that "replace" has a "negative restrictive connotation" and that "replace" and "require" are "loaded terms that allude to restrictions on voting." *Id.* at 12. Publicly, however, Petitioners have used similar verbs to describe the initiative. For example, Petitioners' website says the initiative will "end" Idaho's current primary system to "create" a new primary system and that there "will be" ranked-choice voting. *How it works: Open Primaries Initiative*, Idahoans for Open Primaries, https://openprimariesid.org/open-primaries-initiative (last visited July 24, 2023). These verbs are all communicating the same thing, and the Attorney General's choices do not prejudice the measure.

Petitioners also claim that "require" inaccurately suggests voters must assign a ranking to each candidate on the ballot. That is not a reasonable interpretation of the short title. It says that "ranked-choice voting" will be required "for general elections." It does not say that "voters" must "rank" each and every candidate. Petitioners have already acknowledged that "ranked-choice voting" is "commonly used to describe the proposed reform," Pet'rs' Br. 19, so their effort to distort that term and claim prejudice rings hollow. The short title accurately communicates that the initiative is requiring a system known as "ranked-choice voting."

In any event, even if "require ranked-choice voting" could be interpreted as Petitioners claim, it is true that the initiative will require voters to rank candidates. The initiative's late-added coda that voters are not required to rank every candidate does not change that. A voter may not need to assign a *numerical* ranking to every candidate, but the voter will be ranking every candidate. Any candidate a voter does not assign a numerical ranking will be ranked lower than a numerically ranked candidate. And that ranking will impact how the voter's ballot is tabulated and how his vote is counted.

Because the initiative is proposing to modify existing Idaho law, the short title must convey that change to be distinctive. *See Buchin*, 128 Idaho at 272, 912 P.2d at 640. That is why the Attorney General used the verb "replace." Petitioners' proposed short title uses "allow" with no reference to existing law. It is, therefore, not distinctive.

B. The Attorney General's long, or general, title accurately and impartially describes the purpose of the initiative.

Idaho law provides the Attorney General with 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's long title does just that.

Petitioners' issues with the long title generally track their complaints regarding the short title. For example, they disagree with the long title's use of "nonparty blanket

primary," "ranked-choice voting," and "replace" and "require." Pet'rs' Br. 22-24. For the same reasons those terms are appropriate in the short title, they are appropriate in the long title.

Petitioners raise two additional issues with the long title. They say that the long title "makes the false statement to voters" that candidates can list any "affiliation" on the ballot but need not be "associated" with the party they name. *Id.* at 23. But that is exactly what the initiative says. The initiative draws a clear distinction between "affiliation" and "association." A candidate can unilaterally determine the party with which he or she affiliates. But that affiliation, the initiative says, "does not imply that the candidate is nominated or endorsed by the political party or group or that the party or group approves of or *associates* with that candidate." Verified Pet. Ex. E, §§ 22, 24 (emphasis added). There is nothing false about the long title informing voters that candidates may appear on the ballot with a party affiliation even though the candidate is not associated with that party.

Petitioners also claim the long title creates misconceptions and ambiguities regarding how votes are counted. Pet'rs' Br. 22-23. They say that the long title "makes the false claim" that the initiative "requires voters to cast multiple votes in a single election." *Id.* at 22. But Petitioners do not explain where the long title says that or how it could be understood to say that. They just conclude that it does. It does not, in fact, say any such thing. It accurately describes the ranked-choice voting system in which

people vote "for each candidate on the ballot in order of preference." Verified Pet. Ex. F.

Petitioners also say that the long title "appears to imply that votes cast for an eliminated candidate will not be counted." Pet'rs' Br. 23. The long title actually says that "[t]he candidate with the fewest votes in each round would be eliminated, and votes for that candidate in later rounds would not be counted." *Id.* at 5. Nothing about that sentence, when read in context, is false. That is evident by Petitioners' quick pivot to complaining that the long title is suggesting a "ballot" won't be counted in later rounds. Setting aside how an exhausted, or "inactive," ballot gets counted,[5] the long title says nothing about ballot counting.

Like the long title in *Echohawk*, the long title here expresses the purpose of the initiative without being argumentative or prejudicial. *See Echohawk*, 124 Idaho at 152, 857 P.2d at 631. The Court should decline Petitioners' invitation "to find another way or the best way" to word the long title. *Id.*

C. The Attorney General's short and long titles are judged objectively, not based on subjectivity or speculation.

This case is about the words that compose the short and long titles. The construction of that language is an objective task. The Court's review of the ballot titles begins and ends with the words chosen. Nothing else matters.

[5] As noted, the long title does not address ballot counting, but even so, Section 35 of the initiative states that "[a]n inactive ballot does not count as a vote for any ranked active candidate." So Petitioners' complaint is curious.

Petitioners have nonetheless invited this Court to consider subjective and speculative matters. They make much about views the Attorney General and Solicitor General expressed on social media. But their policy positions—however and wherever expressed—do not change the meaning of the ballot titles. Making an Attorney General's policy positions relevant to the sufficiency of ballot titles he assigns is a troublesome path to go down. It will require the Court to move away from the objective assessment it is well-equipped to handle and delve into construing subjective intentions, like motivation and bias. It will also chill speech and punish Attorneys General for articulating their views to constituents. So they will be more reticent, both as candidates and elected officials, lest some comment about some issue be used against them.[6] That in turn will prevent constituents from making fully informed voting decisions.

Petitioners also try to inject the single-subject rule issue into the case. They argue that the bipartite structure the Attorney General used is just a "set up" to "bolster[] the lawsuit he intends to bring," and all of that somehow makes his titles defective. Pet'rs' Br. 21. Entertaining that argument, however, would require this Court to prejudge an issue that is not yet ripe. It should not do so.

[6] The overreach that would ensue is hard to exaggerate. Virtually any issue on which an Attorney General candidate campaigns has the potential to be the subject of a ballot initiative. Consider the strong support Tom Arkoosh expressed for increased state funding of public education as a candidate in the Attorney General's race. Under Petitioners' position, his policy position would taint any ballot titles he was tasked with assigning to a measure addressing the funding of public education. That is not the law.

They also think the titles' two-part structure "serves only to bootstrap the single-subject challenge" and is therefore an improper argument against the initiative. *Id.* That argument again invites subjectivity and speculation. It is also a misreading of the statute, which directs the Attorney General not to use words that would advocate for or against the measure when read *by voters*. Idaho Code § 34-1809(2)(e). But the advocacy Petitioners complain about is *judicial advocacy*. The statute prohibits argumentative titles impacting a voter's decision to support or not support the initiative, not legal arguments presented to the judiciary.

In any event, Petitioners do not identify how the two-part structure of the titles violates the law. In fact, the title they propose themselves inevitably addresses the proposal in two separate parts. It may not use structural indicators like numbers and separate paragraphs, but it reflects the same bipartite structure. Nothing other than increased readability would change if their short title were styled so:

> An initiative [(1)] to allow all Idaho voters the right to participate in open primary elections and [(2)] to establish an instant runoff general election.

The two parts of the initiative are plain.

The Court does not need to parse the Attorney General's policy positions or pass on the single-subject rule to review the ballot titles. The titles should be weighed by the words alone. The words are all that guided the Court's analysis in *Buchin*, *Echohawk*, and *AFL*. There is no reason to depart from that objective inquiry now.

III. Petitioners Cannot Request a Writ of Mandamus.

Petitioners' request that the Court order the Secretary of State to ignore the law and accept signatures past the statutory deadline fails for at least two reasons. First, Petitioners' claims fail, so they have no right to a remedy. Second, a writ of mandamus would not be available even if they prevailed on their claims. "A writ of mandamus will not lie unless the party seeking the writ has a clear right to have done that which the petitioner seeks and unless it is a clear legal duty of the officer to so act." *Brady v. City of Homedale*, 130 Idaho 569, 571, 944 P.2d 704, 706 (1997); *see also* Idaho Code § 7-302 (Mandamus may be issued "to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station."). The Secretary of State has no "clear legal duty" to accept late-filed signatures. *See Brady*, 130 Idaho at 571, 944 P.2d at 706. Just the opposite. Idaho law provides that "[t]he last day for circulating petitions and obtaining signatures shall be the last day of April in the year an election on the initiative will be held," Idaho Code § 34-1802(1), and that cutoff is without exception.

Petitioners also have no "clear right" to collect signatures beyond the statutory deadline. *See Brady*, 130 Idaho at 571, 944 P.2d at 706. Initiative sponsors may have up to 18 months to gather signatures if they begin soon enough. Idaho Code § 34-1802(1). By statute, based on when Ms. Prince chose to file her petition, April 30, 2024, is the deadline. *See id.* Any time crunch involved is not the Attorney General's making.

IV. Petitioners Have No Basis to Request Attorney Fees but Respondents Do.

The Attorney General assigned lawful ballot titles to the initiative, and Petitioners had no sound basis to challenge them. Their equally unsound arguments underscore the merits issues. They have: vied for a ballot title premised on a term that was expunged from the initiative; distorted and selectively quoted clear, on-point case law; advanced arguments that contradict their prior actions; and ignored Idaho's relevant history with an open primary.

The Court will only award a prevailing party its fees, and only then if "the non-prevailing party acted without a reasonable basis in fact or law," Idaho Code § 12-117(1), or if "the case was brought, pursued or defended frivolously, unreasonably or without foundation." *Id.* § 12-121. The Attorney General has acted reasonably, but the Petitioners have not. As described throughout this brief, Petitioners have no basis to demand the Attorney General use "open primary" to describe the initiative, and they are without excuse for failing to address Idaho's previous open primary system and the related case law. They have also acted without a reasonable basis in fact or law by taking issue with terminology they have used themselves. Accordingly, Respondents request the Court to award their reasonable attorney's fees. *See* Idaho Code §§ 12-117(1), -121.

CONCLUSION

For the foregoing reasons, the Petition should be dismissed or denied, and the Respondents should be awarded their reasonable attorney's fees.

Respectfully submitted.

DATED: July 25, 2023.

STATE OF IDAHO
Office of the Attorney General

By: */s/ Joshua N. Turner*
JOSHUA N. TURNER
Deputy Solicitor General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 25, 2023, 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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