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Idaho Supreme Court
Melanie Gagnepain, Clerk of the Court
By: Melanie Gagnepain, Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

IDAHOANS UNITED FOR WOMEN AND FAMILIES,

Petitioner,

vs.

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

Respondents.

Docket No. 52636-2025

DECLARATION OF JAMES E. M. CRAIG

RAÚL R. LABRADOR
ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400
alan.hurst@ag.idaho.gov
michael.zarian@ag.idaho.gov
jack.corkery@ag.idaho.gov

Alan M. Hurst, ISB #12425
Solicitor General

Michael A. Zarian, ISB #12418
Deputy Solicitor General

Sean M. Corkery, ISB #12350
Assistant Solicitor General

Attorneys for Respondents

I, James E. M. Craig, hereby declare and swear as follows:

1. I am the Chief of the Civil Litigation and Constitutional Defense Division of the Idaho Office of the Attorney General.

2. I assisted the Attorney General in developing the certificates of review for the initiatives proposed by the Petitioner in this case. Further, for the initiative directly at issue in the case, I assisted the Attorney General in drafting the ballot titles.

3. On August 16, 2024, the Office of the Secretary of State hand delivered to the Office of the Attorney General for the preparation of Certificates of Review four separate proposed initiative petitions submitted by Idahoans United for Women and Families. All four proposed initiative petitions addressed similar subjects and were similar in intent. In order to differentiate the four petitions and the Attorney General's Certificates of Review, we designated the proposed initiative petitions as follows: Right to Reproductive Freedom and Privacy (fetal viability); Right to Reproductive Freedom and Privacy (24 weeks); Right to Reproductive Freedom and Privacy (20 weeks); and Right to Abortion Under Certain Circumstances.

4. Attached as **Exhibit A** is a true and correct copy of the proposed initiative petition we designated as the Right to Reproductive Freedom and Privacy (fetal viability), as originally proposed by the Petitioner on August 15, 2024, and the corresponding transmittal letter from the Secretary of State to the Attorney General.

This proposed initiative is very similar, although not identical, to the proposed initiative at issue in this case.

5. Attached as **Exhibit B** is a true and correct copy of the proposed initiative petition we designated as the Right to Reproductive Freedom and Privacy (24 weeks), as originally submitted by the Petitioner on August 15, 2024, and the corresponding transmittal letter from the Secretary of State to the Attorney General.

6. Attached as **Exhibit C** is a true and correct copy of the proposed initiative petition we designated as the Right to Reproductive Freedom and Privacy (20 weeks), as originally submitted by the Petitioner on August 15, 2024, and the corresponding transmittal letter from the Secretary of State to the Attorney General.

7. Attached as **Exhibit D** is a true and correct copy of the proposed initiative petition we designated as the Right to Abortion Under Certain Circumstances, as originally submitted by the Petitioner on August 15, 2024, and the corresponding transmittal letter from the Secretary of State to the Attorney General.

8. Attached as **Exhibit E** is a true and correct copy of the Certificate of Review issued by the Attorney General on September 16, 2024, for the proposed initiative petition we designated as the Right to Reproductive Freedom and Privacy (fetal viability) and referenced in Exhibit A, and the accompanying transmittal letter from the Attorney General to the Secretary of State.

9. Attached as **Exhibit F** is a true and correct copy of the proposed initiative petition delivered to the Attorney General on October 7, 2024, along with Idahoans

United's request for ballot titles and an accompanying transmittal letter from the Secretary of State to the Attorney General.

10. Attached as **Exhibit G** is a true and correct copy of the ballot titles prepared by the Attorney General in response to the request for ballot titles referred to in Exhibit F, along with the accompanying transmittal letter from the Attorney General to the Secretary of State.

11. Attached as **Exhibit H** is a true and correct copy of a March 3, 2025 printout of a Wikipedia article concerning the *Planned Parenthood v. Casey* decision found at https://tinyurl.com/4cdr8jnn. I last accessed this page on March 3, 2025. To my knowledge, no lawyer at the Attorney General's office edited this Wikipedia page.

* * * * *

I declare that the foregoing is true and correct to the best of my knowledge, information and belief.

DATED: March 4, 2025.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: */s/ James E. M. Craig*
James E. M. Craig
Division Chief, Civil Litigation
and Constitutional Defense

CERTIFICATE OF SERVICE

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

Jennifer M. Jensen
jmjensen@hollandhart.com

Anne Henderson Haws
ahhaws@hollandhart.com

Attorneys for Petitioner

/s/ *Alan M. Hurst*
Alan M. Hurst

EXHIBIT A

PHIL McGRANE

IDAHO SECRETARY OF STATE

August 16, 2024

The Honorable Raúl Labrador
Attorney General
HAND-DELIVERED

Re: An Initiative Relating to Reproductive Freedom and Privacy.

Dear Attorney General Labrador:

Please find enclosed a copy of the proposed initiative petition submitted by Idahoans United for Women Families, P.O. Box 6902, Boise, ID 83707, on August 15, 2024.

Pursuant to Section 34-1804, *Idaho Code,* the Secretary of State is required to transmit a copy of any proposed initiative petition in order for the Attorney General to issue a certificate of review.

I appreciate your cooperation in this matter.

Nicole Fitzgerald
Chief Deputy Secretary of State

The enclosure as cited.

700 W. JEFFERSON ST., RM E205, BOISE, ID 83702
PHONE: (208) 334-2300 P.O. BOX 83720, BOISE, ID 83720-0080 SECRETARY@SOS.IDAHO.GOV

Idahoans United for Women and Families
P.O. Box 6902
Boise, ID 83707

August 15, 2024

Honorable Phil McGrane
Secretary of State of the State of Idaho
700 W. Jefferson St., Room E205
Boise, ID 83702

To the Honorable Phil McGrane,

Enclosed with this cover letter, please find the proposed "Reproductive Freedom and Privacy Act" Initiative respectfully submitted pursuant to the requirements of Chapter 18, Title 34, Idaho Code.

The enclosed electors respectfully request that the "Reproductive Freedom and Privacy Act" Initiative shall be submitted to the qualified electors of the State of Idaho, for their approval or rejection at the regular general election, to be held on the third day of November, A.D., 2026, and that if so ratified, the Reproductive Freedom and Privacy Act shall become effective January 1, 2027.

Respectfully submitted,

Melanie Folwell
Idahoans United for Women and Families

FULL TEXT OF INITIATIVE

Be it enacted by the people of the State of Idaho:

SECTION 1. That Chapter 8, Title 39, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 39-801, Idaho Code, and to read as follows:

39-801. REPRODUCTIVE FREEDOM AND PRIVACY ACT

(1) Notwithstanding any other provision of law:
   a. Every person has the right to reproductive freedom and privacy, which entails the right to make and carry out one's own reproductive decisions, including but not limited to decisions on:
      i. Pregnancy;
      ii. Contraception;
      iii. Fertility Treatment;
      iv. Prenatal and Postpartum care;
      v. Childbirth;
      vi. Continuing one's own pregnancy;
      vii. Miscarriage care; and,
      viii. Abortion care.

(2) The state shall not directly or indirectly infringe, burden, or prohibit in any way any person's voluntary exercise of the right to reproductive freedom and privacy nor infringe, burden, or prohibit any acts or omissions taken by a person or entity to assist or facilitate an individual's exercise of the right to reproductive freedom and privacy unless justified by a compelling state interest achieved by the least restrictive means.
   a. Pursuant to the right guaranteed by this section, the state shall not infringe, burden, or prohibit abortion care prior to fetal viability.
   b. It shall not be a violation of the right to reproductive freedom and privacy for the state to regulate abortion care after fetal viability, except in cases of a medical emergency.

(3) For purposes of this section, the state's compelling interest is limited to the purpose of improving or maintaining the health of an individual seeking care, consistent with accepted clinical standards of practice and evidence-based medicine and does not infringe on that individual's autonomous decision-making.
   a. Provided further that:
      i. The right to reproductive freedom and privacy guaranteed by this section shall apply to a person's voluntary exercise of this right as well as to any person or entity that assists an individual in exercising this right.

ii. In no case may abortion care provided consistent with this section provide a basis for professional discipline proceedings or for any civil or criminal liability against a health care professional solely for providing abortion care consistent with this section.

iii. Nothing in this section will be deemed to bar or otherwise apply to any claim of medical malpractice against a health care professional for failing to comply with the applicable community standard of health care practice, as set forth in Section 6-1012, Idaho Code, in providing such abortion care.

iv. A health care professional's freedom of conscience pursuant to Section 18-611, Idaho Code, shall be preserved.

(4) The provisions of this section are intended to control over any other section of Idaho Code and are to be liberally construed in favor of reproductive freedom and privacy. The provisions of this section are also hereby declared to be severable and if any provision of this section or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this section.

(5) As used in this section:

a. "Abortion" or "Abortion care" means the use of any means that are consistent with widely accepted medical standards necessary for the procedure or treatment to intentionally terminate a pregnancy.

b. "Contraception" means an action taken to prevent pregnancy including any drug, device, procedure or biological product intended for use in the prevention of pregnancy.

c. "Fetal viability" means the point in a pregnancy when in the good faith judgment of an attending health care professional and based on the particular facts of the case known to the health care professional at the time, the fetus has a significant likelihood of sustained survival outside of the uterus without the application of extraordinary medical measures.

d. "Fertility Treatment" means medications and procedures consistent with established medical practices in the treatment of infertility by a licensed health care professional, including assisted reproductive technology including but not limited to in vitro fertilization.

e. "Health care professional" means any person licensed, certified or registered by the state of Idaho to deliver health care.

f. "Medical emergency" means a physical medical condition that, on the basis of the attending physician's good faith clinical judgment, so complicates the medical condition of a pregnant patient as to warrant an abortion:

i. To save a pregnant patient's life, or;

ii. For which a delay may:

1. Place the health of the pregnant patient in serious jeopardy;
2. Cause serious impairment to a bodily function, or;
3. Cause serious dysfunction of any bodily organ or part.

iii. A medical emergency is determined on a case-by-case basis based on the facts known to the attending physician at the time and is intended to be interpreted consistent with the definition provided in title 42, U.S. code, chapter 7, section 1395dd(e)(1).

g. "Miscarriage Care" means treatments and procedures consistent with established medical practices in the treatment of a complete or incomplete spontaneous miscarriage by a licensed health care professional.

h. "Physician" means a person licensed to practice medicine and/or surgery or osteopathic medicine and surgery in this state as provided in chapter 18, title 54, Idaho Code.

(6) This section shall be in full force and effect on and after January 1, 2027.

EXHIBIT B

PHIL McGRANE

IDAHO SECRETARY OF STATE

August 16, 2024

The Honorable Raúl Labrador
Attorney General
HAND-DELIVERED

Re: An Initiative Relating to Reproductive Freedom and Privacy.

Dear Attorney General Labrador:

Please find enclosed a copy of the proposed initiative petition submitted by Idahoans United for Women Families, P.O. Box 6902, Boise, ID 83707, on August 15, 2024.

Pursuant to Section 34-1804, *Idaho Code,* the Secretary of State is required to transmit a copy of any proposed initiative petition in order for the Attorney General to issue a certificate of review.

I appreciate your cooperation in this matter.

Nicole Fitzgerald
Chief Deputy Secretary of State

The enclosure as cited.

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Idahoans United for Women and Families
P.O. Box 6902
Boise, ID 83707

August 15, 2024

Honorable Phil McGrane
Secretary of State of the State of Idaho
700 W. Jefferson St., Room E205
Boise, ID 83702

To the Honorable Phil McGrane,

Enclosed with this cover letter, please find the proposed "Reproductive Freedom and Privacy Act" Initiative respectfully submitted pursuant to the requirements of Chapter 18, Title 34, Idaho Code.

The enclosed electors respectfully request that the "Reproductive Freedom and Privacy Act" Initiative shall be submitted to the qualified electors of the State of Idaho, for their approval or rejection at the regular general election, to be held on the third day of November, A.D., 2026, and that if so ratified, the Reproductive Freedom and Privacy Act shall become effective January 1, 2027.

Respectfully submitted,

Melanie Folwell
Idahoans United for Women and Families

FULL TEXT OF INITIATIVE

Be it enacted by the people of the State of Idaho:

SECTION 1. That Chapter 8, Title 39, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 39-801, Idaho Code, and to read as follows:

39-801. REPRODUCTIVE FREEDOM AND PRIVACY ACT

(1) Notwithstanding any other provision of law:
    a. Every person has the right to reproductive freedom and privacy, which entails the right to make and carry out one's own reproductive decisions, including but not limited to decisions on:
        i. Pregnancy;
        ii. Contraception;
        iii. Fertility Treatment;
        iv. Prenatal and Postpartum care;
        v. Childbirth;
        vi. Continuing one's own pregnancy;
        vii. Miscarriage care; and,
        viii. Abortion care.

(2) The state shall not directly or indirectly infringe, burden, or prohibit in any way any person's voluntary exercise of the right to reproductive freedom and privacy nor infringe, burden, or prohibit any acts or omissions taken by a person or entity to assist or facilitate an individual's exercise of the right to reproductive freedom and privacy unless justified by a compelling state interest achieved by the least restrictive means.
    a. Pursuant to the right guaranteed by this section, the state shall not infringe, burden, or prohibit abortion care prior to twenty (24) weeks gestation.
    b. It shall not be a violation of the right to reproductive freedom and privacy for the state to regulate the provision of abortion care after twenty (24) weeks gestation.

(3) For purposes of this section, the state's compelling interest is limited to the purpose of improving or maintaining the health of an individual seeking care, consistent with accepted clinical standards of practice and evidence-based medicine, and does not infringe on that individual's autonomous decision-making.
    a. Provided further that:
        i. The right to reproductive freedom and privacy guaranteed by this section shall apply to a person's voluntary exercise of this right as well as to any person or entity that assists an individual in exercising this right.
        ii. In no case may abortion care provided consistent with this section provide a basis for professional discipline proceedings or for any civil or criminal

liability against a health care professional solely for providing abortion care consistent with this section.

iii. Nothing in this section will be deemed to bar or otherwise apply to any claim of medical malpractice against a health care professional for failing to comply with the applicable community standard of health care practice, as set forth in Section 6-1012, Idaho Code, in providing such abortion care.

iv. A health care professional's freedom of conscience pursuant to Section 18-611, Idaho Code, shall be preserved.

(4) The provisions of this section are intended to control over any other section of Idaho Code and are to be liberally construed in favor of reproductive freedom and privacy. The provisions of this section are also hereby declared to be severable and if any provision of this section or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this section.

(5) As used in this section:

a. "Abortion" or "Abortion care" means the use of any means that are consistent with widely accepted medical standards necessary for the procedure or treatment to intentionally terminate a pregnancy.

b. "Contraception" means an action taken to prevent pregnancy including any drug, device, procedure or biological product intended for use in the prevention of pregnancy.

c. "Fertility Treatment" means medications and procedures consistent with established medical practices in the treatment of infertility by a licensed health care professional, including assisted reproductive technology including but not limited to in vitro fertilization.

d. "Health care professional" means any person licensed, certified or registered by the state of Idaho to deliver health care.

e. "Miscarriage Care" means treatments and procedures consistent with established medical practices in the treatment of a complete or incomplete spontaneous miscarriage by a licensed health care professional.

f. "Physician" means a person licensed to practice medicine and/or surgery or osteopathic medicine and surgery in this state as provided in chapter 18, title 54, Idaho Code.

(6) This section shall be in full force and effect on and after January 1, 2027.

EXHIBIT C

PHIL McGRANE

IDAHO SECRETARY OF STATE

August 16, 2024

The Honorable Raúl Labrador
Attorney General
HAND-DELIVERED

Re: An Initiative Relating to Reproductive Freedom and Privacy.

Dear Attorney General Labrador:

Please find enclosed a copy of the proposed initiative petition submitted by Idahoans United for Women Families, P.O. Box 6902, Boise, ID 83707, on August 15, 2024.

Pursuant to Section 34-1804, *Idaho Code,* the Secretary of State is required to transmit a copy of any proposed initiative petition in order for the Attorney General to issue a certificate of review.

I appreciate your cooperation in this matter.

Nicole Fitzgerald
Chief Deputy Secretary of State

The enclosure as cited.

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Idahoans United for Women and Families
P.O. Box 6902
Boise, ID 83707

August 15, 2024

Honorable Phil McGrane
Secretary of State of the State of Idaho
700 W. Jefferson St., Room E205
Boise, ID 83702

To the Honorable Phil McGrane,

Enclosed with this cover letter, please find the proposed "Reproductive Freedom and Privacy Act" Initiative respectfully submitted pursuant to the requirements of Chapter 18, Title 34, Idaho Code.

The enclosed electors respectfully request that the "Reproductive and Privacy Act" Initiative shall be submitted to the qualified electors of the State of Idaho, for their approval or rejection at the regular general election, to be held on the third day of November, A.D., 2026, and that if so ratified, the Reproductive Freedom and Privacy Act shall become effective January 1, 2027.

Respectfully submitted,

Melanie Folwell
Idahoans United for Women and Families

FULL TEXT OF INITIATIVE

Be it enacted by the people of the State of Idaho:

SECTION 1. That Chapter 8, Title 39, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 39-801, Idaho Code, and to read as follows:

39-801. REPRODUCTIVE FREEDOM AND PRIVACY ACT

(1) Notwithstanding any other provision of law:
   a. Every person has the right to reproductive freedom and privacy, which entails the right to make and carry out one's own reproductive decisions, including but not limited to decisions on:
      i. Pregnancy;
      ii. Contraception;
      iii. Fertility Treatment;
      iv. Prenatal and Postpartum care;
      v. Childbirth;
      vi. Continuing one's own pregnancy;
      vii. Miscarriage care; and,
      viii. Abortion care.

(2) The state shall not directly or indirectly infringe, burden, or prohibit in any way any person's voluntary exercise of the right to reproductive freedom and privacy nor infringe, burden, or prohibit any acts or omissions taken by a person or entity to assist or facilitate an individual's exercise of the right to reproductive freedom and privacy unless justified by a compelling state interest achieved by the least restrictive means.
   a. Pursuant to the right guaranteed by this section, the state shall not infringe, burden, or prohibit abortion care prior to twenty (20) weeks gestation.
   b. It shall not be a violation of the right to reproductive freedom and privacy for the state to regulate the provision of abortion care after twenty (20) weeks gestation, except where, in the physician's good faith clinical judgment, an abortion is necessary to protect or maintain the physical health or life of the pregnant person.

(3) For purposes of this section, the state's compelling interest is limited to the purpose of improving or maintaining the health of an individual seeking care, consistent with accepted clinical standards of practice and evidence-based medicine and does not infringe on that individual's autonomous decision-making.
   a. Provided further that:
      i. The right to reproductive freedom and privacy guaranteed by this section shall apply to a person's voluntary exercise of this right as well as to any person or entity that assists an individual in exercising this right.

ii. In no case may abortion care provided consistent with this section provide a basis for professional discipline proceedings or for any civil or criminal liability against a health care professional solely for providing abortion care consistent with this section.

iii. Nothing in this section will be deemed to bar or otherwise apply to any claim of medical malpractice against a health care professional for failing to comply with the applicable community standard of health care practice, as set forth in Section 6-1012, Idaho Code, in providing such abortion care.

iv. A health care professional's freedom of conscience pursuant to Section 18-611, Idaho Code, shall be preserved.

(4) The provisions of this section are intended to control over any other section of Idaho Code and are to be liberally construed in favor of reproductive freedom and privacy. The provisions of this section are also hereby declared to be severable and if any provision of this section or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this section.

(5) As used in this section:

a. "Abortion" or "Abortion care" means the use of any means that are consistent with widely accepted medical standards necessary for the procedure or treatment to intentionally terminate a pregnancy.

b. "Contraception" means an action taken to prevent pregnancy including any drug, device, procedure or biological product intended for use in the prevention of pregnancy.

c. "Fertility Treatment" means medications and procedures consistent with established medical practices in the treatment of infertility by a licensed health care professional, including assisted reproductive technology including but not limited to in vitro fertilization.

d. "Health care professional" means any person licensed, certified or registered by the state of Idaho to deliver health care.

e. "Miscarriage Care" means treatments and procedures consistent with established medical practices in the treatment of a complete or incomplete spontaneous miscarriage by a licensed health care professional.

f. "Physician" means a person licensed to practice medicine and/or surgery or osteopathic medicine and surgery in this state as provided in chapter 18, title 54, Idaho Code.

(6) This section shall be in full force and effect on and after January 1, 2027.

EXHIBIT
D

PHIL McGRANE

IDAHO SECRETARY OF STATE

August 16, 2024

The Honorable Raúl Labrador
Attorney General
HAND-DELIVERED

Re: An Initiative Relating to Reproductive Freedom and Privacy.

Dear Attorney General Labrador:

Please find enclosed a copy of the proposed initiative petition submitted by Idahoans United for Women Families, P.O. Box 6902, Boise, ID 83707, on August 15, 2024.

Pursuant to Section 34-1804, *Idaho Code,* the Secretary of State is required to transmit a copy of any proposed initiative petition in order for the Attorney General to issue a certificate of review.

I appreciate your cooperation in this matter.

Nicole Fitzgerald
Chief Deputy Secretary of State

The enclosure as cited.

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Idahoans United for Women and Families
P.O. Box 6902
Boise, ID 83707

August 15, 2024

Honorable Phil McGrane
Secretary of State of the State of Idaho
700 W. Jefferson St., Room E205
Boise, ID 83702

To the Honorable Phil McGrane,

Enclosed with this cover letter, please find the proposed initiative respectfully submitted pursuant to the requirements of Chapter 18, Title 34, Idaho Code.

The enclosed electors respectfully request that the initiative shall be submitted to the qualified electors of the State of Idaho, for their approval or rejection at the regular general election, to be held on the third day of November, A.D., 2026, and that if so ratified, the initiative shall become effective January 1, 2027.

Respectfully submitted,

Melanie Folwell
Idahoans United for Women and Families

FULL TEXT OF INITIATIVE

Be it enacted by the people of the State of Idaho:

SECTION 1. That Chapter 8, Title 39, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 39-801, Idaho Code, and to read as follows:

39-801. RIGHT TO ABORTION UNDER CERTAIN CIRCUMSTANCES

(1) Notwithstanding any other provision of law, abortion care shall provide no basis for a violation of the provisions of title 18, Idaho Code, by any person in any of the following instances:
   a. In cases when in the good faith clinical judgment of the pregnant patient's attending physician an abortion is necessary to protect or maintain the pregnant patient's physical health or life, or in the case of a medical emergency. This is determined on a case-by-case basis based on the facts known to the attending physician at the time.
   b. In cases when in the good faith clinical judgment of the pregnant patient's attending physician the patient has a fetal condition that constitutes a fatal anomaly, the fetus is unlikely to survive outside the womb without extraordinary medical intervention, or if the condition is unlikely to result in a live birth. This is determined on a case-by-case basis based on the facts known to the attending physician at the time.
   c. In cases when the pregnant patient certifies to the attending physician that the pregnancy resulted from rape as defined in section 18-6101, Idaho Code, or incest as defined in section 18-6601, Idaho Code. Abortion care provided pursuant to this paragraph shall only be permissible when in the good faith clinical judgment of the pregnant patient's attending physician the pregnancy has not achieved fetal viability.
(2) The state shall not directly or indirectly infringe, burden, or prohibit in any way any person's voluntary exercise of the right to abortion as described in this section nor infringe, burden, or prohibit any acts or omissions taken by a person or entity to assist or facilitate an individual's exercise of the right to abortion under this section unless justified by a compelling state interest achieved by the least restrictive means.
(3) For purposes of this section, the state's compelling interest is limited to the purpose of improving or maintaining the health of an individual seeking care, consistent with accepted clinical standards of practice and evidence-based medicine and does not infringe on that individual's autonomous decision-making.
(4) Provided further that:
   a. The right to abortion guaranteed by this section shall apply to a person's voluntary exercise of this right as well as to any person or entity that assists an individual in exercising this right.
   b. In no case may abortion care provided consistent with this section provide a basis for professional discipline proceedings or for any civil or criminal liability against a health care professional solely for providing abortion care.
   c. Nothing in this section will be deemed to bar or otherwise apply to any claim of medical malpractice against a health care professional for failing to comply with

the applicable community standard of healthcare practice, as set forth in Section 6-1012, Idaho Code, in providing such abortion care.

d. A health care professional's of conscience pursuant to section 18-611, Idaho Code, shall be preserved.

(5) The provisions of this section are intended to control over any other section of Idaho Code and are to be liberally construed in favor of a right to abortion as described under this section. The provisions of this section are also hereby declared to be severable and if any provision of this section or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this section.

(6) As used in this section:

a. "Abortion" or "Abortion care" means the use of any means that are consistent with commonly accepted medical standards necessary for the procedure or treatment to intentionally terminate a pregnancy.

b. "Fetal viability" means the point in a pregnancy when in the good faith judgment of an attending health care professional and based on the particular facts of the case known to the health care professional at the time, the fetus has a significant likelihood of sustained survival outside of the uterus without the application of extraordinary medical measures.

c. "Health care professional" means any person licensed, certified or registered by the state of Idaho to deliver health care.

d. "Medical emergency" means a physical medical condition that, on the basis of the attending physician's good faith clinical judgment, so complicates the medical condition of a pregnant patient as to warrant an abortion:

    i. To save the pregnant patient's life, or;

        1. For which a delay may:
        2. Place the health of the pregnant patient in serious jeopardy;
        3. Cause serious impairment to a bodily function, or;
        4. Cause serious dysfunction of any bodily organ or part.

    ii. Medical emergency is determined on a case-by-case basis based on the facts known to the attending physician at the time and is intended to be interpreted consistent with the definition provided in title 42, U.S. code, chapter 7, section 1395dd(e)(1).

e. "Physician" means a person licensed to practice medicine and/or surgery or osteopathic medicine and surgery in this state as provided in chapter 18, title 54, Idaho Code.

(7) This section shall be in full force and effect on and after January 1, 2027.

EXHIBIT
E

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

September 16, 2024

VIA HAND DELIVERY
The Honorable Phil McGrane
Idaho Secretary of State
Statehouse

RE: Certificate of Review
Proposed Initiative for Adding a New Section to Title 39, Idaho Code, Providing for a Right to Reproductive Freedom and Privacy (fetal viability).[1]

Dear Secretary of State McGrane:

An initiative petition was filed on August 16, 2024, proposing to amend title 39 of the Idaho Code. Pursuant to Idaho Code section 34-1809, this office has reviewed the petition and prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each legal or constitutional issue that may present problems. This letter therefore addresses only those matters of substance that are "deemed necessary and appropriate" to address at this time and does not address or catalogue all problems of substance or of form that the proposed initiative may pose under federal or Idaho law. Idaho Code § 34-1809(1)(a). Further, under the review statute, the Attorney General's recommendations are "advisory only," and the petitioners are free to "accept or reject them in whole or in part." *Id.* § 34-1809(1)(b). This office offers no opinion with regard to the policy issues raised by the proposed initiative or the potential revenue impact to the state budget from likely litigation over the initiative's validity.

[1] This proposed initiative petition was submitted at the same time as three other petitions, all submitted by the same petitioner. Because each proposed initiative is similar in subject matter and intent, they will be distinguished using the following naming convention: Right to Reproductive Freedom and Privacy (fetal viability); Right to Reproductive Freedom and Privacy (24 weeks); Right to Reproductive Freedom and Privacy (20 weeks); and Right to Abortion Under Certain Circumstances.

EXECUTIVE OFFICE
P.O. BOX 83720, BOISE, IDAHO 83720-0010
TELEPHONE: (208) 334-2400, FAX: (208) 854-8071
LOCATED AT 700 W. JEFFERSON STREET, SUITE 210

MATTERS OF SUBSTANTIVE IMPORT

I. Summary of the Proposed Initiative

The proposed initiative seeks to add to Idaho law, by statute, a right to "reproductive freedom and privacy." The initiative proposes a new statute, section 39-801, that would significantly change abortion law in Idaho, granting a right to abortion for any reason "prior to fetal viability." Additionally, the initiative would institute a right to "reproductive freedom and privacy." Broadly speaking, the initiative would: 1) remove any restrictions on abortion before the point of "fetal viability;" 2) exempt from criminal liability any abortion performed in the case of a "medical emergency;" and 3) attempt to place restrictions broadly on future legislation or regulation regarding abortion and "reproductive freedom and privacy."

1. Removing Restrictions on Abortion Before "Fetal Viability"

The proposed initiative would alter Idaho laws by providing a right to abortion for any reason "prior to fetal viability." Pet. § 39-801(2). The initiative defines "fetal viability" as "the point in a pregnancy when…the fetus has a significant likelihood of sustained survival outside of the uterus without the application of extraordinary medical measures." *Id.* § 39-801(5)c. Terms within this definition, such as "significant likelihood of sustained survival" or "extraordinary medical measures" are not defined.

The initiative proposes a right to "reproductive freedom and privacy," which includes the right to "abortion care."[2] *Id.* § 39-801(1)a. The initiative says, "the state shall not infringe, burden, or prohibit abortion care prior to fetal viability." *Id.* § 39-801(2)a.

2. Exemption for Abortions Performed for "Medical Emergencies"

The proposed initiative would also change current Idaho law regarding abortion by providing for an exemption from criminal liability for abortions performed "in cases of medical emergency." *Id.* § 39-801(2)b. The initiative defines a "medical emergency," as a physical medical condition warranting abortion to save the pregnant person's life, avoid placing the pregnant person's health "in serious jeopardy;" avoid "serious impairment to a bodily function," or avoid serious dysfunction of any bodily organ or part." *Id.* § 39-801(5)(f). The proposed initiative notes that this definition of "medical emergency" is "intended to be interpreted consistent with the definition provided in title 42, U.S. code, chapter 7, section 1395dd(e)(1)." *Id.* This federal statute is commonly referred to as the Emergency Medical Treatment and Labor Act ("EMTALA").

This exemption for abortions performed "in cases of a medical emergency" kicks in after "fetal viability." In short, the proposed initiative sets up a framework wherein abortion 1) cannot be "prohibited" *before* "fetal viability," 2) can be "regulated" *after* "fetal viability," and

[2] The proposed initiative defines "abortion care" synonymously with "abortion." Pet. § 39-801(5)a.

3) can *never* be "regulated" or prohibited in cases of "medical emergency," as defined by the initiative.

3. Restrictions on Future Regulation of Abortion and "Reproductive Freedom and Privacy"

In addition to the specific provisions that change current abortion law in Idaho, the proposed initiative also provides for a broad "right to reproductive freedom and privacy." Pet. § 39-801(1)a. The initiative provides a non-exhaustive list of eight "reproductive decisions" included in the right to "reproductive freedom and privacy." The "reproductive decisions" the initiative lists out are decisions on:

i. Pregnancy;
ii. Contraception;
iii. Fertility Treatment;
iv. Prenatal and Postpartum care;
v. Childbirth;
vi. Continuing one's own pregnancy;
vii. Miscarriage care; and,
viii. Abortion care

Id. The initiative provides definitions for "Contraception," "Fertility Treatment," "Miscarriage care," and "Abortion care," but it does not define the other four listed "reproductive decisions." *Id.* § 39-801(5).

After setting forth this "right to reproductive freedom and privacy," the proposed initiative articulates limitations on the State's ability to regulate that right. The proposed initiative uses language commonly associated with fundamental constitutional rights when describing its proposed "right to reproductive freedom and privacy." *See* Planned Parenthood Great Nw. v. State, 171 Idaho 374, 413, 522 P.3d 1132, 1171 (2023) (citing Benton v. Maryland, 395 U.S. 784, 794 (1969) (discussing Fifth Amendment right against Double Jeopardy)). For example, the proposed initiative states that "[t]he state shall not directly or indirectly infringe…the right to reproductive freedom…unless justified by a compelling state interest achieved by the least restrictive means." Pet. § 39-801(2). The proposed initiative defines the appropriate "compelling interest" as regulating this right for "the purpose of improving or maintaining the health of an individual seeking care." Pet. § 39-801(3).

II. Analysis of the Proposed Initiative's Subsections

The matters of substantive import are addressed below, with each of the pertinent substantive subsections discussed in turn.

1. *Subsection (1)* – No Discussion of "Privacy"

In subsection (1) there is a lack of specificity regarding "privacy." The proposed initiative speaks of "reproductive freedom *and* privacy," but the non-exhaustive list of "reproductive decisions" covered by this right seems to deal entirely with freedom (freedom to make those decisions). There is nothing in subsection (1) that relates, on its face, to privacy. There is no explicit "right to privacy" contained within the Idaho Constitution, as there is in other states. Therefore, the drafters may want to include additional details as to what a "right to privacy" entails so as to avoid confusion and ambiguity.

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

The "right to reproductive freedom and privacy" set forth in the initiative would limit the State's authority to regulate abortion. Pet. § 39-801(2)-(3). However, this attempt to treat the "right to reproductive freedom and privacy" as a fundamental constitutional right and restrict future regulation of abortion violates the principle of legislative authority: ordinary statutes cannot bind or curtail the legislative authority of a future legislature. This principle was recently articulated and re-affirmed in the Idaho Supreme Court's Planned Parenthood decision. *See* Planned Parenthood, 171 Idaho at 452-53.

In Planned Parenthood, plaintiffs/petitioners argued that the Defense of Life & Heartbeat Acts were invalid because they conflicted with the Idaho Human Rights Act. *See id.* at 452-53. The Idaho Supreme Court rejected that argument because "no present legislature can bind a future legislature through ordinary legislation." *Id.* at 453 (citing State v. Gallet, 36 Idaho 178, 179, 209 P. 723, 724 (1922)). The Court went on to note that the legislature, therefore, "may enact any law not expressly or inferentially prohibited by the state or federal constitutions." *Id.* (cleaned up). The Idaho Supreme Court concluded that because the Human Rights Act was enacted as "ordinary legislation," it cannot restrict a future legislature's ability to regulate abortion, even if the Human Rights Act purported to do so (something the Court did not decide and did not need to decide).

The proposed initiative here is a proposal to amend the Idaho Code. In other words, if passed through the ballot initiative process, it would constitute "ordinary legislation." As such, the initiative cannot bind future legislatures, or a future attempt to amend the law through a future initiative petition and cannot restrict the Idaho legislature's future regulation of abortion. This squarely conflicts with the initiative, which reads: "The state shall not directly or indirectly infringe, burden, or prohibit in any way any person's voluntary exercise of the right to reproductive freedom and privacy…unless justified by a compelling state interest achieved by the least restrictive means." Pet. § 39-801(2). Moreover, the initiative seeks to bind future legislation even further by dictating that the only compelling interest the state can consider when regulating abortion is "improving or maintaining the health of an individual seeking care." *Id.* § 39-801(3). Under clear Idaho Supreme Court precedent, such an attempt to restrict future legislation impermissible.

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

Subsection (4) provides that "[t]he provisions of this section are intended to control over any other section of Idaho Code and are to be liberally construed in favor of reproductive freedom and privacy." Pet. § 39-801(4). However, the initiative does not specifically address current laws in Idaho regulating abortion, which leaves open questions as to how the initiative would be incorporated into current law. For example, it is unclear what laws and definitions control when the proposed initiative is silent on an issue.

4. *Subsection (5)* – Definitions

"Medical Emergency" - The proposed initiative contains inconsistent and potentially confusing language borrowed from federal law. As noted above, the initiative specifically references EMTALA in its definition of "medical emergency" and borrows much of its language from that law, noting that "medical emergency" should be interpreted consistent with the definition in EMTALA. Pet. § 39-801(6)d.

This is problematic for a couple reasons. First, EMTALA does not itself contain a definition of "medical emergency," nor does it mention abortion at all. Second, while the initiative borrows much of the language from EMTALA, there are places where the two significantly differ, leading to confusion.

EMTALA uses the term "emergency medical condition," and defines that term without reference to whether or when abortion is necessary or warranted. Indeed, EMTALA does not mention or even allude to abortion. Rather it imposes a requirement for hospitals, regardless of a patient's ability to pay, to 1) stabilize and 2) treat or transfer patients who present to their emergency departments with an "emergency medical condition." 42 U.S.C. § 1395dd.

In contrast, within the proposed initiative, the definition of "medical emergency" specifically includes abortion. The definition itself sets forth a standard for when an abortion is "warrant[ed]." Pet. § 39-801(6)d. Under that standard, abortion is warranted "[t]o save the pregnant patient's life," or when a "delay may" cause various medical complications. *Id.*

Finally, the standard for classifying a medical condition as an "emergency" is different in EMTALA than the standard proposed by the initiative. EMTALA provides that a medical emergency is one that, in the absence of immediate medical attention, "*could reasonably be expected to result in"* various medical complications. *Id.* (emphasis added). In contrast, the proposed initiative defines a "medical emergency" as a situation where delay in medical care "*may"* lead to various medical complications. The contrast in standards—"could reasonably be expected to result in" versus "may" lead to—presents a situation that may result in confusion about which standard should apply. Again, this confusion could be avoided by simply removing the reference to EMTALA.

5. Potential Conflict with Right to Life

One issue that may be a concern is whether the initiative's proposed "right to reproductive freedom and privacy" conflicts with an unborn child's right to life. Within the initiative's proposed "right to reproductive freedom and privacy," there is a right to "abortion care." *Id.* § 39-801(1)a.viii. This right to abortion is inherently in conflict with the life of the unborn child (the "fetus"). This raises the further issue of whether the proposed right may conflict with the unborn child's right to life, and thus be declared unconstitutional.

The constitutional legal protections of an unborn child have not been expressly addressed in Idaho. But an unborn child's "inalienable right to life" was one of the earliest justifications for Idaho's early laws criminalizing abortions. *See* Planned Parenthood, 171 Idaho at 426 (quoting an address by Dr. J.H. Lyons from the year 1907 in which he discussed the "immorality of voluntary abortion…based on the unborn child's 'inalienable right' to life by the 'mere fact of its existence' as a 'human being'"). Further, Idaho law also currently recognizes that "preborn children have interests in life, health, and well-being." *See* Idaho Code § 18-8802(1).

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via copy of this Certificate of Review, deposited in the U.S. Mail to Melanie Folwell, P.O Box 6902, Boise, ID 83702.

Sincerely,

Raúl R. Labrador

RAÚL R. LABRADOR
Attorney General

Analysis by:

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

EXHIBIT
F

PHIL McGRANE
IDAHO SECRETARY OF STATE

October 7, 2024

RECEIVED
OCT 07 2024
OFFICE OF THE
ATTORNEY GENERAL

The Honorable Raúl Labrador
Attorney General
HAND-DELIVERED

Re: An Initiative Relating to Reproductive Freedom and Privacy

Dear Attorney General Labrador:

Pursuant to Section 34-1809, Idaho Code, I am transmitting two copies of the proposed initiative initially filed in this office on August 15, 2024, by Idahoans United for Women Families, P.O. Box 6902, Boise, ID 83707. Said copies are to aid you in preparing short and long ballot titles.

Thank you for your time and assistance.

Sincerely,

Nicole Fitzgerald
Deputy Secretary of State

The enclosure as cited.

700 W. JEFFERSON ST., RM E205, BOISE, ID 83702
PHONE: (208) 334-2300 P.O. BOX 83720, BOISE, ID 83720-0080 SECRETARY@SOS.IDAHO.GOV

IDAHOANS UNITED *for* Women & Families

October 3, 2024

To the Honorable Phil McGrane
Secretary of State
P.O. Box 83720
Boise, ID 83720-0080

Re: Reproductive Freedom and Privacy Act Initiative – Certificate of Review

Dear Secretary McGrane,

This letter is written to accompany our return of the enclosed Reproductive Freedom and Privacy Act Initiative for the assignment of a ballot title pursuant to Idaho Code section 34-1809(2). As you are aware, we originally filed Petitions for four possible Initiatives on this subject matter. We have decided to move forward with **only** the enclosed measure, previously identified by the Attorney General as Right to Reproductive Freedom and Privacy (fetal viability), for the assignment of ballot titles.

Please note that after reviewing the Attorney General's Certificate of Review, we have made several changes to the text of the Initiative. One such change was to clarify that the provisions of the Initiative do not create additional financial obligations for the State for the delivery of certain health care services. Because of this change, we request that your Office request the official fiscal impact statement for the Initiative from the Division of Financial Management that reflects the Initiative's enclosed language.

Additionally, the Attorney General's Certificate of Review raised concerns that the Initiative's language may be interpreted as an attempt to impermissibly bind future Legislatures. As recently reaffirmed Idaho Supreme Court precedent has long held: "initiative-based legislation [i]s subject to amendment and repeal by the legislature because, after the law is passed, the constitutional amendment that created the initiative right **placed initiative legislation 'on an equal footing' with other legislative acts.**" *Reclaim Idaho v. Denney*, 169 Idaho 406, 439, 497 P.3d 160, 193 (2021) (emphasis added) (citing *Luker v. Curtis*, 64 Idaho 703, 136 P.2d 978, 979 (1943)). As such, we do not believe that the language of the Initiative *could* bind future legislatures by statute and is neither the implied nor express intent of the initiative. We'd encourage the Attorney General to take this under consideration when drafting titles.

Very truly yours,

Melanie Folwell

Melanie Folwell

Be it enacted by the people of the State of Idaho:

SECTION 1. That Title 39, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW CHAPTER, to be known and designated as Chapter 8, Title 39, Idaho Code, and to read as follows:

39-801. SHORT TITLE. This act shall be known and may be cited as the "Reproductive Freedom and Privacy Act."

39-802. STATEMENT OF PURPOSE. The "Reproductive Freedom and Privacy Act" reinforces the principles of privacy by safeguarding the freedom of individuals to make personal reproductive medical decisions without undue state interference. It recognizes that reproductive choices—such as contraception, fertility treatments, abortion care, childbirth, and pregnancy—are deeply private matters that should be primarily decided by the individual in consultation with their health care provider. This statute upholds the individual's rights to make their own decisions based on their own values, health needs, and circumstances—free from the fear of external pressures or punitive consequences. In this way, the statute supports an inherent right to reproductive freedom and privacy, and protects the confidential nature of the patient-provider relationship and the individual's right to make personal medical decisions without government interference.

39-803. REPRODUCTIVE FREEDOM AND PRIVACY ACT

1. Notwithstanding any other provision of law to the contrary:
    a. Every person has the right to reproductive freedom and privacy, which entails the right to make and carry out one's own reproductive decisions, including but not limited to decisions on:
        i. Pregnancy;
        ii. Contraception;
        iii. Fertility Treatment;
        iv. Prenatal and Postpartum care;
        v. Childbirth;
        vi. Continuing one's own pregnancy;
        vii. Miscarriage care; and,
        viii. Abortion care.

    b. A person's voluntary exercise of their right to reproductive freedom and privacy and privacy shall not be infringed, burdened, or prohibited by the state, directly or indirectly, in any way; neither shall the state infringe, burden, or prohibit any acts or omissions taken by any person or entity to assist or facilitate an individual's exercise of the right to reproductive freedom and privacy and privacy unless the state action is justified by a compelling state interest achieved by the least restrictive means.

c. It shall not be a violation of the right to reproductive freedom and privacy for the state to regulate abortion care after fetal viability, except in cases of medical emergency.

2. For purposes of this section, the state's compelling interest is limited solely to improving or maintaining the health of an individual seeking care, consistent with accepted clinical standards of practice and evidence-based medicine, and does not infringe on that individual's autonomous decision-making.

3. Provided further that:

   a. In no case may abortion care provided consistent with this section provide a basis for professional discipline proceedings or for any civil or criminal liability against a health care professional solely on the basis that the medical professional knowingly attempted, performed, or induced an abortion.
   b. Nothing in this section will be deemed to bar or otherwise apply to any claim of medical malpractice against a health care professional for failing to comply with the applicable community standard of health care practice, as set forth in Section 6-1012, Idaho Code, in providing such abortion care.
   c. A health care professional's freedom of conscience pursuant to Section 18-611, Idaho Code, shall be preserved.

4. The provisions of this section are are to be liberally construed in favor of reproductive freedom and privacy and intended to control over any other section of Idaho Code, consistent with the following:

   a. Nothing in this section shall be construed to limit any right or access to abortion care that currently exists or is otherwise provided for or guaranteed by law.

   b. Nothing in this section shall be construed to impose a financial obligation on the state, its agencies, or their programs for delivery of health care services protected by this section.

5. The provisions of this section are also hereby declared to be severable and if any provision of this section or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this section.

6. As used in this section:

   a. "Abortion" or "Abortion care" means the use of any means which are consistent with widely accepted medical standards necessary for the procedure or treatment

to intentionally terminate a pregnancy.

b. "Childbirth" means the process of labor and delivery, including the stages of labor, the act of giving birth, and any immediate medical procedures related to the delivery of a child, whether by vaginal birth or cesarean section.

c. "Continuing one's own pregnancy" means decisions a pregnant patient makes to continue a pregnancy up until childbirth.

d. "Contraception" means an action taken to prevent pregnancy including any drug, device, procedure or biological product intended for use in the prevention of pregnancy.

e. "Fetal viability" means the point in a pregnancy when in the good faith judgment of an attending health care professional and based on the particular facts of the case known to the health care professional at the time, the fetus has a significant likelihood of sustained survival outside of the uterus without the application of extraordinary medical measures.

f. "Fertility Treatment" means medications and procedures consistent with established medical practices in the treatment of infertility by a licensed health care professional, including assisted reproductive technology including but not limited to in vitro fertilization.

g. "Health care professional" means any person licensed, certified or registered by the state of Idaho to deliver health care.

h. "Medical emergency" means a physical medical condition that, on the basis of the attending physician's good faith clinical judgment, based on the facts known at the time, and determined on a case-by-case basis, complicates the physical medical condition of a pregnant patient as to warrant an abortion:
   i. To protect a pregnant patient's life; or,
   ii. For which a delay may:
      1. Place the health of the pregnant patient in serious jeopardy;
      2. Cause serious impairment to a bodily function; or,
      3. Cause serious dysfunction of any bodily organ or part.

i. "Miscarriage Care" means treatments and procedures consistent with established medical practices in the treatment of a complete or incomplete spontaneous miscarriage by a licensed health care professional.

j. "Physician" means a person licensed to practice medicine and/or surgery or osteopathic medicine and surgery in this state as provided in chapter 18, title 54,

Idaho Code.

k. "Prenatal and postpartum care" means the medical services provided to a pregnant patient before, during, and after childbirth, including exams, treatments, diagnostic testing, and care necessary for the health of the pregnant patient, as well as postpartum recovery and support.

SECTION 2. This act shall be in full force and effect on and after January 1, 2027.

EXHIBIT G

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

October 22, 2024

VIA HAND DELIVERY
The Honorable Phil McGrane
Idaho Secretary of State
Statehouse

RE: Ballot Titles
Proposed Initiative for Adding a New Section to Title 39, Idaho Code, Providing for a Right to Reproductive Freedom and Privacy.

Dear Secretary of State McGrane:

An initiative petition was originally filed on August 15, 2024, proposing to amend title 39 of the Idaho Code. Pursuant to Idaho Code § 34-1809, this office reviewed the petition and provided advisory comments and a certificate of review. Thereafter, the petitioners made changes to their proposed initiative and re-submitted it requesting the assignment of ballot titles. In accordance with § 34-1809, this office must, within ten (10) working days, provide ballot titles for the measure, one short and one general (long) title. The short title—not exceeding twenty (20) words—shall be a distinctive title by which the measure is commonly referred to or spoken of. The general (long) title—not exceeding two hundred (200) words—shall express the purpose of the measure. The ballot titles should give a true and impartial statement of the purpose of the measure and in such language that the ballot title shall not be intentionally an argument or likely to create prejudice either for or against the measure. This letter therefore provides both the short and long ballot titles below, in accordance with Idaho Code § 34-1809. Any person dissatisfied with a ballot title provided herein may appeal to the supreme court by petition, praying for a different title and setting forth the reason why the title is insufficient or unfair.

EXECUTIVE OFFICE
P.O. BOX 83720, BOISE, IDAHO 83720-0010
TELEPHONE: (208) 334-2400, FAX: (208) 854-8071
LOCATED AT 700 W. JEFFERSON STREET, SUITE 210

BALLOT TITLES

I. Short Ballot Title

Measure establishing a right to make and carry out reproductive decisions, including a right to abortion up to fetus viability.

II. Long Ballot Title

The measure seeks to change Idaho's laws by introducing a right to reproductive freedom and privacy including a right to abortion up to the point of the fetus's ability to survive outside the womb. After fetal viability, there would be no general right to abortion except in case of a "medical emergency." The "medical emergency" exception would expand Idaho's current life exception and allow abortions when a pregnant woman faces a complicating physical condition that threatens her life or health, including "serious impairment to a bodily function" or "serious dysfunction of any bodily organ or part."

The proposed measure codifies a right to make reproductive decisions, including contraception, fertility treatment, and prenatal and postpartum care. The measure seeks to prevent the state from enforcing current abortion laws protecting the life of the unborn child. It would also impose a requirement that any restrictions on reproductive freedom and privacy, including abortion prior to fetus viability, must be justified by a "compelling state interest" that must be "limited solely to improving or maintaining the health of an individual seeking care." The measure would also prevent the state from penalizing patients, healthcare providers, or anyone who assists in exercising the proposed right.

Please contact me if you have any questions or comments.

Sincerely,

Raúl R. Labrador

RAÚL R. LABRADOR
Attorney General

IDAHOANS UNITED for Women & Families

October 3, 2024

To the Honorable Phil McGrane
Secretary of State
P.O. Box 83720
Boise, ID 83720-0080

Re: Reproductive Freedom and Privacy Act Initiative – Certificate of Review

Dear Secretary McGrane,

This letter is written to accompany our return of the enclosed Reproductive Freedom and Privacy Act Initiative for the assignment of a ballot title pursuant to Idaho Code section 34-1809(2). As you are aware, we originally filed Petitions for four possible Initiatives on this subject matter. We have decided to move forward with **only** the enclosed measure, previously identified by the Attorney General as Right to Reproductive Freedom and Privacy (fetal viability), for the assignment of ballot titles.

Please note that after reviewing the Attorney General's Certificate of Review, we have made several changes to the text of the Initiative. One such change was to clarify that the provisions of the Initiative do not create additional financial obligations for the State for the delivery of certain health care services. Because of this change, we request that your Office request the official fiscal impact statement for the Initiative from the Division of Financial Management that reflects the Initiative's enclosed language.

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Very truly yours,

Melanie Folwell

Melanie Folwell

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        iii. Fertility Treatment;
        iv. Prenatal and Postpartum care;
        v. Childbirth;
        vi. Continuing one's own pregnancy;
        vii. Miscarriage care; and,
        viii. Abortion care.

    b. A person's voluntary exercise of their right to reproductive freedom and privacy and privacy shall not be infringed, burdened, or prohibited by the state, directly or indirectly, in any way; neither shall the state infringe, burden, or prohibit any acts or omissions taken by any person or entity to assist or facilitate an individual's exercise of the right to reproductive freedom and privacy and privacy unless the state action is justified by a compelling state interest achieved by the least restrictive means.

c. It shall not be a violation of the right to reproductive freedom and privacy for the state to regulate abortion care after fetal viability, except in cases of medical emergency.

2. For purposes of this section, the state's compelling interest is limited solely to improving or maintaining the health of an individual seeking care, consistent with accepted clinical standards of practice and evidence-based medicine, and does not infringe on that individual's autonomous decision-making.

3. Provided further that:

   a. In no case may abortion care provided consistent with this section provide a basis for professional discipline proceedings or for any civil or criminal liability against a health care professional solely on the basis that the medical professional knowingly attempted, performed, or induced an abortion.
   b. Nothing in this section will be deemed to bar or otherwise apply to any claim of medical malpractice against a health care professional for failing to comply with the applicable community standard of health care practice, as set forth in Section 6-1012, Idaho Code, in providing such abortion care.
   c. A health care professional's freedom of conscience pursuant to Section 18-611, Idaho Code, shall be preserved.

4. The provisions of this section are are to be liberally construed in favor of reproductive freedom and privacy and intended to control over any other section of Idaho Code, consistent with the following:

   a. Nothing in this section shall be construed to limit any right or access to abortion care that currently exists or is otherwise provided for or guaranteed by law.

   b. Nothing in this section shall be construed to impose a financial obligation on the state, its agencies, or their programs for delivery of health care services protected by this section.

5. The provisions of this section are also hereby declared to be severable and if any provision of this section or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this section.

6. As used in this section:

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to intentionally terminate a pregnancy.

b. "Childbirth" means the process of labor and delivery, including the stages of labor, the act of giving birth, and any immediate medical procedures related to the delivery of a child, whether by vaginal birth or cesarean section.

c. "Continuing one's own pregnancy" means decisions a pregnant patient makes to continue a pregnancy up until childbirth.

d. "Contraception" means an action taken to prevent pregnancy including any drug, device, procedure or biological product intended for use in the prevention of pregnancy.

e. "Fetal viability" means the point in a pregnancy when in the good faith judgment of an attending health care professional and based on the particular facts of the case known to the health care professional at the time, the fetus has a significant likelihood of sustained survival outside of the uterus without the application of extraordinary medical measures.

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g. "Health care professional" means any person licensed, certified or registered by the state of Idaho to deliver health care.

h. "Medical emergency" means a physical medical condition that, on the basis of the attending physician's good faith clinical judgment, based on the facts known at the time, and determined on a case-by-case basis, complicates the physical medical condition of a pregnant patient as to warrant an abortion:
    i. To protect a pregnant patient's life; or,
    ii. For which a delay may:
        1. Place the health of the pregnant patient in serious jeopardy;
        2. Cause serious impairment to a bodily function; or,
        3. Cause serious dysfunction of any bodily organ or part.

i. "Miscarriage Care" means treatments and procedures consistent with established medical practices in the treatment of a complete or incomplete spontaneous miscarriage by a licensed health care professional.

j. "Physician" means a person licensed to practice medicine and/or surgery or osteopathic medicine and surgery in this state as provided in chapter 18, title 54,

Idaho Code.

k. "Prenatal and postpartum care" means the medical services provided to a pregnant patient before, during, and after childbirth, including exams, treatments, diagnostic testing, and care necessary for the health of the pregnant patient, as well as postpartum recovery and support.

SECTION 2. This act shall be in full force and effect on and after January 1, 2027.

EXHIBIT H

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Planned Parenthood v. Casey

Planned Parenthood v. Casey, 505 U.S. 833 (1992), was a landmark decision of the Supreme Court of the United States in which the Court upheld the right to have an abortion as established by the "essential holding" of *Roe v. Wade* (1973) and issued as its "key judgment" the restoration of the undue burden standard when evaluating state-imposed restrictions on that right.[1] Both the essential holding of *Roe* and the key judgment of *Casey* were overturned by the Supreme Court in 2022, with its landmark decision in *Dobbs v. Jackson Women's Health Organization*.[2]

The case arose from a challenge to five provisions of the Pennsylvania Abortion Control Act of 1982; among the provisions were requirements for a waiting period, spousal notice, and (for minors) parental consent prior to undergoing an abortion procedure. In a plurality opinion jointly written by associate justices Sandra Day O'Connor, Anthony Kennedy, and David Souter, the Supreme Court upheld the "essential holding" of *Roe*, which was that the Due Process Clause of the Fourteenth Amendment to the United States Constitution protected a woman's right to have an abortion prior to fetal viability.[3]

The Court overturned the *Roe* trimester framework in favor of a viability analysis, thereby allowing states to implement abortion restrictions that apply during the first trimester of pregnancy. In its "key judgment," the Court overturned *Roe*'s strict scrutiny standard of review of a state's abortion restrictions with the undue burden standard, under which abortion restrictions would be unconstitutional when they were enacted for "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." Applying this new standard of review, the Court upheld four provisions of the Pennsylvania law, but invalidated the requirement of spousal

Planned Parenthood v. Casey

Supreme Court of the United States

Argued April 22, 1992
Decided June 29, 1992

Full case name	*Planned Parenthood of Southeastern Pennsylvania, et al. v. Robert P. Casey, et al.*
Citations	505 U.S. 833 (https://supreme.justia.com/us/505/833/case.html) (*more*) 112 S. Ct. 2791; 120 L. Ed. 2d 674; 1992 U.S. LEXIS 4751; 60 U.S.L.W. 4795; 92 Daily Journal DAR 8982; 6 Fla. L. Weekly Fed. S 663
Argument	Oral argument (https://www.oyez.org/cases/1991/91-744)
Opinion announcement	Opinion announcement (https://www.oyez.org/cases/1991/91-744)
	Case history
Prior	Judgment and injunction for plaintiffs, 686 F. Supp. 1089 (https://law.justia.com/cases/federal/district-courts/FSupp/686/1089/1362393/) (E.D. Pa. 1988); injunction clarified, 736 F. Supp. 633 (https://law.justia.com/cases/federal/district-courts/FSupp/736/633/1884392/) (E.D. Pa. 1990);

notification. Four justices wrote or joined opinions arguing that *Roe v. Wade* should have been struck down, while two justices wrote opinions favoring the preservation of the higher standard of review for abortion restrictions.

Background

In *Casey*, the plaintiffs challenged five provisions of the Pennsylvania Abortion Control Act of 1982 authored by state Rep. Stephen F. Freind,[4] arguing that the provisions were unconstitutional under *Roe v. Wade*. The Court in *Roe* was the first to establish abortion as a fundamental right protected by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. The majority in *Roe* further held that women have a privacy interest protecting their right to abortion embedded in the Due Process Clause of the Fourteenth Amendment. The five provisions at issue in *Casey* are summarized below.

- § 3205's informed consent — a woman seeking abortion had to give her informed consent prior to the procedure. The doctor had to provide her with specific information at least 24 hours before the procedure was to take place, including information about how the abortion could be detrimental to her health and about the availability of information about the fetus.
- § 3209's spousal notice — a married woman seeking abortion had to sign a statement declaring that she had notified her husband prior to undergoing the procedure, unless certain exceptions applied.
- § 3206's parental consent — minors had to get the informed consent of at least one parent or guardian prior to the abortion procedure. Alternatively, minors could seek judicial bypass in lieu of consent.
- § 3203's medical emergency definition — defining a medical emergency as "[t]hat condition, which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function."

	judgment and injunction granted for plaintiffs, 744 F. Supp. 1323 (https://law.justia.com/cases/federal/district-courts/FSupp/744/1323/1797783/) (E.D. Pa. 1990) (regarding 1988 amendments to 1982 Act); affirmed in part and reversed in part, 947 F. 2d 682 (https://law.justia.com/cases/federal/appellate-courts/F2/947/682/153995/) (3d Cir. 1991); certiorari granted, 502 U.S. 1056 (1992)
Subsequent	Remanded, 978 F.2d 74 (https://law.justia.com/cases/federal/appellate-courts/F2/978/74/183963/) (3d Cir. 1992); motion to disqualify judge denied, 812 F. Supp. 541 (https://law.justia.com/cases/federal/district-courts/FSupp/812/541/1762147/) (E.D. Pa. 1993); record reopened and injunctions continued, 822 F. Supp. 227 (https://law.justia.com/cases/federal/district-courts/FSupp/822/227/2002337/) (E.D. Pa. 1993); reversed and remanded, 14 F.3d 848 (https://law.justia.com/cases/federal/appellate-courts/F3/14/848/613189/) (3d Cir. 1994); stay denied, 510 U.S. 1309 (1994); attorney fees and costs awarded to plaintiffs, 869 F. Supp. 1190 (https://law.justia.com/cases/federal/district-courts/FSupp/869/1190/1495569/) (E.D. Pa. 1994); affirmed, 60 F.3d 816 (https://law.justia.com/cases/federal/appellate-courts/F3/60/816/565510/) (3d Cir. 1995)

Holding

1. Consideration of the fundamental constitutional question resolved by *Roe v. Wade*, principles of institutional integrity, and

- §§ 3207(b), 3214(a), and 3214(f)'s reporting requirements — certain reporting and record keeping mandates were imposed on facilities providing abortion services.

The case was a seminal one in the history of abortion decisions in the United States. It was the first case to provide an opportunity to overturn *Roe* since two liberal U.S. Associate Justices, William J. Brennan Jr. and Thurgood Marshall, had been replaced with the George H. W. Bush-appointed Justices David Souter and Clarence Thomas. Both were viewed, in comparison to their predecessors, as ostensible conservatives. This left the Court with eight Republican-appointed justices, five of whom had been appointed by Presidents Ronald Reagan or Bush, both of whom were well known for their opposition to *Roe*. Finally, the only remaining Democratic appointee was Justice Byron White, who had been one of the two dissenters from the original *Roe* decision and had stood by his dissent in his subsequent dissenting opinion in Thornburgh v. American College of Obstetricians & Gynecologists saying, "I continue to believe that this venture [the substantive due process right to abortion] has been fundamentally misguided since its inception". At this point, only two of the Justices were obvious supporters of *Roe v. Wade*: Harry Blackmun, the author of *Roe*, and John Paul Stevens, who had joined opinions specifically reaffirming *Roe* in *City of Akron v. Akron Center for Reproductive Health* and *Thornburgh v. American College of Obstetricians & Gynecologists*.

The case was argued by American Civil Liberties Union attorney Kathryn Kolbert for Planned Parenthood, with Linda J. Wharton serving as Co-Lead Counsel. Pennsylvania Attorney General, Ernie Preate, argued the case for the state, focusing mainly on how the law could be upheld without overturning Roe, though suggesting Roe be overturned as an alternative means of upholding the law. Upon reaching the Supreme Court, the United States joined the case as an *amicus curiae*, and U.S. Solicitor General, Ken Starr of the Bush Administration, defended the Act in part by urging the Court to overturn *Roe* as having been wrongly decided.

the rule of stare decisis require that Roe's essential holding be reaffirmed.

2. The Pennsylvania law that required spousal awareness prior to obtaining an abortion was invalid under the Fourteenth Amendment because it created an undue burden on married women seeking an abortion.

3. Requirements for parental consent, informed consent, and 24-hour waiting period were constitutionally valid regulations.

Third Circuit Court of Appeals affirmed in part and reversed in part.

Court membership

Chief Justice
William Rehnquist

Associate Justices
Byron White · Harry Blackmun
John P. Stevens · Sandra Day O'Connor
Antonin Scalia · Anthony Kennedy
David Souter · Clarence Thomas

Case opinions

Majority	O'Connor, Kennedy, and Souter (Parts I, II, III, V-A, V-C, and VI), joined by Blackmun and Stevens
Plurality	O'Connor, Kennedy, and Souter (Part V-E), joined by Stevens
Plurality	O'Connor, Kennedy, and Souter (Parts IV, V-B, and V-D)
Concur/dissent	Stevens
Concur/dissent	Blackmun
Concur/dissent	Rehnquist, joined by White, Scalia, and Thomas
Concur/dissent	Scalia, joined by Rehnquist, White, and Thomas

Laws applied

U.S. Const. amends. I, XIV; 18 Pa. Cons. Stat. §§ 3203, 3205–09, 3214 (Pennsylvania Abortion Control Act of 1982)

District Court's ruling

The plaintiffs were five abortion clinics, a class of physicians who provided abortion services, and one physician representing himself independently. They filed suit in the U.S. District Court for the Eastern District of Pennsylvania to enjoin the state from enforcing the five provisions and have them declared facially unconstitutional. The District Court, after a three-day bench trial, held that all the provisions were unconstitutional and entered a permanent injunction against Pennsylvania's enforcement of them.[5]

Overruled by

Dobbs v. Jackson Women's Health Organization (2022)

This case overturned a previous ruling or rulings

Roe v. Wade (1973) (in part), *City of Akron v. Akron Center for Reproductive Health* (1983), *Thornburgh v. American College of Obstetricians & Gynecologists* (1986)

Third Circuit Court of Appeals decision

The Court of Appeals for the Third Circuit affirmed in part and reversed in part, upholding all of the regulations except for the husband notification requirement.[6] The Third Circuit concluded that the husband notification was unduly burdensome because it potentially exposed married women to spousal abuse, violence, and economic duress at the hands of their husbands.[7] Then-Circuit Judge Samuel Alito sat on that three-judge appellate panel and dissented from the court's invalidation of that requirement. Thirty-one years later, as a Supreme Court Justice, Alito wrote the opinion in *Dobbs v. Jackson Women's Health Organization*, which overturned *Roe* and *Casey*.[8][9]

Supreme Court's consideration

At the conference of the Justices two days after oral argument, Souter defied expectations, joining Justices Stevens, Blackmun, and Sandra Day O'Connor, who had all dissented three years earlier in *Webster v. Reproductive Health Services* with regard to that plurality's suggested reconsideration and narrowing of *Roe*. This resulted in a precarious five-Justice majority consisting of Chief Justice William Rehnquist, Byron White, Antonin Scalia, Anthony Kennedy, and Clarence Thomas that favored upholding all five contested abortion restrictions and overturning *Roe*; however, Kennedy changed his mind shortly thereafter, and joined with fellow Reagan-Bush justices O'Connor and Souter to write a plurality opinion that would reaffirm *Roe*.[10]

Supreme Court's opinions

Except for the three opening sections of the O'Connor–Kennedy–Souter opinion, *Casey* was a divided judgment, as no other sections of any opinion were joined by a majority of justices. The plurality opinion jointly written by Justices O'Connor, Kennedy, and Souter was recognized as the principal opinion.[11][a]

O'Connor, Kennedy, and Souter plurality opinion

In the 1992 case of *Planned Parenthood v. Casey*, the authors of the plurality opinion abandoned *Roe's* strict trimester framework but maintained its central holding that women have a right to have an abortion before viability.[1] *Roe* had held that statutes regulating abortion must be subject to "strict scrutiny"—the traditional Supreme Court test for impositions upon fundamental Constitutional rights. *Casey* instead re-adopted the lower, undue burden standard for evaluating state abortion restrictions,[b] but re-emphasized the right to abortion as grounded in the general sense of liberty and privacy protected under the constitution.[c] The authors of the plurality opinion likewise noted the U.S. government's previous challenges to *Roe v. Wade*[d] and expounded on the concept of "liberty."[e]

Upholding the "essential holding" in *Roe*

Justices Anthony Kennedy, David Souter, and Sandra Day O'Connor, all appointed by Republican presidents, defied expectations and helped craft the three-justice plurality opinion that refused to overturn *Roe*.

The plurality opinion stated that it was upholding what it called the "essential holding" of *Roe*. The essential holding consisted of three parts: (1) Women had the right to have an abortion prior to viability and to do so without undue interference from the State; (2) the State could restrict the abortion procedure post-viability, so long as the law contained exceptions for pregnancies which endangered the woman's life or health; and (3) the State had legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.[12] The plurality asserted that the fundamental right to abortion was grounded in the Due Process Clause of the Fourteenth Amendment, and the plurality reiterated what the Court said in *Eisenstadt v. Baird*: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

Stare decisis analysis

The plurality's opinion included a thorough discussion on the doctrine of *stare decisis* (respect of precedent), and provided a clear explanation for why the doctrine had to be applied in *Casey* with regards to *Roe*. The authors of the plurality opinion emphasized that *stare decisis* had to apply in *Casey* because the *Roe* rule had not been proven intolerable; the rule had become subject "to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation"; the law had not developed in such a way around the rule that left the rule "no more than a remnant of abandoned doctrine"; and the facts had not changed, nor viewed differently, to "rob the old rule of significant application or justification."[13] The plurality acknowledged that it was important for the Court to stand by prior decisions, even those decisions some found unpopular, unless there was a change in the fundamental reasoning underpinning the previous decision. The authors of the plurality opinion, making a special note of the precedential value of *Roe v. Wade*, and specifically how women's lives were changed by that decision,[14] stated,

> The sum of the precedential enquiry to this point shows Roe's underpinnings unweakened in any way affecting its central holding. While it has engendered disapproval, it has not been unworkable. An entire generation has come of age free to assume Roe's concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions; no erosion of principle going to liberty or personal autonomy has left Roe's central holding a doctrinal remnant.[15][14]

The authors of the plurality opinion also acknowledged the need for predictability and consistency in judicial decision making. For example,

> Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in Roe and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."[16]

The plurality went on to analyze past judgments refusing to apply the doctrine of stare decisis, such as *Brown v. Board of Education*. There, the authors of the plurality opinion explained, society's rejection of the "Separate but Equal" concept was a legitimate reason for the *Brown v. Board of Education* court's rejection of the *Plessy v. Ferguson* doctrine.[17] Emphasizing the lack of need to overrule the essential holding of *Roe,* and the Court's need to not be seen as overruling a prior decision merely because the individual members of the Court had changed, the authors of the plurality opinion stated,

> Because neither the factual underpinnings of Roe's central holding nor our understanding of it has changed (and because no other indication of weakened precedent has been shown), the Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973.[18]

The plurality further emphasized that the Court would lack legitimacy if it frequently changed its Constitutional decisions, stating,

> The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make.[19]

Since the O'Connor-Kennedy-Souter plurality overruled some portions of *Roe v. Wade* despite its emphasis on *stare decisis*, Chief Justice Rehnquist in dissent argued that this section was entirely *obiter dicta*. All these opening sections were joined by Justices Blackmun and Stevens for the majority. The remainder of the decision did not command a majority, but at least two other Justices concurred in judgment on each of the remaining points.

Viability of the fetus

Although it upheld the "essential holding" in *Roe*, and recognized that women had some constitutional liberty to terminate their pregnancies, the O'Connor–Kennedy–Souter plurality overturned the *Roe* trimester framework in favor of a viability analysis. The *Roe* trimester framework completely forbade states from regulating abortion during the first trimester of pregnancy, permitted regulations designed to protect a woman's health in the second trimester, and permitted prohibitions on abortion during the third trimester (when the fetus becomes viable) under the justification of fetal protection, and so long as the life or health of the mother was not at risk.[20] The plurality found that continuing advancements in medical technology had proven that a fetus could be considered viable at 23 or 24 weeks rather than at the 28 weeks previously understood by the Court in *Roe*.[15] The plurality thus redrew the line of increasing state interest at viability because of increasing medical accuracy about when fetus viability takes place. Likewise, the authors of the plurality opinion felt that fetus viability was "more workable" than the trimester framework.[21] Under this new fetus viability framework, the plurality held that at the point of viability and subsequent to viability, the state could promote its interest in the "potentiality of human life" by regulating, or possibly proscribing, abortion "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[22] Prior to fetus viability, the plurality held, the State can show concern for fetal development, but it cannot pose an undue burden on a woman's fundamental right to abortion.[23] The plurality reasoned that the new pre- and post-viability line would still uphold the essential holding of *Roe*, which recognized both the woman's constitutionally protected liberty, and the State's "important and legitimate interest in potential life."[f]

Undue burden standard

Justice Sandra Day O'Connor was one of the three authors of the "undue burden" standard that she first advocated for in earlier abortion rulings.

In replacing the trimester framework with the viability framework, the plurality also replaced the strict scrutiny analysis under *Roe*, with the "undue burden" standard previously developed by O'Connor in her dissent in *Akron v. Akron Center for Reproductive Health*.[25] According to the dissenters in *Akron*, the undue burden standard had been the governing rule in Roe's first decade. A legal restriction posing an undue burden is one that has "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[26] An undue burden is found even where a statute purports to further the interest of potential life or another valid state interest, if it places a substantial obstacle in the path of access to abortion.[26] The Supreme Court in the 2016 case *Whole Woman's Health v. Hellerstedt* clarified what the 'undue burden' test requires: "*Casey* requires courts to consider the burdens a law imposes on abortion access together with the benefits those laws confer."[27][28] The Supreme Court further clarified in the 2020 *June Medical Services, LLC v. Russo* opinion written by Justice Stephen Breyer with respect to the undue burden standard: "[T]his standard requires courts independently to review the legislative findings upon which an abortion-related statute rests and to weigh the law's "asserted benefits against the burdens" it imposes on abortion access. 579 U.S., at ___(slip op., at 21) (citing *Gonzales v. Carhart*, 550 U. S. 124, 165 (2007))."[29] In *Whole Woman's Health v. Hellerstedt* the court described the undue burden standard in its overall context with these words:

> We begin with the standard, as described in *Casey*. We recognize that the "State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." *Roe v. Wade*, 410 U. S. 113, 150 (1973). But, we added, "a statute which, while furthering [a] valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." *Casey*, 505 U. S., at 877 (plurality opinion). Moreover, "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." *Id.*, at 878.[30]

In applying the new undue burden standard, the plurality overruled *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986),[31] each of which applied "strict scrutiny" to abortion restrictions.[32]

Applying this new standard to the challenged Pennsylvania Act, the plurality struck down the spousal notice requirement, finding that for many women, the statutory provision would impose a substantial obstacle in their path to receive an abortion.[33] The plurality recognized that the provision gave too much power to husbands over their wives ("a spousal notice requirement enables the husband to wield an effective veto over his wife's decision"), and could worsen situations of spousal and child abuse.[34] In finding the provision unconstitutional, the authors of the plurality opinion clarified that the focus of the undue burden test is on the group "for whom the law is a restriction, not the group for whom the law is irrelevant."[35] Otherwise stated, courts should not focus on what portion of the population is affected by the legislation, but rather on the population the law would restrict.[g] The plurality upheld the remaining contested regulations – the State's informed consent and 24-hour waiting period, parental consent requirements, reporting requirements, and the "medical emergencies" definition – holding that none constituted an undue burden.[37]

Notably, when the authors of the plurality discuss the right to privacy in the joint opinion, it is all within the context of a quotation or paraphrase from *Roe* or other previous cases. The authors of the plurality opinion do not, however, explicitly or implicitly state that they do not believe in a right to privacy, or that they do not support the use of privacy in *Roe* to justify the fundamental right to abortion. Justice Blackmun would not agree with an implication asserting otherwise, stating "[t]he Court today reaffirms the long recognized rights of privacy and bodily integrity."

Key judgment

Chief Justice John Roberts's concurrence in the 2020 *June Medical Services, LLC v. Russo* case noted the key outcomes in *Casey*: "The several restrictions that did not impose a substantial obstacle were constitutional, while the restriction that did impose a substantial obstacle was unconstitutional."[38] Before an abortion regulation can be struck down as unconstitutional there must be a determination that this regulation imposes a substantial obstacle in light of the undue burden standard explained in the section above.[39] In *Casey* "the justices imposed a new standard to determine the validity of laws restricting abortions. The new standard asks whether a state abortion regulation has the purpose or effect of imposing an "undue burden", which is defined as a "substantial obstacle in the path of a

woman seeking an abortion before the fetus attains viability."[40][41] The key judgment of *Casey* can be summed up as follows: "Under *Casey*, abortion regulations are valid so long as they do not pose a substantial obstacle and meet the threshold requirement of being "reasonably related" to a "legitimate purpose." *Id.*, at 878; *id.*, at 882 (joint opinion)."[42]

Concurrence/dissents

Justices Harry Blackmun and John Paul Stevens, who both joined the plurality in part, also each filed opinions concurring in the Court's judgment in part and dissenting in part. Chief Justice William Rehnquist filed an opinion concurring in the Court's judgment in part and dissenting in part, which was joined by Justices Byron White, Antonin Scalia, and Clarence Thomas, none of whom joined any part of the plurality. Justice Scalia also filed an opinion concurring in the judgment in part and dissenting in part, which was also joined by Rehnquist, White, and Thomas.

Rehnquist and Scalia, joined by White and Thomas

Rehnquist and Scalia each joined the plurality in upholding the parental consent, informed consent, and waiting period laws. However, they dissented from the plurality's decision to uphold *Roe v. Wade* and strike down the spousal notification law, contending that *Roe* was incorrectly decided. In his opinion, Chief Justice Rehnquist questioned the fundamental right to an abortion, the "right to privacy", and the strict scrutiny application in *Roe*.[43] He also questioned the new "undue burden" analysis under the plurality opinion, instead deciding that the proper analysis for the regulation of abortions was rational-basis.[44]

Chief Justice William Rehnquist was the senior justice of the four that dissented against the upholding of *Roe*.

In his opinion, Justice Scalia also argued for a rational-basis approach, finding that the Pennsylvania statute in its entirety was constitutional.[45] He argued that abortion was not a "protected" liberty, and as such, the abortion liberty could be intruded upon by the State.[46] To this end, Justice Scalia concluded this was so because an abortion right was not in the Constitution, and "longstanding traditions of American society" have allowed abortion to be legally proscribed.[47] Rehnquist and Scalia joined each other's concurrence/dissents. White and Thomas, who did not write their own opinions, joined in both.

Stevens and Blackmun

Justices Blackmun and Stevens wrote opinions in which they approved of the plurality's preservation of *Roe* and rejection of the spousal notification law. They did not agree with the plurality's decision to uphold the other three laws at issue.

Justice Stevens concurred in part and dissented in part. Justice Stevens joined the plurality's preservation of *Roe* and rejection of the spousal notification law, but under his interpretation of the undue burden standard ("[a] burden may be 'undue' either because the burden is too severe or because it lacks a legitimate rational justification"), he would have found the information requirements in §§ 3205(a)(2)(i)–(iii) and § 3205(a)(1)(ii), and the 24-hour waiting period in §§

Justice Harry Blackmun, the original author of *Roe*, would have struck down all of the Pennsylvania abortion restrictions, continuing to apply strict scrutiny.

3205(a)(1)–(2) unconstitutional.[48] Instead of applying an undue burden analysis, Justice Stevens would have preferred to apply the analyses in *Akron* and *Thornburgh,* two cases that had applied a strict scrutiny analysis, to reach the same conclusions.[49] Justice Stevens also placed great emphasis on the fact that women had a right to bodily integrity, and a constitutionally protected liberty interest to decide matters of the "highest privacy and the most personal nature."[50] As such, Justice Stevens felt that a State should not be permitted to attempt to "persuade the woman to choose childbirth over abortion"; he felt this was too coercive and violated the woman's decisional autonomy.[51]

Justice Blackmun concurred in part, concurred in the judgment in part, and dissented in part. He joined the plurality's preservation of *Roe* – of which he wrote the majority – and he, too, rejected the spousal notification law.[52] Justice Blackmun, however, argued for a woman's right to privacy and insisted, as he did in *Roe*, that all non-*de-minimis* abortion regulations were subject to strict scrutiny.[53] Using such an analysis, Justice Blackmun argued that the content-based counseling, the 24-hour waiting period, informed parental consent, and the reporting regulations were unconstitutional.[54] He also dissented from the plurality's undue burden test, and instead found his trimester framework "administrable" and "far less manipulable".[55] Blackmun even went further in his opinion than Stevens, sharply attacking and criticizing the anti-*Roe* bloc of the Court.

Supreme Court's holdings overturned

In May 2022, *Politico* obtained a leaked initial draft majority opinion written by Justice Samuel Alito suggesting that the Supreme Court was poised to overturn *Casey* along with *Roe* in a pending final decision on *Dobbs v. Jackson Women's Health Organization*.[8] On June 24, 2022, the final opinion was issued,[56] with the Court overturning the "essential opinion" in *Roe*,[h] criticizing the *Casey* Court's failure to address the deficiencies of the *Roe* decision[i] and overturning the "key judgment" in *Casey*.[j]

The dissenting opinion[56] disputed the majority's opinion that the "undue burden" standard was not workable, and criticized the majority for overturning precedent,[k] holding that their reasoning was not sufficient to overrule *Roe* and *Casey*,[l] which they described as a precedent about precedent, and warned that by the same reasoning many other rights would be under threat.[m]

See also

- *Griswold v. Connecticut*, holding that a Connecticut statute prohibiting the use of contraceptives violated the right to marital privacy.
- *Eisenstadt v. Baird*, extending the Court's holding in *Griswold* to unmarried couples on the grounds of equal protection.

- *Roe v. Wade*, holding that the Due Process Clause protects a woman's right to obtain an abortion under certain circumstances.
- *Dobbs v. Jackson Women's Health Organization*, overruling *Roe* and *Casey*.
- 2022 abortion rights protests in the United States

Notes

a. The term "principal opinion" has been used to refer to an opinion, part of which is a majority opinion and part of which is a plurality opinion, see Parker v. Randolph, 442 U. S. 62, 77, 78, 80 (1979) (Blackmun, J., concurring in part and concurring in judgment), and to an opinion, part of which is a majority opinion and part of which is a nonplurality opinion, see Idaho v. Coeur d'Alene Tribe of Idaho, 521 U. S. 261, 288-297 (1997) (O'Connor, J., concurring in part and concurring in judgment).

b. "To protect the central right recognized by *Roe v. Wade* while at the same time accommodating the State's profound interest in potential life, we will employ the undue burden analysis as explained in this opinion. An undue burden exists, and therefore, a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[1]

c. "Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. It declares that no State shall "deprive any person of life, liberty, or property, without due process of law." The controlling word in the cases before us is 'liberty'."[1]

d. "Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages, *Roe v. Wade* (1973), that definition of liberty is still questioned. Joining the respondents as *amicus curiae*, the United States, as it has done in five other cases in the last decade, again asks us to overrule *Roe*."[1]

e. "Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Our cases recognize "the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Our precedents "have respected the private realm of family life which the state cannot enter." These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[1]

f. "[T]o protect the central right recognized by *Roe v. Wade* while at the same time accommodating the State's profound interest in potential life, we will employ the undue burden analysis as explained in this opinion.").[24]

g. "The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."[36]

h. "[T]he Court finds the Fourteenth Amendment clearly does not protect the right to an abortion ... The Court concludes the right to obtain an abortion cannot be justified as a component of [a broader entrenched right that is supported by other precedents] ... The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. Roe and Casey arrogated that authority ... ."

i. "Casey, in short, either refused to reaffirm or rejected important aspects of *Roe*'s analysis, failed to remedy glaring deficiencies in *Roe*'s reasoning, endorsed what it termed *Roe*'s central holding while suggesting that a majority might not have thought it was correct, provided no new support for the abortion right other than *Roe*'s status as precedent, and imposed a new test with no firm grounding in constitutional text, history, or precedent ... ."

j. "Under the Court's precedents, rational-basis review is the appropriate standard to apply when state abortion regulations undergo constitutional challenge. Given that procuring an abortion is not a fundamental constitutional right, it follows that the States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot 'substitute their social and economic beliefs for the judgment of legislative bodies.'"

k. "By overruling *Roe*, *Casey*, and more than 20 cases reaffirming or applying the constitutional right to abortion, the majority abandons *stare decisis*, a principle central to the rule of law. '*Stare decisis*' means 'to stand by things decided.' ... It maintains a stability that allows people to order their lives under the law."

l. "*Stare decisis* also 'contributes to the integrity of our constitutional system of government' by ensuring that decisions 'are founded in the law rather than in the proclivities of individuals.' As Hamilton wrote: It 'avoid[s] an arbitrary discretion in the courts.' And as Blackstone said before him: It 'keep[s] the scale of justice even and steady, and not liable to waver with every new judge's opinion.' The 'glory' of our legal system is that it 'gives preference to precedent rather than . . . jurists.' ... That means the Court may not overrule a decision, even a constitutional one, without a 'special justification.' *Stare decisis* is, of course, not an 'inexorable command'; it is sometimes appropriate to overrule an earlier decision. But the Court must have a good reason to do so over and above the belief 'that the precedent was wrongly decided.'"

m. "And no one should be confident that this majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation. Most obviously, the right to terminate a pregnancy arose straight out of the right to purchase and use contraception. In turn, those rights led, more recently, to rights of same-sex intimacy and marriage. They are all part of the same constitutional fabric, protecting autonomous decisionmaking over the most personal of life decisions. The majority (or to be more accurate, most of it) is eager to tell us today that nothing it does 'cast[s] doubt on precedents that do not concern abortion.' But how could that be? The lone rationale for what the majority does today is that the right to elect an abortion is not 'deeply rooted in history': Not until *Roe*, the majority argues, did people think abortion fell within the Constitution's guarantee of liberty. The same could be said, though, of most of the rights the majority claims it is not tampering with. The majority could write just as long an opinion showing, for example, that until the mid-20th century, 'there was no support in American law for a constitutional right to obtain [contraceptives].' So one of two things must be true. Either the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid-19th century are insecure. Either the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other."

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