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Idaho Supreme Court
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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 Administrator of the Idaho Division of Financial Management; and IDAHO DIVISION OF FINANCIAL MANAGEMENT, Respondents.	Case No. 52636-2025 **ORIGINAL ACTION**

PETITIONER'S REPLY TO RESPONSE BRIEF OF LORI WOLFF AND IDAHO DIVISION OF FINANCIAL MANAGEMENT TO VERIFIED PETITION

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INTRODUCTION

The Division of Financial Management's fiscal impact statement for Idahoans United's Reproductive Freedom and Privacy Initiative fails to accomplish the purpose of Idaho Code section 34-1812, which is to provide Idaho voters with an easy-to-understand statement of the immediate and projected fiscal impacts of the Initiative.

Section 34-1812 requires that the Division ground its fiscal projections in supportable assumptions and unbiased, good faith reasoning, using clear and concise language. The Division's FIS fails to comport with the plain meaning of these statutory requirements because it is incorrect, misleading, and ultimately prejudicial to the Initiative. The FIS reflects costs that do not exist, injects a huge dollar figure –$850 million– for a state Medicaid budget, and uses confusing wording. The resulting FIS is not surprising, given the Division did not proceed in its work with the sincere intent to prepare an unbiased, good faith statement of fiscal impacts. Instead, the Division started with an unsubstantiated conclusion, and then, when the Initiative was amended and resubmitted with a clarifying cost provision, it determined it had to show the Initiative would cost at least *something*, in order to deter other initiative proponents from including similar cost provisions in future ballot measures.

The Division argues its statutory duty to prepare a fiscal impact statement stops in the preparation and is not subject to judicial review. The Division invites the Court to give it unfettered discretion to prepare a position statement on the fiscal impact of any citizens initiative. The Division suggests that petition sponsors can simply present their own view of the fiscal impacts while canvasing for signatures. If the Court accepts this invitation and declines to

exercise its original jurisdiction and say what the law means, it will give the Division the last word with every Idaho voter.

ARGUMENT

I. Original Jurisdiction is Proper.

Idahoans United properly seeks writs of certiorari and mandamus because it meets the requirements for each writ to be granted and seeks the appropriate scope of relief from the Court thereunder.

A. The issuance of a writ of certiorari is proper.

Idahoans United's request for a writ of certiorari is proper because its request for review meets the two requirements for it to be granted: (1) Idahoans United has no plain, speed and adequate remedy absent the Court's review; and (2) the Division is exercising a quasi-judicial function and has not met its statutory duties in performing it.

A writ of certiorari (sometimes called a writ of review) "may be granted . . . when an inferior tribunal, board or officer exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy." *Union Pac. Land Res. Corp. v. Shoshone Cty. Assessor*, 140 Idaho 528, 532, 96 P.3d 629, 633 (2004) (cleaned up and citations omitted). "It is the nature of the act rather than of the office or board which performs the act that determines whether or not it is the discharge of a judicial or quasi-judicial function." *Lansdon v. State Bd. of Canvassers*, 18 Idaho 596, 603, 111 P. 133, 135 (1910).

1. Idahoans United has no other speedy and adequate remedy.

The issuance of a writ of certiorari is proper because Idahoans United has no other speedy avenue to obtain relief directing the Division prepare a new, statutorily compliant fiscal

impact statement for the Initiative. The Division failed to fulfill its duty to issue a fiscal impact statement that complies with section 34-1812. Idahoans United faces irreparable injury unless the Court weighs in on this urgent matter affecting the constitutional right of the electorate to fairly exercise the initiative power. This is because Idahoans United cannot begin collecting signatures for the Initiative until it has valid certified ballot titles and a valid FIS. *See Idahoans for Open Primaries v. Labrador (In re Verified Petition for Writs of Certiorari & Mandamus)*, 172 Idaho 466,475-76, 533 P.3d at 1271-72 (2023); *see also Buchin v. Lance* (*In re Writ of Prohibition Entitled "Ballot Title Challenge Oral Argument Requested*"), 128 Idaho 266, 273, 912 P.2d 634, 641 (1995).

Although section 34-1812 does not expressly provide a direct avenue for certification of the issue of a non-compliant fiscal impact statement to the Court, a writ of certiorari is available regardless. As with ballot titles, the Court may entertain challenges to fiscal impact statements under its original jurisdiction notwithstanding the inclusion (or exclusion) of an express provision. *See, e.g.*, *In re Idaho State Federation of Labor*, 75 Idaho 367, 374, 272 P.2d 707, 711 (1954)) (reviewing ballot titles through writ of certiorari under original jurisdiction instead of in direct reliance on section 34-1809); *see also Idahoans for Open Primaries*, 172 Idaho at 489, 533 P.3d at 1285; *Regan v. Denney*, 165 Idaho 15, 20, 437 P.3d 15, 20 (2019).

The fundamental purpose of the Court's exercise of its original jurisdiction to issue a writ of certiorari (and mandamus) is present here. Idahoans United's request involves an urgent matter of grave constitutional importance and thus is directly grounded "in the writs enumerated in Article V, section 9 of the Idaho Constitution." *Labrador v. Idahoans for Open Primaries*, 554 P.3d 85, 96 (Idaho 2024). Idahoans United has demonstrated "that the case presents a justiciable controversy and […] that it also satisfies the legal criteria for the relief sought," which in this

initiated measure context is "the issuance of a writ." *Id.*, 554 P.3d at 90; *see also Ybarra v. Legis. of Idaho*, 166 Idaho 902, 906, 466 P.3d 421, 425 (2020) (quoting I.A.R. 5(a)) ("Any person may apply to the Supreme Court for the issuance of any extraordinary writ or other proceeding over which the Supreme Court has original jurisdiction."). Article V section 9 of the Idaho Constitution "grants [the] Court original jurisdiction to issue a declaration of law when necessary to adjudicate a claim for one of the enumerated writs." *Idaho State Ath. Comm'n v. Office of the Admin. Rules Coordinator*, 542 P.3d 718, 726 (Idaho 2024).

The Division does not dispute the foregoing bright-line conclusions. Instead, the Division argues its statutory duty to prepare a fiscal impact statement is not subject to judicial review. The Court should reject the Division's invitation to give it unfettered discretion because it is incorrect and anti-democratic.

2. The relief sought by Idahoans United through a writ of certiorari is proper.

In addition to the fact that Idahoans has no plain, speedy and adequate remedy absent the Court's exercise of its original jurisdiction, the Court may properly issue a writ of certiorari because the Division's act in preparing a fiscal impact statement is quasi-judicial. *Union Pac. Land Res. Corp.*, 140 Idaho at 532, 96 P.3d at 633. Thus, the Court may review section 34-1812, say what the law means, and determine whether the FIS prepared by the Division comports therewith.

a) The Division exercises a quasi-judicial function.

Parties or entities perform a manner of different types of quasi-judicial functions. However, the salient characteristics of the function are neutrality in the performance of the act in question, analysis based on information both readily available and outside information (whether

gathered for the party's consideration or by the party), and the issuance of a decision based on such work.

These characteristics of a quasi-judicial function were each noted in the role of the Attorney General when preparing short and long ballot titles. *Buchin*, 128 Idaho at 270, 912 P.2d at 638 (citing *Fed'n of Labor*, 75 Idaho at 374, 272 P.2d at 711).

In *Buchin*, the Court held that the Attorney General acts in a quasi-judicial function when analyzing and determining the distinctive characteristics of an initiative, and in phrasing a title. *Id.* at 374, 272 P.2d at 711. As the Court explained, in doing such work the Attorney General is "not an advocate or an adversary" and "must perforce analyze and appraise the proposed legislation, determine what it means and its distinctive characteristics and endeavor to ascertain how it is commonly referred to or spoken of." *Id.* Concluding thus that in "drafting and making" a title the Attorney General exercises a quasi-judicial function. *Id.* This conclusion followed the Court's determination of what the requirement in Idaho Code section 34-1809 that a short title to be "distinctive" meant. *Id.* (citing *Fed'n of Labor*, at 373, 272 P.2d at 710).

Notable are the similarities between the Attorney General's quasi-judicial function in preparing titles and the Division's role in preparing a fiscal impact statement.[1] The Division is charged with preparing an "unbiased, good faith statement of the fiscal impact of the law proposed by the initiative." Idaho Code § 34-1812(1). Thus, like the Attorney General, the Division acts "not as an advocate or an adversary." *Fed'n of Labor*, at 374, 272 P.2d at 710-11. The Division must review the initiative petition and consult with appropriate state or local agencies. Idaho Code § 34-1812(1). After doing so, the Division must prepare a fiscal impact

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[1] Like ballot titles, a fiscal impact statement accompanies a proposed measure every step of the way to the ballot box. It must be provided to prospective signers, it must be posted by the Secretary of State in the voter guide with the proposed legislation, and it must be printed on the ballot along with the titles. Idaho Code § 23-1812(3).

statement that describes, among other things, increases and decreases in revenues and costs, and both the expected immediate impacts and any long-term financial implications. *Id.* § 34-1812(2). Thus, like the Attorney General, the Division must "perforce analyze and apprise the proposed legislation" and "endeavor to ascertain" various categories of fiscal impacts. Therefore, in "drafting and making" the fiscal impact statement, the Division exercises a quasi-judicial function. *Fed'n of Labor*, at 374, 272 P.2d at 710-11.

b) Meaningful statutory standards are necessary to safeguard the constitutional right to legislate by initiative.

A fiscal impact statement that does not clearly and concisely provide voters with an unbiased, good faith statement of the measure's fiscal impacts could doom the chances of an otherwise likely successful measure. A majority of Idahoans have beliefs about access to abortion care that do not align with current Idaho law. Petitioner's Br. at 3-4. Idahoans United seeks to place its Initiative on the ballot to provide Idaho voters the opportunity to meaningfully consider restoring reproductive freedom. But, as Dr. Shulman provides, the Division's FIS for the Initiative may confuse voters about how much that will cost the state. *See* Declaration of Dr. Hillary C. Shulman ("Shulman Decl."), ¶ 6, Ex. A. This is because the language used by the Division is likely to confuse and create feelings of distrust wholly unrelated to the healthcare protections the Initiative would enshrine in Idaho law. *Id.*

The Court's review and articulation of what section 34-1812 requires will benefit everyone—those who bring initiative petitions (regardless of the topic) and those tasked with preparing the statements. And, in the event that a genuine disagreement arises about whether a fiscal impact statement prepared for an initiative is substantially compliant with the statutory requirements, the avenue for plain, speedy and adequate resolution will be clear.

c) The Division's definition of a quasi-judicial function is constrained and unsupported by law.

The Division analysis constrains discussion to the "key attributes" of whether an agency's *decision* is quasi-judicial *See* DFM Br. at 14-15. The Division defines those as whether the process of reaching the decision involves notice, and the effect of a decision on individual rights. *Id.* (citing decisions from Arizona, Georgia, Minnesota, and New York).

The Division's cited cases do not show, however, that the act of preparing a fiscal impact statement is not indeed quasi-judicial. For instance, in *Interstate Power Co. v. Nobles Cty. Bd. of Comm'rs*, the Minnesota Supreme Court declared a zoning board's ruling on a conditional use permit application was quasi-judicial because it had "*the function* adjudicative in nature, of applying specific use standards set by the zoning ordinance to a particular individual use." 617 N.W.2d 566, 574 (Minn. 2000) (emphasis added). The Court in *Interstate Power* held that application of the function, *i.e.* the decision it reached, "was subject to review on certiorari" because the board was acting in an "adjudicative capacity." *Id.* Here, the Division has *the function*, adjudicative in nature, of considering the proposed Initiative's fiscal impact, based on its consideration of financial data, and current law (and then rendering its decision).

The Division argues exercise of discretion alone is insufficient to turn a legislative function into a quasi-judicial one. *See Neddo v. Schrade*, 200 N.E. 657, 659 (N.Y. 1936) (where changing property from one some to another was a legislative act). The Division then primarily constrains its discussion to situations where a party's property right or the rights of citizens at large are at issue, asserting in such situations the requirement of notice is characteristic of the quasi-judicial functions being performed. *See, e.g.*, *Stuart v. Winslow Elementary Sch. Dist.*, 414 P.2d 976, 985 (Ariz. 1966) (where school board order dividing the territory between school

districts was made without notice in violation of Arizona law). In *Stuart*, the Court explained that under the Arizona law at issue, any action taken by a public body "whether ministerial, legislative or judicial, which is wholly void for want of due process is a nullity." *Id.* at 983. The distinction was not simply required notice, but also the impact of the decision, which in that case affected property rights and the rights of citizens. *Id.* at 985.

To evade review, the Division asserts that it is performing a legislative (or administrative) function in preparing a fiscal impact statement—boiling down its work to a simple projection or estimate of the impact of the proposed legislation. Again, review of the cases cited by the Division to advance this argument shows it is without merit. *See Adleman v. Pierce*, 6 Idaho 294, 297-98, 55 P. 658, 658 (1898)) (city council passing an ordinance); *Interstate Power*, 617 N.W.2d at 569 (county board of commissioners amending a county zoning ordinance); *Neddo*, 200 N.E. at 657 (enacting an ordinance to change property from one zone to another); *Dorsten v. Port of Skagit Cty.*, 650 P.2d 220, 222 (Wash. Ct. App. 1982) (port authority raising moorage rates).

In the Division's cited cases, the legislative functions performed by the government actor share a common tie beyond the fact that each involved decisions of a zoning body and impacted property: the government actor's decisions applied a general rule or policy to the public generally, to an open class. That is not the case for the Division's work in preparing a FIS. There is no application of a general policy or rule to an open class of people. Instead, the Division must take up the work to discern what information is relevant, perform fact finding regarding the same, and then draw conclusions and determine how to communicate those conclusions in writing to the electorate in compliance with the dictates of section 34-1812.

Notably, even in the case of decisions by a zoning body, which are by and large legislative functions, the Court has rejected applying a general rule. *Cooper v. Bd. of Cty. Comm'rs*, 101 Idaho 407, 410, 614 P.2d 947, 950 (1980). In *Cooper*, the Court explained that a general rule would "shield from meaningful judicial review" "highly particularized land use decisions" where a zoning body exercises discretion in deciding whether to apply a policy to a particularized group or individual. *Id.* The Court reasoned that, "[o]nly by recognizing the adjudicative nature of these proceedings and by establishing standards for their conduct can the rights of the parties directly affected, whether proponents or opponents of the application, be given protection." *Id.* at 410-11, 614 P.2d at 950-51; *see also Lowery v. Bd. of Cty. Comm'rs*, 115 Idaho 64, 71, 764 P.2d 431, 438 (Ct. App. 1988) ("When acting upon a quasi-judicial zoning matter the governing board is neither a proponent nor an opponent of the proposal at issue, but sits instead in the seat of a judge.").

The Court's reasoning to reject a general rule in *Cooper* is instructive because parallel concerns are present here. To allow the Division the unfettered discretion it claims to have in preparing FISs, with no avenue for review, would likewise result in condoning "government by men rather than government by law." *Cooper*, 101 Idaho at 411, 614 P.2d at 951. Deference to the Division's "reading of the law" likewise contradicts the Legislature's recent expression that "[w]hen interpreting the provisions of *any* state law," not just the Idaho Administrative Procedure Act, "the court shall not defer to an agency's interpretation of the law or rule." Idaho Code § 67-5279.

Finally, the Division's constrained definition of a quasi-judicial function, as one confined by the process of "notice and hearing" and that usually "affects the property or rights of citizens," DFM Br. at 14, conflicts with the quasi-judicial function the Court found the Attorney

General performs by when preparing ballot titles. *See Buchin*, 75 Idaho at 374, 272 P.2d at 711. There was no required notice and hearing, no time for objection, and no impact to property rights. Instead, the salient characteristics were the Attorney General's function in a neutral capacity, review of the proposed legislation, analysis, information gathering, and then decision-making that results in preparation of informative written product meant to guide and inform voters. The function of the Division is the same and its arguments to the contrary should be rejected.

3. The Division's position that it should have unchecked discretion is untenable and anti-democratic.

The Division states that its function in preparing fiscal impact statements should not be reviewable, and petitioners' recourse is with the Legislature. *See* DFM Br. at 21. Yet, in nearly in the same breath, the Division acknowledges that the Legislature "has not authorized judicial review of fiscal impact statements, even though it clearly knew how." *Id.*

The Division asserts its statement is simply a "non-binding" point of view and nothing more. *Id.* But the Division acknowledges a fiscal impact statement supplies the public with information "by conveying the view of the government's budget experts." *Id.* at 16-17. Coupled with that, the Division takes the position that, "Idahoans United is free to tell any potential petition signers that they believe the statement is inaccurate or that the assumptions made in reaching the projection are erroneous." *Id.* at 17. However, the Division's statement literally goes into the ballot booth with the voter. Permitting the Division unfettered discretion, poses the very real and present danger that a fiscal impact statement will become a statement of the executive branch's support or opposition of a measure proposed by citizens. This invades the constitutional right.

The Division's resistance to being held to the substantial compliance standard is confounding—unless it wants to reserve for itself the right to speak to voters about its position on a proposed measure. It indeed is supplying the view of the executive branch on the fiscal impact of an initiative. It suggest citizen proponents can simply train signature gatherers to explain why a statement is wrong, rather than be required to fix it. The Division's position is antithetical to its duty to prepare unbiased, good faith statements of a proposed initiative's fiscal impact and should be rejected by the Court.

B. The issuance of writ of mandamus is proper.

Idahoans United seeks a writ of mandamus to require the Division to prepare a new fiscal impact statement for the Initiative.

The Division mischaracterizes the relief Idahoans United seeks in the form of a writ of mandamus—wrongly arguing that Idahoans United seeks mandamus review to ask the Court to review the substance of the fiscal impact statement. DFM Br. at 11-13. The cases cited by the Division, particularly *Walsh v. Hobbs*, are inapposite to the relief sought by Idahoans United under Idaho law. 557 P.3d 701, 705 (Wash. 2024) (where petition for writ of mandamus seeking to compel a correction to a fiscal impact statement). In *Walsh*, the Court explained that because the fiscal impact statement was reached through an exercise of discretion, mandamus relief, which applies only to direct mandatory, ministerial duties, was unavailable. *Id*. As set forth above, such relief is properly sought by Idahoans United in the form of its request for a writ of *certiorari*.

The Division's challenge to Idahoans United's request for a writ of mandamus is without merit. The Court should retain jurisdiction of this case and issue a writ of mandamus ordering the Division to prepare a new fiscal impact statement that substantially complies with Idaho law.

II. The FIS does not substantially comply with statutory requirements.

The Divisions' FIS fails to accomplish the general purpose of section 34-122, which is to provide Idaho voters an easy to understand statement of the immediate and projected fiscal impacts of the Initiative. "[S]ubstantial compliance does not require absolute conformity . . . but does require a good faith attempt to comply, and that the general purpose detailed in the statute is accomplished." *Smith v. Treasure Valley Seed Co., LLC*, 161 Idaho 107, 110, 383 P.3d 1277, 1280 (2016).

Idahoans United asks the Court to say what section 18-3412 means, and then determine whether the Division's FIS substantially complies. As set forth below, the plain, ordinary, and rational meaning of section 34-1812's language requires the Division to prepare a fiscal impact statement to be eminently fair, not improperly influenced, and prepared with honesty and sincerity of intention in language that is easily understood, free from obscurity, and brief but comprehensive in nature.

The Division's FIS does not substantially comply with the plain meaning requirements of section 34-1812. Instead of proceeding in good faith on its work to prepare the FIS, the Division was motivated by something else entirely—the desire to deter future proponents of initiative measures from stating within the initiative's text that the law will not impact state expenditures. Instead of performing its statutory duties, the Division came up with a way to say the Initiative *could* cost the state something—even though it does not. The Division does so by making its projections based on hypothetical changes in law and policy, not on the impact caused by the Initiative measure, as instructed.

Faced with Idahoans United's challenge to the language of the FIS, the Division asks the Court to give it unbridled discretion to prepare fiscal impact statements, urging the court to

conclude substantial compliance means preparing a statement, no matter what it says or how it says it. Included in the argument is the Division's assertion that there is no statutory requirement that its statements be accurate, anyway. The Court should reject these arguments.

A. The plain, ordinary, and rational meaning of the words of the statute.

The plain meaning of section 34-1812 defines the bounds of Division's duty in preparing a fiscal impact statement. When saying what a law means, the place to start is with the plain, ordinary, and rational meaning of its words. *See Farmers Nat'l Bank v. Green River Dairy, LLC*, 155 Idaho 853, 854, 318 P.3d 622, 623 (2014) (statutory interpretation begins with the literal words of the statute). To determine the plain meaning of words, courts turn to dictionary definitions. *Id*.

1. Plain Meaning – Unbiased, good faith statement; clear and concise language.

The dictionary definitions of "unbiased" and "good faith" provide their plain, ordinary, and rational meaning within the statute. Webster's dictionary defines the word "unbiased" as "free from bias," "free from all prejudice and favoritism," and "eminently fair."[2] The Oxford English dictionary defines "unbiased" as "[n]ot unduly or improperly influenced or inclined; unprejudiced, impartial."[3] And as to the term "good faith," Webster's dictionary defines it as "honesty or lawfulness of purpose."[4] Oxford English Dictionary defines "good faith" as faithfulness, loyalty, truthfulness; especially honesty or sincerity of intention.[5]

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[2] *Unbiased*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/unbiased (last visited Mar. 18, 2024).
[3] *Unbiased*, Oxford English Dictionary, https://www.oed.com/search/dictionary/?scope=Entries&q=unbiased (last visited Mar. 18, 2024).
[4] *Good Faith*, Merriam-Webster Online, https://www.merriam-webster.com/dictionary/good%20faith (last visited Mar. 18, 2024).
[5] *Good Faith*, Oxford English Dictionary, https://www.oed.com/search/dictionary/?scope=Entries&q=good+faith (last visited Mar. 18, 2024).

Taking the plain meaning of these terms together and in the context of the statutory requirement that the Division prepare an "unbiased, good faith statement" of the fiscal impacts of the proposed law, means that the Division must prepare a FIS to be eminently fair, not improperly influenced, and prepared with honesty and sincerity of intention.

The statutory requirements for the preparation of the written FIS do not end with the unbiased and good faith requirement, however. The FIS must also "be written in clear and concise language and shall avoid legal and technical terms whenever possible." Idaho Code § 34-1812(b). Webster's dictionary defines the term "clear" as "free from obscurity or ambiguity" and "easily understood."[6] While Oxford English dictionary defines "clear" for words, statements, explanations, as "easy to understand, fully intelligible, free from obscurity of sense, perspicuous."[7] Webster's dictionary defines the term "concise" as "marked by brevity of expression or statement: free from all elaboration and superfluous detail."[8] Oxford English dictionary defines "concise" in speech and writing as "expressed in few words" and "brief and comprehensive in statement," "not diffuse."[9]

Taken together, the plain meaning of the statutory directive that a fiscal impact be prepared using "clear and concise language" means the language must be easily understood, free from obscurity, and brief but comprehensive in nature.

And, taken all together, the plain, ordinary, and rational meaning of the words of the statute require the Division to prepare a fiscal impact statement to be eminently fair, not

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[6] *Clear*, Merriam-Webster Online, https://www.merriam-webster.com/dictionary/clear (last visited Mar. 18, 2024),
[7] *Clear*, Meaning and Use, Oxford English Dictionary, https://www.oed.com/dictionary/clear_adj?tab=meaning_and_use#9333645 (last visited Mar. 18, 2024)
[8] *Concise*, Merriam Webster Online, https://www.merriam-webster.com/dictionary/concise (last visited Mar. 18, 2024).
[9] *Concise*, Oxford English Dictionary, https://www.oed.com/search/dictionary/?scope=Entries&q= concise (last visited Mar. 18, 2024).

improperly influenced, and prepared with honesty and sincerity of intention. The Division must do so using language that is easily understood and free from obscurity. And the statement must be brief but comprehensive in nature.

B. Substantial compliance requires the Division to determine the likely fiscal impacts of the Initiative on current law, not legal conjecture.

Substantial compliance with the Division's requirement that it prepare an unbiased, good faith statement of the fiscal impacts, means conclusions must be based on the impact of the proposed measure, not conjecture about potential secondary impacts emanating from other laws in the future that could result in costs (or savings for that matter).

The Division's first task was to prepare an unbiased, good faith description of any projected increase or decrease in revenues, costs, expenditures, or indebtedness the state will experience due to the Initiative. Idaho Code § 34-1812 (2). The Division substantially complied in describing any impacts to revenues or indebtedness by preparing the following language: "The laws affected by the initiative would not impact income, sales, or product taxes. There is no revenue impact to the General Fund." Declaration of Melanie Folwell ("Folwell Decl."), Ex. D at 1-2. This statement is accurate.

The FIS prepared by the Division next addresses costs and expenditures, as well as the second and related task of describing the immediate expected fiscal impacts and any long-term financial implications on state or local government. Idaho Code § 34-1812(2). The Division's statement includes that the Initiative could change state expenditures in minor ways, including that "costs associated with the Medicaid and prisoner populations may occur; *see* Idaho codes 20-237B and 56-255 and the Medicaid references from Health and welfare." As for immediate

impacts and apparently long-term impacts, the FIS includes that it is "likely to cost less than $20,000 per year."

1. The Division's references to costs associated with the prisoner population are based on legal conjecture.

In explaining its projection that the Initiative may impact costs associated with prisoner populations, the Division's assumptions statement provides broadly that the Initiative "could impact state funding expenditures for Corrections[….]" Folwell Decl., Ex. D. But then, it states, "[t]he manner of the budget impacts would be different for Corrections due to the health care provisions used by the agency; ***there is no expected changes [sic] to the Corrections health care budget***." *Id.* (emphasis added). Thus, according to the Division's explanation, the only potential impacts of the Initiative to state expenditures are to be found in the state Medicaid budget (addressed below).

Although there are no expected changes to the Corrections budget, the Division tells voters there may be costs. To support its "projection," the Division argues it is not unreasonable for it to consider changes in the law, or future legal interpretations of the requirements of the Eight Amendment, that may result in some state costs that do not legally exist right now. DFM Br. at 28-29. The issue with the Division's argument is apparent: the projection is based on some future potential legal happening, not based on the impact of the proposed Initiative. Substantial compliance should not include room for conjecture. To produce a substantially compliant fiscal statement, statements of immediate impacts and projections of likely long term financial implications must be grounded in the impact of the Initiative itself.

Despite contesting any duty to ensure accuracy, the Division nevertheless asserts its fiscal impact statement is accurate because it hedges, stating costs *may* occur and that even if the cost

to the state is $0, no cost "lies within the range of outcomes" predicted by its statement that it is likely to cost less than $20,000 per year. *See* DFM Br. at 23-24. Such reasoning is not eminently fair, nor easily understood and free from obscurity, as required by the plain meaning of section 34-1218. The solution to this issue is clear: If there are no expected changes to the Corrections budget, nothing should be included about costs associated with prisoner populations—for there is neither an increase nor a decrease according to the Division.

C. The Division's statement of immediate fiscal impacts and long term financial implications on the state Medicaid budget is not substantially compliant.

The Division's articulation of the costs, expenditures, and immediate and long term financial implications of the Initiative related to the state Medicaid budget also fails to substantial comply with section 34-1812. The Division says the Initiative itself could change state expenditures, if passed. Even if the Court ignores the plain language of the Initiative stating it will not impact current state expenditures, it does not. This is because of the operation of Idaho Code section 56-209c and applicable federal law.

Idaho Code section 56-209c provides that, "[n]o funds available to the department of health and welfare, by appropriation or otherwise, shall be used to pay for abortions, unless it is the recommendation of one (1) consulting physician that an abortion is necessary to save the life of the mother, or unless the pregnancy is a result of rape, as defined in section 18-6101, Idaho Code, or incest as determined by the courts." Even if the Initiative somehow repealed Idaho Code section 56-209c by implication, federal law (the Hyde Amendment), would prohibit the state from using Medicaid dollars for abortions except in these limited but pre-existing circumstances.

Idaho's Medicaid obligations related to abortion care did not change post-*Dobbs* because pre-*Dobbs* Medicaid dollars, including those contributed by the state, were still only used in circumstances where "abortion [was] necessary to save the life of the woman, or in cases of rape or incest as determined by the courts, or, where no court determination has been made, [when] reported to a law enforcement agency." IDAPA 16.03.09.511 (2021) Thus, with the passage of the Initiative, Idaho's post-*Dobbs* Medicaid obligations to pay for abortion care will not change—and neither will the state Medicaid budget.

The Division now asserts, however, that when it was preparing the FIS, it considered costs associated with providing post-abortion care in cases of complications. DFM Br. at 29. The Division now articulates an assumption that the Initiative may increase costs to the state because of a suspected increase in abortion complications (due to the increase of abortion care that would be a result of the change in law made by the Initiative). *Id*. In the Declaration of Juliet Charron, the Division provides that pre-*Dobbs*, in 2019 and 2022, Idaho Medicaid spent less than $4,000 each year covering treatment and care for abortion complications. Charron Decl., ¶¶ 11-12. As it acknowledges, Idaho Medicaid currently provides such coverage. *Id.* ¶ 13.

While the Division's projection related to instances of care related to abortion care is logical, the issue is that it cherry-picked an area where there may be an increase in state Medicaid costs, while failing to perform the remainder of its statutory duty, which requires it to equally assess whether the Initiative will result in any reduction of costs and expenditures. Idaho Code § 34-1812 (requiring description of "any projected increase *or decrease* in revenues, costs, expenditures, or indebtedness that the state or local governments will experience if the ballot measure is approved by the voters" (emphasis added)).

The Division's isolated approach fails to substantially comply with the dictates of section 34-1812, which requires sincerity of intention to perform the entirety of its duty under the statute and prepare a brief but comprehensive fiscal impact statement. For the fiscal impact statement to serve its statutory purpose of fairly informing Idaho voters, the Division cannot use unsupported legal conjecture regarding corrections or Medicaid budgets simply because of the "possibility that other state or federal laws will impose financial obligations on the state as a consequence of the initiative." DFM Br. at 25-26.

D. The Division's lack of good faith is shown in the record of its work.

The Division's failure to substantially comply with its duty under the plain meaning of section 34-1812 is shown in the record of its work. Upon receiving Idahoans United's proposed Initiative that is the subject of this Petition, dated November 20, 2024, the Division's focus was not on engaging in an eminently fair, truthful, and transparent process. Instead, in response to the Initiative's requirement that it not "be construed to impose a financial obligation on the state, its agencies, or their programs for delivery of health care services," the Division went to work to come up with language to deter future initiative proponents from including similar provisions. Craig Decl., Ex. F at 2-4; Folwell Decl. Ex. G at 15.

The Division wanted to craft "boilerplate language" it could use for future initiatives "indicating that the costs are 'positive but small' or 'positive but not significant in terms of the budgets to which this applies.'" Folwell Decl. Ex. G at 15. And they did so in consultation with the Secretary of State's office. *See id.* at 14-15 (setting up meeting between Division and Secretary's office to "come up with some type of standard language for indicating that the costs are 'positive but small' or 'positive but not significant in terms of the budgets to which this applies', else [sic] all initiative drafters will include some language that there is no cost to the

state when indeed there will be some, even if they are *de minimis*, or (and this would be worse) if they would be substantial."). These facts explain why the FIS includes the confusing, conjecture-based language. The Division did not include the language for the benefit of providing clear information about the actual impacts of the Initiative—the Division included the confusing, conjecture-based language due to its independent motivation of future deterrence.

But even if the Court looks back to Division's work related to the very first initiative versions submitted by Idahoans United, it failed to substantially comply with its statutory duty. This is because instead of performing a fair and honest evaluation of the fiscal impacts of those four initiatives, which were submitted by Idahoans United in August 2024, the Division's chief economist, Greg Piepmeyer, started with a conclusion and performed no work to substantiate it. Craig Decl., Exs. A-D; Folwell Decl., Ex. G at 2, 22.

The Division's first identical fiscal impact statements also noted potential costs associated with Medicaid and prisoner populations, citing Idaho Codes 20-237B and 56-255. The record shows, though, that the Division never investigated the proposed laws' actual impact to the same (none). It was not until October 2024, when Idahoan's United submitted the first revised version of the initiative to include the present clarification that it does not create a financial obligation on the state, its agencies, or their programs for delivery of the health care services protected by the proposed law, that the Division even looked into it. Craig Decl., Ex. F at 2-4; DFM Br. at 5.

But, at that point, the Division's primary motivation was not to determine if there were some scenario where, considering the Initiative's express language, there could potentially be new state costs voters should know about. Instead, the Division sought to verify "whether there would be costs associated with the initiative notwithstanding the revised language—otherwise

‘all initiative drafters [could] include some language that there is no cost to the state when indeed there will be some.” DFM Br. at 5 (quoting Folwell Decl., Ex. G at 15).

E. The FIS was not prepared using clear and concise language.

The risk of allowing the Division to proceed with a lack of clearly defined standards is not hypothetical; the FIS it prepared for the Initiative illustrates the result.

Particularly jarring is the reference to the state’s $850 million Medicaid budget. While contextualization of fiscal figures is permissible under Idaho Code section 34-1812, inclusion of the massive budgetary figure is entirely unnecessary—even if to put the Division’s “less than $20,000” projection in perspective. The Division admits it had adequate “non-legal” terms to describe that any fiscal impact would be “*de minimus*.” *See* DFM Br. at 31, 33 (“nominal,” “minor” or “insignificant.” Although the Division claims it included the $850 million figure to contextualize the “less than $20,000” projection, the inclusion of the entire Medicaid budget is likely to draw a voter’s attention and create the impression that the Initiative will cost the state significant additional expenditures—which it will not. *See* Shulman Decl. ¶ 7, Ex. A at 8.

Not only are the Division’s conclusions about costs to Medicaid and prisoner populations not supported by good faith, unbiased analysis—the articulation of those costs is not clear and concise under the plain meaning of those words. Again, the FIS also includes references to Idaho Code sections 20-237B and 56-255 without providing context or explanation as to how the statutes apply. The references are in violation of the plain meaning of section 34-1812, which in its directive to prepare a statement with clear and concise language, directs the Division to avoid legal and technical terms whenever possible.

The Division does not convincingly argue inclusion of the legal citations unavoidable. It provides that it included code citations in other fiscal impact statements in the past (and no one

objected), and that, "more legally-inclined readers" can look the citations up and do "further research if they desire," while those who "are less interested in statutory citations" "can simply skip over" them. DFM Br. at 31. Voters, even if legally-inclined, do not have the ability research the code sections in the voting booth. This obfuscates the Division's contention that the citations somehow enable voters to better understand the fiscal impacts of the Initiative. Instead, the code citations will result in voter confusion and will thus prejudice to the Initiative. *See* Shulman Decl." ¶¶ 3, 6, Ex. A. As Dr. Shulman provides, inclusion of legal codes "can turn off voters and make them feel as though there are unknown costs beyond their understanding." *Id.* at 8.

In conjunction with the Idaho Code citations, the Division vaguely mentions "Medicaid references from Health and Welfare," adding further complexity and ambiguity, rather than providing any measure of clarity. The references to these statutes and the agency documents create unnecessary obstacles for voters attempting to ascertain the true fiscal impact of the Initiative.

The FIS suggests that "[c]osts associated with the Medicaid and prisoner populations may occur." The language, *may occur*, is and of itself inherently speculative because it relies on some future unknown happening and fails to offer the electorate clear information about the actual projected fiscal impact based on current law. And, without explanation, it stands in direct contradiction of the express language of the Initiative stating there are no costs. The Division thinks the contradiction between its statement and what the proponents of the Initiative understand to be true about the fiscal impacts is okay—asserting Idahoans United is free to present its own arguments to the voting public about what the Initiative will cost in the immediate and long term. DFM Br. at 17.

The Division's role though, is not to provide an opposing view that citizen proponents then must determine how to credibly neutralize. Its role is to serve as a third-party neutral in determining the true fiscal impacts based on current law and then to clearly articulate them to voters. This begs the question in this case: If the Division does not disagree that there are no impacts caused by the Initiative, why did it not simply revise the language to say so? If section 34-1812 is to have constitutional credibility, the Division's reading of it must be found untenable. *See Reclaim Idaho*, 169 Idaho at 428, 497 P.3d at 182 (holding that the "conditions and manner provisions" of Article III, Section 1 "do not grant the legislature carte blanche in limiting" the people's fundamental right to legislate directly).

III. There is no Basis to exclude the Court's consideration of Dr. Shulman's opinions.

The Division suggests the Court should decline to consider the expert opinion of Dr. Shulman because the Court is exercising its original jurisdiction. There is no jurisdictional bar that prevents the Court from considering an expert opinion. The Court has considered expert opinions submitted in support of petitions in the past. *Planned Parenthood Great Nw. v. State*, 171 Idaho 374, 522 P.3d 1132, (2023). Instead, a bar to the Court's consideration on an expert opinion would be the result of a successful challenge to the qualifications, experience and expertise of a proffered expert. *See id.* at 399, 522 P.3d at 1157. The Court will consider expert opinions where the expert provides an opinion "upon which an expert in the field can properly opine." *Id.* Dr. Shulman is an expert in her field. Shulman Decl., ¶ 3, Ex. B. Moreover, because the Division made no specific objections to the methodology Dr. Shulman employed in reaching her opinions, the Court should afford her well-reasoned and well-supported opinions full weight. *See id.* (where any objections to methodology in reaching opinions goes to weight, not admissibility).

The Division also suggest that the Court should not consider the expert opinions because it could not have possibly considered her opinion when the Division issued the FIS. This argument is a non-starter because Dr. Shulman's opinions do not add facts into the record, rather they are based on the record before the Court—which the Division had full access to and participated in creating.

CONCLUSION

The Division's FIS does not meet the standards required by Idaho Code section 34-1812. It lacks clarity, conciseness, and good faith; includes unnecessary legal and technical terms; misrepresents the financial obligations of the Initiative; and introduces prejudicial and misleading information. Unfortunately, the final product is an unsurprising result of a preparation process that strayed from its statutory guardrails from the beginning and which the Division now claims is absolutely immune from judicial scrutiny.

"[A] review upon a writ of certiorari is to 'declare the law on the subject, and point out to them the legal scope within which their judgment and discretion must be exercised.'" *Idahoans for Open Primaries*, 172 Idaho at 489, 533 P.3d at 1285. Given the grave constitutional concerns at issue here, Idahoans United respectfully requests that this Court declare the legal requirements and standards by which a ballot initiative FIS is to be constructed and determine that the FIS as submitted by the Division fails to comply therewith.

DATED: March 18, 2025

HOLLAND & HART LLP

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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of March, 2025, I caused to be filed, via iCourt, and served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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