IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

RAUL R. LABRADOR, in his official capacity as the Idaho Attorney General, Plaintiff, v. IDAHOANS FOR OPEN PRIMARIES, INC., and IDAHOANS FOR OPEN PRIMARIES, an unincorporated association, Defendants.	Case No. CV01-24-13942 MEMORANDUM DECISION RE CROSS MOTIONS FOR SUMMARY JUDGMENT AND MOTION TO DISMISS

I. INTRODUCTION

The Attorney General filed this action seeking a declaratory judgment pursuant to Idaho's Declaratory Judgment Act found at Idaho Code § 10-1201. *et seq*. The Attorney General's prayer for relief asks this Court to declare "that the signatures in support of the initiative petition are null and void pursuant to Idaho Code § 34-1815." Verified Complaint for Declaratory Judgment and Injunctive Relief at p. 36. He then asks this Court to issue a mandatory injunction ordering the Defendants Idaho for Open Primaries, Inc. and Idahoans for Open Primaries, an unincorporated association, to "withdraw the initiative and petition." *Id*. The Attorney General alleges he has the

authority to institute actions to protect State's rights and interests, including Idaho Code § 34-1815.[1]

The Attorney General seeks a final determination of this Court by way of a summary judgment under Idaho Rule of Civil Procedure Rule 56. Most often, when a party seeks immediate relief prior to a full adjudication on the merits of one's case, the party would seek a temporary restraining order and/or a preliminary injunction under Idaho Rule of Civil Procedure Rule 65. The Attorney General instead filed the present Rule 56 motion. The Court knows of no precedent for seeking summary judgment so early in case—before the opposing party has filed an Answer and conducted any discovery.

Nevertheless, this Court granted the Attorney General's request for a speedy hearing on his Motion for Summary Judgment. The Court did so under the discretionary authority given to the Court to alter the time schedules provided in Rule 56. See IRCP Rule 56(b)(3). In doing so, the Court was influenced by the fact that the declaratory judgment act permits declaratory judgment matters to be advanced on the court's calendar and, if Idaho Code § 34-1808[2] applies to the matter, it provides that all such suits shall be advanced on the court docket and heard and decided by the court as quickly as possible. Therefore, because the specific procedure currently before the Court is a Rule 56 Summary Judgment motion, in exercising its authority thereunder, the Court took into

[1] Ultimately, the Attorney General argues his authority is the authority inherent in the office of Attorney General, citing *Newman and Wasden*. The scope of the AG's authority is not clear to this court. For example, Idaho Code § 34-1822 makes a violation of § 34-1815 a felony. See § Idaho Code § 18-111. Prosecutorial authority for felonies lies with county level prosecuting attorneys unless specific authority is given to the AG. For example, see Idaho Code § 67-140(16) which appears to give the AG concurrent prosecutorial authority over Medicaid fraud claims. As this issue is not ultimately necessary for the Court's decision, the Court does not try to answer these material questions.

[2] Idaho Code § 34-1808 gives the district court the authority to enjoin the secretary of state from certifying or printing ballots if it finds the petition is not legally sufficient. See the Supreme Court's decision in *Raul R. Labrador v. Idahoans for Open Primaries, et al and Phil McGrane in his official capacity as Idaho Secretary of State*, Docket No. 52089, filed August 14, 2024. The Attorney General would apparently argue if this Court disqualifies more than 12,000 ballots, the initiative would not have met the required threshold of approximately 66,000 votes.

account the practical and legal nature of the matter before using the authority given to the Court under Rule 56.

At the time this Court granted the Attorney General's motion for speedy hearing (i.e., on Thursday, August 29, 2024), this Court also stated it would allow the Defendants to file their own motions for relief (e.g., a cross-motion for summary judgment or a motion to dismiss), and Defendants have now filed both such motions.

As will be discussed in more detail below, to obtain summary judgment, the party must establish the absence of a genuine issue of fact and that the party is entitled to judgment as a matter of law. This Court has concerns on both prongs with respect to the Attorney General's motion. On the other hand, the Court finds the Defendants' motion for summary judgment to be well taken. Having determined that Defendants are entitled to summary judgment, the Court does not need to address the motion to dismiss and need not address the Attorney General's request for a mandatory injunction.

II. BACKGROUND

Prior to seeking relief in the district court, the Attorney General approached the Idaho Supreme Court seeking the same substantive relief that he seeks here—specifically, court intervention to stop the printing of the ballots for the November election with the initiative on the ballot. The deadline for ballot questions submission is September 6, 2024. The Supreme Court, a court of limited original jurisdiction, found it did not have original jurisdiction in this matter. The Supreme Court stated that if the Attorney General wanted to have his factual claims adjudicated, the district court is the forum for him to do so. See *Raul R Labrador v. Idahoans for Open Primaries, et al and Phil McGrane in his official capacity as Idaho Secretary of State,* Docket No.

52089, filed August 14, 2024, Slip Op. at page 15.[3] Although the Supreme Court stated the Attorney General could pursue his factual claims in district court, the Supreme Court did opine as to any limits on the district court's scope of review.

Because Idaho Code § 34-1815 is the entire basis for the Attorney General's lawsuit, the statute is set forth in its entirety as follows:

> 34-1815. FALSE STATEMENTS SPOKEN OR WRITTEN CONCERNING PETITION UNLAWFUL — FAILURE TO DISCLOSE MATERIAL PROVISIONS. It shall be unlawful for any person to wilfully or knowingly circulate, publish or exhibit any false statement or representation, whether spoken or written, or to fail to disclose any material provision in a petition, concerning the contents, purport or effect of any petition mentioned in sections 34-1801A through 34-1822, Idaho Code, for the purpose of obtaining any signature to any such petition, or for the purpose of persuading any person to sign any such petition. It shall be unlawful for any person to solicit or obtain any signature on a petition without first showing the signer both the short title and the general title as defined in section 34-1809, Idaho Code, so that the signer has an opportunity to read them before signing the petition.
> Any signature obtained without compliance with this section is null and void.

Idaho Code § 34-1815.

The statute does three things. First, the statute states that it is unlawful for any person to willfully or knowingly circulate, publish or exhibit any false statement or representation, whether spoken or written, or to fail to disclose any material provision in a petition, concerning the contents, purport or effect of any petition mentioned in sections 34-1801A through 34-1822, Idaho Code, for the purpose of obtaining any signature to any such petition, or for the purpose

[3] The AG did not name the secretary of state as a party in this district court action.

of persuading any person to sign any such petition. This provision is extremely broad. For example, a private citizen publishing a letter to the editor or posting an opinion to a social media to encourage signatures on the open primary initiative could be charged with a crime if the Attorney General's view of the facts and law holds here. See Idaho Code § 34-1822.[4]

Second, the statute states it is unlawful to solicit or obtain any signature of a petitioner without first showing the signer both the short title and general titles for the petition. The short and general titles were the subject of lawsuit last summer (i.e., 2023) between the Attorney General and Idahoans for Open Primaries. See, *Idahoans for Open Primaries v. Raul R. Labrador*, 172 Idaho 466, 533 P. 3d 1262 (2023). In short, that lawsuit involved assigning official ballot titles under Idaho Code § 38-1809. That statute describes a detailed process whereby the official short and general ballot titles are achieved. The statute describes roles for the Attorney General, the petition sponsor, the secretary of state, and the Idaho Supreme Court (giving the Supreme Court original jurisdiction…which is the exceptional as the district court is the court of general jurisdiction). These titles became the State-approved language to be put on the initiative, the initiative signature pages, the voter information guide and the ballot itself.[5] The Attorney General offers no evidence that the short and general titles were not provided to

[4] As will be noted below, the AG argues the Idaho Supreme Court established the only words that can be used to describe the initiative when approving the short and general titles for the initiative, and an opinion regarding the actual nature of the initiative, if different than the ballot language, is false.

[5] See *Idahoans for Open Primaries v. Labrador*, 172 Idaho at 473-75, 533 P. 3d at 1269-71 for a succinct description of the steps for approval generally and as accomplished with reference to the subject petition. For convenience of the reader, this is pages 3-5 of the opinion published on the Idaho Supreme Court website on August 13 of last year. Of note, the Supreme Court's description of the process does not mention (as it did not need to) an important step in the process: Any voter or voter group can file an argument not to exceed 500 words for or against the measure. If more than one is submitted for or against, then the secretary of state shall select one. See Supplemental Declaration of Luke Mayville at Exhibit E. This is yet another safeguard to allow all voices to be heard without undue limitation of speech or a requirement to speak only one way.

each signer as required. The statute says nothing about limiting any citizen use of other words to describe a petition other than the statement can't be knowingly false.

Third, the statute provides that any signature obtained without compliance with this section is null and void. Therefore, per the terms of the statute, if (1) a knowing misstatement is made to obtain a signature or (2) a person signs but was not shown the approved ballot titles, the statute requires that the signature be stricken.

The statute does not specifically describe how to go about striking signatures. A criminal action could be brought against an individual and upon conviction, the signature stricken by the court. As discussed elsewhere in this opinion, Idaho Code §34-1815 states the proscribed acts are unlawful and Idaho Code §34-1822 prescribes criminal penalties. It appears that in addition to imposing a criminal penalty, the court before which the criminal case is brought would also then have the authority to strike the signature from the ballot. The record does not reflect that any Idaho county prosecutor initiated a criminal action related to the matters of which the Attorney General now complains.

Idaho Code § 34-1808 might provide a mechanism for striking signatures. That section states that any citizen may apply to the district court of the Fourth Judicial District of the State of Idaho, in and for Ada County, and upon a showing that the petition is not legally sufficient, enjoin the secretary of state from certifying or printing the official ballot. Although the Supreme Court held in *Labrador v. Idahoans for Open Primaries, et al and Phil McGrane* that the Secretary of State's duties are ministerial under this statute, and the Supreme Court didn't have jurisdiction, a citizen could potentially bring an action in this district court to challenge whether the petition has too many invalid signatures to be legally sufficient.

The Attorney General offers a third approach. He asks the court to declare under the Idaho declaratory judgment act that signatures were obtained in violation of Idaho Code §34-1815 and that they must be stricken. He then suggests that the Court order the Defendants to withdraw the Open Primaries Initiative Petition. He further suggests that if the Court declares that votes must be stricken, the secretary of state would have no choice and could not print the initiative. Assuming this procedure is legally viable, the Attorney General must still provide a factual basis for the Court to make such a declaration. And it is here that this Court finds the Attorney General fails.

III. DISCUSSION

A. Standard of Review.

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). Summary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). Furthermore, all disputed facts are "construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party." *Bedke v. Ellsworth*, 168 Idaho 83, 91, 480 P.3d 121, 129 (2021) (quoting *Venable v. Internet Auto Rent & Sales, Inc.*, 156 Idaho 574, 578, 329 P.3d 356, 360 (2014)).

The fact that both parties file motions for summary judgment does not necessarily mean that there are no genuine issues of material fact. *Moss v. Mid–Am. Fire & Marine Ins. Co.*, 103 Idaho 298, 302, 647 P.2d 754, 758 (1982). The filing of cross-motions for summary judgment does not

transform "the court, sitting to hear a summary judgment motion, into the trier of fact." *Id. Banner Life Ins. Co. v. Mark Wallace Dixson Irrevocable Tr.*, 147 Idaho 117, 123–24, 206 P.3d 481, 487–88 (2009). Generally, a court must draw all reasonable inferences from the evidence in the record in favor of the non-moving party, but when matters are to be tried to the Court rather than a jury, the court can draw the most probable inference from facts in the record. As explained by the Idaho Supreme Court in *Banner Life Ins. Co. v. Mark Wallace Dixson Irrevocable Trust*:

> In construing the record on a motion for summary judgment, all reasonable inferences and conclusions must be drawn in favor of the party opposing summary judgment. The nonmoving party, however, "may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or ... otherwise ..., must set forth specific facts showing that there is a genuine issue for trial." "A mere scintilla of evidence is not enough to create a genuine issue of fact," but circumstantial evidence may suffice. Still, the evidence offered in support of or in opposition to a motion for summary judgment must be admissible.
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> The fact that both parties file motions for summary judgment does not necessarily mean that there are no genuine issues of material fact. Moreover, the filing of cross-motions for summary judgment does not transform "the court, sitting to hear a summary judgment motion, into the trier of fact." *Id.* When cross-motions have been filed and the action will be tried before the court without a jury, however, the court may, in ruling on the motions for summary judgment , draw probable inferences arising from the undisputed evidentiary facts. Drawing probable inferences under such circumstances is permissible since the court, as the trier of fact, would be responsible for resolving conflicting inferences at trial. Conflicting evidentiary facts, however, must still be viewed in favor of the nonmoving party.

147 Idaho 117, 123-24, 206 P. 3d. 481, 487-88 (2009).

B. Summary of Alleged Facts in the Record.

The factual record consists of declarations signed under oath. The record established by those declarations is summarized as follows:

1. The Attorney General's Declarations.

In support of the complaint and its motion for summary judgment, the Attorney General submits nine declarations of persons who were approached by signature-gatherers or attended events sponsored by the Defendants and two declaration of Joshua N. Turner, Chief of Constitutional Litigation and Policy at the Attorney General's Office, to which he attaches, among other matters, copies of pages from websites of entities supporting the initiative, pictures of a clipboard used by a signature gatherer, and social media posts from initiative sponsor organizations.

Declarant Jacob Ball states two unnamed persons associated with the Open Primaries Initiative came to his home in September of 2023. He states he specifically asked if the initiative would reintroduce the open primary system in Idaho before 2012. They told him the initiative would reintroduce the open primary system Idaho had in place prior to 2012. He states he recently learned through unnamed traditional media sources that the signature-gatherers lied to him. He tried to remove his name, but the petition had already been submitted to the secretary of state (the petition was submitted to the secretary of state on July 2, 2024). His declaration does not state that the signature-gatherers knowingly lied. His declaration does not explain from what traditional media sources he learned the new information. He does not explain how he didn't learn the truth until so close to July 2, 2024 that he could not try to have his signature removed (although his apparent knowledgeable questions to the gatherers in

September of 2023 would suggest he is not unsophisticated in election matters). Moreover, he does not state that he was not shown the short and general ballot title or whether he read them. The Court notes, however, that there is no evidence in the record that any petition-signer signed on anything other than the approved signature sheet with the short ballot title printed in large font on the bottom of each page. See Exhibit A attached hereto.

Declarant Benjamin Chafetz states he attended an Open Primaries Initiative kickoff and training session on August 19, 2023. He states he heard State Representative Todd Achilles, co-founder and president of Veterans for Idaho Voters, and Ashely Prince, campaign manager for Idahoans for Open Primaries, instruct signature-gatherers that the initiative would establish an open primary.[6] He says they did role-play sessions where they recommended telling potential signatories that the initiative's purpose was to establish an open primary. He does not state, however, that anyone was instructed not to show the short and general ballot title language to potential signatories. He does not state he was misled by the presentation. One would have to grant an inference to the Attorney General that this led to other people being misled. On summary judgment, however, all inferences must be granted in favor of the nonmoving party. Further, as discussed below, the Court does not interpret the Supreme Court's approval of ballot language to narrowly restrict political speech separate and apart from the requirement to show the ballot titles to potential signers.

[6] As noted below, Mr. Ryan Spoon attended that same event and video/audio recorded part of the event. The Court has reviewed that video/audio and finds that the persons who spoke accurately and in detail described the top-four and ranked choice voting elements. They also showed attendees who might become signature-gatherers an infographic that they would make copies of to help explain to voters the elements of the initiative. That infographic is attached as Exhibit C hereto.

Declarant Erika Hardy states in the fall of 2023 she was approached by unnamed signature-gatherers at the Pocatello Campus of Idaho State University. She said the signature-gatherers stated they were attempting to get "open primaries" on the ballot. She says they never mentioned the concept of ranked-choice voting. They never mentioned changes to Idaho's general election laws. They did not use the phrase "top four primary". She says she recently learned that the Open Primaries Initiative would implement ranked-choice voting, which she opposes. She does not state when she learned that the initiative did not do what she thought it would vis-à-vis the July 2, 2024 secretary of state deadline. She does not state that the gatherers did not present the Idaho Supreme Court-approved short and general ballot titles. She does not state the gatherers did not have the statutorily required identification.

Declarant Sharon Hutchins declares she was approached by signature-gatherers in September of 2023 at Julia Davis Park in Boise. She says the signature-gatherers had clipboards and a face sheet with the phrase "open primaries" on it. She says she signed because she associates the phrase "open primaries" with the primary election system in place in Idaho prior to 2011. She states through the course of her conversation with the gatherer that the words top four primary, ranked choice and a primary that was not run by the parties were never mentioned. She does not state when it was she learned that the initiative did not do what she thought it would vis-à-vis the July 2, 2024 deadline. She does not state that the gatherers did not present the Idaho Supreme Court-approved short and general ballot titles. She does not state the gatherers did not have the statutorily required identification.

Declarant Sharon Leach declares she was approached by signature-gatherers outside Rosauers Supermarket in Lewiston in the fall of 2023. She says based on her conversation with

the unnamed signature-gatherers, that she believed the petition would reestablish the primary system Idaho had in place prior to 2011. She does not recall the phrase top four primary or the phrase ranked-choice voting being used. She says she contacted her county clerk but was informed she was too late. She doesn't identify the date or the person with whom she spoke. She does not state whether she tried contacting the secretary of state prior to July 2, 2024. She does not state that the gatherers did not present the Idaho Supreme Court-approved short and general ballot titles. She does not state the gatherers did not have the statutorily required identification.

Declarant Don D. Myers states he was approached by signature-gatherers at his house in Sandpoint, Idaho in August of 2023. They stated they were trying to get open primaries on the ballot. He says he asked if the initiative involved ranked-choice voting and they said it had nothing to do with ranked-choice voting. He does not state that he tried to have his signature removed. He does not state that the gatherers did not present the Idaho Supreme Court-approved short and general ballot titles. He does not state the gatherers did not have the statutorily required identification.

Declarant Ryan Spoon states he attended an Open Primaries Initiative kickoff and training session at Kristin Armstrong Park on August 19, 2023. This is apparently the same event attended by Mr. Chafetz. Mr. Spoon video/audio recorded the first 19 minutes and 33 seconds of the event. He testifies he witnessed Rep. Todd Achilles and Ashely Prince instruct volunteer canvassers and signature-gatherers as part of the training that the ballot initiative would create an "open primary" and to tell potential signees that the ballot initiative would create an open primary. At paragraphs 9-12 he quotes specific statements made by Rep. Achilles

and Ms. Prince. Those statements all appear to be matters of opinion, not fact. Mr. Spoon does not state what, if anything, he did at any time after August 19, 2023 to report or address the matters he heard at the August 19, 2023 event. Moreover, as noted below, the Court has reviewed the entire video presented and all participants very accurately described the details of the initiative, most particularly that it would result in a top-four primary and a ranked-choice general election. In the Court's judgment, Mr. Spoon's summary of what was reflected on the video is not accurate.

Declarant Steven Tanner declares he was approached by an unidentified individual signature-gatherer at the Nampa Farmers Market in the fall of 2023. He asked the gatherer three times if the initiative was about ranked-choice voting and the gatherer shook his head and said it is about "open primaries." He says he did not sign the petition. He does not state that the gatherers did not present the Idaho Supreme Court-approved short and general ballot titles. He does not state the gatherers did not have the statutorily required identification. He does not state what, if anything, he did to report his concerns before signing his declaration on July 11, 2024.

Declarant Anthony Wilcox declares he attended an Open Primaries Initiative training session on September 10, 2023 at Victor City Park in Victor, Idaho. He witnessed Luke Mayville, co-founder of Reclaim Idaho, instruct signature-gatherers that the ballot initiative would create an "open primary." He witnessed Mr. Mayville respond to a question by stating they should say anything they have to to get a signature and that it is the responsibility of the signer to inform himself or herself of the initiative. He says he was later approached by signature-gatherers at Sam's Club in Idaho Falls. One gatherer stated she was collecting

signatures for an "open primary." When he told her the initiative would implement ranked-choice voting, she ended the conversation. He states the phrase "ranked choice" was not used. The concept of a primary that was not run by parties was never mentioned. He does not state that the gatherers did not present the Idaho Supreme Court-approved short and general ballot titles. He does not state the gatherers did not have the statutorily required identification. He does not state what, if anything, he did to report his concerns before signing his declaration on July 11, 2024.

Assistant Attorney General Turner attaches a number of exhibits to his declaration. The first several relate to the submission and approval of the short and general ballot titles. The Supreme Court resolved the dispute over those titles in the previously mentioned case *Idahoans for Open Primaries v. Raul R. Labrador,* 172 Idaho 466, 533 P. 3d 1262 (2023). As previously noted, that litigation resulted in language other than "open primaries" being used in the official titles for the initiative. Mr. Turner next attaches a number of pages from the Open Primaries website wherein the initiative sponsors provide argument in support of the petition and explain their opinion that their petition is a type of open primary, but is a different kind of open primary than Idaho used to have. They also explain how ranked-choice voting would occur. See e.g., Ex. G, pages 2 and 5, Turner Declaration attached as Exhibit B. Mr. Turner points out that the initiative sponsors published materials to be used by volunteers universally titled with the phrase Open Primary Initiative.

Mr. Turner filed a supplemental declaration on September 3, 2024 to which he attaches a number of screen shots from social media that repeatedly show signature-gathering volunteers referring to the initiative as one for the Open Primaries Initiative. Many of the same screen

shots show sample signature pages that contain the Supreme Court-approved ballot title. Again, see Exhibit A hereto.

2. Defendants' Declarations.

The Defendants have submitted four declarations. Motions to dismiss must be based on matters in the pleadings only (i.e., the Complaint and the Answer) and, therefore, the declarations cannot be considered on that motion.

Declarant Marv Hagedorn states he is a former Idaho State Senator and State Representative. That status highlights the political nature of the matter at hand and the political debate and discourse surrounding the petition. Mr. Hagedorn explains he is a member of Veteran for Idaho Voters (V4IV), the purpose of which is to advocate, among other things, for citizen initiatives. He states that V4IV members have made presentations to more than 1,000 people across Idaho and to community groups, union locals, service clubs and chambers of commerce. He references a video on V4IV's website. The website also provides a ranked-choice voting plug-in to its website showing the results of a sample RCV ballot and the voting plug-in provides an explanation of the ranked-choice voting process. He further declares that V4IV printed and distributed 2,500 voter information cards, each with a QR code that directs the recipient to the V4IV website where ranked-choice voting is explained. The V4IV published an op-ed in multiple newspapers across the state in November of last year that explained the elements of the initiative.

Declarant Lori Hickman declares she has been a member of Mormon Women for Ethical Government ("MWEG") for four years and in October of 2023, MWEG joined the coalition for Idahoans for Open Primaries. She volunteered to collect signatures several times. She received

training on how to conduct her signature-gathering. Each time she approached a person, she would verify that the individual was registered to vote and would explain (1) that the initiative would change current law so that primary elections would be open to all registered voters, regardless of party affiliation, (2) that based on primary election results the top 4 candidates with the most votes would then be on the general election ballot and (3) the winner at the general election would be determined by ranked choice or instant runoff voting. She provides multiple examples of MWEG's public efforts to explain the open primaries, top four and ranked-choice attributes of the initiative. See Hickman Declaration at paragraphs 6(a) through 6(d). She does state she also used the phrase "open primary" but that was done in the context of all of her other statements.

Declarant Luke Mayville states he co-founded the organization Reclaim Idaho in 2017. He lists in his declaration multiple citations to articles, ballot titles of similar initiatives in other states, and news programs that have discussed top four/ranked-choice voting as a type of open primary. See Mayville Declaration at paragraphs 9-16. He also declares that over 2,000 unpaid volunteers participated in the signature drive and that signatures were collected from registered Idaho voters from all 44 counties. He states the campaign printed 12,000 copies of an infographic with details on the ranked-choice voting process and it was common practice that the clipboards given to volunteers would have the infographic attached. See Exhibit C. That infographic explains both the top four and the ranked-choice components of the initiative. *Id*. He also refers to presentations he made, specifically one in Valley County, Idaho on September 22, 2023, where he explained both the top four and ranked-choice elements of the initiative. *Id*. at paragraph 24. He also states that every petition prominently included the

official short and general ballot titles approved by the Idaho Supreme Court. *Id*. at paragraph 25. He attaches a sample of the signature sheet that included the short ballot title in 20-point font. See Exhibit A. He further declares that every volunteer trained by the campaign carried a clipboard containing a hard copy of the entire proposed initiative, including the entire short and long ballot titles. Mr. Mayville also provides contrary testimony in response to several of the declarations submitted by the Attorney General. See e.g., Mayville declaration at paragraphs 30 and 31. He testifies that Declarant Spoon omitted from his declaration that Ashley Prince provided a detailed overview of both ranked-choice voting and the instant-runoff process at the Idahoans for Open Primaries event at Kristen Armstrong Park. *Id*. at paragraph 31.

C. The Legal Claims Presented.

1. The Attorney General Does Not Establish the Absence of Genuine Issues of Material Fact That More than 12,000 Registered Voters Signed the Petition Based on False Information Provided by Defendants or Persons Acting at Their Direction.

The Attorney General's principal complaint is that the Defendants used and encouraged others to use the term "open primary initiative" to describe the initiative when the Idaho Supreme Court had previously held that the term "open primary" would not be included in the short title and general title. He then asks this Court to declare all signatures to be invalid. The Attorney General's principal argument is not well taken for numerous reasons.

First, the record is devoid of any evidence that the required ballot titles were not included on the initiative shown to voters or that the short title was not on every initiative signature page. As pointed out by Defendants' counsel at oral argument, the short title was in large font on the bottom of every page of the signature sheets. The signature sheets could only accommodate 12 signatures. The ballot titles were in large print. It would be very hard for a signer not to see

the short ballot title when signing a petition. None of the Attorney General's declarants state otherwise. The record is replete with examples of the signature pages used and each contains the required language. The fact that the signature pages were accepted by county clerks around the state when certifying signatures confirms the lack of evidence that every signatory did not have the approved ballot language in front of them.

Second, the Attorney General fails as a matter of law to establish that use of the term "open primary initiative" to describe the initiative was false. The Idaho Supreme Court's decision in *Idahoans for Open Primaries v. Raul R. Labrador*, 172 Idaho 466, 533 P. 3d 1262 (2023) did not prescribe how proponents of the initiative could describe the initiative in public or private discourse. The Idaho Supreme Court had the authority and duty under Idaho Code § 34-1809 to resolve a dispute when any person was dissatisfied with a ballot title proposed by the Attorney General. Specifically, Idaho Code § 34-1809(3)(c) states that it shall "examine said measure, hear argument, and in its decision thereon certify to the secretary of state a ballot title and a short title for the measure in accord with the intent of this section." In so doing, the Idaho Supreme Court considered Idaho Code § 34-1809(2)(d)'s requirement that the short ballot title contain a "distinctive short title not exceeding twenty (20) words by which the measure is commonly referred to or spoken of… ." That language has to be included at the foot margin of each signature sheet of the petition—and was. This Court does not understand the Supreme Court's authority to be to regulate speech other than approving the ballot titles.[7] This is not about false speech, but rather about preferred speech of a single purpose…the ballot title.

[7] To assert otherwise would likely raise significant constitutional questions. See page 25 below.

Given that this Court cannot find that Idaho Code §34-1809(3)(c) gave the Idaho Supreme Court the authority to regulate speech outside of prescribing the official ballot titles, this Court next considers whether the language used either by, or at the behest of the Defendants, was false in some other way. The Attorney General does submit evidence to support its proposition that the top four/ranked-choice elements of the initiative are not an open primary. The Attorney General also argues that the open primary being proposed is not an open primary like Idaho had prior to 2012.

As to the first point, a top four primary is one type of an open primary in the sense that any candidate, without regard to party affiliation, can appear on the ballot and every citizen can vote for any candidate. The term "top four primary" may be a more distinctive description of the specific type of open primary proposed, but the term "open primary" is not false as applied to the specific initiative. At best, whether or not "open primary" is accurate is a matter of opinion. And other than settling disputes over the official ballot title, the courts can't regulate political opinion.

As to the Attorney General's argument that initiative proponents represented that the initiative would establish an open primary like Idaho had prior to 2012, the evidentiary record the Attorney General submits is weak as to the extent of such statements. On the Attorney General's motion for summary judgment, the district court is required to construe disputed facts most favorable to the non-moving party (i.e., the Defendants). The Attorney General's declarations establish a few isolated incidents where specific declarants asked and were told that it would be an open primary like Idaho used to have. It is true that Idaho did have an open primary prior to 2012, and that type of primary is different than what is proposed. But

construing the declarations most favorably to the Defendants, this Court is not convinced that the unnamed signature-gatherers were saying the initiative would return to the exact same type of open primary Idaho had or would return to a type of open primary.

Even if this Court assumes otherwise, the record does not support drawing an inference that such a message was perpetrated upon more than 12,000 signatories to the petition such as to disqualify the petition itself. As noted above, on cross-motions for summary judgment where the court, not a jury, is the ultimate finder of fact, the court can draw the most reasonable inference from undisputed facts. This Court finds it is not reasonable to infer that more than 12,000 people signing the petition were told that the petition would reinstitute an open primary with the exact same attributes that existed prior to 2012.

In reaching this conclusion, the Court is mindful that a court does not have the power to resolve disputed issues of fact on summary judgment. This Court is not, therefore, making a finding of fact. Rather, the Court finds that based on the record presented, the Attorney General has not provided sufficient evidence of 12,000 people being misled in order to obtain summary judgment on its claim to declare all signatures invalid. Moreover, when a matter is to be tried to the district court, the court can draw the most reasonable inference from the facts in the record (again, first construing any disputed fact most favorably to the nonmoving party). Here, based on the record as a whole, and particularly the many public statements about the full components of the initiative, the inferences that the Attorney General would require this Court to draw are not reasonable.

In determining the reasonableness of inferences to be drawn (i.e, whether the Court can infer from the several declarations, that thousands were misled), the Court has listened and

watched the video submitted with the declaration of Ryan Spoon from the event he attended on August 19, 2023. The Court also takes note of the fact that it is not a complete recording of the presentation. Specifically, Luke Mayville testifies that Declarant Spoon omitted from his declaration that Ashley Prince provided a detailed overview of both ranked-choice voting and the instant-runoff process at the Idahoans for Open Primaries event. Even assuming the truth of the statements on the partial video submitted, it is not reasonable to draw inferences from those statements when they are admittedly not a complete statement of what was said.

In determining whether it is reasonable to draw any inference that more than 12,000 voters were influenced by statements about returning to the 2012 type primary, the Court also notes Mr. Turner's citations to the Defendants' website. The referenced statements appear to be very accurate descriptions of the type of primary and election the initiative would create. See Turner's First Declaration at Exhibit G, pages 2 and 5. The evidence the Attorney General submits actually negates the idea that the Defendants perpetrated false statements to thousands of persons who actually signed a petition. And again, every signature page contained the Supreme Court-approved short titles—further negating the ability to draw an inference of widespread misperception based on a few facts in the record as to specific individuals.

2. Have Defendants Established They Are Entitled to Summary Judgment?

The same Rule 56 standards apply to the Court's consideration of Defendants' motion for summary judgment. Ultimately, the Attorney General's case rises and falls based on the assertion that the Defendants' repeated use of the phrase "open primary" initiative as the "brand" for the initiative is a false statement. Above, this Court concluded that the Attorney General cannot establish, as a matter of law, that the use of term "open primary" initiative was

false. In doing so, the Court construed any disputed fact most favorable to the Defendants as the non-moving party and drew the most reasonable inferences from those and any undisputed facts. The Attorney General is not, therefore, entitled to summary judgment (for this and the other reasons stated above).

The question here is whether, when construing any disputed facts most favorably to the Attorney General (as opposed to construing facts most favorable to Defendants), and drawing the most reasonable of those inferences from those facts and any undisputed facts, have the Defendants established an absence of a genuine issue of material fact as to the alleged falsity of the statements the Defendants made or promulgated. And further, as noted above, a mere scintilla of evidence is not sufficient to withstand summary judgment.

Whether the Defendants have met their burden is a closer question than whether the Attorney General has met his burden (as noted above, he has not). However, there is very little evidence, even interpreted most favorably to the Attorney General, that the Defendants tried to mislead potential signatories to the petition. The public presentations in the record thoroughly discuss both the top four and ranked-choice components of the initiative. The Attorney General offers extensive examples of the Defendants' branding the initiative as an open primary, but very little evidence that the Defendants sought to mislead the potential signatories as to the actual mechanisms of the initiative. The Attorney General offers several declarations of persons alleging they were told otherwise. See discussion of declarations at pages 10 through 15 above. This Court cannot draw a reasonable inference from those few examples, that more than 12,000 people experienced similar circumstances.

This Court therefore concludes that there is no genuine issue of material fact suggesting sufficient false statements to taint enough signatures for the Court to declare more than 12,000 signatures be stricken. For this reason, the Defendants' motion for summary judgment is granted.

3. The Motion to Dismiss is Moot but Constitutional Concerns Remain Relevant.

Having determined Defendants are entitled to summary judgment on other grounds, the Court need not address the motion to dismiss, but the constitutional dimensions of the case do, however, impact the Court's earlier determination that the Supreme Court did not dictate an exclusive means by which the Defendants could refer to the initiative.

As previously noted, the Attorney General's claim is entirely based on Idaho Code § 34-1815. The Defendants assert §34-1815 is unconstitutional to the extent it purports to make it unlawful for any person to willfully or knowingly makes a false statement or representation concerning the contents, purpose or effect of any petition for the purpose of obtaining any signature to any such petition, or for the purpose of persuading any person to sign any such petition. Defendants assert this prohibition violates the First Amendment right of free speech.[8] Generally, the district court should avoid deciding a case on constitutional grounds where it fails for other reasons. In addition, the party asserting unconstitutionality bears a strong burden:

> The party asserting the unconstitutionality of a statute bears the burden of showing its invalidity and must overcome a strong presumption of validity." (citation omitted). …. "It is generally presumed that legislative acts are constitutional, that the state legislature has acted within its constitutional powers, and any doubt concerning interpretation of a statute is to be resolved in favor of that which will render the statute constitutional."

[8] At oral argument, Defendants' counsel argued the language also affects the fundamental right to referendum and to reform one's government.

Jones v. Lynn, 169 Idaho 545, 561, 498 P. 3d 1174, 1190 (2021).

Above, this Court discussed the fact that the Idaho Supreme Court did not declare the only manner in which the initiative could be referred in *Idahoans for Open Primaries v. Raul R. Labrador,* 172 Idaho 466, 533 P. 3d 1262 (2023). To say that the Idaho Supreme Court could actually do so, however, would actually implicate the First Amendment. In addition to the fact that a district court should generally not decide an issue on constitutional grounds when other grounds are dispositive, a court must try to give a statute an interpretation that is constitutional. In so doing here, the Court concludes that suggesting that the Supreme Court's power to settle disputes as to ballot titles means that it has the power to prescribe the only language that can be used to describe an initiative would mean Idaho Code § 34-1815 is unconstitutional. As Defendants note, the United States District Court for the District of Idaho found the subject language of Idaho Code §34-1815 to be unconstitutional. See *Idaho Coalition United for Bears v. Cenarrusa*, 234 F. Supp. 2d 1159, 1166 (D. Idaho 2001). That decision is not binding on this Court. Nevertheless, this Court finds the U.S. District Court's reference to the United States Supreme Court's decision in *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999) and its progeny to be helpful. As Justice Ginsberg stated in *Buckley*:

> We have several times said "no litmus-paper test" will separate valid ballot-access provisions from invalid interactive speech restrictions; we have come upon "no substitute for the hard judgments that must be made." … But the First Amendment requires us to be vigilant in making those judgments, to guard against undue hindrances to political conversations and the exchange of ideas. We therefore detail why we are satisfied that, as in *Meyer*, the restrictions in question significantly inhibit communication with voters about proposed political change, and are not warranted by the state interests (administrative efficiency, fraud detection, informing

> voters) alleged to justify those restrictions. Our judgment is informed by other means Colorado employs to accomplish its regulatory purposes. (cleaned up)

As stated by Justice Thomas in his concurring opinion:

> When considering the constitutionality of a state election regulation that restricts core political speech or imposes "severe burdens" on speech or association, we have generally required that the law be narrowly tailored to serve a compelling state interest. But if the law imposes "lesser burdens," we have said that the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions. *** Predictability of decisions in this area is certainly important, but unfortunately there is no bright line separating severe from lesser burdens. When a State's election law directly regulates core political speech, we have always subjected the challenged restriction to strict scrutiny and required that the legislation be narrowly tailored to serve a compelling governmental interest. Even where a State's law does not directly regulate core political speech, we have applied strict scrutiny. For example, in *Meyer v. Grant*, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988), we considered a challenge to Colorado's law making it a felony to pay initiative petition circulators. We applied strict scrutiny because we determined that initiative petition circulation "of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change." (cleaned up).

Debate concerning the pros, cons and actual effect of an initiative are elements of core political speech. The State's interest in distinctive ballot titles does not justify implying that the assigned ballot title becomes the sole means by which a person can label or discuss a ballot initiative. To say that the Idaho Supreme Court's statutory authority to prescribe ballot title language means the Idaho Supreme Court can foreclose debate about the purpose and effect of an initiative would most certainly render such power unconstitutional. A state also has a strong interest in protecting against fraud. But again, that does not lead to a conclusion the state has

an interest in mandating a particular form of speech to a most preferred way of referring to a subject matter.

In summary, this Court is not ruling on the constitutionality of Idaho Code § 34-1815. This Court only holds that Idaho Code § 34-1809(3)(c) gives the Idaho Supreme Court the authority to settle disputes as to ballot titles. It does not give the Court the authority to regulate further speech regarding the initiative.

4. The Court Does Not Need to Address the Attorney General's Standing to Enforce Idaho Code § 34-1815.

Because this Court has determined Defendants are entitled to summary judgment on other grounds, whether or not the Attorney General has standing is moot.

IV. CONCLUSION

As the Supreme Court noted in its August 14, 2024 decision, allegations of fraud in the gathering of signatures in the initiative process are serious. Slip Opinion at p. 2. The Attorney General has not, however, alleged fraud. The Attorney General's core allegation is that the Defendants violated Idaho Code § 34-1518 by not using the approved ballot title language in its marketing of the initiative. For the reasons explained in more detail above, the Court finds the Attorney General has not met his burden on summary judgment to establish a violation to the extent this Court has the authority to declare all signatures invalid. However, the Court finds the Defendants have established the absence of a genuine issue of material fact and are entitled to summary judgment.

Because the Court finds the Attorney General has not established a right to a declaratory judgment, the Court need not address his claim for an injunction requiring the Defendants to withdraw the petition.

The Attorney General's motion for summary judgment is DENIED. The Defendants' motion for summary judgment is GRANTED.

IT IS SO ORDERED.

DATED: 9/5/2024 9:43:18 AM

PATRICK J. MILLER
District Judge

CERTIFICATE OF MAILING

I hereby certify that on 9/5/2024 09:45:38, I mailed (served) a true and correct copy of the foregoing document to:

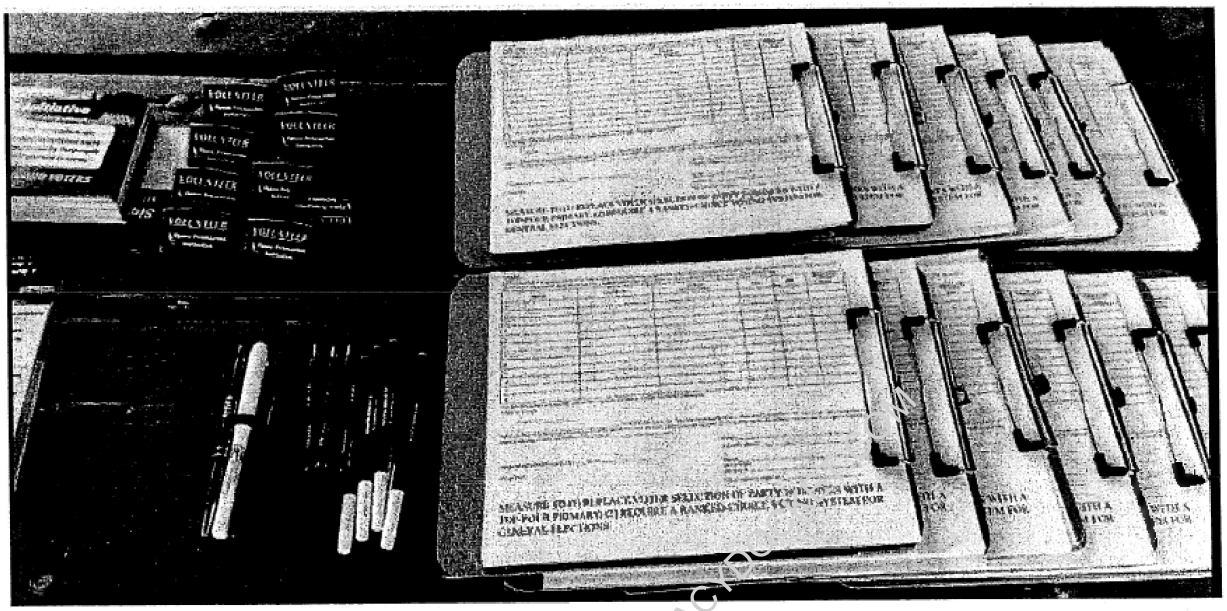
Joshua N. Turner Alan M. Hurst Michael Z. Zarian Sean M. Corkery OFFICE OF THE ATTORNEY GENERAL STATE OF IDAHO	( ) U.S. Mail, Postage Prepaid ( ) Interdepartmental Mail ( ) Facsimile (X) Email josh.turner@ag.idaho.gov alan.hurst@ag.idaho.gov michael.zarian@ag.idaho.gov jack.corkery@ag.idaho.gov
Deborah A. Ferguson Craig H. Durham FERGUSON DURHAM, PLLC	( ) U.S. Mail, Postage Prepaid ( ) Interdepartmental Mail ( ) Facsimile (X) Email daf@fergusondurham.com chd@fergusondurham.com

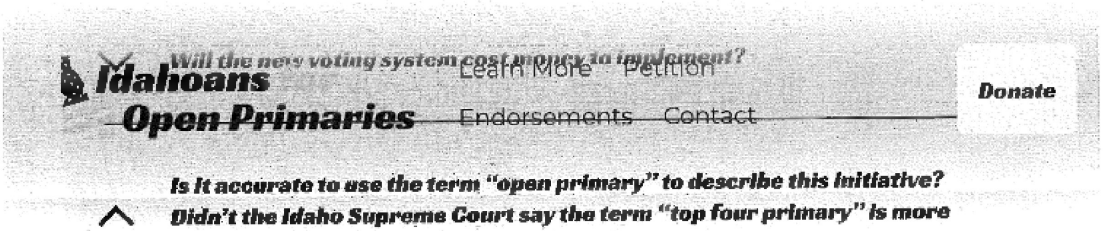
TRENT TRIPPLE
Clerk of the District Court

By: _____
Deputy Clerk

CLERK OF THE DISTRICT COURT
FOURTH JUDICIAL DISTRICT
ADA COUNTY, IDAHO

Exhibit A





Is it accurate to use the term "open primary" to describe this initiative? Didn't the Idaho Supreme Court say the term "top four primary" is more accurate?

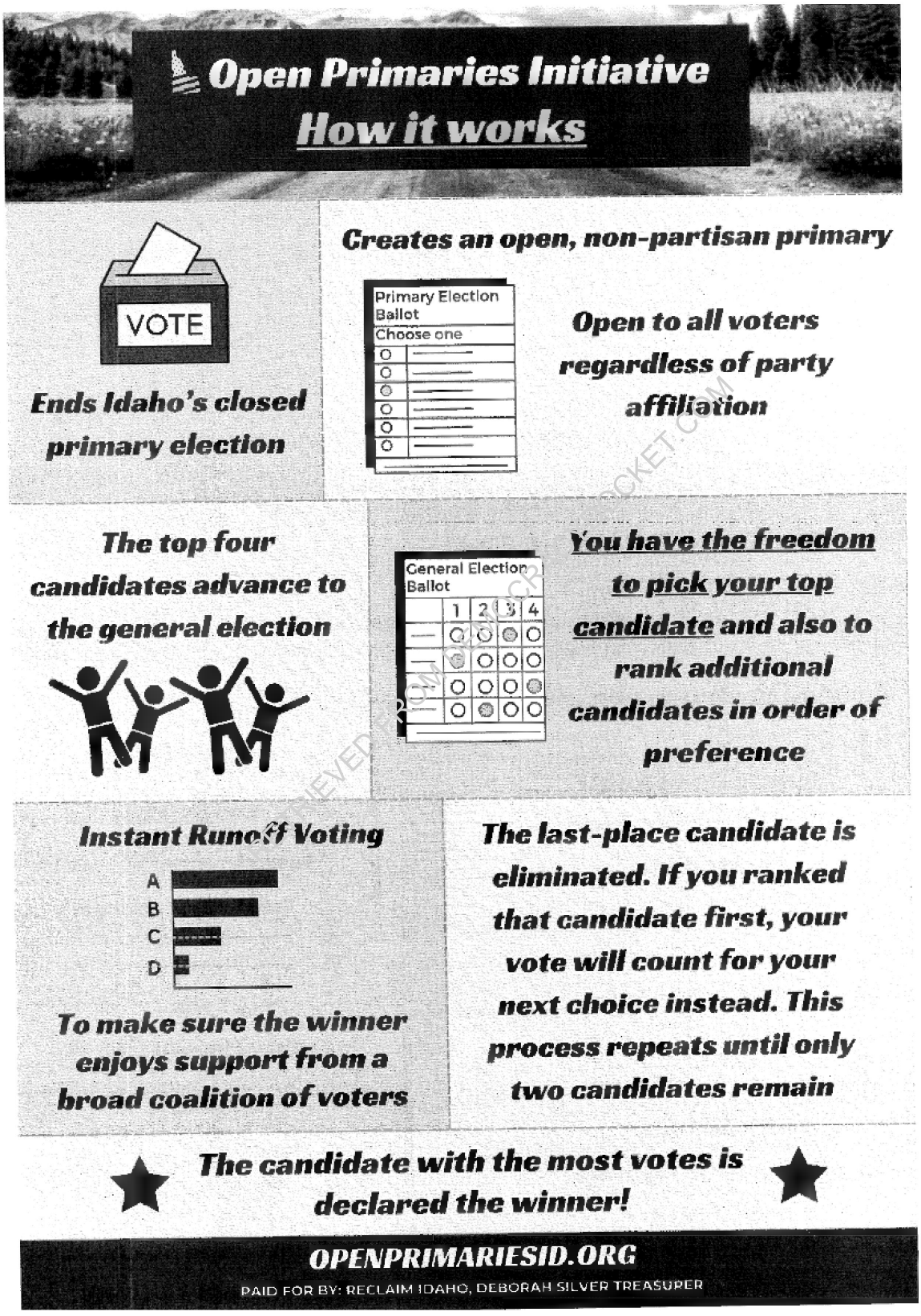
"Open primary" is an accurate term to describe this initiative. It's true that the Idaho Supreme Court took the view that the term "open primary" describes the primary system Idaho used to have, and that the old Idaho system was distinct from what our initiative proposes. Our view, which is common among reformers across the country, is that there are multiple types of "open primary." One type is the partisan open primary system, which is the system we used to have in Idaho. Another type is the nonpartisan open primary, which is the type of open primary established in Alaska and other states. Both systems are correctly called "open primaries" because they both give all voters—regardless of party affiliation—the right to participate in primary elections.

Why is the initiative called the "Open Primaries Initiative" and not the "Ranked Choice Voting Initiative"? Isn't this initiative all about ranked choice voting?

If the Open Primaries Initiative is approved by voters, doesn't the Idaho Legislature have the power to repeal it?

Still have a question?

Exhibit G, Page 5


Open Primaries Initiative
How it works
VOTE
Ends Idaho's closed primary election
Creates an open, non-partisan primary
Primary Election Ballot
Choose one
Open to all voters regardless of party affiliation
The top four candidates advance to the general election
General Election Ballot
1 2 3 4
You have the freedom to pick your top candidate and also to rank additional candidates in order of preference
Instant Runoff Voting
A
B
C
D
To make sure the winner enjoys support from a broad coalition of voters
The last-place candidate is eliminated. If you ranked that candidate first, your vote will count for your next choice instead. This process repeats until only two candidates remain
The candidate with the most votes is declared the winner!
OPENPRIMARIESID.ORG
PAID FOR BY: RECLAIM IDAHO, DEBORAH SILVER TREASURER