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IN THE SUPREME COURT FOR THE STATE OF IDAHO

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAII, ALASKA, INDIANA, KENTUCKY, on behalf of itself, its staff, physicians and patients, and **Caitlin Gustafson, M.D.**, on behalf of herself and her patients,

Petitioners,

v.

STATE OF IDAHO,

Respondent.

Case No. 49615-2022

OPPOSITION TO RESPONDENT'S MOTION TO RECONSIDER

Upon review of the Verified Petition for Writ of Prohibition and Brief in Support, this Court ordered an expedited briefing schedule to ensure prompt resolution of the important constitutional issues presented by this challenge to SB 1309. The Court gave the State two weeks to respond to the Petition, which is more than ample time given that the Attorney General's Office has already issued a lengthy opinion declaring its view that SB 1309 is likely unconstitutional. The State's request that the Court reconsider its order expediting the briefing schedule is meritless. SB 1309 presents an existential threat to the separation of powers in this State, and threatens irreparable harm to Petitioners and their patients if it becomes effective on April 22. Even the State concedes that this is "a weighty matter." Mot. 2. The State's request to reconsider should be denied. Should the Court wish to extend the briefing schedule, it should take up the State's suggestion and grant an alternative or peremptory writ of prohibition forbidding Idaho courts from giving effect to SB 1309 pending resolution of Petitioners' challenge.

I. The Court's Expedited Schedule Is Reasonable.

As the Petition explained, the stakes in this case are exceptionally grave and the harm particularly imminent. As of SB 1309's April 22 effective date, not only will the Legislature have effectively vitiated the separation of powers in violation of clear constitutional mandates and this Court's express instructions, among other state constitutional rights, but abortion after approximately six weeks of pregnancy, before many people even know they are pregnant, will become unavailable statewide. This Court's modest expediting of the briefing schedule is a manifestly appropriate response.

The schedule set by the Court is in line with briefing schedules previously set on petitions for extraordinary writs. For instance, in *Coeur D'Alene Tribe v. Denney* (Idaho Sup. Ct. Case No. 43169-2015), this Court entered an order the same day the petition was filed (June 3, 2015) setting a 14-day deadline for the State's response brief. This Court has set the same deadline in numerous other cases invoking its original jurisdiction and seeking the issuance of an extraordinary writ. *See, e.g.*, *Ybarra v. Legis. by Bedke* (Idaho Sup. Ct. Case No. 47991-2020) (petition filed April 27, 2020; order issued May 1 setting 14-day deadline for response brief); *Reclaim Idaho v. Denney* (Idaho Sup. Ct. Case No. 48760-2021) (petition filed April 26, 2021; order issued April 29 setting 14-day deadline for response brief). The need for expedition here is equally great, if not greater, than it was in those cases.

Moreover, although the State claims that it has "a mere 15 days" to "marshal all [its] arguments and evidence in opposition to the Petition," the State has been anticipating this challenge for some time and is well positioned to respond promptly. Mot. 3. In February 2022, at the request of State Senator Grant Burgoyne, the Office of the Attorney General generated a nine-page, single-spaced "legal analysis of multiple questions regarding Senate Bill 1309." Opinion of the Office of the Idaho Attorney General, Ex. 6 to Petition at 1. Many of the issues Petitioners raise were addressed in that Opinion. The Office of the Attorney General is not starting from scratch: It has long been aware of SB 1309—and its unconstitutionality. The State has previously been ordered to prepare arguments and evidence in opposition to unconstitutional claims brought against it within 14 days. *See, e.g.*, *Stucki v. Idaho Comm'n for Reapportionment* (Idaho Sup. Ct. Case No. 49295-2021) (consolidated to Idaho Sup. Ct. Case No. 49261-2021). It can do so here.

II. The State's Arguments Against This Court's Original Jurisdiction Are Misplaced In Its Request For Reconsideration, And In Any Event Are Meritless.

The State has no real grievance with the briefing schedule the Court has set. Its motion is simply a preview of its merits position that the Court should not exercise original jurisdiction. The State will have ample opportunity to make that argument in its response to the Petition; it is no basis to reconsider the order to expedite. In any event, the State's argument is misplaced. As Petitioners explained in their opening papers, this case is the paradigmatic one for exercise of original jurisdiction because, as this Court recently explained, it asserts "sufficient facts concerning a possible constitutional violation of an urgent nature." *Reclaim Idaho v. Denney*, 497 P.3d 160, 172 (Idaho 2021) (quoting *Sweeney v. Otter*, 119 Idaho 135, 138 (1990)).

The State tries to distinguish this case from others in which this Court has exercised its original jurisdiction, but those attempts all fail. *First*, the State focuses on the fact that, in this case, Petitioners set forth six different ways in which SB 1309 violates the Idaho Constitution, rather than "one specific constitutional provision containing a specific right." Mot. 2 n.1. In the State's apparent view, the more unconstitutional the law, the less appropriate for extraordinary relief. That gets things backwards: The State should not be able to evade this Court's review by violating *multiple* provisions of the Idaho Constitution instead of just one.

Second, the State characterizes Petitioners' claims as "general constitutional claims," which supposedly makes this case inappropriate for this Court's original jurisdiction. Mot. 2 & n.1. Whatever the State means by that, the "generality" of a constitutional claim is not part of this Court's test for exercising original jurisdiction. This Court has granted original jurisdiction in

cases raising similar issues to those raised here, and in cases where petitioners raised more than one issue for review. *See, e.g.*, *Sweeney*, 119 Idaho at 137-38 (accepting jurisdiction to review petition for extraordinary relief regarding whether Lieutenant Governor "violate[d] the separation of powers clause of the Idaho Constitution"); *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 123-24 (2000) (accepting jurisdiction to review petition alleging Idaho statute "violates the guarantees of freedom of speech and the right to vote found in both the Idaho Constitution and the United States Constitution").

Third, the State says that this case presents questions of fact and not questions of law. That is incorrect. Although the State claims that this case will involve "factual disputes" that "go not only to Petitioners' constitutional claims, but also to Petitioners' very standing to bring this challenge," the State does not identify a single one of those alleged disputes. Mot. 3. The constitutional violations are manifest and apparent from the face of the statute. To the extent the Petition alleges facts, it does so in satisfaction of this Court's standard for exercise of original jurisdiction. *See Coeur d'Alene Tribe v. Denney*, 161 Idaho 508, 513-14 (2015) ("[T]his Court may 'exercise jurisdiction to review a petition for extraordinary relief where the petition alleges sufficient facts concerning a possible constitutional violation of an urgent nature.'") (quoting *Idaho Watersheds Project v. State Bd. of Land Comm'rs*, 133 Idaho 55, 57 (1999)). And to the extent those facts matter here, they are not contested because the State itself has already acknowledged that SB 1309 "would ban all abortions in the state of Idaho after a fetal heartbeat is detected with very limited exceptions for medical emergencies, rape, and incest." Opinion of the Office of the

Idaho Attorney General at 1. The State was able to reach that conclusion without any factual development at all.

III. The State's Other Arguments For Delay Have No Merit.

The State posits several other (sometimes contradictory) reasons why this Court should delay its determination in this case.

First, the State suggests there is nothing special about SB 1309 because "all duly-enacted statutes have immediate effect upon their effective date." Mot. 5. That has not stopped this Court, in the past, from exercising its original jurisdiction when petitioners have alleged sufficient facts concerning constitutional violations of an urgent nature. *See, e.g.*, *Ybarra v. Legis. by Bedke*, 166 Idaho 902, 905-06 (2020).

Second, the State also makes the opposite point, admitting that SB 1309 is "novel," and citing its novelty as a reason to delay consideration. Mot. 4. Petitioners agree that SB 1309 is novel. It is novel in its unconstitutional attempt to subvert the role of the Executive and insulate the law from judicial review. *Cf. Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 545 (2021) (Roberts, C.J., concurring) (referring to the "novelty of Texas's scheme" as enacted by SB 8). Yet the State fails to explain why the "novel" nature of SB 1309 warrants delay. Again, the State asks to benefit from SB 1309's blatant unconstitutionality. That cannot be the correct result.

Third, without citing any authority to support its request, the State asks this Court to delay its consideration of this case to wait for decisions in two other cases. The first is *Van Stean v. Texas Right to Life*, No. D-1-GN-21-004179 (98th Jud. Dist. Ct., Travis Cnty., Tex.), which the State says is "currently pending within the Texas Supreme Court." Mot. 4. In fact, it is on appeal

to the Texas Court of Appeals. And while it is sure to end up at the Texas Supreme Court, there is no timeline on which that review is sure to occur. Rather than waiting for *Van Stean* to run its course in the Texas state courts, Petitioners respectfully suggest that the Court look to the Texas district court's thoughtful decision in the same case, *see* Br. ISO Petition 22-23 & n.19, which provides persuasive support to Petitioners' claims here. *Van Stean v. Texas Right to Life*, No. D-1-GN-21-004179, slip op. (Dist. Ct. Travis Cnty., Tex., Dec. 9, 2021), https://reason.com/wp-content/uploads/2021/12/Van-Stean-v-Texas-Right-to-Life-order-12-9-21.pdf. In any event, as the State acknowledges, any decision by Texas courts, whether at the Texas Supreme Court, intermediate appellate court, or a trial court in Texas, is not binding on this Court.

The State also asks this Court to wait for an opinion in *Dobbs v. Jackson Women's Health Organization* (U.S. Supreme Court Case No. 19-1392), on the ground that it "could dramatically reset how abortion cases are legally evaluated under the U.S. Constitution." Mot. 4. The possibility that *Dobbs* may alter abortion jurisprudence under the U.S. Constitution does not counsel in favor of delay here. The State cannot defend a patently unconstitutional law based on the hope that the U.S. Supreme Court in a pending case will subsequently make the law constitutional—which *Dobbs* would not even do here. SB 1309 violates the Idaho Constitution in numerous ways that have absolutely nothing to do with abortion. And even as to its ban on abortion, it violates the Idaho Constitution regardless of what *Dobbs* says.

IV. Petitioners Do Not Oppose An Extension Of The Briefing Schedule If It Is Accompanied By The Issuance Of An Alternative Or Peremptory Writ Of Prohibition To Preserve The Status Quo For The Duration Of This Litigation.

The State suggests in the alternative that this Court "issue an alternative writ of prohibition to preserve the status quo while the parties carefully brief and argue the Petition's merits." Mot. 4. Petitioners are not opposed to that request, so long as this Court issues an alternative or peremptory writ of prohibition directing Idaho Courts not to give effect to SB 1309 during the pendency of this litigation. *See* Idaho Code § 7-403; Idaho App. R. 5(d) (allowing this Court to "direct the respondent … to refrain from acting, as directed in the writ, pending hearing and upon such conditions as the Court may impose"); *Pfirman v. Prob. Ct. of Shoshone Cnty.*, 57 Idaho 304, 308 (1937) (explaining that Court had issued alternative writ of prohibition while considering petition for writ of prohibition). That outcome would properly preserve the status quo, under which SB 1309 has no legal effect and Petitioners can continue providing abortion services without the threat of civil litigation by private litigants. *See, e.g., Coeur D'Alene Turf Club, Inc. v. Cogswell*, 93 Idaho 324, 330 (1969) (staying all proceedings in trial court during the pendency of the appeal in order to preserve the status quo).

Respectfully submitted on this 4th day of April, 2022.

/s/ Michael J. Bartlett

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CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2022, I electronically filed the foregoing with the Clerk of the Court using the iCourt e-file system, and caused the following parties or counsel to be served by electronic means and Federal Express:

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