

LAWRENCE G. WASDEN
ATTORNEY GENERAL

STEVEN L. OLSEN
Chief of Civil Litigation

MEGAN A. LARRONDO, ISB #10597
DAYTON P. REED, ISB #10775
Deputy Attorneys General
954 W. Jefferson Street, 2nd Floor
P.O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-2400
Facsimile: (208) 854-8073
megan.larrondo@ag.idaho.gov
dayton.reed@ag.idaho.gov
Attorneys for Respondent

IN THE SUPREME COURT OF THE STATE OF IDAHO

PLANNED PARENTHOOD OF THE 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.

and

SCOTT BEDKE, in his official capacity as
Speaker of the House of Representatives of the
State of Idaho; CHUCK WINDER, in his
official capacity as President Pro Tempore of
the Idaho State Senate; and the SIXTY-SIXTH
IDAHO LEGISLATURE,

Intervenors-Respondents.

Docket No. 49615-2022

**VERIFIED ANSWER TO
VERIFIED PETITION FOR WRIT
OF PROHIBITION AND
APPLICATION FOR
DECLARATORY JUDGMENT**

The State of Idaho¹ hereby answers and responds to the Verified Petition for Writ of Prohibition and Application for Declaratory Judgment (“Petition”) filed March 30, 2022.

I. GENERAL RESPONSE

Unless specifically admitted herein, the State denies each and every allegation, claim, and request for relief in the Petition.

II. SPECIFIC RESPONSES

In response to the specific allegations, claims, and requests for relief contained in the specific paragraphs in the Petition, the State responds as follows:

A. INTRODUCTION

1. To the extent Petitioners’ Introduction may be construed to contain allegations or requests for relief, the State denies that an original action is an appropriate vehicle to resolve Petitioners’ claims; denies that Idaho Senate Bill No. 1309 (“SB 1309”) is unlawful and unenforceable under the Idaho Constitution; denies that it prohibits a medical professional from performing an abortion if fetal cardiac activity can be detected; denies that the Act violates “settled precedent;” denies that the purpose of SB 1309 was to make an “end run [around] settled precedent;” denies that SB 1309’s private civil action is “unprecedented” when the Legislature has provided for many private civil causes of action; denies that SB 1309 strips the Executive of its power and discretion to ensure that the laws of the State are faithfully executed; denies that SB

¹ The question of just who is the State of Idaho for the purposes of this Verified Answer is a difficult one and one that highlights how a petition for a writ issued against the State, as opposed to a specific individual, is inappropriate. This Office has struggled with who is the appropriate individual to verify this Answer: it could be the Governor as the Chief Executive Office of the State of Idaho, or the Attorney General as the Chief Legal Officer, or the Legislature as the enacting body of SB 1309. None of these present a clear yes or no. Moreover, none of these individuals, nor any other executive or legislative official, has any enforcement authority under SB 1309. Given that there is no one appropriate signor in this matter on behalf of the State of Idaho, the Attorney General does so in his capacity as the legal representative of the State.

1309 puts medical providers who provide abortions after approximately six weeks “at risk of ruinous civil litigation;” denies that SB 1309 leaves Petitioners and all other medical professionals with no choice but to stop performing abortions after six weeks gestational age; and denies that any writ of prohibition should be issued in relation to SB 1309. The State further denies that SB 1309 is blatantly unconstitutional or a power grab by the Idaho Legislature and denies that the Idaho Attorney General’s Office released any opinion to that effect or that the Governor stated as much. The State further denies that the Idaho Constitution contains a fundamental right to privacy in making intimate familial decisions that protects a right to abortion; that SB1309 violates the separation of powers doctrine; that SB 1309 violates Idaho’s prohibition on special legislation; that Idaho’s due process clause contains a prohibition on excessive and vague penalties; that SB 1309 violates any such alleged constitutional prohibition; that the Idaho Constitution contains any guarantee of informational privacy; that SB 1309 violates any guarantee of informational privacy; and that SB 1309 violates Idaho’s constitutional guarantee of equal protection. The State further denies that SB 1309 violates any right to abortion under the Fourteenth Amendment of the U.S. Constitution, because, among other reasons, it does not effectively ban abortions before viability in Idaho. The State further denies that SB 1309 will harm its constitutional norms or the lives of Idaho’s citizens once it becomes effective. The State denies any and all remaining allegations alleged in the Introduction and denies that Petitioners are entitled to the relief requested. The State requests that the Petition be dismissed.

B. JURISDICTION

2. In answering paragraph 1, the State admits the quoted statements are attributable to the Idaho Constitution and the cited statutes but denies that the Petition is appropriate for the exercise of original jurisdiction or for the issuance of a writ of prohibition.

3. In answering paragraph 2, the State admits the quoted statements are attributable to Idaho Appellate Rule 5(a) but denies that the Petition is appropriate for the exercise of original jurisdiction or for the issuance of a writ of prohibition.

4. In answering paragraph 3, the State denies that that Petitioners have alleged sufficient facts concerning a possible constitutional violation of an urgent nature. To the extent Petitioners are citing case law for a proposition, that proposition is a legal conclusion to which no response is required. To the extent an answer is required, the allegations are denied. Answering further, the State denies that Petitioners correctly state the standard for the Court's exercise of its original jurisdiction.

5. In answering paragraph 4, the State admits that Petitioners are bringing six separate challenges to SB 1309 but denies that there has been any violation of the Idaho Constitution under of any of the challenges presented by Petitioners. The State further denies that the Idaho Constitution contains any right to informational privacy regarding an abortion, that the Idaho Constitution prohibits the imposition of excessive or vague penalties, and that there is a fundamental right to privacy in making intimate familial decisions that includes the right to an abortion protected by the Idaho Constitution.

6. In answering paragraph 5, the State denies that SB 1309's effective date creates an issue of urgent statewide importance; denies that Petitioners lack any other adequate remedy at law; and denies that "the people of Idaho" need clarity from this Court as to the constitutionality of SB 1309 or that this challenge calls for this Court's immediate review.

C. PARTIES

7. The State admits only that Planned Parenthood provides various services relating to reproduction and sexual health. The State denies that Planned Parenthood's medical

professionals will be threatened with “ruinous civil liability” if they perform abortions in Idaho after SB 1309 goes into effect. The State denies that Planned Parenthood has standing to bring this lawsuit on behalf of its current and future patients. The State denies the remaining allegations in paragraph 6 for lack of knowledge.

8. The State denies that Dr. Gustafson is necessarily threatened with liability under the Act or that other medical professionals who provide abortions in Idaho are threatened with liability. The State denies that Dr. Gustafson has standing to bring claims on behalf of her current and future patients. The State denies the remaining allegations in paragraph 7 for lack of knowledge.

9. In answering paragraph 8, the State denies that the Idaho Constitution charges the “State of Idaho” with upholding the Idaho Constitution. The State denies that the “State of Idaho” enacted the Act; rather it was the Legislature of the State of Idaho, together with the Governor, that enacted the Act. Further, upon close examination of SB 1309, there is no general enforcement authority of the State of Idaho, any of its enumerated executive officers, of the Legislature, or any of the legislative officers with regard to SB 1309. The State further denies that SB 1309, once effective, will violate Idaho’s Constitution.

D. FACTS COMMON TO ALL CLAIMS

Idaho Senate Bill No. 1309

10. In answering paragraph 9, Petitioners are citing case law for a proposition that is a legal conclusion, and to which no response is required. To the extent an answer is required, the State admits only that under U.S. Supreme Court precedent, the state may regulate pre-viability abortions, including to promote its profound interest in potential life, unless the “state regulation imposes an undue burden” on a woman’s ability to choose an abortion. *Planned Parenthood of*

Southeastern Pennsylvania v. Casey, 505 U.S. 833, 874 (1992). The State denies the allegations in this paragraph, including that SB 1309 will ban abortions prior to fetal viability and that it will allow “ruinous civil penalties.”

11. In answering paragraph 10, the State admits only that the paragraph states SB 1309’s definition of “fetal heartbeat.” The State denies the remaining allegations in paragraph 10.

12. The State denies the allegations in paragraph 11.

13. In answering paragraph 12, the State admits only that a civil cause of action is not available under SB 1309 for an abortion performed or attempted after a fetal heartbeat has been detected when certain exceptions apply. The State denies the remaining allegations in paragraph 12. Answering further, the State states that SB 1309 speaks for itself as to the applicable exceptions.

14. In answering paragraph 13, the State admits only that SB 1309 creates a civil cause of action available to certain individuals described in SB 1309 who meet the standing requirements of the Idaho Constitution, but denies that the civil cause of action was intended to allow an unconstitutional ban on abortion to take effect or that SB 1309 strips enforcement power from the executive officials.

15. In answering paragraph 14, the State admits only that SB 1309 § 6(1) speaks for itself and denies any allegations stated in paragraph 14. To the extent Petitioners are citing case law for a proposition, that proposition is a legal conclusion to which no response is required. To the extent an answer is required, the allegations are denied as the Legislature cannot confer standing where the constitutional requirements for standing are not met.

16. In answering paragraph 15, the State admits only that SB 1309 § 6(3) speaks for itself as to for whom a civil cause of action under SB 1309 is not available. The State denies the remaining allegations.

17. In answering paragraph 16, the State denies the allegations.

18. In answering paragraph 17, the State admits only that SB 1309 § 6(2) speaks for itself and that the statute of limitations for a civil cause of action under SB 1309 is the same as the default statute of limitations in Idaho. *See* I.C. § 5-224. The State denies that SB 1309 allows a “bounty” or encourages frivolous lawsuits. The State admits only that the Act serves to express the State’s value for unborn human life. The State denies any remaining allegations.

19. In answering paragraph 18, the State admits only that SB 1309 provides for statutory damages in an amount not less than twenty thousand dollars (\$20,000) in an effort to set a minimum value for life and that the Legislature has set a minimum amount of statutory damages with no set maximum for other civil causes of action. *See* I.C. § 45-811(4)(a); I.C. § 28-9-625(c)(2). The State denies the remaining allegations.

20. In answering paragraph 19, the State admits only that SB 1309 set out an affirmative defense to litigation, that SB 1309 § 6(5) speaks for itself, that SB 1358 is a trailer bill that amended SB 1309, that SB 1358 § 1(5) speaks for itself, and that the changes made to SB 1309 in SB 1358 § 1(5) were made to satisfy the Idaho Medical Association’s legal concerns and did not eliminate any affirmative defenses. The State states further that a defendant in a cause of action brought under SB 1309 is not limited to only asserting affirmative defenses set out by the Legislature. The State denies any remaining allegations.

21. In answering paragraph 20, the State admits only that SB 1309 §§ 6(7), 6(8) speak for themselves and that Chapters 14, 17, 18, and Title 54 of the Idaho Code also speak for themselves. The State denies the remaining allegations.

22. In answering paragraph 21, the State admits only that Idaho Code § 18-622(1), (2), and Idaho Code § 18-8806 speak for themselves and denies any allegations stated in paragraph 21.

23. In answering paragraph 22, the State denies the allegations.

24. In answering paragraph 23, the State denies the allegations.

25. In answering paragraph 24, the State admits only that Chief Deputy Brian Kane wrote a letter to the Honorable Senator Grant Burgoyne who requested a legal analysis regarding SB 1309, and that the Legislature enacted SB 1309. Mr. Kane's letter speaks for itself. The State denies that the Idaho Office of the Attorney General informed the Legislature that the bill was "likely unconstitutional." The State denies any remaining allegations.

26. In answering paragraph 25, the State admits only that Governor Brad Little signed SB 1309 into law. The transmittal letter from Governor Little to the President of the Senate speaks for itself.

27. In answering paragraph 26, the State admits only that SB 1309's effective date was April 22, 2022. As of the filing of this Answer, the Idaho Supreme Court has stayed the implementation of SB 1309 pending further action by the Court.

Idaho Senate Bill No. 1309's Effects on Petitions and Their Parents

28. In answering paragraph 27, the State admits only that a plaintiff bringing suit under SB 1309's civil cause of action could recover an award of statutory damages and costs and fees. The State denies the remaining allegations in paragraph 27.

29. In answering paragraph 28, the State denies the allegations. The State admits only that there are other abortion providers in Idaho who are not Petitioners.

30. In answering paragraph 29, the State denies the allegations.

31. In answering paragraph 30, the State states that it contains argumentative allegations to which no response is required. To the extent a response is required, the State denies the allegations.

32. In answering paragraph 31, the State states that it contains argumentative allegations to which no response is required. To the extent a response is required, the State denies the allegations, except as to the distance between the identified cities and Boise, and that Idaho is home to five federally recognized tribal reservations.

33. In answering paragraph 32, the State contends that it contains argumentative allegations to which no response is required. To the extent a response is required, the State denies same.

34. In answering paragraph 33, the State contends that it contains argumentative allegations to which no response is required. To the extent a response is required, the State denies same.

35. In answering paragraph 34, the State contends that it contains argumentative allegations to which no response is required. To the extent a response is required, the State denies same.

36. In answering paragraph 35, the State denies the allegations.

37. In answering paragraph 36, the State contends that it contains argumentative allegations to which no response is required. To the extent a response is required, the State denies the same.

38. In answering paragraph 37, the State contends that it contains argumentative allegations to which no response is required. To the extent a response is required, the State denies the same.

39. In answering paragraph 38, the State denies the allegations.

E. CLAIMS FOR RELIEF

SB 1309 Violates the Separation of Powers Doctrine under the Idaho Constitution

40. In answering paragraph 39, the State incorporates the preceding responses to all paragraphs in the Petition.

41. In answering paragraph 40, the State admits the quoted statements are attributable to the Idaho Constitution.

42. In answering paragraph 41, the State admits the quoted statements are attributable to the Idaho Constitution.

43. In answering paragraph 42, the State admits the quoted statements are attributable to the Idaho Constitution and the decision in *Mead v. Arnell*, 117 Idaho 660, 667 (1990) respectively. To the extent that paragraph 42 contains conclusion of law, no response is required.

44. In answering paragraph 43, the State denies the allegations.

45. In answering paragraph 44, the State admits only that SB 1309 creates a civil cause of action and is not a state regulation. The State denies the remaining allegations in paragraph 45.

SB 1309 Violates the Prohibition against “Special” Laws in Article III, section 19 of the Idaho Constitution

46. In answering paragraph 45, the State incorporates the preceding responses to all paragraphs in the Petition.

47. In answering paragraph 46, the State admits the quoted statements are attributable to the Idaho Constitution.

48. In answering paragraph 47, Petitioners are citing case law for a proposition that is a legal conclusion and to which no response is required. To the extent an answer is required, the allegations and legal conclusion are denied.

49. In answering paragraph 48, the State denies the allegations.

50. In answering paragraph 49, the State denies the allegations.

SB 1309 Violates the Right to Informational Privacy under the Idaho Constitution

51. In answering paragraph 50, the State incorporates the preceding responses to all paragraphs in the Petition.

52. In answering paragraph 51, the State denies the allegations.

53. In answering paragraph 52, Petitioners are citing case law for a proposition that is a legal conclusion and to which no response is required. To the extent an answer is required, the allegations are denied.

54. In answering paragraph 53, the State denies that allegations.

SB 1309 Violates the Right to Information Privacy under the Idaho Constitution by Imposing Excessive and Vague Penalties

55. In answering paragraph 54, the State incorporates the preceding responses to all paragraphs in the Petition.

56. In answering paragraph 55, the State admits that the quoted statements are attributable to the Idaho Constitution. Answering further, Petitioners are citing case law for a proposition that is a legal conclusion and to which no response is required. To the extent an answer is required, the allegations are denied.

57. In answering paragraph 56, the State denies the allegations.

58. In answering paragraph 57, the State denies the allegations.

59. In answering paragraph 58, the State denies the allegations.

**SB 1309 Violates the Equal Protection Clause of the Idaho Constitution because of its
Disparate Treatment of Abortion Providers**

60. In answering paragraph 59, the State incorporates the preceding responses to all paragraphs in the Petition.

61. In answering paragraph 60, Petitioners are citing case law for a proposition that is a legal conclusion and to which no response is required. To the extent an answer is required, the allegations are denied.

62. In answering paragraph 61, the State denies the allegations.

63. In answering paragraph 62, the State denies the allegations.

**SB 1309 Violates the Idaho Constitution by Denying the Fundamental Right to Privacy in
Making Intimate Familial Decisions**

64. In answering paragraph 63, the State incorporates the preceding responses to all paragraphs in the Petition.

65. In answering paragraph 64, the State admits only that the quoted statements are attributable to the Idaho Constitution. The State denies the remaining allegations in paragraph 64.

66. In answering paragraph 65, the State denies the allegations.

67. In answering paragraph 66, the State admits that the quoted statements are attributable to the Idaho Constitution

68. In answering paragraph 67, the State admits that the quoted statements are attributable to the Idaho Constitution.

69. In answering paragraph 68, the State admits that the quoted statements are attributable to the Idaho Constitution.

70. In answering paragraph 69, Petitioners are citing case law for a proposition that is a legal conclusion and to which no response is required. To the extent an answer is required, the

allegations are denied. The State denies that privacy in making intimate familial decisions encompassing a right to abortion is a fundamental right protected by the Idaho Constitution and denies that SB 1309 violates any such right.

Prayer for Relief

71. In answering Petitioners' Prayer for Relief, the State denies that Petitioners are entitled to the relief requested in paragraphs (a)-(d) and further deny that Petitioners are entitled to emergency relief.

III. AFFIRMATIVE DEFENSES

FIRST DEFENSE

The Petition fails to state a claim upon which relief may be granted.

SECOND DEFENSE

Petitioners have a plain, speedy, and adequate remedy in the ordinary course of law.

THIRD DEFENSE

This matter is not urgent.

FOURTH DEFENSE

Petitioners do not have standing to assert any claims for relief on behalf of any other individual, including the Executive and/or Petitioners' current and future patients.

FIFTH DEFENSE

Petitioners' claims for relief are inconsistent with and unsupported by Idaho law.

SIXTH DEFENSE

The Court cannot issue the requested writ of prohibition because Petitioners do not seek a proper Writ of Prohibition against the State under Idaho Appellate Rule 5(a), Idaho Rule of Civil Procedure 74, and Idaho Code § 7-402.

SEVENTH DEFENSE

This Court lacks jurisdiction to consider the Petition.

EIGHTH DEFENSE

Petitioners' claims are not ripe.

NINTH DEFENSE

The State of Idaho is not a permissible respondent in an original action for writ of prohibition.

TENTH DEFENSE

Petitioners are not entitled to attorney fees.

DATED: This 28th day of April, 2022.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: /s/ Megan A. Larrondo
MEGAN A. LARRONDO
Deputy Attorney General

VERIFICATION

STATE OF IDAHO)
) ss.
County of Ada)

Lawrence Wasden, Attorney General of the State of Idaho, being first duly sworn, deposes and says:

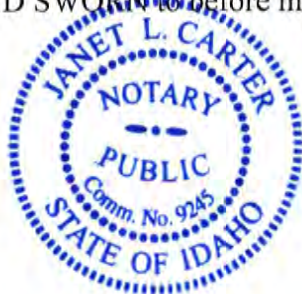
I have read the foregoing Verified Answer to the Verified Petition for Writ of Prohibition and Application for Declaratory Judgment and know the contents thereof, and the same are true to the best of my knowledge and belief.


DATED this 28th day of April, 2022.



LAWRENCE WASDEN

SUBSCRIBED AND SWORN to before me this 28th day of April, 2022.





Notary Public for Idaho
Residing at: Boise, Id
My Commission Expires: 7-29-2023

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of April, 2022, I electronically filed the foregoing with the Clerk of the Court using the iCourt e-file system which sent a Notice of Electronic Filing to the following persons:

Michael J. Bartlett,
BARTLETT & FRENCH LLP

michael@bartlettfrench.com

Alan E. Schoenfeld
Michelle N. Diamond
Rachel E. Craft
Cindy Y. Pan
Samuel J. McHale
WILMER CUTLER PICKERING
HALE AND DORR LLP (New York, NY Office)

alan.schoenfeld@wilmerhale.com
michelle.diamond@wilmerhale.com
rachel.craft@wilmerhale.com
cindy.pan@wilmerhale.com
sam.mchale@wilmerhale.com

Joseph H. Rosenberg
Ann E. Himes
WILMER CUTLER PICKERING
HALE AND DORR LLP (Washington, DC Office)

joseph.rosenberg@wilmerhale.com
annie.himes@wilmerhale.com

Vikram P. Iyer
WILMER CUTLER PICKERING
HALE AND DORR LLP (Los Angeles, CA Office)

vikram.iyer@wilmerhale.com

Attorneys for Petitioners

Daniel W. Bower
MORRIS BOWER & HAWS PLLC

dbower@morrisbowerhaws.com

Attorneys for Intervenors-Respondents

/s/ Megan A. Larrondo
Megan A. Larrondo
DEPUTY ATTORNEY GENERAL