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Idaho Supreme Court
Melanie Gagnepain, Clerk of the Court
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**IN THE SUPREME COURT FOR THE STATE OF IDAHO**

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| **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,<br><br>Petitioners,<br><br>v.<br><br>**STATE OF IDAHO**,<br><br>Respondent,<br><br>and<br><br>**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**,<br><br>Intervenors-Respondents. | Case No. 49615-2022 |

# PETITIONERS' BRIEF IN OPPOSITION TO STATE OF IDAHO'S MOTION TO VACATE STAY

ORIGINAL JURISDICTION

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## INTRODUCTION

In its motion to reconsider this Court's order expediting briefing, the State said "it would be prudent" for the Court to preserve the status quo. Petitioners agreed, and, in its reply, the State did not oppose or otherwise take issue with a stay. Yet the State now asks this Court to reconsider the stay it properly entered under the Idaho Appellate Rules and its own inherent authority. The State cannot rewrite its own filings to disclaim responsibility for the stay, nor may it resurrect arguments it elected not to make in prior briefing. The State did not object to a stay in its reply in support of its motion to reconsider on April 4, 2022, and so the argument has been waived and is untimely.

Even if this Court were to consider the arguments the State has waived, they fail for several reasons. *First*, this Court had the authority to issue a stay under Idaho Appellate Rules 5(d) and 13(g). *Second*, the authority to impose a stay is customarily exercised in constitutional litigation to allow the judiciary to ensure that unconstitutional laws do not go into effect before a court can properly and thoroughly evaluate their constitutionality. *Third*, the State of Idaho is the proper respondent to be enjoined in this case because Idaho law provides that the State can be directly sued for violations of the Idaho Constitution.[1] And *fourth*, this Court has not abused its discretion in staying SB 1309; instead, it properly preserved the status quo—an option the State itself proposed pending adjudication of SB 1309's constitutionality.

[1] *See also* Petitioners' Omnibus Reply Brief ISO Petition at Section I.D.

Petitioners respectfully submit that the stay should remain in place while this case is adjudicated.

## ARGUMENT

### I. The State's Motion Is Procedurally Improper And Must Not Be Considered.

The Court need not consider the State's arguments because the State failed to raise them in its April 4, 2022, reply brief in support of its first motion for reconsideration, and it failed to move for reconsideration or appeal of this Court's grant of the stay within fourteen days—as is customary for reconsidering or appealing rulings. *See* I.A.R. 12.

The State's current position is an about-face from its original motion for reconsideration, filed on April 1, 2022. There, in asking this Court to reconsider its order expediting briefing, the State explained that "Idaho law allows this Court to issue an alternative writ of prohibition to preserve the status quo while the parties carefully brief and argue the Petition's merits." Mem. ISO Mot. for Reconsideration at 4. The State went on to urge this Court that it "would be prudent to preserve the status quo." *Id.* Petitioners agreed and asked this Court to "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." Opp. 1. In its reply, the State did not dispute this characterization of its motion. *See* Reply 1-2. To the contrary, the State emphasized that in lieu of an expedited briefing schedule, there was "a straightforward orderly process" for relief "on a preliminary basis during the pendency of a lawsuit"—namely, issuance of an alternative or peremptory writ. *See id.* at 2 (citing Point IV in Petitioners' opposition); Opp. 7 (Point IV of opposition, arguing for alternative or peremptory writ to preserve status quo). This

Court agreed and on April 8, 2022, stayed the implementation of SB 1309, noting that "[t]he parties … both" sought such relief. Order Granting Mot. for Reconsideration at 2.

If the State believed a stay was improper, it should have made that argument when the issue was before the Court. It cannot now be heard to argue that the relief it proposed and assented to is somehow improper. If the State did genuinely believe that this Court's April 8 order misconstrued its filings and incorrectly imputed a request for a stay to the State, the State easily could have moved promptly for reconsideration of that order. But it did not. In contrast to the *one day* it took the State to move for reconsideration of the order expediting briefing, it waited twenty days to move for reconsideration of the stay.

The State asks for extraordinary relief in vacating this Court's well-considered stay. Its delay alone is reason enough to deny the request.

## II. This Court Has The Power To Issue A Stay Under Its Inherent Authority And Idaho Appellate Rules 5(d) And 13(g).

Even if this Court considers the State's waived arguments, there are no grounds to vacate the stay. This Court may issue a stay, with or without an application by a party, under its own inherent authority and pursuant to Idaho Appellate Rules 5(d) and 13(g).

*First*, I.A.R. 13(g) provides that this Court may "in its discretion" enter an order staying "a proposed act, a pending action or proceeding, or the enforcement of any judgment, order or decree." The State argues the implementation of SB 1309 "is none of these things." Mem. ISO Mot. to Vacate Stay at 5. But implementation of SB 1309 remains a "proposed act" and so falls within Rule 13(g)'s grant of discretionary power. As of April 8, 2022, SB 1309 had not yet taken

effect in Idaho; it was not set to take effect until April 22, 2022. Thus, SB 1309 remained a proposed act at the time it was stayed.[2] On the State's interpretation of Rule 13(g), the Court has no power to stay an unconstitutional law once it is passed by the Legislature and signed by the governor. That is obviously incorrect.

*Second*, I.A.R. 5(d) allows the 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." The State argues that I.A.R. 5 provides "by its plain language [that] a special writ may only issue upon the direct application of a party." Mem. ISO Mot. to Vacate Stay at 8. The State incorrectly concludes that the Court therefore cannot enjoin the enforcement of a law without "having first been formally requested to do so" in an application *separate from* Petitioners' application for an extraordinary writ. *Id.* at 2. In short, the State's interpretation of Rule 5(d) would require Petitioners to apply for a writ of prohibition and then again apply for a stay. This is a misreading of Rule 5(d), which explicitly grants the Court the authority upon application for an extraordinary writ to direct the respondent to refrain from acting "pending hearing and upon such conditions as the Court may impose." I.A.R. 5(d). The Petition asks this Court to issue a "preemptory writ of prohibition forbidding Idaho courts from giving effect to SB 1309," meeting the requirement of Rule 5(a) that a party apply to the Supreme Court for an extraordinary writ. *See* Petition at Prayer

[2] Furthermore, the Court may reasonably interpret the text of Rule 13(g) to encompass as "a proposed act" both SB 1309 itself and any enforcement actions pursuant to SB 1309. Rule 13(g) does not define "proposed act" so as to limit the phrase's meaning to the formal product of a legislative body. Thus, Rule 13(g) is properly read to allow the Court to stay SB 1309 from going into effect and to stay any enforcement of SB 1309.

for Relief (b). And Rule 5(d) permits the Supreme Court to direct the State of Idaho to "refrain from acting, as directed in the writ, pending hearing and upon such conditions as the Court may impose." I.A.R. 5(d).

In any event, even if the Court agrees with the State's reading of I.A.R. 5(d), the State—with the support of Petitioners—requested that the Court stay enforcement of SB 1309 via the issuance of an alternative writ of prohibition. *See* Idaho Code § 7-403*; see also Pfirman v. Probate Ct. of Shoshone Cnty.*, 57 Idaho 304 (1937) (confirming the Supreme Court's authority to issue alternative writ of prohibition while considering whether plaintiff/petitioner is entitled to writ of prohibition).[3] The State cannot now walk back its request for the Court to issue an alternative writ of prohibition to stay SB 1309 and maintain the status quo. *See supra* Section I.

Finally, this Court has the inherent authority to issue a stay *sua sponte*. Indeed, as discussed above, Idaho Appellate Rule 13(g) explicitly provides that "[t]he Supreme Court *may also*, in its discretion, enter an order staying a proposed act … at any time during the pendency of an original application or petition for any extraordinary writ." I.A.R. 13(g) (emphasis added); *see also Blackwell Lumber Co. v. Empire Mill Co.*, 158 P. 792, 793 (Idaho 1916) (holding that "the Constitution invests this court with considerable discretionary power in the matter of the issuance of such writs as it may deem to be expedient in the exercise of its jurisdiction and prohibits the

[3] In the State's memorandum in support of its Motion for Reconsideration, the State relied on *Pfirman* in support of its conclusion that "Idaho law allows [the Supreme Court] to issue an alternative writ of prohibition to preserve the status quo while the parties carefully brief and argue the Petition's merits." Mem. ISO Mot. for Reconsideration at 4. The State construed *Pfirman* as "explaining that the Court issued an alternative writ of prohibition pending a determination as to whether plaintiff was entitled to the writ of prohibition." *Id.*

Legislature from interfering with that power"). In short, this Court plainly has the authority to issue a stay and—at the request of both parties—properly did so.

## III. The Separation Of Powers Doctrine Has No Bearing On A Stay.

Contrary to the State's argument that the separation of powers doctrine prohibits this Court from issuing a stay, this is standard Idaho practice in pre-enforcement challenges to unconstitutional laws. *See, e.g.*, *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 124 (2000) (entering "an order directing the Secretary of State to refrain from implementing the statute until we could fully consider the matter and issue a decision"); *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).

Ignoring this history, the State protests that the "Court simply does not have the authority to just stop a law from going into effect." Mem. ISO Mot. to Vacate Stay at 6. Instead, in the State's view, the Court is limited to injunctions entered against "parties who either act or credibly threaten to act under the law." *Id.* None of the State's cases—all of which are from federal courts interpreting federal law[4]—supports that radical proposition. In *Winsness v. Yocom*, 433 F.3d 727, 728 (10th Cir. 2006), plaintiffs challenged a Utah flag-abuse statute that remained on the books after *Texas v. Johnson*, 491 U.S. 397 (1989), in which the Supreme Court held that such statutes violate the First Amendment. This case had nothing to do with a court "vetoing or suspending

[4] The State's reliance on federal law to argue that this Court cannot stop SB 1309 from going into effect is particularly misplaced because, unlike federal law, Idaho law allows Petitioners to sue the State directly for constitutional violations. *See Tucker v. State*, 162 Idaho 11, 18 (2017).

laws," as the State suggests. Mem. ISO Mot. to Vacate Stay at 6. The Tenth Circuit simply addressed whether "courts [should] issue redundant rulings on the constitutionality of indistinguishable statutes once the Supreme Court has spoken to an issue and law enforcement officials act accordingly." *Winsness*, 433 F.3d at 728. Moreover, the case was dismissed for lack of standing because the plaintiffs could not demonstrate "a live controversy concerning a concrete injury." *Id.* at 738. There was no credible threat of future prosecution, as charges were dropped against plaintiffs and the district attorney had no intention of prosecuting individuals who altered flags for an expressive purpose. *See id.* at 735. Here by contrast, Petitioners face imminent threat of suit if SB 1309 goes into effect. Finally, unlike in *Winsness*, here the U.S. Supreme Court has not passed on the constitutionality of a statute identical or substantially similar to SB 1309, so as to make a ruling on SB 1309's constitutionality "redundant."[5]

The Court therefore acted well within its authority, and consistent with standard practice, in staying enforcement of an allegedly unconstitutional statute pending full adjudication on the merits.

[5] Moreover, *Winsness* does not even make any reference to—as the State's citation suggests—the "separation of powers" or to "vetoing or suspending laws." Mem. ISO Mot. to Vacate Stay at 6. And *Hecox v. Little* is no help to the State because it does not discuss the connection between Governor Little's being named as a party and the U.S. district court's decision to "enjoin the State of Idaho from enforcing a newly enacted law which precludes transgender female athletes from participating on women's sports" teams. 479 F. Supp. 3d 930, 943 (D. Idaho 2020).

## IV. The State Of Idaho Is The Proper Respondent.

The State of Idaho is the proper respondent in this matter and for the issuance of a writ. The State's suggestion that because Petitioners sued the State of Idaho "the issuance of both writs and injunctions [is] unavailable" is incorrect. Mem. ISO Mot. to Vacate Stay at 2.

The State argues that "the State, as a whole, cannot be required to take, or not take, any actions." But *Tucker v. State*, 162 Idaho 11, 18 (2017), held that the State of Idaho can be directly sued for violations of the Idaho Constitution. Petitioners have done precisely that, raising claims challenging the constitutionality of SB 1309.[6] The State's waiver of sovereign immunity where constitutional challenges are asserted acknowledges that the State, as a whole, can indeed be required to give no effect to an unconstitutional law. Under the State's logic, this Court would be incapable of reviewing the constitutionality of blatantly unconstitutional laws like SB 1309. *See* Petitioners' Omnibus Reply Brief ISO Petition at 24 n.15.

## V. The Court Has Not Abused Its Discretion In Issuing The Stay.

Finally, the State makes a halfhearted argument that this Court abused "its discretion in issuing the stay because the stay was without legal basis … and because the order was based on

[6] With respect to this Court's original jurisdiction, the State ignores that (1) "[a]ny person may apply to the Supreme Court for the issuance of an extraordinary writ or other proceeding over which the Supreme Court has original jurisdiction," I.A.R. 5(a); (2) this Court exercises its original jurisdiction where, as here, a petitioner "alleges sufficient facts concerning a possible constitutional violation of an urgent nature," *Sweeney v. Otter*, 119 Idaho 135, 138 (1990); (3) Petitioners' constitutional claims are plainly urgent; and (4) Petitioners are seeking a writ of prohibition, which may prevent courts from entering judgments that give effect to unconstitutional laws, *see* Idaho Code §§ 7-401, 7-402; I.R.C.P. 74(a)(2); *Dumas v. Bryan*, 35 Idaho 557, 562 (1922).

fundamental misconception of the position of the parties before it." Mem. ISO Mot. to Vacate Stay at 9. Petitioners address this argument above and show why it is meritless. The State's attempt to paint its own buyer's remorse as *this Court's* "abuse[] [of] discretion"—unsupported by any case law or argument—should be rejected. The Court properly issued a stay pursuant to Rules 13(g) and 5(d), as well as its inherent authority. The stay is amply supported by the seriousness of the constitutional issues presented and the catastrophic effects of allowing SB 1309 to go into effect—none of which the State addresses in its motion.

## CONCLUSION

Petitioners respectfully submit that this Court was correct to issue a stay and that the stay should not be disturbed during the pendency of the litigation. The State's motion should be denied.

Dated: May 12, 2022

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on May 12, 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, as more fully reflected on the Notification of Service:

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