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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

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, 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.	Case No. 49615-2022

PETITIONERS' OMNIBUS REPLY BRIEF IN SUPPORT OF VERIFIED PETITION FOR WRIT OF PROHIBITION AND APPLICATION FOR DECLARATORY JUDGMENT

ORIGINAL JURISDICTION

MEGAN A. LARRONDO, ISB NO. 10597
DAYTON P. REED, ISB NO. 10775
STATE OF IDAHO
DEPUTY ATTORNEYS GENERAL
954 W. Jefferson Street, 2nd Floor
PO Box 83720
Boise, Idaho 83702-0010
megan.larrondo@ag.idaho.gov
dayton.reed@ag.idaho.gov

Attorneys for Respondent

DANIEL W. BOWER, ISB NO. 7204
MORRIS BOWER & HAWS PLLC
1305 12th Ave. Rd.
Nampa, Idaho 83686
Tel. (208) 345-3333
Fax: (208) 345-4461
dbower@morrisbowerhaws.com

MONTE NEIL STEWART, ISB NO. 8129
11000 Cherwell Court
Las Vegas, Nevada 89144
Tel. (208) 514-6360
monteneilstewart@gmail.com

Attorneys for Intervenors-Respondents

MICHAEL J. BARTLETT, ISB NO. 5496
BARTLETT & FRENCH LLP
1002 W Franklin St.
Boise, Idaho 83702
208-629-2311
208-629-2460 (fax)
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
7 World Trade Center
New York, NY 10007
(212) 230-8800
(212) 230-8888 (fax)
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
1875 Pennsylvania Avenue NW
Washington, DC 20006
(212) 663-6138
(202) 663-6363 (fax)
joseph.rosenberg@wilmerhale.com
annie.himes@wilmerhale.com

VIKRAM P. IYER
WILMER CUTLER PICKERING
HALE AND DORR LLP
350 South Grand Ave.

Los Angeles, CA 90071
(213) 443-5300
(213) 443-5400 (fax)
vikram.iyer@wilmerhale.com

Attorneys for Petitioners

** Pro hac vice applications forthcoming*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

DOCKETED CASES

CONSTITUTIONS, STATUTES, AND RULES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

I. Petitioners' Request For A Writ Of Prohibition Is Procedurally Proper.

Through SB 1309, the Legislature devised a scheme to deprive Idahoans of their constitutional rights by attempting to preclude review of a blatantly unconstitutional statute. The Attorney General advised that the statute was likely unconstitutional, but the Legislature enacted it anyway. And the Governor acknowledged the statute's likely unconstitutionality even as he signed it. If ever there were a case for this Court's exercise of original jurisdiction to issue a Writ of Prohibition, this is it. The sui generis circumstances presented here would chill the exercise of a politically unpopular yet constitutionally protected right into nonexistence if the law takes effect. This Court's intervention is both proper and manifestly necessary.

The State opposes a Writ on four procedural grounds, none of which has merit. It seeks through sophistry to prevent this Court from enjoining the enforcement of a plainly unconstitutional statute that perverts the separation of powers in this State. The State's attempts at misdirection fail.

A. This Court May Issue A Writ Of Prohibition In This Case.

The State first contends that this Court may not issue a Writ of Prohibition here. Its three arguments come up short.

First, the State claims the writ must "direct[] the respondent" to act or refrain from acting. State Br. 8 (emphasis deleted). Because Petitioners seek a writ prohibiting inferior courts from taking action, the State's argument goes, the correct respondent would be "each of the courts the Petitioner seeks to compel or restrain, or else to some official with authority to command the courts," rather than the State of Idaho. *See id.* This is incorrect.

The State cites no authority—not a single case or rule—in support of its request beyond Idaho Appellate Rule 5(d). But I.A.R. 5(d) merely prescribes the procedure for issuing special writs, such as detailing how many members of this Court may issue the writ, how briefing might be scheduled, and how service might be effected. *See* I.A.R. 5(d) (titled "Procedure for Issuance of Writs"). The rule contains no substantive limitation on the writ, as the State claims. To the contrary, this Court has repeatedly (and recently) recognized that "[t]he writ of prohibition is a discretionary remedy under Idaho common law, granted only when this Court concludes that the remedy is appropriate." *Re Petition for Writ of Prohibition*, 168 Idaho 909, 917 (2021); *see also Dana, Larson, Roubal & Assocs. v. Board of Comm'rs*, 124 Idaho 794, 800 (Ct. App. 1993). The Court's prerogative to issue the writ is not constrained by I.A.R. 5(d), and there is no case that interprets I.A.R. 5(d) as the State does. To the contrary, this Court has issued writs of prohibition that enjoined legislation from taking effect without taking aim at a particular respondent. *See, e.g.*, *Reclaim Idaho v. Denney*, 497 P.3d 160, 194 (Idaho 2021) ("[W]e also grant the petition for a writ of prohibition barring SB 1110 from taking effect.").

In any event, the plain language of I.A.R. 5(d) supports the requested writ here. There is nothing in I.A.R. 5(d) that states who can or cannot be a "respondent" for purposes of a writ, nor does it bar the State from being a proper respondent. The named Respondent in this matter—the State of Idaho—includes the Idaho state courts. *See* Idaho Const. art. II, § 1 ("The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial."); *see also FERC v. Mississippi*, 456 U.S. 742, 762 (1982) (referring to the judiciary as

"a branch of state government"). Any writ of prohibition issued by this Court directed at the inferior Idaho courts would, in fact, be directed at the Respondent.

Second, the State argues that a writ of prohibition is appropriate only to "arrest" a "proceeding [that] has already begun," such that, after the writ is issued, "the action will be stopped or slowed." State Br. 9 (citing I.R.C.P. 74(a)(2)). Put differently, the State claims that the writ may not issue because, "[h]ere, there is no proceeding to arrest." *Id.* at 10. Again, the argument is wrong.

To be sure, the Court has issued writs of prohibition affecting pending proceedings; the State points to two such cases. State Br. 9 (citing *Olden v. Paxton*, 27 Idaho 597 (1915); *Rust v. Stewart*, 64 P. 222 (Idaho 1901)). But this Court has also issued writs of prohibition in cases like this one, and the State's attempt to distinguish them is meritless.

Reclaim Idaho v. Denney involved two laws that affected Idahoans' referendum and initiative rights. 497 P.3d at 166. There was no pending proceeding or action that precipitated the challenge. Instead, petitioner Reclaim Idaho filed its case because it had been "working to qualify two initiatives for the 2022 ballot," and one of the laws at issue imposed onerous requirements on qualifying ballot initiatives. *Id.* at 169. Reclaim Idaho sought "a peremptory writ of prohibition … prohibiting the [Secretary of State] or any state official from enforcing these provisions." *Id.* at 170. This Court "grant[ed] the petition for a writ of prohibition barring [that law] from taking effect" because it was unconstitutional. *Id.* at 194. Similarly, the second law at issue operated to allow the Legislature time to veto a duly passed piece of voter legislation. *See id.* at 167. Although the Legislature was not then considering whether to act pursuant to that authority, this Court

granted "a writ of prohibition preventing the Secretary of State from enforcing this provision," too. *Id.* at 194. Reclaim Idaho's position was just like Petitioners' position here. Petitioners currently perform lawful abortions in Idaho, they face ruinous (and unconstitutional) financial penalties that will be imposed if SB 1309 comes into effect, and they seek a writ preventing the courts from enforcing that provision.

In *Van Valkenburgh v. Citizens for Term Limits*, there was no pending action or proceeding, either. 135 Idaho 121, 123 (2000). An Idaho law directed the Secretary of State to print certain material on election ballots. *See id.* According to the State here, there was an ongoing proceeding in that case because the Secretary of State was "in the process of directing the preparation of the primary election ballot." State Br. 9-10. Whatever that means, if it sufficed to establish a pending action, it is hard to imagine that the facts here would not. In any event, the State's reading of the case appears incorrect. There, the Court emphasized in multiple ways that the Secretary of State had not yet taken action pursuant to the challenged law. *See Van Valkenburgh*, 135 Idaho at 124 (petitioners sought "writ of prohibition preventing the Secretary of State from implementing" the law; "this Court issued an order directing the Secretary of State to refrain from implementing the statute until we could fully consider the matter and issue a decision," and ultimately issued a writ "prohibiting" the Secretary of State "from carrying out the directions" in the law).

Another of the State's cases provides even more direct support for Petitioners' request. In *Re Petition for Writ of Prohibition*, an individual was jailed for seven days pursuant to a warrant of attachment. 168 Idaho at 915. "Following her release," the individual sought an "exclusively forward looking" writ of prohibition—"a request for preventative relief"—against the magistrate

court and two magistrate judges. *See id.* at 915, 930. Specifically, the petitioner asked that "the magistrate court be enjoined from issuing future warrants of attachment, against her or other similarly situated parties, in the same manner and with the same alleged deficiencies as the first warrant." *Id.* at 915. This Court issued a writ of prohibition "preventing the magistrate court from issuing warrants of attachment inconsistent with the procedural and constitutional safeguards discussed herein." *Id.* at 930. There was no "actual ongoing proceeding[] to arrest." State Br. 9. Instead, the writ prevented harm from occurring in the future. That is what Petitioners seek here.

The State tacks on two additional arguments, neither of which has any merit. First, the State claims that this Court may not enjoin lower courts from hearing cases because to do that would be to interfere with the lower courts' jurisdiction. *See* State Br. 10. That is incorrect. In support of its contention, the State cites the Idaho Constitution, Article V, § 20, which provides that "[t]he district court shall have original jurisdiction in all cases, both at law and in equity, and such appellate jurisdiction as may be conferred by law." Of course, that provision says nothing about the Supreme Court's jurisdiction under the Idaho Constitution, which explicitly includes the power to issue writs of prohibition. *See* Idaho Const. art. V, § 9. Such writs of prohibition may "restrain an inferior tribunal from exceeding its jurisdiction," *Rust v. Stewart*, 64 P. 222, 222-223 (Idaho 1901), and, as this Court recently confirmed, entering judgments that give effect to unconstitutional causes of action would exceed their jurisdiction, *see Re Petition for Writ of Prohibition*, 168 Idaho at 919-920 (Idaho courts do not have authority to enforce "orders that are unlawful, entered in contravention of procedures prescribed by court rule or in violation of constitutional protections"). A writ of prohibition is properly directed to a lower court's future

adjudication without unconstitutionally depriving it of jurisdiction. *See id.* at 930 (issuing writ of prohibition that prevented inferior Idaho courts from taking certain future actions).

The State tries to confuse Petitioners' straightforward request for relief by pointing to litigation around Texas SB 8, where the petitioners sought an order enjoining federal court clerks from docketing enforcement actions and judges from hearing them. *See* State Br. 10. But Texas SB 8 operates differently than SB 1309—and the federal courts operate differently from this Court. Here, Petitioners seek an order "forbidding Idaho courts from giving effect to SB 1309," Petition at Prayer for Relief (b)—the same relief this Court has ordered in other cases. *See Reclaim Idaho*, 497 P.3d at 194 (granting "writ of prohibition barring SB 1110 from taking effect"). The State provides no reason why such relief would be inappropriate here.

In its other miscellaneous tack-on argument, the State claims that the relief Petitioners seek through the writ of prohibition "would simply duplicate the declaratory relief they seek." State Br. 10. But the State does not cite a single case in which this Court (or any other) has declined to issue a writ of prohibition because it was duplicative of declaratory relief. The State's unsupported assertion again is disproved by this Court's precedent. *See, e.g.*, *Reclaim Idaho*, 497 P.3d at 194 (declaring that certain laws violated the Idaho Constitution and then granting writs of prohibition preventing enforcement of the same statutes); *Van Valkenburgh*, 135 Idaho at 123 (similar).

Third, and finally, the State hypothesizes that "the writ cannot issue because it is really an improper advisory opinion." State Br. 11. But this is a standard-issue pre-enforcement challenge, which Petitioners have standing to bring and this Court has original jurisdiction to hear. *See infra* Sections I.B, I.C. If SB 1309 is allowed to take effect, abortions past six weeks LMP will be

effectively banned in Idaho. *See* Smith Decl. ¶ 14; Gustafson Decl. ¶ 17. The State does not cite a single case in support of its one-paragraph argument. Instead, it cites Idaho Const. art. II, § 1—the very separation of powers principle that SB 1309 eviscerates by deputizing private citizens to exercise exclusively the Executive's enforcement authority and discretion. The State's suggestion that this Court may not hear this case because doing so would violates the separation of powers doctrine merely lays bare the State's desire that SB 1309 evade judicial review entirely.

B. This Court Has Original Jurisdiction.

Petitioners have properly invoked this Court's original jurisdiction by seeking a writ of prohibition to enjoin enforcement of SB 1309, which threatens to violate the constitutional rights of Petitioners and pregnant people in Idaho in a manner that requires urgent review lest irreparable harm be done.

This Court has routinely accepted original jurisdiction in "cases requiring a determination of the constitutionality of recent legislation where there is urgency of the alleged constitutional violation and the urgent need for an immediate determination." *Reclaim Idaho*, 497 P.3d at 172 (citing *Sweeney v. Otter*, 119 Idaho 135, 138 (1990)); *see also Mead v. Arnell*, 117 Idaho 660, 664 (1990) (exercising jurisdiction over application for writ of prohibition "to nullify legislative action," and noting that "[o]ur disposition of the constitutionality [of the challenged statute] will be limited to a simple declaration of its constitutionality"). Although this case fits that definition to a T,[1] the State opposes original jurisdiction because, it claims, Petitioners' constitutional

[1] The Legislature acknowledges as much when it notes that it will not be "displeased" if this Court accepts jurisdiction. *See* Legis. Br. 6 n.5.

challenge (1) lacks urgency and (2) could theoretically be heard in district court. The first argument misconceives Petitioners' claims, and the second misunderstands the standard for the exercise of this Court's jurisdiction.

First, Petitioners do not contend, as the State says, that "urgent" means only that "the challenged law will go into effect." *See* State Br. 12. This matter is definitionally urgent: Without intervention by this Court, the citizens of Idaho will face significant delays—or an outright denial—of constitutionally protected abortion services. Petitioners have alleged that the constitutional violations wrought by SB 1309 pose a distinct and urgent threat to pregnant people in Idaho, who have a limited time-period within which they can obtain an abortion. *See* Petition ¶¶ 27, 35-38; Gustafson Decl. ¶¶ 17-19, 27-29; Smith Decl. ¶¶ 5, 12-13, 21-26. If this Court does not declare SB 1309 unconstitutional, then Idaho clinicians will "be forced to stop providing abortions after a 'fetal heartbeat' is detected," Gustafson Decl. ¶ 17, which will force many Idaho citizens to "carry an unintended pregnancy to term," *id.* ¶ 18. Every day that an abortion is delayed on account of SB 1309 also poses increased "risks to patients' health"—both because abortion (though generally safe) increases in risk with gestational age and because "childbirth is far riskier than abortion." Smith Decl. ¶ 23; *see also* Gustafson Decl. ¶¶ 21, 23.

And this law is unlike other laws. In fact, it is unique. It is precisely the unique nature of SB 1309 that should also assuage the State's fear that if this Court accepts jurisdiction in this case, it will be forced to hear every constitutional challenge in the first instance. *See* State Br. 12-13. Invoking original jurisdiction over this challenge will not allow litigants in the normal course to leap-frog the district courts because it is fortunately a rare occurrence that the Legislature decides

to pass patently unconstitutional legislation with a never-before-seen civil enforcement mechanism that undermines the separation of powers doctrine and is designed to evade judicial review.

The State points to Justice Moeller's dissenting opinion in *Regan v. Denney* to parse the difference between the crisis facing Petitioners and what it sees as a truly urgent one. *See* State Br. 12 n.10. Dissenting from the majority's exercise of original jurisdiction, Justice Moeller contrasted the exercise of jurisdiction in *Sweeney v. Otter*, where a "unique and urgent" constitutional issue arose for "the first time in Idaho's history," with the circumstances in *Regan* itself, where the only urgency was "of Regan's own making." 165 Idaho 15, 31-32 (2019) (Moeller, J., concurring in part and dissenting in part). This case falls squarely on the *Sweeney* side of the line. In defiance of the Attorney General's opinion that the law likely was unconstitutional, the Legislature enacted a statute to be enforced by a unique civil enforcement mechanism designed to evade judicial review, and it elected to make this unprecedented law effective just thirty days after it was signed into law. In doing so, the State has ensured both that the law presents unique constitutional issues and that Petitioners—who filed their challenge just six days after the bill was signed into law—were not responsible for the accelerated timetable within which this Court must now pass on SB 1309's constitutionality.

The State also suggests that there is no urgency to Petitioners' challenge because the United States Supreme Court "could" upend federal constitutional law on abortions. *See* State Br. 14. But Petitioners raise claims under the Idaho Constitution and no decision of the United States Supreme Court will decide those issues. Certainly, no Supreme Court decision would decide whether SB 1309 violates the separation of powers doctrine in Idaho. Nor should this Court accept

the State's dangerous invitation to abdicate its duty to adjudicate a ripe controversy. It was the State that made haste to enact a patently unconstitutional abortion ban prior to what it speculates may be a change to federal constitutional law, and the State cannot delay review now in the hopes that the Supreme Court upends half a century of precedent in *Dobbs v. Jackson Women's Health Organization*. If the State did not want its laws to be challenged prior to a decision in *Dobbs*, it should have waited to enact SB 1309 until after the decision in *Dobbs* was issued.

The State also relies on *Idaho Falls Redevelopment Agency v. Countryman*, 118 Idaho 43 (1990), to suggest that the Court should not exercise original jurisdiction here. Nothing in *Countryman* suggests that Petitioners must provide "evidence or proof of a crisis or urgent situation" in order to establish jurisdiction, as the State contends, *see* State Br. 13; rather, this Court in *Countryman* did exercise its jurisdiction, but ultimately declined to grant the requested relief because the petitioners in that case did not make the requisite showing on the merits of the claim. *See Countryman*, 118 Idaho at 45. To be clear, in this case, this Court can determine as a matter of law that jurisdiction (and the requested relief) are appropriate. But even if any consideration of facts were necessary, and even though at this stage of the proceedings, this Court is to construe the "allegations … as true," *Reclaim Idaho*, 497 P.3d at 178, Petitioners have provided sworn evidence of the urgent situation that more than suffices.

Second, the State argues that this Court lacks original jurisdiction because it is theoretically possible for Petitioners to file or defend an action in district court. This confuses the standard to exercise original jurisdiction with the standard to issue a writ of prohibition. *See Reclaim Idaho*, 497 P.3d at 177 (noting that exercise of original jurisdiction is proper "[e]ven if there is another

remedy in the ordinary course of law in the trial courts"). The question whether an adequate remedy exists goes to whether this Court should exercise its discretion (not its jurisdiction) to issue a writ of prohibition. *See id*. ("A writ is an extraordinary remedy that cannot be granted where an adequate remedy in the ordinary course of law already exists"). More specifically, a writ of prohibition may not issue if there is no "plain, speedy, and adequate remedy in the ordinary course of law." *Wasden ex rel State v. Idaho State Bd. of Land Comm'rs*, 150 Idaho 547, 551-552 (2010). A plain remedy is "evident, obvious, simple or not complicated." *Id*. at 552. Though Petitioners need not meet this standard for the purpose of invoking this Court's jurisdiction, Petitioners have nevertheless satisfied the standard such that a writ may ultimately issue.

The State would apparently prefer to litigate the constitutionality of SB 1309 when a medical provider is sued under SB 1309 and raises its unconstitutionality as an affirmative defense—which is tantamount to saying the State would prefer never to litigate SB 1309's constitutionality. SB 1309's $20,000 statutory damages minimum is an *in terrorem* device that will effectively deter the provision of abortions after six weeks of pregnancy. *See* Gustafson Decl. ¶ 17 ("If SB 1309 goes into effect, … I believe … abortion will become unavailable after approximately six weeks LMP in Idaho."); Smith Decl. ¶ 14 ("Planned Parenthood will be forced to stop providing abortion services after approximately six weeks LMP if SB 1309 takes effect."). This makes it extremely unlikely that any litigant will ever be able to raise SB 1309's unconstitutionality as an affirmative defense. The threat of crippling statutory damages in addition to attorneys' fees and costs is too great for an abortion provider to risk engaging in conduct that might lead to a lawsuit.

The State also argues that Petitioners could have filed claims for declaratory and injunctive relief in district court. Given the novel civil enforcement mechanism implemented by SB 1309, nothing that might be litigated in district court would be "evident, obvious, simple or not complicated." *Re Petition for Writ of Prohibition*, 168 Idaho at 928 (citing *Wasden*, 150 Idaho at 552); *see also* Mem. ISO Mot. for Reconsideration at 2 (Apr. 1, 2022) (referring to the "novel legal issues of first impression within Idaho" that the Petition raises). That civil enforcement mechanism was intended to frustrate the ability of Petitioners to bring a typical pre-enforcement challenge in trial court. The State should not be allowed to pass a law designed to choke off typical pre-enforcement challenges and then protest when an original action is filed with this Court.

In any event, Petitioners are concerned that the district courts could not afford a speedy resolution of their claims, as those courts are working through a backlog of cases that they expect will not be fully addressed until 2025, with priority given to criminal defendants.[2] The Legislature agrees, and maintains that the "speediest disposition of Petitioners' challenges" will result from this Court's immediate review. *See* Legis. Br. 31 n.61.

C. Petitioners Have Established Standing And Petitioners' Claims Are Ripe.

The State does not dispute that Petitioners meet the causation and redressability elements to prove standing. It questions only whether Petitioners have shown injury-in-fact. They have.[3]

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[2] *See* Parris, *Idaho Courts Push Through Extended COVID Backlog*, KTVB.com (Mar. 9, 2022), https://www.ktvb.com/article/news/local/208/idaho-courts-digging-out-from-extended-covid-19-backlog/277-f26def75-f6ff-4780-af5c-c21e4a0dee27.

[3] The State's ripeness argument fails for the same reasons discussed *infra*.

"Idaho has adopted the constitutionally based federal justiciability standard." *ABC Agra, LLC v. Critical Access Grp., Inc.*, 156 Idaho 781, 783 (2014); *Koch v. Canyon Cnty.*, 145 Idaho 158, 161 (2008) ("When deciding whether a party has standing, we have looked to decisions of the United States Supreme Court for guidance."). Under U.S. Supreme Court jurisprudence, an injury in fact "must be 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). A petitioner advancing a pre-enforcement challenge "satisfies the injury-in-fact requirement when he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *Id.* at 159 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).[4] This is because when a "threatened enforcement of a law creates an Article III injury … [an] enforcement action is not a prerequisite to challenging the law." *Id.* at 158; *see also Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.").

Prior to SB 1309's enactment, Petitioners performed abortions in Idaho. Smith Decl. ¶ 7; Gustafson Decl. ¶ 3. They continue to do so only because the statute has been stayed by this Court. SB 1309 imposes severe consequences on medical practitioners like Petitioners who perform an abortion after a "fetal heartbeat" is detected. The law confers a cause of action upon a group of

[4] The Supreme Court has treated private-enforcement lawsuits as "prosecution" for purposes of this standard. *See Susan B. Anthony List*, 573 U.S. at 164.

private citizens, encourages them to sue by allowing a statutory damages award of at least $20,000—with no maximum statutory damages award specified—as well as costs and attorneys' fees, and makes it difficult and costly for medical professionals to defend themselves. *See, e.g.*, Legis. Br. 6 ("The Act's enforcement provisions incentivize potential plaintiffs by allowing them to recover general damages, statutory damages of at least $20,000, and their costs and attorney's fees."). The risk of ruinous and uncertain financial liability created by SB 1309 injures Petitioners, who have no choice but to stop performing all abortion services after fetal cardiac activity can be detected should SB 1309 become effective. Smith Decl. ¶ 4; Gustafson Decl. ¶ 4.

The State first contends that because Petitioners ask this Court to prevent inferior courts from giving legal effect to the unconstitutional civil cause of action contemplated in SB 1309, there is no case or controversy. *See* State Br. 14. That argument attempts to echo *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021), which found no case or controversy between a judge who adjudicates claims under a statute and a litigant who challenges the constitutionality of the statute. State Br. 14. But that conclusion was directed at the claims brought *against* Texas state court judges and clerks in order to satisfy the limited *Ex Parte Young* exception to sovereign immunity. *Whole Woman's Health*, 142 S. Ct. at 532. Here, Petitioners are instead suing the State, as is permissible under Idaho state law. A party injured in fact by state law plainly has standing to sue the State.[5]

[5] In *Whole Woman's Health*, sovereign immunity barred plaintiffs from suing the State of Texas for constitutional violations related to Texas SB 8. 142 S. Ct. at 532. That is not an issue here. *See Tucker v. State*, 162 Idaho 11, 18 (2017) ("The State of Idaho can be directly sued for violations of the Idaho Constitution.").

Second, the State argues that Petitioners' "alleged injury rests on speculation about the conduct of third parties" and that Petitioners have not shown a "'credible threat of enforcement' for an injury to arise sufficient to confer standing." State Br. 14. But if SB 1309 goes into effect, Petitioners will immediately be prevented from providing comprehensive reproductive health care services. Smith Decl. ¶¶ 15-16. SB 1309 will block, or severely inhibit, the ability of people in Idaho to obtain an abortion after 6 weeks LMP, in violation of their constitutional right to do so—this is not speculative.[6]

Preventing Petitioners from performing abortions in Idaho is SB 1309's intended purpose. The Supreme Court has long recognized that an individual suffers an injury-in-fact for purposes of "bring[ing] a preenforcement suit when he has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Susan B. Anthony List*, 573 U.S. at 160 (cleaned up); *see also id.* at 163 ("Nothing in [the U.S. Supreme] Court's decisions requires a plaintiff who wishes to challenge the constitutionality of a law to confess that he will in fact violate that law.");

[6] Petitioner Planned Parenthood provides virtually all abortion services in Idaho. *See* Smith Decl. ¶ 9 (reporting that, in 2021, "Planned Parenthood's Idaho health centers provided over 1,500 abortions"), *id.* ¶ 12 ("Planned Parenthood's health centers are the only generally available abortion services providers in the State of Idaho."); *Idaho Vital Statistics – Induced Abortion 2020*, Idaho Dep't of Health and Welfare, Division of Public Health, Bureau of Vital Records and Health Statistics 6 (Jan. 2022), https://publicdocuments.dhw.idaho.gov/WebLink/DocView.aspx?id=21265&dbid=0&repo=PUBLIC-DOCUMENTS (reporting that, in all of 2020, there were 1,680 induced abortions that occurred in Idaho). Because SB 1309's taking effect would "force[Planned Parenthood] to stop providing abortions after approximately six weeks," Smith Decl. ¶ 12, SB 1309 will effectively ban abortions in Idaho after approximately six weeks LMP.

MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 128-129 (2007) (holding that a plaintiff need not "expose himself to liability before bringing suit to challenge … the constitutionality of a law threatened to be enforced"); *Doe v. Bolton*, 410 U.S. 179, 188 (1973) (a doctor "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief" from an abortion ban).

Petitioners clearly satisfy this standard. Petitioners have been performing constitutionally protected abortions in Idaho, and have continued to do so on account of this Court's stay. They will continue to provide these services unless SB 1309 goes into effect. Smith Decl. ¶ 4; Gustafson Decl. ¶ 4. Petitioners suffer an injury-in-fact because they will be forced to stop providing abortion services after approximately six weeks of pregnancy if SB 1309 were to go to effect, which is the foreseeable consequence of SB 1309's adoption. *See Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (holding that a threatened injury satisfies the injury-in-fact requirement when it is "certainly impending"). That the State has deputized third parties to enforce the statute does not make this harm speculative or contingent, and the State cannot be heard to invoke this enforcement mechanism to claim that Petitioners' injuries are not cognizable because they depend on the—obvious, necessary—decisions of the third parties (unconstitutionally) entrusted to enforce the law.

D. The State Is The Proper Respondent For This Writ.

The State is a proper respondent in any lawsuit in Idaho state court that alleges a state constitutional violation. *See Tucker v. State*, 162 Idaho 11, 18 (2017) ("The State of Idaho can be directly sued for violations of the Idaho Constitution."). Here, Petitioners argue that SB 1309 violates the Idaho Constitution. This Court has previously held that "sovereign immunity is

inapplicable when constitutional violations are alleged" because "a contrary rule would render constitutional rights meaningless." *Id*. That is exactly the case here.

The State argues that *Tucker* does not apply because the Court does not have original jurisdiction and because *Tucker* was brought in district court. Neither argument says anything about whether the State is the proper respondent. And in any event, for the reasons described above, this Court does have original jurisdiction over Petitioners' claims and it was this Court's decision in *Tucker* which held that the State is not immune from claims related to violations of the Idaho Constitution.

The State also argues that a writ of prohibition can only be issued against "any court, corporation, board or person." State Br. 16. That is exactly what Petitioners seek—a writ prohibiting lower courts from giving effect to SB 1309. Nothing in the Idaho rules requires that the party to be enjoined must be the respondent in a writ of prohibition. That is especially the case here, where the respondent is the State, which encompasses the judicial branch.

II. SB 1309 Violates The Idaho Constitution.

Petitioners showed in their petition and opening brief that SB 1309 violates the Idaho Constitution in six separate ways. In another effort at misdirection, the State starts its argument with a long and incorrect explanation of why SB 1309 does not violate the Federal Constitution. *See* State Br. 17-21. This case is about the violence that SB 1309 does to the Idaho Constitution. Only this Court can repair that harm.

If SB 1309 stands, there is no limiting principle to the novel form of enforcement that it allows. The Idaho Legislature might enact with impunity laws designed to deprive citizens of their

constitutional rights while evading judicial review. The Idaho Executive itself has acknowledged this very danger. *See* Gov. Little Letter ("Deputizing private citizens to levy hefty monetary fines on the exercise of a disfavored but judicially recognized constitutional right for the purpose of evading court review undermines our constitutional form of government and weakens our collective liberties."); *see also Whole Woman's Health*, 142 S. Ct. at 545 (Roberts, C.J., concurring in part) (the "nature of the federal right infringed [by this civil enforcement mechanism] does not matter," for it is the role of the courts "in our constitutional system that is at stake"). SB 1309's existence raises the specter of a regime in which constitutional rights of all stripes might become subjects of similar laws, and in which Idaho citizens (and citizens in other States) will fear to exercise constitutionally protected rights.[7]

A. SB 1309 Violates The Idaho Constitution's Separation Of Powers Doctrine.[8]

Petitioners showed in their opening brief that this Court has already made clear that a law like SB 1309 violates the separation of powers, citing this Court's on-point discussion in *Mead v.*

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[7] *See* Gov. Little Letter ("How long before California, New York, and other states hostile to the First and Second Amendments use the same method to target our religious freedoms and right to bear arms?"); Michaels & Noll, *Vigilante Federalism* 44 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3915944 (noting that "blue states" could enact similar laws with respect to "prevailing understandings of free speech, Second Amendment rights, and religious exemptions from generally applicable health and safety regulations, among other things").

[8] The State unavailingly argues that Petitioners lack third-party standing to assert a separation of powers claim because, supposedly, the right infringed belongs to the Governor. State Br. 21. The State does not cite a single case in support of that argument and ignores that this Court routinely entertains separation of powers claims brought by non-state actors. *See, e.g., Idaho Schs. for Equal Educ. Opportunity v. State*, 140 Idaho 586, 594-97 (2004) (law violated separation of powers doctrine, even though plaintiffs were non-state actors); *State v. Easley*, 156 Idaho 214, 221

Arnell, 117 Idaho 660, 667 (1990). *See* Pet. Br. 20-21. Tellingly, neither the State nor the Legislature so much as mentions *Mead*, forfeiting any argument that the decision does not directly address and condemn an authority-stripping provision like SB 1309 on separation of powers grounds. Nor do the State or the Legislature address the analogous Texas state court decision, *Van Stean*,[9] that considered the constitutionality of SB 8, on which SB 1309 is modeled, and which held that SB 8 violated the separation of powers under the Texas Constitution by delegating enforcement authority to its private citizenry. Pet. Br. 22 & n.19.[10]

Instead, the State and Legislature primarily cast SB 1309 as a normal, run-of-the-mill law. In their view—notwithstanding the Attorney General's opinion that SB 1309 "could [] be found" to violate the separation of powers doctrine (AG Opinion), and Governor Little's acknowledgement that SB 1309's enforcement mechanism "undermines our constitutional form of government" (Gov. Little Letter)—SB 1309 is legislative business as usual because (1) the Legislature routinely creates civil causes of action, and (2) the Legislature may create causes of action for private parties to act as "private attorneys general." *See* State Br. 22-24; Legis. Br. 7-9,

(2014) (agreeing with criminal defendant who argued on appeal that separation of powers doctrine was violated).

9 *See Van Stean v. Texas Right to Life*, No. D-1-GN-21-004179 (Tex. Dist. Ct., Dec. 9, 2021), https://reason.com/wp-content/uploads/2021/12/Van-Stean-v-Texas-Right-to-Life-order-12-9-21.pdf.

10 Although the State once mentions *Van Stean*, it does so only in relation to SB 1309's unconstitutional grant of standing. *See* State Br. 23 n.15.

16-25.[11] If SB 1309 were business as usual, the State and Legislature would be able to identify numerous laws in the Idaho Code resembling SB 1309. Instead, they are unable to identify even one. In fact, the Attorney General and Governor have acknowledged the unprecedented nature of SB 1309's civil enforcement mechanism. *See* Mem. ISO Mot. for Reconsideration at 2 (Apr. 1, 2022) (arguing that the "constitutional issues raised in this Petition are novel legal issues of first impression within Idaho"); Gov. Little Letter ("I fear the novel civil enforcement mechanism will in short order be proven both unconstitutional and unwise.").

SB 1309 is unlike other private civil causes of action. SB 1309 creates a class of plaintiffs without any requirement that those plaintiffs show any injury sufficient for standing purposes. All of those plaintiffs will be entitled to a minimum $20,000 in statutory damages (with no stated maximum), on top of actual damages, costs, and attorneys' fees. And by explicitly prohibiting state officials from taking enforcement action based on violations of the law, it is designed to evade pre-enforcement judicial review of a blatantly unconstitutional law. All those features distinguish SB 1309 from, for instance, Idaho's wrongful death statute, which the State cites as "a perfect example" of the Legislature's ability to create civil causes of action. *See* State Br. 23 (citing Idaho

[11] Likewise, while the Idaho Legislature may in the normal course establish procedural boundaries on the causes of action it creates, none of the examples the State cites remotely approaches the combination of factors that makes SB 1309 constitutionally objectionable. *See* State Br. 23. For instance, Idaho Code § 18-4017(4), which allows certain individuals to obtain injunctive relief against those who assist a suicide, contains no allowance for any monetary damages. Similarly, Idaho Code §§ 6-1001 to -1014 sets forth an informal, non-judicial, and non-binding procedure for resolving medical malpractice claims before a hearing panel that can neither award damages nor compel compliance with its "proposals, conclusions or suggestions." Idaho Code §§ 6-1004, 6-1005. By contrast, SB 1309 creates a civil cause of action that provides for unbounded statutory damages, stacked on top of actual damages, costs, and attorneys' fees.

Code § 5-311). The wrongful death statute limits potential plaintiffs to a decedent's "heirs or personal representatives." Idaho Code § 5-311(1). By contrast, SB 1309 allows unharmed plaintiffs—such as a rapist's estranged brother—to sue and to recover statutory damages regardless of that lack of injury. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207 (2021) ("A regime where Congress could freely authorize *unharmed* plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch's Article II authority."). And the wrongful death statute does not alter the two-year statute of limitations that applies to it. *See* Idaho Code § 5-219. SB 1309 doubles that limitations period to four years. *Id.* § 18-8807(2).

SB 1309 also does not resemble typical private attorneys general statutes. That is because private attorneys general statutes normally supplement—rather than replace—the Executive's traditional enforcement authority. The Legislature's own examples prove the point. In support, the Legislature cites private attorneys general schemes under the federal False Claims Act and federal and state antitrust laws. *See* Legis. Br. 7-8, 20 & n.44. In all those cases, the private attorney general cause of action supplements traditional law enforcement authority. For instance, the False Claims Act allows both the Attorney General and private persons to bring civil actions. *See* 31 U.S.C. § 3730(a), (b). Moreover, the Attorney General retains significant supervisory authority over the private attorney general cause of action—the Attorney General can intervene in the action and assume primary responsibility for the litigation, which may include dismissing or settling the case over the private party's objection. *Id.* § 3730(b), (c). Similarly, the federal and Idaho antitrust laws that the Legislature cite allow for cooperative public-private enforcement. *See*

15 U.S.C. §§ 15, 15a, 15c (allowing private persons, the U.S., and State Attorneys General to bring suit for violations of antitrust laws); Idaho Code §§ 48-108, 48-113 (allowing Idaho Attorney General and private persons, respectively, to file suit under Idaho's Competition Act). SB 1309, on the other hand, strips the Executive of its enforcement authority. In short, SB 1309 is anything but run-of-the-mill.

The State and Legislature's other arguments are equally specious. For example, the State attempts to minimize the threat that SB 1309's enforcement scheme poses by arguing that SB 1309 does not deputize private citizens to enforce the law. State Br. 23. But as the Legislature itself explains, that is plainly incorrect. *See* Legis. Br. 6 ("The Act's enforcement provisions authorize specified private actors … to enforce the Act's regulation provisions."); *see also* Idaho Legislature's Statement of Purpose (rev. Mar. 8, 2022) ("This legislation ... include[s] a private enforcement mechanism.").[12] In fact, the Executive's prior statements contradict the State. *See* Gov. Little Letter (noting that SB 1309 "[d]eputiz[ed] private citizens to" enforce it); AG Opinion (remarking on SB 1309's "delegation of the Governor's enforcement power to private citizens").[13] That deputizing of a traditionally public responsibility is unconstitutional. The Legislature has

[12] https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2022/legislation/S1309SOP.pdf (last visited May 12, 2022).

[13] The State notes that the Idaho criminal code contains other civil causes of action relating to abortion. State Br. 23-24 (citing Idaho Code §§ 18-615(2), 18-618(1)). But those provisions are not analogous to SB 1309. For instance, neither provision strips the Executive of its enforcement authority in an effort to evade judicial review. Neither provision extends the applicable statute of limitations from two years to four years. Neither provision allows for unbounded statutory damages beginning at $20,000. And neither provision grants standing to unharmed plaintiffs.

cloaked private parties with authority "traditionally *and* exclusively performed" by the State—to enforce state law—rather than granting them a right to recover for any injury done to them specifically. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928-1929 (2019).

Relatedly, the Legislature maintains that "there is nothing in the Act that heightens" the risk of bad-faith enforcement "above what is found in enforcement generally." Legis Br. 25. Not so. Executive officials "accept an ethical duty to serve honestly and in the public's interest" and to comply with ethics laws. Office of the Att'y Gen., Idaho Ethics In Government Manual (July 2019);[14] Idaho Code §§ 74-401 *et seq.* (Ethics in Government Act of 2015). Private citizens are under no such obligations, which provide an important check on the exercise of raw political power. *See, e.g.*, *Susan B. Anthony List*, 573 U.S. at 164 (noting that when "the universe of potential complainants is not restricted to state officials who are constrained by explicit guidelines or ethical obligations, there is a real risk of complaints from, for example, political opponents"); *TransUnion*, 141 S. Ct. at 2207 ("Private plaintiffs are not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant's general compliance with regulatory law."); *Texas Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 469 (Tex. 1997) ("[T]he basic concept of democratic rule under a republican form of government is compromised when public powers are abandoned to those who are neither elected by the people, appointed by a public official or entity, nor employed by the government.").

[14] https://www.ag.idaho.gov/content/uploads/2018/04/EthicsInGovernment.pdf (last visited May 12, 2022).

The Legislature claims that SB 1309's incentives are not "perverse" because they "are the same" as those in typical private attorneys general statutes. Legis. Br. 26. But as described above, SB 1309 is unlike typical private attorneys general statutes. Perhaps understanding that SB 1309 on its own creates an unacceptable risk of bad-faith enforcement, the State and Legislature point to other Idaho authority that, in general, constrains vexatious or bad-faith litigation. *See* State Br. 27; Legis Br. 27 & nn. 54-55 (discussing availability of affirmative defenses, Rule 11 sanctions, and Idaho's professional rules of responsibility). But those authorities cannot remedy SB 1309's chilling effect on the exercise of constitutional rights. In addition, they would be largely inapplicable to most or all suits under SB 1309. For instance, a plaintiff can proceed *pro se* under SB 1309 (rendering professional rules of conduct irrelevant), and the number of repeat plaintiffs under SB 1309 is likely to be small (minimizing the importance of vexatious litigant designations). The State and the Legislature cannot justify the enactment of a law that encourages bad-faith enforcement by hoping that other laws will blunt its impact.[15]

[15] Although Petitioners focus on the Legislature's unconstitutional encroachment of the Executive, the State and Legislature's oppositions highlight how SB 1309 might also raise separation of powers issues with respect to Legislative encroachment on the Judiciary. The Legislature candidly states that evasion of federal court review is its aim. Legis. Br. 9-16, 21. And the State argues that Petitioners cannot bring this pre-enforcement challenge in state court. State Br. 14-17 (arguing that Petitioners have no standing, this case is not ripe, and that the State of Idaho is not a proper Respondent). Thus, two branches of the Idaho government argue that SB 1309—which Petitioners claim is unconstitutional—is unreviewable in any forum on a pre-enforcement challenge. But "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

B. SB 1309 Is A "Special Law" That Violates The Idaho Constitution.

Laws that create "arbitrary, capricious, or unreasonable" classifications are considered "special laws" and are prohibited. *Arel v. T & L Enters., Inc.*, 146 Idaho 29, 35 (2008); *see also Moon v. North Idaho Farmers Ass'n*, 140 Idaho 536, 546 (2004) (citing *Jones v. Power Cnty.*, 27 Idaho 656 (1915)); Legis. Br. 25 ("We agree with Petitioners' Brief when it teaches that a law can qualify as a prohibited special law if that law is arbitrary, capricious, or unreasonable." (cleaned up)).[16] Laws that alter litigation rules are impermissible "special laws." *See* Idaho Const. art. III, § 19 (legislature may not pass special law that "[r]egulat[es] the jurisdiction and duties of justices of the peace and constables," "regulat[es] the practice of the courts of justice," or "limit[s] … civil … actions"); *see also Idaho Schs. for Equal Educ. Opportunity v. State*, 140 Idaho 586, 591-592 (2004) (invalidating special law that "alter[ed] the procedure of the existing lawsuit").

SB 1309 constitutes a "special" law in violation of the Idaho Constitution because it unreasonably alters litigation rules against abortion providers. Indeed, no other Idaho law distorts civil procedure to this extent, despite the State's insistence to the contrary. *See* State Br. 25-26. SB 1309 (a) attempts to close off pre-enforcement court review of a blatantly unconstitutional law, (b) allows unharmed plaintiffs access to the courts, (c) offers a bounty of $20,000 in statutory

[16] The State claims that Idaho courts apply a three-part, sequential test in evaluating whether a law is "special" under the Idaho Constitution. *See* State Br. 25 (citing *Jones v. Lynn*, 498 P.3d 1174, 1191 (Idaho 2021)). The State's formulation is overly strict. Indeed, even in *Jones* itself, this Court did not follow the test: In concluding that the law at issue was not "special," the Court relied on only the first and third "characteristics." *Jones*, 498 P.3d at 1191 (the law "applies generally to all members of the class it creates, and it is not arbitrary, capricious, or unreasonable").

damages to even those plaintiffs, and (d) provides for an extended statute of limitations (4 years).[17] *See generally* SB 1309 § 6. That combination of factors results in a cause of action against abortion providers that proceeds by rules different from all other lawsuits in Idaho and that is encouraged by the Legislature due to its high damages floor and long limitations period as compared to statutes for similar torts. *See Jones v. State Bd. of Med.*, 97 Idaho 859, 876 (1976) (noting that the "general purpose" of Art. I, § 19 is "to prevent legislation bestowing favors on preferred groups or localities" (cleaned up)).

That SB 1309 targets abortion providers is clear. Accordingly, the State and Legislature's confusion regarding whom the law classifies is unfounded. *See* State Br. 25; Legis. Br. 27-28. Although the law does not explicitly single out abortion providers by name, it singles them out by effect, which this Court has explained to be one of "the hallmarks of special laws." *Citizens Against Range Expansion v. Idaho Fish & Game Dep't*, 153 Idaho 630, 637 (2012). The law does so by distorting the civil procedure norms as described above—subjecting abortion providers to $20,000 (at minimum) in damages recoverable by unharmed plaintiffs for an extended limitations period.

[17] To be sure, a four-year statute of limitations is not unheard of in Idaho. *See* Legis. Br. 27 & n.56; Idaho Code § 5-224. But that is not the point. The most analogous torts are subject to a two-year statute of limitations. *See* Idaho Code § 5-219 (wrongful death, personal injury); *Curtis v. Firth*, 123 Idaho 598, 604 (1993) (confirming two-year statute of limitations of intentional infliction of emotional distress). If SB 1309 had not established a four-year statute of limitations, the two-year limitations period would have applied. Instead, SB 1309 doubles this statute of limitations.

Moreover, the law's legislative history discredits the State's claim that SB 1309 is rational and that its purpose is legitimate. *See* State Br. 26-27; *see also Citizens Against Range Expansion*, 153 Idaho at 636 (this Court may consider legislative history in assessing a law's legitimacy and "whether it is arbitrary, capricious, or unreasonable" (citing *Kirkland v. Blaine Cnty. Med. Ctr.*, 134 Idaho 464, 470 (2000))). SB 1309's legislative history confirms what common sense suggests: The law was intended to copy Texas SB 8 and to enable the Legislature to do what it otherwise could not—cut off pre-enforcement review and thereby ban pre-viability abortion. *See* Comments of B. Conzatti (President, Idaho Family Policy Center) Before Idaho Senate State Affairs Committee 44:45-53:45 (Feb. 16, 2022) (confirming that SB 1309 was "modeled after the Texas heartbeat law" and remarking that "nearly every Texas abortionist has voluntarily complied with the law and that means that abortions are simply just no longer offered in Texas after six weeks of pregnancy");[18] *cf. Department of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (noting that even when undertaking deferential review, courts are "not required to exhibit a naiveté from which ordinary citizens are free" (cleaned up)).

What is more, the Idaho Legislature passed SB 1309 despite advice from the Attorney General that the law was "likely" unconstitutional. *See* AG Opinion ("Senate Bill 1309 would likely be found to violate recognized constitutional rights under the U.S. Supreme Court's current understanding of the U.S. Constitution."). Passing SB 1309 despite that knowledge is alone

[18] *See* Senate State Affairs Committee Hearing (Feb. 16, 2022), https://insession.idaho.gov/IIS/2022/Senate/Committee/State%20Affairs/220216_ssta_0800AM-Meeting.mp4.

powerful evidence of the Legislature's improper purpose. *See McCormack v. Hiedeman*, 900 F. Supp. 2d 1128, 1149 (D. Idaho 2013) (holding that Idaho Legislature's enactment of 20-week abortion ban was not a "legitimate means" or a "legitimate effort" to advance State interest, in part, because Legislature passed law despite Attorney General opinion that law was "likely unconstitutional"), *aff'd sub nom., McCormack v. Herzog*, 788 F.3d 1017 (9th Cir. 2015);[19] *cf. Fox Valley Repro. Health Care Ctr., Inc. v. Arft*, 454 F. Supp. 784, 786 (E.D. Wis. 1978) (refusing to grant qualified immunity to state legislators who enacted law "with full knowledge of its unconstitutionality").

C. SB 1309 Violates The Idaho Constitution's Guarantee Of Informational Privacy.

SB 1309 violates the Idaho Constitution by inviting plaintiffs to put a patient's pregnancy and personal abortion decision at issue in public litigation against the patient's will. The State's arguments to the contrary rest on a misreading of this Court's precedents and a mischaracterization of Petitioners' claims.

First, the State's argument that Petitioners "lack standing to bring this (or any) claim" comes up short. To proceed based on third-party standing, Petitioners must show that (1) they

[19] The State's effort to distinguish *McCormack* is perplexing—and unavailing. State Br. 19. The State argues that the *McCormack* court "found an improper purpose behind an abortion regulation because the court found the law at issue was clearly unconstitutional, not because some state official expressed concern." *Id.* In fact, the *McCormack* court considered the Legislature's disregard of the Attorney General's opinion in reaching the conclusion that the Legislature had acted illegitimately. *See McCormack*, 900 F. Supp. 2d at 1149 ("The Idaho legislature's enactment of the PUCPA in light of this opinion is compelling evidence of the legislature's 'improper purpose' in enacting it.").

have constitutional standing, (2) they have a close relationship with the person who possesses the right, and (3) there is a hindrance to the possessor's ability to protect his own interests. *See Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1620 (2020); *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017). Petitioners already explained above why they possess constitutional standing—they have been injured, the State caused their injuries, and a favorable decision here would redress their injury. Supreme Court precedent establishes that Petitioners have third-party standing to advance these claims on behalf of their patients. *See, e.g.*, *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2118 (2020) (plurality opinion) (asserting that the Supreme Court "ha[s] long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations"); *id.* at 2139 n.4 (Roberts, C.J., concurring) (agreeing that "the abortion providers in this case have standing to assert the constitutional rights of their patients" for "the reasons the plurality explains"); *see also Griswold v. Connecticut*, 381 U.S. 479, 481 (1965) (holding that doctor-patient relationship sufficiently close to justify third-party standing); *Singleton v. Wulff*, 428 U.S. 106, 116-118 (1976) (explaining why pregnant persons face obstacles challenging abortion regulations).[20]

[20] The State's citation to *Doe v. Doe*, 162 Idaho 254 (2017), is unavailing. *Doe v. Doe* regarded a custody dispute, and at issue was whether an individual had third-party standing to raise claims on behalf of a minor after the minor's biological mother elected not to. *See id.* at 255, 259 (and noting the standing analysis was further complicated by the mother's constitutional right to direct the care, custody, and control of her child). The distinction between *Doe v. Doe* and this case is stark. Petitioners are medical providers. They are not seeking to usurp the legally cognizable rights of other individuals to advance the interests of their patients.

Second, the State's claim that Idaho's Constitution provides no right to informational privacy ignores the "expansiveness of Idaho's protection of privacy." *Planned Parenthood of Idaho, Inc. v. Kurtz*, 2001 WL 34157539, at *10 (Idaho Dist. Ct. Aug. 17, 2001) (citing *Murphy v. Pocatello Sch. Dist. No. 25*, 94 Idaho 32 (1971)). It also ignores the Idaho Constitution's guarantee of a right to confidentiality that encompasses private medical records, which are of a "highly personal and sensitive" nature, and which "detail [the] intimate aspects" of a person's life. *Cowles Publ'g Co. v. Kootenai Cnty. Bd. of Cty. Comm'rs*, 144 Idaho 259, 265 (2007).

Third, the State's argument that SB 1309 does not violate the right to informational privacy, because it only "involv[es] sensitive information" (State Br. 30), turns on a mischaracterization of Petitioners' claims. SB 1309 does far more than "involve" sensitive information. Instead, the very records an SB 1309 claimant will require to prevail in litigation will include the most sensitive of information, including about a patient's pregnancy and abortion decision. *See* SB 1358 § 1(4) (making compliance with Idaho Code § 18-8803 a prerequisite for defendant to recover costs and attorneys' fees). And by dangling a minimum $20,000 statutory damages award in front of potential claimants, SB 1309 encourages distant relatives of a fetus—which may include people entirely unrelated to the individual who received an abortion—to reveal an individual's medical condition and medical records in public litigation. Contrary to the State's assertions, Petitioners' claims pose no threat to Idaho's custody or divorce proceedings: Idaho law does not require parents to document evidence showing which parent would best serve the interests of a child in the event a custody dispute were to arise, nor has it created any other cause of action the mere filing of which necessarily reveals a person's medical condition and medical decisions.

Petitioners' claims merely serve to vindicate the rights of Idahoans to preserve the privacy of their most intimate personal decisions.[21]

D. SB 1309 Denies Due Process Under The Idaho Constitution By Imposing Excessive And Vague Penalties.

As the Legislature points out, the void-for-vagueness doctrine "can apply either to proscribed conduct or to a prescribed penalty." Legis. Br. 32 (cleaned up). As Petitioners showed in their opening brief, SB 1309 is void for vagueness as to the latter. Due process requires that an individual receive "fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *State v. Gorringe*, 168 Idaho 175, 182 (2021) (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996)); *see also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003). SB 1309's statutory damages provision fails that test because it allows unbounded damages that are disproportionate to the harms suffered—if any—by civil plaintiffs without giving abortion providers any warning about what those damages might be.

Contrary to the State and Legislature's arguments, SB 1309 is subject to the most stringent vagueness analysis. That is for two reasons. First, the penalties for violating SB 1309 are quasi-criminal. *See State v. Cobb*, 132 Idaho 195, 198 (1998) (criminal penalties subject to more stringent vagueness test). Indeed, the penalties that SB 1309 imposes are particularly severe and

[21] The State and the Legislature suggest that SB 1309's violation of Idahoans' right to informational privacy is justified based on the existence of discretionary discovery rules, redaction of court filings, and the tort of invasion of privacy. *See* State Br. 30; Legis. Br. 29-30 & nn.58-59. As Petitioners have explained, SB 1309 is an unconstitutional invasion of Idahoans' privacy. The State and the Legislature cannot rely on other Idaho authority to make it constitutional.

punitive, and punitive damages "serve the same purposes as criminal penalties." *State Farm*, 538 U.S. at 417. SB 1309's "object, like a criminal proceeding, is to penalize for the commission of an offense against the law," namely, providing abortion services. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965). It does so by imposing a $20,000 damages floor—with no ceiling—for violations. SB 1309 § 6(1), (7). The State notes that in Idaho, typically only contempt and juvenile delinquency proceedings are considered quasi-criminal, emphasizing that the liberty interests at stake in such cases are not at stake here. State Br. 32. But that distinction is reductive. As discussed *infra*, central liberty and privacy interests are threatened by a law that seeks to punitively punish abortion providers for providing medical services for individuals who make intimate decisions affecting their families. Second, the right being threatened is fundamental. Because the Idaho Constitution is at least as protective as the U.S. Constitution, *see State v. Donato*, 135 Idaho 469, 471 (2001), it protects the right to pre-viability abortions. *See Roe v. Wade*, 410 U.S. 113, 153-154 (1973); *see also Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992). In addition, Petitioners explain *infra* how the Idaho Constitution, standing alone, protects the fundamental right at issue here—the right to privacy in making intimate familial decisions.

Crucially, though, even if SB 1309 is not subject to a more stringent vagueness test, it is still unconstitutional. SB 1309 fails to define how statutory damages are calculated. In turn, the law does not provide adequate notice of how excessive they might be. Therefore, it violates due process. Due process proscribes "grossly excessive or arbitrary punishments on a tortfeasor."

State Farm, 538 U.S. at 416.[22] But SB 1309 allows for just that. Indeed, private enforcement, lack of oversight, and unclear damages calculation guidelines all contribute to unstandardized penalties—which can lead to excessive and arbitrary awards. In fact, SB 1309 does not even limit the number of enumerated plaintiffs who can seek damages for a single "offense." *See* SB 1309 § 6(1). As a practical matter, this means that abortion providers who provide abortion services to individuals with large families (or, even worse, to an individual who was *raped by* someone with a large family) might be subject to $20,000 (at minimum) in damages many times over for the same violation without any defense mechanism. What is more, SB 1309's lack of guidelines make it impossible for providers subject to these penalties to be fairly warned. Indeed, the only thing

[22] The State contends that there is no proportionality requirement for statutory damages under the Idaho Constitution. *See* State Br. 33. But even if that were the case, damages awarded under SB 1309 nonetheless must meet proportionality requirements under the federal due process clause. And they do not. Relatedly, the State contends that the federal proportionality standard likely applies only to punitive, not statutory, damages. *See id.* at 33-34. The State's contention is overbroad, and in fact, the State immediately cabins its scope by acknowledging that a statutory damages award can "[violate] due process if it is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *See id.* at 33 (quoting *Verizon California Inc. v. Onlinenic, Inc.*, 2009 WL 2706393, at *6 (N.D. Cal. Aug. 25, 2009)). Likewise, the State's reliance on *Amy v. Curtis*, 2021 WL 858399, at *5 (N.D. Cal. Mar. 8, 2021) in support of this contention is misplaced. In *Amy*, the court rejected defendant's due process challenge of a hefty statutory minimum damages provision because "[d]escribing a minimum statutory award as a 'penalty' ... does not transform that award into punitive damages subject to the same test of proportionality owed under the Fifth Amendment." *Id.* But that same logic reinforces the merit of Petitioners' claim: Petitioners' due process argument applies not only to SB 1309's $20,000 statutory damages minimum, but also to the statute's unbounded allowance for much higher damages awards—which have the potential to be excessive given the lack of guidelines for these awards. Moreover, in *Amy*, the defendant had already been criminally convicted for the underlying conduct at issue, rendering the posture of that case entirely distinct from the one at hand.

that potential defendants know is that they *might* be subject to $20,000 in damages (at minimum), without any indication of how much the actual award will exceed that floor.

E. SB 1309 Violates The Idaho Constitution's Guarantee Of Equal Protection Under The Law.

SB 1309 violates the equal protection clause of the Idaho Constitution because it disproportionately punishes medical professionals who provide abortions compared to other medical providers and other civil defendants.

First, SB 1309 directly singles out abortion providers for a scheme designed to prevent them from obtaining pre-enforcement review, unlike all other statutes. And by leaving damages uncapped, expanding the scope of standing, and expanding the limitations period as compared to similar statutes, SB 1309 increases abortion providers' exposure to liability—and provides for severe penalties, at that.

The State and the Legislature contend that SB 1309 treats similarly situated individuals equally (State Br. 44; Legis. Br. 36-37), but that is a mischaracterization of the law. As discussed, SB 1309's novelty results in singling out abortion providers. Relatedly, the State contends that "the Act's 'scheme' is not 'novel'" because the Legislature has passed other Idaho laws providing for private causes of action. State Br. 44. But the Attorney General itself has repeatedly conceded that "SB 1309 would create a novel civil enforcement action." AG Opinion; *see also* Mem. ISO Mot. for Reconsideration at 2 (Apr. 1, 2022) (referring to "novel legal issues of first impression" in Petition); Gov. Little Letter (remarking upon SB 1309's "novel civil enforcement mechanism").

In any event, none of the laws the State cites is remotely apt.[23] Furthermore, it is of no moment that other state laws establish a four-year statute of limitations or do not specify a statutory damages maximum. *See* State Br. 44-45. The Idaho Code contains no other law with the combination of features that SB 1309 has. *Cf. Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2496 (2021) (Roberts, C.J., dissenting) (calling SB 8's "statutory scheme … not only unusual, but unprecedented"). In addition, as discussed, SB 1309's features differ markedly from the most analogous Idaho statutes, which are for wrongful death and personal injury. *See* Idaho Code § 5-219 (allowing for two-year limitations period).

This novelty, in turn, reflects discriminatory intent that should trigger heightened scrutiny. *See Romer v. Evans*, 517 U.S. 620, 633 (1996) (the "absence of precedent for [the challenged law] is itself instructive; '[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the [Equal Protection Clause]'" (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928))); *see also Gomersall v. St. Luke's Regional Med. Ctr., Ltd.*, 168 Idaho 308, 318-319 (2021) (when "discriminatory character" of law is "apparent on its face," the "means-focus" test, which involves heightened scrutiny,

[23] For example, the State does not explain the relevance of Idaho Code § 45-811, which allows the "owner" of real or personal property to bring a cause of action against individuals who attempt to create or claim interest in a nonconsensual common law lien. Nor does the State explain the relevance of Idaho Code §§ 6-1101 *et seq.* and 6-3301 *et seq.*, which govern the circumstances under which individuals might under various circumstances recover damages from skiers, ski area operators, bicyclists, and mountain operators for failing to follow the duties of care enumerated in the Idaho Code. These statutes share virtually no similarities with SB 1309, which allows unharmed individuals to sue abortion providers for minimum statutory damages of $20,000, along with a private enforcement scheme intended to avoid pre-enforcement review.

applies). In other words, contrary to the State's suggestion, *see* State Br. 45, SB 1309 does "distinguish between groups odiously or in a way calculated to excite ill will." Indeed, SB 1309 purposefully distinguishes between abortion providers and other medical providers in an attempt to prohibit abortion services in Idaho. Thus, heightened scrutiny applies.

Second, the law threatens a fundamental right, and therefore, it is subject to heightened scrutiny. The Idaho Constitution protects the right to privacy in making intimate familial decisions. *See infra* Section II.F. Laws that threaten fundamental rights are subject to heightened scrutiny. *See Idaho Schs. for Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 582 (1993).

But even if SB 1309 is subject only to rational basis review, it still does not survive. "Under either the Fourteenth Amendment or the Idaho Constitution, a classification will survive rational basis analysis if the classification is rationally related to a legitimate governmental purpose." *Meisner v. Potlatch Corp.*, 131 Idaho 258, 262 (1998). But the targeting of abortion providers with a novel enforcement scheme designed to shut down a politically disfavored service and the excessiveness of the uncapped damages award that define this law are anything but rationally related to a legitimate governmental purpose. The State's goal in enacting SB 1309 is to unconstitutionally ban abortion after approximately 6 weeks LMP in an unreviewable manner. If it takes effect, that is precisely what SB 1309 will do. *See* AG Opinion (SB 1309 "would ban all abortions in the state of Idaho after a fetal heartbeat is detected"); *see also McCormack*, 900 F. Supp. 2d at 1149 (enactment of 20-week abortion ban "in the face of the Idaho Attorney General's declaration that it is likely unconstitutional … is compelling evidence of the legislature's 'improper purpose' in enacting it").

F. SB 1309 Violates The Fundamental Right To Privacy In Making Intimate Familial Decisions Protected By The Idaho Constitution.[24]

SB 1309 eviscerates a pregnant person's right to make intimate familial decisions, which is implicit in Idaho's concept of ordered liberty. To claim otherwise, the State attempts to rewrite decades of this Court's well-settled precedent as well as Petitioners' brief. This Court should not accept the revision of either.

First, the State opportunistically wishes to excise this Court's longstanding precedent that a right is fundamental when it is implicit in the concept of ordered liberty. *See* State Br. 3 & n.24. Claiming this black-letter standard is but dicta, the State ignores that this Court has been very clear that it "set forth" the test for determining fundamental rights in *Idaho Schools*, and that the test includes a determination of whether a right "is implicit in Idaho's concept of ordered liberty." *Van Valkenburgh*, 135 Idaho at 126 (citing *Evans*, 123 Idaho at 581-582); *see also Reclaim Idaho*, 497 P.3d at 181 ("This Court has consistently recognized that a right is fundamental … if it is implicit in Idaho's concept of ordered liberty." (cleaned up)). This is not mere dicta, but rather a clear articulation of a well-established legal standard. To hold otherwise would be to obliterate decades of this Court's precedent and to render Article I, Section 21 of the Idaho Constitution redundant—for how else would this Court determine which of the rights not positively enumerated in Idaho's Constitution were "retained by the people"?

[24] Although the State argues otherwise (State Br. 35), as explained elsewhere, Petitioners have third-party standing to assert the claim on behalf of their patients.

Similarly, the State maintains that "the historical existence of a right prior to the adoption of the Idaho Constitution is a condition precedent to finding an inalienable right." State Br. 38. In support of that creative proposition, the State claims that *Newland v. Child* says that the right to own private property is fundamental *because* the right existed before the Idaho Constitution was adopted. *Id.* Yet *Newland* draws no such causal connection, nor would it make sense for it to do so given that the right to own and enjoy private property is codified in Article 1, Section 1 of the Idaho Constitution. Indeed, *Newland* sensibly states that the Idaho Constitution "embrace[s] and proclaim[s]" the right to own private property. 73 Idaho 530, 537 (1953). If the State were correct in its reading of *Newland*, then nothing would be implicit in the concept of ordered liberty that were not already expressly provided in Idaho's Constitution—which is precisely what the State wishes. But this Court should not accept the State's invitation to recast its substantive due process jurisprudence in a manner that upends well-settled precedent and that renders meaningless the Idaho Constitution's reservation of rights provision.[25]

Second, the State's myopic focus on what it claims is Petitioners' request to recognize a fundamental right to abortion belies the fact that Petitioners in reality seek recognition that a

[25] The State also suggest that the claim to a fundamental right is weaker the more constitutional provisions it arises from—but this gets things backwards. *See, e.g.*, *Griswold*, 381 U.S. at 484 (citing numerous Amendments in articulating Federal Constitution's "zone of privacy"); *Women of Minn. by Doe v. Gomez*, 542 N.W.2d 17, 26-27 & n.10 (Minn. 1995) (holding that several provisions of Minnesota Constitution—although not containing explicit privacy guarantee—combined to establish privacy right large enough to protect woman's right to choose to terminate pregnancy); *Davis v. Davis*, 842 S.W.2d 588, 600 (Tenn. 1992) ("The right to privacy, or personal autonomy ('the right to be let alone'), while not mentioned explicitly in our state constitution, is nevertheless reflected in several sections of the Tennessee Declaration of Rights.").

pregnant person's right to privacy in making intimate familial decisions is implicit in Idaho's concept of ordered liberty. Courts are free to reject a State's effort to narrowly define a constitutional right at issue, *see, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 566-567, 578 (2003) (chiding Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986), for narrowly characterizing right at stake as one for "homosexuals to engage in sodomy" rather than more accurately as for adults to be free from government interference when engaging in private, consensual conduct), as this Court should do here.

Regardless, the State's preoccupation with the history of abortion has left it unable to address the larger and different question of whether the Idaho Constitution protects a right to privacy in making intimate familial decisions—which it does.[26] Instead, the State has propounded a confusing and contradictory account of the history of abortion in Idaho. At times, the State claims that this Court "encapsulated Idaho's views on abortion" by writing that it "places in jeopardy the life of … the pregnant woman," State Br. 39; at other times, it claims that "this Court's

[26] The State argues that the Idaho Constitution does not protect individuals' privacy because of a proposed amended constitution that the Legislature put to a voter referendum in 1970. Idaho voters elected not to adopt that constitution, which contained an express right to privacy in Art. I, § 1. *See* State Br. 40 & App'x 9. There is nothing to read into this. The amended version of Art. I, § 1 was only one part of an entirely revised constitution that the Legislature submitted to the electors. *See* App'x 9 (28 pages). There is no evidence that Art. I, § 1 was debated or considered in any particular way. And the State offers no evidence whatsoever regarding the proposed amended constitution—how it came to be, the public discourse (if any) surrounding it, or why it was defeated. And even in the normal course, the failure of a proposed constitutional amendment does not necessarily indicate rejection of the subject matter of the amendment. *See Reichert v. State ex rel. McCulloch*, 278 P.3d 455, 481 (Mont. 2012) (explaining that constitutional convention's failure to adopt proposed amendment did not indicate rejection, especially "without even a single word by any of the delegates directed to this issue and without any language to this effect in the Constitution itself").

understanding" of Idaho's abortion laws was that they were not "designed … for the protection of women's health," *id*. In any event, it sheds little light on what constitutes ordered liberty to say that the men who drafted Idaho's Constitution in the 1880s—before women even had the right to vote—neglected to protect or even debate the issue of abortion.

The State's history is also highly selective, beginning arbitrarily in 1864. *See* State Br. 38; App'x 1. As many sources have noted, "[a]t the opening of the nineteenth century, abortion was governed by common law, and was not a criminal offense if performed before quickening." Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 281-282 (1992); *see also, e.g.*, *Roe v. Wade*, 410 U.S. 113, 132 (1973) ("It is undisputed that at common law, abortion performed before 'quickening'—the first recognizable movement of the fetus in utero, appearing usually from the 16th to the 18th week of pregnancy—was not an indictable offense." (cleaned up)). History did not begin in 1864, and consideration of the fuller historical picture at common law contradicts the State's version of affairs.

And even if the State's version of history is to be credited, it is no silver bullet. Many State high courts have held that their State constitutions protect the right to terminate a pregnancy, even when the State criminalized abortion at the adoption of the State constitution and up until *Roe*. *See, e.g.*, *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206, 235 (Iowa 2018) (Iowa Constitution protects fundamental right to terminate pregnancy even though "abortion was a crime in Iowa when the due process clause was adopted … and it remained a crime until the *Roe* decision"); *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 486 (Kan. 2019)

(explaining that "[t]he State's reliance on the existence of 19th century criminal abortion statutes is wholly unpersuasive"); *Pro-Choice Mississippi v. Fordice*, 716 So. 2d 645, 651 (Miss. 1998) ("In asserting that the Mississippi Constitution does not protect the right to abortion under the privacy clause because the framers believed abortion illegal, the State fails to take into account some very important considerations."); *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 15 (Tenn. 2000) (holding, in spite of long history of criminalizing abortion, that "[t]he concept of ordered liberty embodied in our constitution requires our finding that a woman's right to legally terminate her pregnancy is fundamental"), *superseded by const. amend.*, Tenn. Const. art I, § 36 (2014); *cf. Lawrence*, 539 U.S. at 567-568 (criticizing *Bowers* Court for its reliance on overly simplistic view that "the laws of the many States … make [homosexual sodomy] illegal and have done so for a very long time").

Indeed, the vast majority of the seventeen state appellate courts that have addressed whether their state constitutions independently protect a person's "decisions regarding … pregnancy from unjustifiable government interference" have found that they do. Specifically, appellate courts in thirteen states "have plainly held they do," and three others "have implicitly held their state constitutions contain this protection." *Hodes & Nauser*, 440 P.3d at 504-505 (Biles, J., concurring) (collecting cases). The only outlier is a decision by an intermediate appellate court in Michigan, which the State cites without reference to the sixteen others that reached the opposite

conclusion. *Id.*[27] By ruling for Petitioners, this Court would adhere to its own well-settled precedent and claim as company the vast majority of State high courts to consider similar issues.

Third, the State and Legislature argue that Article I, Sections 1 and 13 do not protect the right at issue here (State Br. 37-38; Legis. Br. 38-39), but the State acknowledges (as it must) that this "Court has rarely analyzed the scope of the rights protected by these provisions." State Br. 38. For the reasons already described in both this brief and Petitioners' opening brief, the due process clause in Article I, Section 13—which guarantees, in relevant part, that "[n]o person shall be … deprived of life, liberty or property without due process of law"—encompasses the right to privacy in making intimate familial decisions. Indeed, this Court has specifically held that the due process clause contained in Art. I, § 13 "may in some instances be broader" than that of the Fourteenth Amendment to the U.S. Constitution. *In re Doe*, 155 Idaho 36, 39 n.2 (2013) (citing *State v. Radford*, 134 Idaho 187, 190 (2000)).

And although the State and Legislature seem to treat the two sections as duplicative, Petitioners noted in their opening brief that they are not. *See* Pet. Br. 34-35 & n.23. Article I, § 1—which declares that "[a]ll men are by nature free and equal, and have certain inalienable rights"—independently protects the right that Petitioners assert here. Idaho Const. art. I, § 1. Section 1's invocation of "inalienable rights" distinguishes it from Section 13 and embodies the concept of natural rights. *See Parsons v. State*, 113 Idaho 421, 427 (Ct. App. 1987) (noting that

[27] And even that case might soon be overturned. *See Whitmer v. Linderman*, No. 22-193498-CZ (Mich. Cir. Ct. filed Apr. 7, 2022), https://www.courts.michigan.gov/4965a7/siteassets/case-documents/briefs/msc/2021-2022/164256/164256_01_03_circuit-ct-complaint.pdf (asserting that *Mahaffey* was wrongly decided).

Section 1 "recognizes that all people enjoy natural, inalienable rights," and remarking that the provision "echo[es] the principles of government stated by the authors of the Declaration of Independence"). Section 1 is not duplicative of—and in fact protects more rights than—Section 13. *See Hodes & Nauser*, 440 P.3d at 473-474 (similar with respect to Kansas's Constitution).

Indeed, State high courts have long interpreted similar constitutional provisions to protect a wide range of unenumerated rights, such as those of personal autonomy, bodily integrity, and self-determination. *See, e.g.*, *Hodes & Nauser*, 440 P.3d at 480-483 (citing many such cases and concluding: "At the heart of a natural rights philosophy is the principle that individuals should be free to make choices about how to conduct their own lives, or, in other words, to exercise personal autonomy"); Calabresi & Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 Tex. L. Rev. 1299, 1441 (2015) (between 1776 and 1868, "several state supreme courts applied" similar provisions "to an enormous variety of topics, suggesting an understanding during this time that" such provisions "protected a vast range of unenumerated rights"). The right to privacy in making intimate familial decisions is an "inalienable right" protected by Article 1, § 1.

CONCLUSION

Only this Court can prevent the violence SB 1309 aims to inflict on the Idaho Constitution's separation of powers. No attempts at legal hand wringing or obfuscation by the State can hide what the Attorney General and the Governor have both admitted: SB 1309 is clearly unconstitutional. For the foregoing reasons, this Court should declare SB 1309 unconstitutional

and issue a writ of prohibition that forbids Idaho courts from giving effect to its civil enforcement provision.

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Respectfully submitted,

/s/ *Michael J. Bartlett*
Michael J. Bartlett, ISB No. 5496
BARTLETT & FRENCH LLP

Alan E. Schoenfeld
Michelle N. Diamond
Rachel E. Craft
Cindy Y. Pan*
Samuel J. McHale*
Joseph H. Rosenberg*
Ann E. Himes*
Vikram P. Iyer
WILMER CUTLER PICKERING
HALE AND DORR LLP

Attorneys for Petitioners

** Pro hac vice applications forthcoming*

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:

Megan A. Larrondo
Dayton P. Reed
STATE OF IDAHO
DEPUTY ATTORNEYS GENERAL
954 W. Jefferson Street, 2nd Floor
PO Box 83720
Boise, Idaho 83702-0010
megan.larrondo@ag.idaho.gov
dayton.reed@ag.idaho.gov

Attorneys for Respondent

Daniel W. Bower
MORRIS BOWER & HAWS PLLC
1305 12th Ave. Rd.
Nampa, Idaho 83686
Tel. (208) 345-3333
Fax: (208) 345-4461
dbower@morrisbowerhaws.com

Monte Neil Stewart
11000 Cherwell Court
Las Vegas, Nevada 89144
Tel. (208) 514-6360
monteneilstewart@gmail.com

Attorneys for Intervenors-Respondents

/s/ Michael J. Bartlett
MICHAEL J. BARTLETT