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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' BRIEF IN RESPONSE TO THIS COURT'S JUNE 30, 2022 ORDER SETTING HEARING

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*
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

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

** Admitted pro hac vice*

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In its haste to eliminate legal abortions in the State of Idaho, the Idaho Legislature created a statutory maze that will require complex and time-consuming litigation to navigate. More specifically, between 2020 and earlier this year, the Idaho Legislature undertook piecemeal efforts to eliminate abortions in Idaho, including:

1. The total abortion ban at issue in the related Petition before this Court, passed in 2020, which will criminalize abortion in Idaho, and which will become effective 30 days after the Supreme Court issued judgment in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), on or about August 18. *See* Idaho Code §§ 18-622(1)-(2). Petitioners challenge the constitutionality of the Total Abortion Ban, raising three independent claims under the Idaho Constitution.

2. A ban, enacted in 2021, which criminalizes all abortions in Idaho performed after a "fetal heartbeat" is detected—corresponding to approximately six weeks of pregnancy. *See id.* § 18-8804(1). This Six Week Ban is slated to take effect 30 days after a U.S. appellate court issues a judgment upholding the constitutionality of a similar ban passed in another state. *See id.* § 18-8805(1).

3. SB 1309, at issue in this Petition and passed earlier this year, which amends the Six Week Ban to add an unprecedented private civil enforcement mechanism—a civil cause of action deputizing certain private individuals to seek extraordinary statutory damages from medical professionals who knowingly or recklessly violate the Ban. *See id.* § 18-8807. SB 1309 was scheduled to take effect on April 22, 2022, but on April 8, this Court stayed implementation of the law. *See Planned Parenthood Great Nw., Haw., Alaska, Ind., Ky. v. State*, No. 49615-2022, 2022 WL 1438870 (Idaho Apr. 8, 2022). Petitioners have challenged the law on a multitude of constitutional grounds.

The two petitions before this Court address unique and independent procedural—as well as substantive—challenges to the Legislature's comprehensive slate of abortion restrictions. Although each raises the question of whether the Idaho Constitution permits the State to ban abortion, there are ample separate legal grounds on which to resolve these cases. The Court need

not—and indeed, should not—consolidate these cases, if it is inclined to resolve this Petition and the Total Ban litigation on these alternative grounds.

While this Court sifts through these complexities and the constitutional merits of these vital issues, it should stay these laws and maintain the status quo, under which Idaho citizens have access to safe, comprehensive reproductive healthcare, including abortions—as they have for nearly half a century. Finally, further factual development and motion practice in any of these cases, including this one, are unnecessary. This Petition presents pure questions of law and satisfies this Court's test for exercising its original jurisdiction.

I. This Court Should Continue To Stay Implementation Of SB 1309 Pending The Outcome Of This Litigation.

This Court may issue a stay, with or without an application by a party pursuant to Idaho Appellate Rules 5(d) and 13(g). Petitioners respectfully request that this Court continue to stay implementation of SB 1309 to protect the constitutional rights—as well as the health and lives—of Idaho's pregnant citizens and their families until the Court is able to resolve Petitioners' claims on the merits. The catastrophic consequences of the serious constitutional violations asserted in the Petition weigh in favor of continuing to preserve the status quo.

As this Court's previous order in this case staying SB 1309 reflected, a stay is standard Idaho practice in pre-enforcement challenges to unconstitutional laws—and has been for decades. *See, e.g.*, *Coeur D'Alene Turf Club, Inc. v. Cogswell*, 93 Idaho 324, 330, 461 P.2d 107, 113 (1969) (issuing an alternative writ and a stay of all proceedings in trial court during the pendency of the appeal in order to preserve the status quo); *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho

121, 124, 15 P.3d 1129, 1132 (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"); *Planned Parenthood Great Nw.*, 2022 WL 1438870, at *1 (staying implementation of SB 1309 under I.A.R. 13(g)).

Idaho Appellate Rule 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."[1] *See* Idaho Code §§ 7-402, 7-403 (permitting this Court to issue alternative writs of prohibition commanding that a party "refrain from further proceedings … until the further order of the court"); *see also Lenaghen v. Smith*, 97 Idaho 383, 384, 545 P.2d 471, 472 (1976) (alternative writ of prohibition issued in advance of oral argument); *Murphy v. McCarty*, 69 Idaho 193, 196, 204 P.2d 1014, 1016 (1949) (alternative writ of prohibition granted while the court took "under advisement" the demurrer to the petition and a motion to quash); *Pfirman v. Probate Ct. of Shoshone Cnty.*, 57 Idaho 304, 64 P.2d 849 (1937) (alternative writ of prohibition issued pending resolution of plaintiff-petitioner's entitlement to writ of prohibition). Idaho Appellate Rule 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."

[1] Petitioners have named the proper Respondent in their challenge to the constitutionality of SB 1309. Specifically, the State of Idaho is a proper Respondent in lawsuits for violations of the Idaho Constitution. *See* Petitioners Br. 17 ("Br.") (citing *Tucker v. State*, 162 Idaho 11, 394 P.3d 54 (2017)). The State's waiver of sovereign immunity where constitutional challenges are asserted acknowledges that the State, as a whole, can indeed be blocked from giving effect to an unconstitutional law.

A stay is proper here because Petitioners have alleged serious violations of the state constitutional rights of the citizens of Idaho and are likely to prevail on the merits of their claims. Absent a stay, Idaho citizens whose rights are infringed by SB 1309 and their families will suffer imminent, grievous, and irreparable harm. *See* Pet. ¶¶ 27-38 (describing SB 1309's likely effects on Petitioners and their patients); Br. Ex. 3, Decl. of K. Smith, ¶¶ 14-26 (similar); Br. Ex. 4, Decl. of C. Gustafson, ¶¶ 9-29 (similar).

Some patients will be denied access to care altogether. Idaho citizens who are unable to access abortion care will be exposed to the health risks and medical consequences of pregnancy and childbirth, including risk of death and serious health complications. The experience of women in Texas following the implementation of SB 8 highlights just how much harm will ensue if this Court declines to stay implementation of SB 1309 and the Total Abortion Ban. A recent study published in the American Journal of Obstetrics and Gynecology found that pregnant patients presenting with medical indications for delivery at less than 22 weeks at two Texas hospitals experienced nearly twice the rate of maternal morbidity as compared to pregnant patients in states without restrictive abortion laws comparable to Texas' laws.[2] Those who are prevented from accessing abortion will also experience psychological burdens, increased financial distress, decreased educational and employment outcomes, and increased rates of domestic violence. And although SB 1309 allows for affirmative defenses based on rape and incest, those defenses are

[2] *See* Nambiar et al., *Maternal Morbidity and Fetal Outcomes Among Pregnant Women at 22 Weeks' Gestation or Less With Complications in Two Texas Hospitals After Legislation on Abortion*, Am. J. Obstetrics & Gynecology (July 4, 2022) (forthcoming).

onerous.[3] As a result, they will certainly be underutilized, which is a particular problem given the rising rates of rape and incest in Idaho.[4]

Petitioners allege that SB 1309 violates the Idaho Constitution, and they are likely to succeed on their claims. *First*, SB 1309 eviscerates the separation of powers enshrined in the Idaho Constitution by forbidding the Executive from enforcing the law and, instead, deputizing private citizens to enforce it. *See* Br. 18-24. SB 1309 is unique: Its combination of exclusive civilian enforcement, lucrative statutory damages (with no cap), lack of requirement of harm, and extension of the statute of limitations resembles no other private cause of action. This Court has already said that such a law would be unconstitutional as a violation of the separation of powers. *See Mead v. Arnell*, 117 Idaho 660, 667, 791 P.2d 410, 417 (1990). SB 1309 is the prototypical violation because it cannot be enforced by any official in the Executive Branch, only by private citizens incentivized by bounties.

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[3] As Governor Little recognized in his signing statement to SB 1309, the "challenges and delays inherent in obtaining the requisite police report render the exception meaningless for many," as well as for those who "lack the capacity or familial support to report incest and sexual assault." *See* Pet. Brief ISO Petition re: SB1309 (No. 49615-2022), Ex. 2 at 1 (Letter from Gov. B. Little to J. McGeachin, dated Mar. 23, 2022).

[4] Rape and incest cases in Idaho recently reached a five-year high: "The Idaho State Police Bureau of Criminal Identification's 'Crime in Idaho' annual report showed 728 cases of rape or attempted rape reported to law enforcement statewide last year. That's nearly a 12% spike from the previous year, when 651 cases were reported. The report also totaled 28 cases of incest reported to law enforcement last year. By comparison, 41 cases of incest were reported in the previous four years combined and just three offenses reported in 2020." Suppe, *Rape, Incest Cases Reach Five-Year High, State Police Report Says*, Idaho Statesman (July 8, 2022).

Second, SB 1309 is an unconstitutional "special" law because it unreasonably regulates the practice of the courts. *See* Br. 24-26. Its unique combination of features—including the broad class of potential plaintiffs, minimum $20,000 statutory damages award, and extended statute of limitations—has the effect of altering litigation rules to favor even unharmed plaintiffs and to disadvantage those wishing to engage in a politically disfavored activity. *See Idaho Schs. for Equal Educ. Opportunity v. State*, 140 Idaho 586, 592, 97 P.3d 453, 459 (2004).

Third, SB 1309 violates the Idaho Constitution's guarantee of informational privacy. *See* Br. 26-28. SB 1309 allows even unharmed plaintiffs (such as estranged family members of a rapist) to sue and thereby draw into public litigation records regarding patients' pregnancies and personal abortion decisions.

Fourth, the due process clause of the Idaho Constitution (art. I, § 13) requires that the penalties imposed by SB 1309 be sufficiently definite to allow people of ordinary intelligence to conform their behavior accordingly. *See* Br. 28-31 (citing *State v. Gorringe*, 168 Idaho 175, 182, 481 P.3d 723, 730 (2021)). SB 1309 violates the mandate because its penalties are excessive (even an unharmed plaintiff can recover $20,000 *minimum*) and vague (there is no maximum).

Fifth, because SB 1309 treats abortion providers differently than other medical providers and all other civil defendants, it violates the Idaho Constitution's equal protection guarantee. *See* Br. 31-33. Through the harsh combination of features that Petitioners have already described, SB 1309 blatantly discriminates against medical providers who offer abortions, which is unconstitutional under heightened scrutiny (and even rational basis review). SB 1309 was

intended to achieve an illegitimate aim—to discriminate—and, if the law ever becomes enforceable, that will be its effect. *See Romer v. Evans*, 517 U.S. 620, 633 (1996).

And, *sixth*, SB 1309 violates the fundamental right to privacy in making intimate familial decisions by forcing pregnant Idahoans after approximately six weeks of pregnancy to carry their pregnancies to term regardless of the individual private circumstances confronting each family. *See* Br. 34-39. The right to privacy in making intimate familial decisions is supported by this Court's precedent recognizing procreation and parental control as fundamental rights, *see, e.g.*, *Idaho Schs. for Equal Opportunity v. Evans*, 123 Idaho 573, 582, 850 P.2d 724, 733 (1993) (procreation); Br. 16; *Electors of Big Butte Area v. State Bd. of Educ.*, 78 Idaho 602, 612, 308 P.2d 225, 231 (1957) (parental control), and its precedent interpreting the Idaho Constitution as more protective than the United States Constitution, *see, e.g.*, *State v. Donato*, 135 Idaho 469, 472, 20 P.3d 5, 8 (2001); Br. 38. It is also a right recognized by other state high courts. *See, e.g.*, *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 483-486 (Kan. 2019) (Kansas Constitution protects "right to make decisions about parenting and procreation" and thus also protects right to terminate pregnancy); *Armstrong v. State*, 989 P.2d 364, 375 (Mont. 1999); *Doe v. Minnesota*, No. 62-CV-19-3868 (Minn. Dist. Ct. 2d Jud. Dist. July 11, 2022), https://www.courthousenews.com/wp-content/uploads/2022/07/doe-minnesota-ruling-ramsey-county.pdf (reaffirming that the Minnesota Constitution protects right to privacy that encompasses right to terminate pregnancy).[5]

[5] This Court has long considered the jurisprudence of courts in other states when interpreting similar provisions of their respective constitutions. *See, e.g.*, *State v. Bennett*, 142 Idaho 166, 172, 125 P.3d 522, 528 (2005); *Thompson v. Engelking*, 96 Idaho 793, 809-810, 537 P.2d 635, 651-652 (1975); *Oneida Cnty. Fair Bd. v. Smylie*, 86 Idaho 341, 347-368, 386 P.2d 374, 377-391 (1963);

And it is a right that has its origins in the common law. *See, e.g.*, *State v. Alcorn*, 7 Idaho 599, 606, 64 P. 1014, 1016 (1901) (acknowledging that at common law, abortion before quickening was not a crime).

SB 1309 therefore infringes on a fundamental right enshrined in the Idaho Constitution, and it must be declared unconstitutional unless it is narrowly tailored to serve a compelling state interest. *See Reclaim Idaho v. Denney*, 169 Idaho 406, —, 497 P.3d 160, 185 (2021). It does not: its impact is to ban all abortions after six weeks of pregnancy. It also allows unharmed individuals to recover statutory damages of $20,000 (at minimum), it allows them twice as long as ordinary plaintiffs to do so, and its exceptions are restrictively narrow. SB 1309 therefore sweeps far too broadly.

Thus, Petitioners are likely to succeed on their constitutional challenge to SB 1309. Allowing the law to go into effect during the pendency of this litigation would permit serious violations of the constitutional rights of Idahoans and cause irreparable harm. Consistent with this Court's standard practice, myriad state courts have stayed the enforcement or effect of laws banning or limiting abortion while challenges to those laws proceed.[6] So too, here, this Court

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Keenan v. Price, 68 Idaho 423, 446-450, 195 P.2d 662, 676-678 (1948).

[6] *See, e.g.*, *EMW Women's Surgical Ctr. v. Cameron*, No. 22-CI-003225 (Ky. Cir. Ct. June 30, 2022) (order granting restraining order); *June Med. Servs. v. Landry*, No. 22-5633 (La. Civ. Dist. Ct. Parish Orleans June 27, 2022), https://aboutblaw.com/3Fv (order granting first temporary restraining order); *June Med. Servs. v. Landry*, No. C-720988 (La. 19th Jud. Dist. Ct. Parish E. Baton Rouge July 11, 2022) (granting temporary restraining order); *Planned Parenthood Ass'n of Utah v. State*, No. 220903886, 2022 WL 2314556, at *1 (Utah 3d Jud. Dist. Ct. June 27, 2022) (order granting temporary restraining order) (noting, among other things, that "absent a Temporary Restraining Order, plaintiffs and women needing abortion services will be irreparably harmed," that "[t]he threatened harm to plaintiffs outweighs the policy interests of the State in prohibiting

should maintain the stay of SB 1309 pending resolution of Petitioners' application.

II. This Case Need Not Be Consolidated With The Total Abortion Ban Litigation Because Each Case Can Be Resolved On Separate Legal Grounds.

This case and Petitioners' challenge to the Total Abortion Ban may share one common legal question, namely, what is the nature of the right to abortion under the Idaho Constitution, but that does not mean the Court should automatically consolidate the two. Although it may expedite the Court's business and minimize expense to hear these two cases together, the Court need not consider the shared legal question to resolve either case, and consolidation may therefore be

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virtually all abortions", and that "[t]he public interest favors deferring the effect of the Act pending further consideration of Plaintiff's claims under the Utah Constitution"); Order Granting Preliminary Injunction ¶¶ 3-4, *Planned Parenthood Ass'n of Utah v. State,* No. 220903886 (Utah 3d Jud. Dist. Ct. July 19, 2022), Dkt. No. 85 (stating that "the balance of harms weighs in [Planned Parenthood Association of Utah] PPAU's favor," and noting that "[w]ithout a preliminary injunction, the Act will cause irreparable harm to PPAU, its patients, and its staff. If left in place, the Act will force many Utahns to continue carrying a pregnancy that they have decided to end, with all of the physical, emotional, and financial costs that entails. Some Utahns will turn to self-managed abortion by buying pills or other items online and outside the U.S. health care system, which may in some cases be unsafe and threaten their health. And even Utahns who are able to obtain an abortion—either because they travel out of state or because they meet one of the law's narrow exceptions—will suffer irreparable harm. Finally, PPAU and its staff will also suffer harms, including the threat of criminal and licensing penalties, reputational harm, and harm to their livelihoods. These harms cannot be compensated after judgment." (internal citations omitted)); *Women's Health Ctr. of W. Va. v. Miller*, No. 22-C-556 (W. Va. Cir. Ct. June 19, 2022) (order granting preliminary injunction). A court in Florida also issued an injunction staying enforcement of the state's law banning abortion, though the injunction is not currently enforceable under state procedural rules while the case is appealed. *See Planned Parenthood of Sw. & Cent. Fla. v. State,* No. 2022 CA 912, 2022 WL 2436704 (Fla. Cir. Ct. July 5, 2022) (order granting temporary injunction) (invoking the right to privacy guaranteed by the Florida Constitution); Lawrence Mower, *Injunction Blocking New Abortion Law Short-Lived, As State Appeals*, Miami Herald (July 5, 2022), https://www.miamiherald.com/news/politics-government/article263175723.html.

inappropriate, especially because both cases can be resolved on narrower, well-established legal grounds.

Courts typically consider the issue of consolidation using the standard found in Idaho Rule of Civil Procedure 42(a). *See, e.g.*, *Bergeman v. Select Portfolio Servicing*, 164 Idaho 498, 432 P.3d 47 (2018); *Branom v. Smith Frozen Foods of Idaho, Inc.*, 83 Idaho 502, 509, 365 P.2d 958, 961 (1961). That rule provides that if two actions before the Court "involve a common question of law or fact, the [C]ourt may" join for hearing "any or all matters at issue in the actions[,]" consolidate the actions, or "issue any other orders to avoid unnecessary cost or delay." Idaho R. Civ. P. 42(a). Consolidation is appropriate "[w]henever the court is of the opinion that it may expedite its business and further the interests of the litigants, at the same time minimizing the expense upon the public and the litigants alike." *Branom*, 83 Idaho at 509; *see also Harrison v. Taylor*, 115 Idaho 588, 597, 768 P.2d 1321, 1330 (1989) (holding that where a court can make the necessary determinations in a single proceeding, and to proceed separately would be a waste of time and expense, cases should be consolidated). At the same time, even where there is a common question of law or fact, the language of the rule is "permissive, not mandatory." *Branom*, 83 Idaho at 508. A court need not consolidate cases—even if they share common questions of law or fact—where in a court's discretion, consolidation is "not necessary or appropriate." *Hipwell v. Challenger Pallet & Supply*, 124 Idaho 294, 299, 859 P.2d 330, 335 (1993).

Consolidation of this Petition and the Total Abortion Ban Petition is unnecessary because the Court can resolve both cases on narrower grounds under clear precedent without ever having to reach the common question that they present. For instance, the Total Abortion Ban Petition can

be disposed of without reaching the merits of the scope of the right claimed because the law's affirmative defenses are unconstitutionally vague under *State v. Cobb*, 132 Idaho 195, 197, 969 P.2d 244, 246 (1998), and similar cases. There is no need for the Court to wade into unsettled questions about the extent of the right to privacy or equal protection in Idaho when the law is clear that the Total Abortion Ban is invalid on other grounds. And, with respect to this Petition, the Court can avoid reaching the question of whether the Idaho Constitution guarantees the right to privacy in making intimate familial decisions because SB 1390, as drafted, violates the Idaho Constitution's separation of powers by stripping the Executive of enforcement authority and delegating it to private citizens who are to be paid bounties by the Legislature. The Governor has acknowledged that the law is likely unconstitutional on this ground, as "[d]eputizing 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."[7] If the Total Abortion Ban is void because it is unconstitutionally vague, and SB 1309 is void because it violates the separation of powers, the Court need not reach Petitioners' other arguments. Should the Court choose to resolve either case on these alternative grounds, consolidation will not be substantially more efficient than hearing the cases separately.

In sum, Petitioners have no objection to consolidation if the Court finds that this would save judicial time and resources. But because the two cases present separate questions that allow

[7] *See* Ex. 2 to Pet. Brief ISO Petition re: SB1309, Mar. 23 Letter from Gov. B. Little to J. McGeachin at 1.

the Court to resolve each on narrow, well-established legal grounds, thereby avoiding the novel question of the right to privacy in making intimate familial decisions under the Idaho Constitution, the Court may determine that consolidation is not substantially more efficient than considering the two cases separately.

III. This Case Should Remain In This Court.

This case raises urgent constitutional issues. One is whether the Idaho Legislature may pass a law that strips all enforcement authority from the Executive and hands it to potentially unharmed private individuals incentivized by a $20,000 (at least) bounty. And, should this Court choose to reach the issue, another is whether and how Idahoans can seek (or provide) abortion services in this State. As the "final arbiter of the meaning of the Idaho Constitution," *Reclaim Idaho*, 497 P.3d at 180, this Court will ultimately decide whether SB 1309 should be struck down as unconstitutional. It should do so now. Petitioners raise pure questions of law. Neither Idahoans nor this Court would benefit from sending this case to the district court. Quite the opposite: If the Court remands the case to the district court and allows the ban to go into effect, Idaho citizens will be irreparably and immediately harmed.

1. The Petition Presents Purely Legal Questions.

This Petition raises six constitutional issues, which are all identified above. Those constitutional issues are pure questions of law. *See V-1 Oil Co. v. Idaho State Tax Comm'n*, 134 Idaho 716, 718, 9 P.3d 519, 521 (2000); *accord Idaho Schs. for Equal Educ. Opportunity*, 140 Idaho at 590 ("A challenge to the constitutionality of a statute is a question of law."); *State v. Cook*, 165 Idaho 305, 309, 444 P.3d 877, 881 (2019) ("Whether a statute is unconstitutionally vague is a

pure question of law."). Because the issues raised in this Petition are pure questions of law, this Court is already equipped to answer them.

2. The Petition Satisfies This Court's Test For Original Jurisdiction.

To invoke this Court's original jurisdiction, a Petitioner must allege "sufficient facts concerning a possible constitutional violation of an urgent nature." *Reclaim Idaho*, 497 P.3d at 172 (cleaned up); *accord, e.g.*, *Ybarra v. Legis. ex rel. Bedke*, 166 Idaho 902, 906, 466 P.3d 421, 425 (2020); *Coeur D'Alene Tribe v. Denney*, 161 Idaho 508, 513-514, 387 P.3d 761, 766-767 (2015). This Court's precedents confirm that the proper way for a petitioner to allege "sufficient facts" is by submitting declarations or affidavits in support of their petition. *See Reclaim Idaho*, 497 P.3d at 171 ("This case, which is being heard as an original action without the benefit of a trial record, presents constitutional issues of significant importance. It is essential that the Court have access to all the relevant facts necessary to reach an appropriate decision."). Petitioners have complied with this Court's requirements. The declarations of Kristine Smith and Dr. Caitlin Gustafson set forth basic background information to assist this Court in assessing Petitioners' constitutional challenges. *See* Br. Ex. 3, Decl. of K. Smith (describing operations of Planned Parenthood in Idaho (¶¶ 6-9), shortage of accessible healthcare services in Idaho (¶¶ 10-13), and SB 1309's likely effects on Planned Parenthood and patients (¶¶ 14-26)); Br. Ex. 4, Decl. of C. Gustafson (addressing Dr. Gustafson's background (¶¶ 2-5), basic facts about abortion procedures (¶¶ 6-8), and SB 1309's likely effects on Dr. Gustafson and patients (¶¶ 9-29)).

This Court routinely exercises its original jurisdiction over cases involving precisely this type of record. For instance, in *Reclaim Idaho*, petitioners submitted ten declarations, several of

which even amounted to expert testimony. 497 P.3d at 170. Disputes regarding those declarations resulted in this Court's adjudicating two motions to strike, both of which this Court parsed carefully and granted in part and denied in part. *See id.* at 170-171. This Court exercised its original jurisdiction and issued two writs of prohibition. *See id.* at 194. Similarly, in *Van Valkenburgh*, petitioners submitted three affidavits. 135 Idaho at 131-132 (Kidwell, J., dissenting). The *Van Valkenburgh* Court exercised its original jurisdiction and issued a writ of prohibition preventing the Secretary of State from acting pursuant to an unconstitutional law. *Id.* at 123 (majority opinion). And in *Ybarra*, petitioners submitted multiple declarations and an expert report. *See* 166 Idaho at 907-908. Those submissions provoked a motion to strike, which the *Ybarra* Court granted in part and denied in part. *See id.* at 907. Although it ultimately declined to issue an extraordinary writ, this Court exercised its original jurisdiction over the case, and, in doing so, even highlighted the helpfulness of the facts in the expert report. *See id.* at 908, 910.

In sum, this Court has made clear that factual allegations through declarations or affidavits are an essential ingredient of a successful petition for an extraordinary writ. Petitioners' two declarations answer this Court's call by providing "sufficient facts" about Petitioners, the services they provide, and SB 1309's potential effect on them and their patients to warrant relief. *See Reclaim Idaho*, 497 P.3d at 169 (in "declarations submitted to this Court," petitioner explained

how "the new signature requirement for qualifying initiatives for the statewide ballot poses an undue burden on" it). This Court should exercise its original jurisdiction over this Petition.[8]

3. Sending This Case To The District Court For Fact Development And Potential Motion Practice Will Not Be Fruitful.

In the wake of *Dobbs*, many Idahoans and their families are living in a state of limbo. For 50 years, Idahoans have been able to obtain abortions here in their home state, and now face uncertainty about whether they'll continue to be able to do so. It is within this Court's discretion to exercise its original jurisdiction "on a case by case basis when compelled by urgent necessity." *Ybarra*, 166 Idaho at 906 (cleaned up). These urgent constitutional issues can (and should) be addressed by this Court without further factual development.

The people of Idaho deserve swift answers. The "potential for uncertainty and disruption … during a drawn-out trial court proceeding" counsels in favor of this Court's exercising its original jurisdiction here. *Ybarra*, 166 Idaho at 906. As the "final arbiter of the meaning of the Idaho Constitution," *Reclaim Idaho*, 497 P.3d at 180, the questions at issue in this Petition will ultimately fall to this Court to answer. The Court should do so now. *Cf. Regan v. Denney*, 165 Idaho 15, 29, 437 P.3d 15, 29 (2019) (Stegner, J., concurring) ("[R]ather than taking the quick off-ramp and letting this case languish through the trial court, only to work its way back to this Court,

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[8] In its opposition, the State argued that this Petition was "procedurally improper" for several reasons. *See* State Br. 8-17. Petitioners have already explained why those arguments are incorrect. *See* Reply Br. 1-17. In particular, this Court is able to issue a writ of prohibition in this case. *See* Reply Br. 1-7. This Court has original jurisdiction. *See* Reply Br. 7-12; *see also supra* § III.2. Petitioners have established standing and their claims are ripe. *See* Reply Br. 12-16. And the State of Idaho is the proper Respondent for this writ. *See* Reply Br. 16-17; *see supra* § I.

I opt to address the question head-on … . Rather than make this pronouncement at some point in the distant future, we have the jurisdiction and the 'urgent need' to make it today.").[9]

[9] If this Court chooses to transfer the case to the District Court for further proceedings, it should nonetheless order a stay of the SB 1309 pending those proceedings, for all the reasons discussed above. *See supra* Part I.

Dated: July 20, 2022

Respectfully submitted,

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

Alan E. Schoenfeld
Michelle N. Diamond
Rachel E. Craft
Vikram P. Iyer
WILMER CUTLER PICKERING
HALE AND DORR LLP

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 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