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Idaho Supreme Court
Melanie Gagnepain, Clerk of the Court
By: Brad Thies, Clerk

**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**; **BRAD LITTLE**, in his official capacity as Governor of the State of Idaho; **LAWRENCE WASDEN**, in his official capacity as Attorney General of the State of Idaho; **JAN M. BENNETTS**, in her official capacity as Ada County Prosecuting Attorney; **GRANT P. LOEBS**, in his official capacity as Twin Falls County Prosecuting Attorney; **IDAHO STATE BOARD OF MEDICINE**; **IDAHO STATE BOARD OF NURSING**; and **IDAHO STATE BOARD OF PHARMACY**,

Respondents.

Case No. 49817-2022

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

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ORIGINAL JURISDICTION

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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:

- The total abortion ban at issue in this Petition, 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). The Petition in this case challenges the constitutionality of the Total Abortion Ban, raising three independent claims under the Idaho Constitution.

- 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* Idaho Code § 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).

- SB 1309, passed earlier this year, at issue in the related Petition before this Court, 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* Idaho Code § 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* Order Granting Motion to Reconsider, No. 49615-2022 (Apr. 8, 2022). Petitioners have challenged the law on a multitude of constitutional grounds in the related Petition.

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 SB 1309 litigation on these alternative grounds.

While this Court sifts through the complexities and constitutional merits of these vitally important issues, it should stay these laws and maintain the status quo, under which Idaho citizens and their families have had 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. As It Did With SB 1309, This Court Should Stay Enforcement Of The Total Abortion Ban 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 issue a stay 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 before August 18 when the law is set to go into effect. The catastrophic consequences of the serious constitutional violations asserted in the Petition weigh in favor of preserving the status quo.

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) (majority opinion)

(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"); Order Granting Motion to Reconsider, *Planned Parenthood v. State*, No. 49615-2022, 2022 WL 1438870 (Idaho Apr. 8, 2022) (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)

[1] Petitioners have named the proper Respondents in their challenge to the constitutionality of the Total Abortion Ban. The law enforcement officer Respondents (Little, Wasden, Bennetts, and Loebs) and the professional licensing board Respondents (the Boards of Medicine, Nursing, and Pharmacy) may be sued to restrain them from proceeding in excess of their jurisdiction. *See* Petitioners Br. 14 & nn.18-19 ("Br.") (citing cases in which this Court has issued writs of prohibition to restrain executive officials and boards from acting unlawfully). The State of Idaho is also a proper Respondent in lawsuits for violations of the Idaho Constitution. *See* Br. 14-15 (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.

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."

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 the Total Abortion Ban and their families will suffer imminent, grievous, and irreparable harm. Simply put, "[t]he Total Abortion Ban will leave Idahoans seeking abortions with no option but to try to seek care out-of-state, a daunting task for many patients but especially for those who are low-income or seeking to conceal their abortion from abusive partners or family members." Pet. ¶ 22. "For some, these heightened challenges … will appreciably delay their access to an abortion," with resultingly heightened medical costs and potential health risks. *Id.* ¶¶ 23-24; *see generally id.* ¶¶ 19-31 (describing Ban's likely effects on Petitioners and their patients); Br. Ex. 1, Decl. of K. Smith ¶¶ 15-26 (similar); Br. Ex. 2, Decl. of C. Gustafson ¶¶ 14-27 (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 patients in Texas following the implementation of SB 8 highlights just how much harm will ensue if this Court declines to stay implementation of 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 the Total Abortion Ban allows for affirmative defenses based on rape and incest, those defenses are onerous and vague.[3] As a result, they will certainly be under-invoked, which is a particular problem given the rising rates of rape and incest in Idaho.[4]

Petitioners allege that the Total Abortion Ban violates the Idaho Constitution, and they are likely to succeed on their claims. *First*, the Ban violates the Idaho Constitution's due process clause because it is unconstitutionally vague. At a minimum, due process requires that the meaning of criminal statutes be clear so that people can conform their conduct to the requirements of the law. *See State v. Cobb*, 132 Idaho 195, 197, 969 P.2d 244, 246 (1998). Several provisions in the Total Abortion Ban fail to meet this standard. Physicians will be forced to guess what a "clinically

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[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).

[3] As Governor Little recognized in his signing statement to SB 1309, which includes similar exceptions, 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* Ex. 2 to Pet. Brief ISO Petition re: SB1309 (No. 49615-2022), Mar. 23 Letter from Gov. B. Little to J. McGeachin at 1.

[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).

diagnosable pregnancy" is and to try to interpret police or child protective services reports regarding "the act of rape or incest" lest they be exposed to criminal liability. Idaho Code § 18-622(2), (3)(b)(i). And doctors wishing to avail themselves of the Ban's narrow and limited affirmative defenses will be forced to guess what it means to perform an abortion "to prevent the death of a pregnant woman" and in a manner providing the "best opportunity for the unborn child to survive." *Id.* § 18-622(3)(a)(ii)-(iii). The Idaho Constitution requires far more from a criminal law. Healthcare providers in Idaho have already expressed alarm, with no idea if they will be able to lawfully provide care for early and minimally symptomatic ectopic pregnancies, early pregnancy loss, and self-managed abortion. *See* Br. Ex. 2, Decl. of C. Gustafson ¶¶ 16-22. The dire consequences of such confusion are already playing out in other states where abortion bans have gone into effect. *See* Sellers & Nirappil, *Confusion Post-Roe Spurs Delays, Denials For Some Lifesaving Pregnancy Care*, Wash. Post (July 16, 2022) ("[I]n Wisconsin, a woman bled for more than 10 days from an incomplete miscarriage after emergency room staff would not remove the fetal tissue amid a confusing legal landscape that has roiled obstetric care.")[5]; Huff, *In Texas, Abortion Laws Inhibit Care For Miscarriages*, NPR (May 10, 2022) ("At least several OB-GYNs in the Austin [Texas] area received a letter from a pharmacy in late 2021 saying it would no longer fill the drug methotrexate in the case of ectopic pregnancy, citing the recent Texas laws.").[6]

[5] Available at https://www.washingtonpost.com/health/2022/07/16/abortion-miscarriage-ectopic-pregnancy-care/.

[6] Available at https://www.npr.org/sections/health-shots/2022/05/10/1097734167/in-texas-abortion-laws-inhibit-care-for-miscarriages.

*Second*, the Total Abortion Ban, which without exception criminalizes abortion at all stages of pregnancy, violates the fundamental right to privacy in making intimate familial decisions by forcing pregnant Idahoans to carry their pregnancies to term regardless of the individual private circumstances confronting each family. *See* Br. 15-29. The right to privacy in making intimate familial decisions is supported by 50 years of precedent holding that procreation is a fundamental right under the Idaho Constitution. *See Stucki v. Loveland*, 94 Idaho 621, 623 n.14, 495 P.2d 571, 573 n.14 (1972); *Newlan v. State*, 96 Idaho 711, 713-714, 535 P.2d 1348, 1350-1351 (1975); *Tarbox v. Tax Comm'n of Idaho*, 107 Idaho 957, 960 n.1, 695 P.2d 342, 345 n.1 (1984) (quoting *Newlan*, 96 Idaho at 713-714, 535 P.2d at 1350-1351); *Idaho Schs. For Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 582, 850 P.2d 724, 733 (1993) ("[T]his Court has stated that procreation is a fundamental right, and the right to procreate is not explicitly mentioned in the state constitution."); *see also Planned Parenthood of Idaho, Inc. v. Kurtz*, 2001 WL 34157539, at *11 (Idaho Dist. Ct. Aug. 17, 2001) ("This Court finds that procreation is a fundamental right."); *see generally* Br. 16.

Moreover, this Court has interpreted the Idaho Constitution to protect parents' fundamental right to decide how to raise and educate their children. *See, e.g.*, *Electors of Big Butte Area v. State Bd. of Educ.*, 78 Idaho 602, 612, 308 P.2d 225, 231 (1957) (Br. 18-19). This Court's precedent interpreting the Idaho Constitution as more protective than the United States Constitution further supports the right to privacy in making intimate familial decisions, *see, e.g.*, *State v. Donato*, 135 Idaho 469, 472, 20 P.3d 5, 8 (2001) (Br. 19), which is a right also recognized by other state high courts, *see, e.g.*, *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 483-86

(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) (reaffirming that the Minnesota Constitution protects right to privacy that encompasses right to terminate pregnancy).[7] And it is a right that has its origins in Idaho 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); Br. 20. The Total Abortion Ban therefore infringes on a fundamental right enshrined in the Idaho Constitution and, subject to strict scrutiny, 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). The Ban cannot survive this test as no state interest could justify an absolute ban on abortion, and any law that does so unquestionably violates the strict scrutiny standard. And even if there was a significant state interest, the Ban sweeps too broadly, especially considering that the State has many superior alternatives to advance its asserted interest in protecting fetal life, including increasing access to healthcare and strengthening social assistance programs. *See* Br. 24-29.

*Third*, the Total Abortion Ban violates the Idaho Constitution's equal protection clause (as well as the Idaho Human Rights Act) because it unlawfully treats men and women differently by

[7] 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); *Keenan v. Price*, 68 Idaho 423, 446450, 195 P.2d 662, 676-678 (1948).

forcing women to conform to discriminatory gender stereotypes. *See* Br. 29-39. The Ban forces women to carry a pregnancy to term and endure the burdens and risks of pregnancy and childbirth, forcing them to become parents even if they are or feel totally unequipped to do so. The Ban therefore unconstitutionally treats women—who would be forced to carry a pregnancy to term, give birth, and unwillingly become a parent—differently than men, who bear no equivalent burden. *See Murphey v. Murphey*, 103 Idaho 720, 723, 653 P.2d 441, 444 (1982) ("Classifications which perpetuate or encourage sexual stereotypes necessarily burden those persons … whose social and economic preferences do not conform to the stereotypical model.").

Thus, Petitioners are likely to succeed on their constitutional challenge to the Total Abortion Ban. 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 post-*Dobbs* challenges to those laws proceed.[8]

[8] *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 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

So too, here, this Court should stay the Total Ban pending resolution of Petitioners' application.

## II. This Case Need Not Be Consolidated With The SB 1309 Litigation Because Each Case Can Be Resolved On Separate Legal Grounds.

This case challenging the Total Abortion Ban and Petitioners' challenge to SB 1309 may share one common legal question, namely, what is the nature of the right to abortion under the Idaho Constitution. 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 and thus should not consolidate the cases, 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

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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 Southwest & Central Florida 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 (Jul. 5, 2022), https://www.miamiherald.com/news/politics-government/article263175723.html.

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 SB 1309 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 SB 1309 Petition can be disposed of without reaching the merits of the scope of the right to privacy under the Idaho Constitution because the law's enforcement mechanism violates the Idaho Constitution's separation of powers doctrine under *Mead v. Arnell*, 117 Idaho 660, 667, 791 P.2d 410, 417 (1990), and similar cases. Neither the State nor the Legislature has attempted to distinguish this precedent. Both the Attorney General

and the Governor have acknowledged that the law is likely unconstitutional on this ground. There is no need for the Court to wade into unsettled questions about the extent of the right to privacy in Idaho when the law is clear that SB 1309 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 the Ban, as drafted, is unconstitutionally vague under established case law. The exceptions are incomprehensible and will chill legal conduct because there is no way for a physician, a prosecutor, or a criminal defense attorney—even those with extensive training—to determine the conduct that is prohibited. 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 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. Idahoans must know whether they can seek (or provide) abortion services in this State, and if the Court does not take action and the Ban goes

into effect, the harm to citizens will begin immediately. As the "final arbiter of the meaning of the Idaho Constitution," *Reclaim Idaho*, 497 P.3d at 180, this Court will ultimately decide whether the Ban 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.

**1. The Petition Presents Purely Legal Questions.**

This Petition raises three constitutional issues. *First*, does the Total Abortion Ban violate the Idaho Constitution because it is impermissibly vague? *See* Br. 39-50. *Second*, does the Total Abortion Ban violate the Idaho Constitution by denying Idahoans the fundamental right to privacy in making intimate familial decisions? *See* Br. 15-29. And *third*, does the Total Abortion Ban violate the Idaho Constitution by depriving women in Idaho equal protection of the laws? *See* Br. 29-39. These 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 v. State*, 140 Idaho 586, 590, 97 P.3d 453, 457 (2004) ("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."). Petitioners also argue that the Total Abortion Ban violates the Idaho Human Rights Act. *See* Br. 37-39. That, too, presents a pure question of law. *See Idaho State Ins. Fund v. Van Tine*, 132 Idaho 902, 905, 980 P.2d 566, 569 (1999) ("[T]he construction and application of a legislative act are pure questions 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. Legislature 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. 1, Decl. of K. Smith (describing operations of Planned Parenthood in Idaho (¶¶ 7-11), shortage of accessible healthcare services in Idaho (¶¶ 12-14), and Ban's likely effects on Planned Parenthood and patients (¶¶ 15-26)); Br. Ex. 2, Decl. of C. Gustafson (addressing Dr. Gustafson's background (¶¶ 2-6), basic facts about abortion procedures (¶¶ 7-13), and Ban's likely effects on Dr. Gustafson and patients (¶¶ 14-27)).

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 the Total Abortion Ban'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.

### 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 mostly able to obtain abortions here in their home state. On or around August 18, that will change unless this Court acts to strike them down on one of the grounds raised in the Petition. Medical professionals in Idaho need clarity regarding their potential criminal liability under the Total Abortion Ban, if it ever comes into effect. 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, 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 Total Abortion Ban pending those proceedings, for all the reasons discussed above. *See supra* Part I.

Dated: July 20, 2022

Respectfully submitted,

/s/ Michael J. Bartlett

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## 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 and Federal Express:

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