

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

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.

Case No. 49615-2022

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

INTRODUCTION

Petitioners Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky (Planned Parenthood), and Caitlin Gustafson, M.D., by and through their attorneys, bring this original action seeking a declaration that Idaho Senate Bill No. 1309 (SB 1309) is unlawful and unenforceable under the Idaho Constitution, and seeking a writ of prohibition forbidding Idaho courts from giving effect to the unconstitutional civil cause of action created by SB 1309.

Petitioners respectfully request relief by April 21, 2022, as SB 1309 becomes effective on April 22, 2022.

SB 1309 prohibits medical professionals from performing an abortion if fetal cardiac activity can be detected, which generally occurs at approximately six weeks of pregnancy, as measured from the first day of a patient's last menstrual period (LMP), before many patients know they are pregnant. In an attempt to end run settled precedent and to allow this unconstitutional ban to take effect, SB 1309 takes the unprecedented step of expressly prohibiting all executive officers in the State—including all prosecutors—from enforcing it, stripping the Executive of its power and discretion to ensure that the laws of this State are faithfully executed. Instead, SB 1309 exclusively empowers private citizens to bring civil claims against medical professionals who provide abortions in contravention of SB 1309's ban. Because medical professionals who provide abortions after approximately six weeks would be at risk of ruinous civil litigation that could result in significant financial penalties of at least \$20,000 plus the private plaintiffs' attorneys' fees and costs, SB 1309 leaves Petitioners and medical professionals no choice but to cease abortion services after six weeks of gestation in Idaho.

SB 1309's enforcement mechanism and substance are blatantly unconstitutional, so much so that Idaho's Attorney General's Office released an opinion to this effect, and the Governor emphasized similar concerns upon signing. Even setting aside the fundamental right to privacy in making intimate familial decisions guaranteed by Idaho's Constitution, the bill's flaws are flagrant and many: It violates the separation of powers doctrine (Art. II, § 1); Idaho's prohibition on special legislation (Art. III, § 19); the due process clause's prohibition on excessive and vague penalties (Art. I, § 13); the guarantee of informational privacy (Art. I, §§ 1, 2, 17, 21); and the equal protection clause (Art. I, §§ 1, 2). SB 1309 should be invalidated for any of these independent reasons alone. Yet it goes one step further, effectively banning abortions before viability in Idaho, in violation of Petitioners' patients' rights under nearly fifty years of precedent.

SB 1309 is an unprecedented power grab by the Idaho Legislature. Absent this Court's intervention, its regime will become the law on April 22, 2022, wreaking havoc on this State's constitutional norms and the lives of its citizens. Petitioners therefore respectfully request that the law be invalidated and declared unconstitutional.

JURISDICTION

1. This Court has "original jurisdiction to issue writs of mandamus, certiorari, prohibition, habeas corpus, and all writs necessary or proper to the complete exercise of its appellate jurisdiction." Idaho Const., art. V, § 9; Idaho Code § 1-203; *id.* § 7-402.

2. "Any person may apply to the Supreme Court for the issuance of any extraordinary writ or other proceeding over which the Supreme Court has original jurisdiction." Idaho. App. R. 5(a).

3. The Court exercises its original jurisdiction when petitions have alleged sufficient facts concerning a possible constitutional violation of an urgent nature. *See Reclaim Idaho v. Denney*, 497 P.3d 160, 172 (Idaho 2021).

4. This Petition challenges SB 1309's violation of:
- a. the separation of powers doctrine set forth in Article II, § 1 of the Idaho Constitution;
 - b. the prohibition against "special" laws in Article III, § 19 of the Idaho Constitution;
 - c. the right to informational privacy protected under Article I, §§ 1, 2, 17, and 21 of the Idaho Constitution;
 - d. the due process clause under Article I, § 13 of the Idaho Constitution by imposing excessive and vague penalties;
 - e. the equal protection clause under Article I, §§ 1 and 2 of the Idaho Constitution; and
 - f. the fundamental right to privacy in making intimate familial decisions, protected under Article I, §§ 1, 13, 17, and 21 of the Idaho Constitution.

5. With SB 1309 set to take effect on April 22, 2022, the issue is of urgent statewide importance. Petitioners have no other adequate remedy at law, and the people of Idaho need clarity from this Court as to the constitutionality of the challenged statute. This matter calls for the Court's immediate review.

PARTIES

6. Petitioner Planned Parenthood is a not-for-profit corporation organized under the laws of the State of Washington and doing business in Idaho. It is the largest provider of reproductive health services in Idaho, operating three health centers in the State, two in Ada County (Boise and Meridian) and one in Twin Falls County. Planned Parenthood provides a broad range of reproductive and sexual health services, including, but not limited to, well person examinations, birth control, testing and treatment for sexually transmitted infections, cancer screening, and pregnancy testing. In Idaho, Planned Parenthood's physicians provide medication abortion through 77 days (or 11 weeks) LMP and procedural abortion through 15.6 weeks LMP. If SB 1309 comes into effect, Planned Parenthood's medical professionals will be threatened with ruinous civil liability if they attempt, perform, or induce abortions in Idaho. Planned Parenthood brings this lawsuit on behalf of itself, its medical professionals, and its current and future patients.

7. Petitioner Dr. Caitlin Gustafson is a licensed physician based in Valley County who practices family medicine and obstetrics and gynecology. Dr. Gustafson provides procedural abortions each month at Planned Parenthood's health center in Meridian, Idaho, as well as medication abortion care for Planned Parenthood patients. Dr. Gustafson provides abortion services until 13.6 weeks LMP. Dr. Gustafson is threatened with liability under SB 1309, as are other medical professionals who provide abortions in Idaho. Dr. Gustafson brings this lawsuit on behalf of herself and her current and future patients.

8. Respondent the State of Idaho is responsible for upholding the Idaho Constitution. The State of Idaho has enacted SB 1309, which, if it comes into effect, will violate the Idaho Constitution.

FACTS COMMON TO ALL CLAIMS

Idaho Senate Bill No. 1309

9. Under long-established Supreme Court precedent, States may not ban abortion prior to fetal viability. *See Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). But SB 1309, unless blocked, will accomplish just that by allowing ruinous civil penalties to be imposed on any “medical professional” who performs “an abortion on a pregnant woman when a fetal heartbeat has been detected, except in the case of a medical emergency, in the case of rape . . . , or in the case of incest.” SB 1309 § 3(1).

10. SB 1309 defines “fetal heartbeat” as “embryonic or fetal cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac.” SB 1309 § 1(2). In a typically developing pregnancy, ultrasound can generally detect cardiac activity beginning at approximately six weeks of pregnancy. SB 1309 thus prohibits virtually all abortions after approximately six weeks LMP—before many patients even know they are pregnant. Indeed, for patients with regular menstrual periods, six weeks of pregnancy is only two weeks after the patient’s first missed period.

11. By prohibiting abortion after approximately six weeks LMP, SB 1309 bans abortion roughly *four months* before viability.¹

12. The ban has exceedingly narrow exceptions. SB 1309 permits an abortion after approximately six weeks of pregnancy only in the case of a narrowly defined “medical emergency” or in the case of rape or incest, but only if it has been previously reported to law enforcement or (in the case of a minor) to child protective services.

13. Precisely in an attempt to allow an unconstitutional ban on abortion to take effect, SB 1309 strips enforcement power from all executive officials and places it solely in the hands of unaccountable individuals by creating a civil cause of action for “[a]ny female upon whom an abortion has attempted or performed, the father of the preborn child, a grandparent of the preborn child, a sibling of the preborn child, or an aunt or uncle of the preborn child” after “an abortion has been attempted or performed.” SB 1309 § 6(1).

14. SB 1309 entitles those plaintiffs to recover: “(a) [a]ll damages from the medical professionals who knowingly or recklessly attempted, performed, or induced the abortion in violation of this chapter; (b) [n]otwithstanding any other provision of law, statutory damages in an amount not less than twenty thousand dollars (\$20,000) from the medical professionals who knowingly or recklessly attempted, performed, or induced an abortion in violation of this chapter; and (c) [c]osts and attorney’s fees.” SB 1309 § 6(1). Even though Idaho plaintiffs are generally required to show a distinct and palpable injury to establish standing, *see Coeur D’Alene Tribe v.*

¹ No embryo is viable at six weeks LMP. A full-term pregnancy is approximately 40 weeks LMP. Viability occurs in a normally developing pregnancy at approximately 24 weeks LMP.

Denney, 161 Idaho 508, 513 (2015), SB 1309 purports to authorize suit by individuals regardless of any showing that they were injured by the abortion, *see* SB 1309 § 6(1).

15. SB 1309 carves out just one narrow exception to this large class of potential claimants, prohibiting a lawsuit by any person who caused the pregnancy through an act of rape or incest. SB 1309 § 6(3). It nevertheless permits the rapist's family members to file suit.

16. SB 1309 therefore puts an individual's pregnancy and personal abortion decisions at issue in public litigation, irrespective of patients' wishes or consent to treatment.

17. Statutorily specified plaintiffs can sue the medical professionals up to four years following the abortion. SB 1309 § 6(2). This statute of limitations is twice the length of those applicable to Idaho's wrongful death and personal injury statutes. *See* Idaho Code § 5-219. This generous statute of limitations, coupled with a potentially minimum bounty of \$20,000 (with no maximum) and the prospect of recovering costs and fees, serves only to encourage civil plaintiffs to file suit, even if frivolous.

18. On the other hand, medical professionals risk severe civil penalties if they attempt, perform, or induce an abortion after approximately six weeks LMP: civil damages of \$20,000 at a minimum with no cap on damages that can be awarded, and no guidance on how courts should calculate damages in excess of \$20,000.

19. Initially, SB 1309 allowed for a single affirmative defense: If the medical professional proved that he or she "reasonably believed, after conducting a reasonable investigation, that ... [in] performing or inducing the abortion [the medical professional] had

complied or would comply with the provisions of” the six-week ban. SB 1309 § 6(5). However, SB 1358, the trailer bill amending SB 1309, eliminated that affirmative defense. SB 1358 § 1(5).

20. Neither the State nor its officials may intervene in an action brought under SB 1309 other than to file an amicus curiae brief. SB 1309 §§ 6(7), 6(8). And “[n]otwithstanding any other provision of law, including chapters 14, 17, and 18, title 54, Idaho Code, the requirements of this section shall be enforced exclusively through the private civil causes of action described.” *Id.* § 6(7). Chapters 14, 17, and 18 of Title 54 of the Idaho Code regulate nurses, pharmacists, and physicians and physician assistants, respectively.

21. In 2020, the Legislature enacted a “trigger ban” criminalizing abortion at all stages of pregnancy, to take effect if the Supreme Court “restores to the states their authority to prohibit abortion”—in other words, if *Roe v. Wade* is overturned. *See* Idaho Code § 18-622(1), (2). In 2021, the Legislature enacted a second trigger ban, which effectively prohibits abortions at six weeks of gestation, to take effect if a United States Court of Appeals upholds a similar statute. *See id.* § 18-8804; *id.* § 18-8806 (banning abortions once a “fetal heartbeat” is detected).

22. Not content to wait for those “triggering” events to take place, the Legislature has now enacted SB 1309 to place enforcement of the State’s unconstitutional ban exclusively in the hands of private citizens.

23. SB 1309 is no ordinary civil enforcement mechanism. It is embedded in the State’s criminal code, yet it explicitly deprives the Executive of the authority to enforce the State’s prohibition. Distinct from a tort or any other civil remedy provision, which exists to remedy a wrong done specifically to an individual claimant, SB 1309 exists to dangle a carrot in front of

ordinary citizens to enforce the State's policies and preferences where the State explicitly cannot, and where some of these citizen enforcers suffer no actual harm. SB 1309's provisions are arbitrary, capricious, unreasonable, and violate numerous provisions of the Idaho Constitution.

24. For these and other reasons, the Idaho Office of the Attorney General informed the Legislature, prior to the bill's enactment, that SB 1309 was likely unconstitutional. The Legislature enacted the statute anyway.

25. Governor Brad Little, on the same day he signed SB 1309 into law, likewise wrote to the President of the Idaho Senate to express his view that SB 1309 was likely unconstitutional. Governor Little predicted that SB 1309's "novel enforcement mechanism will in short order be proven unconstitutional and unwise," in part, because "[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 collective form of government and weakens our collective liberties."

26. Absent the Court's intervention, SB 1309's regime will go into effect on April 22, 2022.

Idaho Senate Bill No. 1309's Effects on Petitioners and Their Patients

27. As detailed above, health care providers face prohibitive statutory damages (as well as fees) if they violate SB 1309. SB 1309 therefore leaves Petitioners no choice but to cease providing abortions after approximately six weeks of pregnancy in Idaho, undermining their mission to provide affordable, comprehensive reproductive health care, including to patients from underserved Idaho communities.

28. Petitioners provide the overwhelming majority of all abortion services in Idaho. Consequently, Petitioners' cessation of abortion services in the State at approximately six weeks LMP will be devastating to the people of Idaho.

29. Access to abortion is critically important for pregnant persons who face unwanted pregnancies. Those seeking an abortion do so for a variety of deeply personal reasons, including familial, medical, and financial ones. Deciding whether to keep or end a pregnancy implicates a person's core religious beliefs, values, and family circumstances.

30. Some people have abortions because it is not the right time to have a child or to add to their families—a majority of abortion patients already have at least one child. Some want to pursue their education; some lack the economic resources or level of partner support or stability needed to raise children; some will be unable to care adequately for their existing children or their ill or aging parents if they increase their family size. Others end a pregnancy to be able to leave an abusive partner. Some people seek abortions to preserve their life or health or because of a diagnosed fetal medical condition; some, because they have become pregnant as a result of rape or incest; and others, because they decide not to have children at all.

31. People who want an abortion generally seek one as soon as possible, but many face logistical challenges that can delay access to care. Idaho is a large and mostly rural State, with high rates of low-income and uninsured residents and with much of its population living in medically underserved areas. Idaho is also home to five federally recognized tribal reservations, within which the majority of Idaho's Native American population resides. Without access to abortion in Idaho, patients will be forced to travel extraordinary distances out of State, and to incur

additional costs—a daunting and prohibitive obstacle for many. Of the providers that are currently available, the nearest would be in Salt Lake City, Utah (340 miles one-way from Boise, 220 miles one-way from Twin Falls), Reno, Nevada (420 miles one-way from Boise, 450 miles one-way from Twin Falls), Bend, Oregon (319 miles one-way from Boise, 444 miles one-way from Twin Falls), Kennewick, Washington (288 miles one-way from Boise, 414 miles one-way from Twin Falls) and Walla Walla, Washington (250 miles one-way from Boise, 380 miles one-way from Twin Falls).

32. Anyone seeking an abortion will likely need to gather more money to cover higher travel costs (not just for gas but potentially also for overnight lodging and more meals), might lose additional income from taking time off work, and will have a harder time obtaining substitute care for a child or other family member. For some, these heightened challenges will be impossible to overcome; for others, they will appreciably delay their access to an abortion. These challenges are especially serious for people with lower incomes, who are already medically underserved and constitute a substantial portion of Petitioners' patients.

33. Due to a combination of factors, including relative lack of access to medical services and difficulty accessing and affording contraceptives, those with lower incomes have more unintended pregnancies, and therefore higher abortion rates, than those with higher incomes. Nearly 75% of pregnant persons who seek abortions nationwide have poverty-level incomes.

34. Furthermore, delay in accessing abortion poses significant health risks because, although abortion is very safe, the health risk associated with an abortion increases with gestational age. Delay also increases medical costs because the cost of an abortion procedure increases as

gestational age increases. Someone seeking an abortion can fall into a vicious cycle of delaying while gathering funds only to find that procedures later in pregnancy are more expensive than anticipated, requiring further delay. In the worst-case scenario, the person may be so delayed by the challenges of having to travel hundreds of miles that they time out of care altogether and are forced to carry a pregnancy to term against their will. This may put patients at even greater risk: Nationally, more than seven hundred women die from pregnancy-related complications every year, and the risk of death is particularly acute for indigenous people (who are more than twice as likely to die from pregnancy-related complications than white people) and for people of color (who are nearly four times as likely to die from pregnancy-related complications than white people).

35. Consequently, SB 1309 will put many pregnant people in Idaho to a difficult choice: carry the pregnancy to term, attempt to self-manage an abortion without access to accurate medical information, or undertake burdensome, time-consuming, and expensive travel to a different State.

36. Being forced to continue a pregnancy against one's will jeopardizes a person's physical, mental, and emotional health, as well as the stability and well-being of their family, including existing children.

37. For people experiencing intimate partner violence, being forced to continue pregnancy also often exacerbates the risk of violence and further tethers the pregnant person to their abuser. In addition, the ban will add to the anguish of patients and their families who receive fetal diagnoses that are incompatible with sustained life after birth—forcing patients to carry

doomed pregnancies for months and suffer the physical and emotional pains of labor and delivery, knowing all the while that their child will not survive.

38. SB 1309 will therefore impose severe and irreparable harm on Petitioners and their patients.

CLAIMS FOR RELIEF

I.

SB 1309 Violates The Separation Of Powers Doctrine Under The Idaho Constitution

39. Petitioners incorporate the preceding paragraphs.

40. The Idaho Constitution establishes “three distinct departments” of government: the “legislative, executive and judicial.” Idaho Const. art. II, § 1.

41. “[N]o person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.” Idaho Const. art. II, § 1.

42. The Idaho Constitution vests the “supreme executive power of the state ... in the governor, who shall see that the laws are faithfully executed.” Idaho Const. art. IV, § 5. Thus, “[e]nforcing the law of this state is a constitutionally mandated executive department function.” *Mead v. Arnell*, 117 Idaho 660, 667 (1990).

43. In enacting SB 1309, the Idaho Legislature has attempted to strip the Idaho Executive of its authority and duty to ensure that the laws are faithfully executed.

44. SB 1309 creates a civil cause of action incentivizing ordinary citizens to sue medical professionals in order to enforce the state’s criminal prohibition on abortion—a

prohibition which is not yet in effect because it is patently unconstitutional. At the same time, SB 1309 provides that the civil liability it creates shall be enforced exclusively through those private civil causes of action. SB 1309 explicitly strips executive officers of the enforcement power and discretion constitutionally entrusted to them. SB 1309 is a brazen, naked, and unlawful attempt by the Idaho Legislature to encroach upon and strip the Idaho executive branch of its core power and discretion.

II.

SB 1309 Violates The Prohibition Against “Special” Laws In Article III, Section 19 Of The Idaho Constitution

45. Petitioners incorporate the preceding paragraphs.

46. The Idaho Constitution prohibits the Legislature from passing “local or special laws” that, as relevant here, “[r]egulat[e] the practice of the courts of justice.” Idaho Const. art. III, § 19.

47. A law is “special” if it “is arbitrary, capricious, or unreasonable.” *Citizens Against Range Expansion v. Idaho Fish and Game Dep’t*, 153 Idaho 630, 636 (2012).

48. SB 1309 regulates the practice of the courts of justice because it allows—and even incentivizes—certain unharmed plaintiffs to sue on a legislatively preferred cause of action with anomalous procedural features.

49. And SB 1309 is “special” because it alters litigation rules to treat a classified group of litigants in an unreasonable manner. It permits non-injured parties to sue in derogation of Idaho standing law; imposes mandatory damages with no statutory maximum; doubles the statute of limitations for materially indistinguishable claims; and strips the Executive of its ordinary

enforcement authority for criminal prohibitions. It was enacted to erase a recognized constitutional right and to avoid judicial review.

III.

SB 1309 Violates The Right To Informational Privacy Under The Idaho Constitution

50. Petitioners incorporate the preceding paragraphs.

51. The Idaho Constitution, like the United States Constitution, ensures that citizens have the right to be left alone. Idaho Const. art. I, §§ 1, 2, 17, 21.

52. Individuals have the right to determine for themselves when, how, and to what extent private medical information about them is communicated to others. *Cowles Pub. Co. v. Kootenai Cty. Bd. of Cty. Comm'rs*, 144 Idaho 259, 265 (2007).

53. SB 1309 violates this right by permitting any claimant to place a patient's pregnancy and personal abortion decision at issue in public litigation against the patient's will. *See* SB 1309 § 6.

IV.

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

54. Petitioners incorporate the preceding paragraphs.

55. The Idaho Constitution guarantees due process of law. *See* Idaho Const. art. I, § 13 (“No person shall ... be deprived of life, liberty, or property without due process of law.”). This requires that the relevant state law “demonstrate a definiteness and certainty sufficient to permit a person to conform his conduct thereto.” *Voyles v. City of Nampa*, 97 Idaho 597, 599 (1976). Statutes must be sufficiently definite to give “people of ordinary intelligence a reasonable

opportunity to know what is prohibited” and to “avoid arbitrary and discriminatory enforcement.” *State v. Leferink*, 133 Idaho 780, 783 (1999). And due process requires “fair notice not only of the conduct that will subject [a person] to punishment, but also of the severity of the penalty that a State may impose.” *State v. Gorringer*, 481 P.3d 723, 730 (Idaho 2021).

56. SB 1309 is unconstitutionally vague because it does not provide fair notice regarding the severity of the penalties that may accompany a violation. SB authorizes statutory damages of at least \$20,000—but it provides no maximum or any guidance as to how statutory damages are to be calculated.

57. SB 1309 also offends due process because it empowers arbitrary and discriminatory enforcement by authorizing private individuals to enforce quasi-criminal state law in violation of clearly established constitutional rights. Its excessive statutory damages incentivize plaintiffs to force abortion providers into court to defend themselves without the typical legal, procedural, and practical controls that traditionally provide a check on government enforcement.

58. SB 1309 therefore deprives abortion providers of the due process rights guaranteed to them under the Idaho Constitution.

V.

SB 1309 Violates The Equal Protection Clause Of The Idaho Constitution Because Of Its Disparate Treatment Of Abortion Providers

59. Petitioners incorporate the preceding paragraphs.

60. The Idaho Constitution requires that “all persons in like circumstances should receive the same benefits and burdens of the law.” *Alpine Vill. Co. v. City of McCall*, 154 Idaho 930, 937 (2013); *see also* Idaho Const. art. I, §§ 1, 2.

61. SB 1309's civil enforcement mechanism creates a cause of action that is significantly different from other civil actions that can be brought against medical providers for violation of other state laws. It also treats abortion providers differently from all other defendants in the State's civil litigation process.

62. SB 1309 subjects abortion providers to ruinous monetary penalties through a civil enforcement scheme designed to prevent judicial review and to provide abortion providers with no way to ensure a fair defense. It empowers private individuals to enforce its harsh terms regardless of whether those individuals can show they were harmed by the abortion. It tilts the scales of justice decidedly in favor of claimants and against abortion providers and fails to treat abortion providers the same as similarly situated medical providers or even the same as other defendants in civil litigation.

VI.

SB 1309 Violates The Idaho Constitution By Denying The Fundamental Right To Privacy In Making Intimate Familial Decisions

63. Petitioners incorporate the preceding paragraphs.

64. The Idaho Constitution guarantees that “[n]o person shall be ... deprived of life, liberty or property without due process of law.” Idaho Const. art. I, § 13. The Idaho Constitution's due process clause is at least as protective as the federal constitution's due process clause. Therefore, SB 1309 violates the Idaho Constitution's due process clause because it will leave Idaho patients without access to pre-viability abortion.

65. The Idaho Constitution also independently contains protections that establish a fundamental right to privacy in making intimate familial decisions.

66. The Idaho Constitution guarantees that “[a]ll men are by nature free and equal, and have certain inalienable rights, among which are enjoying and defending life and liberty; acquiring, possessing and protecting property; pursuing happiness and securing safety.” Idaho Const. art. I, § 1.

67. The Idaho Constitution protects “[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures.” Idaho Const. art I, § 17.

68. The Idaho Constitution makes clear that its “enumeration of rights shall not be construed to impair or deny other rights retained by the people.” Idaho Const. art. I, § 21.

69. This Court is “free to interpret” the Idaho Constitution “as more protective of the rights of Idaho citizens than the United States Supreme Court’s interpretation of the federal constitution.” *State v. Guzman*, 122 Idaho 981, 987 (1992). As this Court has recognized for almost fifty years, the right to procreation is a fundamental right under the Idaho Constitution. *See Newlan v. State*, 96 Idaho 711, 713 (1975); *Tarbox v. Tax Comm’n of the State of Idaho*, 107 Idaho 957, 960 n.1 (1984); *Idaho Schs. for Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 582 (1993). This Court long ago held that Article I, §§ 1 and 21 of the Idaho Constitution protect some degree of personal autonomy. *See Murphy v. Pocatello School District No. 25*, 94 Idaho 32, 38 (1971). And, in the analogous area of search and seizure law, the Idaho Constitution is more protective than the U.S. Constitution. *See, e.g., State v. Donato*, 135 Idaho 469, 472 (2001). Privacy in making intimate familial decisions is, therefore, a fundamental right protected by this Constitution. SB 1309 violates this right.

PRAYER FOR RELIEF

Petitioners respectfully request that this Court grant the following emergency relief as soon as possible and no later than April 21, 2022, as SB 1309 takes effect the next day:

- (a) Declare that Idaho Senate Bill No. 1309 violates the Idaho Constitution because it:
 - a. violates the separation of powers doctrine under Article II, § 1;
 - b. violates the prohibition against “special” laws under Article III, § 19;
 - c. violates the right to informational privacy protected under Article I, §§ 1, 2, 17, and 21;
 - d. violates the due process clause under Article I, § 13 by imposing excessive and vague penalties;
 - e. violates the equal protection clause under Article I, §§ 1 and 2 by imposing disparate treatment on abortion providers; and
 - f. violates the fundamental right to privacy in making intimate familial decisions, protected under Article I, §§ 1, 13, 17, and 21.
- (b) Issue a preemptory writ of prohibition forbidding Idaho courts from giving effect to SB 1309.
- (c) Award to Petitioners their attorneys’ fees and costs.
- (d) Award such other and further relief as this Court shall deem just and reasonable.

Dated on this 29th day of March, 2022.

Respectfully submitted,

/s/ Michael J. Bartlett

MICHAEL J. BARTLETT
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

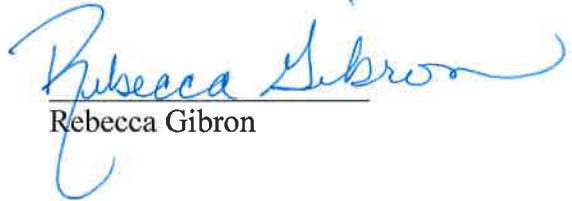
Counsel for Petitioners

** Pro hac vice applications forthcoming*

VERIFICATION

Rebecca Gibron, being duly sworn, deposes and says:

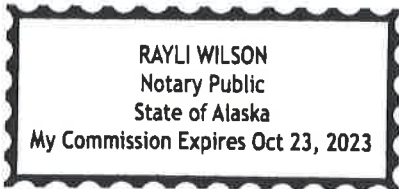
I am the interim Chief Executive Officer of Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Petitioner in this action. I have read the foregoing Petition for Writ of Prohibition and Application for Declaratory Judgment and know the contents thereof. The contents are true to my knowledge.


Rebecca Gibron

State of AK

County of Anchorage

Signed and sworn to before me on March 29, 2022





VERIFICATION

Caitlin Gustafson, M.D., being duly sworn, deposes and says:

I am one of the petitioners in this action. I have read the foregoing Petition for Writ of Prohibition and Application for Declaratory Judgment and know the contents thereof. The contents are true to my knowledge.

Caitlin Gustafson M.D.
Caitlin Gustafson, M.D.

State of Idaho

County of Valley

Signed and sworn to before me on March 29th 2022

Melinda S. Carr



CERTIFICATE OF SERVICE

I hereby certify that on March 30, 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:

State of Idaho
Office of the Attorney General
Civil Litigation Division
954 West Jefferson Street, 2nd Floor
Boise, Idaho 83702
ecf@ag.idaho.gov

/s/ Michael J. Bartlett

MICHAEL J. BARTLETT