

The Honorable Senator Grant Burgoyne
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Dear Senator Burgoyne,

You have requested a legal analysis of multiple questions regarding Senate Bill 1309, which would ban all abortions in the state of Idaho after a fetal heartbeat is detected with very limited exceptions for medical emergencies, rape, and incest. Specifically, you have provided eight questions you wished to be answered regarding S.B. 1309. Due to the expedited nature of this request, I have endeavored to answer the key questions you have posed to the extent possible in the time available.

Question 1: Do the provisions of Section 6 of the bill conflict or create confusion in any degree with any existing Idaho statutory law, Idaho common law, Idaho or U. S. constitutional provisions or principles, or the provisions of any Idaho court rule?

- a. Senate Bill 1309 would likely be found to violate recognized constitutional rights under the U.S. Supreme Court's current understanding of the U.S. Constitution.

S.B. 1309 would effectively prohibit almost all abortions in the State of Idaho beginning at about six weeks gestational age thirty days after enactment. Should a court adjudicate a challenge to the law on the merits of the restriction on abortions, it would likely be found unconstitutional. This is because, under the U.S. Supreme Court's governing jurisprudence, the State may not unduly burden a woman's right to obtain a pre-viability abortion. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2320 (2016) (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 878 (1992)). S.B. 1309 would likely be found to effectively ban virtually all abortions after a fetal heartbeat is detected (i.e., almost all pre-viability abortions) and thus would likely be found unconstitutional under the Court's current jurisprudence. See *Jackson Women's Health Org. v. Dobbs*, 379 F. Supp. 3d 549, 553 (S.D. Miss. 2019), *aff'd*, 951 F.3d 246 (5th Cir. 2020) (granting a preliminary injunction against a very similar ban on abortions after a fetal heartbeat is detected).

The U.S. Supreme Court is expected to soon issue an opinion revisiting its understanding of the right to abortion contained in the U.S. Constitution. The U.S. Supreme Court granted certiorari in the case of *Dobbs, et al. v. Jackson Women's Health Organization, et al.*, Supreme Court Dkt. No. 19-1392 ("*Dobbs*")—a challenge to a Mississippi law banning most abortions after 15 weeks gestational age--on the question of "whether all pre-viability prohibitions on elective abortions are unconstitutional." *Dobbs*, 141 S. Ct. 2619 (2021). The Court heard oral argument on December 1, 2021, and a decision is widely expected to be released by the end of June 2022. Among other arguments, the *Dobbs* petitioners have asked the Court to overrule *Roe v. Wade* and *Casey* and conclude that there is no constitutional right to an abortion. The arguments have also focused on the appropriateness of the viability line for state law restrictions on abortion. There is a possibility that, in just five months, the Court could change the viability line or even overrule *Roe* and *Casey*.

b. S.B. 1309 could be found to violate the Equal Protection Clause of the U.S. Constitution and the Idaho Constitution.

There is a risk that a reviewing court could conclude that the proposed civil enforcement action violates the U.S. and/or the Idaho Constitutions by treating abortion providers differently than other medical providers who violate other state laws. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution requires that all similarly situated people be treated alike. U.S. CONST. amend. XIV; *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). The Idaho Constitution similarly guarantees equal protection under the law. *See* Idaho Const. art. I, § 1 and § 2; *Alpine Vill. Co. v. City of McCall*, 154 Idaho 930, 937, 303 P.3d 617, 624 (2013) (“The principle underlying the equal protection clauses of both the Idaho and U.S. Constitutions is that all persons in like circumstances should receive the same benefits and burdens of the law.”).

The Ninth Circuit has held that laws that unequally burden abortion providers are reviewed under the Equal Protection Clause for whether the law is reasonably related to a rational state interest and whether there is a “stigmatizing or animus based purpose to the law.” *Tucson Women’s Clinic v. Eden*, 379 F.3d 531, 545-46 (9th Cir. 2004). The Ninth Circuit explained in *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018) that, even when animus is present, a law is invalid only if the law serves no legitimate governmental purpose when the politically unpopular group is not a traditionally suspect class. *Id.* at 1200-01 (quotation omitted).

Idaho courts would likely employ a similar analysis to determine whether Idaho’s equal protection guarantees were violated by the civil enforcement mechanism, although a court could employ a stricter “means-focus” test if the court determined that law distinguished between different groups “either odiously or on some other basis calculated to excite animosity or ill will.” *See State v. Hart*, 135 Idaho 827, 830, 25 P. 3d 850, 853 (2001) (quotation omitted). This standard is similar to federal intermediate scrutiny and scrutinizes the “means by which the challenged legislation is said to affect its articulated and otherwise legitimate purpose.” *Jones v. State Bd. of Med.*, 97 Idaho 859, 871, 555 P.2d 399, 411 (1976).

S.B. 1309 would create a novel civil enforcement action that authorizes lawsuits against medical providers who knowingly or recklessly attempt, perform, or induce an abortion after a fetal heartbeat is detected. There are significant differences between this civil enforcement action and procedures for other actions that can be brought against medical providers for violation of the other state laws in the provision of care. For example, the proposed law would purport to grant standing to individuals who could not bring a claim for wrongful death of the fetus. *See* Compare Section 6 (granting standing to the mother, father, grandparent, sibling, aunt or uncle of the preborn child to bring a civil enforcement action) with Idaho Code § 5-310 (allowing parents and guardians of minor children to bring an action for injury to the child). It would allow actual damages, statutory damages, and costs and attorney’s fees to the plaintiff, and override statutory fee shifting mechanisms such as Idaho Code §§ 12-120 and -121 that apply to general civil actions to disallow an award of fees and costs to the defendant. It would authorize both an award of actual damages plus statutory damages of at least \$20,000 against the defendant. In contrast, for example, Idaho Code § 16-1607 only allows an award of actual damages or a statutory award of damages of

\$2,500, whichever is greater, for bad faith reporting of child abuse, abandonment or neglect. *See also, e.g.*, Idaho Code § 48-608 (awarding actual damages or statutory damages). And it would create a four-year statute of limitations, when the general statute of limitations for personal injuries and wrongful death in Idaho is two years. *See* Idaho Code § 5-219. Indeed, enforcement of state laws governing medical professionals solely through the civil enforcement action is itself novel. Medical professionals are required to comply with state laws governing their practice in large part through the discretionary prosecutorial actions of their licensing boards, which carry their own penalties. *See* Chapters 14, 17, and 18, Title 54, Idaho Code. But licensing boards would be precluded under Section 6 of S.B. 1309 from enforcing the ban on abortions after a fetal heartbeat is detected.

Based on the significant difference in treatment between other state laws governing the provision of medical care and the enforcement mechanism in S.B. 1309, a reviewing court could conclude that the enforcement mechanism violates the equal protection guarantees of the U.S. and/or Idaho Constitutions. Notably, an Equal Protection Clause argument against Texas’s Senate Bill 8¹ has been raised in a complaint for interpleader and declaratory judgment filed by Alan Braid, M.D. in the United States District Court for the Northern District of Illinois against three individuals who sued him under S.B. 8’s civil enforcement scheme for performing an abortion after a fetal heartbeat was detected. Complaint for Interpleader & Declaratory Judgment, *Braid v. Stillely*, No. 1:21-cv-05283 (N.D. Ill. Oct. 5, 2021). A decision on the merits has not yet been issued in that case.

- c. S.B. 1309 may be an unconstitutional delegation of the Governor’s enforcement power to private citizens and violate the separation powers under the Idaho Constitution.

The Idaho Constitution vests the “supreme executive power of the state” in the Governor and assigns him the duty of “see[ing] that the laws are faithfully executed.” Idaho Const. art. IV, § 4. But S.B. 1309 expressly precludes any executive branch officer or employee from enforcing the requirements of the proposed chapter, including licensing agencies. Section 6, ll. 30-36. This

¹ S.B. 1309 appears to be modeled after Texas’s Senate Bill 8 (now Texas Health & Safety Code §§ 171.201, *et seq.* and referred to herein as Texas’s S.B. 8), which has greatly decreased abortions in the state of Texas since its passage by requiring physicians determine whether a fetal heartbeat is present before performing an abortion, banning almost all abortions after a fetal heartbeat is detected, and creating a civil enforcement action whereby the ban is enforced by civil lawsuits brought by private citizens against anyone who performs, aids and abets, or intends to participate in a prohibited abortion. A successful plaintiff can be awarded injunctions, statutory damages awards, and fees and costs against defendants. The civil enforcement action created by S.B. 8 contains numerous procedural provisions that make defending against such an action extremely difficult. Abortion providers and advocates challenging S.B. 8 have faced difficulty with pre-enforcement challenges to the law. In the meantime, the threat of civil suit under S.B. 8 appears to have dissuaded many abortion providers from providing abortions in Texas. A recent report indicates that abortions in Texas fell by about 60% in the first month after S.B. 8 took effect.

reallocation of the executive branch's constitutional duty to private citizens could be found to violate Article IV, Section 4 of the Idaho Constitution.

The delegation of the Governor's enforcement power to private citizens could also be found to violate Article II, Section 1, which expressly states:

DEPARTMENTS OF GOVERNMENT. The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no 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.

This separation allows the legislative department the lawmaking and policy functions of government, while the executive is charged with enforcing and executing the legal enactments of the legislative branch. Under the proposed legislation, the legislature arguably would be stripping the executive branch of its constitutional charge in violation of the constitutional separation of powers.

Finally, while it does not appear that the doctrine has been developed in Idaho, a court could follow the analysis applied by the Texas state court in *Van Stean v. Texas Right to Life* in reviewing procedural challenges to Texas' S.B. 8 and find that the delegation of enforcement power to private citizens works as an unconstitutional delegation because there are insufficient standards to guide the delegation of authority to private citizens. Order Declaring Certain Civ. Procs. Unconst. & Issuing Declaratory Judgment ("Order"), *Van Stean v. Texas Right to Life*, No. D-1-GN-21-004179, at 45-46 (98th Jud. Dist. Ct., Travis Cnty, Tex. Dec. 9, 2021), on appeal. In *Van Stean*, the Texas district court applied eight factors used by Texas courts in assessing delegations of executive authority and concluded that the civil enforcement action available under Texas's S.B. 8 failed this test. *Id.* For example, there is no supervision or meaningful review by the government, no one is represented in the claimant's decision-making process, the claimant applies and enforces the law, the claimant has a monetary incentive, the claimant would be imposing punishment on the defendant, and there is no assurance the claimant would possess special qualifications or training for the task delegated. *Id.* If a reviewing court were to adopt this test to determine whether there was a delegation consistent with the Idaho Constitution, it would likely similarly conclude that S.B. 1309's civil enforcement mechanism fails to constitutionally delegate authority to private citizens for similar reasons.

d. The statutory damages available under S.B. 1309 may violate the U.S. Constitution's Due Process Clause.

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution "prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor[.]" *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416, 123 S. Ct. 1513, 1519, 155 L. Ed. 2d 585 (2003). A statutory penalty violates due process where it is "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *United States v. Citrin*, 972 F.2d 1044, 1051 (9th Cir. 1992) (quoting *St. Louis, Iron Mt. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66, 40 S.Ct. 71, 64 L.Ed. 139 (1919)). The constitutionality of a statutory damages award should be

evaluated “with due regard for the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to” the law. *Williams*, 251 U.S. at 67. Statutory penalties serve as a mechanism for compensating victims when actual loss is difficult to prove and as a punishment and deterrent. *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 422 F.3d 949, 963 n.7 (9th Cir. 2005); *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 909–10 (8th Cir. 2012)

In analyzing whether Texas’s S.B. 8’s statutory penalty violated the Due Process Clause, the Texas district court analogized to the constitutional limits the U.S. Supreme Court has found for punitive damages awards. Order, *Van Stean*, No. D-1-GN-21-004179, at 36-40; *but see Capitol Records, Inc.*, 692 F.3d at 907–08 (concluding that the guideposts for constitutional punitive damages do not apply to statutory damages). The court held that the \$10,000 minimum statutory penalty authorized by Texas’ S.B. 8 in civil enforcement actions violated the Due Process Clause. Order, *Van Stean*, No. D-1-GN-21-004179, at 36–40. A reviewing court could similarly conclude that the statutory damages of a minimum of \$20,000 available under S.B. 1309 violates due process either under the due process analysis specific to statutory damages or by analogy to the analysis for punitive damages because the sizeable statutory damages award can be awarded even when the plaintiff suffers no harm.

The fact that the statutory damages available under the civil enforcement mechanism start at \$20,000, but are not capped at a maximum, is of greater concern. There does not appear to be any guidance as to what actual statutory damages awarded should be, other than that they cannot go below \$20,000. This alone could be found to violate the Due Process Clause because there is arguably no fair notice of the severity of the penalty that may be imposed and the lack of a cap facilitates the imposition of an arbitrary penalty. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574, 116 S. Ct. 1589, 1598, 134 L. Ed. 2d 809 (1996) (“Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.”)

For these reasons, statutory damages available under the civil enforcement mechanism could draw constitutional challenges under the Due Process Clause.

Question 3: In any civil litigation that might arise out of Section 6 of the bill, what standing, venue and jurisdictional issues exist if any?

S.B. 1309 would allow the woman on whom the abortion was performed, the father of the preborn child unless the mother was impregnated through an act of rape or incest, or a grandparent, aunt, uncle, or sibling of the preborn child to bring a civil enforcement action against the abortion provider. A reviewing court could find this statutory grant of standing unconstitutional.

The Idaho Constitution provides “Courts of justice shall be open to every person, and a speedy remedy afforded for *every injury* of person, property or character, and right and justice shall be administered without sale, denial, delay or prejudice.” Idaho Const. art. I, § 18 (emphasis added). Concepts of justiciability, including standing, ensure that cases brought before the court fall within the court’s constitutional authority to adjudicate them. *Coeur d’Alene Tribe v. Denney*, 161 Idaho 508, 513, 387 P.3d 761, 766 (2015). “Standing determines whether an injury is adequate

to invoke the protection of a judicial decision.” *Reclaim Idaho v. Denney*, 169 Idaho 406, —, 497 P.3d 160, 172 (2021).

In order to establish standing, a plaintiff must have an (1) injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision. *Id.* at 173. Standing is rooted in the party challenging the law having suffered a distinct and palpable injury because of the law, not just being opposed to a law or action on principle. *Id.* at 175.

Here, it is difficult to see how a competent, adult woman who consented to have an abortion performed upon her can be said to have suffered an injury. Such a suit would likely invite equitable doctrines, such as the doctrine of unclean hands, to bar it. It also could be difficult for fathers, grandparents, aunts, uncles, and siblings to legally establish an injury based on the loss of the possibility of a future relation as speculative injuries cannot confer standing. According to one study, once a pregnancy gets to about 6- or 7-weeks gestational age and a heartbeat is detected, the risk of miscarriage is still about 10%. The risk of miscarriage also varies based on circumstances specific to the individual woman and the specific pregnancy. In other words, the detection of a fetal heartbeat does not guarantee that the future relation will be born alive, rendering any injury stemming from the abortion arguably speculative. Further, the statute does not require the plaintiff relatives to have suffered any mental distress at the loss of the pregnancy to bring the civil action, yet they still would be awarded at least \$20,000.00 in statutory damages. This would be true even if the claimant was personally in favor of the abortion.

The related facts that S.B. 1309 would grant standing to individuals who may have no injury resulting from the abortion and that they would be entitled to a large statutory award of damages without any proof of harm could cause a reviewing court to conclude that the civil enforcement mechanism is either facially unconstitutional or unconstitutional as applied to specific enforcement actions brought under S.B. 1309. This outcome would follow the decision of the Texas district court in *Van Stean*, which declared S.B. 8’s grant of standing to any person and award of damages without any proof of harm unconstitutional. Order, *Van Stean*, No. D-1-GN-21-004179, at 47.

Question 4: In any civil litigation that might arise out of Section 6 of the bill, what choice of law scenarios and issues might exist in the courts of Idaho, other states or other U. S. jurisdictions.?

If a medical professional were to perform an abortion outside of Idaho on an Idaho resident, a claimant might attempt to bring a civil action against that medical professional in Idaho under Section 6 of S.B. 1309. In that scenario, the state law where the abortion was performed would likely be the controlling law. The medical professional would likely not be subject to suit under S.B. 1309, depending on that state’s choice of law rules.

“The world is composed of territorial states having separate and differing systems of law. Events and transactions occur, and issues arise, that may have a significant relationship to more than one state.” Restatement (Second) of Conflict of Laws § 1 (1971). Multiple states may have an interest in an event but have different laws governing the conduct. A state court will apply “the

law” of another state when it is directed by its own choice-of-law rule. Restatement (Second) of Conflict of Laws § 8 (1971). In Idaho, courts apply the “most significant relationship test” when determining the choice-of-law for a tort action. *First Bank of Lincoln v. Land Title of Nez Perce Cty., Inc.*, 165 Idaho 813, 821, 452 P.3d 835, 843 (2019). A court considers: “(a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (d) the place where the relationship, if any, between the parties is centered.” *Id.* “Of these contacts, the most important in guiding this Court's past decisions in tort cases has been the place where the injury occurred.” *Id.* (quoting *Grover v. Isom*, 137 Idaho 770, 773, 53 P.3d 821, 824 (2002)).

Idaho courts facing a choice of law issue in any action brought under S.B. 1309 would likely look to where the abortion occurred for the controlling state law. Even if a woman became pregnant in Idaho, lived in Idaho, and the family member bringing suit lived in Idaho, the most important contact will be where the injury occurred. *See First Bank of Lincoln*, 165 Idaho at 821, 452 P.3d at 843. An Idaho reviewing court would likely consider that where the abortion took place, and use “the law” of that state.

A medical professional facing civil action under S.B. 1309 in another state or U.S. jurisdiction will be subject to that state’s own choice-of-law rules. Each state has its own choice-of-law rules that govern the controlling law.

Question 6: Could the bill have extraterritorial application?

The extraterritorial application of a statute allows the statute to regulate conduct beyond a state’s borders. Idaho has a presumption against the extraterritorial application of state statutes. “Absent a statute granting extraterritorial rights, ‘[s]tatutes are intended to apply and be confined in their operation to persons, property and rights which are within the territorial jurisdiction of the law-making power.’” *Phillips v. Consol. Supply Co.*, 126 Idaho 973, 976, 895 P.2d 574, 577 (1995) (quoting *Ore-Ida Potato Prod., Inc., v. United Pac. Ins. Co.*, 87 Idaho 185, 193, 392 P.2d 191, 195 (1964)).

S.B. 1309 does not expressly grant extraterritorial rights. As such, it is unlikely that S.B. 1309 could be found to have extraterritorial application.

Question 7: The sponsors of this bill have made clear their belief that it will stop abortions in Idaho when it takes effect. Does the U.S. Supreme Court’s refusal to stay a similar Texas law give a green light to this bill, or does this bill nonetheless constitute unconstitutional and unenforceable legislation under any principle of state or federal statutory or constitutional jurisprudence until such time as the U. S. Supreme Court might overturn *Roe v. Wade*.

Texas’s experience with S.B. 8 offers limited guidance as to what Idaho could expect if the Legislature were to enact S.B. 1309. Soon after S.B. 8 was enacted, abortion providers in Texas brought pre-enforcement suit in federal court against a state court judge, a state court clerk, the Texas attorney general, the executive director of the Texas Medical Board, the executive director of the Texas Board of Nursing, the executive director of the Texas Board of Pharmacy, the

executive commissioner of the Texas Health and Human Services Commission, and a private individual under 42 U.S.C. § 1983 arguing that S.B. 8 violated the U.S. Constitution’s guarantee of a right to pre-viability abortions and seeking an injunction barring the defendants from taking any action to enforce the law. *Whole Woman’s Health v. Jackson*, 142 S.Ct. 522, 530 (2021). The U.S. Supreme Court ruled that only the suits against the executive licensing officials could proceed past the motion to dismiss stage, holding that the other defendants were either protected by the doctrine of sovereign immunity (the state court judge and clerk) or lacked enforcement authority (the Texas Attorney General). *Jackson*, 142 S.Ct. at 532-537, 544.²

If S.B. 1309 were challenged in a similar pre-enforcement suit in Idaho, the question would likely arise of whether any Idaho official has the authority to enforce the ban on abortions after a fetal heartbeat is detected under the law. S.B. 1309 states:

Notwithstanding 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. No enforcement of this section may be taken or threatened against any person by this state, a political subdivision of this state, a prosecuting attorney, or an executive or administrative officer or employee of this state or a political subdivision of this state.

Section 7, ll. 30-36.

This language is similar to that in Texas’ S.B. 8.³ However, unlike the key language in S.B. 8, S.B. 1309 specifically calls out the occupational licensing chapters of Idaho Code for nurses, pharmacists, and physicians as provisions that cannot be used to enforce the ban on abortions after a fetal heartbeat is detected. A court could conclude that S.B. 1309’s language is

² The Fifth Circuit for the Court of Appeals has certified the question to the Texas Supreme Court of whether Texas law authorizes the Attorney General, Texas Medical Board, Texas Board of Nursing, the Texas Board of Pharmacy, or the Texas Health and Human Services Commission to take enforcement action against individuals who violate S.B. 8. *Whole Woman’s Health v. Jackson*, —F.4th—, 2022 WL 142193, at *6 (5th Cir. 2022).

³ Texas Health & Safety Code § 171.207(a) provides “Notwithstanding Section 171.005 or any other law, the requirements in this subchapter shall be enforced exclusively through the private civil actions described in Section 171.208. No enforcement of this subchapter, and no enforcement of Chapters 19 and 22, Penal Code, in response to violations of this subchapter, may be taken or threatened by this state, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of this state or a political subdivision against any person, except as provided [in the civil enforcement mechanism].” The U.S. Supreme Court Justices cited a separate provision of the Texas’s Occupations Code that required the board to take disciplinary action for physicians who perform abortions in violation of Chapter 171, Health and Safety Code. See *Jackson*, 142 S.Ct. at 535 (citing Tex. Occ. Code Ann. § 164.055(a) (Gorsuch, Kavanaugh, Alito and Barrett, JJ.); *Whole Woman’s Health v. Jackson*, 142 S.Ct. 522, 544 (citing Tex. Occ. Code Ann. § 164.055(a) (Roberts, C.J., Breyer, Sotomayor, Kagan, JJ.)).

sufficiently specific to preclude enforcement by state licensing officials, including enforcement via Idaho Code § 54-1814(6), which identifies “performing . . . an unlawful abortion or aiding or abetting the performance or procuring of an unlawful abortion” as grounds for medical discipline.

While this difference between Texas’s S.B. 8 and S.B. 1309 could help immunize S.B. 1309 from pre-enforcement scrutiny in a suit brought under a 42 U.S.C. § 1983 for violations of the U.S. Constitution, S.B. 1309 would likely still be vulnerable to a pre-enforcement suit. The State of Idaho can be directly sued for violations of the Idaho Constitution. *Tucker v. State*, 162 Idaho 11, 18, 394 P.3d 54, 61 (2017). An abortion provider could bring an action for a declaratory judgment and injunctive relief in state court under Idaho’s Uniform Declaratory Judgment Act in a pre-enforcement suit raising at least some of the constitutional issues discussed above. *See* Idaho Code § 10-1202. Notably, the Texas district court in *Van Stean* has already declared multiple provisions of Texas’s S.B. 8 unconstitutional and stated that they should not be enforced or applied in Texas courts, although it declined to issue a permanent injunction prior to trial on the merits. Order, *Van Stean*, No. D-1-GN-21-004179, at 47.

The issues with S.B. 1309 could also be raised as a defense to a civil enforcement action under S.B. 1309. Abortion providers in Idaho may be less hesitant to test S.B. 1309 in a post-enforcement action in court because it more clearly prohibits discipline by licensing authorities and it has greater limitations on the civil enforcement actions compared to Texas’s S.B. 8.

There is also a possibility that the Department of Justice would file a pre-enforcement suit seeking to enjoin S.B. 1309. The Department of Justice filed such a suit challenging Texas’ S.B. 8 on the grounds that the law violated the U.S. Constitution, and the federal district court granted a preliminary injunction enjoining S.B. 8 at the United States’ request. *United States v. Texas*, No. 1:21-CV-796-RP, 2021 WL 4593319, at *35 (W.D. Tex. Oct. 6, 2021), *cert. granted before judgment*, 142 S. Ct. 14, 211 L. Ed. 2d 225 (2021). While the Fifth Circuit stayed the injunction on an emergency basis and the U.S. Supreme Court granted certiorari, the Supreme Court dismissed the grant of certiorari as improvidently granted. *United States v. Texas*, 142 S.Ct. 522 (2021). It remains an open question whether the Department of Justice can bring such suits.

In short, it is unlikely that S.B. 1309 would escape pre-enforcement judicial scrutiny, and it could also be subject to post-enforcement scrutiny.

I hope this answers your key questions. Please reach out to me with any further questions or concerns.

Sincerely,

Brian P. Kane
Chief Deputy