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IN THE SUPREME COURT OF THE STATE OF IDAHO

PLANNED PARENTHOOD OF THE 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.

Docket No. 49615-2022

**MEMORANDUM IN SUPPORT
OF RESPONDENT'S MOTION TO
RECONSIDER ORDER RE:
VERIFIED PETITION FOR WRIT
OF PROHIBITION AND
APPLICATION FOR
DECLARATORY JUDGMENT**

Respondent, the State of Idaho, requests that this Court reconsider its Order Re: Verified Petition for Writ of Prohibition issued March 31, 2022 (“the Order”). Respondent opposes Petitioners’ Motion to Expedite Briefing and Argument. Yet, through no fault of its own, Respondent did not have the opportunity to file an opposition with the Court prior to this Court

MEMORANDUM IN SUPPORT OF RESPONDENT'S MOTION TO RECONSIDER ORDER
RE: VERIFIED PETITION FOR WRIT OF PROHIBITION AND APPLICATION FOR
DECLARATORY JUDGMENT - 1

granting the motion. Counsel for Respondent only received a copy of the motion from Petitioners' counsel at 2:35 p.m. on Wednesday, March 30th. The Order was issued the next day at 9:22 a.m. Respondents respectfully request that this Court therefore give consideration to Respondent's arguments opposing Petitioners' Motion to Expedite and reconsider its Order.

On reconsideration, the Court should deny Petitioners' Motion to Expedite because (1) the constitutional issues raised in the Petition are novel legal issues of first impression within Idaho, as well as rapidly evolving nationwide, and therefore deserve the refinement and careful consideration that the ordinary judicial process affords; (2) the Petition presents generalized questions of statutory constitutionality, as well as factual questions, and so is not an appropriate vehicle for exercise of the court's original jurisdiction; and (3) there are multiple alternative and timely avenues by which Petitioners could obtain the expeditious relief that they seek.

This is a weighty matter. Petitioners seek to invalidate one of the State's duly enacted statutes and, in the process, have the Court adjudicate six different general constitutional claims.¹ Perhaps most notably, Petitioners ask this Court to recognize for the first time that the Idaho Constitution contains two rights pertaining to abortions: (1) the right to have an abortion and (2) the right to keep the fact of having had an abortion completely secret, even from the courts. The resolution of Petitioners' arguments should not be rushed into. Yet, that is exactly what Petitioners would have this Court do, and, unfortunately, it is what the Order does. The Order setting a

¹ The generality of the constitutional claims in this matter immediately distinguishes this case from *Reclaim Idaho v. Denney*, 169 Idaho 406, 497 P.3d 160 (2021), in which the claims centered around one specific constitutional provision containing a specific right. The recent reapportionment cases are similarly immediately distinguishable as they carry a constitutional grant of original jurisdiction. Idaho Constitution, Article III, § 2, ¶ 5.

briefing schedule gives Respondents a mere 15 days from informal receipt of the Petition to marshal all their arguments and evidence in opposition to the Petition.

Petitioners' claims are laden with factual assertions that Respondent disputes. *See* Brief in Support of Verified Petition for Writ of Prohibition and Application for Declaratory Judgment, at 9–14, and Exhibits 3 and 4. These factual disputes, which will be addressed to a greater degree in Respondent's brief, go not only to Petitioners' constitutional claims, but also to Petitioners' very standing to bring this challenge. But Respondent now has a mere 14 days to gather the evidence necessary to dispute these assertions, in addition to crafting the legal arguments to oppose the Petition.

The district courts are designed to provide for the timely gathering of facts and evidence as well as to hear disputes regarding such, while the Supreme Court is primarily a court of review. An action requiring factual and evidentiary development such as this one should not be expedited and instead handled through the district court process. *See, e.g., Wasden v. Idaho State Bd. of Land Comm'rs*, 150 Idaho 547, 551–54, 249 P.3d 346, 350–353 (2010) (granting Land Board's motion to dismiss where a “plain, speedy, and adequate remedy in the ordinary course of law” existed by means of joining an action for declaratory relief with a request for injunctive relief). These factual issues demonstrate not only the error in expediting briefing in this matter, but also the error in this Court exercising original jurisdiction over this Petition at all. The legal analysis, factual inquiries, and weighing of issues that Petitioners are seeking to expedite is ordinarily and best done through the trial court process. If this Court exercises original jurisdiction, Respondent will be denied the chance to conduct necessary discovery or retain expert witnesses, as well as an evidentiary hearing or a trial to establish a factual record.

It is also essential to note the novel nature of the legal claims within this argument. Idaho's statute is modeled after a similar Texas statute, Texas's Senate Bill 8. Similar constitutional challenges to Texas' Senate Bill 8 began within the Texas district court and are currently pending within the Texas Supreme Court. See *Van Stean v. Texas Right to Life*, No. D-1-GN-21-004179 (98th Jud. Dist. Ct., Travis Cnty, Tex.), on appeal. This case, although not binding, could prove instructive to the resolution of this case. Similarly, Petitioners invoke the U.S. Supreme Court's jurisprudence in *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 885 (1992). However, the United States Supreme Court has already heard argument in *Dobbs, et al. v. Jackson Women's Health Organization, et al.*, Supreme Court Dkt. No. 19-1392, a case which takes direct aim at the precedents that Petitioners rely on, and a decision could issue at any time. The Court's determination in *Dobbs* could dramatically reset how abortion cases are legally evaluated under the U.S. Constitution. None of these cases originated as an expedited original action in a state supreme court.

Further, it is unnecessary to expedite briefing to give Petitioners the urgent relief they seek, even if this Court does exercise its original jurisdiction (it should not). Idaho law allows this Court to issue an alternative writ of prohibition to preserve the status quo while the parties carefully brief and argue the Petition's merits. Idaho Code § 7-403; see also *Pfirman v. Prob. Ct. of Shoshone Cty.*, 57 Idaho 304, 64 P.2d 849, 850 (1937) (explaining that the Court issued an alternative writ of prohibition pending a determination as to whether plaintiff was entitled to the writ of prohibition). It would be prudent to preserve the status quo and allow both sides the time necessary to thoroughly brief the constitutional claims, rather than require them to rush to meet an unnecessarily short deadline, particularly before a court of last resort reviewing a case of first impression.

If this Court declines to exercise its original jurisdiction, as Respondent contends it should, Petitioners have adequate remedies available before the district court. First, if they feel the statute is unconstitutional, Petitioners can challenge SB 1309 after a civil enforcement lawsuit is brought against them by raising the unconstitutionality of the law as a defense. The constitutionality of SB 1309 would be adjudicated before any fine is imposed. Second, if they can meet standing requirements at the pre-enforcement stage, Petitioners can file a lawsuit in district court and seek a temporary restraining order or a preliminary injunction under the well-crafted Idaho Rules of Civil Procedure, which are designed to address the need for urgent preliminary relief.²

Under either avenue, if Petitioners are aggrieved by the outcome of proceedings before the district court, an appeal is available, along with the ability to seek a stay on appeal. The weighty and multiple constitutional issues raised in this case should not be given short shrift just because Petitioners claim that SB 1309 will immediately impact them. Respondent questions whether SB 1309 will actually have an immediate impact on Petitioners. But in any case, all duly-enacted statutes have immediate effect upon their effective date. This fact is not sufficient justification to bypass the district court and the tools that exist to preserve the status quo during a legal challenge.

For these reasons, the Court should reconsider the Order Re: Verified Petition for Writ of Prohibition and deny Petitioners' motion to expedite briefing.

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² A temporary restraining order would likely provide more timely relief than this action. It is not uncommon to have a temporary restraining order issue within 24 to 48 hours of filing for one. There is simply no remedy that this Court provides that is not available in some fashion at the district court level.

DATED: April 1, 2022.

OFFICE OF THE ATTORNEY GENERAL

By: /s/ Megan A. Larrondo
MEGAN A. LARRONDO,
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of April, 2022, I electronically filed the foregoing with the Clerk of the Court using the iCourt e-file system which sent a Notice of Electronic Filing to the following persons:

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