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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.

and

SCOTT BEDKE, in his official capacity as Speaker of the House of Representatives of the State of Idaho; CHUCK WINDER, in his official capacity as President Pro Tempore of the Idaho State Senate; and the SIXTY-SIXTH IDAHO LEGISLATURE,

Intervenors-Respondents.

Docket No. 49615-2022

MEMORANDUM IN SUPPORT OF RESPONDENT'S MOTION TO VACATE STAY

I. INTRODUCTION

The Court's April 8, 2022 Order staying the implementation of Senate Bill 1309 and its trailer bill (collectively "the Heartbeat Act") was in error. The Idaho Supreme Court has no power to "stay the implementation" of a duly enacted state law when there is no state official before it whose conduct can be enjoined; nor any act that the state official could take to enforce the law; nor even a formal request for the Court to stay the nonexistent act. Petitioners made the choice to sue the State of Idaho instead of a state official. In so doing, they rendered the issuance of both writs and injunctions, which is really what the Court's stay order is, unavailable to them. The Court cannot correct Petitioners' error by enjoining the actions of all (nonparty) Idahoans. Moreover, the Court cannot enjoin the enforcement of a law without having first been formally requested to do so. Neither the State nor the Petitioners directly requested that the Court stay the implementation of challenged law. Any belief that such a request was made results from Petitioners' misreading of the State's filings and is incorrect. The State's position was merely that, if this Court takes up this matter (it should not), it should issue a standard briefing schedule. The State has always wholeheartedly believed that the Heartbeat Act will withstand this challenge and that the Petition should be dismissed out of hand. The State respectfully requests that the Court immediately vacate the stay.

II. BACKGROUND

Petitioners filed their Verified Petition for Writ of Prohibition and Application for Declaratory Judgment ("Petition") on March 30, 2022, together with a Motion to Expedite Briefing and Argument. Petitioners have brought six separate constitutional claims against the State of Idaho. Pet. ¶¶ 39-69. Among them, Petitioners argue that the Idaho Constitution contains two never-before-recognized rights—a right to informational privacy that would allow a woman to

keep the fact of having had an abortion completely secret from the courts and a right to abortion. *Id.* at ¶¶ 50-53, 63-69. On its face, the Petition also raises significant procedural concerns, including as to the propriety of the Court's exercise of its original jurisdiction in the matter.

The morning after the Petition and Motion to Expedite were filed, and before the State had a chance to oppose the motion, this Court issued an order granting Petitioners' motion for expedited briefing. Order Re: Verified Pet. for Writ of Prohibition (Mar. 31, 2022). The Court set a two-week briefing schedule for the State to respond to Petitioners' six separate constitutional claims, as well as to address the significant procedural deficiencies with the challenge. *Id.*

The State quickly filed a motion to reconsider the order, laying out the reasons why expediting the case was inappropriate. *See* Mem. in Supp. of Resp't's Mot. to Recons. Order Re: Verified Pet. for Writ of Prohibition and Appl. for Decl. J. ("Memo ISO Recons.") (Apr. 1, 2022). First, the State explained the need for adequate time to develop and brief the State's defenses to the multiple and weighty claims raised by Planned Parenthood on issues of first impression before Idaho's court of last resort. Memo ISO Recons. 1-4. The State then explained why original jurisdiction was not appropriate as Idaho's district courts are designed for the timely gathering of facts and evidence. *Id.* Finally, the State explained that expediting briefing was not necessary because there were "multiple alternative and timely avenues by which Petitioners could obtain the expeditious relief they seek." *Id.* at 2, 4-5. Notably, the Court's exercise of its original jurisdiction turns in part on whether "there is [ ] a plain, speedy, and adequate remedy in the ordinary course of law." *Reclaim Idaho v. Denney*, 169 Idaho 406, 497 P.3d 160, 177 (2021) (citing *Wasden ex rel. State v. Idaho State Bd. Of Land Comm'rs*, 150 Idaho 547, 551-52, 249 P.3d 346, 350-51) (quoting *Henry v. Ysursa*, 148 Idaho 913, 915, 231 P.3d 1010, 1012 (2008)). Thus, in accordance with these legal limitations bounding the Court's actions, the State identified some of the alternate

methods available for Petitioners to obtain the relief they sought other than an expedited briefing schedule in an original action, such as an alternative writ of prohibition or a temporary restraining order or a preliminary injunction issued by the district court.[1] Memo ISO Recons. 4-5. At no point did the State ask the Court to exercise those tools.

Petitioners objected to the State's motion. In their filing, Petitioners misread the State's argument, incorrectly representing that the State had "suggest[ed]," and even "request[ed]" that this Court issue an alternate writ of prohibition in this particular case. Opp'n to Resp't's Mot. to Recons. ("Opposition") 7. Petitioners also did not request that the Court issue any temporary injunctive relief. They merely stated that they did not object to the State's (nonexistent) request.

In reply, the State addressed a few of the key misconceptions in Petitioners' opposition, deciding generally not to reiterate the points made in its memorandum in support of the motion to reconsider. Reply in Supp. of Mot. to Recons. Order Re: Verified Pet. for Writ of Prohibition and Appl. for Decl. J. However, the State did reiterate the "ample procedural tools available within the district court process" to grant Petitioners the relief they sought, noting that Petitioners had conceded that "a straightforward orderly process exists by which the relief they seek can be granted on a preliminary basis during the pendency of a lawsuit." *Id.* at 3. Again, this was neither a request for a stay, nor was it agreement with any (nonexistent) request from Petitioners.

On April 8, 2022, this Court issued its Order Granting Motion to Reconsider. The Court gave the State a total of twenty-eight days to file its answer and opposition brief. The Court also

[1] Upon further consideration, the State's suggestion that an alternative writ or injunctive relief could issue in this matter as pled by Petitioners was in error. As discussed further below, there is simply no mechanism by which the Court can order the "State of Idaho" to delay "implementation" of the Heartbeat Act.

ordered, "The parties having both requested action by this Court to preserve the status quo to give the parties the ability to adequately brief this case, pursuant to I.A.R. 13(g) the implementation of Senate Bill 1309 is STAYED, pending further action by this Court." Order Granting Mot. to Recons. (Apr. 8, 2020). The Court's order staying this matter was based on a fundamental misapprehension of the parties' briefing. Neither the State nor Petitioners ever requested a stay. The State strongly believes that a stay of Senate Bill 1309 and its trailer bill (collectively the "Heartbeat Act") should never have been issued. The stay should be vacated.

III. ARGUMENT

Neither Idaho Appellate Rules 13(g) nor 5(d) allow the Court to "stay the implementation" of the Heartbeat Act when the State of Idaho has been sued in an original action, particularly when there has been no direct request for the Court to take such action. The Court's stay order should be vacated as procedurally improper, as well as based upon a fundamental misconception of the parties' positions before the Court.

A. The Heartbeat Act cannot be stayed under Idaho Appellate Rule 13(g).

The Court stayed the implementation of the Heartbeat Act under Idaho Appellate Rule 13(g), which provides that the Supreme 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, at any time during the pendency of an original application or petition for any extraordinary writ[.]" By its plain language, Rule 13(g) can only be used to stay "a proposed act, a pending action or proceeding, or the enforcement of any judgment, order, or decree." *Id.* But the "implementation of Senate Bill 1309" is none of these things. It is not a "proposed act." As described in Respondent's opposition brief, one of the many fundamental flaws with Petitioners' challenge is Petitioners' failure to identify any actual or threatened proposed act to enjoin. *See* Resp't's Opp'n Br., Section

III.A. Similarly, it is not a "pending action or proceeding." No actions or proceedings have been filed under the Heartbeat Act. *Id.* And it is patently not "the enforcement of any judgment, order, or decree." Thus, by the plain language of Rule 13(g) alone, it was error for the Court to stay the implementation of the Heartbeat Act.

Beyond the plain language of Rule 13(g), this Court simply does not have the authority to just stop a law from going into effect. The separation of powers doctrine precludes courts from vetoing or suspending laws. *See Winsness v. Yocom*, 433 F.3d 727, 728 (10th Cir. 2006) ("There is no procedure in American law for courts or other agencies of government—other than the legislature itself—to purge from the statute books, laws that conflict with the Constitution as interpreted by the courts). The Court can only halt a law's effect by enjoining parties who either act or credibly threaten to act under the law from doing so, or by declaring the law unconstitutional and relying on the doctrine of *stare decisis* to ensure conformance with the court's ruling. *Id*. Thus, for example, in *Hecox v. Little*, 479 F. Supp. 3d 930, 943 (D. Idaho 2020), the U.S. district court was able to preliminarily "enjoin the State of Idaho from enforcing a newly enacted law that precluded transgender athletes from participating on women's sports" because Governor Little was a named party to the action. *See also McCormack v. Heideman*, 694 F.3d 1004 (9th Cir. 2012) (woman who was criminally prosecuted for terminating her own pregnancy sued county prosecutor against enforcing one portion of a statute against her).

There is simply no state official who is a party to this matter whose conduct can be ordered or enjoined to halt the implementation of the Heartbeat Act.[2] The State of Idaho is not an official to be enjoined. Indeed, there is not even a state official who has any power to enforce the Heartbeat

[2] The State's difficulty in determining who should sign the Verified Answer on behalf of the State of Idaho is evidence of this fatal flaw.

Act. S.B. 1309 § 6 (prohibiting the state, any political subdivision, a prosecutor, or any state officer or employee from bringing or intervening in an action under the Act). And the Court cannot enjoin the conduct of any nonparty Idaho citizens who might sue under the Act. The Court's order implicitly acknowledges as much by failing to identify whose conduct was being enjoined. Order Granting Mot. to Recons. 2 ("the implementation of Senate Bill 1309 is STAYED, pending further action by this Court"). Nowhere in the order itself does it say who or what conduct is being enjoined to prevent this duly enacted law from going into effect. Are individuals who might sue under the law enjoined from doing so? Are county clerks enjoined from docketing certain lawsuits? Once an individual sues, is it a lower court that is enjoined from implementing the law, and if so, at what stage of the litigation proceedings? These questions illustrate the impropriety of a "stay of implementation" where there simply is no party or action to be bound by the Court's order. Rule 13(g) does not grant the Supreme Court the power to generally strike down a law or suspend a law; as such, this Court should vacate the "stay."

B. The Court also could not have stayed the implementation of the Heartbeat Act under Idaho Appellate Rule 5(d).

When anything other than the enumerated items identified in Rule 13(g) is sought to be stayed in an original action, Idaho Appellate Rule 5(d) sets out the grounds under which the stay, in the form of the issuance of a special writ, may issue. Rule 5(d) provides "A majority of the entire Court, may [ ] direct the respondent to so act, or to refrain from acting, as directed in the writ, pending hearing and upon such conditions as the Court may impose." I.A.R. 5(d). But the party seeking the stay must apply for its issuance. Rule 5(a) provides that "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. . . . There shall be no response to *applications* filed

pursuant to this rule unless the Supreme Court requests a party to respond to the application before granting or denying the same." I.A.R. 5(a) (emphasis added). Thus, by its plain language, a special writ may only issue upon the direct application of a party.

Petitioners did not make the necessary application for special writ temporarily staying the Heartbeat Act. Petitioners did not file a separate petition seeking a temporary writ or request one in their Verified Petition. Petitioners also did not request a writ in their Opposition. Instead, Petitioners stated that they "[were] not opposed to [the State's] request," which is both a misreading of the statements in the State's motion to reconsider and something much less than "an application" for the issuance of a special writ. Opp'n 7.

Nor did the State file "an application" for the issuance of a special writ. Instead, the State sought reconsideration of the Court's order setting an expedited briefing schedule and, in so doing, set forth multiple alternative means by which Petitioners could obtain the relief they sought outside of an expedited briefing schedule. Memo ISO Recons. 4-5. While maintaining its foundational position that this Court should not have original jurisdiction over this matter at all, the State posited (wrongly) that, if the Court did exercise that jurisdiction, the rules provided for an alternative writ—if Petitioners had requested and qualified for one, which they did not. *Id.* The State went on to cite two other options for relief that Petitioners could have requested if they were in district court, which the State maintained, and still maintains, is the proper forum for this Petition. *Id.* In short, the ability of this Court to issue an alternative writ was listed alongside other alternative means of relief provided as examples of what the Petitioners could have sought rather than a request for expedited briefing.[3] This was not a request for a stay. Particularly when taken in context

[3] Again, upon further consideration, the State erred in suggesting that a writ or injunctive relief was available to Petitioners in the case that they have pled.

of the rest of the State's motion and supporting memorandum, which takes issue with "Petitioners seek[ing] to invalidate one of the State's duly enacted statutes," and argues that the Petitioners should not "bypass the district court and the tools that exist to preserve the status quo during a legal challenge," the Court misapprehended the State's argument. The State did not request that this Court issue a stay. *Id*. at 2, 5.

Notably, even if Petitioners had requested a temporary special writ under I.A.R. 5(d), it could not issue because the respondent in this matter, to which the writ would have to be directed, is the State of Idaho. The State of Idaho is not the proper respondent for the issuance of a writ. *See* Resp't's Opp'n Br., Section III.A.4. As noted above, the State does not even have any enforcement power as to the Heartbeat Act. *Id.* And Petitioners concede that the State, as a whole, cannot be required to take, or not take, any actions given that the writ that they did request is solely directed at Idaho courts. Pet. 19. Further, a writ cannot issue against the lower courts because they are not named as respondents, because there are no lower court proceedings to arrest, and because the requested writ is either an improper advisory opinion or an unconstitutional infringement on the original jurisdiction of the district courts. *See* Resp't's Opp'n Br., Section III.A.1.

C. Even if the Court could have stayed the implementation of the Heartbeat Act under Idaho Appellate Rule 13(g), the Court abused its discretion in issuing the stay.

Returning to the "stay" the Court ordered, Idaho Appellate Rule 13(g) allows the Court to issue a stay "in its discretion[.]" Thus, even if Idaho Appellate Rule 13(g) could stay the implementation of a duly enacted statute by private citizens across Idaho, the Court abused its discretion in issuing the stay because the stay was without legal basis, as described above, and because the order was based on fundamental misconception of the position of the parties before it. The Court's Order indicates that it stayed the implementation of the Heartbeat Act based on its

perception that the parties had "both requested action by this Court to preserve the status quo to give the parties the ability to adequately brief this case." Order Granting Mot. to Recons.

As discussed above, the State's motion to reconsider did not ask the Court to stay the implementation of the Heartbeat Act. The State identified avenues that would remedy Petitioners' perceived injury outside of expediting briefing; it did not request or suggest that the Court should exercise them. And Petitioners did not request a stay, but rather misstated that the State had requested a stay. Finally, in its reply, the State merely noted that Petitioners themselves had admitted that alternate avenues of relief existed that counseled against expediting briefing in this matter. The conclusion that the parties agreed to a stay was incorrect.

Because there has never been any motion or request for stay presented by either party to this Court, because the State **did not** enter any sort of agreement with Petitioners regarding a stay, and because there are no legal grounds on which a stay could be issued, this Court did not properly exercise its discretion under I.A.R. 13(g). This Court should immediately vacate the stay.

IV. CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court immediately vacate the impermissible "stay of the implementation" of the Heartbeat Act entered on April 8, 2022. No basis exists for the stay.

DATED: April 28, 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 28th 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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