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Idaho Supreme Court
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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

RESPONDENT STATE OF IDAHO'S OPPOSITION TO PETITIONERS'BRIEF IN SUPPORT OF VERIFIED PETITION FOR WRIT OF PROHIBITION AND APPLICATION FOR DECLARATORY JUDGMENT

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I. STATEMENT OF THE CASE

A. Introduction.

The Petition is fundamentally flawed both procedurally and substantively. Procedurally, this Court's original jurisdiction turns on the ability to issue writs that order the named respondent to do, or not do, some action. But such a writ cannot issue here. The State of Idaho has no enforcement authority with regard to Senate Bill 1309 and its trailer bill (collectively "the Heartbeat Act"). Petitioners do not name as respondent any State officer who has authority to act to enforce the Heartbeat Act (none exists), nor have Petitioners identified any currently occurring or threatened action that could be halted by a writ. When stripped of pretense, Petitioners seek an advisory opinion as to the constitutionality of a newly enacted statute. This Court should refuse to hear this unripe declaratory judgment action filed under the *nomme de plume* of a writ of prohibition. The Court should instead allow the district court utilize the rules of civil procedure to provide a plain, speedy, and adequate remedy to Petitioners if one ever becomes necessary. The morass of procedural flaws alone is fatal to the Petition.

Substantively, the Petition should be dismissed because it takes issue with an unremarkable civil cause of action. When the Legislature passed and the Governor signed the Heartbeat Act into law, they did what the Legislative and Executive Branches have frequently done without comment—created a private cause of action. The Heartbeat Act is notable only in what it does not do. It does not ban pre-viability abortions. It does not give standing to individuals who have not been injured. It does not strip the Executive of his constitutional powers. It does not create novel procedures not found in any other civil action or go rogue with statutory damages. It does not "deputize" private citizens. It does not violate the Idaho Constitution. And it does not violate the Fourteenth Amendment to the U.S. Constitution. Like the unremarkable wrongful death action, the Act's private cause of action constitutionally expresses Idaho's value for human life at all stages and allows private citizens to have that value recognized if they so choose.

The Court should decline Petitioners' invitation to refashion itself as a roving arbiter of constitutionality, able to swoop in at a moment's notice to decide the constitutionality of any law, unmoored from case and controversy, and without the issuance of a meaningful writ directed at the named respondent. The Court should dismiss the Petition for both its procedural and substantive failings.

B. The Heartbeat Act was properly codified through the actions of the Legislative and Executive Branches.

Senate Bill 1309, the Fetal Heartbeat Preborn Child Protection Act, passed Idaho's Senate on a 28-6-1 vote, passed Idaho's House of Representatives on a 51-14-5 vote, and was signed into law by the Governor on March 23, 2022. *2022 Legislation – Senate Bill 1309*, IDAHO LEGISLATURE, https://legislature.idaho.gov/sessioninfo/2022/legislation/S1309/ (last visited April 13, 2022). Despite possessing the power to veto Senate Bill 1309 or to allow it to take effect unsigned, the Governor chose to sign it into law.[1] Senate Bill 1358, the trailer bill to Senate Bill 1309, also passed through Idaho's Legislature on substantially similar margins and was signed into law by the Governor the same day. *2022 Legislation—Senate Bill SB 1358*, IDAHO LEGISLATURE, https://legislature.idaho.gov/sessioninfo/2022/legislation/S1358/ (last visited April 13, 2022). This brief will refer to both bills together as the "Heartbeat Act" or the "Act."

The Heartbeat Act provides that any person who intends to perform or induce an abortion must first determine if a fetal heartbeat exists. S.B. 1358 § 2. If a medical professional knowingly or recklessly attempts or performs an abortion after a fetal heartbeat is detected, except in the case of medical emergency, rape, or incest, the Act allows for a civil cause of action against the medical professional. S.B. 1309 § 6; S.B. 1358 § 1. The civil action is available to the woman upon whom

[1] Any reservations the Governor may have expressed at the time of signing are of little moment, given his choice to actively sign the Heartbeat Act into law. Similarly, Chief Deputy Kane's letter cannot bear the weight that Petitioners place on it. In accordance with the constitutional duty of the Attorney General, Mr. Kane issued a conservative and hypothetical analysis of potential challenges that might be leveled against draft legislation at the request of a legislator. When Mr. Kane's letter conflicts with the arguments here, it cannot be given weight because the arguments made in this brief have the benefit of being better informed by subsequent factual developments, of having had specific legal arguments to evaluate, and of having a particular legal challenge in which to evaluate them.

the abortion was performed, the father (unless he impregnated the woman through rape or incest), and the grandparents, siblings, aunts or uncles of the unborn child within a four-year statute of limitations. *Id.* It allows for recovery of actual and statutory damages, costs and attorney fees. *Id.* Defendants to such actions may recover their attorney fees and the costs incurred in their defense in certain circumstances. S.B. 1358 § 1. The Act may not be enforced 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." *Id*. The state, state officials, and prosecuting attorneys are also prohibited from intervening in a civil action brought under the Act. *Id*.

The Act was intended to express the State's profound value for human life, including preborn human life. S.B. 1309 § 2. It is based on legislative findings that the life of each human being begins at fertilization; that a preborn child's life, health, and well-being should be protected; that "a consistent human heartbeat, independent of life support, is a core determining factor in establishing the legal presence of human life" and a key predictor of whether a preborn child will reach live birth; and that, once a fetal heartbeat is detected, the preborn child "has a greater than ninety-five (95%) chance of survival when carried to term." *Id.* The Legislature found that the presence of a detectable heartbeat is a more reliable indicator of a distinct life than the concept of "viability." *Id.* Thus, the Legislature found, the Heartbeat Act is supported by the State's "compelling interest in protecting the life of a preborn child at all stages of its development." *Id.*

C. The Heartbeat Act is a continuation of Idaho's long-standing effort to protect human life in all its forms.

The Heartbeat Act is a continuation of the State's well-established policy preference for protecting human life, which has existed since well before statehood. In 1864, the Idaho Territorial Legislature enacted a law that prohibited abortion except to save a woman's life. Appendix 1, 2, & 3 to Resp't's Opp'n Br. (Act of Feb. 4, 1864, ch. IV, § 42, 1863-64 Idaho (Terr.) Laws 443, repealed and reenacted by Act of Dec. 21, 1864, ch. III, Pt. IV, § 42, 1864 Idaho (Terr.) Laws 305, reenacted by Act of Jan. 14, 1875, ch. IV, § 42, 1874 Idaho (Terr.) Laws 328.) The purpose of the

early abortion laws in Idaho was to protect life. *See Nash v. Meyer*, 54 Idaho 283, 31 P.2d 273, 280 (1934) (in a civil lawsuit between a married couple and a physician, the Court noted that the abortion statute is meant to "discourage abortions because thereby the life of a human being, the unborn child, is taken"). To that end, the Court has affirmed convictions for abortion without any suggestion that the prosecutions violated the Idaho Constitution. *See State v. Alcorn*, 7 Idaho 599, 64 P. 1014, 1019 (1901); *State v. Rose*, 75 Idaho 59, 267 P.2d 109 (1954).

A law prohibiting abortion, regardless of gestational age, remained on the books in Idaho until *Roe v. Wade*, 410 U.S. 113 (1973). Appendix 4, 5 & 6 to Resp't's Opp'n Br. (Idaho Rev. Code §§ 17-1810, 17-1811 (1932), recodified at Idaho Code Ann. §§ 18-601, 18-602 (1947), repealed by Act of March 13, 1973, ch. 197, § 2, 1973 Idaho Sess. Laws 443). After *Roe*, Idaho enacted laws regulating abortion but noted that any attempt to comply with *Roe* was not meant to "condon[e], or approv[e] abortion or the liberalization of abortion laws generally." Appendix 6 to Resp't's Opp'n Br. (Act of March 13, 1973, ch. 197, § 1, 1973 Idaho Sess. Laws 443).

To this day, the protection of life remains the public policy of Idaho. I.C. § 18-601 (2001) (declaring as Idaho's public policy that "all statutes, rules and constitutional provisions shall be interpreted to prefer, by all legal means, live childbirth over abortion."); *Blake v. Cruz*, 108 Idaho 253, 260, 698 P.2d 315, 322 (1984) ("Basic to our culture is the precept that life is precious. As a society, therefore, our laws have as their driving force the purpose of protecting, preserving and improving the quality of human life.") Idaho recognizes the rights of unborn children in several areas of law. For example, a plaintiff may bring a wrongful death action on behalf of an unborn child who was viable at the time of death and even before viability. *Volk v. Baldazo*, 103 Idaho 570, 573-74, 651 P.2d 11, 14-15 (interpreting I.C. § 5-311 and making no conclusion about whether a wrongful death claim could be brought for injury to an unborn child). Under Idaho Code § 15-8-209, a court may appoint a guardian ad litem to represent the interests of an unborn child. And, under the criminal code, the killing of an unborn child at any stage of pregnancy, other than abortion, may be prosecuted as homicide. *See* I.C. §§ 18-4001 (definition of murder); 18-4006 (definition of manslaughter); 18-4016 (definition of embryo and fetus). The Act continues the

Legislature's goal of protecting life in our civil jurisprudence within the constraints of the U.S. Constitution.

D. At this stage, it is unknown whether the Heartbeat Act will have any impact on abortion providers or on women seeking abortion in Idaho.

As argued in the State's motion to strike and supporting memorandum, most of Petitioners' factual assertions about the alleged impact of the Act should be stricken as inadmissible.[2] *See* Memorandum in Support of Respondent's Motion to Strike Portions of the Declarations of Kristine Smith and Dr. Caitlin Gustafson ("Memo ISO Motion to Strike"). But even if they were admissible, Petitioners fail to present the necessary evidence to support their fundamental assumptions that the Act will foreclose all abortions after a fetal heartbeat is detected or cause unconstitutional levels of delay or burden for Idaho women.

First, Petitioners present no evidence that the Act will deter every potential abortion provider in the state from performing an abortion after a fetal heartbeat is detected.[3] Planned Parenthood and Dr. Gustafson are not the only abortion providers in Idaho.[4] There are six other individuals who have performed abortions in Idaho since 2020 at locations other than Planned Parenthood whose intentions remain unknown. Appendix 7 to Resp't's Opp'n Br., (Decl. of Pam Harder ¶ 6). And one cannot assume from Planned Parenthood's decision on its own behalf that

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[2] As this is an original action that is being heard on briefing without the tools for discovery and factual development, Petitioners' factual assertions are not subject to the normal, rigorous testing that litigation is supposed to provide. The State believes that discovery would uncover crucial facts that contradict Petitioners' factual allegations. In any case, Petitioners have disclaimed any purpose for their factual assertions beyond establishing original jurisdiction. *See* Opp'n to Mot. for Recons. 4.

[3] It cannot be assumed that all Idaho physicians are troubled by the Act. The Idaho Medical Association did not oppose it after the trailer bill was added. https://www.idmed.org/idaho/Idaho_Public/Advocacy/IMA_Bill_Tracker.aspx?WebsiteKey=4fb4650f-db88-454a-92f7-d52f9b092b3c ("The bill sponsors agreed to address the legal concerns raised by IMA in a forthcoming trailer bill which would modify the language to allow attorney fees to be recouped by a physician who follows the law. The bill sponsors also agreed to return to normal burdens of proof to ensure a defendant is innocent until proven guilty. With those changes, IMA is neutral on HB 1309 . . . .") (last visited April 13, 2022).

[4] Ms. Smith's and Dr. Gustafson's declarations are based on their unsupported assumptions about liability exposure under the Heartbeat Act. *See* Pet'rs' Br. Ex. 3, ¶¶ 14, 26; Pet'rs' Br. Ex. 4, ¶ 27. How Ms. Smith and Dr. Gustafson might react once their assumptions are corrected must be tested through depositions and fact-finding before a court can conclude that Planned Parenthood and Dr. Gustafson would indeed not perform abortions in Idaho once the Act goes into effect.

the contract providers who perform abortions at Planned Parenthood locations will stop performing abortions at other practices. Declarations from these providers are conspicuous by their absence.

But even if every medical professional in Idaho decided to stop performing abortions after a fetal heartbeat is detected, it cannot be assumed that Idaho women would be unable to obtain abortions. Planned Parenthood and Dr. Gustafson will still perform abortions until about six weeks gestational age. Pet'rs' Br. Ex. 3, ¶ 4; Pet'rs' Br. Ex. 4, ¶ 17. Beyond that, it is up to Petitioners to prove that Idaho women will be unable to obtain abortions elsewhere, and they have not done so.[5] For example, Idaho women will still be able to go to facilities in neighboring states to obtain abortions. Indeed, given Idaho's geography and population centers, the most convenient abortion provider is located out-of-state for many Idaho women (as is true for many other types of specialized medical care). Appendix 8 to Resp't's Opp'n Br., (Exhibit A to Larrondo Decl.). Notably, Planned Parenthood has plans to provide abortions in Ontario, Oregon for the purpose of providing services to Idahoans.[6]

The inference that Idaho women would still be able to obtain abortions after the Heartbeat Act goes into effect is consistent with a recent study on the impact of Texas Senate Bill 8, which allows a far more expansive civil action for abortions performed after a fetal heartbeat is detected. *See* Tex. Health & Safety Code § 171.208, 210 (allowing, for example, a civil action to be brought by any person who aids or abets in the performance of an abortion, forbidding a host of defenses, and imposing extremely plaintiff-friendly venue requirements). The study concluded that abortions among Texas women only decreased by about 10 percent following the enactment of

[5] This is precisely the type of discovery issue that renders this matter inappropriate for the exercise of original jurisdiction, and it is inherent in the undue burden determination required to prove a violation of the Fourteenth Amendment to the U.S. Constitution. For example, in another abortion challenge, Planned Parenthood identified eight potential expert witnesses and eighteen depositions were taken and the court determined that summary judgment was inappropriate because factual issued existed as to whether the challenged law was a federally unconstitutional undue burden. Appendix 8 to Resp't's Opp'n Br. (Decl. Larrondo ¶ 3).

[6] https://oregoncapitalchronicle.com/2022/04/13/planned-parenthood-leasing-clinic-space-in-ontario/ Likely to serve Boise (57 miles, 53 minutes away), Meridian (48 miles, 46 minutes away), Nampa (39 miles, 40 minutes away), and Caldwell (31 miles, 30 minutes away).

Texas Senate Bill 8. Dianna Wray, *Texas Aimed to Ban Abortion Pills-But the Law Has Had Little Effect*, Texas Monthly, Mar. 8, 2022, https://www.texasmonthly.com/news-politics/texas-medication-abortion-pill-ban-ineffective/ ("the overall number of abortions among Texas women [following the enactment of Senate Bill 8] may be down only a little more than 10 percent."). The Act's impact on Idaho women is likely to be similarly limited.

There is also no reason to assume, as Petitioners do, that obtaining abortions by these means would cause federally unconstitutional levels of delay or burden. Petitioners have provided no competent, much less persuasive, evidence in support these contentions. While they speculate about logistical difficulties and cost of travel, Petitioners present no admissible evidence.[7] *See* Memo ISO Motion to Strike.[8] They also fail to present any admissible evidence in support of their assumption that any alleged delay in obtaining an abortion would push a woman past the point where she could obtain an abortion. *See id.*

Petitioners have failed to present the necessary admissible evidence to establish that the Heartbeat Act will have a meaningful impact on the ability of Idaho women to obtain abortions.

II. ADDITIONAL ISSUES PRESENTED

A. Should the Court dismiss the Petition because the requested writ of prohibition is improper?

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[7] Even if their speculation were admissible, it appears that evidence exists to negate these concerns, including for those low income and marginalized women that Petitioners assume desire abortions in Idaho. *See Companies to reimburse Idaho workers for travel costs to get abortion in another state*, Idaho Statesman, Mar. 31, 2022, https://www.idahostatesman.com/news/business/article259977235.html (last visited April 13, 2022) (identifying Hewlett Packard Enterprise, Citigroup Inc., Apple, Inc. Levi Strauss & Co., Match Group, and Bumble Inc. as employers who will cover travel costs of their employees to obtain an abortion of state); Northwest Abortion Fund (https://nwaafund.org/) ("we help people pay for their abortion care . . . . We also help people get to and from the clinic. And we make sure people traveling for care have a safe place to stay.")

[8] Petitioners have similarly provided no evidence to support their assertion that Idaho's existing regulatory regime for abortion is unconstitutionally burdensome even without the Heartbeat Act. For example, Planned Parenthood's contention that Idaho's physician-only law is an unconstitutional undue burden is currently at issue in *Planned Parenthood Great Nw. and Hawaiian Islands v. Wasden*, No. 1:18-CV-00555-BLW, 2021 WL 4496942 (D. Idaho Sep. 30, 2021). There, Planned Parenthood has strenuously argued that the undue burden test is a fact-dependent test that requires resolution via trial on the merits, and the district court thus far has agreed. *Id.* (memorandum opinion denying defendants' motion of summary judgment).

B. Should the Court dismiss the Petition because the Court lacks original jurisdiction to consider it?

C. Should the Court dismiss the Petition because Petitioners lack standing and their claims are not ripe?

D. Should the Court dismiss the Petition because the State of Idaho is not a proper respondent for an original action?

III. ARGUMENT

A. The Petition should be dismissed as procedurally improper.

Petitioners attempt to shoehorn an advisory declaratory judgment action into this Court's limited original jurisdiction to issue certain writs under article V, section 9 of the Idaho Constitution by asking the Court to direct all state courts (who are not named as parties), to do nothing more than adhere to the Court's determination of the constitutionality of a statute that is not yet in effect and that may never have practical effect. Petitioners attempt this not by naming the entity against whom they seek a writ as respondent—the Idaho judiciary—but by naming the "State of Idaho" and, worse, no case or controversy exists. The Court should dismiss the Petition because Petitioners have chosen the wrong party and the wrong forum to achieve their litigation objectives.

1. The requested writ of prohibition cannot issue.

Despite naming the entire State of Idaho as respondent, Petitioners seek a writ of prohibition aimed only at Idaho's lower courts "forbidding" them "from giving effect to SB 1309." Pet., Prayer for Relief, at (b). This writ is improper and ineffectual for several reasons.

First, the Court "may issue a writ directing *the respondent* to act in accordance with the writ," not a third party. I.A.R. 5(d). A petition seeking a writ compelling or restraining the courts must be directed to each of the courts the Petitioner seeks to compel or restrain, or else to some official with authority to command the courts. Naming the State of Idaho as the respondent and hoping to restrain some unnamed individuals or tribunals is unsupported by court rule. If Petitioners wish to obtain a writ controlling the conduct of the judiciary, they must name as

respondents the members of the judiciary whose ongoing or threatened conduct is to be restrained (Petitioners are unable to satisfy this fundamental prerequisite to prohibitory relief because, at this time, no such judicial officer exists).

Second, a writ of prohibition is "an order that arrests the proceedings of any court, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of the court, corporation, board or person." I.R.C.P. 74(a)(2). To "arrest" is "to bring to a stop," "check, slow," or "to make inactive." *Arrest*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/arrest (last visited April 25, 2022). Thus, the definition implies that a proceeding has already begun, and through the writ, the action will be stopped or slowed. Indeed, this Court has explained that a prerequisite to issuing a writ of prohibition is that "the tribunal, corporation, board, or person *is proceeding* without or in excess of the jurisdiction of such tribunal, corporation, board, or person." *Olden v. Paxton*, 27 Idaho 597, 150 P. 40, 41 (1915) (emphasis added); *see also Rust v. Stewart*, 7 Idaho 558, 64 P. 222, 223 (1901) (A writ of prohibition did not lie when an appeal of an order from the Ada County Board of Commissioners was filed in the district court because, in part, this Court could not "presume, in advance of the action of the district court, that it will exceed its jurisdiction.").

The writ of prohibition cases that Petitioners cite follow this pattern.[9] Pet'rs' Br. 15–16. Where a writ of prohibition issues, there are actual ongoing proceedings to arrest. *See, e.g.*, *Reclaim Idaho v. Denney*, 169 Idaho 406, 497 P.3d 160, 179 (2021) (A group organizing a referendum was subject to the Secretary of State's enforcement of the challenged law with regard to its collection of signatures at the time of the lawsuit); *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 124, 15 P.3d 1129, 1132 (2000) (The Secretary of State was in the process

[9] Petitioners also cite several inapposite original jurisdiction cases where a writ of prohibition was not requested. *See Ybarra v. Legislature by Bedke*, 166 Idaho 902, 906, 466 P.3d 421, 425 (2020) (noting that jurisdiction was not at issue, and ultimately denying the writ); *Regan v. Denney*, 165 Idaho 15, 18, 27, 437 P.3d 15, 18, 27 (2019) (denying a petition for writ of mandamus, which has a different purpose under I.R.C.P. 74); *Coeur D'Alene Tribe v. Denney*, 161 Idaho 508, 526, 387 P.3d 761, 779 (2015) (granting writ of mandamus, not writ of prohibition).

of directing the preparation of the primary election ballot). Thus, in *Re: Petition for Writ of Prohibition*, this Court issued a writ of prohibition against a magistrate court *after* the magistrate court had the opportunity to apply facts to law, rule on the motion for contempt, and issue a warrant. 168 Idaho 909, 489 P.3d 820 (2021). The Court does not use the writ of prohibition to preempt the hypothetical future actions of lower courts.

Here, there is no proceeding to arrest. The Heartbeat Act has never been invoked in any Idaho court. Nor have Petitioners presented any evidence that the Act will ever be invoked. *See, e.g.*, Pet'rs' Br. Ex. 3, ¶ 14 (stating that "medical professionals at Planned Parenthood *could* be liable to patients and family members of the fetus for significant damages," but providing no evidence of any specific threat to bring an action) (emphasis added); Pet'rs' Br. Ex. 4, ¶¶ 27–28 (opining that "I *could* be personally liable for each abortion under SB 1309," and "I *fear* that *even if* I comply with SB 1309 . . . I will be subject to frivolous lawsuits") (emphasis added). To grant Petitioners' request, this Court must presume that some unknown third party will file suit in a court in the State of Idaho seeking damages under the Heartbeat Act *and* that *every court in the State* will exceed its jurisdiction in presiding over this future, speculative action. The Court should not make this speculative leap.

In any case, a writ "forbidding Idaho courts from giving effect to SB 1309" cannot be issued. It is unclear what Petitioners wish the writ to actually do, but if they seek what *Whole Woman's Health* sought regarding Texas Senate Bill 8, "an order enjoining all state-court clerks from docketing [SB 1309] cases and all state-court judges from hearing them," *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 532, 211 L. Ed. 2d 316 (2021), such relief would violate article V, section 20 of the Idaho Constitution, which grants district courts "original jurisdiction in all cases, both at law and in equity." And, if Petitioners seek a writ requiring lower courts to dismiss a Heartbeat Act civil action once it is docketed, then "forbidding Idaho courts from giving effect to SB 1309" would simply duplicate the declaratory relief they seek. Idaho courts are required to adhere to Idaho Supreme Court decisions. Pet'rs' Br. Ex. 3, ¶ 3; *State v. Grist*, 147 Idaho 49, 53,

205 P.3d 1185, 1189 (2009). In either case, the requested writ cannot constitute an order that arrests court proceedings.

Third, the writ cannot issue because it is really an improper advisory opinion. A writ of prohibition that restrains all Idaho courts from giving effect to the Heartbeat Act on constitutional grounds is the same thing as an appellate court decision ruling on the constitutionality of a challenged law, but issued outside the required case or controversy for justiciability. Such a ruling would incentivize litigants to come to this Court first for an advance decision on their constitutional arguments, as well as violate the separation of powers established in article II, section 1 of the Idaho Constitution, which constrains the Court to deciding actual cases and controversies. Petitioners' would have this Court act less as a court, deciding a legal dispute between two parties in the context of specific facts, and more like a legislature, effectively repealing a law. Pet'rs' Br. 2 ("It now falls to this Court to do what neither the Legislature nor the Governor has done: block this . . . law.").

2. The exercise of original jurisdiction over the Petition is improper.

For this Court to exercise its original jurisdiction, Petitioners must (1) seek a writ that the Court has the power to issue and (2) establish "that there is not a plain, speedy, and adequate remedy in the ordinary course of law." *Reclaim Idaho*, 169 Idaho 406, 497 P.3d at 177; Idaho Const. art. V, § 9 ("The Supreme Court shall also have original jurisdiction to issue writs of mandamus, certiorari, prohibition, and habeas corpus[.]") As stated above, Petitioners have not met the first criterion. They also fail to meet the second.

Petitioners have failed to establish that a plain, speedy, and adequate remedy does not exist in the ordinary course of law. There is no reason they could not either (1) bring their challenge in district court seeking a declaratory judgment and injunctive relief, or (2) raise their arguments as an affirmative defense to a civil action brought under the Heartbeat Act in district court. *See, e.g.*, *Wasden ex rel. State v. Idaho State Bd. of Land Comm'rs*, 150 Idaho 547, 551–54, 249 P.3d 346, 350–53 (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); *Little v. Broxon*, 31 Idaho 303, 170 P. 918, 919 (1918) (denying a writ of prohibition seeking to prohibit a state official from bringing a case to enforce state law, and holding it was not appropriate for an original action because the petitioner had a plain, speedy and adequate remedy in the form of defending against the lawsuit, if it was ever brought—and "[i]f no action is commenced, no remedy is necessary"). Religious defendants, for example, frequently raise constitutional and civil rights issues as affirmative defenses to statutory causes of action. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012). In either case, Petitioners would have the ability to appeal an unfavorable district court ruling.

The district courts are perfectly capable of adjudicating constitutional claims. *E.g.*, *Regan v. Denney*, 165 Idaho 15, 32, 437 P.3d 15, 32 (2019) (Moeller, J., concurring in part and dissenting in part) ("The constitutionality of such statutory language has previously been challenged in the district courts of the state without the necessity of the Supreme Court invoking its original jurisdiction."). Indeed, the district court is best suited to resolve the numerous factual issues that Petitioners raise, such as whether every medical professional in the State will be deterred from performing abortions and whether the Act will indeed pose a substantial obstacle to a large fraction of Idaho women seeking an abortion. *Wasden ex rel. State*, 150 Idaho at 554, 249 P.3d at 353 (2010) ("[T]he district court will be in the best possible position to assess the fundamental factual question[s]" of the case).

Petitioners misunderstand the requirements for original jurisdiction when they argue that it is justified simply because they have made allegations "concerning a possible constitutional violation of an urgent nature." Pet'rs' Br. 15 (citing *Reclaim Idaho*, 169 Idaho 406, 497 P.3d at 172). Not only is this articulation of the standard wrong, but, if accepted by this Court, it would turn the Court into one of first impression in *every* constitutional challenge because Petitioners interpret "urgent" to mean that "the challenged law will go into effect."[10] Petitioners' proposed

[10] In what circumstances is an alleged constitutional violation not an "urgent" matter? *See Regan*, 165 Idaho at 31–32, 437 P.3d at 31–32 (2019) (Moeller, J., concurring in part and dissenting in part) (distinguishing the "actual and urgent constitutional crisis" and "unique and urgent

standard would prevent all cases with "far reaching implications," bearing on weighty constitutional issues of first impression from being "tested and sharpened through the adversarial system in the district court." *Regan*, 165 Idaho at 29, 437 P.3d at 29 (2019) (Brody, J., concurring in part and dissenting in part). Moreover, the alleged chilling effect of the Act does not support the abnormal judicial action. This Court should be guided by the U.S. Supreme Court and conclude that any alleged chilling effect caused by the Heartbeat Act being on the books is insufficient to justify extraordinary judicial action in a pre-enforcement suit. *Whole Woman's Health*, 142 S. Ct. at 538.

Something more is required to prove the requisite urgency for the exercise of original jurisdiction beyond the challenged law becoming effective. *Reclaim Idaho*, 169 Idaho 406, 497 P.3d at 178–79 (citing the 60-day period to obtain required number of signatures as reason for urgency); *Regan*, 165 Idaho at 21, 437 P.3d at 21 (2019) (citing the 90-day window to submit plan amendments as reason for urgency); *Coeur d'Alene Tribe v. Denney*, 161 Idaho 508, 514, 523, 387 P.3d 761, 767, 776 (2015) ("[T]his Court has insisted upon strict adherence to the procedures outlined in our Constitution for enacting laws and in exercising the veto power[,]" and "it is unlikely that the district court and the legislature could offer a speedy remedy considering the time-sensitive nature of this case and the important constitutional question at stake."). Unlike those cases—in which an external constraint created a quickly approaching deadline to act, or where there was uncertainty as to whether the Constitution's time-limited procedures were correctly followed—there is no externally imposed deadline or question about whether the Heartbeat Act was validly enacted.

Petitioners have not met their burden of providing "evidence or proof of a crisis or urgent situation." *See* 168 Idaho 389, 118 Idaho 43, 45, 794 P.2d 632, 634 (1990); s*ee* Memo ISO Motion

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constitutional issue of first impression that would paralyze the legislature until it was resolved" present in *Sweeney v. Otter*, 119 Idaho 135, 804 P.2d 308, from the claims in *Regan*, and explaining that, "[t]he constitutionality of such statutory language has previously been challenged in the district courts of the state without the necessity of the Supreme Court invoking its original jurisdiction.").

to Strike. This case actually counsels *against* urgency because the U.S. Supreme Court will decide a case this term that could completely reset how pre-viability abortion regulations are evaluated and destroy the underlying premise of Petitioners' challenge. *See Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 414, Supreme Court Dkt. No. 19-1392 (Oct. 18, 2021). There is no need to rush to judgment when the U.S. Supreme Court could reset the evaluative lens at any moment. The Court should decline to exercise its original jurisdiction.

3. Petitioners lack standing and their claims are not ripe.

Petitioners would have this Court believe that redressability is the only criteria for standing. *See* Pet'rs' Br. 17-18. Far from it. Petitioners lack standing to bring this action because there is no case or controversy underlying this action and the elements of relaxed standing are not met. For similar reasons, their claims are not ripe.

To have standing, Petitioners must allege an "injury in fact," meaning their injury must be "actual or imminent, not conjectural or hypothetical." *Tucker v. State*, 162 Idaho 11, 19, 394 P.3d 54, 62 (2017) (citation omitted). Idaho courts have adopted the "case or controversy" requirement of standing from federal practice. *Reclaim Idaho*, 169 Idaho 406, 497 P.3d at 172. Here, there is no case or controversy for two reasons.

First, as the U.S. Supreme Court has recently recognized in litigation over Texas Senate Bill 8, "'no case or controversy' exists 'between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute.'" *Whole Woman's Health*, 142 S. Ct. at 532 (quoting *Pulliam v. Allen*, 466 U.S. 522, 538 n.18 (1984)). As the Petition turns on a request for an order that will control the conduct between the judge who adjudicates a claim under the Act and the litigant who attacks the constitutionality of the Act, there is no case or controversy here.

Second, Petitioners' alleged injury rests on speculation about the conduct of third parties. But "[a]n unenforced statute generally does not cause injury" sufficient to confer standing. *Winsness v. Yocom*, 433 F.3d 727, 728 (10th Cir. 2006). There must either be "enforcement or [a] credible threat of enforcement" for an injury to arise sufficient to confer standing. *Id.* Here, Petitioners have alleged neither. Courts are reluctant "to endorse standing theories that rest on

speculation about the decisions of independent actors." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013)*; see also Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 653 (9th Cir. 2017) ("Plaintiffs filed their complaint before the Shell Egg Laws took effect. As a result, their allegations about the potential economic effects of those laws, after implementation, were necessarily speculative."). This reluctance is only overcome when a finder of fact, weighing the evidence, concludes that there is a sufficient likelihood that third parties will act a particular way, and this would lead to the alleged injury. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565–66 (2019) (ruling that the district court's findings of fact based on the evidence—that noncitizen households would respond to the census at lower rates than other groups, which would lead to the asserted injuries—were not clearly erroneous).

Petitioners cannot meet this burden because they have not presented competent evidence that any third-party intends to sue over the provision of an abortion after a fetal heartbeat is detected; that any medical professional other than themselves intends to stop performing abortions after the Heartbeat Act goes into effect; or that Idaho women will be unable to obtain abortions. Practitioners may choose to continue providing abortions after a fetal heartbeat is detected, and if sued, raise constitutional issues as affirmative defenses. If Petitioners are correct as to the facial unconstitutionality of the Act under *Roe* and *Casey*, any civil lawsuit brought under the Act would be quickly dismissed. Until someone attempts to sue a practitioner under the Act, the actual effect of the law and any injurious effect are speculation; therefore, no case or controversy exists.

Further, the elements of relaxed standing are not met. At times, this Court has "relaxed" the standing requirements where "(1) the matter concerns a significant and distinct constitutional violation, and (2) no party could otherwise have standing to bring a claim." *Emps. Res. Mgmt. Co. v. Ronk*, 162 Idaho 774, 777 n.1, 405 P.3d 33, 36 n.1 (2017) (citing *Coeur d'Alene Tribe*, 161 Idaho at 514, 387 P.3d at 767). Here, as discussed below, no constitutional violation exists. And, in any case, there are other parties who have standing to bring a claim. Once the risk of constitutional injury under the Heartbeat Act moves from speculation to reality, Petitioners—for

some of their claims—or their patients—for certain other of the claims—may have standing. But relaxed standing cannot salvage the absence of a case or controversy.

For similar reasons, Petitioners' claims are not ripe. "[R]ipeness asks 'whether there is any need for court action at the present time.'" *State v. Philip Morris, Inc.*, 158 Idaho 874, 883 n.6, 354 P.3d 187, 196 n.6 (*quoting Miles v. Idaho Power Co.*, 116 Idaho 635, 642, 778 P.2d 757, 764 (1989)). "When no controversy has actually arisen, and it is shown that a controversy might never arise, the case is not ripe for judicial review." *Id*. (citation omitted). Until Petitioners provide competent evidence of the real possibility of injury, no controversy has arisen, and one might never arise.

4. The State of Idaho is not a proper respondent.

The Court should also dismiss the Petition because the State of Idaho is not a proper respondent in an original action as it is not the proper subject for the issuance of a writ. A writ of prohibition can only issue against "*any court, corporation, board or person*" when the appropriate conditions are met. I.R.C.P. 74(a)(2) (emphasis added). The State of Idaho is not a court, corporation, board, or a person, so a writ of prohibition cannot lie against it, nor does it have any enforcement powers under the Heartbeat 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). Indeed, Petitioners' failure to ask for a writ of prohibition against the State is effectively an admission that the State has no "proceedings" to "arrest." Petition, Prayer for Relief (seeking a writ against the courts, not against the State).

Petitioners rely on cases brought in district court to support naming the State as respondent, which merely shows the error of their choice of forum. For example, they rely on *Tucker v. State*, 162 Idaho 11, 18 (2017). Pet'rs' Br. 17. But *Tucker* does not apply here, because the exercise of original jurisdiction hinges on the *writ*, and *Tucker* said nothing about the propriety of a petition for writ directed only at the State of Idaho. The Court in *Tucker* concluded only that sovereign immunity did not bar a declaratory judgment action *brought in district court* against the State of Idaho to proceed. *Tucker*, 162 Idaho at 18, 394 P.3d at 61. Petitioners cannot name the State of

Idaho as a token respondent and request a writ against some other actor to shoulder open the original jurisdiction door. The Petition should be denied for failure to name a proper respondent.

B. The Heartbeat Act's civil action does not violate the Fourteenth Amendment to the U.S. Constitution.

While Petitioners side-step the issue, many of their arguments (wrongly) rely on the assumption that the Heartbeat Act violates the Fourteenth Amendment to the U.S. Constitution. *See* Pet'rs' Br. 18, 26, 34. This assumption is incorrect. If the Court feels that it must address the federal constitutionality of the Act to decide the Petition, Petitioners have failed to meet their burden of overcoming the Heartbeat Act's presumption of constitutionality and establishing that the law is facially unconstitutional as violating *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*. At the outset, the Heartbeat Act cannot possibly be found unconstitutional on this facial challenge even assuming it prohibits all abortions after a fetal heartbeat is detected (it does not) because the civil action applies to both pre- and post-viability abortions. *See Hernandez v. Hernandez*, 151 Idaho 882, 884, 265 P.3d 495, 497 (2011) ("To succeed on a facial challenge, one must demonstrate that under no circumstances the statute is valid."). There is no dispute that the State can prohibit abortions post-viability. *Casey*, 505 U.S. 833, 879 (1992) (After viability, the State may proscribe abortion, except where it is necessary to preserve the life or health of the mother). Moreover, if the Heartbeat Act were read to only prohibit pre-viability abortions via the civil cause of action (an incorrect reading), the unconstitutionality of the prohibition under the U.S. Constitution would be an affirmative defense to any civil action brought under the Heartbeat Act. The validity of this affirmative defense renders any "prohibition" meaningless. Petitioners cannot establish that the Act facially violates the U.S. Constitution.

There are two more reasons why Petitioners' challenge fails even if one assumes the Act only has pre-viability application: (1) the Heartbeat Act is not a state regulation of the abortion procedure and therefore cannot violate the U.S. Constitution, and (2), even if it were, Petitioners have not presented the necessary evidence to prove that the Heartbeat Act's civil action violates

the U.S. Constitution by placing an undue burden on a woman's ability to obtain an abortion of a nonviable fetus.

1. The Heartbeat Act is not a state regulation of the abortion procedure.

Because the Heartbeat Act is not a state regulation of the abortion procedure, it is not governed by the U.S. Supreme Court's line of precedent beginning with *Roe v. Wade*. The Court's recognition of a right to abortion under the U.S. Constitution has always been limited to a restriction on the state's ability to "*regulate* the abortion procedure[.]" *Roe*, 410 U.S. at 163 (emphasis added); *Casey*, 505 U.S. at 874 (concluding that the state may regulate pre-viability abortions, including to promote its profound interest in potential life, unless the "*state regulation* imposes an undue burden" on a woman's ability to choose an abortion)[11] (emphasis added); *id.* at 877 ("A finding of an undue burden is a shorthand for the conclusion that a *state regulation* has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.") (emphasis added). Black's Law Dictionary defines "regulation" as "[c]ontrol over something by rule or restriction." *Regulation*, Black's Law Dictionary (11th ed. 2019). Understanding a "state regulation" prohibited by *Roe* and *Casey* to be an affirmative rule or restriction controlled, i.e., enforced, by the state is consistent with the "state regulations" of abortion that this Court has evaluated under those precedents. *See, e.g.*, *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *June Medical Services, LLC v. Russo*, 140 S. Ct. 2103 (2020).

The Heartbeat Act is not a "state regulation." It does not control the conduct of abortion providers either by rule or restriction enforced by the State because a private civil action is neither a rule nor a restriction enforced by the State.[12] Because the Legislature expressly prohibited the

[11] As noted above, the U.S. Supreme Court will issue a decision this term that could dramatically reset *Casey's* undue burden standard for pre-viability cases. *See Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 414, No. 19-1392 (Oct. 18, 2021).

[12] Petitioners may try to argue that the heartbeat testing and prohibition on performing abortions after a heartbeat is detected portions of the Heartbeat Act are in and of themselves state regulations.

State from enforcing the Heartbeat Act, the law is a dead letter if no individual citizen ever decides to file suit under the Heartbeat Act. Instead, the Heartbeat Act merely expresses the State's preference for life and promotes actions it deems to be in the public interest through a private cause of action.

When the State merely expresses its preference for childbirth over abortion, it does not run afoul of the U.S. Constitution. *Webster v. Reproductive Health Services*, 492 U.S. 490, 509-10 (1989). This is true even when the State's expression of its preference could incidentally prevent a woman from using her chosen doctor, increase the cost of obtaining an abortion, and delay it. *Id.* at 509. The Heartbeat Act is akin to the laws that the U.S. Supreme Court has upheld that prohibit the use of public funds, facilities, and employees for the performance of abortions, and therefore, it cannot be found to violate the U.S. Constitution. *See, e.g., Maher v. Roe*, 432 U.S. 464, 473-74 (1977); *Harris v. McRae*, 448 U.S. 297, 317-18 (1980); *Webster*, 492 U.S. at 509-510.

2. In the alternative, Petitioners have not established that the Heartbeat Act is a federally unconstitutional undue burden.

Even if the Heartbeat Act is a regulation governed by *Roe* and *Casey*, Petitioners have failed to meet their burden of establishing it is a federally unconstitutional undue burden. A state regulation is an undue burden if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 505 U.S. at 877. Petitioners have established neither.

Petitioners have not established that the Legislature was motivated by an improper purpose in passing the Heartbeat Act. In *McCormack v. Heideman*, the U.S. District Court found an improper purpose behind an abortion regulation because the court found the law at issue was clearly unconstitutional, not because some state official expressed concern. 900 F. Supp. 2d 1128,1150-51 (D. Idaho 2013) (relying on the State's clear disregard of controlling Supreme Court precedent and its "apparent determination to define viability in a manner *specifically and repeatedly* condemned by the Supreme Court" to find an improper purpose) (emphasis added).

This argument would fail. The civil action is what gives these portions of the Heartbeat Act meaning. In fact, according to Petitioners, it is what gives them standing to sue.

Here, the U.S. Supreme Court has repeatedly allowed Texas's analogous, but far more expansive, private cause of action to stand. *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494 (2021); *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021). Given this reality, the thoughts of the Governor and Chief Deputy Kane cannot establish that the Legislature was flying in the face of clear, repeated U.S. Supreme Court precedent.

Petitioners also fail to prove that the Heartbeat Act has the effect of placing a substantial obstacle in the path of a woman seeking an abortion. All they offer is inadmissible speculation and the occasional conclusory statement that the law will effectively ban all abortions after six weeks of pregnancy.[13] Petitioners have presented no evidence that the Act will actually have this effect or that the Act is facially unconstitutional as imposing a substantial obstacle "in a large fraction of the cases in which [the law] is relevant" in Idaho. *June Med.*, 140 S. Ct. at 2132 (plurality opinion) (citation omitted); *Hellerstedt*, 579 U.S. at 626, (citation omitted); *Casey*, 505 U.S. at 894-95; Memo ISO Motion to Strike. Petitioners present no evidence of the number of women for whom the law would be an actual restriction or of the number of women who would be burdened by the law, both of which are required to prove a substantial obstacle on a facial challenge. *See Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 958–60 (8th Cir. 2017). Nor have Petitioners presented evidence that establishes that Idaho women would be foreclosed from all options to obtain an abortion after six weeks gestational age, including from other Idaho providers and out-of-state clinics.

With this in mind, the Court must evaluate the claims that Petitioners actually do make—Idaho Constitution claims--with the understanding that the Heartbeat Act complies with the U.S.

[13] Petitioners fail to argue that the Heartbeat Act is a substantial obstacle despite apparently conceding that they must make this showing. They devote a large section of their Statement of the Case to facts that, if admissible, would be used to support such an argument. *See* Pet'rs' Br. 9-14, 18, 34. The Court cannot give any weight to issues that Petitioners have not raised and arguments that Petitioners don't bother to make. *Lamprecht v. Jordan, LLC*, 139 Idaho 182, 187, 75 P.3d 743, 748 (2003) ("When a party fails to support an issue with authority or argument, this Court will not consider it."). All that Petitioners do with their allegations regarding the impact of the Heartbeat Act is demonstrate just how inappropriate their claims are for an original action.

Constitution. The State now turns to the claims that Petitioners have directly placed before the Court.

C. Petitioners' separation of powers claim fails.

Petitioners' claim that the Heartbeat Act violates the separation of powers contained in Idaho's Constitution is fatally flawed both procedurally and substantively. Procedurally, Petitioners lack standing to assert a claim on behalf of the Executive. Substantively, the Heartbeat Act does not impermissibly entrench on the Executive's constitutional powers. The claim fails.

1. Petitioners lack standing to assert claims on behalf of the Governor.

Petitioners lack standing to bring a claim on behalf of the Executive for any alleged encroachment of the Executive's powers. Petitioners ignore the principle that "[e]ven though a potentially illegal action may affect the litigant as well as a third party, the litigant may not rest his claims on the rights or legal interests of the third party." *State v. Doe*, 148 Idaho 919, 936, 231 P.3d 1016, 1033 (2010) (citing *Dep't of Labor v. Triplett*, 494 U.S. 715, 720, (1990). Because the separation of powers claim rests on asserting the "rights or legal interests of [a] third party"—the Executive—it fails for lack of standing.[14]

In Idaho, "[c]ourts must hesitate before resolving the rights of those not parties to litigation." *State v. Doe*, 148 Idaho at 936, 231 P.3d at 1033. The gravity of the "right" at issue does not change the standing analysis. "[S]tanding focuses on the party seeking relief and not on the issues the party wishes to have adjudicated[.]" *Brooksby v. Geico Gen. Ins. Co.*, 153 Idaho 546, 549, 286 P.3d 182, 185 (2012). It also does not matter that, in Petitioners' view, the State has not followed its own constitution. "An interest as a concerned citizen in seeing that the government abides by the law does not confer standing." *Arambarri v. Armstrong*, 152 Idaho 734, 738–39, 274 P.3d 1249, 1253–54 (2012).

[14] Petitioners do not attempt to assert that they have third-party standing to sue on behalf of the Governor. *See* Pet. ¶¶ 6-7 (alleging third-party standing only as to Petitioners' current and future patients); Pet'rs' Br. 17-18 (arguing only that Petitioners have standing because, they allege, their claims are redressable).

The powers of Idaho's Executive "are vested in the governor and the executive branch agencies." *Emps. Res. Mgmt. Co. v. Kealey*, 166 Idaho 449, 452, 461 P.3d 731, 734 (2020). Petitioners, of course, are not the Governor nor are they officers of an executive agency. Pet. ¶¶ 6–7. Yet, they attempt to assert the Executive's interest in protecting the power granted to it by article IV, section 5 of the Idaho Constitution to ensure that the law is faithfully executed. Petitioners' separation of powers claim is therefore barred for lack of standing.

2. The Heartbeat Act does not violate the separation of powers established in Idaho's Constitution.

Petitioners would have this Court believe that the Idaho Legislature violates the Executive's constitutional power to ensure that the law is faithfully executed whenever it enacts a law that provides for a civil cause of action. Not so. Nothing in the separation of powers enshrined in Idaho's Constitution precludes the Idaho Legislature from creating civil causes of action.

Idaho's Constitution provides that the State's power is "divided into three distinct departments, the legislative, executive and judicial[.]" Idaho Const. art. II, § 1. To preserve that separation, the Constitution mandates that "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." *Id.* In *Tucker*, the Court explained that the "separation of powers doctrine is triggered when (1) a textually demonstrable constitutional commitment assigns the matter to a particular branch of government; or (2) the matter implicates another branch's discretionary authority." *Tucker*, 162 Idaho at 29, 394 P.3d at 72.

Neither trigger is tripped by the Heartbeat Act. This is demonstrated by the Court's decision in *Tucker*. There, the right to counsel was at issue. The Court held that vindication of the right did not trigger the separation of powers doctrine because the right "is not entrusted to a particular branch of government" and a "particular branch of government" did not have discretion to enforce the right. *Id.* The same is true here. The Idaho Constitution does not assign the power to bring civil

causes of action regarding abortion to the Executive, nor does the Executive have the discretion to bring *all* civil causes of actions that exist under Idaho law.

It is well-accepted that the Legislature has the power to create civil causes of action. *Stuart v. State*, 149 Idaho 35, 45, 232 P.3d 813, 823 (2010) (explaining that it "is properly within the power of the legislature to establish" causes of action and to define the boundaries of those causes of action). Idaho's wrongful death statute, which already allows parents to sue for the death of their unborn child, is a perfect example. I.C. § 5-311; *Volk*, 103 Idaho at 573-74, 651 P.2d at 14-15. Further, as discussed below, the Legislature has the power to create the procedural boundaries for such causes of action.[15] *See* I.C. § 18-4017(4) (stating who may bring an action for injunctive relief against persons who are reasonably believed to be about to perform assisted suicide on a person); I.C. § 5-311(2)(b) (providing for a cause of action for certain family members to recover loss of support and services when the death of a person is caused by the wrongful act or neglect of another); I.C. §§ 6-1001 to -1014 (outlining in detail the prelitigation proceedings for medical malpractice claims; the tolling of limitations periods; services of claims on accused provider of health care; and confidentiality of proceedings). Again, the Legislature does this all the time, and the Idaho judiciary routinely enforces these statutory claims. The Executive's role is merely to enforce the law as written. *Emps. Res. Mgmt. Co.*, 166 Idaho at 452, 461 P.3d at 734 (explaining that the Executive's function is "carrying out legislative directives and policies").

The Heartbeat Act's location in Idaho Code is not evidence that the State is "deputizing" its citizenry to enforce its criminal prohibitions. *See* Pet'rs' Br. 21. Title 18, Chapter 6 houses most of the State's laws related to abortion. There are multiple civil causes of action that already exist

[15] If the Legislature's procedural rules for the civil action under the Heartbeat Act run afoul of the Constitution, they are preempted by it. Petitioners, as well as the district court in *Van Stean v. Texas*, No. D-1-GN-21-004179 (Dist. Ct. Travis Cnty., Tex., Dec. 9, 2021) on whose decision Petitioners rely, err in assuming that the Legislature can, or did, create standing. *See* Pet'rs' Br. 23-24. As Petitioners point out, standing is a constitutional limitation. The Legislature cannot override the Constitution. *See Evans v. Teton County*, 139 Idaho 71, 75, 73 P.3d 84, 88 (2003). Any individual who falls within the group for whom a cause of action under the Act is available who lacks constitutional standing will find his or her claim jurisdictionally barred. This does not mean the law is facially unconstitutional.

in Title 18, Chapter 6, Idaho Code. *See* I.C. § 18-615(2) (allowing a pregnant woman who is injured by reason of criminal coercion or attempted coercion to obtain an abortion to bring a civil suit and allowing her to recover attorney's fees and costs if she prevail); I.C. § 18-618(1) (allowing an action for the pregnant woman, the father of the unborn child if married to the woman at the time of the abortion, or a maternal grandmother if the mother is deceased for violations of Idaho Code § 18-617 and allowing an award of actual and punitive damages). The Legislature could reasonably have decided to keep the civil cause of action available under the Heartbeat Act together with these laws.

Petitioners' argument also ignores that the Executive played an equal role in enacting the Heartbeat Act. In many of the separation of powers cases that Petitioners cite, the laws at issue are those affecting the power of the judiciary. *See* Pet'rs' Br. 20. The judiciary, of course, plays no role in enacting laws, so it makes sense that additional checks exist to ensure that the Legislative and Executive Departments are not encroaching on the equal power of the Judiciary. But here the posture is different. Governor Little signed the Heartbeat Act into law. He may have expressed reservations about the law, but he made the decision to approve it. The Governor does not now need abortion providers to rescue him from his own decision.

Petitioners' separation of powers argument also stands on the rotten foundation of assuming that the Legislature impermissibly bypassed the Executive to do what the Executive could not do. *See* Pet'rs' Br. 18-19. As discussed above, that assumption crumbles upon inspection. Petitioners have not established that the Heartbeat Act's civil cause of action violates the U.S. Constitution. The Heartbeat Act's civil action does not "deputize" private citizens to do what the Executive could not do, but rather expresses the State's value for unborn life by allowing private citizens to have that value recognized if they so choose.

D. The Heartbeat Act does not constitute an impermissible "special" law under the Idaho Constitution.

Petitioners err in assuming that a law that equally impacts all medical providers in the State is an impermissible "special" law under article III, section 19 of Idaho's Constitution. *See* Pet'rs'

Br. 26. To determine whether a law is "special," courts first look at whether the law facially "applies only to an individual or number of individuals out of a single class similarly situated and affected or to a special locality" and does not just have local application or actual effect on a limited group. *Jones v. Lynn*, 169 Idaho 545, 498 P.3d 1174, 1191 (2021). If the law passes this first step, courts then examine whether the law pursues any "legitimate interest in protecting citizens of the state." *Id.* Finally, if the law does not have a legitimate purpose, courts look at whether it has an "arbitrary, capricious, or unreasonable" classification. *Id*. Only if the law fails all three elements of this test is it deemed an impermissible special law.

For the first step, Petitioners do not and cannot argue that the Heartbeat Act applies to a particular individual or a number of individuals out of a class; for that reason alone, their claim fails. *See* Pet'rs' Br. 24-26. The Heartbeat Act applies to all medical providers alike, and therefore cannot be "special." *See Citizens Against Range Expansion v. Idaho Fish & Game Dep't*, 153 Idaho 630, 636, 289 P.3d 32, 38 (2012) (holding that a law setting a noise standard for all non-military outdoor shooting ranges was a general rather than special law, even though the law was directed at only non-military outdoor ranges and would, in effect, only impact four state-owned shooting ranges).

Neither *Idaho Schools For Equal Educ. Opportunity v. State*, 140 Idaho 586, 592, 97 P.3d 453, 459 (2004) ("ISEEO"), nor *Bear Lake County v. Budge*, 9 Idaho 703, 75 P. 614 (1904) support Petitioners' proposition that the Heartbeat Act is a "special" law because it impermissibly alters the litigation rules by creating a class of unharmed individual who can bring a cause of action. The law at issue in *ISEEO* was enacted by the Legislature to specifically apply to the underlying *ISEEO* litigation, and "particularly, the Plaintiffs and their cause of action against the legislature." *ISEEO*, 140 Idaho at 592, 97 P.3d at 459. This cannot be said of the Heartbeat Act. And, unlike the legislation in *Bear Lake Cnty.*, the Act does not alter fundamental civil procedures for a group of litigants. There, this Court held unconstitutional a law that was designed to quiet title of water rights by allowing the water *commissioner* to institute a proceeding and serve by publication in the newspaper "*all claimants* of a right to the use of the water…." *Bear Lake Cnty.*, 9 Idaho 703, 75

P. at 616 (emphasis added). This ability to serve all unnamed potential "claimants" allowed the commissioner to initiate proceedings without actually identifying or notifying the individuals whose rights would be determined by the proceeding. The Court explained that if the judiciary allowed the service of summons in this matter, "it would lead to most fearful results, as it would enable them by special and limited law to settle controversies over titles to private property, and to take the property of one person against his consent and give it to another." *Id.* at 617.

In contrast, the Heartbeat Act does not alter the fundamentals of civil procedure. The Legislature has not (because it cannot) changed the constitutional rules of standing for civil actions.[16] *See* n.14, above. On this facial challenge, one can certainly contemplate that there are some individuals within the group identified as potential plaintiffs under the Heartbeat Act who would have constitutional standing to sue, such as fathers who have suffered grave emotional harm from the loss of their unborn child, just as they can already bring a wrongful death claim for the loss of that unborn child. *See Volk*, 103 Idaho at 574, 651 P.2d at 15. Just as with other civil actions, the Heartbeat Act merely sets standards for who may file a lawsuit, the damages that may be recovered, recovery of costs and fees, and the applicable statute of limitations. S.B. 1358 § 1. As demonstrated throughout this brief, the Legislature is fully within its purview and constitutional power under article V, section 13 to set such standards. Petitioners have failed to demonstrate that the Heartbeat Act is directed only at a selected number of individuals within a class in a way that regulates the practice of the courts.

Even if this Court were to find that the Heartbeat Act meets the first element of the special law test (it should not), it should reject Petitioners' argument that the law lacks a legitimate purpose.[17] As discussed above, the Legislature was pursuing a legitimate purpose in enacting the

[16] To the extent that Petitioners suggest that no plaintiff could ever meet constitutional standing requirements to bring suit under the Heartbeat Act, the civil action allowed by the Act would be a nullity, and Petitioners' lawsuit is moot.

[17] Petitioners conflate whether there is a legitimate purpose of the law with whether the law contains an "arbitrary, capricious and unreasonable" classification. *See* Pet'rs' Br. 24-25. These are two separate issues. As the court in *Jones* explained, if the Legislature pursues a "legitimate interest in protecting its citizens," the law is not special. *Jones*, 169 Idaho 545, 498 P.3d at 1191.

Heartbeat Act of expressing the State's value for unborn life by allowing private citizens to have that value recognized if they so choose. Despite Petitioners' contention, the Heartbeat Act does not allow for vexatious litigants or bad faith litigation as any defendant still has the benefit of affirmative defenses, Rule 11 sanctions, and even vexatious litigant designations. *See also Shannahan v. Gigray*, 131 Idaho 664, 667, 962 P.2d 1048, 1051 (1998) (reviewing the elements of a tort of wrongful civil proceeding). There is nothing in the Heartbeat Act that strips off the typical guardrails for litigation.

Finally, even if the Court were to find that the Heartbeat Act applies to selected individuals within a class, and that the law lacks a legitimate purpose, Petitioners still cannot prove that the classification of litigants is arbitrary, capricious or unreasonable. The law is generally and legitimately aimed at any provider who performs or induces a procedure that ends life after the detection of fetal heartbeat and the family members of the patient who would likely suffer injury as result of the provider's actions. Because Petitioners cannot establish all three necessary elements to prove a violation of the prohibition on special laws in the Idaho Constitution, the Court should reject the claim that the Heartbeat Act violates article III, section 19.

E. Petitioners' claim that the Heartbeat Act violates a right to informational privacy under the Idaho Constitution fails for three reasons.

Petitioners cannot prevail on their claim that the Heartbeat Act violates a right to informational privacy in the Idaho Constitution for three reasons. First, they lack standing to even bring the claim. Second, the Court has never found that the Idaho Constitution contains any such right. And third, even if the Idaho Constitution contained such a right, it would not prevent putting private information at issue in court. Courts handle private information all the time and have the tools to maintain confidentiality.

1. Petitioners lack standing to assert any informational privacy right on behalf of their patients.

But even if the law does not pursue a legitimate interest in protecting its citizens, the law is only "special" if the classification of individuals is "arbitrary, capricious or unreasonable[.]" *Id.*

Petitioners lack standing to bring this (or any) claim. Like any other plaintiff, Petitioners must demonstrate that they meet three criteria to invoke third-party standing to sue on behalf of their patients:

> (1) [petitioners] must have suffered injury in fact, providing a significantly concrete interest in the outcome of the matter in dispute; (2) [petitioners] must have a sufficiently close relationship to the party whose rights [they are] asserting; and (3) there must be a demonstrated bar to the third parties' ability to protect their interests.

Doe v. Doe, 162 Idaho 254, 258-59 (2017) (citing *Shepherd v. Shepherd*, 161 Idaho 14, 20, 383 P.3d 693, 699 (2016)).

Petitioners fail to present evidence or even argue that they meet these three criteria. *See* Pet'rs' Br. 16; Pet'rs' Br. Exs. 3, 4. First, Petitioners fail to identify any injury in fact they have allegedly suffered relating to their patient's informational privacy. Petitioners' only alleged injury is the fallacious statement that they will be "forced" to stop performing abortions after the Heartbeat Act goes into effect because of the risk of liability, not because of any concern about the release of private patient information. *See* Pet'rs' Br. Exs. 3, 4. Second, Petitioners cannot demonstrate a sufficiently close relationship to their patients as there is no familial or even contractual relationship with previous patients. *See Doe v. Doe*, 162 Idaho 254 (2017) (holding that a nonmarried intimate partner of a woman who undergoes artificial insemination does not have a sufficiently close relationship to the child from the artificial insemination to assert standing on behalf of the child as there was no legally recognized protected relationship to the child). And third, Petitioners cannot establish that there is a "demonstrated bar" to their patients' ability to protect their rights. As Justice Alito, joined by Justices Gorsuch, Thomas, and Kavanaugh, wrote in dissent in *June Medical Services LLC v. Russo*, (1) abortion providers cannot prove a close relationship with a woman who obtains an abortion because the interaction is typically brief and very limited; and (2) there is no hindrance to a woman filing suit because she could file suit under a pseudonym, there is no reason to think that she would need to pay for counsel, and an exception to mootness would apply once the pregnancy ended. 140 S. Ct. 2103, 2168-69 (2020).

Petitioners cannot establish third-party standing to sue on behalf of their patients, thus, their informational privacy claim fails before it even begins.

2. The Idaho Constitution does not contain a right to informational privacy.

Even if Petitioners had standing, they fail to demonstrate that the Idaho Constitution contains any right to "informational privacy." As discussed in greater detail below, the Court has set a test for identifying fundamental rights under the Idaho Constitution. *See* Section III.G., below. Despite identifying the test in another section of their brief, Petitioners do not even attempt to establish the requirements for the Court to find a right of informational privacy. *Compare* Pet'rs' Br. 26-28 *with* Pet'rs' Br. 34-39.

Instead, Petitioners rely on precedent interpreting the U.S. Constitution. *See Cowles Publ'g Co. v. Kootenai County Bd of Cnty. Comm'rs*, 144 Idaho 259, 159 P.3d 896 (2007) (stating that the U.S. Constitution protects a zone of privacy, the contours of which are not well established, and finding that employee emails were not protected under the federal constitution); *see also* Pet'rs' Br. 27 (citing a string of cases interpreting the U.S. Constitution). But the U.S Constitution does not set the bounds for the Idaho Constitution. In *Williams v. State*, 153 Idaho 380, 283 P.3d 127 (2012), the Court noted that, where the Idaho and the U.S. Constitutions contain similar provisions, it considers federal constitutional standards, but, here, Petitioners have not identified any provisions in the Idaho Constitution that match those in the U.S. Constitution from which the zone of privacy emanates. The zone of privacy recognized in the U.S. Constitution is derived from a number of amendments and not any particular language. *See Paul v. Davis*, 424 U.S. 693, 712-13 (1976) ("there is no 'right of privacy' found in any specific guarantee of the Constitution").

When Petitioners do cite cases interpreting the Idaho Constitution, they do not cite any case or proposition that would support finding a "right to be left alone." Petitioners cite only *Murphy v. Pocatello School District No.* 25, which did not address "informational privacy" and held instead that wearing one's hair in a manner of one's choice was a "protected right of *personal taste.*" *Murphy*, 94 Idaho 32, 38, 480 P.2d 878, 884 (1971). The right found in *Murphy*—the right to publicly express one's personal tastes—is about as far from a right to *privacy* as one can get. This

Court should decline Petitioners' invitation to assume that, because the U.S. Constitution contains a right to privacy, the Idaho Constitution, drafted under different circumstances, by different individuals, and at a different time, also contains an unwritten right to informational privacy.

3. The Heartbeat Act does not violate any (nonexistent) right to informational privacy.

Even if a right to informational privacy that could be implicated by the Act existed in the Idaho Constitution (it does not), Petitioners cite no precedent for their claim that a cause of action involving sensitive information is violative of any right to informational privacy. Plaintiffs fail to recognize that courts routinely deal with highly sensitive information in cases of child welfare, divorce, civil commitment, and medical malpractice. If this Court were to find that a cause of action involving sensitive information of a third party violates the constitutional right to informational privacy, it would jeopardize the State's ability to bring a child custody proceeding involving child abuse; a guardian's ability to bring a neglect proceeding on behalf of an incapacitated adult; or a spouse's ability to bring a divorce proceeding involving extra marital affairs. The Court has never expressed a concern for exposing a third party's private information during litigation because the judicial system is well equipped to handle sensitive and highly personal information through the implementation of protective orders and filings under seal. *See* I.R.C.P. 26(c); Idaho Ct. Admin. R. 32.

Petitioners cite to several non-binding and unpersuasive precedents that interpret the federal right to privacy in the context of public dissemination of sensitive material.[18] In addition to those cases interpreting the wrong constitution, they are irrelevant because there is nothing contained in the Heartbeat Act that would require the public dissemination of a patient's medical treatment. The other cases on which Petitioners rely on involve disputes over discovery and protective orders, which only demonstrate how well the courts are equipped to address privacy

[18] *See In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999) (Public disclosure of bankruptcy petitioner's social security number did not violate his right to informational privacy); *Doe v. City of New York*, 15 F.3d 264 (2d. Cir. 1994) (Plaintiff had a right to privacy to keep his HIV status exempt from public disclosure via a press release).

concerns through protective orders and filings under seal.[19] The Court should resist Petitioners' invitation to invalidate all causes of action that involve sensitive information.

F. The Heartbeat Act's civil damages provisions do not violate any due process guarantee under the Idaho Constitution.

The Heartbeat Act's allowance of statutory damages in an amount not less than $20,000 to a prevailing plaintiff does not violate the Idaho Constitution's due process protections either because of vagueness or for a lack of proportionality. Petitioners confuse the doctrine of constitutional vagueness with the requirement that a *penalty* not be grossly excessive or arbitrary in relation to the offense. Proportionality and vagueness are two separate principles. *Compare Walsh v. Swapp L., PLLC*, 166 Idaho 629, 641, 462 P.3d 607, 619 (2020) (explaining that the "void-for-vagueness doctrine under due process clause results in the invalidation of statutes that are so vague as to invite incongruous results because it would leave the public uncertain as to the conduct it prohibits and judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.") (citation omitted) *with United States v. Citrin*, 972 F.2d 1044, 1051 (9th Cir. 1992) (explaining that a "statutorily prescribed penalty violates due process rights 'only where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.'"). Once the two concepts are untangled, the Heartbeat Act does not violate either.

1. The Heartbeat Act is not void for vagueness.

Petitioners argue that the Heartbeat Act is facially void for vagueness because the statutory damages provision "gives no guidance as to how its limitless statutory damages are to be calculated." Pet'rs' Br. 30. But in analyzing vagueness, the only thing that matters is whether the Act provides the abortion provider with sufficient notice as to what *conduct* may subject him to liability. *See High Ol' Times, Inc. v. Busbee*, 673 F.2d 1225, 1228 (11th Cir. 1982) ("Facial

[19] *See Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 128 P.3d 364 (2006) (finding that the court must enter a protective order in relation to the subpoena of patient files of 90 women who had obtained abortions); *Planned Parenthood Fed'n of Am., Inc. v. Ashcroft*, No. C03–4872 PJH, 2004 WL 432222 (N.D. Cal. Mar. 5, 2004) (denying the government's motion to compel the discovery of patient medical records where it was only marginally relevant and unduly burdensome).

vagueness occurs when a statute is utterly devoid of a standard of conduct so that it 'simply has no core' and cannot be validly applied to any conduct") (citing *United States v. Powell*, 423 U.S. 87, 92, 96 S. Ct. 316, 319, 46 L. Ed. 2d 228 (1975)). "A civil or non-criminal statute is not unconstitutionally vague if persons of reasonable intelligence can derive core meaning [of the prescribed conduct] from it." *Olsen v. J.A. Freeman Co*., 117 Idaho 706, 716, 791 P.2d 1285, 1295 (1990). Because Petitioners can derive core meaning from the Act—indeed, their claim turns on the idea that they must conform their conduct to the Act—it is not void for vagueness.

Petitioners' argument, based on various *criminal* cases, that the Heartbeat Act's *civil* cause of action should be subjected to a more stringent vagueness evaluation is inapposite. The Heartbeat Act cannot be evaluated under criminal standards when litigants can only recover civil damages. The mere fact that the Act provides a private cause of action for what could, under a different law, be deemed criminal conduct does not render it quasi-criminal.[20] In Idaho, the classification of cases that qualify as quasi-criminal are generally limited to juvenile delinquency proceedings and contempt. *See Matter of Williams*, 120 Idaho 473, 817 P.2d 139 (1991); *Interest of Doe*, 168 Idaho 389, 483 P.3d 932, 935 (2020); *but see Idaho Sch. For Equal Educ. Opportunity v. Evans*, 150 Idaho 103, 113, 244 P.3d 247, 257 (2010) ("The interests at stake in child protective proceedings are simply not the same as the liberty interest at stake in criminal prosecutions[.]")[21] The Act is not quasi-criminal because it does not put the same liberty interest at stake as in criminal prosecutions. But even if the Heartbeat Act were reviewed under the standard for criminal penalties, it still is not void for vagueness. *See State v. Leferink*, 133 Idaho 780, 992 P.2d 775, 778

[20] *Amy v. Curtis*, in which the defendant challenged a civil enforcement statute of a criminal child pornography statute arguing that it was vague as to who may sue him and the predicates for such a person to sue, is instructive. The U.S. district court rejected the plaintiff's reliance on criminal cases and explained that "there is not so much ambiguity [in the law] that there was no standard for the defendant to bring his behavior within the boundaries of the law." *Amy*, No. 19-cv-02184-PJH, 2021 WL 858399, at *6 (N.D. Cal. Mar. 8, 2021).

[21] This Court also considered the removal from elected office to be quasi-criminal under Section 7459, Rev. Codes. *Daugherty v. Nagel*, 27 Idaho 511, 149 P. 729, 730 (1915).

(1999) ("due process requires that a statute defining a crime be sufficiently explicit so all persons may know what conduct will subject them to penalties") (citation omitted).

As the Act is not facially void for vagueness under the applicable civil standard, Petitioners' argument fails.

2. The Act does not violate any proportionality limits on statutory damages.

As mentioned, Petitioners also appear to bring a proportionality challenge intertwined with their vagueness argument. Petitioners' claim fails before it begins because neither the Idaho Supreme Court nor the Idaho Court of Appeals have ever held that there is a proportionality requirement for statutory damages in Idaho's Constitution. But even if such a requirement existed, Petitioners erroneously direct this Court to federal precedent relating to punitive—not statutory—damages. *Compare* Pet'rs' Br. 30-31 *with Verizon California Inc. v. Onlinenic, Inc.*, No. C 08-2832 JF (RS), 2009 WL 2706393, at *6 (N.D. Cal. Aug. 25, 2009) (stating that it is highly doubtful whether *BMW of N. Am. Inc v. Gore*, 517 U.S. 559 (1996) and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) apply to statutory damages awards at all); *see also Amy*, 2021 WL 858399, at *5. If this Court adopts U.S. Supreme Court precedent in interpreting the Idaho Constitution, an award of statutory damages only violates due process if it is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable. *Verizon Cal. Inc.*, 2009 WL 2706393, at *6 (quoting *St. Louis, Iron Mt. & S. Ry. Co v. Williams*, 251 U.S. 63, 66-67 (1919)); s*ee also Zomba Enter. Inc. v. Panorama Records Inc.*, 491 F.3d 574, 587-88 (6th Cir. 2007) ("If the Supreme Court countenanced a 113:1 ratio in *Williams*, we cannot conclude that a 44:1 ratio [for statutory damages to actual damages in a copyright action] is unacceptable here."). This review is "extraordinarily deferential—even more so than in cases applying abuse-of-discretion review." *Id.*

Thus, in *Amy*, the federal district court rejected the plaintiff's proportionality challenge to the statutory damages provision of a civil cause of action that allowed family members of victims of child pornography to recover $150,000 for each violation from the offender. 2021 WL 858399, at *5. The court rejected the defendant's reliance on *Campbell* and *Gore* and his repeated recasting

of the award as a "penalty," reasoning that statutory damages "are only compensatory, not punitive." *Id.* Just like in *Amy*, the statutory damages here are compensatory in nature as they are intended to compensate potential plaintiffs for the loss of life where such actual damages may be difficult to ascertain. *See also Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 352 (1998) ("[A]n award of statutory damages may serve purposes traditionally associated with legal relief, such as *compensation* and punishment.") (emphasis added).

In any case, Petitioners cannot prevail on their facial due process challenge because the statutory damages provision in the Heartbeat Act can in many circumstances be constitutionally proportionate to the defendant's conduct and the actual damages sustained. *See, e.g. Cole v. Gene by Gene, Ltd., No.* 1:14-CV-00004-SLG, 2017 WL 5992467, at *4 (D. Alaska Jul. 28, 2017) ("[T]he Court will consider the constitutionality of the provision if and when statutory damages are awarded."); *Parker v. Time Warner Ent. Co., L.P.*, 331 F.3d 13 (2d Cir. 2003). For example, if an abortion provider were found to have performed an abortion on a woman who was 15 (or even 33) weeks pregnant, it would not be excessive or disproportionate to award a spouse $30,000 or more in statutory damages for the provider's unlawful conduct, especially where the evidence showed that the spouse was emotionally devastated by loss of the unborn child and had prepared for the birth of the child with the purchase of the many supplies necessary to care for an infant. Finally, if a jury were to award damages that were not constitutionally proportionate to the conduct or actual damages suffered, the court can reduce such an award to comport with due process requirements. *SRM Arms, Inc. v. GSA Direct, LLC*, 169 Idaho 196, 494 P.3d 744, 750 (2021) ("a remittitur is an alternative to granting a new trial when the presiding judge believes that the jury awarded excessive damages due to passion or prejudice").

Finally, even if the Court were to find the statutory damages provision troublesome, the appropriate remedy would not be to strike down the Act in total, but to strike down that particular component.[22] This Court has explained that it must sever unconstitutional portions of statutes when

[22] This is also true of the other procedural aspects of the civil action that Petitioners take issue with.

possible, rather than invalidating an entire act. *Stark v. McLaughlin*, 45 Idaho 112, 261 P. 244, 248 (1927) (when certain portions of a state law are unconstitutional, "our duty is to sustain the remaining portions"); *State v. Bird*, 29 Idaho 47, 156 P. 1140, 1141 (1916) ("The rule is that if one provision of an enactment is invalid and the others valid, the latter are not affected by the void provision, unless they are plainly dependent upon each other, and so inseparably connected that they cannot be divided without defeating the object of the ordinance or statute."); *Gillesby v. Bd. of Comm'rs of Canyon Cty.*, 17 Idaho 586, 107 P. 71, 78 (1910) ("that objectionable feature of said section does not render the whole act unconstitutional and void, as the remaining part of the act is capable of being executed in accordance with the apparent legislative intent wholly independent of that [invalid] portion"). This is true even when an act does not contain a severability clause. *E.g.*, *Idaho Dep't of L. Enf't By & Through Cade v. Free*, 126 Idaho 422, 427, 885 P.2d 381, 386 (1994); *State v. Casey*, 125 Idaho 856, 859, 876 P.2d 138, 141 (1994).

Because the statutory damages provision of the Act can be applied in a constitutionally proportionate manner, Petitioners cannot establish that the Act facially violates the due process clause.

G. Petitioners' claim that the Heartbeat Act violates a right to abortion in the Idaho Constitution fails.

The Court need not even reach the question of whether Idaho's Constitution contains a right to abortion without governmental interference (it does not) because Petitioners lack standing to assert such a right. The only way that Petitioners could assert an alleged injury to a right to an abortion is if they have third-party standing to sue on behalf of their patients. However, as discussed above, they do not. *See* Section III.E.1., above.

In any case, there is no fundamental right to abortion in the Idaho Constitution. To the contrary, the text and history of Idaho's Constitution demonstrates that the Constitution considers unborn human life to be a person entitled to due process protections. Petitioners' scattershot attempt at finding a constitutional hook for their asserted right is, in fact, evidence of the *absence* of any such guarantee in the Idaho Constitution. *See* Pet'rs' Br. 34-38. Petitioners are unable to

identify any direct guarantee of a right to abortion in Idaho's Constitution because there is no positive right to abortion expressly contained in Idaho's Constitution and because a right to abortion did not exist at the time Idaho's Constitution was adopted. The text, structure, and history of Idaho's Constitution all compel a finding that the Constitution does not contain a right to abortion.

This Court has been extremely judicious recognizing new fundamental rights. In *Idaho Schools for Equal Educational Opportunity v. Evans*, the Court abandoned its previous policy of a case-by-case determination of whether a right is fundamental[23] to "hold that the 'fundamental rights' found in our state constitution are those expressed as a positive right."123 Idaho 573, 581, 850 P.2d 724, 732 (1993). While the Court continued on in *dicta* to suggest, based on *dicta* from its earlier decision in *Tarbox,* that "rights which are not directly guaranteed by the state constitution may be considered to be fundamental if they are implicit in our State's concept of ordered liberty," the Court has never recognized a fundamental right on this basis.[24] In *Evans*, the Court emphasized how very limited the fundamental rights contained in the Idaho Constitution are, recognizing that a right must be "directly guaranteed by the state constitution" to be fundamental. *Id.* Thus, for example, even though the Idaho Constitution "imposes a '*duty [upon] the legislature* [ ] to establish and maintain a general, uniform and thorough system of public, free common schools,' . . . [i]t does not establish education as a basic fundamental right." *Id.* (quoting Idaho Const. art. IX, § 1).

[23] In *Thompson v. Engelking*, 96 Idaho 793, 804 537 P.2d 635, 646 (1975), the Court rejected the concept of fundamental rights. There are a few caveats: *State v. Bennion*, 112 Idaho 32, recognized a fundamental right to a jury trial under article I, § 9 and *Johnson v. Sunshine Min.Co., Inc.*, 106 Idaho 866, 684 P.2d 268 (1984), suggested that fundamental rights could be found when the Court refused to find that article I, § 18 "guarantee[ed] the common law rights which were in effect at the time the Constitution was adopted, as 'fundamental rights.'" *Johnson*, 106 Idaho at 869, 271 n.4.

[24] The Court's subsequent articulations of the *Evans* test to find a fundamental right—"'a right is fundamental under the Idaho Constitution if it is expressed as a positive right, or if it is implicit in Idaho's concept of ordered liberty.'"—is inaccurate in the assumption that the secondary ground for finding a fundamental right was part of the holding in *Evans*, rather than *dicta*. *Reclaim Idaho*, 169 Idaho at 497 P.3d at 181 (quoting *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 126, 15 P.3d 1129, 1134 (2000) (citing *Evans*, 123 Idaho at 581–82, 850 P.2d at 732–33; *Simpson v. Cenarrusa*, 130 Idaho 609, 615, 944 P.2d 1372, 1378 (1997)).

Since deciding *Evans*, the Court has only found fundamental rights on two occasions, and only where the Idaho Constitution directly expressed the right as a positive guarantee: in *Reclaim Idaho*, the Court found a fundamental right to initiate legislation and hold referenda based on the express language of article III, section 1, particularly the language that "The people reserve to themselves the power . . . ." *Reclaim Idaho*, 169 Idaho 406, 497 P.3d at 181-84; and in *Van Valkenburgh*, the Court found that the right to vote is a fundamental right because of the express guarantee of the right of suffrage in the Idaho Constitution. 135 Idaho at 126, 15 P.3d at 1134 (relying in part on Idaho Const. art. I, § 19) ("No power, civil or military, shall at any time interfere with or prevent the free and lawful exercise of the right of suffrage.").

In contrast, the Court repeatedly refused to find a substantive right under article I, section 18, which provides that "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." *Venters v. Sorreto Del., Inc.*, 141 Idaho 245, 252, 108 P.3d 392, 399 (2004) ("Art. I, § 18 . . . did not create any substantive rights"); *see also Gomersall v. St. Luke's Reg'l Med. Ctr., Ltd.*, 168 Idaho 308, 319, 483 P.3d 365, 376 (2021) (minor does not have a fundamental right under article I, section 18 to access the courts to pursue a medical malpractice action). Similarly, the Court has also declined to find that holding public office and being listed on a ballot is a fundamental right. *Rudeen v. Cenarrusa*, 136 Idaho 560, 570, 38 P.3d 598, 608 (2001). Thus, because the Idaho Constitution does not directly guarantee a right to abortion, it does not contain any such fundamental right.

Turning to the provisions that Petitioners invoke, Petitioners first appear to argue that the due process guarantees contained in article 1, sections 1 and 13 of Idaho's Constitution directly guarantee the right to abortion. Article I, section 1 of the Idaho Constitution provides 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."[25] Article I, section 13 provides, in pertinent part, "No person shall . . . be deprived of life, liberty or property without due process of law."

The Court has rarely analyzed the scope of the rights protected by these provisions. *See, e.g., Hall v. Johnson*, 53 Idaho 667, 677, 27 P.2d 674 (1933); *Newland v. Child*, 73 Idaho 530, 537, 254 P.2d 1066, 1069 (1953). *Newland* is instructive because the Court gave a rationale for why the right it found was inalienable. The Court interpreted the constitutional provisions to hold that the "right to own and enjoy private property" is "one of the natural, inherent, and inalienable rights of free men" because "[i]t is not a gift of our constitutions[;] it *existed before them*." *Id.* (emphasis added). Thus, while not all rights that existed before the Constitution was adopted are necessarily inalienable, the historical existence of a right prior to the adoption of the Idaho Constitution is a condition precedent to finding an inalienable right.

Petitioners' arguments that liberty means abortion run aground on the shoals of Idaho's history. It cannot possibly be said that a right to abortion existed in Idaho prior to the adoption of Idaho's Constitution. Abortion was a serious criminal offense before and at the time Idaho's Constitution was adopted. In 1864, the Idaho Territorial Legislature enacted a law that prohibited abortion with the only exception being to save a woman's life. Appendix 1-3 (Act of Feb. 4, 1864, ch. IV, § 42, 1863-64 Idaho (Terr.) Laws 443, repealed and reenacted by Act of Dec. 21, 1864, ch. III, Pt. IV, § 42, 1864 Idaho (Terr.) Laws 305, reenacted by Act of Jan. 14, 1875, ch. IV, § 42, 1874 Idaho (Terr.) Laws 328). In 1887, shortly before Idaho's Constitution was adopted, this statute was replaced by two statutes that prohibited performing, soliciting, and/or submitting to abortions.[26] Appendix 10 (Idaho Rev. Stat. §§ 6794, 6795 (1887). A criminal abortion could occur at any stage in gestation. *State v. Alcorn*, 7 Idaho 599, 64 P. 1014, 1016 (1901) (affirming a

[25] It does not appear that the Idaho Supreme Court has ever exclusively found a fundamental right in article I, section 1 of the Idaho Constitution.

[26] These statutes were not repealed until after *Roe* was decided. Appendix 4-6 (Idaho Rev. Code, §§ 6794, 6795 (1908), *recodified at Idaho Comp. Stat.* §§ 17-1810, 17-1811 (1932), *recodified at* Idaho Code §§ 18-601, 18-602 (1948), *repealed by* an Act of March 17, 1973, ch. 197, § 2, 1973 Idaho Sess. Laws 443).

conviction for manslaughter resulting from the performance of an abortion and the death of the pregnant woman when there was evidence that the woman believed she had been pregnant a little over two months and distinguishing Idaho's statutes from common law, where "an abortion could not be committed prior to the quickening of the fetus."). In 1901, the Court encapsulated Idaho's views on abortion: "[a]n unnatural abortion, brought about by means of drugs or instruments, violates decency, the best interests of society, the divine law, the law of nature, the criminal statutes of this state, and is not only destructive of the life unborn, but places in jeopardy the life of a human being,—the pregnant woman." *Id.* at 1019. Given this history, there is no basis from which to conclude that a right to abortion was enshrined in Idaho's Constitution. Certainly, one would expect that such a sea change--from criminal prohibition to protected right--would have been discussed by the drafters of the Constitution, if not enshrined explicitly, yet no such mention was made at the Constitutional Convention. *See* 1 Proceedings and Debates of the Constitutional Convention of Idaho (I.W. Hart ed., 1912); 2 Proceedings and Debates of the Constitutional Convention of Idaho (I.W. Hart ed., 1912). If anything, Idaho's history illustrates the very opposite of a right to abortion—that the Idaho Constitution *prohibits* abortion because the unborn child has due process protections.

Petitioners' half-hearted attempt to argue that the U.S Supreme Court's decisions interpreting federal due process protections control the Idaho Constitution cannot overcome Idaho's historical opposition to abortion. Neither this Court nor the Idaho Court of Appeals has ever adopted *Roe*'s reasoning or result in interpreting Idaho's Constitution. In fact, this Court's understanding of the purpose behind Idaho's pre-*Roe* criminal abortion laws is contrary to one of the fundamental premises of *Roe*—that abortion statues were designed in part for the protection of women's health. *Compare Nash v. Meyer*, 54 Idaho 283, 31 P.2d 273, 276 (1934) ("[T]he abortion statute is not designed for the protection of the woman . . . only of the unborn child and through it society") *with Roe*, 410 U.S. at 148-50 (finding support for the proposition that abortion laws were designed to protect the health of the woman). This Court should follow the Michigan Court of Appeals' reasoning and conclude that there is no reason for *Roe* to set the scope of the Idaho

Constitution. *See, e.g.*, *Mahaffey v. Att'y Gen.*, 222 Mich. App. 325, 333-34, 564 N.W.2d 104, 109 (1997) ("[T]he existence of a federal constitutional right to abortion is not necessarily relevant to" determining whether the Michigan Constitution contains a right to abortion).

This Court should also reject Petitioners' effort to have it find, for the first time, a fundamental right to abortion in the form of a right to privacy expressed in Idaho's "concept of ordered liberty." Idaho's strong opposition to abortion both before and after statehood again precludes a finding that Idaho's "concept of ordered liberty" contained a right to abortion. This Court has never recognized even a generalized right to privacy in conduct at home under Idaho's Constitution.[27] *State v. Kincaid*, 98 Idaho 440, 442, 566 P.2d 763, 765 (1977). Notably, in 1970, an effort to add an express right to privacy to Idaho's Constitution failed. *See* Appendix 9 (1970 Idaho Sess. Laws 740 (proposed article I, section 1: "All men . . . have certain inalienable rights, among them to . . . enjoy the right to privacy; . . . ."); Idaho Constitutional Amendment History, 1960 through 1978, Idaho Secretary of State, https://sos.idaho.gov/elect/inits/hst60_70.htm (last visited April 26, 2022) (indicating that the proposed constitutional amendment failed). Petitioners' three arguments for injecting a right to abortion into Idaho's "concept of ordered liberty" all fall.

First, the Court has never held that the Idaho Constitution contains a fundamental right of procreation. While the Court has repeated *dicta* that procreation is a fundamental right under the Idaho Constitution, that *dicta* can be traced back to still more *dicta* discussing fundamental rights under *the U.S. Constitution* in *Newlan v. State*, 96 Idaho 711, 535, P.2d 1348 (1975). *See Van Valkenburgh*, 135 Idaho at 126, 15 P.3d at 1134; *Evans*, 123 Idaho at 581, 850 P.2d at 732; *Tarbox v. Tax Comm'n*, 107 Idaho 957, 960 n.1, 695 P.2d 342 n.1 (1984). *Newlan*'s *dicta* is not persuasive as to Petitioners' argument because it was directed toward the rights contained in the U.S. Constitution. 96 Idaho at 714, 535 P.2d at 1351 ("*[T]he United States Supreme Court* has

[27] While an Idaho district court did find a fundamental right to procreation (meaning abortion) as part of a generalized privacy right under the Idaho Constitution, the court's conclusion was based on the same errors as those in Petitioners' arguments, which are discussed below. *See Plannned Parenthood of Idaho, Inc. v. Kurtz*, No. CVOC0103909D., 2002 WL 32156983, at *3, *4 (Idaho 4th Jud. Dist. June 12, 2002).

approached the problem of statutory classification on a two-tier basis. If the classification is suspect because it was based on matters such as race, national origin or alienage, or the statute infringes upon fundamental rights such as voting, procreation or rights regarding criminal procedure then strict judicial scrutiny is applied[.]") (emphasis added). This flaw is also true of the Court's *dicta* in *State v. Centrell*, 94 Idaho 653, 655 n.9, 496 P.2d 276, 278 n.9 (1972), where it appeared to conflate the state and federal constitutions. But even if this Court had found a "right of procreation," that right is vastly different from a right to intentionally terminate human life, which is what abortion does. Idaho's Constitution allows the State to prohibit the intentional termination of human life, which the State does, for example, with its prohibition on assisted suicide. *See* I.C. § 18-4017(1).

Second, Petitioners' "personal autonomy" argument is meritless. Article I, section 21 of the Idaho Constitution, which provides, "[t]his enumeration of rights shall not be construed to impair or deny other rights retained by the people," is solely a reservation of rights "accorded . . . before the constitution was adopted" and must be read narrowly. *Electors of Big Butte Area v. State Bd. of Educ.*, 78 Idaho 602, 612, 308 P.2d 225, 231 (1957); *Cameron v. Lakeland Class A School Dist. No. 272, Kootenai Cnty.*, 82 Idaho 375, 353 P.2d 652 (1960) (holding that a statute requiring a school to be maintained at the location where previously maintained did not violate article I, section 21 because the inherent right of parental control over public schools reserved by article I, section 21 was limited). Again, the Court has never held that a right to abortion exists under article I, section 21. And, in any case, article I, section 21 cannot be said to have retained a right to abortion because, as discussed above, abortions were criminally prohibited when the Idaho Constitution was adopted.

Petitioners ask this Court to stretch a single case decided in 1971 that found a protected right of personal taste related to the length of a student's hair—*Murphy v. Pocatello School District No. 25*—beyond recognition to find the right they desire under article I, section 21. Pet'rs' Br. 36-37. There, the Court found the right "under both the Idaho Constitution, [article] 1, [sections] 1 and 21, and under the Ninth Amendment of the United States Constitution made applicable to

the states by the Fourteenth Amendment." *Murphy*, 94 Idaho at 38, 480 P.2d at 884 (footnote omitted). This right was limited to matters of personal taste expressed through one's appearance, as the Court recognized in its discussion of a possible First Amendment basis for the decision and as the Court has subsequently confirmed. *Id.*, 94 Idaho at 37, 480 P.2d at 883; s*ee also Johnson v. Joint School Dist. No. 60, Bingham Cnty.*, 95 Idaho 317, 319, 508 P.2d 547, 549 (1973) (relying on *Murphy* to decide a challenge about female students wearing "slacks, pantsuits and culottes").[28] Perhaps most problematic for Petitioners' argument, the Court discussed but *did not* adopt Fifth and Fourteenth Amendment substantive due process justifications of the rights "to marital privacy" and "to breed children." *Murphy*, 94 Idaho at 37, 480 P.2d at 883. The decision in *Murphy* cannot support finding a right to abortion.

Third, Petitioners' bodily privacy in the context of search and seizure law argument likewise lacks merit. Article I, section 17 of Idaho's Constitution provides "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue without probable cause shown by affidavit, particularly describing the place to be searched and the person or thing to be seized." This provision is a limitation on the means by which evidence is obtained. It does not govern the conduct that the State may regulate; more specifically, nothing in this provision relates the State's ability to regulate to the ability to terminate life. Indeed, the "purpose of [this provision] is to safeguard the privacy of citizens by insuring against the search of premises where probable cause is lacking," i.e., to control how evidence is gathered. *State v. Lewis*, No. 48878, 2022 WL 628496, *2 (Ct. App. Idaho filed Mar. 4, 2022) (citing *State v. Yoder*, 96 Idaho 651, 653, 534 P.2d 771, 773 (1975)). Petitioners cite to no Idaho Supreme Court case that supports the inferential leap they seek. *See*

[28] *Murphy* has only been cited a few times in Idaho Supreme Court cases, has not been cited by the Court since 2001, has never been cited by the Court outside of the school context, and has never been relied upon by the Court to find any right under the Idaho Constitution. *See Johnson v. Joint Sch. Dist. No. 60, Bingham Cnty.*, 95 Idaho 317, 508 P.2d 547 (1973); *Rogers v. Gooding Pub. Joint Sch. Dist. No. 231*, 135 Idaho 480, 20 P.3d 16 (2001), *overruled on other grounds by City of Osburn v. Randel*, 152 Idaho 906, 277 P.3d 353 (2012); *Bauer ex. rel. Bauer v. Minidoka Sch. Dist. No. 331*, 116 Idaho 586, 587, 778 P.2d 336, 337 (1989).

Pet'rs' Br. 38 (citing *State v. Donato*, 135 Idaho 469, 20 P.3d 5 (2001) and *State v. Guzman*, 122 Idaho 981, 842 P.2d 660 (1992)).

While article I, section 17 occasionally offers greater privacy protections than the federal Fourth Amendment (again, only in the context of search and seizure), the Idaho Supreme Court has generally only recognized greater bodily privacy protections when an Idaho-specific circumstance compels a recognition of greater privacy protections, such as when Idaho's "unique rural tradition" justified a different definition of curtilage, or when the Court rejected a good faith exception to the warrant requirement based on its long-standing jurisprudence regarding the Idaho Constitution. *See Donato*, 135 Idaho at 472, 20 P.3d at 8 (discussing *State v. Webb*, 130 Idaho 462, 943 P.2d 52 (1997) and *Guzman*). Thus, even if the right of bodily privacy in the context of search and seizure law were relevant, Idaho's long-standing tradition of prohibiting abortion and promoting life would not justify finding a right to abortion.

This Court should decline Petitioners' invitation to jumble up Idaho's constitutional provisions and find a right to abortion lurking in the chaos. The Court should also decline to rely on federal caselaw interpreting the U.S. Constitution and on other state courts interpreting their own constitutions. As Petitioners admit, the Court does not "sheepishly follow[] in the footsteps of the U.S. Supreme Court in the area of state constitutional analysis." Pet'rs' Br. 34-35. Petitioners' citations to Iowa's and Kansas's interpretations of their constitutions are similarly irrelevant. Idaho's Constitution is specific to Idaho. Looking to the specific language of Idaho's Constitution and Idaho's particular history, the drafters of Idaho's Constitution did not contemplate their language would prevent the State from regulating something that was currently prohibited under criminal law. But, even if the Court were to find a fundamental right to abortion in the Idaho Constitution that matches the right under the U.S. Constitution, the Heartbeat Act would not violate it because the Act does not violate the U.S. Constitution. *See* Section III.B, above.

H. The Heartbeat Act does not violate Idaho's equal protection guarantee.

Petitioners have not met their burden of showing beyond a reasonable doubt that the Heartbeat Act violates the Idaho Constitution's guarantees of equal protection, which are contained

in article I, sections 1 and 2 of the Idaho Constitution. *Rudeen v. Cenarrusa*, 136 Idaho 560, 564, 568 n.3, 38 P.3d 598, 602, 606 n.3 (2001). The Heartbeat Act does not treat similarly situated individuals differently, and even if it does, it survives the applicable rational basis review.

Petitioners fall at the first hurdle in the three-step equal protection analysis because the Heartbeat Act does not treat similarly situated individuals differently. "[N]o equal protection analysis is required and no violation of equal protection will be found in situations where the State has not engaged in the disparate treatment of similarly situated individuals." *Alpine Vill. Co. v. City of McCall*, 154 Idaho 930, 937, 303 P.3d 617, 624 *(*citing *Shobe v. Ada Cnty., Bd. of Comm'rs*, 130 Idaho 580, 585–86, 944 P.2d 715, 720–21 (1997)).

Petitioners appear to allege two different classifications: (1) abortion providers versus other medical providers and (2) abortion providers versus all other civil defendants. *See* Pet'rs' Br. 31-33. But they do not show that the Heartbeat Act treats similarly situated individuals differently. The law applies equally to all medical providers. It is not specific to a particular class of medical providers as any medical provider who performs an abortion after a fetal heartbeat is detected is equally impacted by this law. In any case, medical providers who perform abortions are not similarly situated to other medical providers or other civil defendants because neither comparator intentionally takes human life in pursuing its profession. *Harris v. McRae*, 448 U.S. 297, 325 (1980) ("Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life.").

Petitioners are also incorrect that the Heartbeat Act treats abortion providers, to the extent that they constitute a class, differently. *See* Pet'rs' Br. 31-32. First, the Act's "scheme" is not "novel": the Legislature has created multiple private causes of action that are not paired with a state enforcement mechanism. *See, e.*g., I.C. §§ 45-811, 6-1101 *et seq*., 6-3301, *et seq*. Second, the Act does not and cannot confer standing that violates the constitutional requirements for standing that apply to all litigants. *See* n.16, above. Third, the default statute

of limitations in Idaho is four years, just like that of the Act.[29] *See* I.C. § 5-224. Fourth, the Legislature has allowed recovery of statutory damages plus attorney's fees and costs by the plaintiff or claimant only in other civil causes of action. *See, e.g.*, I.C. §§ 16-1607, 39-5303, 45-615, 45-811(4)(a). Fifth, the Legislature has set minimum statutory damages with no maximum before. *See* I.C. § 45-811(4)(a). Petitioners simply cannot establish the necessary disparate treatment of similarly situated individuals to meet the first step of their equal protection claim.

Moving to the second step of the equal protection analysis, rational basis review applies because no suspect class or fundamental right is involved and the Act is not discriminatory on its face. A law is only reviewed under strict scrutiny if there is a suspect class or a fundamental right involved. *Rudeen*, 136 Idaho at 569, 38 P.3d at 607 (citations omitted). Petitioners correctly refrain from arguing that abortion providers are a suspect class, Pet'rs' Br. 32-33, and as discussed above, the Act does not implicate a fundamental right, so strict scrutiny does not apply. *See* Section III.G., above. "Means-focus" scrutiny also does not apply. Means-focus scrutiny only applies where two groups are treated differently "either odiously or on some other basis calculated to excite animosity or ill will." *McLean v. Maverik Country Stores, Inc.*, 142 Idaho 810, 814, 135 P.3d 756, 760 (2006) (quoting *Rudeen*, 136 Idaho at 569, 38 P.3d at 607). Contrary to Petitioners' argument, it does not apply any time two groups are treated differently. *Compare* Pet'rs' Br. 32 *with Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 396, 987 P.2d 300, 308 (1999). Because the Heartbeat Act does not distinguish between groups odiously or in a way calculated to excite ill will, means-focus scrutiny does not apply. The Heartbeat Act "involve[s] social and economic welfare issues," so rational basis review applies. *Venters v. Sorrento Del., Inc.*, 141 Idaho 245, 251–52, 108 P.3d 392, 398–99 (2005).

[29] To the extent that Petitioners quibble over the difference in statute of limitations for a wrongful death action versus a claim under the Heartbeat Act, they admit that abortions are often shrouded in secrecy, even from one's partner, so it makes sense for the Legislature to conclude that a longer statute of limitations is necessary for actions under the Heartbeat Act.

Ultimately, it does not matter whether strict scrutiny or means-focus scrutiny applies because Petitioners do not actually argue how the Heartbeat Act fails either level of heightened scrutiny, arguing only that the law does not pass rational basis review. Pet'rs' Br. 32-33. Petitioners would have this Court believe that the law fails rational basis review simply because it allegedly treats abortion providers differently. Pet'rs' Br. at 33. But this is a circular restatement of the first step of the equal protection analysis, not rational basis review. The Heartbeat Act survives rational basis review because any classification contained in it is rationally related to a legitimate legislative purpose. *State v. Hart*, 135 Idaho 827, 830, 25 P. 3d 850, 853 (2001) (citing *Coghlan*, 133 Idaho at 396, 987 P.2d at 308).

"A statute will only be found to deny equal protection under the rational basis test if: (1) the classification is totally unrelated to the state's goals, and (2) there is no conceivable state of facts that will support the state's classification." *Venters*, 141 Idaho at 252, 108 P.3d at 399 (citing *Idaho State Ins. Fund v. Van Tine*, 132 Idaho 902, 909, 980 P.2d 566, 573 (1999)). The Heartbeat Act passes this test. Recognizing statutorily that the presence of a fetal heartbeat signals the presence of life and establishing procedures by which a private citizen can have the value of that life recognized, should they so choose, achieves the State's legitimate interests in expressing its value for unborn life and encourages childbirth over abortion. *Casey*, 505 U.S. at 877-78 (the legitimate interests of the State include "express[ing] profound respect for the life of the unborn" and "persuading [a woman] to choose childbirth over abortion.") Further, as discussed above, the Heartbeat Act cannot be assumed to have an illegitimate purpose because it does not violate the U.S. Constitution. *See* Section III.B., above. It is irrelevant whether Petitioners disagree with how the State has chosen to go about achieving its interests or whether the State has actually achieved its interests. The Court does "not evaluate the fairness or efficacy of the statute that is being challenged." *Gomersall*, 168 Idaho at 318, 483 P.3d at 375 (citing *McLean v. Maverik Country Stores, Inc.*, 142 Idaho 810, 814, 135 P.3d 756, 760 (2006)). Petitioners cannot overcome the Heartbeat Act's "strong presumption of validity" because the Legislature has not done anything

out of the ordinary. *Coghlan*, 133 Idaho at 396, 987 P.2d at 308 (1999) (quoting *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 314-15 (1993)).

IV. CONCLUSION

The Court should dismiss the Petition and deny the requested relief because (1) the Petition is not judiciable, and (2), even if it were judiciable, the Heartbeat Act does not violate the Idaho Constitution. The Court should also deny the request for attorney's fees and costs made in Prayer for Relief for these reasons and because Petitioners fail to argue any basis for an award of fees.

DATED this 28th day of April, 2022.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 28, 2022, I filed the foregoing electronically through the iCourt E-File system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notification of Service.

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