Electronically Filed
7/20/2022 2:44 PM
Idaho Supreme Court
Melanie Gagnepain, Clerk of the Court
By: Brad Thies, Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAII, ALASKA, INDIANA, KENTUCKY, on behalf of itself, its staff, physicians and patients and CAITLIN GUSTAFSON, M.D., on behalf of herself and her patients,

Petitioners,

v.

STATE OF IDAHO,

Respondent,

and

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

Intervenors-Respondents.

Supreme Court Docket No. 49615-2022

INTERVENORS-RESPONDENTS' BRIEF ON ISSUES SET FOR HEARING

LAWRENCE G. WASDEN
ATTORNEY GENERAL

STEVEN L. OLSEN
Chief of Civil Litigation

MEGAN A. LARRONDO, ISB #10597
DAYTON P. REED, ISB #10775
Deputy Attorneys General
954 W. Jefferson Street, 2nd Floor
P.O. Box 83720, Boise, ID 83720-0010
megan.larrondo@ag.idaho.gov
dayton.reed@ag.idaho.gov

Attorneys for Respondent State of Idaho

Alan E. Schoenfeld
Michelle N. Diamond
Rachel E. Craft
Cindy Y. Pan
Samuel J. McHale
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
New York, NY 10007
alan.schoenfeld@wilmerhale.com
michelle.diamond@wilmerhale.com
rachel.craft@wilmerhale.com
cindy.pan@wilmerhale.com

Attorneys for Petitioners

Daniel W. Bower, ISB #7204
MORRIS BOWER & HAWS PLLC
1305 12th Ave. Rd.
Nampa, Idaho 83686
dbower@morrisbowerhaws.com

Monte Neil Stewart, ISB #8129
11000 Cherwell Court
Las Vegas, Nevada 89144
monteneilstewart@gmail.com

Attorneys for Intervenors-Respondents

Joseph H. Rosenberg
Ann E. Himes
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
joseph.rosenberg@wilmerhale.com
annie.himes@wilmerhale.com

Attorneys for Petitioners

Michael J. Bartlett, ISB #5496
BARTLETT & FRENCH LLP
1002 W Franklin St.
Boise, Idaho 83702
michael@bartlettfrench.com

Attorneys for Petitioners

Vikram P. Iyer
WILMER CUTLER PICKERING HALE AND DORR LLP
350 South Grand Ave.
Los Angeles, CA 90071
vikram.iyer@wilmerhale.com

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES ii

I INTRODUCTION 1

II ARGUMENT 2

A. This Court Should End Immediately the Stay of Implementation of the Heartbeat Act 2

1. *Dobbs* and the strong basis of the Heartbeat Act's private enforcement provision defeat the Petitioners' separation-of-powers argument. 4

2. The Petitioners' "special law" argument is also baseless. 9

3. Because the Petitioners are making only a facial and not an as-applied challenge to the Heartbeat Act, their "informational privacy" argument fails. 11

4. Because the Petitioners are making only a facial and not an as-applied challenge to the Heartbeat Act, their "vague penalties" argument fails 12

5. Because the Petitioners refuse to see that abortion is different, their "equal protection" argument is valueless 13

6. It is highly likely that this Court will decline the Petitioners' invitation to conjure out of the Idaho Constitution a *Roe*-like "right" to abortion 14

7. Because it is highly likely that this Court will enter a final judgment upholding the Heartbeat Act against all challenges, it would be an abuse of discretion to further stay its implementation 16

B. Factual Development is Unnecessary Where the Petitioners' Constitutional Challenges are Facial and Demand Complete Constitutional Invalidation of Both the Heartbeat Act and the Trigger Law. 17

III CONCLUSION 21

CERTIFICATE OF SERVICE 23

TABLE OF CASES AND AUTHORITIES

CASES

Citizens United v. Fed. Election Comm'n,
558 U.S. 310, 331, 130 S. Ct. 876, 893 (2010).....18

Courthouse News Serv. v. Omundson,
No. 1:21-CV-00305-DCN, 2022 WL 1125357, at *10 (D. Idaho Apr. 14, 2022).....2

Dobbs v. Jackson Women's Health Org.,
597 U.S. --, 142 S. Ct. 2228 (June 24, 2022).....3, 4, 5, 6, 10, 11, 14, 15, 16, 20

Ezell v. City of Chicago,
651 F.3d 684, 697 (7th Cir. 2011) 18, 19

Gonzales v. Carhart,
550 U.S. 124, 133, 127 S. Ct. 1610, 1619 (2007).....15

Hernandez v. Hernandez,
151 Idaho 882, 884, 265 P.3d 495, 497 (2011).....12

Justice v. Hosemann,
771 F.3d 285, 292 (5th Cir. 2014) 18

Lakewood v. Plain Dealer Pub.l'g Co.,
486 U.S. 750, 770 n.11, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988).....18, 19

Mead v. Arnel,
117 Idaho 660, 662, 667, 670, 791 P.2d 410, 412, 417, 420 (1990) 8, 9

Olsen v. J.A. Freeman Co.,
117 Idaho 706, 709, 791 P.2d 1285, 1288 (1990).....2

Planned Parenthood of Se. Pennsylvania v. Casey,
505 U.S. 833, 112 S. Ct. 2791 (1992).....3, 4, 5, 6, 10, 11, 16

Roe v. Wade,
410 U.S. 113, 93 S. Ct. 705 (1973).....3, 4, 5, 6, 10, 11, 14, 15, 16

Six Star Holdings, LLC v. City of Milwaukee,
821 F.3d 795, 803 (7th Cir. 2016) 18

State v. Cobb,
132 Idaho 195, 969 P.2d 244 (1998).....12

State v. Korsen,
138 Idaho 706, 712, 69 P.3d 126, 132 (2003).....19

United States v. Marcavage,
609 F.3d 264, 27391 (3d Cir. 2010).....19

United States v. Treasury Employees,
513 U.S. 454, 477–478, 115 S.Ct. 1003 (1995).....18

Winter v. Nat. Res. Def. Council, Inc.,
555 U.S. 7, 20, 129 S. Ct. 365, 374 (2008).....2

IDAHO CODE

I.C. § 18-601 .....3, 17

I.C. § 18-622 ("Trigger Law").....1, 3, 17, 18, 21

I.C. § 67–5218.....8

OTHER AUTHORITIES

SB 1309 ("Heartbeat Act") 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 17, 18, 21

I

INTRODUCTION

This is the Idaho Legislature's Brief in response to this Court's June 30, 2022 call for the parties to address four issues,[1] in preparation for an August 3, 2022 hearing in the two pending cases initiated by the Petitioners, Idaho Supreme Court 49615-2022 ("First Case") and Idaho Supreme Court 49817-2022 ("Second Case").

The first issue is whether this Court should end immediately the stay of implementation of Senate Bill 1309 ("Heartbeat Act") entered in the First Case on April 8, 2022.[2] The second issue, related to the first, is whether this Court should enter in the Second Case a stay of implementation of Idaho Code § 18-622 ("Trigger Law"). As we demonstrate in Section II below, the right and, indeed, the only defensible answer is that no stay should be entered in either case, and to do so would constitute a manifest abuse of this Court's Rule 13(g)[3] discretion. On the stay issue, this Brief adopts the additional argument directly set forth in the State's Brief filed concurrently by the Attorney General's Office.

The third issue is whether this Court should consolidate the First Case and the Second Case. On this point, this Brief adopts and incorporates the argument set forth in the State's Brief on this issue.

The fourth issue is whether this Court should invoke any procedure "for the development of a factual record and potential motion practice." Without question, the right answer is no. We so demonstrate in Section III below. The State's Brief makes a similar showing, which we also adopt.

---

[1] Order Setting Hearing.

[2] Order Granting Motion to Reconsider.

[3] Idaho Appellate Rule 13(g).

II

ARGUMENT

A. This Court Should End Immediately the Stay of Implementation of the Heartbeat Act.

Together, the present posture of this case and Idaho law render indefensible any continuing stay of the Heartbeat Act.

That is so, first and foremost, because the Petitioners' arguments against the Act, weak to begin with, now stand exposed as fatally defective. That matters. Central to this Court's discretion to issue a stay[4] must always be an assessment of the applicant's likelihood of success on the merits.[5] To stay implementation of a duly enacted statute demonstrably likely to be held valid and constitutional in a final judgment would be the quintessence of abuse of discretion. That self-evident statement merits repetition: To stay implementation of a duly enacted statute demonstrably likely to be held valid and constitutional in a final judgment would be the quintessence of abuse of discretion.

Indeed, when the constitutional challenge to a statute is as weak and doomed to fail as the Petitioners' challenge to the Heartbeat Act, all other components of the stay equation (irreparable

[4] *Id.*

[5] In the American legal tradition, the considerations for stays and injunctions against government action are likelihood of success on the merits, irreparable injury, balance of harm and/or equities, and public interest. *E.g., Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 374 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."); *Courthouse News Serv. v. Omundson*, No. 1:21-CV-00305-DCN, 2022 WL 1125357, at *10 (D. Idaho Apr. 14, 2022). Any lesser standard would be particularly inappropriate in a case such as this where the government action sought to be stopped before a final resolution on the merits is the implementation of a duly enacted statute. That is because such a statute comes before the court with a strong presumption of its constitutionality. *E.g., Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 709, 791 P.2d 1285, 1288 (1990) (The party challenging a statute on constitutional grounds bears the burden of establishing that the statute is unconstitutional and "must overcome a strong presumption of validity.").

injury, balance of harm, public interest), even taken together, cannot justify a stay. That is because no one, despite their claims of future injury, is ever entitled to stop the operation of a valid statute.

Moreover, in this case, considerations of public interest are in harmony with, not contrary to, the preeminent consideration of the likelihood of success on the merits. In Idaho, "it is hereby declared to be the public policy of this state that all state statutes, rules and constitutional provisions shall be interpreted to prefer, by all legal means, live childbirth over abortion."[6] It would never be in the public interest to stay the operation of a valid statute preferring live childbirth over abortion or even such a statute not yet but highly likely to be held valid. More importantly, it would not be in the public interest for this State's citizens to face what is inevitable if the stay of the Heartbeat Act continues and this Court also stays the implementation of the Trigger Law. In such a case, Idaho would immediately become the anything-goes Wild West of abortion practice.[7]

Because the Petitioners' failure to show a likelihood of success on the merits—alone and without regard to any other inquiry or consideration—compels termination of the stay, the following sections demonstrate that failure.

Before going on, however, we note this: To continue the stay is also wrong for each of a number of reasons well set forth by the Attorney General's Office in both the State's Brief filed simultaneously with this Brief and its prior filings on the issue. The Legislature endorses and adopts those reasons.

---

[6] Idaho Code § 18-601.

[7] Although portions of Idaho Code, Title 18, Chapter 6 would be operative in the event of a double stay, it would be only those portions created under the distorting pressures of the *Roe/Casey* regime, *see Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791 (1992), modifying *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705 (1973). That regime has now rightly been held to have been "egregiously wrong" from the day it commenced. *Dobbs v. Jackson Women's Health Org*., 597 U.S. --, 142 S. Ct. 2228 (June 24, 2022). We hereafter cite the slip opinion, as follows: *Dobbs* at *6. In other words, all the abortions that that egregiously wrong regime compelled the unwilling people of Idaho to allow will continue to occur. That is a particular form of lawlessness; hence, "anything-goes Wild West" is an apt description.

1. *Dobbs* and the strong basis of the Heartbeat Act's private enforcement provision defeat the Petitioners' separation-of-powers argument.

The Petitioners' separation-of-powers argument refuses (not too strong a word) to acknowledge the legitimate state interest well and effectively promoted by the Heartbeat Act's private cause of action, which is both the Act's enforcement provision and its choice-of-forum provision ("the challenged provision"). That legitimate interest is to assure that it is this Court (perhaps initially but certainly ultimately), not the court of a different sovereign, that applies the Idaho Constitution to the Heartbeat Act. Not only is the challenged provision the only way to advance that interest, but it also does so well and effectively.

Because the Petitioners' separation-of-powers argument refuses to acknowledge those two realities of important, legitimate interest and well-tailored means, their briefs are loaded with conclusory cries of arbitrary, capricious, improper, unlawful, unconstitutional, etc. That is just what one would expect when listening to someone encountering a new and creative statutory scheme but refusing to acknowledge that it well and effectively advances an important, legitimate state interest.

That refusal to see, evident throughout the Petitioners' briefs, has recently been rendered all the more inexcusable and indefensible by the holding in *Dobbs*[8] and its implications for the Petitioners' separation-of-powers argument. The truth of that statement is demonstrated by five points, each one clear and well-nigh indisputable in its own right.

First, *Dobbs*, in addition to overruling *Roe* and *Casey* and thereby "return[ing] the issue of abortion to the people's elected representatives," *id*. at *7, articulated a clear *federal* constitutional standard for judging a state's regulation of abortion. That standard is rational-basis review:

> [R]ational-basis review is the appropriate standard . . . . It follows that the States may regulate abortion for legitimate reasons, and when such regulations are

[8] *Dobbs* at *5.

> challenged under the Constitution, courts cannot "substitute their social and economic beliefs for the judgment of legislative bodies." . . . That respect for a legislature's judgment applies even when the laws at issue concern matters of great social significance and moral substance . . . .
>
> A law regulating abortion, like other health and welfare laws, is entitled to a "strong presumption of validity." . . . It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests.

Id. at *42.

In applying this standard to the Mississippi abortion statute, *Dobbs* noted a number of "legitimate state interests" immunizing that statute against federal constitutional challenge. Most of those interests apply in whole, and the rest apply in important part, to the Heartbeat Act:

> These legitimate interests include respect for and preservation of prenatal life at all stages of development, . . .; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability.

Id.

Thus, the first point is that, post-*Dobbs*, the Heartbeat Act passes *federal* constitutional muster.

The second point—clear and certain in light of the first point—is that the Petitioners' challenge to the Heartbeat Act is now limited to the Idaho Constitution, without resort to or reliance on, in any way, federal constitutional law. As this Court said in its June 30, 2022 Order, after noting that *Dobbs* overruled *Roe* and *Casey*:

> While Petitioners grounded their Petition on Idaho's constitution, their arguments were premised, in part, on the contention that the Idaho Constitution should be interpreted consistently with those provisions of the United States Constitution that formed the basis for the decisions in *Roe* and *Casey*.

No longer can Petitioners' arguments be so premised. Only the Idaho Constitution is now at play here. Only it now determines whether the Heartbeat Act stands or falls. That is the second point.

The third point is that only this Court can authoritatively and conclusively interpret and apply the Idaho Constitution to the Heartbeat Act. That power resides nowhere else. As we said in Brief of the Idaho Legislature at 11-12: No federal judge has "what the State's supreme court has: a deep expertise in state law interpretation, a focused perception of not just those laws but of the State's society, culture, and people, and the power to pronounce an interpretation of state law that is binding on all federal courts, even the United States Supreme Court."

The fourth point follows inexorably: Idaho has a powerful and legitimate interest in having this Court, and no other, apply the Idaho Constitution to the Heartbeat Act. Indeed, that interest is more compelling now than it was the day the Heartbeat Act became law or the day the Petitioners initiated this case—exactly because, as this Court explained in its June 30, 2022 Order, *Dobbs* has shorn from this case the Petitioners' arguments "premised, in part" on a role for *Roe/Casey* jurisprudence in this case's resolution.

The fifth point is that the Heartbeat Act's challenged provision is the only legal means available to the Legislature to vindicate Idaho's important interest in having this Court (either initially or ultimately), and no other, apply the Idaho Constitution to the Heartbeat Act. And the challenged provision vindicates that interest well and effectively. *See* Brief of the Idaho Legislature at 14 (filed April 28, 2022; hereafter referred to as "the Legislature's Brief, with this Brief of the Idaho Legislature hereafter and heretofore referred to as "this Brief").

The Petitioners' Reply Brief at 17–24 (trying to save their separation-of-powers argument) never engages this fifth point or the four points inexorably leading up to it. Petitioners remain silent when facing Idaho's important, legitimate interest in having this Court, and no other, apply the Idaho Constitution to the Heartbeat Act. Remarkable, given that it is that well-served legitimate

interest that destroys their separation-of-powers argument and renders baseless their cries of arbitrary, capricious, improper, unlawful, unconstitutional, etc.

The other arguments that Petitioners make in the context of their larger separation-of-powers argument are likewise baseless, as seen when comparing the Legislature's Brief at 16-25 with the Petitioners' Reply Brief at 18-25. Thus, in the context of the stay issue, that comparing becomes a crucial task. A few of the Petitioners' secondary arguments, however, perhaps merit the following brief comments.

In challenging the Heartbeat Act's use of private plaintiffs to enforce the Act, the Petitioners' briefs' approach, in essence, is to paint a picture of a lawless, uncontrollable mob (consisting in part of rapists' brothers[9]) embroiling innocent medical providers in unmeritorious litigation and further injuring them with bad-faith litigation tactics beyond the control of our district courts.[10] False picture. The many protective rules and judicial powers cited in the briefs of the State and the Legislature[11] apply just as much to private litigants as to government lawyers. So, false picture indeed.

In further challenging the Heartbeat Act's exclusive use of private plaintiffs to enforce the Act, the Petitioners' briefs' approach is to repeatedly say that such an approach "does not resemble

---

[9] The Petitioners' Opening Brief published the rapist's-brother defamation at page 23. In response, the Legislature's Brief noted "that the Petitioners' Brief's regrettable crack about 'a rapist's estranged brother' . . . is beneath contempt because it imputes the rapist's evil to his brother and thereby denigrates the brother's humanity. That brother has lost a niece or a nephew. That is a 'distinct and palpable' injury under any definition, as is the loss of a son or daughter, a brother or sister, a grandson or granddaughter." Under customary standards of professionalism, decency, and decorum (at least, customary in Idaho), that responsive statement should have been enough to prevent further such contemptuous language. But Petitioners' counsel chose to double-down. Their Reply Brief at 21 says: "SB 1309 allows unharmed plaintiffs—such as a rapist's estranged brother—to sue and to recover statutory damages regardless of that lack of injury."

[10] *E.g.*, Petitioners' Opening Brief at 23-24, 25, 33; Petitioners' Reply Brief at 23.

[11] State's Brief at 27; Legislature's Brief at 27 & nn. 54-55.

typical private attorneys general statutes," *id*. at 27, and is otherwise unusual or unique. What Petitioners' briefs *never* do is grapple with *why* that is so, *why* the private cause of action is the exclusive enforcement mechanism.

The answer is obvious: that mechanism *must* be exclusive in order to vindicate Idaho's important interest in having this Court, not the court of a separate sovereign, apply this State's Constitution to this State's Act regulating something of great importance to this State's people, abortion. Only that statutory approach and no other works to protect that interest. Of course, for the Petitioners to even acknowledge that reality would be to explode their it's-different-therefore-it's-bad-and-unconstitutional argument.

Petitioners posture that this Court's decision in *Mead v. Arnel*, 117 Idaho 660, 667, 791 P.2d 410, 417 (1990) conclusively resolves this case's separation-of-powers issue and then say that the State and the Legislature have "forfeited" that issue by not addressing *Mead*. Petitioners' Reply Brief at 18–19. We did not address *Mead*, however, only because it is plainly inapposite. As this Court said in *Mead*: "The issue before the Court is whether the Idaho Legislature may rescind the rules promulgated by an executive department board or agency by concurrent resolution pursuant to I.C. § 67–5218." *Id*. at 662, 791 P.2d at 412. This issue in more general form, the Court noted, had long been the subject of an intense academic and judicial debate across the country and was a close and difficult issue. *Id*. Resolving the separation-of-powers issue, the Court held:

> In sum, I.C. § 67–5218 was created in the constitutionally mandated manner and is substantively proper under the terms of article 2, § 1, in that it does not permit the exercise of power by the legislature in rejecting rules or regulations properly belonging to the executive or the judiciary. Thus, we declare I.C. § 67–5218, as to rescinding rules and regulations pursuant thereto, constitutional. However, we do not suggest that all such legislative statutory reservations or rejections of rules or regulations pursuant thereto are necessarily consistent with the separation of powers principles.

Id. at 670, 791 P.2d at 420. In light of this holding, it is understandable that our repeated review of *Mead* has failed to disclose any meaningful connection between the resolution of the separation-of-powers issue in that case and the vastly different separation-of-powers issue in this case. Petitioners have failed to show such. *Mead* is plainly inapposite.[12]

* * * * * * * * *

Petitioners have advanced their separation-of-powers argument as their first, most salient, most powerful, most meritorious argument. It may be their first and most salient, but it is neither powerful nor meritorious. Rather, it is baseless. In no conceivable way can that argument sustain a conclusion wholly necessary if the stay is to continue—that it is *likely* that the Heartbeat Act will not pass constitutional muster. The only defensible conclusion is the opposite—that in high likelihood the Act will be held fully valid and constitutional.

* * * * * * *

In the context of the stay issue and its controlling likelihood-of-success-on-the-merits component, a crucial task remains. It is to compare the dissection of the Petitioners' additional arguments found in the State's Brief and the Legislature's Brief with the corresponding sections in the Petitioners' briefs. We do not repeat that dissection here. We do, however, in the following sections address such portions of the Petitioners' remaining arguments as perhaps merit some further refutation.

2. The Petitioners' "special law" argument is also baseless.

The Petitioners' "special law" argument repeatedly evidences two large blind spots and hence two fatal defects. One, the Petitioners premise this argument on the assertion that "[l]aws

[12] In an act of desperation, the Petitioners also rely heavily on the unreported, unappealed decision of a Texas state district court judge ruling against the Texas law similar to the Heartbeat Act. Petitioners' Reply Brief at 19. To state the obvious, that decision is not competent authority, in every sense of the word "competent."

that create 'arbitrary, capricious, or unreasonable' classifications are considered 'special laws' and are prohibited.[13] The Petitioners are able to so premise this argument *only* because of their steadfast refusal to acknowledge what is before their eyes—Idaho's important, legitimate interest in having this Court, not the court of a separate sovereign, apply the Idaho Constitution to the Heartbeat Act and the fact that the challenged provisions are not just the only way to advance that interest but a way that does so well and effectively. The previous section illuminates that steadfast refusal as well as the realities the Petitioners refuse to acknowledge. Those realities show the Petitioners' chant of "arbitrary, capricious, or unreasonable" to be essentially mindless and meaningless.

Two, and more importantly, the Petitioners' "special law" argument also refuses to acknowledge what is clearly demonstrated in both the Legislature's Brief and by *Dobbs*—that abortion is different in a way that fully justifies its different treatment in the law. The Petitioners seem to think they win this argument by showing "[t]hat SB 1309 targets abortion providers."[14] The Heartbeat Act does regulate only abortionists, and that fact advances not one whit the specious "special law" argument. That is because abortion is not just another medical procedure, like a hernia repair or an appendectomy. An abortion kills a human being, the preborn child.[15] *Dobbs* makes the same point: "What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged: Abortion destroys what those decisions call 'potential life' and what the law at issue in this case regards as the life of an 'unborn human being.' *See Roe* . . . (abortion is "inherently different");

[13] Petitioner's Reply Brief at 25.

[14] Petitioners' Reply Brief at 26.

[15] Legislature's Brief at 36-37.

Casey . . . (abortion is "a unique act"). None of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion."[16]

By refusing to acknowledge that abortion is different and profoundly so from other medical procedures—and, hence, that the abortionist's practice is different and profoundly so from all other medical practices—the Petitioners render their "special law" argument of no value.

3. Because the Petitioners are making only a facial and not an as-applied challenge to the Heartbeat Act, their "informational privacy" argument fails.

The Legislature's Brief at 29–31 demonstrated that, because the Petitioners are making only a facial and not an as-applied challenge to the Heartbeat Act, their "informational privacy" argument is without merit. Here is the essence of that demonstration:

> Petitioners' Brief is making a facial, not an as-applied, challenge to the Act. Petitioners' Brief would have this Court strike down the entirety of the Act on the speculation that in some future civil action the court and the parties will not adequately protect an unconsenting woman's not-already-public medical information. If (and that is a big if) that ever happens, the woman can seek relief through an as-applied challenge to that perceived narrow inadequacy in the Act. And, indeed, only the woman can seek that relief, not Petitioners or other abortion providers, because it is her interest alone that is at stake.

Id. at 31.

The Petitioners' Reply Brief says *nothing* in response to this demonstration. Their Reply Brief says *nothing* countering the simple truth that all their "informational privacy" arguments are mere speculation about possible future events and therefore wholly inappropriate as part of a facial challenge. That silence can be read only and fairly as a concession of defeat.

Given clear Idaho law, this concession is right. This Court has explained:

> The party challenging a statute bears the burden of proving it unconstitutional. . . . *To succeed on a facial challenge, one must demonstrate that under no circumstances is the statute valid*. . . . But, to prevail in an as-applied challenge,

[16] *Dobbs*, *supra*, at *32.

> one must demonstrate only that the statute is unconstitutional as applied in a specific instance.[17]

The Legislature's Brief at 29–32 sets forth many circumstances in which the statute is valid beyond any question. The Petitioners have failed, in this their facial challenge to the Heartbeat Act, to "demonstrate that under no circumstances is the statute valid." They have not even tried to do so. Accordingly, their "informational privacy" argument fails.

4. Because the Petitioners are making only a facial and not an as-applied challenge to the Heartbeat Act, their "vague penalties" argument fails.

This section is almost identical to the previous section because the Petitioners, with their "vague penalties" argument, again ignore or are otherwise oblivious to the reality that they are making the argument as part of an admittedly limited facial challenge to the Heartbeat Act.

The Legislature's Brief at 35 says:

> [T]his Court must determine under its usual deferential standard whether the $20,000 figure chosen by Legislature is "excessive" in any constitutionally meaningful sense. We say $20,000 because any greater amount is not before this Court in this proceeding, which is strictly a facial challenge to the Act. Any greater figure is wholly speculative and can be dealt with properly in and only in an as-applied appellate challenge. (Footnotes omitted.)

The Petitioners' Reply Brief, again, says *nothing* in response or counter to this straightforward observation. So, again, a concession. And, again, because of clear Idaho law,[18] a concession that is correct. With their "vague penalties" argument, the Petitioners again have failed, in this their facial challenge to the Heartbeat Act, to "demonstrate that under no circumstances is the statute valid." They have not even tried to do so. Accordingly, this argument too fails.

---

[17] *Hernandez v. Hernandez*, 151 Idaho 882, 884, 265 P.3d 495, 497 (2011) (emphasis added).

[18] *E.g., Hernandez v. Hernandez, supra,* 151 Idaho at 884, 265 P.3d at 497; *see generally State v. Cobb,* 132 Idaho 195, 969 P.2d 244 (1998).

5. Because the Petitioners refuse to see that abortion is different, their "equal protection" argument is valueless.

The Petitioners' "equal protection" argument begins with this observation: the Heartbeat Act "target[s] abortion providers." Petitioners' Reply Brief at 36. This observation is right if "targets" means that the Act is directed at persons who perform abortions. Their next observation is this: the Heartbeat Act has the purpose and effect of "shut[ting] down a politically disfavored service." *Id*. This observation is not entirely correct. On its face, the Heartbeat Act says that a person may not perform an abortion on a pregnant woman when a fetal heartbeat has been detected, except in the case of a medical emergency, rape, or incest. So the Act does not "shut down" or ban all abortions; rather, it limits lawful abortions to pregnancies in the first five to six weeks of pregnancy (usually the time the fetal heartbeat is first detected) or in cases of a medical emergency, rape, or incest. It is true that all other abortions are "politically disfavored" in Idaho and that the Heartbeat Act aims to "shut down" such.

Proceeding from these observations, the "equal protection" argument is that the Heartbeat Act violates state constitutional equal protection norms by treating abortionists differently than other medical providers and abortion differently than other medical procedures. Thus, at this point, the entire premise of the Petitioners' argument becomes this: there is no difference between abortion and other medical procedures that should matter to the law and therefore no legally significant difference between abortionists and other medical providers.

That premise is false, as the people of Idaho know, as their Legislature knows, as the United States Supreme Court knows, and, we trust, as this Court knows. Abortion *is* different.

> [The Petitioners' "equal protection" argument] fails because it is either blind to or willfully fails to acknowledge the profound difference between an abortion and all other medical procedures. Only an abortion sets out intentionally to terminate the life of a preborn child, to kill what is indisputably human life, to cut short the only biological process in the universe that, but for that intentional intervention, will bring forth a being that even abortion providers cannot deny must be accorded the

> fullest measure of dignity, respect, protection, and life available under any constitutional system. That is a distinction that makes a difference if any distinction ever has in the eyes of the law. It is that distinction that fully justifies, under any constitutional standard, separate regulation of abortion providers and their death-dealing procedures. (Footnotes omitted.)[19]

We have set forth in Section I.B. above the United States Supreme Court's affirmation that abortion is different in ways fully justifying the States' regulation (including prohibition) of it.

Because abortion is different in such morally profound and legally significant ways, and because the Petitioners cannot—indeed will not—acknowledge, let alone attempt to refute, that simple truth, they cannot—and do not—make a coherent "equal protection" argument to this Court, one that can withstand even the most cursory scrutiny.

6. It is highly likely that this Court will decline the Petitioners' invitation to conjure out of the Idaho Constitution a *Roe*-like "right" to abortion.

With their last argument, the Petitioners are inviting this Court to conjure out of the Idaho Constitution a *Roe*-like "right" to abortion. However, just as Justice Harry Blackmun in his *Roe* decision was, and a myriad of *Roe*-defenders since have been, relative to the federal constitution,[20] the Petitioners are rather uncertain about what language of the Idaho Constitution should be deemed to give rise to such a "right." In the end, they settle on no specific constitutional language but premise their invitation instead on this general notion: This Court should recognize "a pregnant person's right to make intimate familial decisions, which is implicit in Idaho's concept of ordered liberty."[21]

We will pass by the reference to "pregnant *person*" to get directly at a disgusting sleight-of-hand hidden in the phrase "the right to make intimate familial decisions." The Petitioners are

[19] Legislature's Brief at 36–37.

[20] *Dobbs* recounts this confusion and uncertainty at *9–15.

[21] Petitioner's Reply Brief at 37.

not seeking a right to make "intimate familial decisions" such as the decision to carry a preborn child to term or to use contraceptives or some other form of birth control or to use assistive reproductive technologies or to put a new baby up for adoption or to adopt a baby or any such thing. The Petitioners are asking this Court to create an Idaho constitutional "right" residing in the pregnant woman to decide, and then to carry out the decision, to abort—that is, to kill—the preborn child. That "right" is profoundly different morally and legally from the other rights sensibly encompassed by the phrase "intimate familial decisions," exactly because abortion kills a preborn child, a human being. Thus, abortion is not just another "intimate familial decision," one type among several others; abortion is profoundly different from those decisions that the law protects as true "intimate familial decisions."

This Court should not countenance in this context or any other the Petitioners' persistent and willful blindness to that reality and their accompanying sleight-of-hand.

It is also important to note that the Petitioners put no bounds on this "right" they are inviting this Court to invent—not "viability," not a particular "trimester," not a set number of weeks, apparently content for now to leave the legislative details to this Court. It is certain, however, that Planned Parenthood is a nationwide advocate for no limits on the "right" and strongly opposes all measures to prevent even "partial-birth abortion."[22]

In the context of the federal constitution and the history of the Nation, *Dobbs* analyzes and refutes every argument and stratagem that the Petitioners have put forth here to entice this Court to invent a *Roe*-like "right" and impose it on Idaho. That truth is important. It is important because

[22] *E.g., Gonzales v. Carhart*, 550 U.S. 124, 133, 127 S. Ct. 1610, 1619 (2007) (where the respondents, including Planned Parenthood Federation of America, Inc. and its San Francisco subsidiary, opposed the federal Partial-Birth Abortion Act). For a detailed description of the cruel procedures used for partial-birth abortions, *see id*. 550 U.S. at 136–40, 127 S. Ct. at 1621–23.

Dobbs' analysis and refutations ought to apply with full strength to the Petitioners' arguments put forth here unless they can demonstrate something materially different about the Idaho Constitution—its language, its history, its treatment by this Court—(and helpful to the Petitioners' position) when compared to the federal constitution. Likewise, Petitioners' argument is without merit unless they can demonstrate something materially different about Idaho's history (and helpful to the Petitioners' position) when compared to the history of our Nation. The Petitioners cannot do that. Indeed, the two biggest pertinent differences cut against the Petitioners' position: the Idaho Constitution has never served under a *Roe/Casey*-like regime, and Idaho's people were among the staunchest in the Nation in opposing the federal *Roe/Casey* regime and among the gladdest at its downfall.

In the end, it is fair to say that the emperor has no clothes, that the Petitioners are really doing nothing other than making a naked invitation to this Court to exercise "raw judicial power"[23] to gratify the policy preferences that they hope are held by at least three justices of this Court. That being so, and it is, it is equally fair to conclude that, to a high level of likelihood, this Court will decline the Petitioners' invitation to conjure out of the Idaho Constitution a *Roe*-like "right" to abortion.

7. Because it is highly likely that this Court will enter a final judgment upholding the Heartbeat Act against all challenges, it would be an abuse of discretion to further stay its implementation.

This proposition seems to us to be self-evident. We cannot envision the judicial power being rightly used to delay the implementation of a duly enacted statute after demonstrating the high likelihood that the same judicial power will in due course uphold it against all challenges. If there is any real separation-of-powers issue in these cases, that could well be it.

[23] *Dobbs* at *2–3 ("As Justice Byron White aptly put it in his dissent, the [*Roe*] decision represented the 'exercise of raw judicial power,' . . . .").

Because two of the three other traditional considerations in this context—the balance of harm and public interest—also strongly favor lifting the stay, that is what should happen. Both those considerations, in unison, point to that result. It would be profound harm to this State and its people, and at the same time manifestly against good public policy, for the stay to continue, especially if this Court also stays the implementation of the Trigger Law. In such a case, Idaho would immediately become the anything-goes Wild West of abortion practice. Likewise, in a polity where democratic processes and the rule of law are honored, it could not be in the public interest to stay the operation of a valid statute, or even one not yet but highly likely to be held valid. That is especially true where the public policy at stake is so clear: "it is hereby declared to be the public policy of this state that all state statutes, rules and constitutional provisions shall be interpreted to prefer, by all legal means, live childbirth over abortion."[24]

The Legislature respectfully urges this Court to immediately terminate the stay against the implementation of the Heartbeat Act.

B. Factual Development is Unnecessary Where the Petitioners' Constitutional Challenges are Facial and Demand Complete Constitutional Invalidation of Both the Heartbeat Act and the Trigger Law.

Because of the nature of the Petitioners' claims and of the relief they seek, neither the First nor the Second Case should be transferred from this Court for the development of a factual record or related motion practice. Their claims all constitute a facial challenge to the two laws; none of their claims is an as-applied challenge, and; the relief sought is complete invalidation of both laws on legal arguments that do not require fact development. As explained by the United States Supreme Court, the distinction of an "as applied" versus "facial" challenge is "both instructive and necessary, for it goes to the breadth of the remedy employed by the Court, not what must be

[24] Idaho Code § 18-601.

pleaded in a complaint."[25] Thus, it is the remedy pursued by the Petitioners that determines the need or not for the development of a factual record. When as here with both cases, the Petitioners seek only the broad relief of a blanket determination of unconstitutionality and not the "narrower remedy" associated with "as-applied" challenges, there is no need, let alone any requirement, for the development of a factual record.[26]It is incontrovertible that the Petitioners' primary argument is that the Heartbeat Act and the Trigger Law are facially unconstitutional. The Petitioners are telling this Court that both challenged laws, on their face, violate the Idaho Constitution and, on that basis and that basis alone, are asking this Court to invalidate the entirety of both laws.[27] Indeed, with the Heartbeat Act, the Petitioners plainly admit that they are *not* alleging facts related to their causes of action; rather, "[t]o the extent the Petition alleges facts, it does so in satisfaction of this Court's standard for exercise of original jurisdiction."[28] Consequently, upon a holding that the Court has original jurisdiction, any facts alleged are not relevant.[29]

---

[25] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331, 130 S. Ct. 876, 893, (2010) (citing *United States v. Treasury Employees*, 513 U.S. 454, 477–478, 115 S.Ct. 1003 (1995) (contrasting "a facial challenge" with "a narrower remedy").

[26] *See Six Star Holdings, LLC v. City of Milwaukee*, 821 F.3d 795, 803 (7th Cir. 2016) ("[A] facial challenge usually involves prospective relief, such as an injunction, whereas an as-applied challenge invites narrower, retrospective relief, such as damages."); *Justice v. Hosemann*, 771 F.3d 285, 292 (5th Cir. 2014) (Explaining that it is the narrow remedy of an as-applied challenge that requires the acquisition of particularized facts).

[27] *See* Petitioners' Motion to Expedite Briefing and Argument [Second Case], p.1 ("Petitioners are invoking this Court's original jurisdiction, seeking relief on their claims that the Idaho Code Section 18-622 . . . is unlawful and unenforceable under the Idaho Constitution and Human Rights Law . . . ."); *See also* Petitioners' Opp'n to Motion for Reconsideration [First Case], p.4 ("The constitutional violations are manifest and apparent *from the face of the statute*.") (Emphasis added).

[28] *See* Petitioners Opp'n to Respondent's Motion to Reconsider [First Case], p.4.

[29] *See Ezell v. City of Chicago*, 651 F.3d 684, 697 (7th Cir. 2011) ("The plaintiffs have challenged the firing-range ban on its face, not merely as applied in their particular circumstances. In a facial constitutional challenge, individual application facts do not matter. Once standing is established, the plaintiff's personal situation becomes irrelevant."). *See also Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 770 n.11, 108

Indeed, the Petitioners assert that both challenged laws should be declared violative of Idaho constitutional protections without regard or reference to particular individualized conduct.[30] As is evident from all the Petitioners' filings, they make no attempt to request the "more narrow" remedy associated with an "as applied" challenge—that is, relief based on and directed at an individual's actual conduct. That is so with respect to both challenged laws.[31] Consequently, exactly because of how the Petitioners have framed their own claims and of what relief they are seeking, there is no need for this Court to invoke any procedure for factual development.

The unnecessary and irrelevant nature of factual development in these two cases becomes even more apparent upon consideration of the individual causes of action and the relief demanded in each. For example, the Petitioners assert that both statutes are void for vagueness.[32] In the *Korsen* case, this Court made clear that in Idaho "[a] statute may be challenged as unconstitutionally vague on its face or as applied to a defendant's conduct."[33] This Court went on to hold that vagueness "as applied" can be shown in two separate ways that both require the application of the statute to a particular individual's actual conduct.[34] In contrast, where the

S. Ct. 2138 (1988) ("Facial attacks, by their nature, are not dependent on the facts."); *United States v. Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010) ("A facial attack tests a law's constitutionality based on its text alone and does not consider the facts or circumstances of a particular case.").

[30] *See* Verified Petition for Writ of Prohibition for Declaratory Judgment [Second Case], p.18; *see* Verified Petition for Writ of Prohibition and Application for Declaratory Judgment [First Case], p.19.

[31] *See Marcavage*, 609 F.3d at 273 ("An as-applied attack . . . does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right.").

[32] *See* Second Case Petition, p.16 (Count III); First Case Petition, pp.15-16 (Count IV).

[33] *See State v. Korsen*, 138 Idaho 706, 712, 69 P.3d 126, 132 (2003).

[34] *Id*.

challenge is facial and not "as applied," the matter is a "pure question of law."[35] Thus, for the void-for-vagueness causes of action, where there are no allegations of particular, individualized conduct, the issue is purely a question of law and does not require any kind of factual development by any means.

The same analysis applies equally directly to each of the Petitioners' other causes of action in the two cases—substantive due process, equal protection, and privacy rights.[36] Each of those causes of action is characterized by (i) an absence of allegations of any individual's conduct deemed to meet an element of the cause of action, (ii) a challenge to the constitutionality of the impugned law based solely on its face, and (iii) a prayer for the remedy of complete invalidation of the entire law. Consequently, under the clear law set forth above, each of those causes of action will be rightly resolved by this Court without any "factual development."

Nothing about *Dobbs* or its impact on these two cases alters this conclusion. *Dobbs* certainly had an impact on both cases. Importantly, it eliminated the notion, relied on by the Petitioners throughout both cases, that there is a federal constitutional right to abortion.[37] Thus, the Petitioners are now reduced to pleading with this Court to invent a state constitutional right to abortion, despite the utter lack of basis in the language or history of our Constitution, in precedent, or our people's values and traditions for such an act of judicial power. (We have so shown in Section II above.) So, yes, *Dobbs* effected large changes in the legal landscape of the Petitioners' two cases. But none of those changes altered the reality that all of the Petitioners' challenges

[35] *Id.*

[36] *See* Second Case Petition, pp.12-13, 14-15, 16-17 (Counts I, II and III); First Case Petition, pp.15-18. (Counts III, IV, V and VI).

[37] *See Dobbs* at *38 ("[T]he Constitution does not confer a right to abortion . . . and the authority to regulate abortion must be returned to the people and their elected representatives.").

remain facial challenges seeking a total invalidation of the two laws, that none of their challenges or causes of action constitute an as-applied attack, and that consequently there is no need, let alone requirement, for any "factual development" in the resolution of either case. Whether this Court will accept or decline the Petitioners' invitation to invent a state constitutional right to abortion is solely a matter of law. No fact properly subject to a finding by a special master or district court judge can alter in any way resolution of that question of law.

This Court was rightly prepared to hear oral argument and rule on the constitutionality of the Heartbeat Act without factual development. It is equally correct to take that same approach to the Trigger Law.

In light of all the foregoing, the Legislature respectfully submits that the only right and sensible approach is to resolve both cases as the Petitioners have presented them—as facial challenges to be resolved as a matter of law by reference to and only to the face of the challenged laws. Use of any procedure for "factual development" is unnecessary and will be needlessly wasteful of precious time.

III

CONCLUSION

The circumstances of these cases, rules of this Court, and governing law, all sustain unequivocally these actions by this Court:

1. immediate termination of the stay on the implementation of the Heartbeat Act;
2. refusal to stay the Trigger Law; and
3. rejection of any procedure the purpose or effect of which is "factual development."

The Legislature respectfully urges this Court to so act.

Dated this 20th day of July, 2022.

/s/ Daniel W. Bower

Daniel W. Bower
MORRIS BOWER & HAWS PLLC

/s/ Monte Neil Stewart

Monte Neil Stewart

Attorneys for Intervenors-Respondents

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2022, I filed and served the foregoing via the Odyssey File and Serve system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Michael J. Barlett BARTLETT & FRENCH LLP 1002 W. Franklin St. Boise, ID 83702	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Facsimile: 208-629-2460 iCourt: michael@bartlettfrench.com

Attorneys for Petitioners

Alan E. Schoenfeld Michelle N. Diamond Rachel E. Craft Cindy Y. Pan Samuel J. McHale WILMER CUTLER PICKERING HALE AND DORR LLP 7 World Trade Center New York, NY 10007	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Facsimile: 212-230-8888 iCourt: alan.schoenfeld@wilmerhale.com michelle.diamond@wilmerhale.com rachel.craft@wilmerhale.com cindy.pan@wilmerhale.com sam.mchale@wilmerhale.com

Attorneys for Petitioners

Joseph H. Rosenberg Ann E. Himes WILMER CUTLER PICKERING HALE AND DORR LLP 1875 Pennsylvania Avenue NW Washington, DC 20006	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Facsimile: 202-663-6363 iCourt: joseph.rosenberg@wilmerhale.com annie.himes@wilmerhale.com

Attorneys for Petitioners

Vikram P. Iyer WILMER CUTLER PICKERING HALE AND DORR LLP 350 South Grand Ave. Los Angeles, CA 90071	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Facsimile: 213-443-5400 iCourt: vikram.iyer@wilmerhale.com

Attorneys for Petitioners

Megan A. Larrondo
Dayton P. Reed
STATE OF IDAHO
DEPUTY ATTORNEYS GENERAL
954 W. Jefferson Street, 2nd Floor
PO Box 83720
Boise, ID 83720-0010

Attorneys for Respondent

☐ U.S. Mail
☐ Hand Delivered
☐ Facsimile: 202-663-6363
☒ iCourt: megan.larrondo@ag.idaho.gov
dayton.reed@ag.idaho.gov

/s/ Daniel W. Bower
Daniel W. Bower