Electronically Filed
7/20/2022 4:40 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 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 RESPONSE TO ORDER SETTING 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

DANIEL W. BOWER
MORRIS BOWER & HAWS PLLC
1305 12th Ave. Rd.
Nampa, ID 83686
dbower@morrisbowerhaws.com

MONTE NEIL STEWART
11000 Cherwell Court
Las Vegas, Nevada 89144
monteneilstewart@gmail.com

Attorneys for Intervenors-Respondents

MICHAEL J. BARTLETT
BARTLETT & FRENCH LLP
1002 W Franklin St.
Boise, ID 83702
michael@bartlettfrench.com

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
sam.mchale@wilmerhale.com

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

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 AUTHORITIES

Cases

Idaho Constitution

Idaho Code

Rules

Other Authorities

I. INTRODUCTION

This Court should (1) immediately vacate the stay of implementation of the Senate Bill 1309, otherwise known as the Heartbeat Act; (2) consolidate Petitioners' two challenges before this Court to dispose of them, or hear the two challenges on the same day if the Court declines to consolidate; and (3) not transfer the cases to the district court for factual development.

The Court should vacate the stay of the Heartbeat Act because Petitioners can show no likelihood of success on the merits: there is no constitutional right to abortion, and they will not suffer a cognizable injury if the stay of the Heartbeat Act is vacated. The fundamental assumption behind Petitioners' challenge to the civil action stated in the Heartbeat Act is that it is an impermissible attempt by the Idaho Legislature to prevent women from exercising their right to choose an abortion under the U.S. Constitution as recognized in *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). Petitioners' assumption was fatally flawed before *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) was decided, as demonstrated by the Respondents in their opposition briefing. And now that the U.S. Supreme Court has overruled *Roe* and *Casey* with *Dobbs*, there can be no doubt that the Heartbeat Act's civil action does not and cannot deny any federal constitutional rights. Moreover, it does not and cannot deny any rights under the Idaho Constitution. The text, structure, and history of the Idaho Constitution all demonstrate that it does not contain a right to abortion. Abortion at all stages was criminally prohibited in Idaho from 1864 until legislators were forced to begrudgingly regulate abortion under *Roe*. State's Opp'n Br., Dkt. No. 49615-2022, at 3-4 (reviewing the history of Idaho's abortion laws pre- and post-statehood). It defies reason to believe

that the drafters of the Idaho Constitution, without any discussion or explicit reference, intended to protect as a fundamental right conduct that was criminally prohibited. For these reasons, Petitioners also cannot show that they will suffer cognizable injury—let alone irreparable injury—if the stay of the Heartbeat Act is vacated. On the other hand, the State has and will continue to suffer grave harm if the stay of the Heartbeat Act is not immediately vacated. Any stay of the State's duly enacted laws causes grave injury. The injury here is particularly harmful, given that the Heartbeat Act was intended to express the State's policy choice for life and the value the State places on preborn human life.

As to the other questions posed by the Court: because there is no constitutional right to abortion and because the Court lacks original jurisdiction over both Petitions, Petitioners' two petitions should be consolidated and denied together. Should the Court disagree, the petitions should be set for oral argument on the same day, rather than consolidated, to allow adequate time to address the issues. No factual development is necessary or appropriate because the Court lacks original jurisdiction over Petitioners' claims and they are questions of law.

II. BACKGROUND

A. Legislative History

Senate Bill 1309, the Fetal Heartbeat Preborn Child Protection Act, passed Idaho's Senate on a 28-6-1 vote and passed Idaho's House of Representatives on a 51-14-5 vote. 2022 Legislative – Senate Bill 1309, IDAHO LEGISLATURE, https://legislature.idaho.gov/sessioninfo/2022/legislation/S1309/ (last visited July 14, 2022). Senate Bill 1358 is the trailer bill to Senate Bill 1309. It passed Idaho's House and Senate on substantially similar margins to Senate Bill 1309. 2022 Legislature – Senate Bill 1358, IDAHO

LEGISLATURE, https://legislature.idaho.gov/sessioninfo/2022/legislation/S1358/ (last visited July 14, 2022). Both bills were signed into law by the Governor on March 23, 2022. They are collectively referred to in this brief as the "Heartbeat Act."

The Heartbeat Act was intended to express the State's profound value for human life, including preborn human life. S.B. 1309 § 2. It 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 Heartbeat 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 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*.

B. Procedural History

On March 30, 2022, Petitioners, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky and Caitlin Gustafson, M.D., filed a Verified Petition for Writ of Prohibition and Application for Declaratory Judgment against the State of Idaho with this Court in Supreme Court Docket No. 49615-2022. Petitioners seek a declaration that the civil action authorized by the Heartbeat Act violates the Idaho Constitution on six different grounds: (1) separation of powers; (2) the prohibition against the enactment of "special" laws; (3) an alleged right to keep the fact of having had an abortion secret from the courts; (4) an alleged due process prohibition on excessive and vague penalties; (5) an alleged equal protection prohibition on treating abortion providers differently from other civil defendants; and (6) an alleged right to abortion contained in the Idaho Constitution. Despite Petitioners' ostensible claims under the Idaho Constitution, as discussed below, their arguments demonstrate that their real concern was that they believed that the Heartbeat Act would violate the right to abortion recognized in *Roe* and *Casey*. While the issuance of the declaration would afford Petitioners the complete relief they seek, Petitioners also seek a writ of prohibition against the State of Idaho forbidding Idaho courts from giving effect to the Heartbeat Act, presumably to afford the 'hook' required for the exercise of this Court's original jurisdiction.

Petitioners filed a motion to expedite briefing with their Verified Petition and brief. Related to the motion to expedite, this Court stayed the implementation of the Heartbeat Act. Order Granting Mot. to Recons., Dkt. No. 49615-2022.

Pursuant to the briefing schedule issued by the Court, the Respondents, the State of Idaho as Respondent and the Legislature as Intervenor-Respondents, filed their respective answers and opposition briefing on April 28. In addition to arguing the fatal substantive errors in Petitioners' arguments, the State also pointed out the serious procedural flaws with Petitioners' effort to shoehorn a declaratory judgment action into this Court's original jurisdiction. Resp. State of Idaho's Opp'n to Pet'rs' Br. in Supp. of Verified Pet. for Writ of Prohibition and Appl. for Decl. J., Dkt. No. 49615-2022 ("State's Opposition Brief").

At the same time, the State asked this Court to vacate the stay of implementation of the Heartbeat Act, arguing that the stay was inappropriate for three fundamental procedural reasons. Mot. to Vacate Stay; Mem. in Supp. of Resp't's Mot. to Vacate Stay. This Court denied that motion without explanation on May 20, 2022. Order Den. Mot. to Vacate Stay.

On June 24, 2022, the U. S. Supreme Court delivered its opinion in *Dobbs*, overruling *Roe* and *Casey* and restoring to state legislatures the ability to regulate abortion. *Dobbs*, 142 S. Ct. at 2279. The U.S. Supreme Court's decision in *Dobbs* signaled that Idaho's trigger law, Idaho Code § 18-622, which will criminally prohibit the performance of abortions in Idaho with few exceptions, will go into effect. Section 18-622 will become effective 30 days after "[t]he issuance of the judgment in any decision of the U.S. Supreme Court that restores to the states their authority to prohibit abortion," i.e., 30 days after the judgment is issued in *Dobbs*. Idaho Code § 18-622(1)(a). Section 18-622 is expected to become effective on or around August 23rd; however, as of the date of this filing, that judgment has not issued, and it is unknown precisely when Idaho Code § 18-622 will be triggered into law.

Three days later, Petitioners filed a Verified Petition for Writ of Prohibition and Application for Declaratory Judgment against the State of Idaho, Brad Little, Lawrence Wasden, Jan M. Bennetts, Grant P. Loebs, the Idaho State Board of Medicine, the Idaho State Board of Nursing, and the Idaho State Board of Pharmacy with this Court in Supreme Court Docket No. 49817-2022. Petitioners seek a declaration that Idaho Code § 18-622 violates: (1) a right to abortion contained in the Idaho Constitution; (2) the Idaho Constitution's equal protection guarantee by treating women differently from men; and the Idaho Human Rights Act by discriminating on the basis of sex; and (3) the Idaho Constitution's prohibition on vague laws because it does not provide clarity on what is prohibited. Petitioners also seek a writ of prohibition preventing inferior Idaho courts from giving effect to Idaho Code § 18-622, Idaho law enforcement from enforcing Idaho Code § 18-622, and Idaho professional boards from enforcing Idaho Code § 18-622. Finally, Petitioners seek an alternative or peremptory writ of prohibition or stay of implementation of Idaho Code § 18-622 in the event the briefing and/or oral argument schedule extends beyond August 18, 2022, despite the fact that, by their own admission, Idaho Code § 18-622 only goes into effect 30 days after the judgment is issued in *Dobbs*.

Petitioners also sought to expedite briefing and argument on this new petition. Mot. to Expedite Briefing and Arg. for Verified Pet. for Writ of Prohibition and Appl. for Decl. J., Dkt. No. 49817-2022. Petitioners asked for oral argument to be held on their new petition on the same date as that argument had been scheduled for their challenge to the Heartbeat Act—August 3rd. *Id.* at 2-3. In response, the State urged the Court to deny the motion to expedite—the challenge was not yet ripe because the trigger law had not yet gone into effect and because the Court's

exercise of original jurisdiction in this challenge was inappropriate. Resp. to Mot. to Expedite Briefing and Arg., Dkt. No. 49817-2022, at 2-3. The State also opposed any request for a stay of enforcement of Idaho Code § 18-622, particularly in light of the U.S. Supreme Court's decision in *Dobbs*. *Id.* at 2, 4.

Shortly thereafter, this Court vacated oral argument on the merits of the Petition. The Court instead set Supreme Court Docket No. 49615-2022 for hearing, to present argument on three issues in light of the decision in *Dobbs*: (1) "[w]hether this Court should continue to stay the enforcement of SB 1309 pending the outcome of the litigation;" (2) "[w]hether this case, Docket No. 49615-2022, should be consolidated with the second case Petitioners filed, Docket No. 49817-2022"; and (3) "[w]hether this case should be transferred from the Idaho Supreme Court to the district court for the development of a factual record and potential motion practice pursuant to I.A.R. 5(d)." Order Setting Hr'g, Dkt. No. 49615-2022. The Court indicated that oral argument on Supreme Court Docket No. 49817-2022 would be held at the same time. This brief responds to the three questions posed by the Court.

III. ARGUMENT

A. The Court should vacate the stay of the Heartbeat Act.

The Court should vacate the stay of the implementation of the Heartbeat Act because it was procedurally improper for the reasons stated in the State of Idaho's Motion to Vacate Stay and the State's Reply in Support of Respondent's Motion to Vacate Stay in Supreme Court Docket No. 49615-2022. In short, the stay was procedurally improper because there is no state official before the Court (or otherwise) whose conduct can be stayed; no specific individual or conduct that was

identified in the stay order as having been enjoined; there was no request for a stay before the Court; the stay order was effectively the issuance of a writ, which cannot issue against the State or the courts and clerks of the State of Idaho; and the order resulted from a misapprehension of the parties' briefing. *See* State of Idaho's Mot. to Vacate Stay, Dkt. No. 49615-2022; State's Reply in Supp. of Resp't's Mot. to Vacate Stay, Dkt. No. 49615-2022. The State hereby incorporates and renews those procedural arguments and asks the Court to reconsider its denial of the State of Idaho's Motion to Vacate Stay. *See* Order Den. Mot. to Vacate Stay, Dkt. 49615-2022.

Additionally, the Court should vacate the stay of implementation of the Heartbeat Act because Petitioners have no likelihood of success on the merits of their challenge and they will not be irreparably injured if the stay is vacated; in contrast, the State is being and will continue to be irreparably injured if the stay is not lifted.

1. Petitioners cannot establish a likelihood of success on the merits: there is no constitutional right to abortion.

The arguments in the State's Opposition Brief, which the State incorporates by reference, establish that Petitioners lack any likelihood of success on the merits on this challenge and compel vacating the stay of the Heartbeat Act. *See* State's Opp'n Br., Dkt. No. 49615-2022. As set out more fully in the State's Opposition Brief, Petitioners' challenge to the Heartbeat Act fails because of defects that impact the entire petition: (1) Petitioners' request for a writ of prohibition is improper because a writ cannot issue against the State as a whole, there are no ongoing proceedings to arrest via a writ, and the writ they seek is actually, at best, a declaratory judgment and, at worst, an advisory opinion; (2) the Court cannot exercise original jurisdiction in this matter because the

Court does not have the power to issue the requested writ, and Petitioners have a plain, speedy, and adequate remedy before the district court; and (3) Petitioners lack standing to bring their claims and their claims are not ripe.

The specific claims in the Petition also fail because (1) the Heartbeat Act does not violate the Fourteenth Amendment even as interpreted under *Roe* and *Casey*; (2) the 'separation of powers' claim fails because the Legislature has the power to create civil causes of action; (3) the 'special law' claim fails because the Heartbeat Act equally impacts all medical professionals and it does not undermine the rules of civil procedure or have an improper purpose; (4) the 'informational privacy' claim fails because the Idaho Constitution does not contain a right to keep the fact of having had an abortion secret from the courts, and courts are perfectly capable of handling sensitive information; (5) the due process claim fails because the Heartbeat Act clearly informs abortion providers as to what could subject them to liability and, on this facial challenge, the Act does not violate any proportionality limits on statutory damages; (6) the 'right to abortion' claim fails because there is no right to abortion under the Idaho Constitution; and (7) the equal protection claim fails because the Heartbeat Act does not treat similarly situated individuals differently and, even if it did, the civil action it states is rationally related to the State's legitimate state interest in expressing its value for preborn human life. State's Opp'n Br., Dkt. No. 49615-2022.

After the State filed its Opposition Brief, the U.S. Supreme Court issued its decision in *Dobbs.* In *Dobbs,* the U.S. Supreme Court overruled *Roe* and *Casey,* denouncing *Roe* as "egregiously wrong from the start," 142 S. Ct. at 2243, and explaining that "guided by the history

and tradition that map the essential components of our Nation's concept of ordered liberty . . . the clear answer is that the Fourteenth Amendment does not protect the right to an abortion." *Id.* at 2248. Now, abortion regulations must simply survive rational-basis review—that is, the challenged statute need only reasonably achieve a legitimate state interest. *Id.* at 2283-84. Such legitimate state 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.* at 2284 (citation omitted).

The Heartbeat Act survives rational basis review under *Dobbs* by rationally advancing the State's legitimate interest in demonstrating its "respect for and preservation of prenatal life at all stages of development." *Id.*; *see also* State's Opp'n Br., Dkt. No. 49615-2022, at 46 ("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."). Thus, post-*Dobbs*, Petitioners cannot establish any likelihood of success on the merits of establishing that the Heartbeat Act runs afoul of the U.S. Constitution. It does not.

The decision in *Dobbs* has eliminated any possible justification for staying the Heartbeat Act given that Petitioners' challenge turns on the assumption that the Heartbeat Act violates the now-overruled *Roe* and *Casey*. While Petitioners strategically pled claims under the Idaho

Constitution, their real issue with the Heartbeat Act was their view of the impact that the law would have on the right to abortion under *Roe* and *Casey*[1]: their separation of powers claim turns on the argument that Idaho Constitution was violated because the Heartbeat Act deputized power to private citizens to do something the State could not—ban pre-viability abortions; Pet'rs' Br., Dkt. No. 49615-2022, at 18 (The Heartbeat Act "attempts to deputize private citizens" to "insulate the State from responsibility" and "[t]he Idaho Constitution forbids this circumvention," citing the separation of powers clause); the "special" law argument turns on the argument that the Legislature created special rules for claims under the Heartbeat Act that were "designed for the express purpose of putting an unconstitutional prohibition into effect;" *id.* at 26; the 'informational privacy' argument is built on the alleged exposure of personal information "to enforce the State's unlawful policies;" *id.* at 28; the due process argument depends on the assumption that the Heartbeat Act "targets constitutionally protected conduct;" *id.* at 29; and the equal protection argument argues that the Heartbeat Act "interferes with a fundamental right," *id.* at 32, and lacks any rational basis because the Heartbeat Act "has no purpose other than to . . . penalize abortion providers and deny citizens their constitutional rights." *Id.* at 33.

Even Petitioners' (incorrect) argument that the Idaho Constitution contains a fundamental right to obtain an abortion flows from their argument that the U.S. Constitution contains a right to abortion. Petitioners argued that the Idaho Constitution contained a right to abortion because such

[1] In their reply brief, Petitioners attempt to unmoor their arguments from a right to abortion. Reply Br., Dkt. No. 49615-2022, at 17-18. But they cannot divorce their case from the basic premise on which they brought it—an alleged violation of a right to abortion.

a right was contained in the U.S. Constitution under *Roe* and *Casey*. *See id.* at 34 ("This Court has made clear that the U.S. Supreme Court's interpretation of the U.S. Constitution is at least the floor of constitutional protection for the Idaho Constitution. Thus, because it bans pre-viability abortion in violation of the federal due process clause, there can be no doubt that [the Heartbeat Act] violates the due process clause of the Idaho Constitution. *See Roe*, 410 U.S. at 153-54; *see also Casey*, 505 U.S. at 846; *McCormack*, 788 F.3d at 1029.") (other quotations and citations omitted). All of these arguments are invalid now that *Roe* and *Casey* have been overruled.

Additional examples of Petitioners tying their case to the alleged impact of the Heartbeat Act to a federal right to abortion under *Roe* and *Casey* run rife through their filings. Petitioners opened their Verified Petition by alleging "In an attempt to end run settled precedent and to allow this unconstitutional ban [on abortions after a fetal heartbeat is detected] to take effect[,]" the Heartbeat Act "exclusively empowers private citizens to bring civil claims against medical professionals." Pet., Dkt. No. 49615-2022, at 1. Doubling down, Petitioners alleged that the Heartbeat Act "effectively [bans] abortions before viability in Idaho, in violation of Petitioners' patients' rights under nearly fifty years of precedent." *Id.* at 2; *see also* Pet'rs' Br., Dkt. No. 49615-2022, at 18 (The Heartbeat Act "attempts to deputize private citizens to do what fifty years of precedent has reaffirmed a State itself may not—enforce a pre-viability ban on abortion," citing *Roe* and *Casey*). The first "fact" in their "Facts Common to All Claims" section is

> 9. Under long-established Supreme Court precedent, States may not ban abortion prior to fetal viability. *See Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). But [the Heartbeat Act], unless blocked, will accomplish just that by allowing ruinous civil penalties to be

> imposed on any 'medical professional' who performs [an abortion after a fetal heartbeat is detected unless an exception applies.]

Pet., Dkt. No. 49615-2022, ¶ 9. Petitioners characterized the Heartbeat Act as a premature equivalent to the State's trigger laws that would ban most abortions after the Supreme Court "'restores to the states their authority to prohibit abortion'—in other words, if *Roe v. Wade* is overturned." *Id.* at ¶¶ 21-22. But now *Roe* has been overturned.

Even the "severe and irreparable" harms that Petitioners alleged would result from the Heartbeat Act going into effect flow from *Roe* and *Casey*.[2] Petitioners alleged the Heartbeat Act would cause them to stop performing abortions after six weeks gestational age and therefore prevent women from obtaining abortions, cause delay in accessing care, cause logistical difficulties related to travel to access care, and increase costs. *Id.* at ¶¶ 27-38. As pointed out by the State in its Opposition Brief, all of Petitioners' assertions as to the impact of the Heartbeat Act are the types of allegations that a plaintiff would make in challenging an abortion regulation as an unconstitutional undue burden under the now-overruled *Casey* decision. States' Opp'n Br., Dkt. No. 49615-2022, at 20 n.13. Petitioners simply cannot establish any likelihood of success on the merits now that *Dobbs* has overturned *Roe* and *Casey*.

[2] In *Roe*, the U.S. Supreme Court held that there was a constitutional right to abortion under the substantive component of the Fourteenth Amendment's Due Process Clause. *Casey*, 505 U.S. at 846-53. Then, in *Casey*, the Court established a framework for constitutionally permissible abortion regulations and held that a state could regulate pre-viability abortions so long as that state did not impose an undue burden on a woman's ability to obtain an abortion. *Id.* at 874. Under this framework, states could prohibit post-viability abortions except when the life or health of the mother was endangered. *Id.* at 879.

The decision in *Dobbs* also reinforces that there is no right to abortion under the Idaho Constitution. The U.S. Supreme Court's decision is highly persuasive in interpreting Idaho's Constitution, particularly given that the Court emphasized abortion regulations, including Idaho's, as they existed at the time the Fourteenth Amendment to the U.S. Constitution was ratified, i.e., 21 years before Idaho's Constitution was adopted. *Id.* at 2252-53 ("By 1868, the year when the Fourteenth Amendment was ratified, three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening."); *id.* at 2297-98 (reproducing Idaho's 1864 law prohibiting abortion in the Appendix). The U.S. Supreme Court even cited the Idaho Supreme Court decision in *Nash v. Meyer*, 54 Idaho 283, 301, 31 P.2d 273, 280 (1934) as part of its reasoning. *Id.* at 2256. The U.S. Supreme Court concluded in *Dobbs* that "a right to abortion is not deeply rooted in the Nation's history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973." *Id.* at 2253-54. The persuasive reasoning in *Dobbs*, combined with the absence of any textual justification for finding a right to abortion in Idaho's Constitution, and the reality that abortion at all stages was criminally prohibited in Idaho from 1864 until *Roe* was decided, *see* State's Opp'n Br., Dkt. No. 49615-2022, at 3-4, 35-43 (reviewing the history of Idaho's abortion laws pre- and post-statehood), compels the conclusion that the Idaho Constitution does not contain a right to abortion. It defies reason to believe that the drafters of the Idaho Constitution, without any discussion or explicit reference, intended to protect as a fundamental right conduct that was criminally prohibited under the Idaho Constitution. There is no right to abortion in the Idaho Constitution.

The absence of any right to abortion under the U.S. and Idaho Constitutions, as well as the additional flaws with Petitioners' arguments discussed in the State's Opposition Brief, establish that Petitioners have no likelihood of success on the merits.

2. Petitioners cannot establish that they will suffer irreparable injury if the stay of the Heartbeat Act is vacated.

The Court has found the absence of an irreparable injury to be crucial in refusing to issue a stay to preserve the status quo on appeal. *Kiefer v. City of Idaho Falls*, 46 Idaho 1, 7, 265 P. 701, 703 (1928) (recognizing that a stay to preserve the status quo on appeal is appropriate where refusal to grant a stay would "injuriously affect appellants and militate against the full and complete exercise by [the Supreme Court] of its appellate jurisdiction."). Here, now that *Roe* and *Casey* have been overruled, the Heartbeat Act cannot possibly be said to infringe on a protected right, i.e., to cause any injury. The injuries that Petitioners allege in challenging the Heartbeat Act were only cognizable injuries under *Roe* and *Casey*.[3] *See, e.g.*, Mot. to Expedite Briefing and Arg., Dkt. No. 49615-2022, at 2 (arguing that the Court needed to decide their claims prior to the Heartbeat Act's effective date because Petitioners would stop performing abortions after the Heartbeat Act's effective date). Now that the U.S. Supreme Court has overruled these precedents, Petitioners have no possible claim of irreparable injury if the Heartbeat Act is allowed to go into effect. There is no right to obtain an abortion under the U.S. Constitution. *Dobbs*, 142 S. Ct. at 2279. Nor is there a right to obtain an abortion under the Idaho Constitution. *See* State's Opp'n Br., Dkt. No. 49615-

[3] As discussed in their Opposition Brief, the State strenuously disputes that Petitioners had even established that these alleged injuries would occur if the Heartbeat Act were to go into effect. State's Opp'n Br., Dkt. No. 49615-2022, at 5-7.

2022, at 35-43; *see also* Respondents' Response to Order Setting Hearing (Dkt. 49817-2022). The absence of any irreparable injury weighs heavily in favor of vacating the stay.

In contrast, the State is being, and would continue to be, gravely injured by the continued stay of implementation of its duly enacted law. *State v. Bennett*, 142 Idaho 166, 125 P.3d 522, 525 (2005) ("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.") (quotation and citation omitted). The harm that the State has and will continue to suffer from the stay of implementation of the Heartbeat Act weighs heavily in favor of vacating the stay. *See Kiefer*, 46 Idaho 1, 265 P. at 703 (also considering whether granting the stay would be "injurious to respondents" in deciding whether the court had the power to issue the stay). The Heartbeat Act expresses the State's policy preference for life and the value it places on preborn life.

Because Petitioners cannot establish any likelihood of success on the merits in light of *Dobbs* and the prior briefing filed by the respondents, because they can have no irreparable injury, and because the State is and will continue to be gravely harmed by the stay, the Court should vacate the stay of the Heartbeat Act.

B. The Court should consolidate the two petitions if it agrees the lack of any right to abortion under the U.S. and Idaho Constitutions controls; alternatively, the cases should be paired for oral argument on the same day.

Given that neither the U.S. nor the Idaho Constitution contain a right to abortion, Petitioners' claims that the Heartbeat Act and the Trigger Law violate a right to abortion, or some principle of the Idaho Constitution that would prevent them from violating that (non-existent) constitutional right, fail. The broad and far-reaching implications of *Dobbs*, coupled with the

absence of a right to abortion in the Idaho Constitution, enable the Court to resolve Petitioners' claims by consolidating these two matters.

Dobbs returned the power to regulate abortion to state legislatures and, in so doing, wholly shifted the paradigm of abortion litigation. This Court recognized these far-reaching implications in its June 30, 2022 order:

> [w]hile 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*. The *Dobbs* decision has altered the landscape of the long-standing federal constitutional law upon which Petitions relied and which recognized a fundamental right to privacy, as it applies to abortion law.

Order Setting Hr'g, Dkt. No. 49615-2022. Petitioners' position that the Idaho Constitution should be interpreted consistently with the U.S. Constitution, coupled with the absence of any right to abortion under the Idaho Constitution, has given the Court the ability to dispose of both cases based on the absence of any constitutional right to abortion.

Alternatively, these matters should not be consolidated if the Court disagrees that the absence of any constitutional right to abortion controls. Petitioners' challenges to the Heartbeat Act, which states a third-party civil cause of action against abortion providers who perform abortions after a fetal heartbeat is detected, and the Trigger Law, which operates to create criminal liability and licensure penalties against abortion providers, raise different procedural issues and involve different legal arguments should the issue of abortion not be found dispositive. Petitioners' challenge to the Heartbeat Act invokes six different constitutional claims, while their challenge to the Trigger Law involves three constitutional claims. Of those claims, one claim—that there is a

right to abortion under the Idaho Constitution—directly overlaps. Should the Court feel that the different procedural and substantive issues raised by these different claims require separate analyses, the Court, its staff, and the parties would benefit from pairing the two cases for oral argument on the same day, but not consolidating them, to ensure adequate time to analyze each issue.

C. The Court should not transfer the Heartbeat Act challenge to the district court under I.A.R. 5(d) to develop a factual record.

The Court should not transfer the Heartbeat Act challenge to the district court for two reasons. First, a transfer for factual development under Idaho Appellate Rule 5(d) would be an exercise of the Court's original jurisdiction. But the exercise of original jurisdiction over this claim is improper. Second, factual development is not warranted to dispose of Petitioners' claims. Petitioners' facial challenge to the Heartbeat Act raises purely legal questions. It should be disposed of on the law.

1. This case should not be transferred because the Court should not exercise its original jurisdiction.

This Petition should not be transferred to a district court under Idaho Appellate Rule 5(d) because it should be denied. Petitioners can point to no state or federal constitutional provision that provides for a right to abortion. As discussed above, Idaho has consistently outlawed abortion since before statehood. *See, e,g., Dobbs*, 142 S. Ct. at 2297-98 (reproducing Idaho's 1864 law prohibiting abortion). This action is an improper vehicle for an original action, and this Court should clearly indicate this, rather than facilitating Petitioners' procedural missteps. If Petitioners

eventually identify an actionable cause of action, the ordinary procedures within the appropriate district court are available to them.

This Court's original jurisdiction is limited to certain writs, including a writ of prohibition. Idaho Const. art. V, § 9. But, as discussed in the State's Opposition Brief, the writ Petitioners seek is invalid. The State incorporates the arguments made in its Opposition Brief by reference and will not belabor all of the arguments here. In brief, there are no proceedings to arrest, Idaho Code § 7-401, and the writ would restrain the actions of parties not named as respondents. I.A.R. 5(d). State's Opp'n Br., Dkt. No. 46915-2022, at 8-11. The State of Idaho as a whole cannot be the target of a writ of prohibition because it is not a "tribunal, corporation, board or person." Idaho Code §§ 7-401, 73-114(1)(d) (defining "person" to mean "a corporation as well as a natural person"); *see also* State's Opp'n Br., Dkt. No. 46915-2022, at 16-17. Because Petitioners have failed to request a valid writ, Petitioners have failed to invoke this Court's original jurisdiction. The declaratory judgment Petitioners seek should be sought in the normal course of litigation, in the district court, when an actual case and controversy arises. This is an adequate, speedy remedy at law that Petitioners should be required to use. *Reclaim Idaho v. Denney*, 169 Idaho 406, 497 P.3d 160, 177 (2021).

2. Factual development is inappropriate because this is a facial challenge that should be denied as a matter of law.

If the Court chooses to hear this case as an original action (and it should not), it should undertake a *facial* analysis of the Heartbeat Act's constitutionality and require Plaintiffs to establish that no set of circumstances exists under which the law would be valid. *Lochsa Falls,*

L.L.C. v. State, 147 Idaho 232, 240–41, 207 P.3d 963, 971–72 (2009). Anything less would encroach upon the Legislature's and the Governor's constitutional prerogatives. *See* Idaho Const. art. III, § 1 ("The legislative power of the state shall be vested in a senate and house of representatives."); *id.* art. IV, § 10 (providing that a bill passed by the Legislature and either signed by the Governor, not returned within five days, or passing a veto override, "shall become a law"). As demonstrated by the State's Opposition Brief, this Court can and should deny the Petition as legally insufficient without taking any evidence.

The State does not concede that the Heartbeat Act restricts abortion in any circumstance or that it constitutes a regulation of abortion. But assuming *arguendo* that it does restrict abortion and is a regulation, *Dobbs* unequivocally demonstrates that laws that may have the effect of restricting abortion are *facially* permissible. *Dobbs*, 142 S. Ct. at 2279. *Dobbs* further reiterates that "A law regulating abortion, like other health and welfare laws, is entitled to a strong presumption of validity." *Id.* at 2284 (cleaned up); *accord Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 90, 982 P.2d 917, 925 (1999) ("The party challenging a statute on constitutional grounds must overcome a strong presumption of validity. . . . Every reasonable presumption must be indulged in favor of the constitutionality of an enactment." (cleaned up)). As discussed above, ultimately, *Dobbs* held that the People's representatives have the authority to regulate abortion through statute: "Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives." *Dobbs*, 142 S. Ct. at 2284; *see also id.* at 2275 (criticizing previous abortion

rulings as having "diluted the strict standard for facial constitutional challenges," and citing *United States v. Salerno*, 481 U.S. 739, 745 (1987), which explained that a facial challenge requires a plaintiff to "establish that no set of circumstances exists under which the Act would be valid"). This Court should likewise afford the appropriate deference to the Legislature and the Governor and deny the facial challenge to the Heartbeat Act without factual development.

Moreover, as discussed in the State's Opposition Brief and discussed above as to why Petitioners do not have a likelihood of success on the merits, each of Petitioners' arguments under the Idaho Constitution can and should be disposed of as a matter of law. No factual development is necessary or appropriate to dispose of these challenges.

Particularly in the circumstances of this law, where the statute has never been applied and there is no certainty it will ever be applied because the State has no enforcement abilities, a decision by this Court as to the Heartbeat Act's constitutionality would be advisory and hypothetical. Such a decision would be the equivalent of a repeal or veto—an undoing of the work of the other two co-equal branches of State government before any case has arisen, unmoored from the concrete facts of any case or controversy. *See State v. Olivas*, 158 Idaho 375, 380, 347 P.3d 1189, 1194 (2015) ("The Idaho Constitution prohibits any branch of government from exercising powers that properly belong to another branch, unless the constitution expressly so directs or permits. Idaho Const. art. II, § 1. . . . This Court always must be watchful, as it has been in the past, that no one

of the three separate departments of the government encroach upon the powers properly belonging to another." (cleaned up)). Absent a concrete factual scenario,[4] this Petition should be denied.

Rather than exercising its original jurisdiction and transferring this case for factual development, the Court should deny the Petition.

IV. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court (1) immediately vacate the stay of implementation of the Heartbeat Act; (2) consolidate the petitions if it intends to deny both petitions based on the absence of any constitutional right to abortion, or, in the alternative, pair the petitions for oral argument on the same day; and (3) not transfer the challenge to the Heartbeat Act to the district court for development of a factual record and motion practice. Instead, the petitions should be denied.

Respectfully submitted this 20th day of July, 2022.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

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

[4] Following the implementation of the Heartbeat Act, if Petitioners believe they have a factual scenario that warrants a lawsuit, then they should bring it before the district court, where evidence can be weighed and tested against any as-applied claim as discussed in the State Respondents' Response to Order Setting Hearing on the Trigger Law. But with no case or controversy currently before the Court, the Petition needs to be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of July, 2022, I electronically filed the foregoing with the Clerk of the Court using the iCourt e-file system which sent a Notice of Electronic Filing to the following persons:

Michael J. Bartlett
BARTLETT & FRENCH LLP
michael@bartlettfrench.com

DANIEL W. BOWER
MORRIS BOWER & HAWS PLLC
dbower@morrisbowerhaws.com

Alan E. Schoenfeld
Michelle N. Diamond
Rachel E. Craft
Cindy Y. Pan
Samuel J. McHale
WILMER CUTLER PICKERING
HALE AND DORR LLP (New York, NY Office)
alan.schoenfeld@wilmerhale.com
michelle.diamond@wilmerhale.com
rachel.craft@wilmerhale.com
cindy.pan@wilmerhale.com
sam.mchale@wilmerhale.com

MONTE NEIL STEWART
monteneilstewart@gmail.com

Joseph H. Rosenberg
Ann E. Himes
WILMER CUTLER PICKERING
HALE AND DORR LLP (Washington, DC Office)
joseph.rosenberg@wilmerhale.com
annie.himes@wilmerhale.com

Vikram P. Iyer
WILMER CUTLER PICKERING
HALE AND DORR LLP (Los Angeles, CA Office)
joseph.rosenberg@wilmerhale.com

/s/ Megan A. Larrondo
MEGAN A. LARRONDO
Deputy Attorney General