

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
Telephone: (208) 334-2400
Facsimile: (208) 854-8073
megan.larrondo@ag.idaho.gov
dayton.reed@ag.idaho.gov

*Attorneys for the State of Idaho, Governor Little,
Attorney General Wasden, the Board of Medicine,
and the Board of Pharmacy*

IN THE IDAHO SUPREME COURT

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; BRAD LITTLE, in his
official capacity as Governor of the State of
Idaho; LAWRENCE WASDEN, in his official
capacity as Attorney General of the State of
Idaho; JAN M. BENNETTS, in her official
capacity as Ada County Prosecuting Attorney;
GRANT P. LOEBS, in his official capacity as
Twin Falls County Prosecuting Attorney;
IDAHO STATE BOARD OF MEDICINE;
IDAHO STATE BOARD OF NURSING; and
IDAHO STATE BOARD OF PHARMACY,

Respondents.

Docket No. 49817-2022

**RESPONSE TO MOTION TO
EXPEDITE BRIEFING AND
ARGUMENT**

The State urges the Court to deny the motion to expedite because it is unnecessary given that these proceedings are not ripe. Therefore, this action is inappropriate for an original jurisdiction action. However, if the Court is inclined to grant Petitioners' motion to expedite, the State would not object to a deadline of July 18, 2022, to file its responsive brief. Further, the State would also not object to having the court hold oral argument on August 3, 2022—the same date scheduled for argument in *Planned Parenthood v. State of Idaho*, Supreme Court Docket No. 49615-2022—provided, however, that this Court does not combine, join, or consolidate these two distinct cases, in analysis or argument, as they present different legal issues and different statutes.

The State does object to a stay of enforcement of Idaho Code § 18–622. As in *Planned Parenthood v. State of Idaho*, Supreme Court Docket No. 49615-2022, the State does **not** request or consent to any kind of stay or other preliminary relief. Additionally, on June 24, 2022, the United States Supreme Court, in *Dobbs v. Jackson Women's Health Organization*, expressly left the question of the legality of abortion to the state legislatures. No. 19-1392, 2022 WL 2276808, at *43 (U.S. June 24, 2022). The remedy sought by petitioners should be sought in the legislature or the ballot box.

A challenge to Idaho Code § 18–622 is not ripe because no condition precedent for it to become effective has yet taken place. Section 18–622(1) states that the section only becomes effective after either “(a) The issuance of the judgment in any decision of the United States supreme court that restores to the states their authority to prohibit abortion; or (b) Adoption of an amendment to the United States constitution that restores to the states their authority to prohibit abortion.” Although the United States Supreme Court did rule that the states should be restored their authority to regulate abortion in *Dobbs v. Jackson Women's Health Organization*, 19-1392, 2022 WL 2276808, at *43 (U.S. June 24, 2022), the United States Supreme Court has not issued

a judgment in that case yet. As of today, the 30-day period for Idaho Code § 18–622 to become effective has not yet begun to run, and it is unknown when it will begin to run. The case is not ripe; therefore, this Court should decline to hear it and decline to grant the motion to expedite.

Petitioners attempt to bring a declaratory judgment action before this Court by calling it a petition for writ. As the State has argued in *Planned Parenthood v. State of Idaho*, Supreme Court Docket No. 49615-2022, the Constitution grants this Court jurisdiction over a petition for writ of prohibition, but that writ can only “arrest” the “proceedings” of a “respondent.” I.A.R. 5(d), I.R.C.P. 74(a)(2). There are no proceedings to arrest: no court or board has ever applied Idaho Code § 18–622. And the writ seeks to arrest the proceedings of third parties who are not respondents in this case: all Idaho Courts and law enforcement officers. The Petitioners do not seek a valid writ, and therefore this Court lacks jurisdiction to hear their petition. “The Court’s limited original jurisdiction does not include the authority to issue declaratory judgments which are not necessary to decide the question of whether an extraordinary writ should issue.” *Regan v. Denney*, 165 Idaho 15, 29, 437 P.3d 15, 29 (2019) (Brody, J., concurring in part and dissenting in part).

The relief sought reveals Petitioners’ true aim. They seek a declaratory judgment that Idaho Code § 18–622 is unconstitutional—any request for this Court to restrain lower courts, law enforcement, and boards from giving it effect is superfluous. They want this Court to hear their declaratory judgment action to avoid necessary the rigors of civil litigation, such as the need for an actual case and controversy, the burdens of discovery, and all other rules and procedures that ensure a controversy is “tested and sharpened through the adversarial system in the district court.” *Regan v. Denney*, 165 Idaho 15, 29, 437 P.3d 15, 29 (2019) (Brody, J., concurring in part and dissenting in part). They envision the Court acting less like a court, and more like a legislature or

executive officer, vetoing a law that has never been applied based on their opinions of what makes good public policy. But this Court decides concrete legal disputes, not ideological disagreements.

The petition asks this Court to identify a specific right to abortion in the Idaho Constitution, which is modelled after the United States Constitution. In *Dobbs v. Jackson Women’s Health Organization*, the United States Supreme Court expressly rejected the claim of a constitutional right to abortion and left the question of the legality of abortion to the state legislatures. No. 19-1392, 2022 WL 2276808, at *43 (U.S. June 24, 2022). The debate Petitioners desire to wage is not appropriate for an expedited original action.

DATED this 29th day of June, 2022.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: /s/ Dayton P. Reed
DAYTON P. REED
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of June, 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

Alan E. Schoenfeld
Rachel E. Craft
WILMER CUTLER PICKERING
HALE AND DORR LLP (New York, NY Office)

alan.schoenfeld@wilmerhale.com

rachel.craft@wilmerhale.com

Sofie C. Brooks
WILMER CUTLER PICKERING
HALE AND DORR LLP (Boston, MA Office)

sofie.brooks@wilmerhale.com

Attorneys for Petitioners

/s/ Dayton P. Reed

DAYTON P. REED

Deputy Attorney General