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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; 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

RESPONDENTS' RESPONSE TO ORDER SETTING HEARING

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I. INTRODUCTION

This Court should (1) decline to stay enforcement of Idaho Code § 18-622, referred to herein as the Trigger Law; (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 not stay the Trigger Law because Petitioners can show no likelihood of success on the merits because there is no constitutional right to abortion, and they will not suffer a cognizable injury if the Trigger Law is not stayed. Petitioners' challenge to the Trigger Law turns on their assumption that somehow, somewhere there is a constitutional right to obtain an abortion that will be violated by the statute when it goes into effect. Petitioners only pay lip service to the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Org*., 142 S. Ct. 2228 (2022), which overruled *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)'s recognition of a constitutional right to abortion and returned the ability to regulate and prohibit abortion to state legislatures. But *Dobbs* matters; it means that there is no constitutional right to abortion. The Idaho Constitution certainly does not contain any such right. Idaho has been opposed to abortion since before statehood. 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 a cognizable injury—let alone an irreparable injury—if the Trigger Law is not stayed. In contrast, the State Respondents will suffer grave harm if the Court stays a duly enacted law pending disposition of this lawsuit. The lives of preborn

children, which the State recognizes as extant and valued, will be lost. This Court should reject the Petitioners' effort to override the State's policy choices while the challenge to the Trigger Law is decided.

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 before this Court should be consolidated and denied together. Should the Court disagree, the cases should be set for oral argument on the same day. No factual development is necessary or appropriate because this matter is inappropriate for the exercise of this Court's original jurisdiction and Petitioners' claims are questions of law.

II. BACKGROUND

A. Legislative History

Senate Bill 1385 passed Idaho's Senate on a 27-7-1 vote, passed Idaho's House of Representatives on a 49-18-3 vote, and was signed into law by the Governor on March 24, 2020. 2020 Legislation – Senate Bill 1385, IDAHO LEGISLATURE, https://legislature.idaho.gov/sessioninfo/2020/legislation/S1385/ (last visited July 14, 2022). Senate Bill 1385 is codified as Idaho Code § 18-622.

Section 18-622 makes performing an abortion a felony, except when performed by a physician in the cases of reported rape or incest, or where "[t]he physician determined, in his good faith medical judgment and based on the facts known to the physician at the time, that the abortion was necessary to prevent the death of the pregnant woman," unless the risk is death by suicide. Idaho Code §§ 18-622(2), (3)(a)(ii), (3)(b)(ii), 3(b)(iii). In all cases, for an exception to apply, the abortion must have been performed or attempted to be performed "in the manner that, in [the physician's] good faith medical judgment and based on the facts known to the physician at that time, provided the best opportunity for the unborn child to survive, unless, in his good faith medical

judgment, termination of the pregnancy in that manner would have posed a greater risk of the death of the pregnant woman." Idaho Code §§ 18-622(3)(a)(iii), (3)(b)(iv). "Abortion" is defined by Idaho Code § 18-604(1) as "the use of any means to intentionally terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child except that, for the purposes of this chapter, abortion shall not mean the use of an intrauterine device or birth control pill to inhibit or prevent ovulations, fertilization or the implantation of a fertilized ovum within the uterus." The Trigger Law does not apply to "[m]edical treatment provided to a pregnant woman by a health care professional as defined in this chapter that results in the accidental death of, or unintentional injury to, the unborn child." Idaho Code § 18-622(4).

B. Procedural History

On June 24, 2022, the United States Supreme Court delivered its decision in *Dobbs*, overruling *Roe* and *Casey*. *Dobbs*, 142 S. Ct. at 2284 ("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."). The Trigger Law will become effective thirty days after the judgment is issued by the U.S. Supreme Court in *Dobbs*. Idaho Code § 18-622(1) ("this section shall become effective thirty (30) days following the occurrence of . . . (a) "[t]he issuance of the judgment in any decision of the United States supreme court that restores to the states their authority to prohibit abortion"). Given that the decision in *Dobbs* was published on June 24, 2022, the Trigger Law is expected to become effective on or around August 23, 2022; however, as of the date of this filing, the judgment has not been issued, and it is unknown precisely when the Trigger Law will become effective.

On June 27, 2022, Petitioners filed a Verified Petition for Writ of Prohibition and Application for Declaratory Judgment ("Petition") with this Court, naming as respondents the State

of Idaho, Governor Brad Little, Attorney General Lawrence Wasden, Ada County Prosecutor Jan M. Bennetts, Twin Falls County Prosecutor Grant P. Loebs, the Idaho State Board of Medicine, the Idaho State Board of Nursing, and the Idaho State Board of Pharmacy (collectively, "State Respondents"). Pet., Dkt. No. 49817-2022. Petitioners seek a declaration that Idaho Code § 18-622 violates: (1) an alleged right to abortion 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 allegedly discriminating on the basis of sex, and (3) the Idaho Constitution's prohibition on vague laws because, Petitioners allege, the law does not clearly state what is prohibited. Pet., Dkt. No. 49817-2022, at 18, Prayer for Relief (a)-(b). Petitioners also seek a writ of prohibition preventing (1) inferior Idaho courts from giving effect to Idaho Code § 18-622, (2) Idaho law enforcement from enforcing Idaho Code § 18-622, and (3) Idaho professional boards from enforcing Idaho Code § 18-622. *Id.*, Prayer for Relief (c). Finally, Petitioners seek an alternative or peremptory writ of prohibition or stay of implementation of the Trigger Law in the event the briefing and/or oral argument schedule extends beyond August 18, 2022, despite the fact that, by their own admission, the statute only goes into effect 30 days after the judgment is issued in *Dobbs*. *Id.*, Prayer for Relief (d). This Court has noted that Petitioners' request for an immediate stay or writ pending a decision is premature. Order Setting Hr'g, Dkt. No. 49817-2022, at 3 n.2.

On the same date that they filed their Petition, Petitioners also filed a Motion to Expedite Briefing and Argument for Verified Petition for Writ of Prohibition and Application for Declaratory Judgment ("Motion to Expedite"). Petitioners requested that this Court expedite briefing and oral argument so their Petition could be argued on August 3, 2022 and this Court could issue a decision on the Petition by August 18, 2022. Mot. to Expedite, Dkt. No. 49817-2022, at 2-3. The State Respondents urged the Court to deny the Motion to Expedite because 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 Respondents also opposed a stay, particularly considering the U.S. Supreme Court's decision in *Dobbs*. *Id.* at 2, 4.

Petitioners have another pending original action before this Court—their challenge to the civil action stated in Senate Bill 1309, otherwise known as "the Heartbeat Act"—which was filed prior to the U.S. Supreme Court's decision in *Dobbs* and Petitioners' challenge to the Trigger Law. Once this Court vacates its stay of implementation, the Heartbeat Act will allow certain individuals to bring a civil suit over the performance of an abortion after a fetal heartbeat is detected. *See* Idaho Code §§ 18-8803, 18-8804, and 18-8807. In their challenge to the Heartbeat Act, Petitioners seek a declaration that the civil cause of action stated 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. Verified Pet. for Writ of Prohibition and Appl. for Decl. J., Dkt. No. 49615-2022, at 19, Prayer for Relief (a). Petitioners also seek a writ of prohibition against the State of Idaho forbidding Idaho courts from giving effect to the Heartbeat Act. *Id.*, Prayer for Relief (b). As of the filing of the Petitioners' challenge to the Trigger Law, their challenge to the Heartbeat Act had already been fully briefed and set for oral argument.

On June 30, 2022, this Court vacated oral argument in the Heartbeat Act challenge and, instead, set the two cases for hearing on specific procedural issues on August 3, 2022. Order Setting Hr'g, Dkt. No. 49615-2022, at 3; Order Setting Hr'g, Dkt. No. 49817-2022, at 3. The Court will hear argument related to the Trigger Law challenge on the following three issues: (1)

"[w]hether this Court should stay the enforcement of Idaho Code section 18-622(2) pending the outcome of this litigation;" (2) "[w]hether this case, Docket No. 49817-2022, should be consolidated with the first case Petitioners filed, Docket No. 49615-2022;" 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. 49817-2022, at 3. This brief responds to the three questions posed by the Court.

III. ARGUMENT

A. The Court should not stay the enforcement of the Trigger Law pending the outcome of this litigation.

The Court should decline to stay enforcement of the Trigger Law. A statute is not a proposed act, pending action, proceeding, judgment, order, or decree that the Court has discretion under I.A.R. 13(g) to stay. *See* I.A.R. 13(g) ("The Supreme Court may . . ., in its discretion, enter an order staying a *proposed act, a pending action or proceeding, or the enforcement of any judgment, order or decree*, . . . at any time during the pendency of an original application or petition for any extraordinary writ[.]") (emphasis added). Rather, it is a statute that, as the date of this filing, has no definite effective date, and Petitioners have not identified any threat of enforcement. In any case, the Court lacks jurisdiction to hear this case as an original action. *See Regan v. Denney*, 165 Idaho 15, 29, 437 P.3d 15, 29 (2019) (Brody, J., concurring in part and dissenting in part) ("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."). Therefore, the Court cannot stay the Trigger Law as part of its exercise of its original jurisdiction. This Court's original jurisdiction is limited to certain writs, including a writ of prohibition. Idaho Const. art. V, § 9. But the writ Petitioners seek is invalid. 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), namely all Idaho courts and law enforcement officers. Without jurisdiction to hear the case in the first place, the Court should not order any kind of preliminary relief.

But even if the Court disagrees with the procedural reasons for not "staying" a statute, this Court should decline to stay a duly enacted law where Petitioners have not shown any likelihood of success on the merits or irreparable injury from the Trigger Law going into effect and where the State Respondents will suffer grave harm from the stay. Petitioners' distaste for the Trigger Law is not sufficient to override the democratic process enshrined in the Idaho Constitution, even temporarily.

1. Petitioners have not shown they have any likelihood of success on the merits.

In addition to the procedural failings that doom their Petition, Petitioners cannot show any likelihood of success on the merits as to their substantive claims because the Trigger Law is constitutional. No right to an abortion exists in either the U.S. or Idaho Constitutions. Petitioners' equal protection argument likewise lacks merit because they have not identified any similarly situated individuals who are being treated differently by the Trigger Law and, in any case, the Trigger Law passes rational basis review. Their Idaho Human Rights Act argument lacks merit because, like the Trigger Law, it is a statutory enactment and can be reconciled with the Trigger Law. Finally, Petitioners cannot show a likelihood of success on their vagueness argument because the Trigger Law, as Petitioners demonstrate by their own filings, contains the necessary core of discernable meaning that prevents Petitioners from prevailing on this facial challenge.

a. Petitioners have no likelihood of success on their right to abortion claim.

There simply is no likelihood that Petitioners will prevail in convincing this Court that a constitutional right to an abortion lurks in the Idaho Constitution. Therefore, there is no

justification to enjoin the Trigger Law based on Petitioners' 'right to abortion' arguments. Unable to clearly point to a right to abortion in the Idaho Constitution, Petitioners attempt a kind of 'penumbral' argument for the existence of an amorphous right to privacy that happens to include a right to abortion, cobbled out of unrelated and inapposite rulings from this Court. A litigant should not be allowed to broadly gesture at a smattering of this Court's decisions, assert that a right to abortion is in there somewhere (if you squint), and expect that this Court will stay enforcement of a law that passed all the rigors of the legislative process pending the Court's disposition of the suits on the merits.

In arguing a fundamental right exists under the Idaho Constitution to terminate the life of an unborn child, Petitioners largely repeat their arguments from their Heartbeat Act briefing, deleting the references to *Roe* and the argument that the Idaho Constitution's due process protections should be interpreted to match the U.S. Constitution's Fourteenth Amendment protections. *Compare* Pet'rs' Br. In Supp. of Verified Pet. for Writ of Prohibition and Appl. for Decl. J., Dkt. No. 49615-2022, at 34-39, *with* Pet'rs' Br. in Supp. of Verified Pet. for Writ of Prohibition and Appl. for Decl. J. ("Petitioners' Brief"), Dkt. No. 49817-2022, at 15-24. The fatal flaws in these arguments were discussed in the State's responsive briefing in the Heartbeat Act challenge.[1] *See* Resp't 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 35-43. Petitioners' new arguments add nothing of merit.

Petitioners now also argue that the Idaho Constitution contains a right to abortion in part because the recognition of a fundamental right for parents "to decide how to raise and educate their

[1] This includes Petitioners' newly fleshed out article I, section 1 argument. *See* Pet'rs' Br., Dkt. No. 49817-2022, at 20-21. The State's Opposition Brief filed in the Heartbeat Act challenge establishes that Petitioners' article I, section I argument has no likelihood of success on the merits. State's Opp'n Br., Dkt. No. 49615-2022, at 37-39.

children" means that the Idaho Constitution guarantees a fundamental right for parents to terminate the life of their unborn children. Pet'rs' Br., Dkt. No. 49817-2022, at 18. But the right to raise and educate born children does not give parents the fundamental right to take the lives of those children. *State v. Row*, 131 Idaho 303, 306, 955 P.2d 1082, 1085 (1998) (mother convicted of the first-degree murder of her children). Petitioners' analogy is patently inapposite to the question of whether the Idaho Constitution contains a right to terminate the lives of unborn children. As Petitioners admit, the rights of parents under the Idaho Constitution stem from the rights that existed before the Idaho Constitution was adopted. Pet'rs' Br., Dkt. No. 49817-2022, at 18 ("The *Big Butte* Court located that fundamental right in Art. I, § 21 because it was a right accorded to parenthood before the Idaho constitution was adopted and so it was retained by the people.") (cleaned up). As discussed in the State's Opposition Brief in the Heartbeat Act challenge, abortion at all stages was criminally prohibited before and at the time the Idaho Constitution was adopted. State's Opp'n Br., Dkt. No. 49615-2022, at 38-39.

In addition, Petitioners' new argument regarding the common law and quickening has been rebutted by the U.S. Supreme Court in *Dobbs*, 142 S. Ct. at 2236 ("many [common law] authorities asserted that even a pre-quickening abortion was 'unlawful.'"), and, in any case, is irrelevant to the question of whether the Idaho Constitution protected as a fundamental right an act that was criminally prohibited at the time the document was drafted and adopted. Similarly, how other courts have interpreted the constitutions of their states cannot establish a likelihood of success on the merits as to the meaning of Idaho's Constitution. It is Idaho's Constitution and Idaho's history that matters.

Petitioners' arguments rely on the same reasoning that *Dobbs* completely rejected as ignoring "what is distinctive about abortion: its effect on what *Roe* termed 'potential life.'" *Id.* at 2237. The U.S. Supreme Court's reasoning in *Dobbs* is persuasive in interpreting the Idaho

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., twenty-one 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. Should this Court determine that it is necessary to look outside of Idaho's consistent criminal prohibitions of abortion from pre-statehood to when *Roe* was decided, the U.S. Supreme Court's reasoning in *Dobbs* is highly persuasive in concluding that the Idaho Constitution contains no right to abortion and that only rational basis review should be applied to the Trigger Law.

Notably, there is no likelihood of Petitioners being able to show that the Trigger Law fails rational basis review. Rational basis review requires that "a statute bear a reasonable relationship to a permissible legislative objective." *Bradbury v. Idaho Jud. Council*, 136 Idaho 63, 69, 28 P.3d 1006, 1012 (2001) (citation omitted); *Dobbs*, 142 S. Ct. at 2284 ("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 it would serve legitimate state interests.") (citation omitted). As the U.S. Supreme Court articulated in *Dobbs*, legitimate state interests for regulating abortion "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." *Dobbs*, 142 S. Ct. at 2284 (citations omitted). Here, the legitimate state interest of preserving prenatal life at all stages of development is reasonably served by prohibiting the termination of that life except in very limited circumstances. Petitioners' policy preferences for extending the maximum prescription period for contraceptives, increasing the number of insured women, increasing the number of maternal-fetal medicine and family medicine doctors in Idaho, increasing funding to Idaho's Indian Health Services, extending pandemic SNAP benefits, and passing a Pregnant Workers' Fairness Act cannot override the deference the Court must extend to legislative judgment. Pet'rs' Br., Dkt. No. 49817-2022, at 26-28. Petitioners cannot show any likelihood of success on their right to abortion claim.

b. Petitioners have no likelihood of success on their equal protection or Idaho Human Rights Act claims.

Regarding their equal protection challenge to the Trigger Law, Petitioners again cannot show a likelihood of success on the merits. They fail to cite any case that has found that regulating abortion implicates the equal protection guarantee in the Idaho Constitution by treating women differently than men. *Id.* at 29-37. As the U.S. Supreme Court concluded in *Dobbs*, this argument is "squarely foreclosed by our precedents, which establish that a State's regulation of abortion is not a sex-based classification and is thus not subject to the 'heightened scrutiny' that applies to such classifications." *Dobbs*, 142 S. Ct. at 2245. "The 'goal of preventing abortion' does not constitute 'invidiously discriminatory animus' against women," *Id.* at 2246 (quoting *Bray v. Alexandria Women's Health Center*, 506 U.S. 263, 273-74 (1993); instead, "laws regulating or prohibiting abortion . . . are governed by the same standard of review as other health and safety measures." *Dobbs*, 142 S.Ct. at 2246.

Thus, Petitioners hit the same fatal snag as that which unravels their equal protection challenge to the Heartbeat Act: the Trigger Law does not treat *similarly situated* individuals differently. *See* State's Opp'n Br., Dkt. No. 49615-2022, at 44. The Trigger Law applies equally to all people who perform abortions, and, if one looks at those whom the law impacts by implicitly preventing them from receiving abortions in Idaho outside the Trigger Law's affirmative defenses, it applies to all women. Petitioners' effort to create gender-based classes of similarly situated individuals fails. There is no similarly situated individual who is treated differently by the Trigger Law. But even if an equal protection analysis were to apply because the Trigger Law treats similarly situated individuals differently (it does not), the Trigger Law passes rational basis review because it rationally achieves the legitimate state interest of preserving fetal life at all stages of development by prohibiting abortion, which terminates fetal life, except in cases of reported rape or incest or where necessary to preserve the life of the mother.

Petitioners also cannot show any likelihood of success on their Idaho Human Rights Act argument. The Trigger Law and the Idaho Human Rights Act are both statutes enacted by the Legislature and any apparent inconsistencies should be reconciled if possible. *State v. Gamino*, 148 Idaho 827, 829, 230 P.3d 437, 439 (2010). The two statutes can be reconciled: consistent with the plain language of the statute, the Idaho Human Rights Act does not apply to legislative regulation of abortion. *See* Idaho Code § 67-5909 (prohibiting specified conduct by an "employer," "employment agency," "labor organization," "person," "educational institution," and "owner or any other person engaging in a real estate transaction, or for a real estate broker or salesman"). Indeed, the legislature who enacted the Idaho Human Rights Act cannot bind future legislatures from enacting laws on any topic. *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (plurality) (citing William Blackstone, Commentaries on the Laws of England 90 (1765)) ("one legislature may not bind the legislative authority of its successors."). Moreover, even if there could

be said to be a conflict between the Idaho Human Rights Act and the Trigger Law (and there cannot), the Trigger Law controls over the Idaho Human Rights Act because "[t]o the extent of a conflict between an earlier and later statute, the more recent expression of legislative intent prevails." *State v. Betterton*, 127 Idaho 562, 564, 903 P.2d 151, 153 (Idaho Ct. App. 1995) (citation omitted); *Gamino*, 148 Idaho at 829, 230 P.3d at 439. The Trigger Law is patently the more recently enacted statute, and therefore controls. Moreover, the Trigger Law is the more specific statute, and therefore also controls. *Betterton*, 127 Idaho at 564, 903 P.2d at 153 ("[w]here two statutes deal with the same subject matter, the more specific will prevail.") (citation omitted).

c. Petitioners can show no likelihood of success on their vagueness claim.

Petitioners similarly cannot show a likelihood of success on the merits on their vagueness challenge. The Trigger Law has a core meaning understandable to persons of ordinary intelligence: it proscribes abortions, meaning it proscribes the intentional termination of a clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child. A person of ordinary intelligence would understand that when a woman is clinically diagnosed as pregnant, performing an abortion is a crime under Idaho Code § 18-622 and may subject the person to licensing ramifications. Petitioners admit as much when they allege that the Trigger Law will cause them to "cease providing abortion services in Idaho *except in the rarest of circumstances*," Petition, Dkt. No. 49817-2022, ¶ 21 (emphasis added), and they will "cease *nearly all* abortion services in Idaho" once the Trigger Law goes into effect. Mot. to Expedite, Dkt. No. 49817-2022, at 2 (emphasis added). Petitioners understand what this statute proscribes. *See State v. Knutsen*, 158 Idaho 199, 202, 345 P.3d 989, 992 (2015) (citing *Kolender v Lawson*, 461 U.S. 352, 357 (1983)). This reality is enough to cause Petitioners' facial vagueness challenge to fail. *Cf. Alcohol Beverage Control Bd. v. Boyd*, 148 Idaho 944, 947-49, 231 P.3d 1041, 1045-47 (2010) (concluding statute was not facially vague where party did the

conduct proscribed by the statute—serving alcohol to an intoxicated person—even though the party argued "there [was] no standard by which to measure when a person is 'actually,' 'obviously,' or 'apparently' intoxicated").

Petitioners' gripe that the definition of abortion in Idaho Code § 18-604(1) does not specify how a doctor clinically determines pregnancy misses the point. The statute specifies the conduct and specifies the fact that needs to be determined: "clinically diagnosable pregnancy." A statute need not specify how a certain fact must be determined. *See, e.g.*, *State v. Harper*, 163 Idaho 539, 415 P.3d 948 (Idaho Ct. App. 2018). In fact, it is appropriate for flexibility to be built into the statute. *Id.*

Petitioners' allegation regarding the affirmative defense that permits an abortion when the physician determines "in his good faith medical judgment based on the facts known to the physician at the time, that the abortion was necessary to prevent the death of the pregnant woman" also misses the mark. It is clear to a person of ordinary intelligence that an abortion can be performed, based on "good faith medical judgment," when it is essential to stop the death of a pregnant woman. *Necessary* and *Prevent*, Black's Law Dictionary (11th ed. 2019). Moreover, there is a clear directive that, for an abortion to be subject to the affirmative defenses, the *manner* of the abortion must provide the best opportunity for the unborn child to survive, based on the physician's good faith medical judgment and facts known at the time, unless the physician determines using his or her good faith medical judgment that the manner would pose a greater risk of death to the pregnant woman. The Trigger Law's affirmative defenses do not impose a time requirement or present constitutional issue.

In short, Petitioners' arguments against the Trigger Law are not likely to succeed.

2. Petitioners will not suffer irreparable harm if a stay is not issued, but the State will suffer irreparable harm if enforcement of the Trigger Law is delayed.

The absence of any irreparable injury is also fatal to any request for a stay of the Trigger Law. A stay cannot be issued here because the injury that Petitioners allege would result if the law goes into effect is not cognizable. There is no constitutional right to obtain an abortion. As with Petitioners' challenge to the Heartbeat Act, the reason Petitioners ask the Court to stay the Trigger Law is to ensure that abortions continue to be offered in the State of Idaho at pre-*Dobbs* levels. Mot. to Expedite, Dkt. No. 49817-2022, at 2 (justifying the need for urgency or a stay because, allegedly, the Trigger Law "leave Petitioners and other medical professionals no choice but to cease nearly all abortion services in Idaho. . . . The many Idahoans who would otherwise be able to obtain safe abortion care in Idaho will be forced to obtain abortion care hundreds of miles away or to carry their pregnancies to term."); Pet'rs' Br., Dkt. No. 49817-2022, at 1 (repeating this same allegation as to the harm that would be caused by the Trigger Law going into effect). Seemingly unwilling to recognize that *Dobbs* overruled the only constitutional right to abortion applicable to Idaho women, Petitioners make the same allegations of harm that they would (and did in the Heartbeat Act challenge) make under a *Casey* undue burden analysis. *Compare* Pet., Dkt. No. 49817-2022, ¶¶ 19-31 *and* Pet'rs' Br., Dkt. No. 49817-2022, at 6-10 (describing the impact of the Trigger Law in terms of the difficulty it will pose for Idahoans to obtain abortions) *with* Pet'rs' Br., Dkt. No. 49615-2022, at 9-14. But *Casey* has been overruled. Petitioners' allegations that women will be delayed in obtaining abortions and unable to obtain abortions does not establish a cognizable injury.

In contrast, as with the stay of implementation of the Heartbeat Act, the State will suffer grave and irreparable harm by being unable to enforce its duly enacted statute pending a decision on the merits. Imposing a stay in these circumstances would elevate the policy preferences of two

petitioners over the policy preferences endorsed by the representatives of a supermajority of the State's population. (Senate Bill 1385 in the 2020 session passed 27-7-1 in the Senate and 49-18-3 in the House. *Senate Bill 1385*, 2020 Legislation, https://legislature.idaho.gov/sessioninfo/2020/legislation/S1385/.) It would also delay enforcement of a law intended to save the lives of preborn children, whose lives the State recognizes as being extant and valued. This is not a statute of little consequence. Lives will be lost if the Trigger Law is delayed.

Ultimately, the petition states numerous reasons Petitioners do not want the Trigger Law to go into effect because, as a policy matter, they are in favor of abortion. These stand in stark contrast to the State's policy in favor of its "'profound interest' in preserving the life of preborn children" and "prefer[ring], by all legal means, live childbirth over abortion." Idaho Code § 18-601. As recognized by the U.S. Supreme Court, "[a]bortion presents a profound moral issue on which Americans hold sharply conflicting views." *Dobbs*, 142 S. Ct. at 2240. Rather than the U.S. or Idaho Supreme Court "weigh[ing] those arguments and decid[ing] how abortion may be regulated," this debate is properly waged in the Legislature and at the ballot box. *Id.* at 2259. Where the Legislature and the Governor have exercised their constitutional roles in enacting a statute, a litigant should not be able to nullify that process merely by announcing a contrary policy preference to this Court. The Court should not turn down this road. It should not override the legislative process by staying enforcement of the Trigger Law pending a decision on the merits.

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

As discussed above and in Respondent State of Idaho's Response to Order Setting Hearing filed in the Heartbeat Act challenge, which the State Respondents incorporate by reference herein, *Dobbs* has altered the landscape of legal challenges to abortion by making clear that the U. S. Constitution does not provide a right to abortion. Resp'ts' State's Resp. to Order Setting Hr'g, Dkt. No. 49615-2022, at 9-10, 14, 17, 20-21. Given that neither the U.S. nor the Idaho Constitution contains a right to abortion, Petitioners' claims that the Heartbeat Act and the Trigger Law violate a right to abortion fail. To the extent that the Court considers the absence of a right to abortion to be dispositive, the Court should consolidate these cases and dispose of them accordingly. *Id.* at 17-18.

Should the Court disagree that the absence of a constitutional right to abortion controls the disposition of these petitions, they should be paired for oral argument on the same day, but not consolidated, to ensure that adequate time is available to the Court and the parties to analyze all the claims asserted by Petitioners and the procedural issues with each claim. *See Id.*

C. This case should not be transferred to the district court for the development of a factual record and potential motion practice.

As with Petitioners' challenge to the Heartbeat Act, the Court should not transfer the Trigger Law 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, and the exercise of original jurisdiction over this claim would be improper. Second, factual development is not warranted to dispose of Petitioners' claims. Petitioners' facial challenges to the Heartbeat Act raise purely legal questions. These claims should be disposed of on the law.

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

As discussed in Section III(C) of Respondent State of Idaho's Response to Order Setting Hearing filed in the Heartbeat Act challenge, which Respondents incorporate by reference here, this case should not be transferred to a district court under I.A.R. 5(d) because this Petition is not appropriate for an original action in this Court and should be denied. Petitioners have failed to request a valid writ, and therefore have failed to invoke this Court's jurisdiction. *Dobbs* and the Idaho Constitution unequivocally demonstrate that legislative enactments restricting abortion are facially permissible. Any as-applied challenge should be brought in the district court in the context of an actual case or controversy, where the district court can address the factual issues and dispositive motions. [2]

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[2] *Dobbs* and the Idaho Constitution demonstrate that the Trigger Law is facially valid. Once this Court denies the petition, Petitioners may bring an as-applied challenge in the district court once an actual case and controversy arises, with an actual application or threatened enforcement of Section 18-622 and a foundation of concrete facts. There, the district court can fulfill its constitutional responsibility to exercise "original jurisdiction in all cases, both at law and in equity . . . ." Idaho Const. art. V, § 20. The district court can address factual disputes; decide motions regarding admissibility of unsupported or hearsay testimony, the qualification and scope of experts, and potential discovery disputes; rule on motions to dispose of any legal theories that are unsupported by evidence, or that must be denied for lack of a justiciable claim; and make appropriate credibility determinations. This helps to maintain the orderly procedure that governs across the State in the most expensive commercial disputes and the most weighty constitutional challenges. *See Navarro v. Yonkers*, 144 Idaho 882, 888, 173 P.3d 1141, 1147 (2007) (quoting *Pieper v. Pieper*, 125 Idaho 667, 669, 873 P.2d 921, 923 (Idaho Ct. App. 1994)) ("Appellate courts . . . are not permitted to substitute their own view of the evidence for that of the trial court, nor to make credibility determinations."). This is all part of the sharpening and honing that cases in the district court are subject to, which leads to the best possible case before this Court of last resort. *See Regan*, 165 Idaho at 29, 437 P.3d at 29 (2019) (Brody, J., concurring in part and dissenting in part). As over a century of judicial history in the State has shown, these fact-finding and case-sharpening procedures are effective and appropriate when undertaken in the district court.

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

As discussed by the Legislature in Section II(B) of its brief, the facts Petitioners allege are of no consequence in this facial challenge brought against the Trigger Law. The questions in this facial challenge are purely questions of law. Whether the Trigger Law is unconstitutionally vague is a pure question of law. *State v. Cook*, 165 Idaho 305, 309, 444 P.3d 877, 881 (2019). This is because the Court construes the statute by either considering the legislatively provided definition or the "commonly understood, everyday meanings" of the terms of the statute. *State v. Larsen*, 135 Idaho 754, 757, 24 P.3d 702, 705 (2001). The Court then applies this legal reading of the statute to determine if it communicates a core meaning, that is whether it is "worded with sufficient clarity and definiteness that ordinary people can understand what conduct is prohibited and that the statute be worded in a manner that does not allow arbitrary and discriminatory enforcement." *State v. Korsen*, 138 Idaho 706, 711-12, 69 P.3d 126, 131-32 (2003), *abrogated on other grounds by Evans v. Michigan*, 568 U.S. 313 (2013)). The other issues raised by Petitioners are similarly questions of law: whether the Idaho Constitution contains a right to abortion, whether the Trigger Law facially violates equal protection, and whether the applicable, narrower, more specific and more recent Section 18-622 applies to abortion rather than the inapplicable, more broad, and less specific Idaho Human Rights Act. *CDA Dairy Queen, Inc. v. State Ins. Fund*, 154 Idaho 379, 382, 299 P.3d 186, 189 (2013) (explaining that constitutional questions and questions of statutory interpretation are questions of law). Factual development under I.A.R. 5(d) is not necessary to appropriately dispose of this challenge.

IV. CONCLUSION

For the foregoing reasons, the State Respondents respectfully request that this Court (1) decline to stay enforcement of the Trigger Law; (2) consolidate the petitions challenging the

Heartbeat Act and the Trigger Law and deny both petitions based on the absence of any constitutional right to abortion, or, alternatively 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.

DATED this 20th day of July, 2022.

OFFICE OF THE ATTORNEY GENERAL

By: */s/ Megan A. Larrondo*
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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:

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