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IN THE SUPREME COURT OF THE STATE OF IDAHO

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

Petitioners,

v.

STATE OF IDAHO; 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. 49899-2022

OPPOSITION TO MOTION TO EXPEDITE BRIEFING AND ARGUMENT

I. INTRODUCTION

Petitioners again ask this Court to rush to issue an improper advisory opinion on the legality of the State's laws governing abortion. Their motion to expedite this new Petition challenging Idaho Code §§ 18-8804 and 18-8805, the criminal prohibitions of the Heartbeat Act, is unclear as to exactly how Petitioners wish this Court to expedite this matter, but no matter how Petitioners' request is construed, it should be denied.

First, far from requiring expeditious resolution, resolution of this challenge is particularly premature. Petitioners' challenge to the Heartbeat Act's criminal prohibitions, brought before the law is even effective and before any case or controversy exists, is a request for an improper advisory opinion. At the very least, the Court should first decide the challenge to the Heartbeat Act's civil action (*Planned Parenthood et al v. State of Idaho,* Dkt. 49615-2022) and Petitioners' challenge to the Idaho Code § 18-622, the Trigger Law, (*Planned Parenthood et al. v. State of Idaho et al.*, Dkt. 49817-2022) before deciding this challenge. If civil actions are allowed to proceed under the Heartbeat Act, Petitioners have already stated they will not perform the abortions criminally prohibited under the Heartbeat Act. And, once the Trigger Law goes into effect, it will expressly supersede the Heartbeat Act's criminal prohibitions. This Court should not rush to decide this matter where there is a high likelihood that the challenge will be mooted by the Court's decisions on Petitioners' first two Petitions.

Second, argument regarding this Petition should not be added to the oral argument on the six procedural questions set for August 3 because this Petition is premature. If, instead, Petitioners are asking that the case be set for oral argument on the merits on August 3, that request should also be denied because argument on the merits should be heard on all

three challenges in a consolidated proceeding to allow this Court to dispose of all three Petitions either because it lacks original jurisdiction or because there is no constitutional right to abortion.

Third, this Court should refuse to stay the criminal prohibitions of the Heartbeat Act. Petitioners should not be allowed, even temporarily, to override the policy enshrined into law by the People's representatives with their own policy preferences. Respondents request the opportunity to fully brief their opposition to a stay of the criminal prohibitions of the Heartbeat Act should this Court question whether a stay is appropriate.

II. ARGUMENT

A. The Court should decline Petitioners' effort to obtain a rushed advisory opinion from this Court because their challenge is premature.

Throughout their three challenges filed with this Court, Petitioners have consistently sought to rush this Court into ill-considered and insufficiently informed advisory opinions issued prior to the effective date of each challenged law. Their efforts began with their challenge to the Senate Bill 1309, the Heartbeat Act's civil action (*Planned Parenthood et al. v. State of Idaho*, Dkt. 49615-2022), where Petitioners sought to rush this Court to judgment prior to S. 1309's effective date based on their argument that the Heartbeat Act's civil action violated the right to abortion found in *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) before the U.S. Supreme Court could overrule *Roe* and *Casey* and pull the rug out from under their challenge with its decision in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). Petitioners' efforts continued with their challenge to Idaho Code § 18-622, the Trigger Law, (*Planned Parenthood et al. v. State of Idaho et al*, Dkt. 49817-2022), where Petitioners sought to expedite briefing and have oral argument held on the merits of their

challenge to the Trigger Law prior to its effective date and just 37 days after they filed their Petition.[1] And it continues now with Petitioners' challenge to Idaho Code §§ 18-8804 and 18-8805, the criminal prohibitions of the Heartbeat Act, (*Planned Parenthood et al. v. State of Idaho et al.*, Dkt. 49899-2022), on which Petitioners request oral argument just nine short days after filing this third Petition, before Respondents have filed responsive briefing, prior to the effective date of the law, and on the same day that the Court is set to hear argument on preliminary procedural questions designed to assist the Court with determining the merits of Petitioners' first two challenges.

The Court should refuse Petitioners' newest effort to obtain an improper and premature advisory opinion. The criminal prohibitions of the Heartbeat Act will not take effect until August 19, 2022, which is 30 days after the entry and issuance of the judgment in the Eleventh Circuit's decision in *SisterSong Women of Color Reproductive Justice Collective v. Governor of Georgia*, -- F.4th ---, 2022 WL 2824904 (11th Cir. July 20, 2022) (No. 20-13024). Idaho Code § 18-8805(1) ("This section shall become effective thirty (30) days following the issuance of the judgment in any United States appellate court case in which the appellate court upholds a restriction or ban on abortion for a preborn child because a detectable heartbeat is present on the grounds that such restriction or ban does not violate the United States constitution."). At this time, there is no case or controversy related to the Heartbeat Act's criminal provisions because there is no actual or threatened enforcement of the Heartbeat Act's criminal provisions.

[1] The Court rejected Petitioners' effort to rush the Court to judgment on their challenge to the Trigger Law. *See* Order Setting Hearing, Dkt. 48717-2022, at 2-3 (declining Petitioners' request to expedite briefing and oral argument so that oral argument could be held on August 3 and instead setting hearing on three procedural questions on August 3).

Once again, Petitioners' newest Petition is an ill-concealed effort to bring a declaratory judgment action seeking an advisory opinion from the State's highest court on the constitutionality of a state law before any case or controversy arises. But the Constitution only grants the Court jurisdiction to decide petitions for particular writs. Although styled as a petition for writ of prohibition, Petitioners do not seek a writ of prohibition here because a writ would not "arrest" the "proceedings" of a "respondent" as required for issuance of the writ Petitioners seek. I.A.R. 5(d), Idaho Code § 7–401. There are no proceedings to arrest: no court or board has ever applied the criminal prohibitions of the Heartbeat Act given that they are not yet in effect. Moreover, the writ seeks to arrest the proceedings of third parties who are not respondents in this case: all Idaho Courts and law enforcement officers. This Court lacks jurisdiction to hear this Petition given that Petitioners do not request a valid writ. Petitioners are well-able, once a case or controversy exists, to argue that the challenged law is unconstitutional by raising this argument as a defense to an actual or threatened enforcement action, assuming Petitioners decide they will continue to perform prohibited abortions.

Moreover, this challenge will be mooted as soon as this Court vacates the stay of the Heartbeat Act's civil action. Petitioners have stated that, once the civil action is effective, they will not perform abortions after a fetal heartbeat is detected because of their risk assessment related to the Heartbeat Act's civil actions. *Petitioners' Brief in Support of Verified Petition*, Dkt. 49615-2022, exhibit 3 ¶ 14 and exhibit 4 ¶ 17. Thus, once this Court vacates the stay of the Heartbeat Act's civil action, Petitioners' arguments as to the Heartbeat Act's criminal provisions will be moot and Petitioners will lack standing to challenge the Heartbeat Act's criminal provisions because, by their own admissions in challenging the

Heartbeat Act's civil action, they will not be engaging in the conduct governed by the Heartbeat Act's criminal prohibitions. There is no reason for this Court to rush this matter to judgment when this Court's resolution of Petitioners' challenge to the Heartbeat Act could moot Petitioners' concerns with the Heartbeat Act's criminal provisions.

This challenge will also be mooted once the Trigger Law goes into effect. The Trigger Law will supersede the Heartbeat Act's criminal provisions when it takes effect on August 25, 2022, shortly after the Heartbeat Act's criminal provisions take effect. Idaho Code § 18-8805 ("In the event both this section and section 18-622, Idaho Code are enforceable, section 18-622, Idaho Code, shall supersede this section."). The Trigger Law will become effective on August 25, 2022, given that the U.S. Supreme Court issued the judgment in *Dobbs* on July 26, 2022. Once the Trigger Law is effective, the criminal prohibitions of the Heartbeat Act become irrelevant and this challenge is moot.

The Court should deny Petitioners' request to expedite this case. There is no reason to rush to judgment on a challenge where no case or controversy exists and, even if one did exist, will shortly be mooted.

B. This Court should not hold oral argument on this challenge on August 3.

To the extent that Petitioners ask that this Court hold argument on August 3 on the procedural questions of whether to stay the Heartbeat Act's criminal prohibitions, whether to consolidate the three proceedings, and whether to transfer the Heartbeat Act to the district court for factual findings, the Respondents oppose this request for the reasons stated in Section (II)A. There is no reason to resolve this case before the Trigger Law and civil action

challenges because resolution of those challenges will very likely render this challenge moot.[2]

Alternatively, to the extent that Petitioners request that merits argument be held on this challenge on August 3, the Court should reject that request, too. In addition to the reasons already stated above, holding merits argument on Petitioners' newest challenge on August 3 would deny Respondents their full ability to oppose both this challenge and Petitioners' challenge to the Trigger Law. First, merits argument in this case would largely moot briefing on this challenge before Respondents even have a chance to respond. Second, it would largely moot merits argument and briefing on the Trigger Law challenge, again before Respondents are allowed to fully respond, and on the very same day that the Court is hearing argument intended to determine how the Court will handle the Trigger Law challenge. Given that Petitioners' arguments in this new Petition are substantially similar to the arguments made in their challenge to the Trigger Law, holding merits argument on this new challenge on August 3 would deny Respondents the ability to respond to Petitioners' briefing in both the Trigger Law challenge and this new challenge. This Court should reject Petitioners' effort to weight the scales in their favor and moot the procedural questions that this Court found necessary to resolve prior to addressing the merits of Petitioners' first two challenges.

C. The Court should not stay the Heartbeat Act's criminal prohibitions.

Respondents strenuously oppose a stay of the Heartbeat Act's criminal provisions.[3] First, as discussed in the State and Respondents' Responses to the Court's two Orders Setting

[2] Should this Court disagree, the State Respondents request the opportunity to submit written briefing answering these questions as to this third challenge prior to oral argument.

[3] As this Court noted with regard to Petitioners' request to stay the Trigger Law, a stay at this point would be premature given that, by petitioners' own contention, the Heartbeat Act's

Hearing, a statute is not something that can be stayed under Idaho Appellate Rule 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[.]"). In addition, Petitioners have no likelihood of success on the merits, nor have they demonstrated irreparable harm if a stay is denied given that there is no right to abortion under either the U.S. or the Idaho Constitutions.

Petitioners have no likelihood of success on the merits because this matter is not appropriate for the Court's exercise of its original jurisdiction as discussed above. In addition, for the reasons discussed in Respondents' Response to Order Setting Hearing in the Trigger Law challenge, Petitioners have no likelihood of success on their argument that there is a right to abortion hiding in Idaho's Constitution. *Respondents' Response to Order Setting Hearing*, Dkt. 49817-2022, at 7–11. Abortion at all stages was criminally prohibited at the time Idaho's Constitution was adopted; it cannot possibly have been implicitly protected as a fundamental right at the same time. *Dobbs* left no room for doubt that it is well within the purview of state legislatures to regulate abortion. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). Petitioners are unlikely to succeed on the merits of this latest challenge and therefore, the Court should not issue a stay.

Petitioners also have no likelihood of success on their argument that the Heartbeat Act's criminal prohibitions violate the equal protection protections of the Idaho Constitutions or the Idaho Human Rights Act. There is no equal protection issue here

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criminal prohibitions do not go into effect until "on or around August 19, 2022." Petr's' Motion to Expedite Briefing and Argument, Dkt. 49899-2022.

because the Heartbeat Act does not treat similarly situated individuals differently, but even if it did, the law is not discriminatory on its face and passes rational basis review. *Dobbs*, 142 S. Ct. at 2245–46; *see Respondents' Response to Order Setting Hearing*, Dkt. 49817-2022, at 11-12. In addition, the Idaho Human Right Act does not govern the Idaho Legislature and any conflict between the Heartbeat Act and the Idaho Human Rights Act can be resolved through statutory interpretation. *Id.* at 12-13 (citing *State v. Gamino*, 148 Idaho 827, 829, 230 P.3d 437, 439 (2010); *State v. Betterton*, 127 Idaho 562, 564, 903 P.2d 151, 153 (Idaho Ct. App. 1995)).

Finally, regarding Petitioners' vagueness argument, the Heartbeat Act survives this facial challenge because it has a core meaning ascertainable to a person of ordinary intelligence. *State v. Fluewelling*, 150 Idaho 576, 578, 249 P.3d 375, 377 (2011). Indeed, Petitioners apparently understood what the Heartbeat Act's affirmative defenses meant when they filed their challenge to the Heartbeat Act's civil action, given that their vagueness arguments could have been made in that challenge but were not. Similarly, they were able to understand when the law was triggered into effect, because they have filed a lawsuit challenging it prior to the law going into effect and identified the correct effective date.

Petitioners also cannot establish irreparable harm. The harm they allege is that women will not get abortions or will be delayed or suffer burdens in obtaining abortions. But there is no constitutional right to have an abortion. Indeed, Petitioners are abortion providers, not women seeking abortions, and so cannot possibly not suffer irreparable harm if abortions are restricted in Idaho—there has never been a constitutional right to *perform* abortions. That said, should this Court think there is any chance that a stay of the Heartbeat Act's criminal provisions is warranted, Respondents respectfully request the opportunity to

fully brief the issue, consistent with the opportunity that they were provided to brief the questions of whether the Court should vacate the stay of the Heartbeat Act's civil action and whether the Court should stay the Trigger Law. *Order Setting Hearing*, Dkt. 49815-2022; *Order Setting Hearing*, Dkt. 49817-2022.

III. CONCLUSION

This Court should decline Petitioners' request to expedite the issuance of a premature advisory opinion. Respondents respectfully request that the Court deny Petitioners' motion to expedite and that the Court deny Petitioners request for a stay of the criminal prohibitions of the Heartbeat Act. However, should this Court decide to set this matter for argument on August 3 on the same procedural questions as those posed in the prior two challenges, Respondents request the opportunity to brief the issues. Should this Court feel inclined to stay the Heartbeat Act's criminal prohibitions (it should not), Respondents respectfully request the opportunity to fully brief the issue.

DATED this 28th day of July, 2022.

OFFICE OF THE ATTORNEY GENERAL

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th 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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