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Idaho Supreme Court
Melanie Gagnepain, Clerk of the Court
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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,

and

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

Intervenor-Respondents.

Docket No. 49817-2022

BRIEF OF IDAHO LEGISLATURE

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STATEMENT OF THE CASE

I. Nature of the Case

This case presents the momentous question of whether the people of Idaho are free to govern themselves with respect to abortion. The Supreme Court of the United States has held that there is no federal constitutional right to an abortion and that abortion's regulation (or not) belongs to the people of each State and their elected representatives. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). Petitioners ask this Court to thwart the return of sovereign power contemplated under *Dobbs* by reading into the Idaho Constitution an implied right to abortion.

As elected representatives of the people of Idaho, we urge the Court to reject that invitation. At stake in the petitions before this Court are laws adopted to protect the public interest in a matter of profound moral, practical, and legal significance. These laws protect the unborn, the safety of women, the integrity of the medical profession, and the future of the State. Nothing in the Idaho Constitution implies the right to abortion at will. Finding such a right for the first time in Idaho's history would dangerously undermine the processes of republican self-government. The principle of limited government requires the Court to vindicate personal rights where they fairly appear in the Idaho Constitution but not to invent rights that the State's constitution does not contain.

II. Course of the Proceedings

On June 27, 2022, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, and Dr. Gustafson (collectively "Petitioners") brought this original action challenging the validity of Idaho Code § 18-622 ("Section 622"). That statute makes it a crime to perform an abortion, except for a physician acting to save a mother's life or to terminate a pregnancy caused

by rape or incest. *See* Idaho Code § 18-622(2). Petitioners seek a declaration that Section 622 is invalid *in toto* under the Idaho Constitution and the Idaho Human Rights Act. Verified Petition for Writ of Prohibition and Application for Declaratory Judgment, *Planned Parenthood Great Northwest v. State of Idaho*, No. 49817-2022, at 1 (June 27, 2022) ("Petition"). They also seek "a writ of prohibition preventing (1) inferior Idaho courts from giving effect to the Ban's unlawful criminal cause of action, (2) Idaho law enforcement officials from enforcing the unlawful Ban, and (3) Idaho professional licensing boards from enforcing the Ban's unlawful suspension and revocation requirements." *Id.* The Petition here is one of three petitions filed by Petitioners with this Court, challenging Idaho's abortion laws. *See Planned Parenthood Great Northwest v. State of Idaho*, Nos. 49615, 49817, 49899, 2022 WL 3335696, at *2–3 (Idaho Aug. 12, 2022) (describing the three petitions, which initiated the three proceedings hereafter referred to respectively as the First Case, Second Case, and Third Case).

Section 622 becomes effective 30 days after a decision by the United States Supreme Court "that restores to the states their authority to prohibit abortion." Idaho Code § 18-622(1)(a). *Dobbs* was that decision. *See* 142 S. Ct. at 2279 (holding that "the authority to regulate abortion must be returned to the people and their elected representatives"). Although the petition contemplates that Section 622 will become effective no sooner than August 19, 2022, Petition at 7–8, actually the *Dobbs* judgment issued on July 26—making August 25 the statute's effective date.[1] Petitioners

[1] *See Dobbs v. Jackson's Women's Health Org.*, No. 19-1392, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-1392.html (docket entry showing that the judgment issued on July 26, 2022).

moved to stay Section 622 pending resolution of their claims on the merits, but following a hearing on August 3, this Court denied that motion. *See Planned Parenthood*, 2022 WL 3335696, at *7 ("Petitioners' request for a stay of enforcement of the Total Abortion Ban[2] pending resolution of this case is denied.").

Also on August 12, this Court issued an order consolidating the three petitions "for purposes of oral argument and opinion only." Order, *Planned Parenthood Great Northwest v. Idaho*, Nos. 49615-2022, 49817-2022, and 49899-2022, at 3 (Idaho Aug. 12, 2022). Briefing will continue to be filed separately and on an expedited schedule in each case. *Id.* That Order directed, "Respondents and Intervenor-Respondents shall file Answers and supporting Briefs in both cases on or before August 19, 2022." *Id.* Supported by the Legislature, the State moved for a 14-day extension, which this Court granted, making the new deadline for answers and supporting briefs September 2, 2022. *See* Order Extending Time to File Answers and Supporting Briefs, *Planned Parenthood Great Northwest v. Idaho*, Nos. 49615-2022, 49817-2022, and 49899-2022, at 2 (Idaho Aug. 19, 2022). This brief is filed timely and in compliance with these Orders.

III. **Factual Background**

Relevant facts can be summarized briefly. Abortion has been a crime under Idaho law from territorial days through 1973, when the U.S. Supreme Court issued *Roe v. Wade*, 410 U.S. 113

[2] "Total Abortion Ban" is the Petitioners' rhetorical label for Section 622, but it is of course a misleading, indeed Orwellian, label. Because Section 622 provides exceptions for preservation of the life of the mother and pregnancies resulting from rape and incest, such overwrought and misleading rhetoric ought not be used in careful analysis of the issues here.

(1973), holding that the federal constitution contains a fundamental right to an abortion. *See Planned Parenthood*, 2022 WL 3335696, at *6 (citing territorial and state statutes from 1864–1973 and describing abortion as "a long-standing criminal offense in Idaho"). In 2020, the Idaho Legislature enacted Section 622. It makes performing a "criminal abortion" a felony and prescribes affirmative defenses, including that a physician performed an abortion after determining that it was "necessary to prevent the death of the pregnant woman" and that the pregnancy resulted from "the act of rape or incest." Idaho Code §§ 18-622(2), (3). From the date of its adoption, Section 622 lay moribund, subject to a triggering provision that has now occurred with the United States Supreme Court's decision in *Dobbs*. *Id.* § 18-622(1)(a).

Only three days after *Dobbs*, Petitioners filed their Petition initiating this proceeding, the Second Case. This Court has summed up Petitioners' challenge to Section 622 admirably. "[W]hat Petitioners are asking this Court to ultimately do is to declare a right to abortion under the Idaho Constitution when—on its face—there is none…. Petitioners offer numerous reasons why such a right should nevertheless be read into one, some, or a combination of certain Sections in Article I of the Idaho Constitution." *Planned Parenthood*, 2022 WL 3335696, at *6. Intervenor-Respondents vigorously oppose the petition for reasons explained below.

ISSUE PRESENTED

Does Section 622 violate the Idaho Constitution as Petitioners allege?

ARGUMENT

I. A Modest Exercise of Judicial Authority Will Conclude that the Idaho Constitution Contains No Express Right to Abortion and that Such a Right Is Outside the State's Understanding of "Ordered Liberty."

A. Established Rules Cabin the Judicial Review of a Statute's Constitutionality.

A foundational principle under our constitutional system of divided powers to make, enforce, and interpret law is that "[t]he judicial power to declare legislative action unconstitutional should be exercised only in clear cases." *Stuart v. State*, 149 Idaho 35, 40, 232 P.3d 813, 818 (2010) (citing *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 869, 154 P.3d 433, 440 (2007)). Well-established legal presumptions and rules of interpretation act as a barrier to discourage courts from exercising legislative power.

Take the presumption of constitutional validity. "The general rule is that the party challenging a statute on constitutional grounds 'must overcome a *strong* presumption of validity.'" *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 90, 982 P.2d 917 (1999) (citations omitted) (emphasis added); *accord Powers v. Canyon Cnty.*, 108 Idaho 967, 982, 703 P.2d 1342, 1357 (1985). A duly enacted statute "should be held to be constitutional until it is shown beyond a reasonable doubt that it is not so, and that a law should not be held to be void for repugnancy to the Constitution in a doubtful case." *Sanderson v. Salmon River Canal Co.*, 45 Idaho 244, 263 P. 32, 35 (1927).

Consider, as well, the rule that "whenever possible, a statute should be construed so as to avoid a conflict with the state or federal constitution." *State v. Gomez-Alas*, 477 P.3d 911, 920

(2020). This also puts a thumb on the scale in favor of preserving the validity and operation of a statute enacted through the constitutionally prescribed processes of republican government.

Equally settled is the principle that when interpreting the Idaho Constitution "the rules of statutory construction apply." *Reclaim Idaho v. Denney*, 169 Idaho 406, 427, 497 P.3d 160, 181 (2021). Those rules are familiar:

> The objective of statutory interpretation is to derive the intent of the legislative body that adopted the act. Statutory interpretation begins with the literal language of the statute. Provisions should not be read in isolation, but must be interpreted in the context of the entire document. The statute should be considered as a whole, and words should be given their plain, usual, and ordinary meanings. It should be noted that the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant. When the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and the Court need not consider rules of statutory construction.

In Re Doe, 168 Idaho 511, 200, 484 P.3d 195, 200 (2021) (original authorities omitted).

The straightforward application of these principles of judicial self-discipline weighs heavily against the Petitioners' attack on the constitutionality of Section 622.

B. The Idaho Constitution Does Not Contain an Express Right to Abortion and No Such Right Exists by Implication.

1. The Idaho Constitution contains no express right to abortion.

"[A] right is fundamental under the Idaho Constitution if it is expressed as a positive right, or if it is implicit in Idaho's concept of ordered liberty." *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 126, 15 P.3d 1129, 1134 (2000). No provision of the state constitution mentions abortion as a positive right. *See Planned Parenthood*, 2022 WL 3335696, at *6 (the state

constitution contains no right to abortion "on its face"). Any such right—if it exists at all—must be discovered by implication.

2. Petitioners' "implied right of abortion" is not implicit in Idaho's conception of ordered liberty.

Without an express right of abortion, Petitioners must convince the Court that such a right is "implicit in Idaho's concept of ordered liberty." *Van Valkenburgh*, 135 Idaho at 126, 15 P.3d at 1134. Petitioners say that "[t]he fundamental right to privacy in making intimate familial decision[s] is implicit in Idaho's concept of ordered liberty." *See* Petitioners' Brief in Support of Verified Petition for Writ of Prohibition and Application for Declaratory Judgment, *Planned Parenthood Great Northwest v. State of Idaho*, No. 49817-2022 (June 27, 2022) ("Br.") at 16.[3] Yet they do not even try to show that the right is "implicit in *Idaho*'s concept of ordered liberty." *Van Valkenburgh*, 135 Idaho at 126, 15 P.3d at 1134 (emphasis added). That inquiry must rest on "neutral criteria" and avoid "the appearance of result-oriented decision making." *Idaho Schs. for Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 581, 850 P.2d 724, 732 (1992). Petitioners' argument falters at every step.

The Petitioners' brief does not identify a state-law standard for determining when their asserted right is implicit in Idaho's conception of ordered liberty, so, by operation of Idaho law, federal constitutional standards will apply. *See State v. Doe*, 148 Idaho 919, 923, 231 P.3d 1016, 1020 n.1 (2010) (when a claimant offers no "compelling argument how the standards applied by

[3] Petitioners' discussion of other states' constitutions, laws, and precedents is irrelevant. Br. at 22–24. Only the Idaho Constitution and this Court's interpretation of it have any material role in deciding whether our Constitution provides an implied right of abortion.

the Idaho Constitution would be applied any differently than those of the U.S. Constitution … this Court normally applies federal constitutional standards."). This Court has recognized that the leading decision on the meaning of "ordered liberty" under the Fourteenth Amendment is *Washington v. Glucksberg*, 521 U.S. 702 (1997). It announced "a two-step analysis" to determine when the federal constitution implicitly protects an unenumerated right. *See State v. Doe*, 148 Idaho at 1031, 231 P.3d at 934 (citing *Glucksberg*, 521 U.S. 702 (1997)). Under that framework, a court begins by "carefully formulating the interest at stake" by identifying "concrete examples involving fundamental rights." *Glucksberg*, 521 U.S. at 722. Next, that interest "must be shown objectively to 'be deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Id.* at 720–21.

Petitioners' assertion of a "fundamental right to privacy in making intimate familial decision[s]," Br. at 16, is too abstract to survive the first step of that analysis. When considering an asserted right to assisted suicide, *Glucksberg* set the pattern by rejecting overly generalized formulations like "a right to die" in favor of "a right to commit suicide which itself includes a right to assistance doing so." 521 U.S. at 722, 723. Petitioners too must be "more precise." *Id.* at 723. Since the terms *privacy* and *intimate* and even *family decisions* are pitched at too high a level of generality, *Glucksburg* requires a more concrete description. Tailored closely to the facts, what Petitioners claim is the right to decide "whether or not to . . . bear a child" without substantial government interference or oversight. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977) (cited in Br. at 17).

So described, the right Petitioners seek under the Idaho Constitution falters at the second step under *Glucksberg*. Except when countermanded by *Roe* and its progeny, abortion has been a crime under Idaho law during its entire history—including before statehood.[4] *See Planned Parenthood*, 2022 WL 3335696, at *6 (citing territorial and state statutes from 1864–1973 and describing abortion as "a long-standing criminal offense in Idaho"). The decision to abort a pregnancy is anything but "deeply rooted" in Idaho's legal history and traditions. *Glucksberg*, 521 U.S. at 721. Like the United States Supreme Court's consideration of a supposed right to assisted suicide, "we are confronted with a consistent … tradition that has long rejected the asserted right, and continues explicitly to reject it today." *Id.* at 723. The right to procure an abortion cannot be an implied right under the Idaho Constitution because it is firmly outside Idaho's "concept of ordered liberty." *Evans*, 123 Idaho at 582, 850 P.2d at 733. Petitioners essentially ask this Court to transform a crime into a right. No other implied right under the state constitution has that pedigree. *Evans*, 123 Idaho at 581, 850 P.2d at 733 (describing "voting, procreation, and constitutional safeguards for persons accused of crimes [as] fundamental rights under the state

[4] Although we wholly endorse the Court's description of Idaho's legal history regarding abortion, *Planned Parenthood*, 2022 WL 3335696, at *6, Petitioners press a fallacious historical argument that merits a direct response. They maintain that Idaho common law did not make abortion a crime before *quickening*, the moment when a pregnant mother can feel the unborn child moving within her. Br. at 20. That's a red herring. Even if the common law did not *punish* pre-quickening abortion, it hardly makes it a protected *right*. *See Dobbs*, 142 S. Ct. at 2250 ("Although a pre-quickening abortion was not itself considered homicide, it does not follow that abortion was permissible at common law—much less that abortion was a legal right.").

constitution"). Petitioners cannot justify the revolution in Idaho law that their sought-after right would spark.

II. The Idaho Constitution Likewise Offers No Support for Petitioners' Other Arguments Seeking an Implied Right of Abortion.

A. Petitioners Cannot Maintain an Implied Right to Abortion Grounded in a Right of Privacy.

Petitioners' arguments for an implied "right to privacy in making intimate familial decisions" have no basis in the Idaho Constitution, and do not support a right to abortion even if they did. Br. at 15 (emphasis removed and capitalization altered). They argue for an implied constitutional right that no single provision of the Idaho Constitution supports. As this Court has aptly written, "what Petitioners are asking this Court to ultimately do is to declare a right to abortion under the Idaho Constitution" based on "numerous reasons why such a right should nevertheless be *read into* one, some, or a combination of certain sections of Article I of the Idaho Constitution." *Id.* Petitioners admit as much. *Id.* at 16 ("Petitioners ask this Court to make explicit what is implicit in the Idaho Constitution and in this Court's precedents ….").

Petitioners' constitutional method is objectionable in principle. They ask the Court to recognize a right of privacy broad enough to nullify Section 622—a law adopted through the constitutional processes of democratic lawmaking—based on a patchwork quilt of constitutional provisions, not one of which actually addresses abortion. Far from resting on "neutral criteria," Petitioners' invitation to assemble a democracy-defying constitutional right from the not-quite-relevant fundamental rights already recognized under Idaho law unmistakably offers "the appearance of result-oriented decision making." *Evans*, 123 Idaho at 581, 850 P.2d at 732.

The fundamental right to procreation, important though "stated in *dicta*," does not advance Petitioners' cause. *Evans*, 123 Idaho at 582, 850 P.2d at 733. That constitutional safeguard involves "the right to have offspring"—not to terminate them. *Skinner v. Okla. ex rel. Williamson*, 316 U.S. 535, 536 (1942). Petitioners draw an unjustified inference by baldly insisting that "[t]he right to procreate—and to choose *not* to—are critical components of the right to privacy in making intimate familial decisions …." Br. at 16. But no provision of the Idaho Constitution and no decision of this Court remotely suggests that the right to bear a child includes the right to abort her. As the Legislature said in its July 20, 2022 brief filed in the First Case:

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

Intervenor-Respondents' Brief on Issues Set for Hearing at 14–15 (emphasis in original).

Petitioners' reliance on the United States Supreme Court's decision in *Carey* gives away the game. *Carey* invalidated a New York law restricting the distribution of contraceptives to minors.[5] 431 U.S. at 699. And on page 685 of the *Carey* decision—which Petitioners cite—one

[5] Insofar as Petitioners' conception of the right to procreation rests on federal law, "federal constitutional standards" will apply. *Doe*, 148 Idaho at 923, 231 P.3d at 1020 n.1. On that score,

finds the following sentence describing the privacy right that Petitioners seek: "If the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." 431 U.S. at 685 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)). Yet this is precisely the choice that Idaho law has consistently denied by making abortion a crime. *See Planned Parenthood*, 2022 WL 3335696, at *6. Citing *Carey* to support a right of privacy over intimate family decisions removes any doubt that the Petitioners' argument seeks to leverage the right to procreate into a novel right to abortion. And this Court's decisions nowhere justify making that inference.

Tacitly acknowledging that the right to procreate does not support their sought-after privacy right, Petitioners shift to another constitutional argument. Next, they contend that "the Idaho Constitution protects some degree of personal autonomy." Br. at 17. They cite *Murphy v. Pocatello School District #25*, 94 Idaho 32, 480 P.2d 878 (1971), which held that a high school wrongly suspended a male student for refusing to cut his hair. "[W]e hold the right to wear one's hair in a manner of his choice to be a protected right of personal taste not to be interfered with by the state unless the state … establishe[s] that the exercise of personal taste, as manifested by personal appearance, has substantially impaired some societal interest …." *Id.* at 38, 480 P.2d at 884. *Murphy* makes a passing reference to the "the rights of privacy, personal taste, the right to be

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Dobbs rebuffed the notion that "the right not to be sterilized without consent" entails a right to abortion under the United States Constitution. *Dobbs*, 142 S. Ct. at 2257 (citing *Skinner*, 316 U.S. at 535).

left alone, and the like" but without explaining how such implied constitutional rights are to be recognized except that they are "left to judicial determination." *Id.* at 37, 480 P.2d at 883.

Murphy contributes nothing to Petitioners' cause. Its holding does not announce a general right of privacy or endorse the supposed right to make "intimate familial decisions." Br. at 15. A factual gulf separates *Murphy* from this case: refusing to cut one's hair is worlds apart from terminating the life of an unborn child. And the mode of constitutional interpretation—based on a bare "judicial determination," 94 Idaho at 37, 480 P.2d at 883—is strikingly at odds with more recent precedent. Twenty years ago, this Court stepped away from a "case by case determination of whether a particular right asserted is fundamental." *Evans*, 123 Idaho at 581, 850 P.2d at 732. Conscientiously seeking "neutral criteria," and mindful of "the appearance of result-oriented decision making," the Court adopted a more disciplined approach. *Id.* "We now hold that the 'fundamental rights' found in our state constitution are those expressed as a positive right." *Id.* In addition to enumerated rights, "[r]ights which are not directly guaranteed by the state constitution may be considered to be fundamental if they are implicit in our State's concept of ordered liberty." *Id.* at 582, 850 P.2d at 733. As we have explained, Petitioners cannot satisfy that demanding standard.

Petitioners' other grounds for a supposed right of privacy in intimate family decisions are even less convincing. A right of parents "to participate in the supervision and control of the education of their children" is beside the point since that right only extends to a child's education and does not entail unfettered autonomy over family decisions, intimate or not. *Electors of Big Butte Area v. State Bd. Educ.*, 78 Idaho 602, 611, 308 P.2d 225, 231 (1957). Bodily privacy is no

more availing. That the Idaho Constitution affords greater protection than the Fourth Amendment from unreasonable searches and seizures of one's home has little to do, and nothing pertinent, with "intimate familial decisions." Br. at 19. The Idaho Constitution's shelter for natural rights in Article 1, § 1 is similarly unhelpful. Neither that provision nor this Court's decisions interpreting it ever hints that "[t]he right to privacy in making intimate familial decisions is an 'inalienable right' protected by Section 1." *Id.* at 21.

Petitioners' attempt to stitch together a right of privacy out of the disparate threads of procreation, personal autonomy, bodily integrity, parental control of their children's education, and natural rights sounds familiar. It should. *Roe* relied on it, *Casey* rejected it, and *Dobbs* called an end to the exercise of locating a right to abortion in a privacy right built out of multiple constitutional rights. *See Dobbs*, 142 S. Ct. at 2245 (describing *Roe's* holding as depending on "no fewer than five different constitutional provisions"); *id.* at 2271 (describing how *Casey* "abandoned any reliance on a privacy right and instead grounded the abortion right entirely on the Fourteenth Amendment's Due Process Clause"); *id.* at 2283 ("procuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution's text or in our Nation's history"). *Dobbs's* response to the more-clever-than-right argument for an abortion right founded on the conceptually weak right of privacy is unanswerable. "None of these decisions involved what is distinctive about abortion: its effect on what *Roe* termed 'potential life.'" *Id.* at 2237.

That distinctive feature of abortion explains why Petitioners' demand to make private decisions about whether to end a pregnancy without any interference by the state ultimately fails. Like *Roe*, that demand "is bad constitutional law, or rather because it is *not* constitutional law and

gives almost no sense of an obligation to try to be." John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 947 (1973). Petitioners' invitation to ground a right to abortion on a previously unknown right of privacy ignores the profound consequences of *Dobbs*. As this Court has rightly said, "The *Dobbs* decision has altered the landscape of the long-standing federal constitutional law upon which Petitioners relied and which recognized a fundamental right to privacy, as it applies to abortion laws." Order Setting Hearing, *Planned Parenthood Great Northwest v. Idaho*, No. 49817-2022, at 3 (Idaho June 30, 2022). *Dobbs* dooms Petitioners' sought-after right of privacy. Abortion is not a fundamental right.

B. Section 622 Does Not Offend the Idaho Constitution's Guarantee of Equal Protection or the Idaho Human Rights Act.

1. The Idaho Human Rights Act does not limit the Legislature's regulation of abortion.

Petitioners try another tack, arguing that Section 622 "violates the right to equal protection set forth in the Idaho Constitution and the Idaho Human Rights Act because [the statute] forces women to endure the burdens and risks of pregnancy, childbirth, and parenting based on outdated stereotypes about their societal role." Br. at 28. Ordinary principles of adjudication direct us to address Petitioners' statutory claim first. *See Nampa Christian Schs. Found. Inc. v. State Dep't of Emp't*, 110 Idaho 918, 920, 719 P.2d 1178, 1180 (1986) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.") (quoting *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)).

Petitioners say that "the State of Idaho will force women to remain pregnant against their will, and thereby violate Idaho Section 67-5909 by depriving women of their statutory right to equal enjoyment of public accommodations, education, and employment." Br. at 38. Nonsense.

Petitioners' claim has no foundation in the statute. Section 67-5909 prohibits certain forms of discrimination on the basis of sex. Subsection (1) prohibits sex discrimination by an employer; subsection (2) prohibits it by an employment agency; subsection (3) prohibits it by a labor organization; subsection (4) prohibits it by an employer labor organization or employment agency, with respect to publications or advertisements; subsections (5) and (6) prohibit it by a place of public accommodation; subsection (7) prohibits it by an educational institution; subsections (8) through (11) prohibit sex discrimination by an owner, lender, or other person with respect to a real estate transaction. *See* Idaho Code § 67-5909(1)–(11). To state the obvious: None of these provisions bars the Idaho Legislature's regulation of abortion.

Nor could they. No present legislature can bind a future one through ordinary legislation. *State v. Gallet*, 36 Idaho 178, 179, 209 P. 723, 724 (1922) (acknowledging that a "statutory" obligation "is not binding upon future Legislatures"). Not only that, the Idaho Constitution guarantees that "no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the legislature." Idaho Const. art. 1, § 2. Instead, "the legislature may enact any law not expressly or inferentially prohibited by the state or federal constitutions." *Strandlee v. State*, 96 Idaho 849, 852, 538 P.2d 778, 781 (1975).

Because the Idaho Human Rights Act does not limit the Legislature's power to regulate abortion, we next address Petitioners' argument that Section 622 violates the Idaho Constitution's right to equal protection of the law.

2. Section 622 does not deny women equal protection of the law.

Petitioners say that Section 622 "violates the right to equal protection" by discriminating against women.[6] Not so.

Separate provisions of the Idaho Constitution declare that "[g]overnment is instituted for [the people's] equal protection and benefit" and that Idahoans "are by nature free and equal." Idaho Const. art. I, §§ 2, 1. Together these guarantees of the equal protection of the law are "substantially equivalent" to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Rudeen v. Cenarrusa*, 136 Idaho 560, 568, 38 P.3d 598, 606 (2001). Equal protection claims are assessed under a three-step framework. "The first step is to identify the classification that is being challenged…. The second step is to determine the standard under which the classification will be judicially reviewed…. The final step is to determine whether the appropriate standard has been satisfied." *Id.* (citing *Tarbox v. Idaho Tax Comm'n*, 107 Idaho 957, 959, 695 P.2d 342, 344 (1984)). Those standards are well-established.

> Where the classification is based on a suspect classification or involves a fundamental right we have employed the strict scrutiny test. Where the

[6] Petitioners tell the Court that "people of all gender identities may become pregnant." Br. at 29 n.43. That assertion is sadly dismissive of the physical and emotional toll that a woman endures to bring a child into the world. For its part, the Idaho Legislature did not use the word *woman* in the 622 Statute because it is a "recognized term[ ] in equal protection jurisprudence" or "for ease of reference and clarity." *Id.* Idahoans prefer to call things by their real names. *Woman* appears in the 622 Statute because abortion ends a pregnancy and only a woman can become pregnant.

> discriminatory character of a challenged statutory classification is apparent on its face and where there is also a patent indication of a lack of relationship between the classification and the declared purpose of the statute, the means-focus test is applicable. In other cases the rational basis test is employed.

Olsen v. J.A. Freeman Co., 117 Idaho 706, 710, 791 P.2d 1285, 1289 (1990) (citations and quotation marks omitted).

Petitioners allege that the Idaho abortion statute discriminates against women "by forcing them into the home and into the role of mother without their consent." Br. at 34. That allegation is impossible to square with the language of Section 622. On its face, the statute consists of prohibitions directed against any "person who performs or attempts to perform" a criminal abortion—not against a pregnant woman. Idaho Code § 18-622(2). The statute cannot even be "construed to subject a pregnant woman on whom any abortion is performed or attempted to any criminal conviction and penalty." Idaho Code § 18-622(5). Petitioners' only conceivable argument is that making non-exempt abortions a crime will "likely chill physicians from performing abortions at all" and the unavailability of qualified physicians willing to perform an abortion falls solely on women since they and not men become pregnant. Br. at 48.

But that is insufficient to establish an equal protection claim. *Dobbs* explains 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 (footnote omitted). As the United States Supreme Court held, a law regulating "a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the [law] is a 'mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other.'" *Id.* at

2245–46 (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974)). Section 622 is anything but a pretext for discriminating against women. In fact, it cannot even be "construed" to punish a pregnant woman who obtains an abortion. Idaho Code § 18-622(5). Petitioners' suggestion that Section 622 discriminates against women by punishing physicians who perform unpermitted abortions is too legally and factually remote from the language of the statute to support an equal protection claim. Nor does the Legislature's purpose of 'preventing abortion' count as 'invidiously discriminatory animus' against women." *Id.* at 2246 (quoting *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 273–74 (1993) (cleaned up)).

Petitioners' equal protection claim thus collapses—which should not be surprising. Long experience with claims trying to construe fundamental rights out of the Equal Protection Clause taught the United States Supreme Court a vital lesson that bears repeating. "It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973).

Because Section 622 neither restricts a fundamental right nor discriminates against a suspect class, the correct standard of review is rational basis. *Olsen*, 791 P.2d at 1289 ("In other cases the rational basis test is employed.").[7] *Dobbs* affirmed that approach, concluding that "rational-basis review is the appropriate standard for such challenges" to the validity of laws

[7] Petitioners' extensive discussion of strict scrutiny in the context of fundamental rights, Br. at 24–29, and the means-focus standard in the context of equal protection, *id.* at 30–37, is immaterial. In Idaho, abortion has traditionally been a crime, not a fundamental right, and *Dobbs* explains why a law restricting abortion does not invidiously discriminate against women. It follows that Section 622 must be judged under the rational basis standard. *Olsen*, 117 Idaho at 710, 791 P.2d at 1289.

regulating abortion. *Id.* at 2283. Under rational-basis review, a law "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests." *Dobbs*, 142 S. Ct. at 2284. A law so judged receives a "strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319 (1993). Legislative interests deemed legitimate include:

> [R]espect 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.

Section 622 rationally advances several of these legitimate interests. The statute's ban on criminal abortion fairly reflects "respect for and preservation of prenatal life." *Id.* Requiring any lawful abortion to be performed by a physician protects "maternal health and safety" as well as "the integrity of the medical profession." *Id.* Maternal health is likewise protected by allowing for an abortion when "necessary to prevent the death of the pregnant woman" and when the pregnancy results from rape or incest. Idaho Code §§ 18-622(3)(a)(ii), 18-622(3)(b)(ii)–(iii). And requiring a physician to act while "provid[ing] the best opportunity for the unborn child to survive, unless … termination of the pregnancy in that manner would have posed a greater risk of the death of the pregnant woman," *id.* § 18-622(3)(a)(iii), should have the salutary results of "eliminati[ng] … particularly gruesome or barbaric medical procedures" and "mitigate[ng] … fetal pain." *Dobbs*, 142 S. Ct. at 2284.

In short, Section 622 does not deny the equal protection of the law to the women of Idaho.

3. Section 622 is not unconstitutionally vague.

Petitioners take a final swing by invoking the Due Process Clause. They say that Section 622 is so vague that "physicians will be forced to forego providing not only potentially legal abortions but also needed care for miscarriages because it is impossible to tell from the statute whether this conduct is legal or not." Br. at 42.

Petitioners are correct that the Idaho Constitution guarantees that the government will not deprive a person of "life, liberty or property without due process of law." Idaho Const. art. I, § 13. It is likewise true that the due process of law entails a safeguard against vague laws—the void-for-vagueness doctrine. Under that doctrine, "an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). That is because the due process of law requires that "laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.* But this Court has acknowledged that statutory clarity cannot be perfect, since "we can never expect mathematical certainty from our language." *Id.* at 110.

This Court has endorsed *Grayned* and established a framework to implement the void-for-vagueness doctrine. *See State v. Bitt*, 118 Idaho 584, 585-86, 798 P.2d 43, 44–45 (1990). Step one, "the court must ask whether the ordinance regulates constitutionally protected conduct." *Id.* at 88, 798 P.2d at 47. Step two "asks whether the ordinance precludes a significant amount of the constitutionally protected conduct." *Id.* When the answer is yes, "then the ordinance is quite likely overbroad and must be restricted in its application or rewritten." *Id.* But when the answer in steps one or two is negative, "then the [third] step is to ask whether (a) the ordinance gives notice to

those who are subject to it, and (b) whether the ordinance contains guidelines and imposes sufficient discretion on those who must enforce the ordinance." *Id.* Step three "can be satisfied and the enactment found constitutional" whenever a court finds "a core of circumstances to which the statute or ordinance could be unquestionably constitutionally applied." *Id.* Under this framework, Section 622 is not impermissibly vague.

Before addressing these allegations in detail, we must pause to clear up two ways that Petitioners' brief misstates Idaho law.

First, Petitioners defy *Bitt* by contending that "pointing to some examples of behavior that are obviously within the ambit of a criminal statute is not enough. The inquiry is holistic, and it turns on whether a person is required to 'guess at' the statute's meaning and may 'differ as to its application.'" Br. at 41 (quoting *State v. Leferink*, 133 Idaho 780, 778, 992 P.2d 775, 783 (1999)). *Bitt* unambiguously takes the opposite position. It specifically holds that a challenged law satisfies the notice-and-guidelines element of the void-for-vagueness doctrine if a reviewing court identifies "a core of circumstances to which the statute or ordinance could be unquestionably constitutionally applied." *Bitt*, 118 Idaho at 588, 798 P.2d at 47. And *Leferink*, on which Petitioners rely, echoes that standard. 133 Idaho at 779, 992 P.2d at 784.

Second, Petitioners contest the principle of "older decisions," Br. at 41, holding that a challenged law "will only be found void for vagueness if it is unconstitutionally vague in all its applications," *State v. Doe*, 148 Idaho 919, 925, 231 P.3d 1016, 1022 (2010) (citations omitted). Superseding this principle, Petitioners say, is a United States Supreme Court decision declaring that a law may be void-for-vagueness when a court finds "some conduct that clearly falls within

the provision's grasp." *Johnson v. United States*, 576 U.S. 591, 598 (2015) (quoted in Br. at 41). But *Johnson* involves the interpretation of the Armed Career Criminal Act, it never suggested that its holding controls state criminal statutes, and this Court has not adopted *Johnson* as a guidepost under Idaho law. *Doe* remains valid under Idaho law. A party bringing a facial challenge must demonstrate that the law is "unconstitutionally vague in all its applications." *Doe*, 148 Idaho at 925, 231 P.3d at 1022; *accord Leferink*, 133 Idaho at 779, 992 P.2d at 784.

Nor does that established rule change simply because Petitioners' object is to invalidate a statute regulating abortion. *Dobbs* noted that "*Roe* and *Casey* have led to the distortion of many important but unrelated legal doctrines." *Dobbs*, 142 S. Ct. at 2275 (citation omitted). Among the distorting decisions were those "dilut[ing] the strict standard for facial constitutional challenges." *Id.* (footnote omitted). But *Dobbs* declared an end to the era of abortion exceptionalism. Eliminating the distorting effects of *Roe* and *Casey*, in the Court's view, "provides further support for overruling those decisions." *Id.* It follows that *Doe*, with its mandate to demonstrate a law's unconstitutionality "in all its applications," governs here. *Doe*, 148 Idaho at 925, 231 P.3d at 1022.

So to restate the pertinent standard, Petitioners can succeed in their facial challenge to Section 662 only if they establish that the law is "unconstitutionally vague in all its applications." *Doe*, 148 Idaho at 925, 231 P.3d at 1022. A law is unconstitutionally vague when it fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned*, 408 U.S. at 108. And a law is not impermissibly vague when it addresses "a core of circumstances to which the statute or ordinance could be unquestionably constitutionally applied." *Bitt*, 118 Idaho at 588, 798 P.2d at 47.

Petitioners do not assert that performing an abortion is constitutionally protected conduct under the void-for-vagueness doctrine. Their challenge comes within step three of *Bitt* because, they say, Section 622 "fails to give a sufficient explanation of what (1) the term 'clinically diagnosable pregnancy,' (2) the requirement that an abortion performed 'to prevent the death of a pregnant woman,' or (3) the process of performing an abortion in the manner that provides the 'best opportunity for the unborn child to survive' might mean in practice." Br. at 39–40. Measured by the proper standard, these provisions of Section 622 are not unconstitutionally vague.

Begin with the statutory phrase "clinically diagnosable pregnancy." Idaho Code § 18-604(1). Petitioners quibble that "there are many standards by which the medical community measures whether a patient is pregnant." Br. at 43. If true, that assertion helps the Petitioners' argument not at all. That is because Petitioners get the legal analysis upside-down by attempting to articulate instances in which, they say, the law might be uncertain. *Id*. at 43–45. This Court has rejected exactly that approach: "'What ifs' can be posed to question isolated cases, but the concept enunciated in *Bitt* [is] that a statute must have a 'core of circumstances' to which the statute 'could be unquestionably constitutionally applied' is present … and can be understood by those of ordinary intelligence." *State v. Zichko*, 129 Idaho 259, 262, 923 P.2d 966, 969 (1996) (quotations omitted). Idaho's definition of abortion satisfies *Bitt*. Much of the time, a woman's personal physician performs a medical test that diagnoses whether she is pregnant. Terminating such a pregnancy through an abortion falls within the statute by "intentionally terminat[ing] the clinically diagnosable pregnancy of a woman." Idaho Code § 18-604(1). A physician who performs an abortion in these circumstances (absent an affirmative defense) cannot say that the law is

unconstitutionally vague when she "engaged in conduct that is clearly prohibited." *Doe*, 148 Idaho at 919, 231 P.3d at 1022.

Petitioners also miss the mark by rejecting a limiting judicial construction in this context. Br. at 44. No such construction is necessary. The meaning of "clinically diagnosable pregnancy," *id.*, gives a physician "of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he [or she] may act accordingly." *Grayned*, 408 U.S. at 108. That is so because the contested phrase addresses "a core of circumstances to which the statute or ordinance could be unquestionably constitutionally applied." *Bitt*, 118 Idaho at 588, 798 P.2d at 47.

Consider next Petitioners' complaints about Section 622's affirmative defense for a physician who performs an abortion to save a mother's life. The statute provides, "It shall be an affirmative defense to prosecution … and to any disciplinary action… that … the abortion was necessary to prevent the death of the pregnant woman." Idaho Code § 18-622(3). Petitioners say that "[t]he statute gives no indication whether the risk of death must be imminent or substantial in order to perform the abortion." Br. at 45.[8] In particular, they protest that the statute is vague because "no medical consensus" resolves when an abortion is necessary to save the woman's life and because the statute does not specify "a certain percentage change that death will occur if the procedure is not performed." *Id.*

[8] Petitioners gratuitously add that "carrying a pregnancy to term increases a woman's risk of death when compared with the risk of death associated with an abortion." Br. at 45. Even if true—which is questionable for some abortion procedures—the Legislature was entitled to consider that an abortion makes the unborn child's risk of death absolutely certain.

Again, Petitioners misconceive how the void-for-vagueness doctrine operates. It does not nullify a state statute based on "'[w]hat ifs' … posed to question isolated cases." *Zichko*, 129 Idaho at 262, 923 P.2d at 969. Rather, the doctrine comes into play only when a statute does not address "a core of circumstances to which the statute or ordinance could be unquestionably constitutionally applied." *Bitt*, 118 Idaho at 588, 798 P.2d at 47. Section 622 amply meets that test. Allowing a physician to avoid prosecution when he can show that "the abortion was necessary to prevent the death of the pregnant woman," Idaho Code § 18-622(3), surely applies to "a core of circumstances" where the statute applies with requisite clarity. Moreover, Section 622 accounts for difficult medical judgments with its deference to "good faith medical judgment based on the facts known to the physician at the time." *Id.* § 18-622(3)(a)(iii). Rare but tragic conditions pose life-threatening risks to a pregnant woman. But Section 622 excuses a physician from prosecution for responding to those conditions by saving the woman's life. Nor will the physician face punishment for trying to save her life through a premature delivery when medical efforts "result[ ] in the accidental death of, or intentional injury to, the unborn child." Idaho Code § 18-622(4). That there may be hard questions in "isolated cases" at the margin does not render Section 622 unconstitutionally vague. *Zichko*, 129 Idaho at 262, 923 P.2d at 969.

Petitioners further complain that Section 622 is impermissibly vague where it requires a physician to perform an abortion "in the manner that … provided the best opportunity for the unborn child to survive, unless … 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). Admittedly, the word *abortion* here trips up the reader. Confusion follows because the common meaning of

abortion is to terminate a pregnancy and because that commonsense understanding is reflected in the statutory definition of *abortion* as a medical procedure "to intentionally terminate" a pregnancy "with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child." *Id.* § 604(1). This ordinary understanding of abortion explains what is "distinctive" about it as a constitutional matter: "its effect on what *Roe* termed 'potential life.'" *Dobbs*, 142 S. Ct. at 2237.

With this understanding in view, the word *abortion* in Section 622(3)(a)(iii) appears to be something akin to a scrivener's error. Substituting the phrase "deliver the child" in place of "perform the abortion" and "induction of labor" in place of "termination of the pregnancy" might resolve the confusion. Even with these textual difficulties, Petitioners' demand "to find Section 18-622 unconstitutionally vague" runs contrary to this Court's precedents. Br. at 50. Those decisions teach that the remedy for unconstitutional vagueness, a more modest adjustment respectful of the Legislature's lawmaking authority, is "a limiting judicial construction, consistent with the apparent legislative intent and comporting with constitutional limitations." *Leferink,* 133 Idaho at 784, 992 P.2d at 779. That remedy would suffice to eliminate the objectionable vagueness or confusion in Section 622(3)(a)(iii).[9] Nullifying the statute now *in toto* is unwarranted. That is

[9] Petitioners also pick nits because of "the lack of any language defining the timeframe," Br. at 49, when a physician must act "in the manner that … provided the best opportunity for the unborn child to survive." Idaho Code § 18-622(3)(a)(iii). The Legislature wasn't foolish enough to prescribe a timeline to cover circumstances that cannot be known in advance. Instead, Section 622 prudently describes the only timeframe that matters—the timing determined by a physician's "good faith medical judgment and based on the facts known to the physician at the time." *Id.*

especially so because if in the future there arises in a specific real-world situation actual confusion (a big "if"), the matter can be properly and adequately resolved through an as-applied challenge.[10]

III. Granting the Petition Would Usurp the Power to Decide how the State of Idaho Will Regulate Abortion, at the Loss of Idahoans' Fundamental Rights.

The petition here asks the Court to read into the Idaho Constitution a fundamental right to abortion that nowhere appears on the face of the document and that contradicts Idaho's historic

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[10] *United States v. Idaho*, No. 1:22-CV-00329-BLW, 2022 WL 3692618 (D. Idaho Aug. 24, 2022) ("Federal Decision"), provides no good support for the Petitioners' challenges to Section 622, for a number of reasons. One, the Federal Decision was limited to a very narrow question: To what extent, if any, does Section 622 conflict with the requirements of a federal statute requiring stabilizing treatment for those presenting with an emergency medical condition at Medicare-funded emergency rooms? Two, the Federal Decision is only preliminary, not final; it involved issuance of a preliminary injunction, and so is subject to much-needed correction, either by the district court itself or by appellate courts through authorized interlocutory appeals. Three, the Federal Decision got wrong the law on both preemption and the Supremacy Clause. A decision by a different federal district court judge issued one day earlier (but ignored by the Federal Decision) got the law right and thereby demonstrates quite conclusively the Federal Decision's material errors. *Texas v. Becerra*, No. 5:22-CV-185-H, 2022 WL 3639525 (N.D. Tex. Aug. 23, 2022). A soon-to-be-filed motion by the Idaho Legislature in the Idaho federal case will further illuminate those material errors. Four, in order to magnify the alleged conflict between Section 622 and the federal statute, the Federal Decision portrayed Section 622 as broader in scope and application than it actually is. But it is this Court, not a federal district court in Boise or anywhere else, with the right, power, and ability to authoritatively interpret and construe Idaho statutes, with that interpretation and construction thereafter binding on all other courts, even the United States Supreme Court. *See, e.g., Johnson v. United States*, 559 U.S. 133, 138, 130 S. Ct. 1265, 1269 (2010) ("We are, however, bound by the Florida Supreme Court's interpretation of state law, including its determination of the elements of" that law.); *Paulson v. City of San Diego,* 294 F.3d 1124, 1128 (9th Cir. 2002) (en banc) ("When interpreting state law, we are bound to follow the decisions of the state's highest court" and "[w]hen the state supreme court has not spoken on an issue, we must determine what result the court would reach based on state appellate court opinions, statutes and treatises." (citations omitted)). Following the rules set forth in Section I.A above, this Court will read Section 622 in a way to steer that statute away from constitutional problems rather than, as did the Federal Decision, directly into them.

treatment of abortion as, generally speaking, a crime. *Planned Parenthood*, 2022 WL 3335696, at *6. Failing that, Petitioners ask for a declaration voiding Section 622 as unconstitutional, either as a denial of the equal protection of law, or as void-for-vagueness. Br. at 2. None of these arguments is persuasive, as we have explained. But in addition to their intrinsic weaknesses, Petitioners' contentions should be rejected because of the havoc they would wreak.

Petitioners' essential demand is for a judicial declaration that Section 622 is unconstitutional and therefore invalid *in toto*. Granting that demand would void a statute reflecting the considered judgment of Idaho's elected representatives. In that, the petition invites this Court to repeat the grave errors committed—and only recently repented of—by the Supreme Court of the United States. Its decision in *Dobbs* candidly admits that "*Roe* was on a collision course with the Constitution from the day it was decided, *Casey* perpetuated its errors, and those errors do not concern some arcane corner of the law of little importance to the American people." *Dobbs*, 142 S. Ct. at 2265. Manufacturing a federal right to abortion came with profound costs:

> [W]ielding nothing but "raw judicial power," *Roe*, 410 U.S. at 222, (White, J., dissenting), the Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people. *Casey* described itself as calling both sides of the national controversy to resolve their debate, but in doing so, *Casey* necessarily declared a winning side. Those on the losing side—those who sought to advance the State's interest in fetal life—could no longer seek to persuade their elected representatives to adopt policies consistent with their views. The Court short-circuited the democratic process by closing it to the large number of Americans who dissented in any respect from *Roe*.

Id.

These same baneful consequences would fall on Idaho if the petition were granted. Lost would be Idahoans' "precious right to govern themselves." *Obergefell v. Hodges*, 576 U.S. 644

(2015) (Roberts, C.J., dissenting). The Idaho Constitution declares that "[a]ll political power is inherent in the people" and that "they have the right to alter, reform or abolish the same whenever they may deem it necessary." Idaho Constitution art. I, § 2. It guarantees the right to vote in the most unqualified terms: "No power, civil or military, shall at any time interfere with or prevent the free and lawful exercise of the right of suffrage." *Id.* art. I, § 19. Not surprisingly, the right to vote is counted among the fundamental rights recognized by this Court. *Van Valkenburgh*, 15 P.3d at 1134. Petitioners cannot explain how a decision in their favor can avoid nullifying the votes of hundreds of thousands of Idahoans who have elected representatives in the belief that they will pursue a statewide policy of discouraging abortion.

It is no answer to say that the sought-for right to abortion is a fundamental right that, along with other such rights, "may not be submitted to vote; they depend on the outcome of no elections." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943) (Jackson, J.). This argument begs the question. When the text of the Idaho Constitution is silent, as are this Court's decisions, and when Petitioners' case depends on piling inference on inference, it becomes blindingly clear that Petitioners have no constitutional right to claim. What they have is a political demand. And their political demands, like any others', must survive "the vicissitudes of political controversy" if they are to become law. *Id.*

* * *

Much has been written and said about whether the Idaho Constitution protects a right to abortion. That controversy bears the hallmarks of an era when struggles over the existence and scope of individual rights occupy center stage. It is illuminating, even sobering, to recall that earlier

Idahoans took a very different perspective about the State's destiny. Consider this statement by A.F. Parker, a delegate at the convention that gave Idaho its form of government:

> [W]hile you and I may not live to see it, we must bear in mind that we are laying the foundations of a state, not for ourselves, but for our children and our children's children, and for *generations yet unborn.*

1 Proceedings and Debates of the Constitutional Convention of Idaho, 1889, at 706 (I.W. Hart ed., 1912) (emphasis added). It is with something like that perspective on the vital connection between Idaho's future and its protection of the unborn that the Legislature acted in adopting Section 622. Like any statute, it is of course wholly open to revision or reversal through the democratic process. But the authority to regulate abortion through law—finally—belongs to the people of Idaho and their elected representatives, not the courts of the land. And this Court should say so.

CONCLUSION

For all the reasons set forth above, the Legislature respectfully requests that this Court enter an order dismissing the Petition, with prejudice.

Dated this 2nd day of September, 2022

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I hereby certify that on September 2, 2022, I filed and served the foregoing via the Odyssey File and Serve system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A. R. 34.1, and that an electronic copy was served on each party at the following email addresses:

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