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Idaho Supreme Court
Melanie Gagnepain, Clerk of the Court
By: Brad Thies, Clerk

IN THE SUPREME COURT FOR 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,

and

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

Intervenors-Respondents.

Case No. 49817-2022

PETITIONERS' OMNIBUS REPLY BRIEF IN SUPPORT OF VERIFIED PETITION FOR WRIT OF PROHIBITION AND APPLICATION FOR DECLARATORY JUDGMENT

ORIGINAL JURISDICTION

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From 2020 to 2022, in its alacrity to undermine a right then protected by the U.S. Constitution, the Idaho Legislature made a mess of the Idaho Code, passing a series of disjointedly overlapping, severe bans on abortion: a "Total Abortion Ban" subjecting "[e]very person who performs or attempts to perform" an abortion to between two and five years' imprisonment, Idaho Code ("I.C.") § 18-622(2); a "Six Week Ban" imposing criminal penalties for performing an abortion after a "fetal heartbeat" has been detected, which as defined by the Ban, occurs at about six weeks of pregnancy, I.C. § 18-8805; and "SB 1309," a statute creating civil liability—enforceable by private individuals—for violations of the Six Week Ban, I.C. § 18-8807. Planned Parenthood and Dr. Caitlin Gustafson brought actions for declaratory judgments and writs of prohibition against enforcement for each of these statutes. Petitioners filed with respect to SB 1309 on March 30, 2022, Dkt. No. 49615-2022, with respect to the Total Abortion Ban on June 27, 2022, Dkt. No. 49817-2022, and with respect to the Six Week Ban on July 25, 2022, Dkt. No. 49899-2022. This petition and briefing, Dkt. No. 49817-2022, concern the Total Abortion Ban.

The Legislature set the Total Abortion Ban to take effect 30 days following a trigger event: "The issuance of the judgment in any decision of the United States supreme court that restores to the states their authority to prohibit abortion." I.C. § 18-622(a). The judgment in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), was issued on July 26, 2022, triggering the Total Abortion Ban's 30-day clock. Petitioners sought a stay of implementation pending the Court's consideration of the merits for the Total Abortion Ban, as well as for the other abortion bans. On August 3, 2022, the Court heard oral argument related to procedural issues raised by the

petitions, including whether to stay the Total Abortion Ban and continue the stay of SB 1309, pending a final determination on the merits.

On August 12, 2022, this Court declined to stay the Total Abortion Ban and vacated its prior stay of SB 1309. *Planned Parenthood Great Nw. v. State*, 2022 WL 3335696 (Idaho Aug. 12, 2022). As members of the Court observed, "[n]o one seriously disputes that the Petitioners have established a showing of irreparable harm if a stay is not granted," *id*. at *12 (Stegner, J., concurring in part and dissenting in part), but the Court denied the requested stay because the petition involved complex issues of law, presented a "new" case not falling "within well-established principles," and therefore should be resolved only after the matter was submitted on the merits. *Id.* at *4, *6. The Court did not address Petitioners' request to stay enforcement of the criminal provisions of the Six Week Ban, but stated that these provisions would go into effect August 19, 2022. *Id.* at *8. Because the Six Week Ban's criminal provision was at that time no longer dormant, the Court further held that "it is no longer substantially likely, or clear" that SB 1309 violates the separation of powers doctrine under the Idaho Constitution, and therefore vacated the preliminary stay against implementation of SB 1309. *Id.* Justice Stegner, joined by Justice Zahn, dissented from the Court's decision to deny the stays. The Court ordered expedited briefing for the Six Week Ban and Total Abortion Ban and scheduled a consolidated oral argument on the merits of all three cases for September 29, 2022. *Id.* at *1, *9.

The Total Abortion Ban went into effect on August 25, 2022. Its consequences were severe and immediate.[1] Abortion is banned in the State, forcing pregnant Idahoans seeking abortion to flee the State to find care, if they are able to marshal the resources to do so, or to remain pregnant, carry to term, and parent against their will.[2] These burdens fall most heavily on patients who already face barriers to accessing health care, including patients with low incomes, patients of color, patients who live on tribal lands, and patients who live the farthest from health centers, because these patients will have the most difficulty traveling to obtain care elsewhere.

Further, the Ban's narrow and confusing affirmative defense purporting to permit abortions if the "abortion was necessary to prevent the death of the pregnant woman" is putting patients' health at risk and physicians in criminal jeopardy. Even though, as described in Dr. Gustafson's declaration in this case, as well as in the physician declarations filed in a federal case challenging the Total Abortion Ban as violating EMTALA, *United States v. Idaho*, Case No. 1:22-cv-329-BLW (D. Idaho Aug. 8, 2022), pregnant patients with urgent conditions such as preeclampsia, HELLP syndrome (hemolysis, elevated liver enzymes, and low platelets), PPROM (preterm

[1] Respondents argue that Petitioners' evidence of harm submitted with their opening brief should not be considered because "they offered their factual allegations only to establish a basis for the Court's exercise of its original jurisdiction." State Opp. 6. Not only is this wrong, but it is also directly at odds with Respondents' continued challenge to the Court's original jurisdiction. Respondents cannot have it both ways—at minimum, the Court must consider Petitioners' evidence of harm to the extent that original jurisdiction remains a contested issue.

[2] Respondents' contention that there is no harm because Dr. Gustafson testified that the Total Ban would only prevent "nearly" all abortions (State Opp. 7) is absurd. All of the declarations confirm that the Total Ban eliminates needed care for the vast majority of Idahoans. Petitioners need not prove that no abortion will ever be provided by any doctor at any point in the future in order to demonstrate harm.

premature rupture of the membranes), infections leading to sepsis, and placental abruption may require abortion care, providers are afraid to provide that care because the Ban is vague and the consequences are draconian. *See* Ex. 1, Cooper Decl. ¶ 12 ("I would be hesitant to provide the necessary care due to the significant risk to my professional license, my livelihood, my personal security, and the well-being of my family."); Ex. 1, Corrigan Decl. ¶ 18 (declarant "would have felt the need to consult with a lawyer in addition to the ethics and medical professionals [she] had already consulted," had the situation occurred after the Ban was in effect, which would have "further delayed … treatment"). As a result, pregnant Idahoans are facing denial and delays in care that put them at risk of serious consequences and even death.

ARGUMENT

When it passed these abortion statutes, the Idaho Legislature created an overlapping and unclear set of laws in an effort to alter 50 years of settled law in the State. The full statutory scheme, which now includes the Total Abortion Ban, the Six Week Ban, and SB 1309, presents a maze that is impossible for Idahoans, and particularly for the medical providers targeted by these laws, to navigate. But the problem with these laws is not only that they are difficult to understand. They also represent an unprecedented rescission of rights, catapulting Idaho decades into the past and infringing on its citizens' fundamental right to make intimate decisions concerning their bodies and families—more specifically, whether to create or expand a family. This is not to say that the State cannot regulate abortion within constitutional limits, as indeed it has for decades. Recognizing that the right to terminate a pregnancy is fundamental is the starting point of the analysis, not the end. Because the right is fundamental, it requires application of heightened

scrutiny, which balances the patient's interest in decisional and bodily autonomy with the State's interest in reasonably regulating abortion. The State may well determine that there are times when the interest in restricting abortion outweighs the constitutional right to make intimate decisions and related fundamental rights. But the Total Abortion Ban, along with the other two abortion bans, as drafted, violate multiple provisions of the Idaho Constitution and have already harmed and will continue to harm Idaho's citizens.

The Total Abortion Ban is neither necessary to protect the State's interests nor narrowly tailored, and as such violates the Idaho Constitution. The Total Abortion Ban is also constitutionally infirm for two other independent reasons: it violates due process because it is unconstitutionally vague, and it violates Idahoans' right to equal protection. Accordingly, this Court should exercise its original jurisdiction to strike down this encroachment on Idahoans' constitutional rights.

I. Respondents' Procedural Challenges Are Meritless

A. The Court Has Original Jurisdiction

As the Court already acknowledged in declining to remand for additional factfinding, this case should be decided by the Supreme Court in the first instance. August 12, 2022 Order, Case No. 49817-2022 at 3 ("The Court retains these matters and will not assign them to a district court for the development of a factual record under I.A.R. 5(d)"). The State Respondents provide no reason for this Court to reconsider that decision. As Petitioners have explained in other briefing, this case is indistinguishable from other instances in which the Court has exercised such jurisdiction because it is a challenge asserting a "possible constitutional violation of an urgent

nature." *Reclaim Idaho v. Denney*, 169 Idaho 406, 418, 497 P.3d 160, 172 (2021) (quoting *Sweeney v. Otter*, 119 Idaho 135, 138, 804 P.2d 308, 311 (1990)); *see also* Br. ISO Verified Petition, Case No. 49615-2022 at 15-18, Case No. 49817-2022 at 11-15; Pet. Br. in Response to Court's Jun. 30, 2022 Order, Case No. 49615-2022 at 13-15, Case No. 49817-2022 at 12-15.

The Court already recognized the urgency posed by these constitutional questions when it set the cases for expedited hearing. *See* August 12, 2022 Order, Case No. 49817-2022 at 3-4. In such circumstances, it is beyond question that Petitioners need not wait to be sued for exercising their constitutionally protected rights. *Dombrowski v. Pfister*, 380 U.S. 479, 489 (1965) (noting the "interest in [the] immediate resolution … where criminal prosecutions are threatened under statutes allegedly overbroad and seriously inhibiting the exercise of protected freedoms"). Respondents' suggestion that Petitioners are required to wait to challenge the Total Abortion Ban by raising constitutional defenses to an individual prosecution is contrary to this Court's and United States Supreme Court precedent.

Respondents are also wrong to characterize Petitioners' claims as seeking "an improper advisory opinion." State Opp. 9. The Total Abortion Ban went into effect as of August 25 and is currently enforceable against abortion providers, including Petitioners, resulting in abortions being virtually unavailable in Idaho. Petitioners seek to enjoin prosecutions under this unconstitutional law, a form of relief that arguably ranks as the single most important and sacred of the Court's duties. *See Reclaim Idaho*, 169 Idaho at 433 ("Protecting the constitutional rights of both the majority and the minority is not only a vital role of the judicial branch, it is also one that judicial officers throughout Idaho are accustomed to performing on a daily basis."). People in Idaho are

entitled to have adjudicated this "urgent constitutional dispute" that creates "uncertainty and disruption" across the State. *Ybarra v. Legislature by Bedke*, 166 Idaho 902, 906, 466 P.3d 421, 425 (2020).

B. Petitioners Have Sued the Necessary and Proper Parties

State Respondents are incorrect that Petitioners are required to name additional parties to establish the Court's original jurisdiction, and in keeping this case, the Court never suggested that additional parties are required. They are also incorrect that the State and the officers acting under its authority are beyond the reach of the Court's authority to grant relief.

As an initial matter, the Court has the authority to issue a writ against the State under Idaho Rule of Civil Procedure 74(a) and to otherwise enjoin unconstitutional conduct by officers of the State. Idaho Rule of Civil Procedure 74(a)(2) provides that a writ of prohibition "arrests the proceedings of any court, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of the court, corporation, board or person." A writ of prohibition against the State, accordingly, "arrests the proceedings of [a] … person" or the people acting on behalf of the State—namely those individuals who are charged with enforcing the Total Abortion Ban. Nor is this concept unusual—the State is often named as a defendant in cases challenging unconstitutional laws.[3] *See, e.g.*, *Idaho Schs. for Equal Educ. Opportunity v. State*, 142 Idaho 450, 460, 129 P.3d 1199, 1209 (2005).

[3] To the extent that plaintiffs in other cases have sued officials rather than suing the State, this decision is typically based on sovereign immunity, which does not apply to Petitioners' claims. *See Tucker v. State*, 162 Idaho 11, 18, 394 P.3d 54, 61 (2017) ("sovereign immunity is inapplicable when constitutional violations are alleged").

Even if the Court were to dismiss the State, this would make little difference because, in addition to the State itself, Petitioners have named several governmental officers directly. These officers are Governor Brad Little in his official capacity, Attorney General Lawrence Wasden in his official capacity, the Ada County Prosecuting Attorney in her official capacity, the Twin Falls County Prosecuting Attorney in his official capacity, as well as the Idaho State Board of Medicine, the Idaho State Board of Nursing, and the Idaho State Board of Pharmacy. Respondents do not dispute that a writ of prohibition can run against these individuals and administrative boards.

Respondents, however, contend that in order to obtain relief, Petitioners were required to personally name every individual law enforcement employee in the State of Idaho as well as the Idaho Board of Midwifery. There is no legal precedent supporting such a requirement. Respondents admit that Petitioners named "two prosecutors as respondents" who perform "the majority of criminal prosecution" in Ada and Twin Falls Counties, the two counties in which Planned Parenthood operates. Petitioners are not required to name every prosecutor and administrative board in order to bring a facial challenge regarding the constitutionality of these statutes. *See State v. Harper*, 163 Idaho 539, 543, 415 P.3d 948, 952 (Ct. App. 2018) (considering a facial vagueness challenge in the context of an individual criminal prosecution); *Idaho Schs. for Equal Educ. Opportunity*, 142 Idaho at 454 (because case considering whether legislative action "is unconstitutional will necessarily affect all school districts throughout the state, regardless of whether those districts presented evidence at trial, previously settled, or were never even parties to this lawsuit," not every school district needed to be "technically represent[ed]"). Simply because Section 622, according to the State, hypothetically "could apply" to the Board of

Midwifery, that does not mean that Petitioners were required to include it in this action. Any potential future enforcement actions by that Board could be litigated separately, if necessary. And finally, Respondents' claim that Petitioners were required to name lower courts as respondents is equally misplaced. Even if Petitioners had the option to seek a writ of prohibition against lower courts directly, they are certainly not *required* to bring such a claim. *See Idaho Schs. for Equal Educ. Opportunity*, 142 Idaho at 454.

C. Petitioners Have Standing

Petitioners also have standing to bring claims related to the right to abortion under the Idaho Constitution both directly and under the doctrine of third-party standing.[4]

First, Petitioners, as abortion providers, are injured directly by the Total Abortion Ban because they cannot perform abortions, and because they are now subject to potential enforcement at great personal and reputational harm if they were to perform an abortion. To have standing, Petitioners must show "an injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury." *Syringa Networks, LLC v. Idaho Dep't of Admin.*, 155 Idaho 55, 61, 305 P.3d 499, 505 (2013). Petitioners have an injury "not [] suffered alike by all citizens in the jurisdiction" because they are directly harmed by no longer being able to perform abortions, on pain of criminal penalties and loss of their professional livelihoods. *Id.*

Petitioners also uniquely face prosecution under the Total Abortion Ban. The Court has held that prosecution under a state statute confers standing to challenge the constitutionality of that

[4] Respondents do not challenge Petitioners' standing to bring their vagueness challenges. State Opp. 12.

statute. *State v. Cantrell*, 94 Idaho 653, 655, 496 P.2d 276, 278 (1972). That principle is applicable here where Petitioners have standing because "[t]he value of [their] reputation and standing in the local legal community is also at stake" should these laws be enforced against them. *Hepworth Holzer, LLP v. Fourth Jud. Dist. of State*, 169 Idaho 387, 394, 496 P.3d 873, 880 (2021). All of these injuries are directly traceable to the State, its officers, and others responsible for enforcement of the abortion bans.

In addition, Petitioners have standing under Idaho's third-party standing test. Idaho has adopted the federal standard for third-party standing. *See State v. Doe*, 148 Idaho 919, 936, 231 P.3d 1016, 1033 (2010). A party asserting third-party standing must (1) "have suffered injury in fact, providing a significantly concrete interest in the outcome of the matter in dispute"; (2) "have a sufficiently close relationship to the party whose rights he is asserting"; and (3) "there must be a demonstrated bar to the third parties' ability to protect their interests." *Id.* Under this framework, courts "have long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations." *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2118 (2020) (citations omitted), *abrogated on other grounds by Dobb*s *v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). Petitioners satisfy the first prong for the reasons discussed above. This Court has also recognized "the closeness of the doctor-patient relationship" in the abortion context because "a woman cannot safely secure an abortion without the aid of a physician." *Kootenai Med. Ctr. ex rel. Teresa K. v. Idaho Dep't of Health & Welfare*, 147 Idaho 872, 879, 216 P.3d 630, 637 (2009) (citing *Singleton v. Wulff*, 428 U.S. 106, 117 (1977)). The closeness of this relationship is well established in federal law as well and pre-dates *Roe v.*

Wade. *See Griswold v. Connecticut*, 381 U.S. 479, 481 (1965) (doctor-patient relationship sufficiently close to justify third-party standing). Finally, fears about stigmatization—especially in the wake of new political action seeking to prevent access to abortion—create a bar to Idahoans' ability to protect their legal interests should they seek an abortion.

Respondents' attempt to downplay *Kootenai* and the federal case law it discusses by arguing that dicta in *Dobbs* completely changes the landscape of modern standing doctrine is unconvincing. State Opp. 13. Neither the *Dobbs* opinion nor Respondents themselves explain what test—other than the one articulated in numerous decisions of the United States Supreme Court and also expressly adopted by this Court—would possibly apply. In the absence of any such holding abrogating long-held standing principles, Petitioners clearly satisfy the test for third-party standing as described in *Kootenai*.

II. The Total Abortion Ban Violates Idahoans' Constitutionally Protected Fundamental Rights

The Total Abortion Ban strips Idahoans of the fundamental right to make intimate decisions concerning their bodies and families in violation of multiple provisions of the Idaho Constitution, including Article I, § 1; Article I, § 17; and Article I, § 21. The rights of Idaho's citizens are not limited to those that have been enumerated, and a right need not be explicit to be fundamental. Rather, this Court has "consistently recognized that '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.'" *Reclaim Idaho*, 169 Idaho at 427 (emphasis supplied).[5] Moreover, this Court has not tied the analysis of whether a right is "implicit in [Idaho]'s concept of ordered liberty" to the requirement that it be deeply rooted in history or tradition. *Idaho Schs. for Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 581-582, 850 P.2d 724, 732-733 (1993); *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 126, 15 P.3d 1129, 1134 (2000) (citing *Evans*, 123 Idaho at 581-582); *see also Reclaim Idaho*, 169 Idaho at 427. Neither the U.S. Supreme Court's interpretation of the U.S. Constitution nor the existence of historical statutes criminalizing abortion prevent this Court from recognizing that the right to autonomy and privacy in making intimate familial decisions—including abortion—is implicit in Idaho's concept of ordered liberty. This Court can, and should, find that the multiple privacy- and autonomy-respecting provisions of Idaho's Constitution, read independently or together, protect that right.

A. Idahoans' Concept of Ordered Liberty Intentionally Diverges from the Federal Test

As an initial matter, Idaho's test for determining if a right is "implicit in the concept of ordered liberty" does not require that the right be "deeply rooted" in Idaho's history and tradition, and thus diverges from the test applied by the U.S. Supreme Court when interpreting the U.S. Constitution. *Compare Evans*, 123 Idaho at 582 ("Rights which are not directly guaranteed by the

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[5] Respondents' argument that the right to abortion cannot be inferred from the text of Article I, §§ 1, 17, or 21 is merely a repackaging of their attempt to rewrite the holding of *Evans* to support the notion that a right must be expressed as a "positive right" to be protected as fundamental. *See* State Opp. 15-16. The contention that this Court has subsequently and on multiple occasions misread *Evans*, *see* State Opp. 15-16, n. 15, strains credulity. (And is at odds with the Legislature's interpretation. *See* Leg. Opp. 13.)

state constitution may be considered to be fundamental if they are implicit in our State's concept of ordered liberty."), *with Dobbs* 142 S. Ct. at 2242-2243, 2284 ("That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)); *see also Utah Pub. Emps. Ass'n v. State*, 610 P.2d 1272, 1273 (Utah 1980) ("Only those rights which form an implicit part of the life of a free citizen in a free society can be called fundamental."). Respondents' and the Legislature's contentions to the contrary are incorrect. *See* State Opp. 18-19; Leg. Opp. 7-9.[6]

The absence of any language requiring an analysis of history and tradition cannot be presumed inadvertent nor an oversight. *Evans* announced a new standard for determining "whether a particular right asserted is fundamental," and in adopting that standard, the Court considered (and rejected) alternative formulations. 123 Idaho at 581 ("We have determined that it is time to partially abandon our case by case determination …. We have considered but reject the appellants' suggestion that the *Rodriguez* definition of fundamental rights be adopted."). The word "tradition" does not appear anywhere in *Evans*, and the word "history" does not appear in the majority opinion. *See id*. at 589 (Bakes, J., concurring) ("history" appears only in quoted text). Since this Court's first articulation of the standard in *Evans*, it has not once tied the notion of

[6] The Legislature's reliance on *State v. Doe*, in which the petitioner "made no showing or any compelling argument" for how his claims under the Idaho Constitution would differ from his claims under the U.S. Constitution, is unpersuasive. 148 Idaho at 923 n.1. In *Doe*, the Court made clear it was addressing the petitioner's claims "under the U.S. Constitution only," and indeed its analysis of whether a fundamental right had been asserted focused on the Fourteenth Amendment (and thus *Glucksberg*). *Id*. at 923, 934.

"implicit in the concept of ordered liberty" to history or tradition. *Van Valkenburgh*, 135 Idaho at 126 (no language requiring that fundamental right be rooted in history and tradition); *Simpson v. Cenarrusa*, 130 Idaho 609, 615, 944 P.2d 1372, 1378 (1997) (Silak, J., concurring); *Reclaim Idaho*, 169 Idaho at 427 (same). It is therefore not necessary for the Court to conclude, in order to find that the Idaho Constitution protects the right to abortion, that such a right has historically been recognized.

Idaho's decision not to condition recognition of a fundamental right on history and tradition reflects an acknowledgement that the Court should not be bound simply by what has come before. Nonetheless, Respondents argue that there is no basis for the Court to find that a right to terminate one's pregnancy is protected because no such right was discussed at the Constitutional Convention. State Opp. 20. But that proves too much. The Constitutional Convention rejected any concept of women's rights, a notion that Idahoans today could all agree is wholly incompatible with any notion of "ordered liberty." *See* 1 Proceedings and Debates of the Constitutional Convention of Idaho, 1889, 88-92, 163-174, 913 (I.W. Hart, ed.) (1912) (unqualified defeat of the amendment for women's suffrage, despite direct address of two women asking delegates for women's suffrage, "appealing to your spirit of liberty and honor, to grant us as a part of the fundamental law you are making our own free, unquestioned right to vote"). And Idaho law at the time openly embraced eugenics, with this Court upholding as constitutional the sterilization of people with mental disabilities and mental illness. *See State v. Troutman*, 50 Idaho 673, 299 P. 668, 669-670 (1931) (citing with approval *Buck v. Bell*, 274 U.S. 200 (1927)); *see also* Nourse, *Buck v. Bell: A Constitutional Tragedy from A Lost World*, 39 Pepp. L. Rev. 101, 101-102 (2011) (citing *Troutman*

and concluding that "[e]ven if grounded in eugenic assumptions widely held at the time," *Buck v. Bell* and *Troutman* represent "a quiet evil, a tragedy of indifference to the Constitution and its most basic principles"). Idahoans' concept of ordered liberty need not remain (and indeed has not remained) static.

Other States have similarly recognized that fundamental rights analysis need not be tied to tradition, specifically in the context of abortion. Statutes criminalizing abortion existed in many States where courts have subsequently found that their state constitutions independently protect a person's "decisions regarding … pregnancy from unjustifiable government interference." *See Hodes & Nauser, MDS, P.A. v. Schmidt*, 309 Kan. 610, 683-684, 440 P.3d 461, 504-505 (2019) (Biles, J., concurring) (collecting cases); *see also* Pet. Br. 22-24 (collecting cases). For example, in *Hodes & Nauser*, Kansas made a nearly identical argument to the one Respondents offer here: that the Kansas Supreme Court could not conclude that the state constitution protects a right to abortion when, at the time of statehood, territorial statutes made abortion a crime. *See* State Opp. 3, 14, 19-20, 22-23; Leg. Opp. 9. The court rejected this argument for three reasons: (1) there was no evidence that the territorial legislation reflected the will of the people even at that time, (2) the historical statutes were never tested for their constitutionality, and (3) at the time the historical statutes were enacted, women were not afforded equal rights. 309 Kan. at 651.

As to the first point, the Kansas Supreme Court found that the historical criminal statutes did not warrant deference, as the history "[did] not reflect the type of antiabortion sentiment the State wishes to ascribe to the genesis of [the state's] early abortion statutes," and did not allow the Court to infer "what a majority of the legislators—much less the people in the [Territory] or the

new state—thought about abortion." 309 Kan. at 655-656. The same can be said of Idaho. A number of advertisements in Idaho newspapers across the territory promoted abortifacients in the years both immediately preceding and following the Idaho Constitutional Convention.[7] These open and notorious public advertisements for access to abortion medication gravely undermine the State's contention that Idaho's historical legislation reflected the will of the people.

Second, the Kansas Supreme Court recognized that the State's constitution naturally would not have applied to territorial statutes, and those territorial laws (or their later iterations) were not tested against the state's constitution. 309 Kan. at 657 ("[T]he fact that an unconstitutional statute has been enacted and has remained in the statute books for a long period of time in no sense imparts legality …. Age does not invest a statute with constitutional validity, neither does it rob it of such

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[7] *See* Idaho Semi-Weekly World (Idaho City, Idaho Territory Mar. 18, 1890), Chronicling America: Historic American Newspapers. Lib. of Congress (advertisement for tansy wafers, known abortifacient, to "restore suppressed menses," delivered in a box "securely sealed from eyes of inquisitive people"); Wood River Times (Hailey, Idaho Feb. 27, 1884), Chronicling America: Historic American Newspapers. Lib. of Congress (advertisement for a women's health journal providing information about "Falling of the Womb" and "Suppressed Menses"); The Caldwell Tribune (Caldwell, Idaho Territory Mar. 20, 1885), Chronicling America: Historic American Newspapers. Lib. of Congress (advertisement for "female pills" with known abortifacient ingredients and "other good monthly female regulators"); Idaho News (Blackfoot, Idaho Aug. 6, 1887), Chronicling America: Historic American Newspapers. Lib. of Congress (advertisement for prescription that cures "painful menstruation and unnatural suppressions"); Idaho Semi-Weekly World (Idaho City, Idaho Territory Apr. 11, 1890), Chronicling America: Historic American Newspapers. Lib. of Congress (advertisements for female pills that "relieve suppressed menstruation" and are "sure, safe, certain"); *see also Moore v. State*, 37 Tex. Crim. 552, 568, 40 S.W. 287, 293 (1897) (prosecuting an individual taking a prescription for "suppressed menses" in doses to cause an abortion); *State v. Watson*, 30 Kan. 281, 1 P. 770, 772 (1883) (prosecuting an individual for taking the "oil of tansy … for the purpose of destroying the child"); *Dunn v. People*, 172 Ill. 582, 593, 50 N.E. 137, 139 (1898) (prosecution of the doctor providing medication for an abortion, which she refers to as "falling of the womb" in her dying declaration).

validity." (ellipses in original) (internal citations omitted)). That an untested law may not be presumed constitutionally valid is an article of faith among States interpreting their own constitutions. *People v. Belous*, 71 Cal. 2d 954, 967, 458 P.2d 194, 202 (1969) ("Although we may assume that the law was valid when first enacted, the validity of a law in 1850 does not resolve the issue of whether the law is constitutionally valid today.").

Finally, and most importantly, the Kansas Supreme Court rejected the State's reliance on historical criminal statutes because the laws were passed at a time when discriminatory biases held by a majority of legislators did not recognize the rights of women. Discussing the historical lack of women's rights, the court concluded that

> We no longer live in a world of separate spheres for men and women. True equality of opportunity in the full range of human endeavor is a [state] constitutional value, and it cannot be met if the ability to seize and maximize opportunity is tethered to prejudices from two centuries ago. Therefore, rather than rely on historical prejudices in our analysis, we look to natural rights and apply them equally to protect all individuals.

Hodes & Nauser, 309 Kan. at 659-660.

The Kansas Supreme Court's logic—which did not rely on the interpretation of any federal rights—is compelling. Though Idaho may have historically criminalized abortion, many such laws were enacted at points in history where women were considered second-class citizens. Allowing the existence of centuries-old laws, reflecting antiquated views not only on which citizens could vote but also on which could participate in civic, social, and political life, to dictate the Court's analysis of fundamental rights in 2022, would perpetuate the disenfranchisement and discriminatory treatment of women that existed circa 1890. This Court should decline to do so.

B. The Right to Abortion is Implicit in Idaho's Concept of Ordered Liberty

Respondents argue that there is no right to abortion written into the Idaho Constitution and characterize Petitioners as asking this Court to "break new legal ground" by recognizing that right. State Opp. 13-14. While it is true that this Court has not previously analyzed whether this particular right is protected by Idaho's Constitution, it is not at all novel for the Court to "read [a fundamental right] into one, some, or a combination of certain sections in Article I of the Idaho Constitution." August 12, 2022 Opinion, Case No. 49817-2022, at 10.[8] To the contrary, this Court has embraced its role as "the final arbiter of the meaning of the Idaho Constitution," and has not shied away from its obligation to "protect against encroachments on the people's constitutionally enshrined power." *Reclaim Idaho*, 169 Idaho at 426; *see also Nye v. Katsilometes*, 165 Idaho 455, 463, 447 P.3d 903, 911 (2019) ("[A]pplying well-settled legal principles to an unsettled question of law … is a judicial function almost as old as our republic."). This is true even when the right asserted implicates "a turbulent field of social, economic and political policy." *Evans*, 123 Idaho at 583 ("[W]e decline to accept the respondents' argument that the other branches of government be allowed to interpret the constitution for us.").

Moreover, this Court has long made clear that it is "at liberty to find within the provisions of [Idaho's constitution] greater protection than is afforded under the federal constitution as interpreted by the United States Supreme Court." *State v. Donato*, 135 Idaho 469, 471, 20 P.3d 5,

[8] This case presents the unprecedented situation where a federally recognized right is no longer guaranteed. Naturally, there has been no need for the Court to consider this question from 1973 to now. And as discussed *supra* at 16-17, the fact that earlier laws were not challenged does not somehow imbue them with a presumption of constitutionality.

7 (2001) (citing *State v. Newman*, 108 Idaho 5, 10 n. 6, 696 P.2d 856, 861 n. 6 (1985)); *see also CDA Dairy Queen, Inc. v. State Ins. Fund*, 154 Idaho 379, 383-384, 299 P.3d 186, 190-191 (2013) (federal framework appropriate for analysis of state constitutional questions "unless the state constitution, the unique nature of the state, or Idaho precedent clearly indicates that a different analysis applies"). Where the Court has concluded that "the citizenry of Idaho will be better served" if the federal courts' interpretation of similar provisions is abandoned in favor of an independent Idaho interpretation, it has not hesitated to interpret the state constitution freely. *See State v. Guzman*, 122 Idaho 981, 987-998, 842 P.2d 660, 666-677 (1992) (rejecting U.S. Supreme Court's good faith exception to the warrant requirement and concluding that "the citizenry of Idaho will be better served if it no longer controls"); *State v. Webb*, 130 Idaho 462, 467-468, 943 P.2d 52, 57-58 (1997) (breaking from U.S. Supreme Court's definition of curtilage to better ensure Idaho citizens' reasonable expectations of privacy were met). This is one such case.

1. Article I, § 1 Protects the Substantive and Inalienable Rights to Bodily Autonomy and to Make Intimate Familial Decisions, Including Abortion

The Idaho Constitution's decree in Article I, § 1 that "[a]ll men … have certain inalienable rights, among which are enjoying and defending life and liberty … pursuing happiness and securing safety" supports the recognition of a right to bodily autonomy and a right to make intimate familial decisions, including the decision whether to carry a pregnancy to term or to obtain an abortion.

As an initial matter, the language of Article I, § 1 indicates that it refers to *substantive*, not procedural rights. This is a critical distinction between Article I, § 1 of Idaho's Constitution and

the Fourteenth Amendment of the U.S. Constitution. *Compare* Idaho Const. Art. I, § 1 ("All men are by nature free and equal, and have certain inalienable rights, among which are enjoying and defending life and liberty; acquiring, possessing and protecting property; pursuing happiness and securing safety."), *with* U.S. Const. Amend. XIV ("No State shall … deprive any person of life, liberty, or property, without due process of law …."); *see Hodes & Nauser*, 309 Kan. at 627 (interpreting absence of "without due process of law" language in Kansas Constitution, concluding that it "demonstrates an emphasis on substantive rights—not procedural rights"). Moreover, Article I, § 1 does not purport to be an exhaustive list of inalienable rights, as indicated by the language "among which." *See, e.g.*, *State v. McKean*, 159 Idaho 75, 81, 356 P.3d 368, 374 (2015) (list prefaced by the words "such as" is "non-exclusive" (cleaned up)).

Idaho courts have recognized that substantive, inalienable rights—defined by Black's Law Dictionary as those that "cannot be transferred or surrendered"—are rights that "exist independently of rights created by government or society." Black's Law Dictionary (11th ed. 2019) ("inalienable right" definition under "right"); *see Newland v. Child*, 73 Idaho 530, 537, 254 P.2d 1066, 1069 (1953) ("inalienable rights of free men," such as right to own property, are "not a gift of our constitutions, because [they] existed before them"); *Parsons v. State*, 113 Idaho 421, 427, 745 P.2d 300, 306 (Ct. App. 1987) (state constitution recognizes inalienable rights). In other words, Idahoans are not dependent on the constitution (state or federal) to grant them these rights—they are reserved to individuals and exist independently of the rights created by the framers' constitutional language. Inalienable rights are, by their very nature, fundamental to Idahoans' liberty.

Among the inalienable rights Article I, § 1 protects is the right to bodily autonomy and the right to decisional autonomy in matters relating to procreation. With respect to bodily autonomy, countless courts, including this one, have acknowledged that control and authority over one's own body is integral to the concept of liberty. *See, e.g.*, *Peckham v. Idaho State Bd. of Dentistry*, 154 Idaho 846, 853, 303 P.3d 205, 212 (2013) (in context of dental care, concluding that a "healthcare provider must offer pertinent information to his or her patients," and that "[t]he failure to do so would be a grave affront to their rights to self-determination and bodily autonomy"); *Greenhow v. Whitehead*, 67 Idaho 262, 265, 175 P.2d 1007, 1008 (1946) (acknowledging that "[i]nviolability of the person" was implicated by compulsory medical examination of personal injury plaintiff, who as a result was entitled to certain protections such as presence of attendant) (citation omitted)). This follows from the Idaho Constitution's protection of the right to "secur[e] safety."

Because pregnancy profoundly affects the body, regulation of abortion compromises the constitutionally protected right to "secur[e] safety" and derogates the interest in bodily autonomy and privacy. *See Remy v. MacDonald*, 2002 WL 970149, at *3 (Mass. Super. Ct. Mar. 15, 2002) ("Judicial scrutiny into the day-by-day lives of a pregnant woman would involve an unprecedented intrusion into the privacy and the autonomy of citizens, including the decision making process of every pregnant woman"), *aff'd*, 440 Mass. 675, 801 N.E.2d 260 (2004); *Committee to Defend Reprod. Rts. v. Myers*, 29 Cal. 3d 252, 274, 625 P.2d 779, 792 (1981) ("[I]f a woman is forced to bear a child—not simply to provide an ovum but to carry the child to term—the invasion is incalculably greater … it is difficult to imagine a clearer case of bodily intrusion, even if the original conception was in some sense voluntary." (ellipses in original)).

Respondents' contention that the Court has not even recognized a fundamental right to procreate badly misreads the Court's precedent. *See* State Opp. 14-15.[9] Respondents' assertion that this entire line of cases is traceable to *Newlan*, which in turn addressed federal rights reliant on *Roe* and overruled by *Dobbs*, is wrong. *See, e.g.*, *Stucki v. Loveland*, 94 Idaho 621, 623 n.13, 495 P.2d 571, 573 n.14 (1972) (pre-*Roe*, referencing both Fourteenth Amendment and Article I, § 2 of the Idaho Constitution); *Cantrell*, 94 Idaho at 654 (same). Though the Court's earlier cases do not contain a robust analysis of this right, there is no question that the right has long been recognized. *See, e.g.*, *Stucki*, 94 Idaho at 623 n.14 (more rigorous tests of purpose applied to "infringements of 'fundamental interests' such as voting, procreation and rights regarding criminal procedure"); *Newlan v. State*, 96 Idaho 711, 713, 535 P.2d 1348, 1350 (1975) (same); *Tarbox v. Tax Comm'n of Idaho*, 107 Idaho 957, 960 n.1, 695 P.2d 342, 345 n.1 (1984) (same). Moreover, in *Evans*, this Court used procreation as the exemplar of a fundamental right "not explicitly mentioned in the state constitution," but nonetheless implicit in Idaho's concept of ordered liberty. *Evans*, 123 Idaho at 582.[10]

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[9] To the extent that Respondents try to argue that this Court's August 12, 2022 order somehow "recognized" that Idaho has in fact *not* recognized the right to decide whether to procreate, Respondents egregiously overreach. *See* State Opp. 14.

[10] Procreation, while closely related to the right at issue here, is not the only context in which Idaho has recognized rights not expressly enumerated in the constitution. *See, e.g.*, *Murphy v. Pocatello Sch. Dist. No. 25*, 94 Idaho 32, 33, 480 P.2d 878, 879 (1971) (right of a public school student to wear his or her hair in manner of personal choice was protected under Article I, §§ 1 and 21 of the Idaho Constitution). Moreover, the fact that this Court has declined to find that the Idaho Constitution provided substantive protections for other rights or under other provisions of the Idaho Constitution, *see* State Opp. 17, does not in any way preclude this Court from finding that the Constitution provides protection here.

Numerous state high and appellate courts, interpreting their state constitutions, have concluded that the right to terminate a pregnancy arises from either a right to bodily autonomy, a right to procreational autonomy, or both. Take, for example, the Supreme Court of Tennessee, in *Planned Parenthood of Middle Tennessee v. Sundquist*:

> The concept of ordered liberty embodied in our constitution requires our finding that a woman's right to legally terminate her pregnancy is fundamental. … A woman's termination of her pregnancy is just such an inherently intimate and personal enterprise. This privacy interest is closely aligned with matters of marriage, child rearing, and other procreational interests that have previously been held to be fundamental. To distinguish it as somehow non-fundamental would require this Court to ignore the obvious corollary.

38 S.W.3d 1, 15 (Tenn. 2000). Another is *Women of State of Minnesota by Doe v. Gomez*, in which the Supreme Court of Minnesota recognized the uniquely personal nature of the right to terminate a pregnancy, while also noting its connection to bodily autonomy, stating "[w]e can think of few decisions more intimate, personal, and profound than a woman's decision between childbirth and abortion. Indeed, this decision is of such great import that it governs whether the woman will undergo extreme physical and psychological changes and whether she will create lifelong attachments and responsibilities." 542 N.W.2d 17, 27 (Minn. 1995) (several provisions of Minnesota Constitution, which does not contain an explicit privacy guarantee, nonetheless established a privacy covering the right to choose to terminate pregnancy). Alaska also acknowledged the element of bodily intrusion that occurs if an individual is compelled to carry a pregnancy to term, noting that "[a] woman's control of her body, and the choice whether or when to bear children, involves the kind of decision-making that is necessary for civilized life and ordered liberty. Our prior decisions support the further conclusion that the right to an abortion is

the kind of fundamental right and privilege encompassed within the intention and spirit of Alaska's constitutional language." *Valley Hosp. Ass'n, Inc. v. Mat-Su Coal. for Choice*, 948 P.2d 963, 968 (Alaska 1997) (cleaned up). Other state high courts interpreting their own constitutions have reached similar conclusions. *See, e.g., Armstrong v. State*, 1999 MT 261, ¶¶ 51, 53, 296 Mont. 361, 380-381, 989 P.2d 364, 378 (1999) (recognizing that "[f]ew matters more directly implicate personal autonomy and individual privacy than medical judgments affecting one's bodily integrity and health," and noting that "unless fundamental constitutional rights—procreative autonomy being the present example—are grounded in something more substantial than the prevailing political winds, Huxley's *Brave New World* or Orwell's *1984* will always be as close as the next election"); *Pro-Choice Mississippi v. Fordice*, 716 So. 2d 645, 653 (1998) ("While we do not interpret our Constitution as recognizing an explicit right to an abortion, we believe that autonomous bodily integrity is protected under the right to privacy … [and p]rotected within the right of autonomous bodily integrity is an implicit right to have an abortion.").

Here, both the Legislature and the State make much of the notion that abortion is different than other rights that Idaho has previously found were protected by its constitution. And with that limited premise—that the right to decide whether to terminate a pregnancy is unique—Petitioners would agree. The challenges regarding fundamental rights that have previously come before this Court—i.e., challenges to a school dress code, a pen register on one' s telephone line, the division of educational resources—do not come close to the level of intrusion on personal liberty that is presented by this case. The Total Ban seeks to regulate the use of Idahoans' bodies, and quite literally compels the subjugation of their physical persons for the purpose of another. As the

Kansas Supreme Court observed, "abortion laws do not merely restrict a particular action; they can impose an obligation on an unwilling woman to carry out a long-term course of conduct that will impact her health and alter her life." *Hodes & Nauser*, 309 Kan. at 646. The tangible reality of the Total Ban is that it will force Idahoans to undergo "extreme physical and psychological changes" against their will. *See Gomez*, 542 N.W.2d at 27. It removes their bodies from their control, and for the duration of the pregnancy—some 40 or so weeks—personal autonomy is trampled by the State. Moreover, the Total Ban is forcing Idahoans to become parents, which is a lifelong and irreversible shift in identity. In no other context has the State tried to dictate the use of an individual's physical body in this way. This Court can, and should, decline to allow the Total Abortion Ban to do so.

2. Article I, § 17 Protects Idahoans' Right to Privacy Regarding Their Intimate Familial Decisions

Additionally, Article I, § 17 protects an individual's right to privacy,[11] and has been interpreted by this Court to provide broader protections of that right than the U.S. Constitution. *See Donato*, 135 Idaho at 472 ("[W]e have previously found [that] Article I, § 17, in some instances, provides greater protection than the parallel provision in the Fourth Amendment of the U.S. Constitution."). This is especially true where Idahoans' reasonable expectations of privacy

[11] Respondents' contention that Article I, § 17 does no more than "limit[] the means by which evidence is obtained" is out of step with the broader language used in Idaho's case law discussing the right to privacy, and is in contrast to the way many other states have interpreted similar state constitutional provisions. *See, e.g.*, *Gomez*, 542 N.W.2d at 19 (noting that "right [of privacy] begins with protecting the integrity of one's own body and includes the right not to have it altered or invaded without consent," and is implicated rights and privileges clause, due process clause, and search and seizure clause of the Minnesota Constitution).

were at stake, or where Idaho's citizens would be "better served" by greater protections than the federal constitution provides. *See Webb*, 130 Idaho at 467-468 (breaking from U.S. Supreme Court's definition of curtilage, concluding that the unique rural tradition and custom in Idaho was a special consideration warranting broader privacy protections than the U.S. Constitution to better ensure Idaho citizens' reasonable expectations of privacy were met); *Guzman*, 122 Idaho at 987-998 (rejecting U.S. Supreme Court's good faith exception to the warrant requirement and concluding that "the citizenry of Idaho will be better served if it no longer controls"); *State v. Thompson*, 114 Idaho 746, 749, 760 P.2d 1162, 1165 (1988) (rejecting U.S. Supreme Court's interpretation of the Fourth Amendment protections with respect to telephone line pen registers, finding that Idaho Constitution provided greater protection).

The rationale in *Thompson* is illuminating. There, the Court was faced with a U.S. Supreme Court decision concluding that Fourth Amendment safeguards did not extend to numbers dialed from a private telephone because the line holder did not possess a legitimate expectation of privacy as to the phone numbers he dialed. *See Smith v. Maryland*, 442 U.S. 735, 745-746 (1979). This Court nonetheless rejected the majority's reasoning and adopted language from the *Smith* dissent, concluding the list of numbers dialed from an individual's telephone line was protected under Article I, § 17 of the Idaho Constitution "because it easily could reveal the identities of the persons and the places called, and thus reveal the most intimate details of a person's life." *Thompson*, 114 Idaho at 750. The Court's reasoning focused on the privacy of Idaho's citizens, holding that "[p]rivacy in placing calls is of value not only to those engaged in criminal activity. The prospect of unregulated governmental monitoring will undoubtedly prove disturbing even to those with

nothing illicit to hide." *Id*. at 751; *see also Webb*, 130 Idaho at 465 (finding that the U.S. Supreme Court's definition of curtilage "may not adequately reflect the scope of the privacy interest protected by art. I, § 17 of the Idaho Constitution," and articulating a "broader test" that allows Idaho Courts to "take into consideration the differences in custom and terrain … when contemplating particular expectations of privacy").

Here, it cannot seriously be disputed that the decision whether to carry a pregnancy to term touches on "the most intimate details of a person's life." *Thompson*, 114 Idaho at 750; *see also Gomez*, 542 N.W.2d at 27. If the Idaho Constitution provides, to a greater extent than provided for in the U.S. Constitution, protection from government interference with the right to privacy of one's telephone line, Idaho's Constitution also provides greater protection of an individual's right to privacy in making intimate familial decisions, including the decision to obtain an abortion. In subsequent discussions of *Thompson*, this Court has recognized that "[t]he public holds some belief that conversations and information generated by telephone calls will remain private," and that "there are circumstances … which would justify the common expectation that information generated by telephone calls and conversations would remain private." *Donato*, 135 Idaho at 474. If there is an expectation of privacy with respect to telephone calls, citizens of Idaho are unquestionably justified in the expectation of privacy with respect to their sensitive medical decisions, including the decision whether to terminate a pregnancy.

Moreover, the unusual and unprecedented situation giving rise to this case—the U.S. Supreme Court's retraction of a federal fundamental right—bears on the question of Idahoans' reasonable expectations of privacy and compels protection under Article I, § 17. Multiple

generations of Idahoans have simply never known a world without the right to privacy in making intimate familial decisions, including the decision to obtain an abortion. Accordingly, Idaho's citizens necessarily have a "legitimate expectation of privacy, which 'society is prepared to recognize as reasonable.'" *Thompson*, 114 Idaho at 749. (Indeed, such an expectation would be reasonable per se, given that society's collective understanding was that that privacy was constitutionally protected.) Given these expectations of privacy, Idaho's citizens would clearly be "better served" by greater protections than those afforded by the federal constitution.

3. Article I, § 21 Further Supports Idahoans' Right to Make Intimate Familial Decisions

Article I, § 21 provides another source of protection, establishing that the Constitution's "enumeration of rights shall not be construed to impair or deny other rights retained by the people." Relying on Section 21, this Court has recognized the right to personal autonomy, *Murphy v. Pocatello School District No. 25*, 94 Idaho 32, 33, 480 P.2d 878, 879 (1971), as well as parents' fundamental right to decide how to raise and educate their children, *Electors of Big Butte Area v. State Board of Education*, 78 Idaho 602, 612, 308 P.2d 225, 231 (1957). Respondents' contention that Petitioners advance a "limitless interpretation" of Section 21 that is "inconsistent with the intent of the drafters" ignores the text itself. State Opp. 22. To the contrary, the language used by the framers indicates that the listing of rights—expressed positive rights, so to speak—should not be read to impair, deny, or somehow invalidate "other rights retained by the people." *See* Idaho Const. Art. I, § 21; *see also Evans*, 123 Idaho at 581-582; *Big Butte*, 78 Idaho at 612 ("[I]t cannot seriously be urged that in clothing the legislature … with such powers the people transferred to

them the rights accorded to parenthood before the constitution was adopted."). Respondents misconstrue Petitioners' argument, focusing only on the subject matter of *Big Butte* and ignoring the implications of this Court's interpretation of Article I, § 21. The notion that Article I, § 21 functions in concert with the inalienable rights protected by Article I, § 1 was further affirmed by this Court in *Murphy*.[12] Petitioners agree with the Legislature's position that "a factual gulf separates *Murphy* from this case," *see* Leg. Opp. 13, because the contemplated infringement of Murphy's rights, in that case the requirement that Murphy cut his hair against his will, is far less intrusive than compelling someone to carry an unplanned or dangerous pregnancy to term. And even so, this Court found that the Idaho Constitution, Article I, § 1 and Article I, § 21, as well as the Ninth Amendment, protected Murphy's retained right to control his hair length. *Murphy*, 94 Idaho at 38. Here, with a far greater intrusion to one's bodily integrity at stake, the Court has even more reason to find that Sections 1 and 21 work synergistically to protect the decision whether to carry a pregnancy to term or to obtain an abortion.

Finally, though the Legislature disparages Petitioners' arguments as derived from a "patchwork quilt of constitutional provisions," Leg. Opp. 10, its own brief acknowledges that the provisions of Idaho's Constitution "should not be read in isolation, but must be interpreted in the context of the entire document," and that the constitution "should be considered as a whole," *id*. at 6 (citing *In Re Doe*, 168 Idaho 511, 516, 484 P.3d 195, 200 (2021)); *see also Pentico v. Idaho*

[12] Though Respondents assail *Murphy* as "questionable," and claim that "[t]his Court has recognized *Murphy*'s limited precedential value," they provide no support whatsoever for those assertions. State Opp. 24.

Comm'n for Reapportionment, 169 Idaho 840, 844, 504 P.3d 376, 380 (2022) (applying statutory construction canons to constitutional interpretation, noting that provisions "must be interpreted in the context of the entire document," and that the constitution "should be considered as a whole") (internal citations omitted)); *Boise-Payette Lumber Co. v. Challis Indep. Sch. Dist. No. 1 of Custer Cnty.*, 46 Idaho 403, 268 P. 26, 27 (1928) ("No one provision of Constitution or statute should be separated from all others, and considered alone; but all provisions bearing on a particular subject should be brought into view; and it is the duty of the court to have recourse to the whole Constitution if necessary, to ascertain the true intent and meaning of any particular provision."). There is simply nothing objectionable, nor even novel, about the notion that the Court may recognize rights in "'penumbras, formed by emanations' from a number of constitutional amendments which, taken as a whole, form a 'zone of privacy' into which the state is not permitted to trespass." *Murphy*, 94 Idaho at 37 (citing *Griswold*, 381 U.S. at 484).

4. Idaho's Constitution Should Also Be Read in the Broader Context of the Political Moment and Ideals Surrounding Constitutions Written at Time

Idaho's Constitution should also be read in the context of the specific political moment out of which it and other state constitutions of the era were born. For example, Idaho joined 29 other state constitutions, the clear majority at the time, in including a provision guaranteeing inalienable, natural, or inherent unenumerated rights. *See* Calabresi & Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 Tex. L. Rev. 1299, 1303 (2015); *see also* Colo. Const. Art. 2, § 3; Neb. Const. Art. 1, § 1; Cal. Const. Art. I, § 1; Ark. Const. Art. 2, § 2; S.D. Const. Art. 6, § 1. The delegates at the Idaho Constitutional

Convention were not working in isolation in Boise, but were working in dialogue with the constitutions of other States, to which the delegates looked in crafting Idaho's Constitution. Among other States, they looked explicitly to the constitutional traditions of Minnesota,[13] Washington,[14] California,[15] New Jersey,[16] and Montana[17] in deciding how to craft the constitutional tradition of Idaho. Idaho has continued to find those States' interpretation of constitutional provisions persuasive and informative when interpreting the Idaho Constitution. *See, e.g., Thompson v. Engelking*, 96 Idaho 793, 810, 537 P.2d 635, 652 (1975) (favorably citing Washington Supreme Court); *Murphy*, 94 Idaho at 36 (citing California appellate courts). The constitutional traditions of those States embrace fundamental protection for the right to decisional autonomy of pregnant persons in accessing abortions. This includes those very same constitutional traditions the delegates specifically looked to in crafting the Idaho Constitution. *See Gomez*, 542 N.W.2d at 26-27 & n.10 (holding that several provisions of Minnesota Constitution—although not containing explicit privacy guarantee—combined to establish privacy right large enough to protect

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13 *See* 1 Proceedings and Debates of the Constitutional Convention of Idaho, 1889, 772 (I.W. Hart, ed.) (1912).

14 *See* 2 Proceedings and Debates of the Constitutional Convention of Idaho, 1889, 1699 (I.W. Hart, ed.) (1912).

15 *See* 1 Proceedings and Debates of the Constitutional Convention of Idaho, 1889, 149, 264, 288, 329, 589, 818 (I.W. Hart, ed.) (1912); 2 Proceedings and Debates of the Constitutional Convention of Idaho, 1889, 1345, 1776, 1884 (I.W. Hart, ed.) (1912).

16 *See* 2 Proceedings and Debates of the Constitutional Convention of Idaho, 1889, 1607 (I.W. Hart, ed.) (1912).

17 *See* 1 Proceedings and Debates of the Constitutional Convention of Idaho, 1889, 149, 214, 520, 814-15, 889 (I.W. Hart, ed.) (1912); 2 Proceedings and Debates of the Constitutional Convention of Idaho, 1889, 1413, 1884 (I.W. Hart, ed.) (1912).

woman's right to choose to terminate pregnancy); *State v. Koome*, 84 Wash. 2d 901, 904, 530 P.2d 260, 263 (1975) (en banc) (right of privacy in Washington Constitution protects right to abortion); *Committee to Defend Reprod. Rts.*, 29 Cal. 3d at 275 (California Constitution's right to privacy protects right to choose whether to bear children); *Right to Choose v. Byrne*, 91 N.J. 287, 306, 450 A.2d 925, 935 (1982) (striking restriction of Medicaid funding for medically necessary abortions based on a recognized right to privacy); *Armstrong*, 296 Mont. at 376. And while not called out by name by the delegates at the convention, the constitutions of Kansas, Mississippi, Alaska, Florida, Ohio, Massachusetts, and Connecticut were premised on the same political ideals, and the courts of those States have since interpreted similar language in their state constitutions as protecting the right to terminate a pregnancy. *See* Opening Br. 23 n.26; *see also Hodes & Nauser*, 309 Kan. at 682-684 (Biles, J., concurring) (collecting cases).

Respondents' attempts to distinguish North Dakota and Michigan, State Opp. 25-26, are flawed. Respondents point to the opinion of one justice on the North Dakota Supreme Court to say that Idaho would not be alone in rejecting any recognition that pregnant persons have a fundamental right to decisional autonomy over their uteruses (and the rest of their bodies). *See* State Opp. 25-26 (citing to one of four opinions in *MKB Mgmt. Corp. v. Burdick*, 2014 ND 197, ¶ 4, 855 N.W.2d 31, 32 (2014)). But no position had a majority in that case, and Respondents offer no rationale for selectively ignoring the words of the other justices on the North Dakota Supreme Court. *See MKB Mgmt. Corp.*, 2014 ND at ¶ 97 (Kapsner, J. and Maring, S.J., concurring) ("We agree a fundamental right to choose abortion before viability exists under a woman's liberty interest in article 1, section 1 of the North Dakota constitution and that interest is

protected under article 1, section 12."). Respondents also read half of Michigan's precedent, pointing to the fact that in 1997 Michigan guaranteed a right to abortion consistent with the federal right at the time. State Opp. 25-26 (citing *Mahaffey v. Attorney General*, 564 N.W.2d 104, 109-110 (Mich. Ct. App. 1997). As *Roe* and *Casey* were at the time settled law, this tells us little—especially when the same court in Michigan has since confirmed that substantive due process under Michigan's constitution encompasses "an individual's right to bodily integrity." *Mays v. Snyder*, 323 Mich. App. 1, 58-59, 916 N.W.2d 227, 261 (2018). Respondents' other attempts to distinguish Petitioners' cases similarly fall flat.

C. The Total Ban is Neither Necessary nor Narrowly Tailored, and So Violates the Idaho Constitution

Recognizing the right to choose whether to terminate a pregnant is only the starting point of the analysis. Strict scrutiny applies to fundamental rights because it is the most finely tuned calibration of grave and weighty competing interests—both the pregnant person's and the State's. The State's alternative—subjecting abortion regulation to rational basis review—gives *no weight* to the interests in securing safety, privacy, the choice whether to procreate, or bodily or decisional autonomy. Because the right to decide whether to terminate a pregnancy is fundamental, to survive strict scrutiny, the Total Abortion Ban must be both "necessary to serve a compelling state interest" and "narrowly tailored to achieve that interest." *Reclaim Idaho*, 169 Idaho at 431 (quoting *Bradbury v. Idaho Jud. Council*, 136 Idaho 63, 69, 28 P.3d 1006, 1012 (2001)). The Total Ban is neither necessary nor narrowly tailored, and is therefore unconstitutional.

First, the Total Ban's prohibition on an individual exercising the fundamental right to end an unplanned pregnancy beginning at the earliest stages of pregnancy is not necessary to serve any compelling state interest. The State's proffered interest in "preserving prenatal life at all stages of development," State Opp. 27-28, omits any reference to the protection of the health and safety of the patient, and concludes that because this reason is "legitimate," it must necessarily also qualify as "compelling." In citing solely the State's interest in fetal life, the State's argument in fact demonstrates that no state interest could justify an absolute ban—because it ignores the existence, let alone the rights, of the pregnant person prohibited from exercising any autonomy with regard to the unplanned pregnancy in their body. While various state interests could be considered compelling to justify limiting abortions later in pregnancy, no state interest could justify an absolute ban such as that at issue here. *See Reclaim Idaho*, 169 Idaho at 429 ("[T]he legislature's duty to give effect to the people's rights is not a free pass to override constitutional constraints and legislate a right into non-existence, even if the legislature believes doing so is in the people's best interest.").

But even if the State's proffered rationale qualified as a compelling interest, the Total Ban is not narrowly tailored to achieve those interests. For one, its criminalization sweeps too broadly, reaching constitutionally protected conduct without exception or functional affirmative defenses. *See* I.C. § 18-622(2). Furthermore, Idaho has a multitude of more effective alternatives to achieve its stated objective—more effective alternatives that do not unconstitutionally inhibit the exercise

of protected rights—including increasing access to contraception,[18] increasing access to healthcare and strengthening social assistance programs,[19] and supporting those Idahoans who desire to be parents by providing them with the resources they need to do so. That these more effective alternatives better achieve the Total Ban's stated legislative purpose demonstrates that the Total Ban is not narrowly tailored and is therefore unconstitutional. *See Reclaim Idaho*, 169 Idaho at 435-437.

The State cannot have a compelling interest in violating the constitutionally protected rights of Idahoans to make intimate decisions concerning their families, and the various available alternatives that would more effectively achieve the Legislature's asserted goals than the discriminatory Total Abortion Ban demonstrate that the Ban is not narrowly tailored and is unconstitutional.

III. The Total Abortion Ban Is Unconstitutionally Vague

Respondents do not seriously contest that the Total Abortion Ban is so confusing and difficult to apply that it fails to provide notice of precisely what is and is not legal. The Legislature openly admits that at least one extremely important term—the word "abortion" as used in the

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[18] Studies show that access to free birth control lowers abortion rates. *See* Opening Br. 26 n.29. However, the Legislature has rejected this common-sense measure. *See, e.g.*, Duggan, *House Kills Increased Access to Contraceptives Bill*, Idaho Press (Mar. 14, 2022) (rejecting bill that would have increased access by extending the maximum prescription period of contraceptives).

[19] Women who seek abortions commonly cite lack of financial resources among the reasons for their decision. *See* Biggs et al., *Understanding Why Women Seek Abortions in the US*, 13 BMC Women's Health, at 2 (2013). And yet Idaho has chosen to not extend SNAP benefits to provide food for needy families, and has not joined the 23 states that have passed a Pregnant Workers' Fairness Act. *See* Opening Br. 28, nn. 41-42.

affirmative defenses—"trips up the reader," causes "[c]onfusion," and "appears to be something akin to a scrivener's error" because, as the Legislature acknowledges, it is physically impossible to perform an abortion "in the manner that … provide[s] the best opportunity for the unborn child to survive." Leg. Opp. 26-27 (quoting I.C. § 18-622(3)(a)(iii)).

Faced with statutes that cannot be read coherently, Respondents choose to quibble about what percentage of the time providers may be able to accurately guess that their conduct is legal and what this means about whether the statute must be struck down as vague. These arguments do not meaningfully change the calculus because, at a basic level, Respondents agree that the question is 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." *State v. Bitt*, 118 Idaho 584, 588, 798 P.2d 43, 47 (1990); *see* State Opp. 36-37 (acknowledging this is the legal standard for vagueness claims); Leg. Opp. 21-22 (same). They also agree that part (b) of this test turns on whether there is a "core of circumstances to which the statute or ordinance could be unquestionably constitutionally applied." *Bitt*, 118 Idaho at 588. "[I]f the statute or ordinance is broad enough to catch everyone, it has no core of circumstances to which it applies and is therefore unconstitutionally vague." *Id*. Multiple provisions of the Total Ban do not meet this undisputed standard.

To the extent that Respondents rely on additional Idaho cases citing *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), for the proposition that a statute is unconstitutionally vague only when it is so "in all of its applications," that language from *Hoffman* was discussed specifically in the more recent case *Johnson v. United States*, 576 U.S. 591 (2015),

where the Supreme Court concluded that the "supposed requirement of vagueness in all applications is not a requirement at all, but a tautology: If we hold a statute to be vague, it is vague in all its applications (and never mind the reality)." *Id*. at 603. The Court therefore questioned with skepticism why "the existence of some" conduct that "clearly" falls within the realm of what the statute prohibits should "save" the clause in question. *Id*. While the dissent in *Johnson* repeatedly cited *Hoffman*, the majority's clear rejection of *Hoffman* leaves no question that there is no requirement that a law be vague in every possible instance to be unconstitutionally vague. It may be true—as Respondents imply—that Idaho could theoretically choose to split from the United States Supreme Court on this point, but Respondents have offered no reason legally or factually to do so.

A. The Affirmative Defenses Are Unconstitutionally Vague

Ultimately, when a person is required to "guess at" the statute's meaning and may "differ as to its application," that statute is unconstitutionally vague. *State v. Leferink*, 133 Idaho 780, 783, 992 P.2d 775, 778 (1999). The affirmative defenses provided in the Total Ban provide no guidance as to how they should be applied, thereby chilling provider conduct that may be legal. For example, the first exception, which allows physicians to raise affirmative defenses that they performed an abortion because it was "necessary to prevent the death of the pregnant woman" in the "good faith medical judgment" of that physician "based on the facts known to the physician at the time," I.C. § 18-622(3)(a)(ii), lacks any guidance as to imminence or temporality. As explained in Petitioners' opening brief, there is unfortunately "no bright line in medicine or science that says,

'OK you are officially dying.'"[20] Such "indeterminacy about how to measure … risk" of death, compounded by "indeterminacy about how much risk" is required to qualify as "necessary to prevent" the pregnant person's death, is "more unpredictability and arbitrariness than the Due Process Clause tolerates." *Johnson*, 576 U.S. at 598. The second affirmative defense, which purports to shield providers who perform an abortion because the pregnancy resulted from rape or incest, would leave physicians to interpret police reports and legal details to determine whether the definitions for these crimes have been met—a task they have no expertise to perform.

These exceptions are also internally contradictory. While the affirmative defenses purport to allow abortions to be performed in certain circumstances, Sections 18-622(3)(a)(iii) and (3)(b)(iv) simultaneously require that they be performed "in the manner that … provide[s] the best opportunity for the unborn child to survive." I.C. § 18-622(3)(a)(iii). But, of course, there is no way to perform an abortion such that a fetus would survive before viability. Gustafson Decl. ¶ 18. As Respondents acknowledge, Leg. Opp. 26-27, such an abortion would not even qualify as an abortion under the statutory definition, which includes only procedures done "with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child." I.C. § 18-604(1). This contradiction makes both affirmative defenses—by the Legislature's own admission—"confusing," *see* Leg. Opp. 26-27, and impossible to apply in practice, which is unconstitutional. Moreover, the State's suggestion that the Court read different words into the statute to save it, State Opp. 48, amounts to an unconstitutional request for the court

[20] Healy, *With Roe Set to End, Many Women Worry About High-Risk Pregnancies*, N.Y. Times (June 20, 2022).

to re-write the statute. "Even when addressing an ambiguous statute, the courts are not free to rewrite a statute under the guise of statutory construction." *Matter of Release from Common L. Lien*, 513 P.3d 447, 451 (Idaho 2022) (quotations omitted).

Respondents try to brush away the multiple incomprehensible provisions of the affirmative defenses by pointing to the language that medical decisions should be made based on the physician's "good faith medical judgment." That phrase alone is far from sufficient to end the unconstitutional ambiguity for two reasons: First, even under the good faith standard, the law fails to provide physicians notice of what conduct is illegal by creating a large range of conduct that is arguably legal, but could easily be interpreted by a particular prosecutor, judge, or jury to be illegal. This invites arbitrary enforcement and chills legal conduct, such as the treatment of pregnant cancer patients, which one physician publicly described as a "gray area"[21] where doctors are not able to form a good faith medical judgment about whether an abortion is "necessary" to prevent death. *See also United States v. Idaho*, 2022 WL 3692618, at *3 ("Despite the risks such conditions present, it is not always possible for a physician to know whether treatment for any particular condition, at any particular moment in time, is 'necessary to prevent the death' of the pregnant patient, which is the prerequisite to their relying on the affirmative defense offered by the criminal abortion statute.").

[21] *See* Palermo, *Keeping Doomed Fetuses Alive: How Doctors Say Idaho's Abortion Law Disrupts Care*, The Idaho Statesman (Aug. 27, 2022). The current laws "technically outlaw" treatments commonly used for cancer such as chemotherapy or radiation as the treatments could harm the fetus.

Second, the "good faith medical judgment" standard does not save either affirmative defense from the contradiction of having to perform abortions in the manner that "provide[s] the best opportunity for the unborn child to survive." As discussed, this requirement is nonsensical and renders the affirmative defense essentially unavailable. *See McNair v. State*, 285 Ga. 514, 517, 678 S.E.2d 69, 71 (2009) (striking down statute as unconstitutionally vague because it "can be read as setting forth two directly contradictory ways for executing" the same action, and "[b]ecause of the language in the statute, both methods are equally plausible"); *State v. Zarnke*, 224 Wis. 2d 116, 132, 589 N.W.2d 370, 376 (1999) (striking down criminal statute where it was "virtually impossible for a defendant … to meet his or her burden" in asserting an affirmative defense).

Respondents' other points are equally unconvincing. First, they argue that the word "necessary" has various definitions, and therefore these provisions are not vague. State Opp. 41. But Petitioners do not contend that the word "necessary" alone is what makes this provision vague. The phrase "necessary to preserve the life or health of the mother," for example, is much broader than the phrase "necessary to prevent the death" of the pregnant person, and it may very well not be unconstitutionally vague. Respondents' comparisons to different legal authorities that use the word "necessary" are not dispositive of Petitioners' claim. Respondents also point at length to the Hyde Amendment, which uses completely different language and does not subject physicians who perform abortions to criminal sanctions or require them to bear the burden of proving the lawfulness of their conduct. Courts treat criminal laws "more stringent[ly]" for purposes of

vagueness than those that do not carry criminal penalties. *State v. Cobb*, 132 Idaho 195, 198, 969 P.2d 244, 247 (1998).

B. The Term "Clinically Diagnosable Pregnancy" Is Unconstitutionally Vague

Respondents likewise fail to counter Petitioners' argument that the term "clinically diagnosable pregnancy," defined nowhere in Section 18-604, is fatally vague.

Where the "[s]tatutory language [is] of such a standardless sweep [that it] allows policemen, prosecutors, and juries to pursue their personal predilections," it is unconstitutionally vague. *Smith v. Goguen*, 415 U.S. 566, 575 (1974) (striking down a statute allowing prosecution of anyone who "treats contemptuously" the United States flag). A doctor has no way of knowing whether a particular procedure will qualify as terminating a "clinically diagnosable pregnancy" and will therefore be deemed illegal by the State. "Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law." *Id.*; *see also McCormack v. Herzog*, 788 F.3d 1017, 1031 (9th Cir. 2015) (striking down abortion provisions that used vague undefined terms that were also not "terms of art with specific definitions in the medical context").

There is no "core" set of circumstances in which the term "clinically diagnosable pregnancy" is clear because, as Petitioners have explained, doctors diagnose pregnancy in many different ways, including "elevated hormone levels, ultrasounds, and a positive home pregnancy test result." Gustafson Decl. ¶ 15. On top of this, a person meeting one or multiple of these diagnostic methods may have a dangerous or non-viable pregnancy, and providing medical care for this type of condition would not be commonly understood as an abortion in the medical community due to the non-viability of the pregnancy. Because the statute provides no definition

for the term "clinically diagnosable pregnancy," and gives no standard for how a doctor should determine whether a patient has a "clinically diagnosable pregnancy" under the statute, a physician cannot be sure how to align this definition with real clinical situations, such as when there is a positive pregnancy test but no identifiable pregnancy by ultrasound, or a spontaneous pregnancy loss where a pregnancy test would remain positive for up to weeks after the fetal loss has occurred. The vagueness in this term delays, or even prevents, physicians from providing the standard of care to patients with miscarriages and other non-viable pregnancies. *See, e.g.*, Gustafson Decl. ¶¶ 15, 20; Ex. 1, Cooper Decl. ¶ 12; Ex. 1, Corrigan Decl. ¶ 18.

The lack of any consensus around this term is confirmed by the continuing confusion among Respondents themselves while defending these laws in the multiple forums in which they are being challenged. For example, during oral argument in federal litigation concerning the Total Abortion Ban, the Legislature took the stance that an ectopic pregnancy would not qualify as a "clinically diagnosable pregnancy," while the State "conceded that the procedure necessary to terminate an ectopic pregnancy is a criminal act, given the broad definitions used in Idaho's criminal abortion statute." *United States v. Idaho*, 2022 WL 3692618, at *3. If even trained attorneys defending the law cannot agree on the meaning of this term, physicians cannot be required to make this determination and face criminal punishment if they guess incorrectly.

Respondents contend that the term should not be considered vague because it has appeared in other statutes regulating abortion. But they admit that this term has not "been challenged previously in litigation" in Idaho, and that in the other decisions they cite there was no "suggestion that it was unconstitutionally vague," meaning that no vagueness claim was raised. State Opp. 38,

39. No Idaho court has actually upheld this term in response to a vagueness challenge. Respondents' point that this term appeared in previous abortion regulations is also of no moment, because several months into a pregnancy, there is no longer doubt about whether a person is pregnant, whereas the Total Ban applies starting at conception, when "persons of common intelligence" may well "differ as to its application"—for example, before a person would test positive on a home pregnancy test. *Bitt*, 118 Idaho at 585 (cleaned up). The cases that Respondents cite do not address these complexities because such restrictive abortion bans were presumptively unconstitutional until *Dobbs*.

C. The Statutes Are Also Impossible to Parse When Read Together

In addition to the fatal deficiencies within the Total Ban itself, the Ban is also unconstitutionally vague when read in conjunction with the other abortion bans at issue before this Court. In addition to the Total Ban, the Six Week Ban imposes criminal penalties for performing an abortion after a "fetal heartbeat" has been detected, I.C. § 18-8805, and SB 1309 creates civil liability—enforceable by private individuals—for abortions "knowingly or recklessly attempted, performed, or induced … in violation of this chapter." I.C. § 18-8807(1)(a). As lawsuits may be filed for damages as well as statutory damages up to $20,000 per suit for up to four years after the procedure, these civil penalties are prohibitive. I.C. § 18-8807(1)(b).

These multiple bans are impossible to read in conjunction. Not even Respondents themselves can agree on which provisions of which laws are currently in effect or which standard currently governs providers. While the Legislature blithely asserts that "the Heartbeat Act's criminal provisions are now effective," Legislature's Six Week Ban Opp. 6, the State argues that

"[t]he Heartbeat Act's criminal provisions no longer apply except for a very narrow subset of abortions performed in a Medicare-participating emergency department," State's Six Week Ban Opp. 6, based on the preliminary injunction issued in *United States v. Idaho*, 2022 WL 3692618, at *15.[22] When those charged with enforcing the law cannot ascertain its intended meaning, unconstitutional and arbitrary enforcement is inevitable. *See Goguen*, 415 U.S. at 575.

Even assuming the State's current position that, absent the federal injunction, the Total Ban supersedes the criminal portion of the Six Week Ban and therefore only SB 1309 remains (except with respect to abortions permitted under the federal EMTALA injunction), those provisions (applying standards taken from the superseded criminal penalties of Section 18-8804) conflict with the standards given in the Total Abortion Ban in numerous respects. The conflict subjects physicians trying to provide care to their patients to a confusing web of standards that essentially renders the exceptions and affirmative defenses meaningless. For example, whereas the Six Week Ban includes exceptions for categories of abortions, I.C. § 18-8804, the Total Ban phrases its carve-outs as affirmative defenses that, "must be proven by a preponderance of the evidence," I.C. § 18-622(3), meaning that doctors have to deal with serious consequences based on two separate legal standards when working to understand what care they can provide to a seriously ill patient. On top of this, while the Total Ban uses a subjective standard that centers on the physician's good

[22] Moreover, the preliminary injunction enjoins enforcement of the Total Ban in very limited circumstances. As recent commentary has noted, "[w]ith the Total Abortion Ban in effect, doctors in Idaho wonder what care they can offer to a patient in clinic without risking felony charges and a minimum of two years in jail." *See* Huntsberger, *Ambiguous Idaho Abortion Laws That Misunderstand Pregnancy Care Will Cause Harm to Patients*, Idaho Capital Sun (Sept. 8, 2022).

faith medical judgment, the equivalent exception in SB 1309 uses an objective standard. *Compare* I.C. § 18-622 ("good faith medical judgment" standard for affirmative defenses), *with* I.C. § 18-8801(5) (applying "reasonable medical judgment" standard to definition of "medical emergency"); *see also* I.C. § 18-8805(2) (mens rea requirement unclear, criminal liability for any provider who "knowingly or recklessly" performs an abortion).

The different statutes also use inconsistent terminology. Whereas the affirmative defense in the Total Ban is based on a risk of "death" to the pregnant person, the Six Week Ban's exception permits abortions "in the case of a medical emergency." I.C. § 18-8804. And "medical emergency" here has its own statutory definition that may or may not overlap with whatever it may mean to "prevent the death of" a pregnant person under the Total Ban. *See* I.C. § 18-8801(5) (defining "medical emergency" as "a condition that, in reasonable medical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function"). The Six Week Ban exception also includes a temporal requirement not contemplated in the Total Ban affirmative defense. As discussed in Br. ISO Six Week Ban at 11-12, the Total Ban could conceivably allow a physician to treat a condition like an ectopic pregnancy at an earlier pregnancy stage or cancer at an earlier stage that *eventually* would threaten the life of the mother, even if that threat was not *immediate*. A medical professional may therefore avoid criminal prosecution under the Total Ban for treating a patient but then be subjected to prohibitive penalties under the Six Week Ban or SB 1309. The obvious

result of all this is that rational and prudent physicians may avoid performing any abortion, even when one of the various carve-outs to liability under one of the Bans is indisputably met.

These multiple conflicting standards among the different bans, and the lack of clarity as to which standard applies for the civil enforcement mechanism created by SB 1309, further compound the constitutional violations caused by each individual statutory provision, making it impossible for physicians to know whether they are acting legally. The basic right to due process includes the right to understand the law so that individuals are not being jailed arbitrarily without notice. *See McNair*, 285 Ga. at 517; *Zarnke*, 224 Wis. 2d at 121-122. Even if the laws individually did not meet this standard, it is hard to fathom how a provider would have fair notice of the governing standard based on the laws as read *together*.

IV. The Total Abortion Ban Violates the Right to Equal Protection.

Respondents essentially argue that because Petitioners cannot point to a decision where this Court has already held that the right to equal protection encompasses a right to access abortion, Petitioners' equal protection claim fails. State Opp. 29. But, as Petitioners explained in their opening brief, this Court's precedents compel the conclusion that the Total Abortion Ban's elimination of all access to abortions violates Idaho's constitutional and statutory guarantees against discriminatory and unequal treatment. Opening Br. 29-38.

As a law that classifies people by gender, the Total Abortion Ban is subject to heightened scrutiny. By "confer[ring] an advantage" on men and society at large "at the expense of" the bodies and lives of the women being forced to carry unwanted pregnancies and bear the burdens of the resulting births, the Total Ban imposes precisely the unequal treatment between groups that

triggers means-focus review. *See Jones v. State Bd. of Med.*, 97 Idaho 859, 871, 555 P.2d 399, 411 (1976). Respondents argue that because the Total Ban criminalizes all abortion providers equally, it does not implicate equal protection, and that because only women can become pregnant, any gender-based classification that could implicate the female body does not run afoul of equal protection guarantees. *See* State Opp. 30-31.[23] But this reasoning is subject to no limiting principle—is the State arguing that it could require women to have intrauterine devices (IUDs) implanted without running afoul of equal protection, simply because women can become pregnant and men cannot? Clearly, that is not so.

Furthermore, the Total Abortion Ban discriminates on the basis of sex because it forces women to endure the burdens and risk of pregnancy, childbirth, and parenting based on outdated stereotypes about women's role in society. While such stereotypes have been used for much of this nation's history to justify denying women the right to vote, contribute equally in the workplace, and enjoy the benefits that men enjoyed in so many other areas of civic, social, and political life, requiring women to sacrifice their minds and bodies in service of the biologically bestowed obligation to remain "the center of home and family life" justifies denying women rights no longer. *Nevada Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 729 (2003). Recognizing that "[c]lassifications which perpetuate or encourage sexual stereotypes necessarily burden those persons," this Court, too, has made clear that unless a "substantial relationship" justifying the

[23] Respondents' citation to the criminalization of female genital mutilation is inapt and a grossly inappropriate comparison. State Opp. 31 n.19. The Total Ban is antithetical to protecting a woman's body against unwanted interference.

classifications based on an otherwise valid state goal, such classifications are "abhorrent to art. I, § 2 of the Idaho Constitution." *Murphey v. Murphey*, 103 Idaho 720, 723, 653 P.2d 441, 444 (1982).

The lack of any substantial relationship justifying its invidious classifications means the Total Ban is precisely the kind of statute that this Court finds "abhorrent" to the Idaho Constitution's guarantee of equal protection. Respondents again pretend that the State's interest in fetal life exists independently of the woman's body the State is coercively regulating to argue that "there's nothing invidious to see here."[24] *See* State Opp. 32-33. The Total Ban is no more able to survive heightened scrutiny than it can strict scrutiny, as explained above. This Court has already concluded that a law that lacks sufficient connection between ostensibly valid legislative interests and the creation of a gender-based classification is unconstitutional. *See Murphey*, 103 Idaho at 722. And this Court has, again and again, struck down policies that discriminated on the basis of sex without an adequate justification. *See* Opening Br. 37 (collecting cases). This Court should do so again here.

For similar reasons, enforcing the Total Ban would also be a violation of the Idaho Human Rights Act. I.C. § 67-5909. Respondents contend that the Human Rights Act does not say that the "Legislature" can't discriminate, and that even if there were a conflict, Section 622 controls as

[24] Respondents essentially argue that because the Total Ban is not a racial classification, it cannot be invidious, *see* State Opp. 33—which does not correctly state the law. *See State v. Hart*, 135 Idaho 827, 830, 25 P.3d 850, 853 (2001) (defining invidious discrimination without reference to race); *see also Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 396, 987 P.2d 300, 308 (1999) (same).

the more recently enacted statute. State Opp. 34-35; Leg. Opp. 15-16. What Respondents do not argue, and cannot argue, is that the Total Ban does not discriminate against women. Forcing a woman to carry a pregnancy to term rather than have an abortion hinders her ability to pursue educational goals, access equal employment opportunities, and enjoy other public benefits, thereby imposing enormous costs on her. *See* Opening Br. 38. By denying women access to equal opportunities in these public spaces, and by restricting their exercise of basic rights while failing to impose any equivalent restriction on men, the Total Abortion Ban violates the Idaho Human Rights Act. *See* I.C. § 67-5909(5); *Idaho Comm'n on Hum. Rts. v. Campbell*, 95 Idaho 215, 216-217, 506 P.2d 112, 113-114 (1973).

CONCLUSION

For the foregoing reasons, this Court should declare the Total Abortion Ban unconstitutional and issue a writ of prohibition that forbids Idaho courts from giving effect to the Ban's criminal causes of action; Idaho law enforcement officials from enforcing the unconstitutional Ban, and Idaho professional licensing boards from enforcing the Ban's unlawful suspension and revocation requirements.

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Respectfully submitted,
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I hereby certify that on September 9, 2022, I electronically filed the foregoing with the Clerk of the Court using the iCourt e-file system, and caused the following parties or counsel to be served by electronic means:

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