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Idaho Supreme Court
Melanie Gagnepain, Clerk of the Court
By: Corby King-Clark, Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAII, ALASKA, INDIANA, KENTUCKY, on behalf of itself, its staff, physicians and patients, and Caitlin Gustafson, M.D., on behalf of herself and her patients,

Petitioners,

v.

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

Respondents,

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.

Docket No. 49817-2022

RESPONDENTS' OPPOSITION TO BRIEF IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION AND APPLICATION FOR DECLARATORY JUDGMENT

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I. STATEMENT OF THE CASE

A. Introduction

Mere days after the United States Supreme Court returned the issue of abortion to the States with its decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 22228 (2022), Petitioners renewed their request that this Court to find a right to abortion in the Idaho Constitution with this challenge to Idaho Code § 18-622 ("Section 622"). But to find a right to abortion, this Court would have to infer such a right into one or some of the provisions of Article I, contrary to the intent of the drafters. Looking to the text and history of the Idaho Constitution, no such right lurks in its depths. The drafters cannot be understood to have protected as a fundamental right something that was, and had been for some time, criminally prohibited at all stages except when necessary to save the life of the woman.

Similarly, Petitioners' effort to slip a right to abortion into the equal protection guarantee contained in Idaho's Constitution fails. As the United States Supreme Court persuasively recognized in *Dobbs*, laws that restrict the performance of abortions are neither a sex-based classification nor a pretext for impermissible discrimination against women. There is no equal protection issue with a law that does not treat similarly situated people differently and whose purpose is to preserve preborn human life—a legitimate, indeed a compelling, state interest.

Finally, Petitioners' vagueness argument fails because there is a core of meaning in Section 622 that is ascertainable to persons of ordinary intelligence. The terms Petitioners challenge have long been used in abortion statutes. There is no reason to think that, just because there is no longer a federal constitutional right to abortion, providers are suddenly unable to understand these terms.

The Petition should be denied as procedurally and substantively deficient. Petitioners' policy preferences, disguised as constitutional claims, cannot override the Legislature's policy determination in Section 622 to protect life.

B. Section 18-622 was signed into law in 2020 and became effective on August 25, 2022.

Section 622 makes performing an abortion a felony, except that an affirmative defense exists for abortions performed by physicians in the cases of reported rape or incest, or where "[t]he physician determined, in his good faith medical judgment and based on the facts known to the physician at the time, that the abortion was necessary to prevent the death of the pregnant woman," unless the risk is death by suicide. Idaho Code §§ 18-622(2), (3)(a)(ii), (3)(b)(ii), 3(b)(iii). In all cases, for one of these affirmative defenses to apply, the abortion must have been performed or attempted to be performed "in the manner that, in [the physician's] good faith medical judgment and based on the facts known to the physician at that time, provided the best opportunity for the unborn child to survive, unless, in his good faith medical judgment, termination of the pregnancy in that manner would have posed a greater risk of the death of the pregnant woman." Idaho Code §§ 18-622(3)(a)(iii), (3)(b)(iv). "Abortion" is defined by Idaho Code § 18-604(1) as "the use of any means to intentionally terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child . . . ." Section 622 does not apply to "[m]edical treatment provided to a pregnant woman by a health care professional as defined in this chapter that results in the accidental death of, or unintentional injury to, the unborn child." Idaho Code § 18-622(4).

While enacted in 2020, Section 622 did not become effective until August 25, 2022. Idaho Code § 18-622(1);
https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-1392.html ("JUDGMENT ISSUED" "Jul 26 2022"). Having named a few token respondents, Petitioners now effectively seek a state-wide injunction of Section 622. Pet, Dkt. No. 49817, Prayer for Relief (c) (seeking a declaration that Section 622 is legally invalid and a writ of prohibition preventing inferior Idaho courts from giving effect to Section 622 and Idaho law enforcement and

Idaho professional boards from enforcing it).

C. Section 18-622 is consistent with Idaho's longstanding policy of protecting preborn human life.

As this Court recognized in its August 12, 2022 Opinion, before Idaho policymakers were begrudgingly forced to regulate abortion by the recognition of a federal right to abortion in *Roe v. Wade*, 410 U.S. 113 (1973), abortion at all stages and in almost all circumstances was a crime in Idaho, and had been since early territorial days. *See Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Inc. v. State*, No. 49615, 49817, 49899, 2022 WL 335696, at *6 (Idaho Aug. 12, 2022)[1] ("before *Roe* announced a federal constitutional right to abortion in 1973, abortion had been a long-standing criminal offense in Idaho. *See* Idaho Rev. Stat. §§ 6794, 6795 (1887), *recodified at* Idaho Comp. Stat. §§ 17-1810, 17-1811 (1932), *recodified at* I.C. §§ 18-601, 18-602 (1948), *repealed after* Roe *by an* Act of March 17, 1973, ch. 197, § 2, 1973 Idaho S.L. 443. Indeed, abortion had been a crime in Idaho since its early territorial days and for approximately 26 years before Idaho adopted its constitution in 1890. *See* Act of Feb. 4, 1864, ch. IV, § 42, 1863-64 Idaho (Terr.) Laws 443, *repealed and reenacted by* Act of Dec. 21, 1864, ch. III, Pt. IV, § 42, 1864 Idaho (Terr.) Laws 305, *reenacted by* Act of Jan. 14, 1875, ch. IV, § 42, 1874 Idaho (Terr.) Laws 328."). These pre-*Roe* abortion laws allowed a single exception for when an abortion could be performed: when the pregnant woman's treating physician deemed the abortion "necessary" to "save" or, starting in 1932, to "preserve," her "life." Appendix 1, Resp'ts' Opp'n Br., Dkt. No. 49817[2], at 448 (Act of Feb. 4, 1864, ch. IV, § 42, 1863-64 Idaho (Terr.) Laws 443); App. 2, at 305 (Act of Dec. 21, 1864, ch. III, Pt. IV, § 42, 1864 Idaho (Terr.) Laws 305); App. 3, at 328 (Act of Jan. 14,

[1] Citations to this Court's August 12, 2022 decision will otherwise be to the slip opinion ("Op.").
[2] All citations contained in this brief to an Appendix are to the Appendix to this brief. The page number citations are to the internal citations used in the source documents in each Appendix.

1875, ch. IV, § 42, 1874 Idaho (Terr.) Laws 328); App. 4, at 999-1000 (Idaho Comp. Stat. §§ 17-1810, 17-1811 (1932)); App. 5, at 21-22 (Idaho Code §§ 18-601, 18-602 (1947)).

The purpose of these laws was to protect preborn human life. *See Nash v. Meyer*, 54 Idaho 283, 31 P.2d 273, 280 (1934) (noting that the abortion statute is meant to "discourage abortions because thereby the life of a human being, the unborn child, is taken"). Abortion was heavily disfavored at the time Idaho's Constitution was adopted. In 1901, the Court encapsulated Idaho's views on abortion: "[a]n unnatural abortion, brought about by means of drugs or instruments, violates decency, the best interests of society, the divine law, the law of nature, the criminal statutes of this state, and is not only destructive of a life unborn, but places in jeopardy the life of a human being,—the pregnant woman." *State v. Alcorn*, 7 Idaho 599, 64 P. 1014, 1019 (1901). Consistent with this understanding that abortion was criminally and morally prohibited, the Idaho Supreme Court affirmed convictions under these laws without any suggestion that the prosecutions violated the Idaho Constitution. *See id.*; *State v. Rose*, 75 Idaho 59, 267 P.2d 109 (1954).

Post-*Roe*, the protection of human life, including preborn human life, to the greatest degree possible has remained the public policy of Idaho. *See, e.g.*, Idaho Code § 18-601 (2001) (expressing the "fundamental importance" of Idaho's "'profound interest' in preserving the life of preborn children" and declaring as Idaho's public policy that "all state statutes, rules and constitutional provisions shall be interpreted to prefer, by all legal means, live childbirth over abortion."); Idaho Code § 39-9302(1)(b) (2016) ("It continues to be the public policy of the State of Idaho to promote live childbirth over abortion."); *Blake v. Cruz*, 108 Idaho 253, 260, 698 P.2d 315, 322 (1984) ("Basic to our culture is the precept that life is precious. As a society, therefore, our laws have as their driving force the purpose of protecting, preserving and improving the quality of human existence."). Shortly after *Roe* was decided, Idaho enacted laws regulating abortion but noted that any attempt to comply with *Roe* was not meant to "condon[e], or approv[e] abortion or

the liberalization of abortion laws generally." App. 6 (Act of March 13, 1973, ch. 197, § 1, 1997 Idaho Sess. Laws 443). The 1973 post-*Roe* legislation contained Idaho's first trigger law, which would have automatically restored Idaho's criminal prohibition on abortion if the authority to regulate abortion was returned to the states.[3] *Id.* at 448.

Continuing these policy values, in 2020, the Idaho Legislature passed and the Governor signed into law Section 622 to protect preborn human life in Idaho without additional legislative action as soon as the ability to prohibit abortion was restored to the states. https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2020/legislation/S1385SOP.pdf. A year later, the Fetal Heartbeat Preborn Child Protection Act ("Heartbeat Act"), a trigger law that would criminally prohibit the performance of an abortion after a fetal heartbeat was detectable except in the case of a medical emergency, reported rape, or reported incest (once triggered to effectiveness and unless and until Section 622 was enforceable) was signed into law as Idaho Code § 18-8701[8801] *et seq*. H.B. 366, 66th Leg., 1st Reg. Sess. (Idaho 2021), https://legislature.idaho.gov/sessioninfo/2021/legislation/H0366/.[4] And in the 2022 regular legislative session, the Idaho Legislature amended the Heartbeat Act to create a civil action for abortions performed after a fetal heartbeat was detectable except in the case of medical

[3] The repeal clause and the 1973 trigger laws were repealed in 1990. App. 9 at 50-51 (Idaho Code §§ 18-613-615 (1979)); App. 10 (Idaho Code §§ 18-613-615 (1990)).

[4] Now that both trigger laws are effective, Section 622 supersedes only the criminal and licensing penalties for violations of the Heartbeat Act. *See* Idaho Code § 18-8805(4) ("Nothing in this section [which sets out criminal and licensing penalties for violations of the Heartbeat Act] shall be construed to conflict with the effectiveness of section 18-622, Idaho Code, following the occurrence of the circumstances described in that section. In the event both this section and section 18-622, Idaho Code, are enforceable, section 18-622, Idaho Code, shall supersede this section."). If Section 622 is found unenforceable, the Heartbeat Act's criminal and licensing penalties are enforceable. *Id.* Regardless of the criminal laws, the Heartbeat Act allows a civil action for abortions performed by medical professional after a fetal heartbeat is detected except in cases of medical emergency, reported rape, and reported incest. *Id.*

emergency, reported rape or reported incest. S.B. 1309, 66th Leg., 2d Reg. Sess. (Idaho 2022), https://legislature.idaho.gov/sessioninfo/2022/legislation/S1309/

D. This Court cannot assume Section 622 will negatively impact Idahoans.

Petitioners have identified no competent evidence that Section 622 will negatively impact Idaho women,[5] even if this were something that this Court could consider in deciding this challenge. It is not. As Petitioners admit, their factual allegations speculating on the alleged impact of Section 622 are irrelevant to decide the "pure questions of law" that they raise: they offered their factual allegations only to establish a basis for the Court's exercise of its original jurisdiction. Pet'rs' Br. in Response to this Court's June 30, 2022 Order Setting Hr'g 13-15.

Moreover, *Roe* and *Casey* have been overruled. While Petitioners' allegations of delay and cost might have been valid considerations under the undue burden regime established in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), *Casey* has been overruled. *Dobbs*, 142 S. Ct. at 2279. Thus, Petitioners' (inadmissible) speculation about the possible effects of Section 622, such as delay and increased cost in obtaining out-of-state abortions and increased numbers of women who choose childbirth over abortion, are policy considerations. The Legislature has arrived at the opposite side of the policy ledger, seeking to preserve life, including preborn human life, whenever possible, and it is the Legislature's policy judgments that control.[6]

Even if Petitioners' factual allegations were relevant, Petitioners do not even speculate that

[5] The majority of Petitioners' allegations as to the alleged effect of Section 622 must be stricken as inadmissible. *See* Resp'ts' Mot. to Strike, and Mem. in Support, Dkt. No. 49817.

[6] It is ironic that Petitioners demonstrate such zeal for preserving the separation of powers between the Governor and the Legislature in challenging the Heartbeat Act's civil action while demonstrating an equivalent disdain for that same principle when it comes to preserving the separation of powers between the Judiciary and the Legislature.

they will entirely stop performing abortions in Idaho because of Section 622.[7] *See* Pet., Dkt. No. 49817, ¶ 21 (alleging Section 622 will cause Petitioners to "cease providing abortion services in Idaho *except in the rarest circumstances*") (emphasis added); Mot. to Expedite, Dkt. No. 49817, at 2 (alleging Petitioners will "cease *nearly all* abortion services in Idaho" once Section 622 goes into effect.) (emphasis added.); Gustafson Decl. ¶ 22 (failing to conclude that she would never perform an abortion under one of Section 622's affirmative defenses). Moreover, Petitioners also present no competent evidence that every other physician in Idaho has made or will make the same determination or have the same concerns as they. For over 100 years, abortions were criminally prohibited in Idaho except where a physician determined that abortion was necessary to save the life of the pregnant woman, yet Petitioners fail to even allege that Idaho women were prevented from obtaining necessary life-saving medical care for pregnancy complications. There is simply no admissible evidence before this Court that Idaho women be denied necessary life-saving medical care, or abortions in the cases of reported rape and reported incest, because of Section 622.

II. ADDITIONAL ISSUES PRESENTED

A. Should the Court deny the Petition because the requested writs cannot issue and therefore this Court cannot exercise its original jurisdiction?

B. Should the Court dismiss the State of Idaho from this proceeding?

C. Should the Court deny three of Petitioners' claims for lack of standing?

III. ARGUMENT

A. The Petition should be dismissed as procedurally improper.

[7] Notably, Petitioners' speculation was generated before the challenged law went into effect. There is no evidence, inadmissible or otherwise, as to what Petitioners will or have done now that Section 622 is enforceable.

As with their challenge to the civil action contained in the Heartbeat Act (Dkt. No. 49615), Petitioners attempt to shoehorn an advisory declaratory judgment action into this Court's limited original jurisdiction to issue certain writs under article V, section 9 of the Idaho Constitution. This is apparent on the face of the Petition: Petitioners do not even attempt to name as respondents all the individuals whose conduct they seek to enjoin, and they do not request valid writs. And because Petitioners have not requested valid writs, this Court cannot exercise its original jurisdiction. The Petition should be denied on procedural grounds, but in any case, the State of Idaho should be dismissed as a respondent and Petitioners' first two claims denied for lack of standing.

1. The requested writs of prohibition cannot issue and therefore this Court cannot exercise its original jurisdiction.

The petition seeks to restrain parties who are not named as respondents, and therefore the writ sought is invalid. As discussed in prior briefing, the Court "may issue a writ directing *the respondent* to act in accordance with the writ," not a third party. I.A.R. 5(d) (emphasis added) Resp'ts' Opp'n Br., Dkt. No. 49615, at 8-9. But Petitioners seek a writ "preventing (1) inferior Idaho courts from giving effect to [Section 622's] criminal cause of action, (2) Idaho law enforcement officials from enforcing [Section 622] and (3) Idaho professional licensing boards from enforcing [Section 622's] unlawful suspension and revocation requirements." Pet., Dkt. No. 49817, at 1, 18. Petitioners do not name any court as a respondent, they do not name the officials who oversee the majority of law enforcement in Idaho, nor do they name all of Idaho's professional licensing boards who might be required by Section 622 to impose licensing penalties on a "health care professional." For example, Section 622 could apply to the Board of Midwifery. Idaho Code § 54-5504. Therefore, the writ is invalid because it seeks to restrain non-parties, who were given no notice or opportunity to defend against this action.

With regard to law enforcement, while the Governor oversees the Idaho State Police, local

sheriffs perform most law enforcement in the State without oversight of the Governor or the Attorney General; but no sheriffs are named as respondents. Likewise, the Attorney General performs some criminal prosecution, but the majority of criminal prosecution is performed by local elected prosecutors who are independent constitutional officers. Idaho Const. art. V, § 18. Apparently recognizing this, Petitioners name two prosecutors as respondents, yet they fail to name the remaining 42 county prosecutors necessary to achieve Idaho-wide relief.

As to the requested writ against the lower courts, again, the "inferior courts" are not named as respondents. Moreover, it is unclear what the requested writ would do. If Petitioners seek what *Whole Woman's Health* sought regarding Texas Senate Bill 8, "an order enjoining all state-court clerks from docketing [Trigger Law] cases and all state-court judges from hearing them," *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 532, 211 L. Ed. 2d 316 (2021), such relief would violate article V, section 20 of the Idaho Constitution, which grants district courts "original jurisdiction in all cases, both at law and in equity." And, if Petitioners seek a writ requiring lower courts to dismiss a Trigger Law case once it is docketed, then "forbidding Idaho courts . . . from giving effect to" (Pet'rs' Br., Prayer for Relief (c)), Section 622 would simply duplicate the declaratory relief they seek.[8] Idaho courts are required to adhere to Idaho Supreme Court decisions. *State v. Grist*, 147 Idaho 49, 53, 205 P.3d 1185, 1189 (2009). And in either case, the requested writ cannot constitute an order that arrests court proceedings. What Petitioners really seek is an improper advisory opinion.

Further, a writ of prohibition ordinarily cannot issue when "there is a plain, speedy, and adequate remedy in the ordinary course of law." *Reclaim Idaho v. Denney*, 169 Idaho 406, 423, 497 P.3d 160, 177 (2021). Petitioners have failed to establish that such a remedy does not exist for

[8] This case is a declaratory judgment action camouflaged as a writ request.

them. There is no reason they could not either (1) bring their challenge in district court seeking a declaratory judgment and injunctive relief, or (2) raise their arguments as an affirmative defense to an action brought under Section 622. *See, e.g.*, *Wasden ex rel. State v. Idaho State Bd. of Land Comm'rs*, 150 Idaho 547, 551–54, 249 P.3d 346, 350–53 (2010) (granting Land Board's motion to dismiss where a "plain, speedy, and adequate remedy in the ordinary course of law" existed by means of joining an action for declaratory relief with a request for injunctive relief); *Little v. Broxon*, 31 Idaho 303, 170 P. 918, 919 (1918) (denying a writ of prohibition seeking to prohibit a state official from bringing a case to enforce state law, and holding it was not appropriate for an original action because the petitioner had a plain, speedy and adequate remedy in the form of defending against the lawsuit, if it was ever brought—and "[i]f no action is commenced, no remedy is necessary"). Religious defendants, for example, frequently raise constitutional and civil rights issues as affirmative defenses to statutory causes of action. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012). In any district court action, Petitioners would have the ability to appeal an unfavorable district court ruling.

This Court has stated that a writ can sometimes issue when there is an alternative adequate remedy available "where there is 'urgency of the alleged constitutional violation and the urgent need for an immediate determination.'" *Reclaim Idaho*, 169 Idaho at 423, 497 P.3d at 177 (quoting *Ybarra v. Legislature by Bedke*, 166 Idaho 902, 906, 466 P.3d 421, 425 (2020)). But the cases that this Court cited in support of this conclusion either require a circumstance where no one else has standing or the willingness to bring the petition (*Coeur d'Alene Tribe v. Denney*, 161 Idaho 508, 387 P.3d 761 (2015)), or an external factor mandating that a decision must be issued in a very short time frame (*Regan v. Denney*, 165 Idaho 15, 437 P.3d 15 (2019)). *Reclaim Idaho*, 169 Idaho at 424, 497 P.3d at 178. Thus, in *Reclaim Idaho*, the Court felt that the 60-day period for filing a referendum of the law—the very filing that would be affected by the challenged law if it were to

stand—met this second criteria for the exercise of original jurisdiction. *Id.* But neither of these circumstances are present here, where Idaho women can sue and no external factor mandates that a decision be issued in a matter of days.[9] Moreover, the evidence of "urgency" Petitioners present is inadmissible and cannot be considered. *See* Resp'ts' Mot. to Strike and Mem. in Support, Dkt. No. 49817.

Thus, as argued in previous filings, the exercise of this Court's original jurisdiction is not appropriate. Petitioners must seek a writ that the Court has the power to issue for this Court to exercise its original jurisdiction. *Reclaim Idaho*, 169 Idaho 406, 497 P.3d at 177; Idaho Const. art. V, § 9 ("The Supreme Court shall also have original jurisdiction to issue writs of mandamus, certiorari, prohibition, and habeas corpus[.]"). Because Petitioners do not seek a writ the Court has the power to issue, the Court cannot exercise its original jurisdiction.

2. The State of Idaho is not a proper respondent.

The State of Idaho is not a proper respondent in this original action as it is not the proper subject for the issuance of a writ. A writ of prohibition can only issue against "*any court, corporation, board or person*" when the appropriate conditions are met. I.R.C.P. 74(a)(2) (emphasis added). The State of Idaho is not any of those, so a writ of prohibition cannot lie against it. Further, the petition names the State of Idaho as a respondent, but Petitioners do not request a writ against the State. Indeed, a writ against the State cannot issue: the "State of Idaho" cannot act on its own and has no proceedings to arrest, and there is no support for a writ of prohibition that restrains every citizen in the State all at once. The State of Idaho should be dismissed from this action.

[9] If, as Petitioners argue, the required urgency for the exercise of original jurisdiction just means that people wish to have clarity as to what the law is, original jurisdiction applies to every question of constitutional or statutory interpretation.

3. Petitioners lack standing to sue on behalf of Idaho women.

Because Petitioners may not bring claims on behalf of third parties, their claims that a right to abortion exists under the Idaho Constitution, that Section 622 violates equal protection, and that Section 622 violates the Idaho Human Rights Act are barred for lack of standing. As this Court has explained, "even though a potentially illegal action may affect the litigant as well as a third party, the litigant may not rest his claims on the rights or legal interests of the third party." *State v. Doe*, 148 Idaho 919, 936, 231 P.3d 1016, 1033 (2010) (cleaned up). This "is based on the presumption that the third parties themselves are the best proponents of their own rights." *Id.*

Petitioners here are abortion providers, not women seeking an abortion. Apart from their vagueness claim, all of Petitioners' claims rest on the asserted rights or legal interests of third parties.[10] Instead, Petitioners attempt to bring these claims under the theory of third-party standing, which requires that they satisfy three elements: "(1) [they] must have suffered injury in fact, providing a significantly concrete interest in the outcome of the matter in dispute; (2) [they] must have a sufficiently close relationship to the party whose rights [they are] asserting; *and* (3) there must be a demonstrated bar to the third parties' ability to protect their interests." *State v. Doe*, 148 Idaho 919, 936, 231 P.3d 1016, 1033 (2010) (citing *Powers v. Ohio*, 499 U.S. 400 (1991)) (emphasis added). The claims asserted on behalf of non-party women fail to satisfy these elements. Petitioners have not alleged they suffered injury in fact[11]—there is no allegation of a charge or

[10] Petitioners do not allege that they are in the class of persons protected by the asserted constitutional interests in obtaining an abortion, equal protection, and rights under the Idaho Human Rights Act.

[11] Notably, the Court of Appeals, in an unpublished decision, applied the *Powers* elements and found that the absence of injury to two pro-life plaintiffs who sought a writ to halt all elective abortions in Idaho was fatal to their standing. *Bayes v. State*, No. 37469, 2010 WL 9589689, at *2–3 (Idaho Ct. App. Dec. 20, 2010) (unpublished). This case is instructive as it is the very inverse of what Petitioners seek to do as pro-abortion advocates.

even a threat under Section 622. They have not alleged a familial, associational, or other "sufficiently close" relationship with non-party women whose interests they attempt to assert. And they have not demonstrated any bar to non-party women being able to protect their own interests—there is no reason why a woman desiring an abortion could not bring a claim under a pseudonym to assert her own interest in privacy or equal protection—as, indeed, happened in *Roe*. *See Roe*, 410 U.S. at 120. Petitioners lack third-party standing as to their claims brought on behalf of non-party women.

Notably, Petitioners cannot rely on pre-*Dobbs* federal caselaw regarding third party standing and abortion providers, such as the plurality decision[12] in *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103, 2118–19 (2020), *abrogated by Dobbs*, or on this Court's decisions that have relied on incorrect federal caselaw regarding third-party standing and abortion providers, such as *Kootenai Medical Center ex rel. Teresa K. v. Idaho Department of Health & Welfare*, 147 Idaho 872, 879, 216 P.3d 630, 637 (2009) (relying on *Singleton v. Wulff*, 428 U.S. 106, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1977)). In overruling *Roe* and *Casey*, the U.S. Supreme Court in *Dobbs* specifically criticized treatment of third-party standing in abortion cases, stating that these cases "have ignored the Court's third-party standing doctrine," and have had to "engineer exceptions to longstanding background rules." *Dobbs*, 142 S. Ct. at 2275-76 (2022). Post-*Dobbs*, courts cannot continue entertaining a special exception to third-party standing rules for abortion cases. Because Petitioners cannot satisfy the traditional elements of third-party standing, they cannot bring claims on behalf of all Idaho women.

B. There is no right to abortion under the Idaho Constitution.

"On its face" there is no "right to abortion under the Idaho Constitution." Op. 10. Thus,

[12] Chief Justice Roberts' fifth-vote concurrence did not address—and therefore did not *adopt*—the third-party standing analysis. *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2133 (2020).

Petitioners ask this Court to "break[] new legal ground" to "infer [a right to abortion] exists absent *Roe*" by reading such a right "into one, some or a combination of certain sections of Article I of the Idaho Constitution" despite the fact that abortion was criminally prohibited in Idaho at all stages from early territorial days until *Roe* was decided. *Id*. The Court should decline Petitioners' request. No such right is protected by the Idaho Constitution. To the contrary, the text and history of Idaho's Constitution demonstrates that the Constitution considers unborn human life to be a person entitled to due process protections. Petitioners' various arguments to infer a right to abortion into the Idaho Constitution are unavailing.

1. This Court has never recognized a "right to procreate" under the Idaho Constitution.

As this Court recognized when it held that Petitioners ask it to break new legal ground in finding a right to abortion under the Idaho Constitution, Petitioners err in their assertion that this Court has already held that "a right to decide whether to procreate" is a fundamental right under the Idaho Constitution.[13] While the Court has repeated dicta that procreation is a fundamental right under the Idaho Constitution, that dicta can be traced back to more dicta discussing fundamental rights under *the United States Constitution* in *Newlan v. State*, 96 Idaho 711, 535 P.2d 1348 (1975). *See Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 126, 15 P.3d 1129, 1134 (2000); *Idaho Sch. For Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 581, 850 P.2d 724, 732; *Tarbox v. Tax Comm'n*, 107 Idaho 957, 960 n.1, 695 P.2d 342, 345 n.1 (1984). *Newlan*'s *dicta* is not persuasive as to Petitioners' argument because it was directed toward the rights contained in the federal constitution and was distorted by the now-overruled *Roe* and *Casey*. 96 Idaho at 713, 535

[13] While an Idaho district court did find a fundamental right to procreation (meaning abortion) as part of a generalized privacy right under the Idaho Constitution, the court's conclusion was based on the same errors as those in Petitioners' arguments. *See Planned Parenthood of Idaho, Inc. v. Kurtz*, No. CVOC0103909D, 2002 WL 32156983, at *3, *4 (Idaho 4th Jud. Dist. June 12, 2002).

P.2d at 1350 ("*[T]he United States Supreme Court* has approached the problem of statutory classification on a two-tier basis. If the classification is suspect because it is based on matters such as race, national origin or alienage, or the statute infringes upon fundamental rights such as voting, procreation or rights regarding criminal procedure then strict judicial scrutiny is applied[.]") (emphasis added). This flaw is also true of the Court's pre-*Roe* dicta in *State v. Cantrell*, 94 Idaho 653, 655 n.9, 496 P.2d 276, 278 n.9 (1972), where it appeared to conflate the state and federal constitutions.

But in any case, any "right to procreate" is vastly different from a right to intentionally terminate human life, which is what abortion does. *See Dobbs*, 142 S. Ct. at 2268, 2277 (quoting from *Roe* that "abortion is 'inherently different from marital intimacy,' 'marriage,' or 'procreation.'"). Idaho's Constitution allows the State to prohibit the intentional termination of human life, which the State does, for example, with its prohibition on assisted suicide. *See* Idaho Code § 18-4017(1).

2. A right to abortion does not exist in the Idaho Constitution because it is not expressly guaranteed.

Turning to this question as a question of first impression, an abortion right cannot be held to exist in the Idaho Constitution because, as this Court has already recognized, such a right is not expressly guaranteed by the Idaho Constitution. A right must be expressed as a "positive right" in the Idaho Constitution to be protected as a fundamental right. In *Evans*, the Court abandoned its previous policy of a case-by-case determination of whether a right is fundamental[14] to "hold that

[14] In *Thompson v. Engelking*, 96 Idaho 793, 804, 537 P.2d 635, 646 (1975), the Court rejected the concept of fundamental rights. There are a few caveats: *State v. Bennion*, 112 Idaho 32, recognized a fundamental right to a jury trial under article I, section 7 and *Johnson v. Sunshine Mining Co., Inc.*, 106 Idaho 866, 869 n.4, 684 P.2d 268, 271 n.4 (1984), suggested that fundamental rights could be found when the Court refused to find that article I, section 18 "guarantee[ed] the common law rights which were in effect at the time the Constitution was adopted, as 'fundamental rights.'"

the 'fundamental rights' found in our state constitution are those expressed as a positive right."123 Idaho at 581, 850 P.2d at 732. While the Court continued on in *dicta* to suggest, based on *dicta* from its earlier decision in *Tarbox*, that "rights which are not directly guaranteed by the state constitution may be considered to be fundamental if they are implicit in our State's concept of ordered liberty," the Court has never recognized a fundamental right on this basis.[15] *Id.* at 582, 850 P.2d at 733. In *Evans*, the Court emphasized how very limited the fundamental rights contained in the Idaho Constitution are, recognizing that a right must be "directly guaranteed by the state constitution" to be fundamental. *Id.* Thus, for example, even though the Idaho Constitution "imposes a '*duty [upon] the legislature* [ ] to establish and maintain a general, uniform and thorough system of public, free common schools,' . . . [i]t does not establish education as a basic fundamental right." *Id.* (quoting Idaho Const. art. IX, § 1).

Since deciding *Evans*, the Court has only found fundamental rights on two occasions, and only where the Idaho Constitution directly expressed the right as a positive guarantee. In *Reclaim Idaho*, the Court found a fundamental right to initiate legislation and hold referenda based on the express language of article III, section 1, particularly the language that "The people reserve to themselves the power . . . ." 169 Idaho at 427-30, 497 P.3d at 181-84. And in *Van Valkenburgh*, the Court found that the right to vote is a fundamental right because of the express guarantee of the right of suffrage in the Idaho Constitution. 135 Idaho at 126, 15 P.3d at 1134 (relying in part on Idaho Const. art. I, § 19) ("No power, civil or military, shall at any time interfere with or prevent

[15] The Court's subsequent articulations of the *Evans* test to find a fundamental right—"'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.'"—is inaccurate in the assumption that the secondary ground for finding a fundamental right was part of the holding in *Evans*, rather than dicta. *Reclaim Idaho*, 169 Idaho at 427, 497 P.3d at 181 (quoting *Van Valkenburgh*, 135 Idaho at 126, 15 P.3d at 1134 (citing *Evans*, 123 Idaho at 581–82, 850 P.2d at 732–33; *Simpson v. Cenarrusa*, 130 Idaho 609, 615, 944 P.2d 1372, 1378 (1997)).

the free and lawful exercise of the right of suffrage.").

In contrast, the Court repeatedly refused to find a substantive right under article I, section 18, which provides that "Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property or character, and right and justice shall be administered without sale, denial, delay, or prejudice." *Venters v. Sorrento Del., Inc.*, 141 Idaho 245, 252, 108 P.3d 392, 399 (2004) ("Art. I, § 18 . . . did not create any substantive rights"); *see also Gomersall v. St. Luke's Reg'l Med. Ctr., Ltd.*, 168 Idaho 308, 319, 483 P.3d 365, 376 (2021) (minor does not have a fundamental right under article I, section 18 to access the courts to pursue a medical malpractice action). Similarly, the Court has also declined to find that holding public office and being listed on a ballot is a fundamental right. *Rudeen v. Cenarrusa*, 136 Idaho 560, 570, 38 P.3d 598, 608 (2001).

Because the Idaho Constitution does not directly guarantee a right to abortion—or even Petitioners' highly sanitized "right to privacy in making intimate familial decisions"—a right to abortion does not exist in the Constitution.

3. Even if a right to abortion could be found absent an express guarantee, such right cannot be inferred.

Even if this Court were to conclude that a right to abortion can be inferred into the Constitution despite the lack of an express guarantee, the alleged right must still be inferred into extant constitutional text. While Petitioners studiously avoid the actual constitutional text, preferring instead to rely on inapplicable dicta and unrelated judicial decisions, the text and intent behind article I, section 1; article I, section 21; and/or article I, section 17, all identified by Petitioners as potential "homes" for their new constitutional right, are the touchstones to determine whether a right to abortion exists.

"When interpreting constitutional provisions, the fundamental object is to ascertain the

intent of the drafters by reading the words as written, employing their natural and ordinary meaning, and construing them to fulfill the intent of the drafters." *State v. Winkler*, 167 Idaho 527, 531, 473 P.3d 796, 800 (2020) (quotation omitted). "Where the constitutional provision is 'clear and unambiguous,' the expressed intent of the drafters must be given effect." *Id.* (quotation omitted). "A constitutional provision 'is ambiguous where reasonable minds might differ or be uncertain as to its meaning.'" *Id.* (quotation omitted). Petitioners' argument fails because there is no reason to believe that the drafters of these constitutional provisions intended any of them to provide a right to abortion.

4. There is no right to abortion under article I, section 1.

Article I, section 1 provides, "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." Petitioners would have this Court read "liberty" to mean obtaining an abortion at the woman's election. Put differently, Petitioners would have this Court read "liberty" to mean "the freedom to do whatever one wants." But this cannot possibly be what the drafters of Idaho's Constitution intended. If this was their intent, there would be no room for government at all, because government, of necessity, must place some restrictions on individual conduct to allow people to live together in society. *See Dobbs*, 142 S. Ct. at 2258 (noting that "attempts to justify abortion through appeals to a broader right to autonomy and to define one's 'concept of existence' prove too much. Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like." (quotation omitted)). Instead, for an inalienable right, including a liberty right, to be protected under article I, section 1, it must have been deeply ingrained in Idaho's history and tradition at the time the Constitution was adopted. *See Newland v. Child*, 73 Idaho 530, 537, 254 P.2d 1066, 1069 (1953) (interpreting the constitutional provisions to hold that the "right to own and enjoy private

property" as "one of the natural, inherent, and inalienable rights of free men" because "[i]t is not a gift of our constitutions[;] it *existed before them*.") (emphasis added).

This historical requirement is consistent with how the U.S. Supreme Court has interpreted the scope of the protected "liberty" under the Fourteenth Amendment to the U.S. Constitution. U.S. Const. amend. XIV (prohibiting "any State [from] depriv[ing] any person of . . . liberty . . . without due process of law"). The U.S. Supreme Court emphasized that "historical inquiries" into whether a right is "objectively, deeply rooted in this Nation's history and tradition" "are essential whenever [a Court is] asked to recognize a new component" of protected "liberty" "because the term 'liberty' alone provides little guidance." *Dobbs*, 142 S. Ct. at 2247. "'Liberty' is a capacious term. As Lincoln once said: 'We all declare for Liberty; but in using the same word we do not all mean the same thing.'" *Id.* Thus, the Court cautioned, in interpreting what is meant by "liberty," "we must guard against the natural human tendency to confuse what [the Fourteenth Amendment] protects with our own ardent views about the liberty that Americans should enjoy." *Id.*

Thus, would the drafters of the Idaho Constitution have understood a right to obtain an abortion to be a "liberty" that is part of the inalienable rights of man? The answer is patently no. As discussed above, abortion was a serious criminal offense before and at the time Idaho's Constitution was adopted. Starting in 1864 and continuing until 1973, first the territory and then the State of Idaho criminally prohibited the performance of abortion with the only exception being to save a woman's life. *See supra* Section I.C. In 1887, shortly before Idaho's Constitution was adopted, two statutes explicitly prohibited performing, soliciting, and/or submitting to abortions at any stage of gestation.[16] App. 8, at 734-35 (Idaho Rev. Stat. §§ 6794, 6795 (1887)); *Alcorn*, 7

[16] It is puzzling why Petitioners appear to argue the common law understanding of abortion trumps Idaho's criminal prohibition of abortion at all stages in interpreting the Idaho Constitution. Pet'rs Br., Dkt. No. 49817, at 20. As discussed above, this Court is bound to the intent of the drafters of

Idaho 599, 64 P. 1014, 1016 (affirming a conviction for manslaughter resulting from the performance of an abortion and the death of the pregnant woman when there was evidence that the woman believed she had been pregnant a little over two months and distinguishing Idaho's statutes from common law, where "an abortion could not be committed prior to the quickening of the fetus."). In 1901, the Court encapsulated Idaho's views on abortion as violating "decency, the best interests of society, the divine law, the law of nature, the criminal statutes of this state, and is not only destructive of a life unborn, but places in jeopardy the life of . . . the pregnant woman." *Id.* at 1019.

Given this history, there is no basis from which to conclude that the drafters understood the inalienable right of liberty to mean a protected right to terminate preborn life. Certainly, one would expect that such a sea change—from criminal prohibition to protected right—would have been discussed by the drafters of the Constitution, if not enshrined explicitly, yet no such mention was made at the Constitutional Convention. *See* 1 Proceedings and Debates of the Constitutional Convention of Idaho (I.W. Hart ed., 1912); 2 Proceedings and Debates of the Constitutional Convention of Idaho (I.W. Hart ed., 1912). Indeed, if anything, Idaho's history and the text of

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Idaho's Constitution in interpreting constitutional protections. At the time of the drafting of Idaho's Constitution, the common law understanding of abortion was irrelevant. Abortion was criminally prohibited at all stages under Idaho's laws. *See* App. 8, at 734-735 (Idaho Rev. Stat. §§ 6794, 6795 (1887))*; Alcorn*, 7 Idaho at 606, 64 P. 1014 at 1016 ("At the common law an abortion could not be committed prior to the quickening of the [fetus]. *This is not the case under our statutes*.") (emphasis added). This vital fact was absent from *Pro-Choice Miss v. Fordice*, 716 So.2d 645 (Miss. 1998), which Petitioners rely upon. Pet'rs' Br., Dkt. No. 49817, at 20. In *Pro-Choice Mississippi*, the Mississippi Supreme Court found a right to abortion in the form of a right to privacy in the state constitution in part because abortion was illegal only after quickening at the time the Mississippi Constitution was adopted. *Id.* at 651 ("[A]t the time the Mississippi Constitution was adopted, abortion was legal until quickening, some four to five months into pregnancy . . . . The State's illegality argument, that the framers intended to preclude protection of abortion, is without merit.")

article I, section 1 illustrate that the Idaho Constitution actually *prohibits* abortion because the unborn child has due process protections.

Petitioners' article I, section 1 "natural rights" argument thus also fails. *See* Pet'rs' Br., Dkt. No. 49817, at 20-22. Black's Law Dictionary defines "natural right" as "a right that is conceived as part of natural law and that is therefore thought to exist independently of rights created by government or society, such as the right to life, liberty, and property. *Right*, Black's Law Dictionary (11th ed. 2019); *see also Marty v. State*, 117 Idaho 133, 143, 786 P.2d 524, 534 (1989) (quoting *Surocco v. Geary*, 3 Cal. 69, 73 (1853) (referencing "the natural rights of man, independent of society or civil government"). Natural rights are limited to those rights which form the basis of the social compact and that are consistent with "the moral law." *See Doe v. Maher*, 515 A.2d 134, 148-49 (Conn. 1986). The Idaho Supreme Court, writing in 1901, has already established that the termination of preborn human life is not a natural right in Idaho, describing an "unnatural abortion" as "violat[ing] decency, the best interests of society, the divine law" and "the law of nature." *Alcorn*, 7 Idaho 599, 64 P. at 1019. Ultimately, this Court cannot ignore the inescapable difference between abortion and any other liberty interest or alleged "natural right." "What sharply distinguishes the abortion right" from other liberty rights is the incontrovertible fact that "[a]bortion destroys . . . the life of an unborn human being." *Dobbs*, 142 S. Ct. at 2258 (cleaned up).

The conclusion that article I, section 1's guarantee of liberty does not contain a right to abortion is consistent with the U.S. Supreme Court's decision in *Dobbs*, which offers compelling persuasive precedent. This Court is typically guided by the U.S. Supreme Court's interpretation of analogous federal constitutional provisions, unless there is good reason in Idaho's history and circumstances to depart from the federal interpretation. *See CDA Dairy Queen, Inc. v. State Ins. Fund*, 154 Idaho 379, 383-84, 299 P.3d 186, 190-91 (2013) ("Generally, the federal framework is

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.") Here there is no reason to depart.

In *Dobbs*, the U.S. Supreme Court concluded that the Fourteenth Amendment did not protect a right to an abortion as a protected "liberty" because "a right to abortion is not deeply rooted in the Nation's history and traditions." 142 S. Ct. at 2253. In reaching its conclusion, the U.S. Supreme Court emphasized the state of abortion regulations, including Idaho's, twenty-one years before Idaho's Constitution was adopted, i.e., as they existed at the time the Fourteenth Amendment to the U.S. Constitution was ratified. *Id.* at 2252-53 ("By 1868, the year when the Fourteenth Amendment was ratified, three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening."); *Id.* at 2297-98 (reproducing Idaho's 1864 law prohibiting abortion in the Appendix). The U.S. Supreme Court even cited this Court's decision in *Nash v. Meyer*, 54 Idaho 283, 301, 31 P.2d 273, 280 (1934) as part of its reasoning. 142 S. Ct. at 2256. This Court should follow the reasoning in *Dobbs* to conclude that there is no right to abortion in the liberty protected by article I, section 1.

5. <u>There is no right to abortion under article I, section 21</u>.

Not content with arguing that "liberty" has any meaning that this Court chooses to assign to it, Petitioners would similarly turn article I, section 21 into a substantive guarantee of rights at the Court's unfettered discretion. Petitioners' limitless interpretation of article I, section 21 is unsupported and inconsistent with the intent of the drafters.

Article I, section 21 provides, "[t]his enumeration of rights shall not be construed to impair or deny other rights retained by the people." As Petitioners admit, this provision is solely a reservation of rights "accorded . . . *before* the constitution was adopted" and must be read narrowly to encompass only rights that existed before Idaho's Constitution was adopted.

Electors of Big Butte Area v. State Bd. of Educ., 78 Idaho 602, 612, 308 P.2d 225, 231 (1957) ("*Big Butte*") (emphasis added); *Cameron v. Lakeland Class A Sch. Dist. No. 272, Kootenai Cnty.*, 82 Idaho 375, 353 P.2d 652 (1960) (holding that a statute requiring a school to be maintained at the location where previously maintained did not violate article I, section 21 because the inherent right of parental control over public schools reserved by article I, section 21 was limited); Pet'rs' Br., Dkt. No. 49817, at 18 ("The *Big Butte* Court located that fundamental right in Art. I, § 21 because it was a right accorded to parenthood before the Idaho constitution was adopted and so it was retained by the people.") (cleaned up). Thus, the fact that abortion was criminally prohibited at the time the Constitution was adopted precludes any notion that article I, section 21 substantively guarantees a right to abortion.

Petitioners' effort to expand a right to "participate in the supervision and control of the education of their children," in other words, a right to care for and raise one's live children, to a right to intentionally terminate the lives of preborn children is confounding, to say the least. Pet'rs' Br., Dkt. No. 49817, at 18 (quoting *Big Butte*, 78 Idaho 602, 612, 308 P.2d 225, 231 (1957). The right to raise and educate born children does not give parents the fundamental right to take the lives of those children. *State v. Row*, 131 Idaho 303, 306, 955 P.2d 1082, 1085 (1998) (mother convicted of the first-degree murder of her children). Indeed, the cases that Petitioners rely upon demonstrate the high value that the drafters of the Idaho Constitution placed on bearing and raising children. *Martin v. Vincent*, 34 Idaho 432, 435-36, 201 P. 492, 493 ("The right of a parent to the custody, control, and society of his child is one of the highest known to the law. The family is a unit of society and is so recognized by the state.") Petitioners' analogy is patently inapposite to the question of whether the Idaho Constitution contains a right to *terminate* the lives of preborn children. Again, it demonstrates that, if anything, abortion is constitutionally prohibited.

Similarly, Petitioners cannot stretch a case establishing a right to publicly express one's

tastes in terms of hair length to encompass a right to terminate preborn life. In *Murphy v. Pocatello School District No. 25*, the Court found a protected right of personal taste "to wear one's hair in any manner desired" "under both the Idaho Constitution, [article] 1, [sections] 1 and 21, and under the Ninth Amendment of the United States Constitution[.]" 94 Idaho 32, 37-38, 480 P.2d 878, 883-84 (1971) (footnote omitted). However, value of this precedent in interpreting article I, section 21 is questionable. The Court in *Murphy* only mentioned the Idaho Constitution briefly and without any explanation as to how or why article I, sections 1 and 21 applied. The Court's only detailed discussion of potentially applicable constitutional provisions was of the First, Fifth, Fourteenth, and Ninth Amendments to the U.S. Constitution. *Id.* Further, the Court's rationale—that the absence of a specific constitutional provision related to privacy compelled the conclusion that it existed under the Ninth Amendment—is deeply questionable. *Id*. This Court has recognized *Murphy*'s limited precedential value. *Murphy* has been cited only a few times in Idaho Supreme Court cases, has not been cited by the Court since 2001, has never been cited by the Court outside of the school context, and has never been relied upon by the Court to find any right under the Idaho Constitution. *See Johnson v. Joint Sch. Dist. No. 60, Bingham Cnty.*, 95 Idaho 317, 508 P.2d 547 (1973); *Rogers v. Gooding Pub. Joint Sch. Dist. No. 231*, 135 Idaho 480, 20 P.3d 16 (2001), *overruled on other grounds by City of Osburn v. Randel*, 152 Idaho 906, 277 P.3d 353 (2012); *Bauer ex. rel. Bauer v. Minidoka Sch. Dist. No. 331*, 116 Idaho 586, 587, 778 P.2d 336, 337 (1989). To the extent that *Murphy* has any precedential value whatsoever, it is strictly limited to the question of hair length and is immaterial to this case.

6. <u>There is no right to abortion under article I, section 17</u>.

Article I, section 17 of Idaho's Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue without probable cause shown by affidavit, particularly

describing the place to be searched and the person or thing to be seized." This provision limits the means by which evidence is obtained. It does not govern the conduct that the State may regulate; more specifically, nothing in this provision relates to the State's ability to regulate abortion. Indeed, the "purpose of [this provision] is to safeguard the privacy of citizens by insuring against the search of premises where probable cause is lacking," i.e., to control how evidence is gathered. *State v. Lewis*, 170 Idaho 267, 509 P.3d 1196, 1198 (Idaho Ct. App. 2022) (citing *State v. Yoder*, 96 Idaho 651, 653, 534 P.2d 771, 773 (1975)). Petitioners cite to no Idaho Supreme Court case that supports the inferential leap they seek. *See* Pet'rs' Br., Dkt. No. 49817, at 19 (citing *State v. Donato*, 135 Idaho 469, 20 P.3d 5 (2001) and *State v. Guzman*, 122 Idaho 981, 842 P.2d 660 (1992)).

While article I, section 17 occasionally offers greater privacy protections than the federal Fourth Amendment (again, only in the context of search and seizure), this Court has generally only recognized greater bodily privacy protections when an Idaho-specific circumstance compels a recognition of greater privacy protections, such as when Idaho's "unique rural tradition" justified a different definition of curtilage, or when the Court rejected a good faith exception to the warrant requirement based on its long-standing jurisprudence regarding the Idaho Constitution. *See Donato*, 135 Idaho at 472, 20 P.3d at 8 (discussing *State v. Webb*, 130 Idaho 462, 943 P.2d 52 (1997) and *Guzman*). Thus, even if the right of bodily privacy in the context of search and seizure law were relevant, Idaho's long-standing tradition of prohibiting abortion and promoting life would not justify finding a right to abortion.

7. The conclusions of other state courts interpreting their constitutions do not compel finding a right to abortion in Idaho's Constitution.

To the extent that the decisions of other state courts interpreting their state constitutions have any persuasive value, not all courts to have faced the question have found a right to abortion

in their constitutions. *MKB Mgmt. Corp. v. Burdick*, 855 N.W.2d 31, 45-46 (N.D. 2014) (Vande Walle, C.J.) (in a fractured decision, writing "[O]ur state constitutional provisions were not intended to encompass a fundamental right to abortion justifying review under strict scrutiny and the compelling state interest test."); *Mahaffey v. Attorney General***,** 564 N.W.2d 104, 109-10 (Mich. Ct. App. 1997) (Michigan constitution does not guarantee a right to abortion beyond the federal right). At least two of the courts that did find a right to abortion in their state constitutions were heavily influenced by the now-overruled decisions in *Roe* and *Casey*. *See Preterm Cleveland v. Voinovich*, 627 N.E.2d 570, 584 (Ohio 1993) ("In this case, we are guided by [*Casey*] which does establish the standards under the United States Constitution."); *Pro-Choice Mississippi v. Fordice*, 716 So.2d 645 (Miss. 1998) (relying heavily on the historical discussion of abortion in *Roe*); *Hope Clinic for Women, Ltd. v. Flores*, 991 N.E.2d 745, 768-769 (Ill. 2013) (interpreting the state due process clause consistent with the federal due process clause and therefore relying on U.S. Supreme Court jurisprudence that was based on a federal right to abortion). And many of the state supreme courts that have found a right to abortion under their state constitutions found that right in explicit privacy provisions, a provision that is absent from Idaho's Constitution.[17] *See, e,g.*, *Armstrong v. State*, 989 P.2d 364 (Mont. 1999); *In re T.W.*, 551 So.2d 1186, 1191 (Fla. 1989); *Valley Hosp. Ass'n, Inc. v. Mat-Su Coal. for Choice*, 948 P.2d 963, 969 (Alaska 1997).

8. Section 622 passes rational basis review.

[17] In 1970, an effort to add an express right to privacy to Idaho's Constitution failed. *See* App. 7, at 740 (1970 Idaho Sess. Laws 740 (proposed article I, section 1: "All men . . . have certain inalienable rights, among them to . . . enjoy the right to privacy; . . . .")); Idaho Constitutional Amendment History, 1960 through 1978, Idaho Secretary of State, https://sos.idaho.gov/elect/inits/hst60_70.htm (last visited September 2, 2022) (indicating that the proposed constitutional amendment failed). Petitioners do not dispute this. Pet'rs' Reply Br., 49615, at 39 n.26. They merely suggest that the State is making much ado about nothing. However, the mere fact that there is no express right of privacy in the Idaho Constitution is significant.

Thus, rational basis review applies because Section 622 does not infringe on a fundamental right. *Bradbury v. Idaho Jud. Council*, 136 Idaho 63, 69, 28 P.3d 1006, 1012 (2001) ("[W]here no fundamental right or suspect classification is involved or when dealing with legislation involving social or economic interests, courts apply the rational basis test's deferential standard of review"); *Dobbs*, 142 S. Ct. at 2283 ("Rational-basis review is the appropriate standard for such challenges."). Rational basis review requires that "a statute bear a reasonable relationship to a permissible legislative objective." *Bradbury*, 136 Idaho at 69, 28 P.3d at 1012 (citation omitted); *Dobbs*, 142 S. Ct. at 2284 ("A law regulating abortion, like other health and welfare laws, is entitled to a strong presumption of validity. It must be sustained if there is a rational basis on which the legislature could have thought it would serve legitimate state interests.") (citation omitted). Section 622 must be presumed constitutional. *Bradbury*, 136 Idaho at 68, 28 P.3d at 1011.

As the U.S. Supreme Court articulated in *Dobbs*, legitimate state interests for regulating abortion "include respect for and preservation of prenatal life at all stages of development, . . .; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability." 142 S. Ct. at 2284 (citations omitted).

Idaho's legitimate state interest of preserving prenatal life at all stages of development is reasonably served by prohibiting the performance of a procedure that is only used to end preborn human life except in very limited circumstances where the life of the mother is in danger or in the cases of rape or incest. *See* Idaho Code § 18-601 ("Idaho hereby expresses the fundamental importance of that 'profound interest' in preserving the life of preborn children."). That "legitimate interest[] provide[s] a rational basis for" and "justif[ies] [Section 622]." *Dobbs*, 142 S. Ct. at 2284. Petitioners' policy preferences for extending the maximum prescription period for contraceptives,

increasing the number of insured women, increasing the number of maternal-fetal medicine and family medicine doctors in Idaho, increasing funding to Idaho's Indian Health Services, extending pandemic SNAP benefits, and passing a Pregnant Workers' Fairness Act cannot override the deference the Court must extend to legislative judgment. Pet'rs' Br., Dkt. No. 49817, at 26-28. The Legislature is the place to advocate for these policy changes, not this Court.

Indeed, while strict scrutiny does not apply, Section 622 would even survive strict scrutiny because the preservation of prenatal life is a "compelling"[18] state interest and Section 622 is "necessary" to preserve prenatal life because it prohibits the use of the procedure that ends prenatal life, except in very narrow circumstances. *Reclaim Idaho*, 169 Idaho at 430, 497 P.3d at 184 (quoting *Van Valkenburgh*, 135 Idaho at 126, 15 P.3d at 1134 ("a law which infringes on a fundamental right will be upheld only where the State can demonstrate the law is necessary to promote a compelling state interest"). The requirement for abortions performed under an affirmative defense renders the statute even more targeted to preserving life: when the abortion can be performed in a way that allows the unborn child to live without increasing the risk of death to the mother, it must be performed in that manner. Section 622 is far more "necessary" to preserving prenatal life than Petitioners' policy moves.

C. Section 622 does not violate Idaho's equal protection guarantee.

Petitioners have not met their burden of showing beyond a reasonable doubt that Section 622 violates the Idaho Constitution's guarantees of equal protection contained in article I, sections 1 and 2 of the Idaho Constitution. *Rudeen*, 136 Idaho at 564, 568 n.3, 38 P.3d at 602, 606 n.3

[18] While the Supreme Court has described a state's interest in preserving prenatal life as "legitimate," *Dobbs*, 142 S. Ct. at 2284, "profound," *Casey*, 505 U.S. 833, 878 (1992) and "important," *id.* at 882, there is little doubt that this interest must also be described as compelling, particularly now that *Roe* and *Casey*'s distorting effect have been negated by *Dobbs*. *See Alcorn*, 7 Idaho 599, 64 P. at 1019.

(2001). Petitioners cite no case that has found that regulating abortion implicates the equal protection guarantee in the Idaho Constitution by treating women differently than men. Pet'rs' Br., Dkt. No. 49817, at 29-37. Their equal protection claim is foreclosed by the reasoning in *Dobbs* that the Fourteenth Amendment's Equal Protection Clause does not protect a right to abortion, by the fact that it does not treat similarly situated individuals differently. Even if a claim exists, it survives rational basis review.

1. This Court should adopt the U.S. Supreme Court's rationale in *Dobbs* to conclude that Petitioners' equal protection claim lacks merit.

"The majority of Idaho cases . . . state that the equal protection guarantees of the federal and Idaho Constitutions are substantially equivalent." *Rudeen,* 136 Idaho at 568, 38 P.3d at 606. Because of this kinship between the Idaho and federal constitutional equal protection guarantees, this Court has cited to federal authority to apply Idaho's constitutional equal protection guarantee in an analogous situation. *Rudeen,* 136 Idaho at 570, 38 P.3d at 608.

Thus, this Court is properly guided by the reasoning in *Dobbs* to dispose of this claim. *Hellar v. Cenarrusa*, 106 Idaho 586, 590, 682 P.2d 539, 543 (1984) (this Court "may look to the rulings of the federal courts on the United States constitution for guidance in interpreting our own state constitutional guarantees."). In *Dobbs*, the Court succinctly dispatched the argument that abortion regulations implicate the federal Equal Protection Clause, holding that the Court's precedents squarely foreclose the argument that equal protection houses an abortion right. 142 S. Ct. at 2245-46 (cleaned up). "[A] State's regulation of abortion is not a sex-based classification and is thus not subject to the 'heightened scrutiny' that applies to such classifications." *Id.* "The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a mere pretext" for "an invidious discrimination against members of one sex." *Id.* (citation omitted). "The goal of preventing abortion does not

constitute invidiously discriminatory animus against women." *Id.* (citation omitted). "Accordingly, laws regulating or prohibiting abortion . . . are governed by the same standard of review as other health and safety measures." *Id.*

Because there is no compelling reason to depart from federal equal protection jurisprudence, the Court should adopt the sound reasoning of *Dobbs* and find that the Idaho Constitution's equal protection guarantee is not implicated by an abortion regulation. *See Tarbox v. Idaho Tax Comm'n*, 107 Idaho 957, 959 n.3, 961, 695 P.2d 342, 344, 346 n.3 (1984). ("[T]he differences between the standard applied under Idaho's equal protection clause and the federal clause are negligible; accordingly, we will not undertake a separate analysis[.]").

2. Section 622 does not implicate equal protection because it does not treat similarly situated individuals differently.

Looking beyond *Dobbs*, Section 622 does not implicate an equal protection concern because it does not treat similarly situated individuals differently. The first step of an equal protection analysis is to identify the classification under attack. *Nelson v. Pocatello*, 170 Idaho 160, 508 P.3d 1234, 1241 (2022) (cleaned up). "[N]o equal protection analysis is required and no violation of equal protection will be found in situations where the State has not engaged in the disparate treatment of similarly situated individuals." *Alpine Vill. Co. v. City of McCall*, 154 Idaho 930, 937, 303 P.3d 617, 624 (citing *Shobe v. Ada Cnty., Bd. of Comm'rs*, 130 Idaho 580, 585–86, 944 P.2d 715, 720–21 (1997)).

Section 622 creates no cognizable classification because it treats all who perform an abortion equally—the same way that Idaho's law against burglary, for example, treats all who commit burglary equally. *Compare* Idaho Code § 18-1401 ("*Every person* who enters any house, room, apartment, tenement, store, shop, warehouse, mill, barn, stable, outhouse, or a building, tent, vessel, vehicle, trailer, airplane, or railroad car with intent to commit any theft or any felony is

guilty of burglary.") (emphasis added); *with id.* § 18-622(2) ("*Every person* who performs or attempts to perform an abortion as defined in this chapter commits the crime of criminal abortion.") (emphasis added). Section 622 does not differentiate between males who perform abortions and females who perform abortions. As to Petitioners, or any others who might complain of being subject to criminal penalties, Section 622 does not classify based on sex or gender.

Petitioners' argument that Section 622 discriminates against women because women are impacted by abortion in ways that men are not, simply proves that *similarly-situated* people are not being treated differently. Petitioners' argument admits that men are not similarly situated to women in the arena of pregnancy and abortion. But equal protection is only violated when similarly-situated individuals are treated differently. "[T]he basic tenet underlying equal protection is that it is only 'similarly situated people' that are entitled to 'receive the same benefits and burdens under the law.'" *Int. of Doe*, 165 Idaho 72, 78, 438 P.3d 769, 775 (2019) (quoting *State v. Hansen*, 125 Idaho 927, 933, 877 P.2d 898, 904 (1994)).[19]

"While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . . . Normal pregnancy is an objectively identifiable physical condition with unique characteristics." *Geduldig v. Aiello*, 417 U.S. 484, 497 n.20 (1974). Because pregnancy is unique to women, Petitioners cannot show that another group is similarly situated to women with regard to abortion. None of Petitioners' arguments referencing cases involving "similarly situated men" have any application here; men are similarly situated to women with regard to administering an estate (Pet'rs' Br., Dkt. No. 49817, at 33 (citing *Reed v. Reed*, 404 U.S. 71 (1971)) and alimony (Pet'rs' Br., Dkt. No. 49817, at 37 (citing *Murphey v. Murphey*, 103 Idaho 720 (1982)), but they are not similarly situated

[19] Idaho is permitted to criminalize objectionable activities that uniquely impact members of one sex. *See, e.g.*, Idaho Code § 18-1506B (criminalizing female genital mutilation of children).

with regard to the issues addressed in Section 622.

Petitioners also attempt to argue that Section 622 discriminates against women because it regulates abortion performed on "a pregnant woman," and thereby "singles out" women for different treatment than men. Pet'rs' Br., Dkt. No. 49817, at 34. To the extent Petitioners wish to quibble, the use of the word "woman" in the text of Section 622—a word which they expressly disclaim as having definitive meaning in this case, Pet., Dkt. No. 49817, at 14 n.5, Idaho Code § 73-114(1)(b) instructs that a gendered word be construed to include both genders unless that word is specifically defined for a particular statute. Thus, because title 18, chapter 6 does not specifically define "woman," the word "person" could be "freely substitute[ed]" for "woman." *Gatsby v. Gatsby*, 169 Idaho 308, 314–15, 495 P.3d 996, 1002–03 (2021) (applying Idaho Code § 73-114(1)(b) to substitute the word "spouse" for "husband"). In other words, to the extent that any classification exists in the text of the statute, no equal protection claim exists because Section 622 applies to all pregnant persons.

Petitioners' Equal Protection claim fails at the first step.

3. Section 622 is subject to rational basis review, not means-focus scrutiny.

Even assuming, *arguendo*, that Section 622 does create a sex-based classification because women are affected differently than men, rational basis review applies because the distinction is based on biology, not discriminatory intent.

Means-focus scrutiny is not applicable merely because Petitioners argue that Section 622 impacts women differently from men. "The means-focus test is applicable if two conditions are met: (1) where the discriminatory character of a challenged statutory classification is apparent on its face *and* (2) where there is also a patent indication of a lack of relationship between the classification and the declared purpose of the statute." *Nelson*, 170 Idaho 160, 508 P.3d at 1242 (quoting *Gomersall*, 168 Idaho at 318, 483 P.3d at 375) (cleaned up) (emphasis added). Disparate

treatment of one group is insufficient to trigger means-focus scrutiny; only "invidiously discriminatory" treatment can trigger means-focus scrutiny. *Jones v. Lynn*, 169 Idaho 545, 563, 498 P.3d 1174, 1192 (2021) (citing *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 396, 987 P.2d 300, 308 (1999)). Invidious discrimination "distinguish[es] between individuals or groups either odiously or on some other basis calculated to excite animosity or ill will." *State v. Hart*, 135 Idaho 827, 830, 25 P.3d 850, 853 (2001) (quoting *Coghlan*, 133 Idaho at 396, 987 P.2d at 308).

Section 622 does not odiously discriminate, nor is it calculated to excite animosity or ill will toward women as a class. It is calculated to do one thing: preserve the lives of unborn children.[20] Pursuing the goal of preventing abortion is not, standing alone, invidious discrimination; invidious discrimination involves actions "tending to excite odium, ill will, or envy; likely to give offense; esp., unjustly and irritatingly discriminating," and is usually associated with racism. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 274 (1993). It "does not remotely qualify for such harsh description, and for such derogatory association with racism," and that "a value judgment favoring childbirth over abortion is proper and reasonable" enough to pursue through public means. *Id.*

These principles are consistent with the Idaho Supreme Court's jurisprudence and, as discussed above, provide compelling guidance. Despite Petitioners' unfounded assertions that Section 622's goal is to "forc[e] [women] into the home and into the role of mother," Pet'rs' Br., Dkt. No. 49817, at 33–34, the legislatively expressed goal of Section 622 and other Idaho abortion laws is to further the State's "'profound interest' in preserving the life of preborn children," and to further the policy of "prefer[ring], by all legal means, live childbirth over abortion." Idaho Code § 18-601. That legislative purpose must be given weight. *Nelson*, 170 Idaho 160, 508 P.3d at 1243.

[20] This goal and the interest in protecting the lives of unborn children and mothers are not mutually exclusive. Hence, Section 622 allows for abortions when the mother's life is at stake.

And as the U.S. Supreme Court has recognized, this value judgment is proper and reasonable, not invidiously discriminatory. *Bray*, 506 U.S. at 274.

4. Section 622 survives rational basis review.

Because means-focus scrutiny does not apply, and Petitioners do not attempt to argue that strict scrutiny applies, any implied classification Petitioners assert exists (none actually exists) must be subject to rational basis scrutiny. *Nelson*, 170 Idaho 160, 508 P.3d at 1241 (cleaned up) (quoting *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 710, 791 P.2d 1285, 1289 (1990)). Section 622 satisfies rational basis review. Assuming, *arguendo*, that Section 622 creates a classification based on sex, this is the result of biological fact, not the result of any intent by the Legislature to treat women differently. What is important to the Legislature is protecting preborn children. That purpose is not only legitimate, but profound. Idaho Code § 18–601. Banning abortion in most circumstances directly furthers that interest. As discussed above, Section 622 is rationally related to the legitimate—indeed, compelling—state interest in preserving preborn human life.

And even if means-focus scrutiny were to apply, Section 622 would still survive. This is because a law prohibiting the procedure that ends preborn life will "substantially further[] some specifically identifiable legislative end," (here, preserving preborn life) because it prevents that preborn life from being taken. *Coghlan*, 133 Idaho at 395, 987 P.2d at 307 (quoting *Jones v. State Bd. Of Med.*, 97 Idaho 859, 867, 555 P.2d 399 (1976)).

D. Section 622 does not violate the Idaho Human Rights Act.

Petitioners' argument under the Idaho Human Rights Act fails for three simple reasons.

First, the Legislature that enacted the Idaho Human Rights Act cannot bind future Legislatures. *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (plurality) (citing William Blackstone, Commentaries on the Laws of England 90 (1765)) ("one legislature may not bind the legislative authority of its successors.").

Second, even if it could, the Idaho Human Rights Act, by its plain language, does not apply to Section 622 because it cannot and does not regulate the Legislature's constitutional power to enact laws. *See* Idaho Code § 67-5909 (prohibiting specified conduct by an "employer," "employment agency," "labor organization," "person," "educational institution," and "owner or any other person engaging in a real estate transaction, or for a real estate broker or salesman"). Nowhere in the Idaho Human Rights Act does the statute purport to bind legislative action. But even if there was a conflict, Section 622 and the Idaho Human Rights Act are both statutes enacted by the Legislature and any apparent inconsistencies should be reconciled if possible. *State v. Gamino*, 148 Idaho 827, 829, 230 P.3d 437, 439 (2010). The two statutes can be reconciled by understanding the Idaho Human Rights Act as not governing the Legislature's regulation of abortion.

Third, even if there could be said to be a conflict between the Idaho Human Rights Act and Section 622 (and there cannot), Section 622 controls over the Idaho Human Rights Act because "[t]o the extent of a conflict between an earlier and later statute, the more recent expression of legislative intent prevails." *State v. Betterton*, 127 Idaho 562, 564, 903 P.2d 151, 153 (Idaho Ct. App. 1995) (citation omitted); *Gamino*, 148 Idaho at 829, 230 P.3d at 439. Section 622 is the more recently enacted statute, and therefore controls. Moreover, Section 622 is the more specific statute, and therefore also controls. *Betterton*, 127 Idaho at 564, 903 P.2d at 153 ("[w]here two statutes deal with the same subject matter, the more specific will prevail.") (citation omitted).

E. Section 622 is not void for vagueness.

Petitioners challenge three components of Section 622 as unconstitutionally vague in all applications under the Due Process Clause in article I, section 13 of the Idaho Constitution: (1) the term "clinically diagnosable pregnancy" that appears in the definition of "abortion" in Idaho Code § 18-604(1); (2) the phrase "to prevent the death of a pregnant woman" in Idaho Code § 18-

622(3)(a)(ii); and (3) the phrase "best opportunity for the unborn child to survive" in Idaho Code § 18-622(3)(a)(iii). These challenges ignore that the involved terms and phrases appear commonly in abortion statutes. Under settled Idaho precedent, these terms easily survive a facial vagueness challenge.

But before those issues are addressed, it must be recognized that Petitioners' vagueness challenge fails on their own allegations. Patently, Section 622 has a core meaning understandable to persons of ordinary intelligence because Petitioners admit to understanding the core meaning of the prohibited conduct, as well as the affirmative defenses, when they allege that the statute will cause them to "cease providing abortion services in Idaho *except in the rarest circumstances*," Pet., Dkt. No. 49817, ¶ 21 (emphasis added), and to "cease *nearly all* abortion services in Idaho," Mot. to Expedite, Dkt. No. 49817, at 2 (emphasis added). Given these predictions, Petitioners cannot deny that they understand the "core" of Section 622. *See State v. Knutsen*, 158 Idaho 199, 202, 345 P.3d 989, 992 (2015) (citing *Kolender v Lawson*, 461 U.S. 352, 357 (1983)). This understanding alone is enough to cause Petitioners' facial vagueness challenge to fail. *Cf. Alcohol Beverage Control v. Boyd*, 148 Idaho 944, 947-49, 231 P.3d 1041, 1045-47 (2010) (Statute was not facially unconstitutional where the plaintiff did the conduct proscribed by the statute—serving alcohol to an intoxicated person—even though he argued "there [was] no standard by which to measure when a person is 'actually,' 'obviously,' or 'apparently' intoxicated.").

1. Idaho's applicable vagueness standard only requires that a core of circumstances to which the law unquestionably applies exist.

This Court has established a three-step inquiry for resolving claims of unconstitutional vagueness, only the last of which has relevance here because no constitutionally protected conduct is at stake. The last step "ask[s] 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). "This last step can be satisfied and the enactment found constitutional with a recognition by the reviewing court, or by the party that urges the Court to find the statute or ordinance constitutional, of a core of circumstances to which the statute or ordinance could be unquestionably constitutionally applied." *Id.* Thus, "[i]n order to be successful in a facial vagueness challenge 'the complainant must demonstrate that the law is impermissibly vague in all of its applications.' . . . It must be shown that the enactment is invalid *in toto*." *State v. Leferink*, 133 Idaho 780, 784, 992 P.2d 775, 779 (1999) (quoting *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 497 (1982)); *see also State v. Cobb*, 132 Idaho 195, 197, 969 P.2d 244, 246 (1998) ("The threshold question in any vagueness challenge is whether to scrutinize the statute for intolerable vagueness on its face or whether to do so only as the statute is applied in the particular case."). Finally, "[t]he party challenging the constitutionality of a statute must overcome a strong presumption of validity. . . . A statute should not be held void for vagueness if any practical interpretation can be given it." *Hart*, 135 Idaho at 829, 25 P.3d at 852 (citations omitted). Although "greater tolerance is permitted when addressing a civil or non-criminal statute as opposed to a criminal statute under the void for vagueness doctrine" (*Olsen*, 117 Idaho at 716, 791 P.2d at 1295 (citation omitted)), these general principles, including the need to establish a facial vagueness claim by showing that the challenged provision has no comprehensible regulatory or prohibitory "core," apply to a challenge to a criminal statute—a conclusion borne out by the fact that the path-marking *Bitt* decision arose in a criminal context.

2. Challenged Term/Phrases

a. "Clinically diagnosable pregnancy"

The definition of abortion in Idaho Code § 18-604(1) provides:

"Abortion" means the use of any means to intentionally terminate the clinically

> diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child . . . .

This definition has remained unchanged since its adoption 18 years ago. 2006 Idaho Sess. Laws 1322. The Department of Health and Welfare, Division of Public Health, Bureau of Vital Statistics reports thousands of induced abortions in Idaho performed in this State based on data from physician-completed forms required under Idaho Code § 39-261. Plainly enough, Idaho physicians have experienced no discernable difficulty in applying the definition of abortion in Idaho Code § 18-604(1), including the term "clinically diagnosable pregnancy." Nor has the definition been challenged previously in litigation over various aspects of Idaho's abortion regulation. *See, e.g.*, *McCormack v. Herzog,* 788 F.3d 1017 (9th Cir. 2015); *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908 (9th Cir. 2004). Petitioners' claim to have discovered a fundamental vagueness defect in Title 18, Chapter 6 beggars common sense.

Nor is the Idaho "abortion" definition idiosyncratic. In *American College of Obstetricians & Gynecologists, Pennsylvania Section v. Thornburgh,* 737 F.2d 283, 305 (3d Cir. 1984), *aff'd on other grounds sub nom. Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), the Third Circuit rejected a vagueness challenge to the definition of "abortion" in 18 Pa. Cons. Stat. § 3203, as termination of "clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child . . . ." Responding to the plaintiffs' contention that the definition was "vague and overbroad" because it could "be read to include ordinary gynecological procedures on women not known or believed to be pregnant which cause an abortion when the woman's pregnancy was, in fact, diagnosable," the panel held

> [i]f the Act explicitly defined abortion as the intentional termination of a human pregnancy, it would satisfy the requirement that a statute "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,"

> . . . or give "a reasonable opportunity to know what is prohibited[.]" . . . We have the duty in "marginal cases" to make the offense "constitutionally definite by a reasonable construction of the statute[]" . . . and thus read the definition to incorporate an intent requirement as defined in the Pennsylvania Code, . . . thereby saving it from unconstitutionality.

Id. at 294 (citations omitted). The Idaho "abortion" definition is identical except for the inclusion of the infinitive-splitting "intentionally" before "terminate," a grammatical choice that does not diminish the persuasiveness of this precedent in the least.

Other decisions have addressed abortion-related claims directly at statutes with definitions using the term "clinically diagnosable" without any suggestion that it was unconstitutionally vague. *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 535–36 (8th Cir. 1994) (N.D. Cent. Code § 14-02.1-02); *Isaacson v. Horne*, 884 F. Supp. 2d 961, 963 (D. Ariz. 2012), *rev'd*, 716 F.3d 1213 (9th Cir. 2013) (Ariz. Rev. Stat. § 36-2151(1)); *see also Patel v. State*, 60 N.E.3d 1041, 1056 n.16 (Ind. Ct. App. 2016) ("abortion inducing drug" defined in Ind. Code § 16-18-2-1.6 "in pertinent part as 'a medicine, drug, or substance prescribed or dispensed with the intent of terminating a clinically diagnosable pregnancy with the knowledge that the termination will, with reasonable likelihood, cause the death of the fetus[]'"). Indeed, Petitioner Planned Parenthood itself is challenging a Kentucky abortion statute on procedural and due process, but not vagueness, grounds where the statute defines "abortion-inducing drug" identically to the Indiana law (Ky. Rev. Stat. § 311.7731(2)). *See Planned Parenthood of Great Nw., Haw., Alaska, Ind., & Ky., Inc. v. Cameron*, No. 3:22-cv-198-RGJ, 2022 WL 1597163, at *9-13 (W.D. Ky. May 19, 2022), *remanded*, No. 22-5421, 2022 WL 3646092 (6th Cir. June 30, 2022).

Petitioners' gripe that the definition of abortion in Idaho Code § 18-604(1) does not specify *how* a doctor is supposed to clinically diagnose pregnancy misses the point. The statute specifies the fact that needs to be determined: "clinically diagnosable pregnancy." A statute need not specify *how* a certain fact must be determined to provide precise guidelines to physicians. *See, e.g., State*

v. Harper, 163 Idaho 539, 415 P.3d 948 (Idaho Ct. App. 2018). In fact, that the Legislature has deferred to physician expertise as to how to clinically diagnose a pregnancy. *Id.*

Petitioners' facial vagueness claim accordingly fails not only because the term "clinically diagnosable pregnancy" provides precise guidelines to physicians and prosecutors but also because no plausible claim has been, or can be, made that the term "clinically diagnosable pregnancy" is "invalid *in toto*." History has shown that it can be applied without difficulty. Indeed, Petitioners' argument reveals their concern is not vagueness; it is what they perceive as the definition's applicability to treatment of medical conditions that they do not view as abortions, such as ectopic pregnancies and miscarriages. Pet'rs' Br., Dkt. No. 49817, at 44. But theirs is a policy, not a vagueness, concern. The statute is clear on this point: if the unborn child has died, no "pregnancy" exists; if the child remains alive, lawful termination of the "pregnancy" is subject to the requirements in Idaho Code § 18-622(3). *See* Idaho Code 18-604(11) ("'Pregnant' and 'pregnancy.' Each term shall mean the reproductive condition of having a *developing* fetus in the body and commences with fertilization.") (emphasis added).

b. "Necessary to prevent the death of the pregnant woman"

Petitioners next contend that the phrase "necessary to prevent the death of the pregnant woman" in Idaho Code § 18-622(3)(a)(ii) is unconstitutionally vague because it "gives no indication whether the risk of death must be imminent or substantial in order to perform the abortion, and, by definition, carrying a pregnancy to term increases a woman's risk of death when compared with the risk of death associated with obtaining an abortion." Pet'rs' Br., Dkt. No. 49817, at 45. As to the second assertions—i.e., comparative risks—Petitioners reveal that their dissatisfaction lies in policy, not in claimed vagueness. As to the first assertion—"no indication whether the risk of death must be imminent or substantial"—Petitioners' claim is textually unsupported and, in any event, does not support a facial vagueness challenge.

To begin, the term "necessary" is defined in the on-line Black's Law Dictionary (11th ed. 2019) as "[t]hat is needed for some purpose or reason; essential[.]" When used as part of the term "medically necessary abortion[,]" the term is so frequently-used and well-accepted that Black's assigns it the meaning "[a]n abortion performed to preserve the life or health of the mother." *Id.* The phrase "necessary to prevent the death of the pregnant woman" is thus a syntactically unremarkable limitation on abortion access and reflects a direct relationship between the abortion and the mother's survival. Indeed, a multitude of statutes and regulations turn on a physician's determination of when care is "necessary"—a concept that inheres in the abortion context even where the involved statutory scheme does not use the term. *See Spears v. State*, 278 So.2d 443, 445 (Miss. 1973) ("The Mississippi statute does not contain the words, 'based on his best clinical judgment that an abortion is necessary,' that appear in the Georgia statute [at issue in *Doe v. Bolton*, 410 U.S. 179 (1973)], and such language is not necessary for the validity of the statute because the necessity for an operation or a particular treatment represents a clinical judgment that physicians are routinely called upon to make for proper treatment of their patients.").

Petitioners do not suggest the contrary. They instead argue that the phrase does not "explain[] . . . whether there must be a certain percentage chance that death will occur if the procedure is not performed, and, if so, what percentage is acceptable versus not." Pet'rs' Br., Dkt. No. 49817, at 45. Again, Petitioners demand a level of legislative direction that is not required by constitutional vagueness requirements. Moreover, Petitioners' discomfort with the absence of prescribed percentages reflects a misunderstanding of Section 622's decision-making allocation. The Legislature determined, as matter of public policy, that abortions should be prohibited generally but recognized that exceptions should be available (1) to preserve the mother's life and (2) where the pregnancy has resulted from rape or incest. With respect to the first exception, the statute leaves to the good faith medical judgment of the involved physician, based upon the facts

known at the time, whether an abortion is necessary to prevent the woman's death. In other words, this subjective standard allocates to the physician herself the very risk-weighing that so troubles Petitioners.

Neither the "life-preservation" language nor the decision-making allocation, moreover, is new to Title 18, Chapter 6. Prior to non-substantive amendments in 2022, 2022 Idaho Sess. Laws 574, Idaho Code § 18-608(3) had authorized since 1973 third-trimester abortions if, among other things, "in the judgment of the attending physician," corroborated by a consulting physician, the abortion is "necessary for the preservation of the life of such woman" and it is "performed in a manner consistent with preservation of any reasonable potential for survival of a viable fetus."

That the Legislature adopted this approach should not surprise.[21] For example, the original Hyde Amendment, Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1977), provided that "[n]one of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term." As explained in *Harris v. McRae*, 448 U.S. 297, 302-03 (1980), Congress broadened the Amendment for the 1980 fiscal year to include a rape-or-incest exception "'when such rape or incest has been reported promptly to a law enforcement agency or public health service[]'" but returned to the original "endangered" exception after having broadened it for almost two fiscal years to "'instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians[.]'"[22] The Amendment's text has continued to change

[21] The "preservation of the life of the woman" exception contained in Idaho Code § 18-608(3) was, of course, not new in Idaho law. It appeared in Idaho's statutes from early territorial days. *See supra* Section I.C. Neither the pre-*Roe* exceptions nor Idaho Code § 18-608(3)'s "preservation" standard was ever challenged on vagueness grounds.

[22] The *Harris* Court also rejected the plaintiffs' claim that the Hyde Amendment exceptions were unconstitutionally vague because, *inter alia*, they were "'set out in terms that the ordinary person

over time. *See, e.g.*, *Dalton v. Little Rock Fam. Plan. Servs.*, 516 U.S. 474, 477 (1996) (per curiam) ("While the versions of the Hyde Amendment applicable to the 1994 and 1995 fiscal years authorized the use of federal funds to pay for an abortion after notice that 'such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest,' the version of the amendment applicable to prior years limited federal funding to those abortions necessary to save the life of the mother. . . . Because this history identifies the possibility that a different version of the Hyde Amendment may be enacted in the future, it was improper for the District Court to enjoin enforcement of Amendment 68 'for so long as the State of Arkansas accepts federal funds pursuant to the Medicaid Act.'"). The most recent fiscal-year Hyde Amendment provides an exception with respect to a prohibition of Medicaid and Medicare expenditures for abortions "in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed." Consolidated Appropriations Act, Pub. L. No. 117-103, § 507(2), 136 Stat. 49, 496 (2022). Each of these fiscal-year Hyde Amendments, despite their textual variation, shared a common framework: a general statutory exception coupled with a grant of discretion to the physician to determine when application of the exception was medically appropriate.

Petitioners assert that Section 622 "combines the uncertainty inherent in assessing the risk of death for a particular pregnancy with the uncertainty of how much risk, and over what time period, is required for an abortion to 'prevent' a pregnant person's death." Pet'rs' Br., Dkt. No.

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exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.'" 448 U.S. at 311 n.17. There is no discernible difference for Petitioners' vagueness argument between the Idaho Code § 18-622(3)(a)(ii) exception and the "endangerment" Hyde Amendment counterpart.

49817, at 47. This assertion identifies a non-existent vagueness "flaw" that inheres not only in the Idaho statute, but also in the Hyde Amendment—a claim that, as noted, was rejected by the *Harris* Court as to the "life of the mother would be endangered" formulation—and by other courts interpreting other state laws restricting the performance of abortions.[23]

Petitioners' failure to identify any abortion-restriction statute that measures up to their high barrier for non-vagueness is noteworthy. The reason is obvious: Legislative bodies understand that physicians, not they, possess the competence to make ad hoc determinations as to when an abortion is necessary to prevent a specified harm—here, death. *Cf. Bolton*, 410 U.S. at 192 (rejecting

[23] *See, e.g.*, *Urbish v. Lamm*, 761 P.2d 756, 760 (Colo. 1988) ("Taken as a whole, Amendment 3 expresses the intention that no induced abortion shall be paid for by public funds unless necessary to prevent the death of the pregnant woman and unless every reasonable effort also has been made to preserve the life of the unborn child."); *Nelson v. Planned Parenthood Center of Tucson, Inc.*, 505 P.2d 580, 584–85 (Ariz. Ct. App. 1973) (finding that the phrase "necessary to preserve her life" is not unconstitutionally vague); *Cheaney v. State*, 285 N.E.2d 265, 270–71 (Ind. 1972) (finding that the phrase "unless such miscarriage is necessary to preserve her life" was not unconstitutionally vague); *Crossen v. Attorney General*, 344 F. Supp. 587, 590 (E.D. Ky. 1972) (finding that phrase "necessary to preserve her life" was not vague); *Sasaki v. Commonwealth*, 485 S.W.2d 897, 900–01 (Ky. 1972) (holding that the phrase "necessary to preserve her life" is not unconstitutionally vague, albeit perhaps technically imprecise); *Rodgers v. Danforth*, 486 S.W.2d 258, 259 (Mo. 1972) (finding that phrase "necessary to preserve her life or that of an unborn child" is not vague); *State v. Munson*, 201 N.W.2d 123, 127 (S.D. 1972) (finding that phrase "unless the same is necessary to preserve her life" is not unconstitutionally vague); *Thompson v. State*, 493 S.W.2d 913, 920 (Tex. Crim. App. 1971) (finding that phrase to "save the life of the mother" was not vague); *State v. Abodeely*, 179 N.W.2d 347, 354 (Iowa 1970) (finding that the words "unless such miscarriage shall be necessary to save her life" were not unconstitutionally vague and uncertain); *Rosen v. Louisiana State Board of Medical Examiners*, 318 F. Supp. 1217, 1220 (E.D. La. 1970) (finding that words "relief of a woman whose life appears in peril" were not vague); *Steinberg v. Brown*, 321 F. Supp. 741, 745 (N.D. Ohio 1970) ("necessary to preserve her life" not vague); *Babbitz v. McCann*, 310 F. Supp. 293, 297–98 (E.D. Wis. 1970) (finding the phrase "to save the life of the mother" was not vague).

vagueness challenge to the term "necessary" because "[w]hether, in the words of the Georgia statute, 'an abortion is necessary' is a professional judgment that the Georgia physician will be called upon to make routinely"). Section 622 protects that space by requiring only that the physician's determination be made with good faith medical judgment based upon the facts then at hand. Again, Petitioners fret over a determination that has been expressly handed over to their good faith judgment.

This is not to say that decision-making under the good-faith-medical-judgment affirmative defense in Section 622 will always be easy or accord with the physician's preference. To illustrate, in *United States v. Idaho*, No. 1:22-cv-00329-BLW, 2022 WL 3692618, at *11 (D. Idaho Aug. 24, 2022), the district court cited a physician's declaration that "'[f]or those patients who are clearly suffering from a severe pregnancy related illness and for which there is a clear indicated treatment, but death is not imminent, it is unclear whether I should provide the appropriate treatment because the circumstances may not justify the affirmative defense.'" (citation omitted). Nevertheless, the court erred in stating that "the nature of that determination [under § 18-622(3)(a)(ii)]—how imminent a patient's death must before an abortion is necessary—is inscrutable."[24] *Id.* The precise boundary-line where an abortion becomes "necessary to prevent the death of a pregnant woman" must be, as it is under Idaho Code § 18-622(3)(a)(ii), committed to the physician's judgment. Would the statute be made less "inscrutable"—if such were logically possible—by inserting "imminent or non-imminent" before "death"? Doubtful, particularly under Petitioners' risk assessment concerns. But, more importantly, a literal reading of the phrase "necessary to prevent the death" draws no distinction between "imminent" and "non-imminent" death, and the rule of

[24] Notably, the district court's interpretation of Section 622 is not entitled to any deference. It is for this Court, not a federal court, to serve as "the final arbiter[] of the meaning of state statutory directions." *Whole Women's Health v. Jackson*, 142 S. Ct. 522, 536 (2021).

lenity counsels against that distinction. *See, e.g.*, *State v. Olsen*, 161 Idaho 385, 392, 386 P.3d 908, 915 (2016) ("The rule of lenity states that criminal statutes must be strictly construed in favor of defendants.") (cleaned up). In addition, the "rule of construction that 'whenever possible, a statute should be construed so as to avoid a conflict with the state or federal constitution[,]' *State v. Gomez-Alas*, 167 Idaho 857, 866, 477 P.3d 911, 920 (2020)[,]" applies to the extent that a concern exists, as this Court recognized in this very case. Op. 10-11. As with Petitioners' complaint about the term "clinically diagnosable pregnancy," the problem lies not with vagueness but with Petitioners' policy objection to Section 622.

In sum, the State "must only demonstrate that the Statute has a discernable core." *Planned Parenthood of Ind. & Ky., Inc. v. Marion Cnty. Prosecutor*, 7 F.4th 594, 605 (7th Cir. 2021). Section 622 clearly does, even if its enforcement may present "uncertainties at the margin[]" (*id.*) appropriately addressed in as-applied challenges. [25] *See SisterSong Women of Color Reproductive*

[25] Petitioners err in arguing that (1) a 2015 decision by the U.S. Supreme Court changed this Court's standard for evaluating the vagueness of criminal laws in Idaho and (2) the decision confirms that the challenged phrase is impermissibly vague. Pet'rs' Br., Dkt. No. 49817, at 41, 47. In *Johnson v. United States*, 576 U.S. 591 (2015), the Supreme Court held unconstitutionally vague the residual clause of the Armed Career Criminal Act. 18 U.S.C. § 924(e)(2)(B). This statute imposes greater potential punishment for three or more "violent felony" convictions that, under the residuary clause, include convictions for a felony that "involves conduct that presents a serious potential risk of physical injury to another." In so holding, the Court overruled prior decisions directing lower courts to "assesses whether a crime qualifies as a violent felony 'in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.'" *Johnson*, 576 U.S. at 596. It pointed to "this Court's repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause confirm its hopeless indeterminacy" and the fact that "[t]he clause has 'created numerous splits among the lower federal courts,' where it has proved 'nearly impossible to apply consistently.'" *Id.* at 598, 601. No such history of confusion exists here with respect to the analogous "preservation of the life of such woman" phrase even though it has been part of Title 18, Chapter 6 for almost 50 years. No less inapposite is Petitioners' reliance on *Planned Parenthood of Central New Jersey v. Farmer*, 220 F.3d 127 (3d Cir. 2000). The majority of the circuit court panel agreed with the district

Justice Collective v. Governor of Ga., 40 F.4th 1320, 1328 (11th Cir. 2022) ("A person of reasonable intelligence is capable of understanding that the 'core meaning [of]' the provision is to expand the definition of person to include unborn humans who are carried in the womb of their mothers at any stage of development. . . . To be sure, there might be vague applications of that definition in other provisions of the Georgia Code, but challenges to those applications—like the arguments raised in the abortionists' supplemental brief about potential applications to constitutionally protected conduct—are properly brought in an as-applied manner."). It bears repeating that the Supreme Court in *Harris v. McRae* reached precisely the same result employing precisely the same reasoning as *SisterSong* when it held that the Hyde Amendment exception then in dispute was not unconstitutionally vague. *Harris*, 448 U.S. at 302, 311 n.17. Having made no showing that Section 622 is so vague as to be unenforceable in all applications, Petitioners fail to establish their challenge to the "necessary to prevent the death of the pregnant woman" phrase.

c. "[I]n the manner that … provided the best opportunity for the unborn child to survive"

Petitioners argue that "the phrase 'best opportunity for the unborn child to survive' is vague in multiple important ways" because (1) "the entire premise of performing an abortion in which the unborn child survives is flawed" (Pet'rs' Br., Dkt. No. 49817, at 48); and (2) "[t]he provision does not make clear whether an abortion in the first trimester is acceptable because it offers the "best" (despite being zero) opportunity to survive at that point in time, or whether a physician must wait until later in pregnancy and then perform a labor induction, though a labor induction is not

court that New Jersey's partial birth abortion statute unconstitutionally vague "because it failed to define with any certainty the conduct that is proscribed." *Id.* at 134-35. The straightforward text of Idaho Code § 18-622 bears no resemblance to the complex law in *Farmer*, and, given the Supreme Court's then-recent decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000), the majority's analysis "was never necessary and is now obsolete." *Id.* at 152 (Alito, J., concurring in judgment). Moreover, this Court has never adopted *Johnson* as controlling Idaho law. The Idaho precedent cited in this brief setting the standard for evaluating vagueness challenges controls.

considered an abortion in medical terms" (*id.* at 49). Their argument reads requirements into the statute that do not exist. Nothing in the plain language can be read to create an effective prohibition on pre-viability abortions. The language of this statute is limited to addressing the *manner* in which the abortion is performed or *attempted* to be performed, when it is necessary to save the life of the mother or in cases of reported rape or incest. Petitioners construe the statutory language to create a constitutional issue and, in so doing, ignore an important principle in resolving vagueness challenges: "Possible infirmity for vagueness may be avoided if the statute is given a limiting judicial construction, consistent with the apparent legislative intent and comporting with constitutional limitations." *Leferink*, 133 Idaho at 784, 992 P.2d at 779; *accord* Op. 10-11.

The challenged phrase, like "preservation of the life of such woman," has been part of Idaho Code § 18-608(3) since 1973 (and again, has never been challenged on any grounds including alleged vagueness) and, read *in pari materia* with its use there, is directed to third-trimester abortions, i.e., abortions involving a viable fetus. *See, e.g.*, *Gomez v. Crookham Co.*, 166 Idaho 249, 253, 457 P.3d 901, 905 (2020) ("Statutes which relate to the same subject are *in pari materia* and they should be construed together to effectuate legislative intent.") (cleaned up). And again, the use of that phrase did not constitute a frolic by the Legislature. Thus, in *Lathrop v. Deal*, 801 S.E.2d 867, 870 (Ga. 2017), the Georgia Supreme Court recognized that "[i]n the limited circumstances in which an abortion is permissible [under state law] notwithstanding a determination that the probable gestational age is 20 weeks or more, a physician must perform the abortion by means that offer 'the best opportunity for the unborn child to survive,' unless those means would pose an increased risk to the woman undergoing the procedure of 'death [or] substantial and irreversible physical impairment of a major bodily function.'" (citation omitted).

Contrary to Petitioners' apparent position, the "best opportunity for the unborn child to survive" language does not embody a contradiction to the abortion exceptions in Idaho Code § 18-

622(3). Pet'rs' Br., Dkt. No. 49817, at 48. The value of such a requirement was underscored recently in *Texas v. Becerra*, No. 5:22-CV-185-H, 2022 WL 3639525 (N.D. Tex. Aug. 23, 2022). There, the district court repeatedly referenced Tex. Health & Safety Code § 170A.002(b)(3) that requires a person performing or attempting to perform an abortion to do so "in a manner that, in the exercise of reasonable medical judgment, provides the best opportunity for the unborn child to survive unless, in the reasonable medical judgment, that manner would create: (A) a greater risk of the pregnant female's death; or (B) a serious risk of substantial impairment of a major bodily function of the pregnant female." *Id.* at *2. It concluded from this provision that "even when an abortion is necessary, Texas law requires procedures that maximize the chance for the unborn child to live, unless those procedures would themselves create a greater risk to the pregnant female" (*id.* at *9) and observed that "the Supreme Court—on numerous occasions and most recently in *Dobbs*—has affirmed that states have a genuine interest in protecting the life of the unborn child[]"—the "very interest" asserted by Texas (*id.* at *29). Against the backdrop of this state statutory scheme, the court held that the Department of Health and Human Services Secretary acted beyond the scope of his authority in issuing a July 2022 "Guidance" and an accompanying letter that "direct hospitals and doctors, under EMTALA [the Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395dd], to provide abortions under certain circumstances and that they must follow federal, not state, law when doing so." *Id.* at *3. It reasoned in part:

> [T]he Guidance [states] that "if a physician believes that a pregnant woman presenting at an emergency department is experiencing an emergency medical condition as defined by EMTALA, and that abortion is the stabilizing treatment necessary to resolve that condition, the physician *must* provide that treatment." . . . If that treatment, abortion, is banned by state law or only allowed in narrower circumstances than the Guidance would allow, "that state law is preempted." . . . The Guidance conspicuously eliminates the physician's statutory duty to stabilize the health of the "unborn child" when in serious jeopardy. . . . Accordingly, it purports to resolve the conflict between the health of the pregnant woman and the

unborn child where EMTALA does not.

Id. at *23 (citation omitted); *see* 42 U.S.C. § 1395dd(f) ("The provisions of this section do not preempt any State or local law requirement, except to the extent that the requirement directly conflicts with a requirement of this section."). *Becerra*'s significance here is manifest: States have a right to value the unborn and to require a physician, subject to a good faith medical judgment based on the facts known at the time, to perform or attempt to perform an abortion in a manner that will create the best opportunity for the unborn child's survival. As reflected by the inclusion of comparable language in Idaho Code § 18-608(3), this provision has immediate relevance to abortion-related procedures where the child has reached viability. Given this relevance, neither prong of Petitioners' vagueness challenge succeeds.

IV. CONCLUSION

The Court should dismiss the Petition and deny the requested relief because (1) the Petition is not judiciable, and (2), even if it were judiciable, Section 622 does not violate the Idaho Constitution or the Idaho Human Rights Act. The Court should also deny the request for attorney's fees and costs made in Prayer for Relief because Petitioners fail to argue any basis for an award of fees, as well as because Petitioners cannot prevail.

DATED this 2nd day of September, 2022.

OFFICE OF THE ATTORNEY GENERAL

By*: /s/ Megan A. Larrondo*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of September, 2022, I electronically filed the foregoing with the Clerk of the Court using the iCourt e-file system which sent a Notice of Electronic Filing to the following persons:

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