Electronically Filed
9/2/2022 6:19 PM
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. 49899-2022

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

LAWRENCE G. WASDEN
ATTORNEY GENERAL

STEVEN L. OLSEN
Chief of Civil Litigation

MEGAN A. LARRONDO, ISB #10597
DAYTON P. REED, ISB #10775
Deputy Attorneys General
954 W. Jefferson Street, 2nd Floor
P.O. Box 83720
Boise, ID 83720-0010
megan.larrondo@ag.idaho.gov
dayton.reed@ag.idaho.gov

Attorneys for Respondents

Daniel W. Bower
MORRIS BOWER & HAWS PLLC
1305 12th Ave. Rd.
Nampa, Idaho 83686
dbower@morrisbowerhaws.com

Monte Neil Stewart
11000 Cherwell Court
Las Vegas, Nevada 89144
monteneilstewart@gmail.com

Attorneys for Intervenors-Respondents

Michael J. Bartlett, ISB #5496
BARTLETT & FRENCH LLP
1002 W Franklin St.
Boise, Idaho 83702
michael@bartlettfrench.com

Alan E. Schoenfeld
Rachel E. Craft
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
New York, NY 10007
alan.schoenfeld@wilmerhale.com
rachel.craft@wilmerhale.com

Sofie C. Brooks
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
sofie.brooks@wilmerhale.com

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

CASES

IDAHO CODE

UNITED STATES CODE

OTHER AUTHORITIES

I. STATEMENT OF THE CASE

A. Introduction

Petitioners' challenge to Sections 18-8804 and 18-8805 of the Fetal Heartbeat Preborn Child Protection Act, or the "Heartbeat Act," which prohibit, via criminal and licensing penalties, performing an abortion after a fetal heartbeat is detectable except in narrow exceptions, is a blatant afterthought. Their arguments that the challenged sections violate a (nonexistent) right to abortion under the Idaho Constitution, violate the equal protection guarantees of the Idaho Constitution (by treating differently situated groups differently), and violate the Idaho Human Rights Act (by misinterpreting the Act) are mere repetitions of the arguments they have already made. As previously articulated, the Court should reject these arguments because (1) the drafters of the Idaho Constitution cannot be assumed to have intended to protect as a fundamental right something that was criminally prohibited; (2) regulating a procedure based on biological fact to preserve preborn human life does not violate equal protection; and (3) the Idaho Human Rights Act has no applicability to the Legislature's enactment of a law.

The only new claim is Petitioners' vagueness challenge to certain provisions of the Heartbeat Act. But Petitioners' own filings demonstrate that they have no real vagueness concerns. The same terms challenged here were implicated in Petitioners' initial attack on the Heartbeat Act's civil action, which they filed way back in March. At that time, Petitioners failed to argue that those terms were void for vagueness—and for good reason. The clear weight of precedent and history demonstrate that there is no viable vagueness argument here. Indeed, even the declaration that Petitioners offer in support of their Petition makes plain that while an abortion provider might find the *scope* of the law unpalatable, she can understand its basic terms. Petitioners' arguments that Sections 18-8804 and 18-8805 of the Heartbeat Act are void for vagueness fail.

Petitioners' claims should be rejected, not just for the reasons set forth above, but additionally because of the procedural deficiencies that the State Respondents have identified. The Petition is substantively and procedurally deficient and should be denied.

B. The criminal provisions of the Fetal Heartbeat Preborn Child Protection Act were signed into law in 2021 and became effective on August 19, 2022.

The Heartbeat Act, which contains the challenged Sections 18-8804 and 18-8805, Idaho Code, requires any person who intends to perform or induce an abortion to determine whether a fetal heartbeat is present, except in a medical emergency. Idaho Code § 18-8803. A fetal heartbeat is defined as "embryonic or fetal cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac," and the Heartbeat Act requires the person testing the pregnant woman to use his or her "reasonable medical judgment" and "standard medical practice" to determine presence of a fetal heartbeat and record the results in the medical record. Idaho Code §§ 18–8801(2), 18–8803. If a fetal heartbeat is detected, Section 18-8804 prohibits performing an abortion except in cases of a medical emergency or where documentation is provided that the woman or her guardian reported rape or incest to law enforcement or child protective services. A medical emergency is defined as a condition that necessitates an immediate abortion to avert the mother's death or "for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function." Idaho Code § 18-8801(5).

Section 18-8805 of the Heartbeat Act provides criminal and licensing penalties for violations of the chapter.[1] A licensed health care professional who knowingly or recklessly performs or induces an abortion in violation of the Heartbeat Act is guilty of a felony punishable by imprisonment for two to five years. Idaho Code § 18-8805(2). Further, the Heartbeat Act directs the appropriate licensing board to suspend the health care professional's license to practice for six months for a first offense, and permanently revoke the license upon a subsequent offense. Idaho Code § 18-8805(3).

While enacted in 2021, the Heartbeat Act's criminal prohibitions[2] did not become effective until August 19, 2022 because the statute contains a contingent effective date. Idaho Code § 18-

[1] The Heartbeat Act also contains a civil cause of action that is not at issue in this challenge. Idaho Code § 18-8807.

[2] For the purposes of this brief only, the phrases "criminal prohibitions" and "criminal provisions" refer to both the criminal and licensing enforcement mechanisms.

8805(1) ("[t]his section shall become effective thirty (30) days following the issuance of the judgment in any United States appellate court case in which the appellate court upholds a restriction or ban on abortion for a preborn child because a detectable heartbeat is present on the grounds that such restriction or ban does not violate the United States constitution."). On July 20, 2022, the Eleventh Circuit issued its decision and judgment in *SisterSong Women of Color Reproductive Justice Collective v. Governor*, 40 F.4th 1320, 1323 (11th Cir. 2022), upholding a law criminally prohibiting the performance of abortions after a fetal heartbeat is detectable, triggering the Heartbeat Act's criminal prohibitions. The Heartbeat Act's criminal prohibitions therefore took effect on August 19, 2022. *See Planned Parenthood of Great Nw., Haw., Alaska, Ind., Ky., Inc. v. State*, Nos. 49615, 49817, 49899, 2022 WL 3335696, at *8 (Idaho Aug. 12, 2022).[3]

Petitioners now seek relief declaring the challenged statutes unconstitutional and a writ of prohibition preventing (1) "inferior" courts from giving effect to Sections 18-8804 and 18-8805 and (2) Idaho law enforcement and Idaho professional boards from enforcing these sections. Pet., Dkt. No. 49899, Prayer for Relief (c). Despite the wide-ranging relief they have requested, Petitioners have only named as respondents the State of Idaho, Governor Brad Little, Attorney General Lawrence Wasden, two county prosecutors, and three health professional licensing boards (collectively, "State Respondents"). Pet., Dkt. No. 49899.

C. The Heartbeat Act's criminal prohibitions are consistent with Idaho's longstanding policy of protecting preborn human life.

As this Court recognized in its August 12, 2022 Opinion—and as explained in other briefing—before Idaho policymakers were begrudgingly forced to create a framework to regulate abortion in response to *Roe*, abortion at all stages was a crime in Idaho, even in early territorial days. Op. 10 ("[B]efore Roe announced a federal constitutional right to abortion in 1973, abortion had been a long-standing criminal offense in Idaho. . . . Indeed, abortion had been a crime in Idaho since its early territorial days and for approximately 26 years before Idaho adopted its constitution

[3] Citations to this Court's August 12, 2022 decision will otherwise be to the slip opinion ("Op.").

in 1890."). *See also* Resp'ts' Opp'n Br., Dkt. No. 49817, at 3-4 (describing the history and purpose of the criminal abortion laws in Idaho).

Post-*Roe*, the protection of human life, including preborn human life, to the greatest degree possible has remained the public policy of Idaho, as described in the State Respondents' Opposition Brief filed in Docket 49817. Resp'ts' Opp'n Br., Dkt. No. 49817, at 4-5 (describing the legislative reaction of Idaho lawmakers to the decision in *Roe*, which included enacting a 1973 trigger law that would have restored Idaho's criminal prohibition of abortion if the ability to prohibit abortion was restored to the states). Moreover, Idaho has repeatedly expressed its value for preborn human life post-*Roe*. *Id.* at 4-6. Consistent with this policy, in 2020, the Idaho Legislature passed and the Governor signed into law Idaho Code § 18-622 ("Section 622"), and a year later, the Legislature and the Governor enacted the Heartbeat Act. *Id.* at 5-6.

D. This Court cannot assume that the Heartbeat Act's criminal provisions will negatively impact Idahoans.

Petitioners have identified no competent evidence that the Heartbeat Act will negatively impact Idaho women as a whole,[4] 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 the Heartbeat Act are irrelevant to decide the "pure questions of law" that they raise. *See* Pet'rs' Br. in Resp. to this Court's June 30, 2022 Order Setting Hr'g, Dkt. No. 49615, at 13-15.

Moreover, *Roe* and *Casey* have been overruled. While Petitioners' allegations of delay and cost might have been valid considerations under *Casey*'s undue burden regime, *Casey* has been overruled. *Dobbs*, 142 S. Ct. at 2279. The Supreme Court returned the issue of abortion to the States. *Id.* Thus, Petitioners' (inadmissible) speculation about the possible effects of the Heartbeat Act implicate only 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

[4] A substantial number of Petitioners' allegations as to the alleged effect of the Heartbeat Act must be stricken as inadmissible. *See* Resp'ts' Mot. to Strike and Mem. in Support, Dkt. No. 49899, filed contemporaneously with this brief.

the Legislature's policy judgments that control. In addition, Petitioners present the speculation of only one doctor as to the alleged impact of the Heartbeat Act's criminal prohibitions on Idaho women. There is no reason to believe that other providers will share her concerns or her difficulties in understanding the Heartbeat Act.

II. ADDITIONAL ISSUES PRESENTED

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

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

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

D. Should the Court deny the Petition because the claims are largely moot?

III. ARGUMENT

A. The Petition should be denied because of the procedural deficiencies that also exist in the Section 622 challenge.

The Petition should be denied as procedurally improper for all the reasons argued in the opposition to the Section 622 challenge, which the State Respondents incorporate by reference herein. Resp'ts' Opp'n Br., Dkt. No. 49817, at 7-13. The requested writ of prohibition cannot issue because they seek to restrain non-parties, because Petitioners have plain, speedy and adequate remedies available to them in the ordinary course of law, and because there is no urgent need for an immediate decision. *See id.* at 8-11. Petitioners' failure to seek a valid writ means that this Court cannot exercise its original jurisdiction. *Id.* Moreover, the State of Idaho is not a proper respondent to a petition for writ and should be dismissed for this reason. *Id.* at 11. Finally, Petitioners lack standing to sue on behalf of Idaho women. *Id.* at 12-13. Therefore, their claims that (1) a right to abortion exists under the Idaho Constitution, (2) the Heartbeat Act's criminal provisions violate equal protection, and (3) the Heartbeat Act's criminal provisions violate the Idaho Human Rights Act are all barred for lack of standing. *Id.*

B. The Petition should be denied because the claims are largely moot.

The Petition should also be denied because it is largely moot.[5] The Heartbeat Act's criminal provisions no longer apply except for a very narrow subset of abortions performed in a Medicare-participating emergency department. *United States v. Idaho*, No. 1:22-CV-00329-BLW, 2022 WL 3692618, at *15 (D. Idaho Aug. 24, 2022). The mootness of Petitioners' claims arises from Section 18-8805(4), which provides that Section 622 supersedes the Heartbeat Act's criminal provision to the extent that Section 622 is "enforceable." Because Section 622 is now enforceable in almost all situations, the Heartbeat Act's criminal provision is almost entirely inoperative.

Because the broad relief that Petitioners seek is inappropriate, the petition should be denied.

C. There is no right to abortion under the Idaho Constitution, and the Heartbeat Act satisfies the applicable rational basis review.

As previously argued, the Idaho Constitution does not protect a right to abortion. *See* Resp'ts' Opp'n Br., Dkt. No. 49817, at 13-28. This Court has never recognized a fundamental "right to procreate" under the Idaho Constitution, and it certainly has never recognized a right to end the life of a preborn child. *Id.* at 14-15. Further, a right to abortion does not exist in the Idaho Constitution because it is not expressly guaranteed as a positive right. *Id.* at 15-17. And even if a right to abortion could be found absent an express guarantee, such right cannot be inferred into the text of the Idaho Constitution or found in any of the constitutional provisions in which Petitioners attempt to house it—article I, section 1; article I, section 17; or article I, section 21. *Id.* at 18-25. Moreover, the decisions of other state courts interpreting their own state constitutions do not support finding a right to abortion in *Idaho's* Constitution. *Id.* at 25-26.

[5] Petitioners' claims are not entirely moot only because of a preliminary injunction recently issued in federal district court, which could be reversed or vacated at any time. *United States v. Idaho*, *supra* at *id.* That preliminary injunction exempts from Section 622's prohibitions an abortion that is provided as necessary stabilizing treatment for an emergency medical condition in an emergency department at Medicare-participating hospitals under the authority of the Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395dd. *Id.* Because Section 622 is not currently enforceable as to these abortions, Section 622 does not supersede in those situations, and the Heartbeat Act's criminal provisions still apply. Idaho Code § 18-8805(4).

The question of whether a right to abortion exists in the Constitution turns on the intent of the drafters of Idaho's Constitution. There is no way that they could have understood that they were enshrining as a fundamental right something that (1) was criminally prohibited in all circumstances except when necessary to save the life of the mother and (2) was understood to "violate decency, the best interests of society, the divine law" and "the law of nature." *State v. Alcorn*, 7 Idaho 599, 64 P. 1014, 1019 (1901)).

Because there is no fundamental right to abortion in the Idaho Constitution, rational basis review applies to a due process challenge to the Heartbeat Act's criminal prohibitions. *Bradbury v. Idaho Jud. Council*, 136 Idaho 63, 69, 28 P.3d 1006, 1012 (2001). These provisions pass rational basis review because they serve the legitimate state interest of preserving life beginning when a fetal heartbeat is detectable (i.e., at the biologically identifiable moment when life can reliably be determined to have begun, Idaho Code § 18-8802), except circumstances where the mothers' life or health are in danger or in cases of reported rape or incest.

Where the interests at stake are "respect for and preservation of prenatal life at all stages of development, . . .; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability," *Dobbs*, 142 S. Ct. at 2284, there is no more direct way to further those interests than to prohibit the procedures specifically designed to end preborn life. The Heartbeat Act's criminal prohibitions, which prohibits abortion only in circumstances where a fetal heartbeat is detected, is rationally related to the legitimate state interests identified in *Dobbs*, and therefore, passes rational basis scrutiny.

Indeed, the Heartbeat Act would even pass strict scrutiny if it were appropriate because the preservation of prenatal life is a "compelling" state interest and the Heartbeat Act is "necessary" to preserve prenatal life. The Heartbeat Act prohibits, after biologically identifiable life is detected, only the use of the procedure that ends preborn life, except in narrow circumstances. *Reclaim Idaho v. Denney*, 169 Idaho 406, 431, 497 P.3d 160, 185 (2021). The fact that the Heartbeat Act

does not prohibit abortions before about six weeks gestational age does not mean that it is underinclusive—as the Legislature observed, a heartbeat is a generally recognized objective indicator of the presence of life. Idaho Code § 18-8802. The Heartbeat Act is a far more targeted method of preserving prenatal life than the tangentially related policy moves that Petitioners favor, such as increasing access to contraception and expanding social assistance programs. *See* Pet'rs' Br., Dkt. No. 49899, at 9.

D. The Heartbeat Act does not violate Idaho's equal protection guarantee

In response to Petitioners' contention that the Heartbeat Act's criminal provisions violate Idaho's equal protection guarantee, Respondents again incorporate their arguments from the opposition to the challenge to Section 622. *See* Resp'ts' Opp'n Br., Dkt. No. 49817, at 28-32.

First, this Court should adopt the compelling reasoning of the United States Supreme Court in *Dobbs*. *Id.* at 29-30. As the U.S. Supreme Court has held, "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.* at 29 (quoting *Dobbs*, 142 S. Ct. at 2245-46). Moreover, "[t]he goal of preventing abortion does not constitute invidiously discriminatory animus against women." *Id.* But even if the Court were not guided by *Dobbs*, the Heartbeat Act satisfies Idaho's interpretation of equal protection. The Heartbeat Act does not implicate equal protection because it does not treat similarly situated individuals differently, and therefore creates no cognizable classification. *Id.* at 30-32.

Even if the Act did classify between pregnant women and all others, this classification would be subject to rational basis scrutiny, not means-focus, because it does not constitute invidious discrimination. *See id.* at 32-33. Circumscribing the use of a procedure that only one group of people can undergo based on a biological fact is not, in and of itself, invidious discrimination where the purpose of the law is not to punish women, but to protect preborn human life. *See Nelson v. Pocatello*, 170 Idaho 160, 508 P.3d 1234, 1243 (2022) (distinguishing between firefighters with cancer and firefighters with other occupational diseases for the purposes of a presumption related to workers' compensation benefits is not invidiously discriminatory because

the statutory presumption is not intended to punish employers of firefighters with cancer but "to protect firefighters as an occupational class at greater risk of contracting cancer because of the nature of their work").

Thus, even if there were a classification here, the Heartbeat Act's criminal prohibitions would survive rational basis review because the alleged classification is rationally related to the legitimate state interest in preserving preborn life. Largely prohibiting the use of a procedure that terminates preborn human life after a fetal heartbeat is detectable rationally serves the goal of preserving preborn life. By the same token, the Heartbeat Act's criminal prohibitions would also survive means-focus scrutiny because a law largely prohibiting the procedure that takes preborn life when it is biologically identifiable that life has begun will "substantially further[]" the "specifically identifiable legislative end" of preserving preborn life. *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 395, 987 P.2d 300, 307 (1999) (quoting *Jones v. State Bd. Of Med*., 97 Idaho 859, 867, 555 P.2d 399 (1976)). As the U.S. Supreme Court has recognized, this value judgment is proper and reasonable, not invidiously discriminatory. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 274 (1993).

E. The Heartbeat Act does not violate the Idaho Human Rights Act.

For the reasons explained in the response to the challenge to Section 622, Petitioners' argument that the Heartbeat Act violates the Idaho Human Rights Act is meritless. *See* Resp'ts' Opp'n Br., Dkt. No. 49817, at 34-35. First, one Legislature cannot bind a subsequent one; the Legislature is not precluded from passing the Heartbeat Act because of the existence of the Idaho Human Rights Act. *Id.* at 34. Second, the Idaho Human Rights Act by its plain language does not apply to legislative regulation of abortion. *Id.* at 35. And third, the Heartbeat Act and the Idaho Human Rights Act are both statutes, and to the extent they could possibly conflict, the more recent and more specific Heartbeat Act applies. *Id.*

F. Petitioners' vagueness challenges are meritless.

Petitioners raise vagueness challenges concerning the Heartbeat Act. They also raised vagueness challenges concerning Section 622. *See* Pet'rs' Br., Dkt. No. 49817, at 39-50.

Respondents incorporate the applicable vagueness standard from their response to the challenge to Section 622. *See* Resp'ts' Opp'n Br., Dkt. No. 49817, at 36-37.

Petitioners raise two vagueness challenges under article I, section 13 of the Idaho Constitution to the "medical emergency" definition in Idaho Code § 18-8801(5):[6] (1) Petitioners first argue, "The requirements that permit an abortion to be performed only 'to avert [the patient's] death' or to avoid 'serious risk of substantial and irreversible impairment of a major bodily function' do not give sufficient guidance to medical professionals attempting to comply with the law," (Pet'rs' Br., Dkt. No. 49899, at 11); and (2) Petitioners next argue that the "reasonable medical judgment" standard "does not even permit providers to rely [*sic*] 'good faith medical judgment' in determining whether an emergency permits abortion care" and, therefore, "[e]ven if a provider determines a 'medical emergency' exists, this determination could later be decided to be not 'reasonable.'" *Id.* They raise a third challenge to the rape and incest exceptions in Idaho Code §§ 18-8804(1)(a) and (b) because the Act "requires that physicians—not lawyers or judges—determine whether a given narrative on a police report meets the complicated statutory elements for rape or incest under Idaho law." *Id.* at 12.[7] These challenges ignore that the involved terms and phrases appear commonly in abortion statutes and have never been invalidated on vagueness or other grounds. 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, the Heartbeat Act has a core meaning

[6] Idaho Code § 18-8801(5) provides:
"Medical emergency" means a condition that, in reasonable medical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.

[7] Petitioners also alleged that the effective date provision in Idaho Code § 18-8805(1) was impermissibly vague. Pet'rs' Br., Dkt. No. 49899, at 12. However, that claim is now moot. Op. 4 ("There is no dispute that the criminal liability provision was triggered on July 20, 2022, when the United States Court of Appeals for the Eleventh Circuit upheld a Georgia law prohibiting abortions after a detectable human heartbeat.").

understandable to persons of ordinary intelligence because Petitioners admit to understanding the core meaning of the prohibited conduct, as well as the exceptions, when they allege that the statute will cause them to "cease providing abortions in Idaho," *Id.* at 6, and to "cease *most* abortion services in Idaho," Mot. to Expedite, Dkt. No. 49899, 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, 103 S. Ct. 1855, 1858, 75 L. Ed. 2d 903, 909 (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.").

Petitioners marshal no persuasive decisional support for any of these facial attacks. *See State v. Leferink*, 133 Idaho 780, 784, 992 P.2d 775, 779 (1999) ("In 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*.") (quoting *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 497 (1982)). These standards, of course, track closely with those applied under the Due Process Clause in the Fifth and Fourteenth Amendments to the United States Constitution. *See, e.g., SisterSong Women of Color Reproductive Justice Collective*, 40 F.4th at 1328 ("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.") (citation omitted).

1. "To avert her death" and "serious risk of substantial and irreversible impairment of a major bodily function"

The phrases "to avert her death" and "serious risk of substantial and irreversible impairment of a major bodily function" are commonplace in "medical emergency" definitions both past and present.[8] Indeed, these phrases appear in the definition of "medical emergency" in Idaho Code § 18-604(9) ("'Medical emergency' means a condition that . . . so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy *to avert her death* or for which a delay will create *serious risk of substantial and irreversible impairment* of a major bodily function.") (emphasis added). This definition of medical

[8] *E.g.*, Cases: *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 417-18 n.56 (5th Cir. 2013) (("[T]his Act does not apply to abortions that are necessary to avert the death or substantial and irreversible physical impairment of a major bodily function of the pregnant woman."); *Am. Coll. of Obstetricians & Gynecologists, Pa. Section v. Thornburgh*, 737 F.2d 283, 305 (3d Cir. 1984) ("'Medical emergency.' That condition which, on the basis of the physician's best clinical judgment, so complicates a pregnancy as to necessitate the immediate abortion of same to avert the death of the mother or for which a 24-hour delay will create grave peril of immediate and irreversible loss of major bodily function."), *aff'd sub nom. Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).

E.g., Statutes: Ala. Stat. § 26-23G-2(6) ("Serious Health Risk To The Unborn Child's Mother. In reasonable medical judgment, the child's mother has a condition that so complicates her medical condition that it necessitates the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions."); Ga. Code § 16-12-141(a)(3) ("'Medical emergency' means a condition in which an abortion is necessary in order to prevent the death of the pregnant woman or the substantial and irreversible physical impairment of a major bodily function of the pregnant woman."); N.C. Gen. Stat. § 90-21.81(5) ("Medical emergency. A condition which, in reasonable medical judgment, so complicates the medical condition of the pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible physical impairment of a major bodily function, not including any psychological or emotional conditions."); and N.D. Cent. Code Ann. § 14-02.1-02 ("'Medical emergency' means a condition that, in reasonable medical judgment, so complicates the medical condition of the pregnant woman that it necessitates an immediate abortion of her pregnancy without first determining postfertilization age to avert her death or for which the delay necessary to determine postfertilization age will create serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions. A condition may not be deemed a medical emergency if based on a claim or diagnosis that the woman will engage in conduct that she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function.").

emergency has been used in Idaho since 2005 and has never been challenged on the grounds of vagueness. 2005 Idaho Sess. Laws 1318. The absence of any challenge is particularly notable because the definition of medical emergency is fundamental to the informed consent bypass in Idaho Code § 18-609(4) and to the parental consent and judicial authorization bypass for an abortion to be performed on a minor. Idaho Code § 18-609A(7)(b). In other words, had there been a true vagueness issue here, this definition would have been challenged long ago. Patently, providers can understand the phrases Petitioners' challenge.

The United States Supreme Court has long recognized that legislative bodies, in the abortion context, properly defer to physicians' medical judgment whether an abortion is necessary to preserve a pregnant woman's life or health. *United States v. Vutich*, 402 U.S. 62, 72 (1971) ("[W]hether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered."); *Doe v. Bolton*, 410 U.S. 179, 192 (1973) (rejecting a vagueness challenge to the word "necessary"; "[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.").

Petitioners' conclusory contention that these phrases do not provide physicians "sufficient guidance" for compliance purposes in *all* applications—which they pursue without citing any apposite authority—rings hollow given the phrases' ubiquity and judicial recognition that they provide adequate guidance to physicians for abortion-performance purposes. Moreover, Petitioners' fail to recognize that, as with Section 622, the rule of lenity counsels against any distinction that might concern them (though they fail to identify any distinction of concern). Pet'rs' Br., Dkt. No. 49899, at 11. *See 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). Petitioners also ignore 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). This rule applies to the extent that a

concern exists, as this Court recognized in this very case. Op. 10-11. Petitioners' facial challenge fails.

2. "Reasonable medical judgment"

Petitioners rely on *Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998), for the proposition "that confusion over an objective or subjective standard for a medical professional renders a statute void for vagueness." Pet'rs' Br., Dkt. No. 49899, at 12. There, an abortion provider challenged on vagueness grounds several provisions, including an Ohio statute's medical necessity and medical emergency provisions. As the panel majority explained,

> The Act's "medical emergency" definition requires the physician to determine "in good faith and in the exercise of reasonable medical judgment" whether an emergency exists. . . . Similarly, the medical necessity exception to the post-viability ban requires that the physician determine "in good faith and in the exercise of reasonable medical judgment" that the abortion is necessary. . . . Thus, both of these provisions contain subjective and objective elements in that a physician must believe that the abortion is necessary *and* his belief must be objectively reasonable to other physicians. This dual standard as written contains no scienter requirement. Therefore, a physician may act in good faith and yet still be held criminally and civilly liable if, after the fact, other physicians determine that the physician's medical judgment was not reasonable. In other words, a physician need not act wilfully [*sic*] or recklessly in determining whether a medical emergency or medical necessity exists in order to be held criminally or civilly liable; rather, under the Act, physicians face liability even if they act in good faith according to their own best medical judgment.

Women's Medical Professional Corp., 130 F.3d at 204 (citations omitted). Relying on *Colautti v. Franklin*, 439 U.S. 379 (1979), which invalidated on vagueness grounds a Pennsylvania viability-determination statute that imposed strict liability on physicians for failure to comply with mixed subjective good-faith (the viability determination) and objective (the care required to be provided a viable fetus) standards of care,[9] the majority found the Ohio law impermissibly vague because

[9] The relevant portions of the Pennsylvania law provided:

> "(a) Every person who performs or induces an abortion shall prior thereto have made a determination based on his experience, judgment or professional competence that the fetus is not viable, and if the determination is that the fetus is viable or if there is sufficient reason to believe that the fetus may be viable, shall

(1) "[t]he determination of whether a medical emergency or necessity exists, like the determination of whether a fetus is viable, is fraught with uncertainty and susceptible to being subsequently disputed by others"; (2) the law did not have a scienter element; and (3) "the lack of scienter is compounded by the fact that this Act requires that a physician meet both an objective and a subjective standard in order to avoid liability." 130 F.3d at 205. The panel added that "[t]he uncertainty induced by this statute . . . threatens to inhibit the exercise of constitutionally protected rights." *Id.*

The dissenting Sixth Circuit panel member argued, in part, that "the principle invoked by the Court in *Colautti* simply is that a scienter requirement can mitigate the vagueness of an otherwise vague law—not that the absence of a scienter requirement will 'create' vagueness where it does not otherwise exist." *Id.* at 216. The dissenter also did not "believe there is anything vague, or even novel, about a statute prescribing a standard including components of good faith and reasonableness. For example, when a defendant raises a claim of self defense, he must show an honest belief that the imminent use of deadly force was necessary and that such belief was reasonable under the circumstances." *Id.*

In dissenting from denial of the *Voinovich* defendants' petition for writ of certiorari, Justice Thomas, joined by the Chief Justice and Justice Scalia, stated that "[t]he statutory language in *Colautti* was ambiguous because it could be read as imposing either a purely subjective or a mixed

---

> exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted and the abortion technique employed shall be that which would provide the best opportunity for the fetus to be aborted alive so long as a different technique would not be necessary in order to preserve the life or health of the mother.
>
> . . .
>
> "(d) Any person who fails to make the determination provided for in subsection (a) of this section, or who fails to exercise the degree of professional skill, care and diligence or to provide the abortion technique as provided for in subsection (a) of this section . . . shall be subject to such civil or criminal liability as would pertain to him had the fetus been a child who was intended to be born and not aborted."

Colautti, 439 U.S. at 380 n.1.

subjective and objective mental requirement, thereby leaving physicians uncertain of the relevant legal standard" and that "in *Colautti* itself, we explicitly declined to address whether 'under a properly drafted statute, a finding of bad faith or some other type of scienter would be required before a physician could be held criminally responsible for an erroneous determination of viability.'" *Voinovich v. Women's Med. Prof. Corp.*, 523 U.S. 1036, 118 (1998).

The Seventh Circuit found Justice Thomas's analysis concerning *Colautti*'s limited reach persuasive in *Karlin v. Foust*, 188 F.3d 446 (7th Cir. 1999), where it upheld a Wisconsin abortion statute's medical emergency provision that imposed an objective "reasonable medical judgment" standard.[10] *Id.* at 462-63. It further deemed the Sixth Circuit's decision "dicta" because that court "had no occasion to pass on the constitutional sufficiency of an objective standard alone." *Id.* at 463. Turning to whether the Wisconsin "reasonable medical judgment" standard was unconstitutionally vague, the court reasoned that, unlike the Pennsylvania and Ohio statutes, "physicians are fully aware that they will be judged solely on an objective basis in making the determination that a medical emergency exists" and added that "the 'reasonable medical judgment' standard clearly is an ascertainable and comprehensible standard that provides physicians with more than 'fair warning' as to what conduct is expected of them in order to avoid the imposition of liability under [the Wisconsin law] because this is the same standard by which all of their medical decisions are judged under traditional theories of tort law." *Id.* at 464. On this point, it observed that "[w]hile physicians may feel more secure in determining that a medical emergency exists under [the Wisconsin law] if they know that their emergency medical decisions need only satisfy a subjective good faith standard, a state's decision to hold a physician's emergency medical determination to an objective standard alone does not render the medical emergency provision impermissibly vague." *Id.* at 465. The panel next concluded that the objective standard adequately

[10] The statute defined a "medical emergency" as "a condition, in a physician's reasonable medical judgment, that so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a 24–hour delay in performance or inducement of an abortion will create serious risk of substantial and irreversible impairment of one or more of the woman's major bodily functions." Wis. Stat. § 253.10(2)(d).

cabined state enforcement discretion, since "[j]ust as [the law's] 'reasonable medical judgment' standard clearly provides the standard to which physicians must conform their conduct, that same standard provides the guideline pursuant to which prosecutors, state licensing authorities, and civil plaintiffs can seek to hold physicians liable for erroneous emergency medical determinations." *Id.* at 466.

Karlin's reasoning is lucid and applies here. First, Section 18-8801(1) incorporates a scienter requirement into the definition of "abortion" that is defined to mean in relevant part "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 preborn child" (emphasis added). *Cf.* Idaho Code § 18-101(5) ("The word 'knowingly[]' imports only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of such act or omission."). Section 18-8804(1) then incorporates this definition into the substantive requirement that "[a] person may not perform an abortion on a pregnant woman when a fetal heartbeat has been detected," subject to the medical emergency and rape or incest exceptions. Section 18-8804(1), in short, does not impose strict liability on a physician performing a post-fetal heartbeat abortion.

Second, the medical emergency definition contains a single, objective standard: reasonable medical judgment. This is no less than in *Karlin*, and, therefore, both the regulated (physicians) and the regulators (prosecutors and licensing officials) have a clearly ascertainable standard against which to determine compliance with Idaho Code § 18-8804(1).

Third, as discussed, the *Voinovich* majority evinced concern over the possible chilling effect of the Ohio's dual standard of care/lack of a scienter element on "the exercise of constitutional rights"—that concern no longer exists post-*Dobbs*. *See State v. Bitt*, 118 Idaho 584, 588, 798 P.2d 43, 47 (1990) (Absent regulation of a significant amount of constitutionally protected conduct, vagueness analysis only "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."). Petitioners cannot carry their facial

challenge burden with respect to the 'reasonable medical judgment' standard in Idaho Code § 18-8801(5).

3. Rape and incest exceptions

The rape and incest exceptions in Idaho Code §§ 18-8804(1)(a) and (b) demand no "guess about whether a given police report sufficiently alleges rape or incest." Pet'rs' Br., Dkt. No. 49899, at 12. They merely require an adult not subject to guardianship to have "reported the act of rape or incest to a law enforcement agency and provided a copy of such report to the physician who is to perform the abortion" (Idaho Code § 18-8804(1)(a)) and a minor's parent or a guardian to do the same. Idaho Code § 18-8804(1)(b). These provisions do not require a physician to make any "guess"; they require the patient, her parent or her guardian to have reported the alleged rape or incest to law enforcement officials and to tender the report to the physician. The provisions are not vague, and their application cannot be invalidated "*in toto*" (*Leferink*, 133 Idaho at 784, 992 P.2d at 779) on mere speculation that, in a particular instance, the report tendered to the physician may raise a question about whether it deals with a rape or incest. In other words, the "core" of the abortions for which the exceptions will be invoked will not implicate Petitioners' concern. *Bitt*, 118 Idaho at 588, 798 P.2d at 47 (The "last step [of vagueness analysis] 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.").

It warrants noting, finally, that Idaho Code §§ 18-622(3)(b)(ii) and (iii) contain identical language and have not been challenged on vagueness grounds by Petitioners. *See* Pet'rs' Br., Dkt. No. 49817, at 43 n.47 (arguing only that "[t]he requirement that a patient or a patient's parents provide copies of reports from a law enforcement agency or child protective services before a physician is permitted to obtain an abortion is also unfairly prohibitive"). Petitioners' vagueness claim here thus appears to be nothing more than a wholly-unsupported afterthought.

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, the Heartbeat Act's criminal provisions do 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 the Prayer for Relief because Petitioners fail to argue any basis for an award of fees and because Petitioners cannot prevail.

DATED: September 2, 2022.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 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:

Michael J. Bartlett, michael@bartlettfrench.com
BARTLETT & FRENCH LLP

Alan E. Schoenfeld alan.schoenfeld@wilmerhale.com
Rachel E. Craft rachel.craft@wilmerhale.com
WILMER CUTLER PICKERING
HALE AND DORR LLP (New York, NY Office)

Sofie C. Brooks sofie.brooks@wilmerhale.com
WILMER CUTLER PICKERING
HALE AND DORR LLP (Boston, MA Office)

Attorneys for Petitioners

Daniel W. Bower dbower@morrisbowerhaws.com
MORRIS BOWER & HAWS PLLC

Monte Neil Stewart monteneilstewart@gmail.com
Attorney at Law

Attorneys for Intervenors-Respondents

/s/ Megan A. Larrondo
MEGAN A. LARRONDO
Deputy Attorney General