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In the Supreme Court of the State of Utah

Planned Parenthood Association of Utah, *Plaintiff-Respondent*, v. State of Utah, et al., *Defendants-Petitioners.*	No. _____

Petition for Permission to Appeal an Interlocutory Order
(subject to assignment to the Court of Appeals)

On petition for permission to appeal an interlocutory order
from the Third Judicial District Court
Honorable Andrew Stone
No. 220903886

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Introduction

When left to decide for itself, Utah has prohibited abortions, with limited exceptions, dating back to territorial days. *Roe* largely took that authority away. *Dobbs* restored it. With decision making authority on this issue back in the hands of citizens and their duly elected representatives, the State returned to its long-held policy of prohibiting abortions with limited exceptions.

Planned Parenthood Association of Utah (PPAU) challenges Utah's renewed abortion policy as violating an alleged implied state constitutional right to abortion. And the district court preliminarily enjoined the State from enforcing its law. That extraordinary remedy warrants immediate review by and relief from this Court. First, PPAU lacks standing by itself or representing others to assert a right to abortion. The district court therefore lacks jurisdiction. Second, PPAU has no possibility of winning on its claims given the anti-abortion legal landscape both before and after Utah's Constitution was adopted. That means PPAU's issues are neither substantially likely to prevail nor serious questions warranting more litigation. The district court should not have issued a preliminary injunction barring the State from enforcing a duly enacted law.

Background

SB 174. The Utah Legislature enacted Senate Bill 174, codified at Utah Code §§ 76-7a-101 to -301, in its 2020 General Session. 2020 Utah Laws 1981-82. The law prohibits abortion, with three exceptions. First, an abortion may be performed when "necessary to avert . . . the death of the woman on whom the abortion is performed" or "a serious risk of substantial and irreversible impairment of a major bodily function." Utah Code § 76-7a-201(1)(a). Second, abortion is permitted when, as certified by two qualified physicians, the fetus suffers from a "uniformly diagnosable and uniformly lethal" condition or a "severe brain abnormality that is uniformly diagnosable." *Id.* § -201(1)(b). Third, SB

174 permits an abortion if the woman is pregnant as a result of rape or incest that has been reported to law enforcement. *Id.* § -201(c).

SB 174 further requires that abortions be performed only by a physician, and only in a clinic or hospital (absent a medical emergency). *Id.* § -201(2). Any person "who performs an abortion in violation of [SB 174] is guilty of a second degree felony," *id.* § -201(3), and clinics or physicians can have their licenses revoked. *Id.* § -201(4)-(5).

SB 174 becomes effective. In light of then-governing legal precedent, the Legislature gave SB 174 a "[c]ontingent effective date." 2020 Utah Laws 1981, 1982. SB 174 would take effect whenever legislative general counsel certified that "a court of binding authority has held that a state may prohibit abortion of an unborn child at any time during the gestational period, subject to the exceptions enumerated in [SB 174]." *Id.*

That contingency happened on June 24, 2022. The United States Supreme Court issued *Dobbs v. Jackson Women's Health Organization,* 142 S. Ct. 2228 (2022). While recognizing that "[a]bortion presents a profound moral question," *id.* at 2284, the Supreme Court held the federal "[c]onstitution does not prohibit the citizens of each State from regulating or prohibiting abortion." *Id.* at 2284. And because "*Roe* and *Casey* arrogated that authority," the Supreme Court "overrule[d] those decisions and return[ed] that authority to the people and their elected representatives." *Id.* Later that day, legislative general counsel certified that SB 174's contingency had been met. Complaint, Ex. B. SB 174 immediately took effect. 2020 Utah Laws 1982.

PPAU claims SB 174 violates a state constitutional right to abortion. The next day, PPAU filed a complaint in Third District Court claiming SB 174 violates the Utah Constitution. But, like the U.S. Constitution, the state constitution says nothing about abortion. In fact, "such a right was entirely unknown in American law" until the latter part

of the 1900s. *Dobbs*, 142 S. Ct. at 2242. Nor is the alleged right otherwise "deeply rooted in this Nation's history and tradition." *Id.* So to prevail, PPAU would have to conjure an *implied* right to abortion from somewhere within Utah's charter that clearly barred SB 174. PPAU's complaint attempts to carry that heavy burden by asserting seven claims contending that SB 174 violates eleven different state constitutional provisions that alone or in various combinations impliedly guarantee a right to abortion: (1) a right to determine family composition under Utah Const. art. 1, §§ 2, 25, 27; (2) the Equal Rights Clause, Utah Const. art. IV, § 1; (3) the Uniform Operations of Laws, Utah Const. art. I, §§ 2, 24; (4) a substantive due process right to bodily integrity under Utah Const. art. I, §§ 1, 7, 11; (5) the prohibition against involuntary servitude, Utah Const. art. I, § 21; (6) a right of conscience, Utah Const. art. I, § 4; and (7) a right to privacy, Utah Const. art. I, § 1 and art. 14. *See* Compl. ¶¶ 60-92. Some claims involved double-implied rights—implying a right to abortion from another implied right. *See, e.g.,* Compl. ¶ 61 (discussing family composition and parental claim); *id.* ¶ 77 (discussing bodily integrity claim); *id.* ¶¶ 91-92 (discussing right to privacy claim). And one claim relies on this Court's caselaw openly criticizing *Roe v. Wade*. *See* Compl. ¶ 61 (discussing family composition claim and citing *In re J.P.*, 648 P.2d 1364, 1372-74 (Utah 1982), which distinguishes the parental rights at issue in that case from the "substantive due process cases like *Roe v. Wade* . . . which rely on a 'right of privacy' not mentioned in the Constitution to establish other rights unknown at common law"). PPAU simultaneously requested a temporary restraining order against SB 174's enforcement, which the district court granted before the State could submit any responsive briefing.

The district court preliminarily enjoins SB 174. PPAU then moved for a preliminary injunction on six of its claims. PI Mot. at 19-43. The parties submitted briefs

and the court heard argument. At the end of the hearing, the court announced its decision to grant the preliminary injunction. Prel. Inj. Tr. (Tr.) at 46-54 (attachment 2 hereto). The court determined that PPAU had standing as an abortion provider to challenge SB 174 and that PPAU has "representative standing" to press the claims on behalf of putative abortion seekers. Tr. at 46. Turning to the preliminary injunction, the court said the test was flexible and a stronger showing on irreparable harm meant less of a need to show likelihood of success. Tr. at 47. In fact, the court wouldn't comment on the strength of PPAU's claims, Tr. at 47, instead finding merely that "there are clearly serious constitutional issues here to be litigated, *and the claims are plainly not frivolous*." Tr. at 52 (emphasis added).

The court issued a written preliminary injunction order (Order) on July 19, 2022 (attachment A hereto) before the State had a chance to object to the draft. *See* Utah R. Civ. P. 7(j)(4). As to standing, the order stated that "PPAU has demonstrated an injury in its own right and to its patients" that an injunction would redress. Order at 4. Alternatively, the court ruled that PPAU has "representative standing because it is an appropriate party to litigate this case of significant public import." *Id.*

On the preliminary injunction test, the district court determined all four factors favored PPAU. The court found PPAU made a strong showing that SB 174 will cause irreparable harm based almost entirely on alleged harm to non-plaintiff, unnamed "Utahns" who would have to carry an unwanted pregnancy or travel out of state for an abortion or turn to self-managed abortions. *Id.* at 2. Based again mostly on these non-plaintiffs, the court reasoned the balance of harms weighed in PPAU's favor because "it is unclear on this record whether and to what extent the Act will ultimately further its legislative goals." *Id.* The court then announced a preliminary injunction is in the public interest because it

"would maintain the status quo while the constitutional issues in this case can be resolved on the merits." *Id.* at 3.

Finally, the court said PPAU had demonstrated "at least serious issues on the merits that should be subject to further litigation" as to their claims that one or more of the asserted constitutional provisions guarantees a right to abortion. *Id.* at 3. The court said these were "novel and complicated" issues upon which PPAU might prevail. *Id.* at 4. And the court concluded it would benefit from further issue development, including any facts the parties wanted to present. *Id.*

With that, the court entered a preliminary injunction against SB 174's enforcement pending final resolution of the case. *Id.* at 5. The State now timely requests permission to challenge the district court's preliminary injunction order. Utah R. App. P. 5(a).

Issues Presented

1. Did the district court err by concluding that PPAU has standing on its own or on behalf of third parties to challenge SB 174?
2. Did the district court abuse its discretion by granting a preliminary injunction against SB 174's enforcement despite the fact that PPAU failed to show a substantial likelihood of success or serious issue on their claims that the Utah Constitution impliedly protects a right to abortion?

Preservation: The State raised both issues in its memorandum in opposition to plaintiff's motion for a preliminary injunction. PI Opp. at 18-67.

Standard of review: Standing generally presents a mixed question of fact and law; the question whether a "given individual or association has standing to request a particular relief is primarily a question of law" and the Court gives "minimal discretion" to the district court's determination of whether specific facts satisfy standing requirements. *Hinkle v.*

Jacobsen, 2019 UT 72, ¶ 18, 456 P.3d 738. The Court reviews the grant of a preliminary injunction for abuse of discretion. *Aquagen Int'l, Inc. v. Calrae Trust*, 972 P.2d 411, 413 (Utah 1998). And a court abuses its discretion when it grants a preliminary injunction even though the plaintiff has no possibility of prevailing on the merits. *Id.*

Reasons Why Interlocutory Appeal Should Be Permitted

An appeal from an interlocutory order may be granted when the order "involves substantial rights and may materially affect the final decision," or when immediate review "will better serve the administration and interests of justice." Utah R. App. P. 5(g). Both reasons justify interlocutory appeal here. PPAU lacks its own or third-party standing to challenge SB 174 based on an implied constitutional right to abortion. Reviewing that issue (and dismissing the case) now, rather than a year or two later on direct appeal, better serves the administration and interests of justice. More importantly, the case involves profound and substantial rights—protecting the lives of unborn children—and the State and public interest in enforcing SB 174's policy choices. The preliminary injunction unjustifiably blocks those rights given PPAU's lack of any possibility of winning or serious claims. Reversing the district court now will not only allow the State to enforce its duly enacted law but will reinforce the correct analysis for resolving PPAU's claims on the merits.

I. The district court erred by concluding PPAU has standing to assert a constitutional right to abortion.

The district court ruled that PPAU has standing itself and as a representative of others. That's wrong on both counts. The Court should grant immediate review to reverse and dismiss this litigation for lack of jurisdiction. *Living Rivers v. Exec. Dir. of the Utah Dept. of Env't Quality*, 2017 UT 64, ¶ 27, 417 P.3d 57.

PPAU lacks standing by itself. The district court concluded that PPAU had standing because it showed "an injury in its own right and to its patients" and an injunction

"would redress those injuries." Order at 4. But standing demands more than just a redressable injury. A plaintiff must also have a "personal stake" in the dispute, *Jenkins v. Swan*, 675 P.2d 1145, 1148 (Utah 1983), based on its "own rights" rather than the claims of non-parties or the public at large, *Provo City Corp. v. Thompson*, 2004 UT 14, ¶ 9, 86 P.3d 735 (to have standing, "a party may generally assert only his or her own rights and cannot raise the claims of third parties who are not before the court" (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973)). That means PPAU "must assert [its] own legal rights and interests, and cannot rest [its] claim[s] to relief on the legal rights or interests of third parties." *Shelledy v. Lore*, 836 P.2d 786, 789 (Utah 1992).

PPAU lacks standing because it has no personal stake in this case *based on its own rights*. Rather, all of its claims for relief are based on the alleged implied constitutional right to abortion that, even if it existed, would belong to women who seek abortions, not clinics like PPAU that perform the procedure. That's why the overwhelming majority of PPAU's Complaint focuses on arguments about the legal rights of, and harms to, third-party patients who are not before the Court. PPAU has not alleged that SB 174 violates any of PPAU's own actual or alleged constitutional rights. And PPAU has no interest implicated by SB 174 sounding in privacy, bodily integrity, equal protection, family composition, or any of the other alleged constitutional rights from which it hopes to derive an implied abortion right.

PPAU failed to establish, and the district court failed to find, all three elements of standing. *Alpine Homes, Inc. v. City of W. Jordan*, 2017 UT 45, ¶ 34, 424 P.3d 95 (party must show all three standing elements). The district court was not free to skip any "standing requirements simply because the plaintiff wishes to assert a constitutional claim." *Haik v. Jones*, 2018 UT 39, ¶ 21 n.3, 427 P.3d 1155. The district court erred in

concluding PPAU on its own has standing to assert SB 174 violates an alleged implied constitutional right to abortion.

PPAU lacks standing to represent non-parties. In the alternative, the district court determined PPAU "has representative standing because it is an appropriate party to litigate this case of significant public import." Order at 4. It is not totally clear what the district court means. The court may be conflating associational standing and public interest standing. Whatever the case, the court wrongly decided PPAU had standing to press others' claims.

An association has standing if its individual members satisfy traditional standing requirements and their participation is not necessary to resolve the case. *Utah Chapter of Sierra Club v. Utah Air Quality Bd.*, 2006 UT 74, ¶ 21, 148 P.3d 960. But PPAU is not a membership association (with patients as members) and does not seriously claim to have or demonstrate associational standing. *See* PI Motion at 6; PI Reply at 4. So the district court erred to the extent it suggested PPAU had associational standing. *See ACLU of Utah v. State*, 2020 UT 31, ¶ 3, 467 P.3d 832 (noting petitioners never claimed associational standing).

Nor does PPAU merit alternative standing under the public interest standing doctrine.[1] Under current precedent, courts may allow standing as an exception to the traditional rules "where matters of great public interest and societal impact are concerned," but Utah courts "will not readily relieve a plaintiff of the salutory requirement of showing

[1] Public interest standing rests on shaky ground—"two members of this court have expressed serious doubt about the intellectual underpinnings of the doctrine and have invited further discussion of its continued viability." *Haik*, 2018 UT 39, ¶ 23 n.5. The State reserves the right to challenge the doctrine in its brief on the merits should the Court grant this petition for permission to file an interlocutory appeal.

a real and personal interest in the dispute." *Jenkins*, 675 P.2d at 1149-50. To warrant public interest standing, PPAU must show, among other things, that the issues it wants to litigate are unlikely to be raised by anyone else if PPAU is denied standing. *ACLU*, 2020 UT 31, ¶ 4. The district court's order did not address this issue but the court stated at the hearing that it is a "natural conclusion to think" a woman needing an abortion would not find a lawsuit to be "the most efficient way to serve her own interests." Tr. at 46. That may be true for some women facing an abortion choice. But given the examples of women asserting abortion rights in court, no one could reasonably conclude that it is unlikely anyone but PPAU will challenge SB 174. Like the plaintiffs who asserted a federal constitutional right in *Roe v. Wade* and its companion case *Doe v. Bolton*, Utahns affected by SB 174 could bring a constitutional challenge in their own name, form an association to do so, or join PPAU's suit letting it do the heavy lifting. *See, e.g., Women of State of Minn. by Doe v. Gomez*, 542 N.W.2d 17, 20-21 nn.2-3 (Minn. 1995) (plaintiffs, including individual women, challenged regulations restricting abortion access under the state constitution).

For similar reasons, PPAU cannot rely on the third-party standing exception discussed in *Shelledy* (which the district court did not mention, much less apply here). The exception would apply only if, among other things, it is *impossible* for the third-party right holders to assert their own claims. *Shelledy*, 836 P.2d at 789. That's not the case here—women affected by SB 174 have "never been precluded from asserting" their own alleged abortion rights. *Id.*

Finally, PPAU argued—but the district court did not address—that it would have standing in federal court under the relaxed abortion-related third-party standing exception, so PPAU necessarily has standing in state court. PI Mot. at 6. But state and federal standing

requirements are not identical, *Gregory*, 2013 UT 18, ¶ 12, and PPAU's argument fails to explain why the Court should adopt the federal standard PPAU prefers.

II. The district court abused its discretion in preliminarily enjoining SB 174.

A preliminary injunction may issue "only" if the applicant shows (1) it will suffer irreparable harm absent the injunction, (2) the harm to the applicant outweighs the damage the injunction will cause to the restrained party, (3) the injunction is not adverse to the public interest, and (4) a substantial likelihood of prevailing on the merits or "the case presents serious issues on the merits which should be the subject of further litigation." Utah R. Civ. P. 65A(e). These factors were derived from Tenth Circuit cases and federal case authority should assist state courts in developing the standards. *See* Utah R. Civ. P. 65A(e) advisory committee note, para. (e).

Because preliminary injunctions are extraordinary remedies, they should not be "lightly granted." *Sys. Concepts, Inc. v. Dixon*, 669 P.2d 421, 425 (Utah 1983). The movant's right to relief must be "clear and unequivocal." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003). PPAU did not, and cannot, meet this high standard for extraordinary relief. The district court abused its discretion in issuing the preliminary injunction. Order at 2-4.

PPAU's claims do not raise serious issues warranting further litigation and have no possibility of prevailing. The district court did not find that PPAU showed a substantial likelihood of success on the merits. Instead, the court determined that PPAU had raised "serious issues on the merits" that should be litigated more. Order at 3. The court said PPAU's issues were "novel and complicated" and it "may prevail" on one of its claims. *Id.* at 4. The claims are certainly novel, but they are not complicated and PPAU cannot prevail under the governing law and legal landscape. Put another way, PPAU's claims fail

the serious-question prong because they are not "genuinely debatable." *Tri-State Generation and Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 359 (10th Cir. 1986).[2]

PPAU's problems start with "the general and well-established rule that legislative enactments are presumed to be constitutional unless the contrary clearly appears." *Highland Boy Gold Mining Co. v. Strickley*, 78 P. 296, 297 (Utah 1904); *see also Vega v. Jordan Valley Med. Ctr., LP,* 2019 UT 35, ¶ 12, 449 P.3d 31 ("The presumption of constitutionality also means that we will seek to resolve doubts about a statute's validity in favor of constitutionality, and will not declare a legislative enactment invalid unless it clearly violates a constitutional provision.").

And PPAU's task gets more difficult given the analytical framework it must use to overcome that presumption of constitutionality. Utah courts interpreting the Utah Constitution "seek to ascertain and give power to the meaning of the text as it was understood by the people who validly enacted it as constitutional law." *Richards v. Cox*, 2019 UT 57, ¶ 13, 450 P.3d 1074; *see also Neese v. Utah Bd. of Pardons & Parole*, 2017 UT 89, ¶ 95, 416 P.3d 663 (holding that Utah constitutional analysis is an "originalist inquiry" that aims to "ascertain[] the 'original public meaning' of the constitutional text"). This inquiry's "focus is on the objective original public meaning of the text, not the intent

[2] Under Tenth Circuit case law, the serious-question test no longer exists. *See Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1287 (10th Cir. 2016) (stating "our modified test [using the serious-question element] is inconsistent with the Supreme Court's recent decision in [*Winter*]. . . . Under *Winter*'s rationale, any modified test which relaxes one of the prongs for preliminary relief and thus deviates from the standard test is impermissible"). But even when the test still existed, it would not have applied to PPAU's claims: "[w]here . . . a preliminary injunction 'seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme,' the less rigorous fair-ground-for-litigation standard should not be applied." *Heideman*, 348 F.3d 1182, 1189 (10th Cir. 2003) (internal quotation marks omitted).

of those who wrote it." *S. Salt Lake v. Maese*, 2019 UT 58, ¶ 19 n.6, 450 P.3d 1092. That is, a court's interpretive "task is to understand what" a constitutional provision "meant to those who voted to approve the Utah Constitution"—to discern "what the general public understanding was at the time of statehood." *Id.* ¶ 21 & n.7.

"[T]here is 'no magic formula'" for answering that question. *Salt Lake City Corp. v. Haik*, 2020 UT 29, ¶ 12, 466 P.3d 178. But the Court's cases lay down markers that guide the inquiry. When interpreting the Utah Constitution, that Court has analyzed a constitutional provision's "text, historical evidence of the state of the law when it was drafted, and Utah's particular traditions at the time of drafting," *id.* (internal quotation marks omitted), as well as "the shared linguistic, political, and legal presuppositions and understandings of the ratification era," *Neese*, 2017 UT 89, ¶ 98. Those "different sources will be more or less persuasive depending on the constitutional question and the content of those sources." *Maese*, 2019 UT 58, ¶ 19.

Following the settled original-public-meaning guideposts here leads to only one conclusion—there is no implied right to abortion in the Utah Constitution.

a. No express textual support. The "'starting point in interpreting a constitutional provision is the textual language itself.'" *Haik*, 2020 UT 29, ¶ 15. PPAU references ten constitutional provisions in its motion for preliminary injunction—article I, §§ 1, 2, 4, 7, 11, 14, 24, 25, 27, and article IV, § 1. None of them expressly refers to "abortion." Nor does any one of them refer to a "miscarriage," a word that at the time of the founding meant "substantially the same" thing as abortion. *Crook*, 51 P. at 1093.

b. No constitutional convention support. When "the plain language of the Utah Constitution does not answer the question," *Maese*, 2019 UT 58, ¶ 28, the Court considers evidence from the debates in the 1895 Utah Constitutional Convention to inform its

original-public-meaning inquiry. *See Haik*, 2020 UT 29, ¶¶ 24-34; *Maese*, 2019 UT 58, ¶¶ 30-33. As far as the State can tell, neither "abortion" nor "miscarriage" were mentioned during the convention. And nothing in the debates on provisions PPAU relies on suggests they protected an implied right to abortion. PI Opp. at 24-34.

c. The 1898 and later codes criminalized abortion. The 1898 Utah Code provides an important source of "historical evidence" about "Utah's particular traditions at the time" the constitution was adopted. *Haik*, 2020 UT 29, ¶ 12 (internal quotation marks omitted). This code "holds particular significance because it was the first effort to codify the law after adoption of our constitution." *Maese*, 2019 UT 58, ¶ 45. And coming immediately after statehood, that code helps show "the contemporaneous public meaning of certain constitutional terms and concepts." *Id.* ¶ 46.

Here, the 1898 code fatally undermines PPAU's claim that the constitution protects an implied right to abortion. One code section reenacted a prior territorial criminal prohibition on performing an abortion. Utah Rev. Stat. Tit. 75, ch. 27, § 4226 (1898) (attachment 3, exh. C). Another section made it a new crime for a woman to solicit or submit to an abortion. *Id.* § 4227 (attachment 3, exh. C). The provisions making it a crime to perform or obtain an abortion remained part of the Utah Code from 1898 until the U.S. Supreme Court decided *Roe* in 1973. *See* 410 U.S. at 118 n.2 (citing Utah Code §§ 76-2-1, -2 (1953)). The Legislature's long, consistent treatment of abortion as a crime confirms that the legislative view "closest in time to the enactment of our constitution did not question the" constitutional "propriety of" banning abortion. *Maese*, 2019 UT 58, ¶ 58.

What's more, in 1907, the Legislature passed even more statutes that regulated abortion by making it an act of professional misconduct for a physician or surgeon to "offer[] or attempt[] to procure or aid or abet in procuring a criminal abortion" or to

"procur[e] or aid[] and abet[] in procuring a criminal abortion." Comp. Laws of Utah, Tit. 63, § 1736(1)-(2) (1907) (attachment 3, exh. D). It reenacted those regulations in 1917, 1933, and 1943. *See* Comp. Laws of Utah, Tit. 85, § 4448(1)-(2) (1917); Rev. Stat. of Utah § 79-9-18(1) (1933); Utah Code § 79-9-18(1) (1943) (attachment 3, exh. E to G). And between 1907 and 1933, physicians or surgeons who performed an abortion had their medical license revoked and were banned from practicing medicine in Utah. *See* Comp. Laws of Utah, Tit. 63, §§ 1734-1735 (1907); Comp. Laws of Utah, Tit. 85, §§ 4446-4447 (1917) (attachment 3, exh. D, E).

d. The executive and judicial branches enforced these early abortion laws.

Notably, prosecutors charged and convicted defendants who violated those abortion laws. And when cases seeking appellate review of those convictions reached this Court, no one challenged the abortion laws' validity and the Court affirmed the conviction or otherwise disposed of the appeals without questioning whether the abortion statutes violated the constitution. *See State v. McCoy*, 49 P. 420, 421-22 (Utah 1897); *State v. Crook*, 51 P. 1091, 1091-92 (Utah 1898); *State v. Davis*, 75 P. 857, 858 (Utah 1904); *State v. McCurtain*, 172 P.2d 481, 482-83 (Utah 1918); *State v. Cragun*, 38 P.2d 1071, 1071, 1079 (Utah 1934); *State v. Clark*, 284 P.2d 700, 701 (Utah 1955). Similarly, the Court upheld revocations of medical licenses for performing an abortion, again with no party challenging those laws and the Court always acknowledging that abortion was a crime in Utah and never suggesting any constitutional doubts about the ban. *See Moormeister v. Golding*, 27 P.2d at 449; *Moormeister v. Dep't of Registration of State*, 288 P. at 903; *Cragun*, 20 P.2d at 248.

Had those convictions or laws posed potential constitutional problems, some defendant surely would have raised the issue and the Court would have said as much. After

all, the Court has long recognized "it is the plain duty of the courts to declare [a statute's] invalidity" if the statute "violates the supreme law of the state." *Block*, 76 P. at 23. The failure of any litigant to raise this issue and absence of any Court rulings on it further confirm that the general public at the time of the founding did not understand the Utah Constitution to protect an implied right to abortion.

e. Neither Utah territorial law, the common law, nor sister states recognized a constitutional right to abortion. The Court has also discerned original public meaning by "examin[ing] the backdrop of 'legal presuppositions and understandings' against which" the constitution "was drafted." *Haik*, 2020 UT 29, ¶ 40. The Court has looked for those backdrop presumptions and understandings in "laws in effect at the time of the Utah Constitution's ratification," *Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 55, 140 P.3d 1235, and "common law sources," *id.* ¶ 49, including, "at times, … sister state law," *Maese*, 2019 UT 58, ¶ 59. In fact, "[t]he laws in effect in Utah in 1895, both statutory and common law," provide "the clearest picture of the values and policy judgments of the people of Utah when they voted for their constitution." *Am. Bush*, 2006 UT 40, ¶ 50.

Here, each of those sources further confirms that the Utah Constitution does not protect an implied right to abortion. First, Utah territorial law had already outlawed performing abortions for two decades before statehood. Terr. of Utah Comp. Laws § 1972 (1876) (attachment 3, exh. A); Comp. Laws of Utah, Title 9, ch. 3, § 4507 (vol. II, p. 591) (1888) (attachment 3, exh. B).

Second, the common law in 1896 likewise did not recognize a right to abortion. The U.S. Supreme Court just held as much in *Dobbs*: "[a]t common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages." 142 S. Ct. at 2248. In England, the "authorities differed

on the severity of punishment for abortions committed at different points in pregnancy," but "none endorsed the practice." *Id.* at 2251. And "[i]n 1803, the British Parliament made abortion a crime at all stages of pregnancy and authorized the imposition of severe punishment." *Id.* at 2252. The common-law record "[i]n this country" is "similar." *Id.* at 2251. "The few cases available from the early colonial period corroborate that abortion was a crime" in colonial America. *Id.* In short, the common law is fatal to PPAU's claims.

Third, *Dobbs* confirms the status of abortion protections in "sister state law" in 1896. *Maese*, 2019 UT 58, ¶ 59. "Until the latter part of the 20th century, . . . [n]o state constitutional provision had recognized" a right "to obtain an abortion." *Dobbs*, 142 S. Ct. at 2248. And "[b]y 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 2252-53. "Of the nine States that had not yet criminalized abortion at all stages, all but one did so by 1910." *Id.* at 2253. So too "in the Territories that would become the last 13 States"; "[a]ll of them criminalized abortion at all stages of pregnancy between 1850 (the Kingdom of Hawaii) and 1919 (New Mexico)." *Id.* Thus, "[b]y the end of the 1950s, according to the *Roe* Court's own count, statutes in all but four States and the District of Columbia prohibited abortion 'however and whenever performed, unless done to save or preserve the life of the mother.'" *Id.* (quoting *Roe*, 410 U.S. at 139). Beyond that, "[t]here is ample evidence that" States passed their abortion bans in the 1800s and 1900s "spurred by a sincere belief that abortion kills a human being. Many judicial decisions from the late 19th and early 20th centuries made that point." *Id.* at 2256.

* * *

"In light of" that crushing weight of "historical evidence"—the common law, Utah territorial law, the 1898 and successive Utah Codes, and virtually all sister states in 1896

prohibiting abortion—"it is inconceivable that the framers of our constitution or the citizens of this state intended to protect" abortion as an implied "constitutional right." *Am. Bush*, 2006 UT 40, ¶ 65. All the constitutional provisions PPAU rely on date to the original 1896 constitution, without any substantial changes, and thus held force for decades alongside abortion bans even stricter than SB 174. *See* attachment 4 hereto (chart containing constitutional provisions PPAU relies on as worded in 1896 and now).

At the hearing, the court said it needed original public meaning analysis for recent amendments to some of the constitutional provisions PPAU relies on. Tr. at 50-51. But none of the amendments could plausibly create an implied right to abortion. *See id*. For example, amendments to article I, sections 1, 11 in 2020—the same year SB 174 was enacted—added gender neutral language that the Voter Information Pamphlet explained made no changes to the provisions' substance or meaning. *See* 2020 Voter Information Ballot at 41-43.[3] The pamphlet is strong evidence of how the public understood the amendments. *See, e.g, State v. Willis*, 2004 UT 93, ¶ 15, 100 P.3d 1218; *State v. Kastanis*, 848 P.2d 673, 675 (Utah 1993). The amendment to article I, section 4 in 2000 similarly had nothing to do with abortion and cannot plausibly read to create such a right. 2000 Voter Information Pamphlet at 34.[4] Beyond the voter guides, it is ludicrous to suggest that voters could have thought they were adding an implied right to abortion to the state constitution without *any* public debate on the issue—the most contentious public policy matter of the last half century.

In short, PPAU's claims about an implied state constitutional right to abortion do

[3] https://voteinfo.utah.gov/wp-content/uploads/sites/42/2021/03/Utah-VIP-2020-General-FIN.pdf.

[4] https://voteinfo.utah.gov/wp-content/uploads/sites/42/2021/03/Utah-VIP-2020-General-FIN.pdf.

not raise genuinely debatable, serious questions worthy of additional litigation. The claims have no possibility of surviving an original-public-meaning analysis required by this Court. The district court abused its discretion and should be reversed on interlocutory appeal on this ground alone. *Aquagen Int'l*, 972 P.2d at 413.

PPAU did not make a strong showing of irreparable harm. The district court wrongly relied mostly on alleged harms to third parties, not PPAU. Order at 2. As noted above, those women are not parties to this case and PPAU has no standing to press their rights. So their alleged harm does not show any irreparable harm to PPAU. Focusing only on PPAU as rule 65A(e)(1) requires, its alleged harms are mostly economic—the inability to provide abortion services. PI Mot. at 16; Order at 2. Those types of harm are not irreparable. *Hunsaker v. Kersh*, 1999 UT 106, ¶9, 991 P.2d 67; *see also Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986). The Court noted PPAU (and its staff) may also suffer reputational harm or the threat of criminal and licensing penalties. Order at 2. But this is far from a strong showing of irreparable harm (and again includes non-party staff in the calculation).

The court failed to properly balance the actual harms. Again including the alleged harms to third parties, the district court found those harms outweighed any interest the State had in a statute the court said was uncertain to achieve its purposes. Order at 2. That's wrong on several levels. First, the court should not have included third-party harms on PPAU's side of the balance. Utah R. Civ. P. 65A(e)(2) (weighing the "threatened harm to the applicant"). Second, the court ignored recognized harms to the State. *See, e.g., Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."). Third, enjoining SB 174 imposes a

particularly severe irreparable harm on the State side of the balance given the profound State and public interest at stake—the preservation of human life, both the mother's and unborn child's. Utah Code § 76-7-301.1(1). Abortion is irreparable and irreversible. That injury outweighs any PPAU harm that denying equitable relief might cause. *See* Utah R. Civ. P. 65A(e)(2).

A preliminary injunction adversely affects compelling public interest. The district court said only that a preliminary injunction is in the public interest because it would maintain the status quo while the constitutional claims are resolved on the merits. Order at 3. But that's doubly wrong. First, the injunction does not *maintain* the status quo; it *changes* the status quo to permit abortions that are illegal under SB 174. The district court's contrary view effectively reads *Dobbs* out of existence. Second, the court again ignores the compelling State and public interest in preserving the lives of unborn children and mothers. Utah Code § 76-7-301.1. SB 174 balances and seeks to protect both the unborn child and the mother's life and health and mental well-being. PPAU (and the preliminary injunction) do not and adversely affect the public interest. To be sure, the State "does not have an interest in enforcing a law that is likely constitutionally infirm." *Chamber of Com. of U.S. v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010). But SB 174 is constitutionally sound, and PPAU cannot swing the public interest in its favor merely by claiming it raises "serious issues" in need of further litigation.

Interlocutory Appeal Advances the Termination of the Litigation

PPAU lacks standing to assert a right to an abortion on its own behalf or on behalf of non-party women who might want an abortion not authorized by SB 174. PPAU's lack of standing means the district court lacks jurisdiction and the case must be dismissed, terminating the litigation. Making that ruling now will spare the parties and the public

another 12-18 months of litigation followed by a direct appeal only to arrive back at the same point—PPAU lacks standing.

The Court Should Retain and Decide This Matter

The Court should retain and decide this petition rather than transferring it to the court of appeals. The petition raises important questions about standing, preliminary injunction factors, and constitutional interpretation that will affect the parties' dispute and future cases. More importantly, SB 174 involves compelling State interests: the protection and preservation of human life, existing and unborn. The State and the public need a definitive answer now, that only this Court can provide, about whether SB 174 is enforceable pending resolution of PPAU's claims.

Conclusion

For the foregoing reasons, the Court should grant the State's petition for permission to appeal the district court's preliminary injunction order. If the Court grants the petition, the State will propose a briefing schedule so the matter can be resolved as soon as reasonably possible.

Respectfully submitted,

s/ Melissa A. Holyoak
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Certificate of Compliance

1. This petition does not exceed 20 pages, excluding any tables or addenda, in compliance with Utah Rule of Appellate Procedure 5(d).

2. This petition has been prepared in a proportionally spaced typeface using Microsoft Word in 13-point Times New Roman font in compliance with the typeface and typesize requirements of Utah Rule of Appellate Procedure 27(a).

3. This brief contains no non-public information and complies with Utah Rule of Appellate Procedure 21(g).

s/ Melissa A. Holyoak

Certificate of Service

I hereby certify that on 9 August 2022 a true, correct and complete copy of the foregoing Petition for Permission to Appeal from an Interlocutory Order was filed with the Court and served via United States Mail and/or electronic mail as follows:

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Attachments

1. Order Granting Plaintiff's Motion for a Preliminary Injunction

2. Transcript of Preliminary Injunction Hearing

3. Utah abortion laws from 1876 Compiled Laws to 1943 Utah Code

4. Chart comparing state constitutional provisions PPAU relies on in 1896 and now