In the Supreme Court of the State of Utah

State of Utah, et al., *Petitioners*, v. Planned Parenthood Association of Utah, *Respondent*.	No. 20220696-SC

Reply Brief of Petitioners

On interlocutory appeal from the Third Judicial District Court
Honorable Andrew Stone
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Introduction

The district court wrongly granted a preliminary injunction against SB 174's enforcement. The bar for issuing such extraordinary relief remains high even though SB 174 regulates abortion—a profoundly moral issue about which Utahn's sharply disagree.

Respondent Planned Parenthood Association of Utah has not met its burden to enjoin SB 174 during pendency of its suit. Despite all of PPAU's and its amici's briefing, PPAU fails to show (1) standing to assert an alleged right to abortion on its own or third-parties' behalf, or (2) satisfaction of all the preliminary injunction factors. Most importantly, PPAU has not shown—and does not meaningfully address—how it has any chance of prevailing on its claims under an original public meaning interpretation of the constitution. Considering all the legal evidence—common law, territorial law, no express constitutional text or discussion at the constitutional convention,1898 and subsequent Utah Codes, contemporaneous sister state law—uniformly arrayed against finding an implied constitutional right to an abortion, PPAU cannot win and has not raised any serious issues.

This does not diminish abortion as an important moral and policy issue about which people of good faith disagree. But it does mean the issue belongs to the people to address through the elected policy-making branch. They have done so with SB 174. PPAU has shown no right to preliminarily thwart that legislative enactment. The Court should reverse the preliminary injunction.

Argument

I. PPAU lacks standing.

The district court wrongly concluded that PPAU has standing itself and on behalf of others. State Br. at 10-15. PPAU's arguments do not salvage the court's ruling. Indeed, PPAU views standing as more nuisance—"exalt[ing] form over substance"—than necessity. PPAU Br. at 13. But standing is no mere technicality to be tossed aside "simply because the plaintiff wishes to assert a constitutional claim." *Haik v. Jones*, 2018 UT 39, ¶ 21 n.3, 427 P.3d 1155. Standing is a jurisdictional requirement that helps confine judicial power within constitutional limits and safeguards separation of powers. *See, e.g., Alpine Homes, Inc. v. City of W. Jordan*, 2017 UT 45, ¶ 39, 424 P.3d 95; *Brown v. Div. of Water Rights of Dep't of Nat. Res.*, 2010 UT 14, ¶ 12 & n.9, 228 P.3d 747; *Jenkins v. Swan*, 675 P.2d 1145, 1149 (Utah 1983).[1]

As to its own standing, PPAU acknowledges "the general rule" that a litigant "'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) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)); PPAU Br. at 10. But PPAU seems to suggest that this "general" rule is not really part of the traditional standing test PPAU must satisfy, PPAU Br. at 9-10, so it can assert an alleged right to abortion that, if it existed,

[1] Justice Pearce has more recently questioned whether state standing requirements derive from the Utah Constitution—as the Court has long held—or prudential concerns. *See, e.g., Laws v. Grayeyes*, 2021 UT 59, ¶ 84, 498 P.3d 410 (Pearce, J., concurring in part and concurring in the judgment). Either way, the point remains that standing requirements bolster separation of powers principles and should not be lightly discarded. *See id.* ¶ 101 (citing *Terracor v. Utah Bd. of State Lands & Forestry*, 716 P.2d 796, 799 (Utah 1986)).

would belong to individuals, not PPAU. The case PPAU relies on, however, involves claimants asserting injuries to their *own* alleged legal rights, not rights belonging to someone else. PPAU Br. at 10 (citing *Hogs R Us v. Town of Fairfield*, 2009 UT 21, ¶¶ 8-10, 207 P.3d 1221). In *Hogs R Us*, the issue was whether the city had "a plain duty to maintain roads within its jurisdiction" and, if so, whether petitioners who traveled the roads had "a clear right to performance of that duty." 2009 UT 21, ¶ 13. The standing dispute thus focused on whether the petitioners had shown "particularized injury," not whether they were asserting their own alleged rights. *Id.* ¶ 10. The case does not let PPAU bypass the "general rule" to assert its own rights.

PPAU also argues it should have standing right now because it could later argue SB 174 is unconstitutional if PPAU were prosecuted for violating the Act in the future. PPAU Br. at 10. And PPAU says it should not have to risk "'arrest or prosecution to . . . challenge'" the Act. *Id.* (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979)). But, again, the case PPAU relies on does not solve its standing problem. In *Babbitt*, the parties challenging the statute(s) and facing potential prosecution asserted "*their* First Amendment rights," not someone else's. 442 U.S. at 301 (emphasis added). Indeed, the *Babbitt* quote PPAU relies on comes from *Steffel v. Thompson*, which states that a litigant need not "first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of *his* constitutional rights." 415 U.S. 452, 459 (1974) (emphasis added). PPAU does not and cannot assert the violation of its own alleged constitutional rights and thus lacks standing.

Turning to representative or third-party standing doctrines, PPAU first says it should have something like associational standing because it's a health care provider trying to vindicate its patients' alleged rights. PPAU Br. at 10. But associational standing does not work like that. State Br. at 12 (citing *Utah Chapter of Sierra Club v. Utah Air Quality Bd.*, 2006 UT 74, ¶ 21, 148 P.3d 960). PPAU is not a membership association (with patients as members), and it points to no authority applying that doctrine to the doctor-patient relationship.

PPAU also wrongly compares itself to a criminal defendant asserting *Batson* violations. PPAU Br. at 10. But in the case PPAU cites, the defendant claimed violations of *his own* constitutional rights. *State v. Span*, 819 P.2d 329, 337 n.4 (Utah 1991). So that theory does not help. Nor does PPAU's reference to a declaratory judgment statute. PPAU Br. at 10. This appeal arises from, and challenges PPAU's standing to get, a preliminary injunction. And even if PPAU's suit sought only a declaratory judgment, those actions do not provide end runs around the judiciary's power. *Utah Safe to Learn-Safe to Worship Coalition, Inc. v. State*, 2004 UT 32, ¶ 19, 94 P.3d 217 ("[a]lthough statutes authorizing courts to render declaratory relief should be liberally construed, the courts must, nevertheless, operate within the constitutional and statutory powers and duties imposed upon them" (internal quotation marks omitted)).

PPAU also argues it has third-party standing under *Shelledy*, PPAU Br. at 10-12, which the district court did not address. R. 849. That rationale would apply only if, among other things, it is "*impossibl[e]*" for the third-party rights holders to assert their own claims. *Shelledy*, 836 P.2d at 789 (emphasis added).

That's not the case here as shown by the individuals who have challenged other abortion laws. State Br. at 13-14. Unable to prove "impossibility," PPAU claims it suffices to show that "practical barriers discourage suit." PPAU Br. at 11. But that ignores *Shelledy's* application of the impossibility element. The Court held the test was not satisfied in that case because the actual right holders had "never been precluded from asserting" their own rights. *Shelledy*, 836 P.2d at 789. So too here. Women seeking abortions are not, and never have been, "precluded" from asserting their alleged right to an abortion. State Br. at 13-14 (citing cases). The fact that some individuals might feel discouraged from suing does not meet the *Shelledy* test nor otherwise bestow third-party standing on PPAU.[2] Downgrading "impossibility" to mere discouragement would nullify "the general rule" that a party cannot "assert the constitutional rights of a third party." *Shelledy*, 836 P.2d at 789.

[2] PPAU says that under federal law the State forfeited any objections to PPAU's third-party standing under *Shelledy*. PPAU Br. at 2-3, 11. Even if this standing argument could be waived, *Cove at Little Valley Homeowners Ass'n v. Traverse Ridge Special Serv. Dist.*, 2022 UT 23, ¶ 33, 513 P.3d 658, the State preserved it. The State argued below that individuals could sue to challenge SB 174 thereby making PPAU's asserted public-interest standing inappropriate. R. 525. That's the same reason *Shelledy* does not apply. The point was therefore preserved because the district court could have ruled on it. *Patterson v. Patterson*, 2011 UT 68, ¶ 12, 266 P.3d 828; *see In re Baby Girl T.*, 2012 UT 78, ¶ 38, 298 P.3d 1251 ("magic words or phrases" are not required to preserve an argument). Plus, the district court did not address *Shelledy* anyway, so the policies behind preservation rules are not implicated. *Patterson*, 2011 UT 68, ¶¶ 15-16.

For the same reasons, PPAU does not qualify for constitutionally dubious public-interest standing.[3] Aplt. Br. at 12-14. Under that doctrine, 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 of Utah v. State*, 2020 UT 31, ¶ 4, 467 P.3d 832 (per curiam). PPAU argues it has made that showing with a few declarations from women unlikely to sue. PPAU Br. at 12. But that doesn't clear the bar. Of course some women may not want to sue to challenge abortion laws—for any number of reasons. The same goes for some individuals contemplating lawsuits in any number of other contexts. That cannot be enough to justify public interest standing, or it would be available in nearly every case. PPAU's evidence is especially inadequate here, where the State provided cases showing that individuals have brought and can bring suits challenging abortion laws. State Br. at 13-14; R. 525. PPAU has no response to those real-world examples. Just like the ACLU failed to show that inmates were unlikely to raise the Covid-19 issues asserted in its suit, *ACLU*, 2020 UT 31, ¶¶ 1, 4, even though inmates face litigation hurdles that ACLU does not, PPAU cannot show that its challenge to SB 174 is unlikely to be raised by any individual with actual standing.

PPAU also states it would be hard for an individual plaintiff to respond to discovery directed to PPAU about its "abortion services as a whole." PPAU

[3] The public-interest standing doctrine finds no quarter in constitutionally based standing. *Gregory v. Shurtleff*, 2013 UT 18, ¶¶ 63-115, 299 P.3d 1098 (Lee, J., concurring in part and dissenting in part); *see also Laws*, 2021 UT 59, ¶ 114 (Pearce, J., concurring in part and concurring in the judgment) (noting inconsistency between traditional standing requirement and public interest standing). The doctrine should be repudiated.

Br. at 13. This makes no sense—even if an individual plaintiff brought this action, PPAU would respond to non-party discovery directed to PPAU, not the individual plaintiff. Utah R. Civ. P. 45 (authorizing subpoena of non-party for deposition and production of documents). More broadly, procedural rules already exist to ensure that discovery remains proportionate to the claims asserted. Utah R. Civ. P. 26(b). And if potential discovery burdens justified public interest standing, then it would become the exception that swallowed the traditional standing rule. *See, e.g., Gregory*, 2013 UT 18, ¶ 13 (noting Court "'will not readily relieve a plaintiff'" of traditional standing requirements (quoting *Jenkins*, 675 P.2d at 1150))).

Finally, PPAU knows there are individuals with standing it could add to this suit. It told the district court as much. After this Court granted permission for interlocutory appeal, PPAU moved the district court to vacate the discovery due dates pending appeal. It argued vacatur was necessary, in part, because this Court's decision could "potentially require [PPAU] to join new plaintiffs after the close of fact discovery." R. 991. PPAU can't have it both ways—telling this Court there are no individuals with standing that will raise these issues while telling the district court that PPAU needs to vacate discovery deadlines so it won't have to add individual plaintiffs after discovery ends.

In short, PPAU lacks standing on its own to assert an alleged implied constitutional right to abortion and does not satisfy any third-party standing doctrine.[4] The preliminary injunction should therefore be reversed.

[4] PPAU no longer appears to assert abortion-provider standing under federal law, which the U.S. Supreme Court recently recognized has "ignored the Court's third-party standing doctrine." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2275 (2022).

II. The district court wrongly granted a preliminary injunction.

Even if the Court determines PPAU has standing for preliminary injunction purposes, the district court's order should still be reversed. The court erroneously concluded PPAU's constitutional claims raise serious issues when the claims have no chance of surviving an original public meaning analysis. The court also misjudged the harm and public interest factors. Nothing PPAU argues rehabilitates the district court's errors.

A. PPAU's constitutional claims do not raise serious issues and have no possibility of prevailing.

PPAU's constitutional arguments amount to a long concession that it raises no serious issues and has no possibility of winning. PPAU first disavows that it asserts a right to abortion; challenges original public meaning as the proper way to interpret the constitution; then argues that the analysis, if used, should focus on 1984 rather than the founding era (or when the operative text was enacted). After that, PPAU runs through its claims with no meaningful response to the overwhelming law and evidence—territorial law, common law, constitutional text, constitutional convention discussions, the Utah Code from 1898 to *Roe*, contemporaneous sister state law—showing the original and continuing public meaning of the Utah Constitution does not protect an express or implied right to an abortion (as a right or means to exercise some other right).

1. The Court interprets the Utah Constitution using the original public meaning analysis.

a. PPAU first tries to change the issue. Evidently conceding the Utah Constitution does not protect any express or implied right to abortion, PPAU

says it does not have to prove that. PPAU Br. at 20. Instead, PPAU states SB 174 "is unconstitutional because it forecloses abortion as the means by which individuals exercise substantive rights." *Id.* This attempted issue rebrand does not help PPAU. First, the rebrand defies how this Court and the U.S. Supreme Court have already described the same types of abortion arguments that PPAU makes. *See, e.g., Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2245 (2022) (explaining *Roe* held "that the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, which is also not mentioned," and that privacy right "had been found to spring from no fewer than five different constitutional provisions—the First, Fourth, Fifth, Ninth, and Fourteenth Amendments" (citations omitted)); *In re J. P.*, 648 P.2d 1364, 1375 (Utah 1982) (describing "cases like *Roe*" that "rely on a 'right of privacy' not mentioned in the Constitution to establish other rights [i.e., abortion] unknown at common law"); *H L v. Matheson*, 604 P.2d 907, 908 (Utah 1979), *aff'd*, 450 U.S. 398 (1981) (noting plaintiff "claimed the right of privacy encompassed the right to have an abortion").

Second, the issue reframing forgets that "the constitution is not a license for common-law policymaking," *In re Adoption of B.B.*, 2020 UT 52, ¶ 24, 469 P.3d 1083, and would lead to virtually unlimited and absurd rights. The constitution, this Court has emphasized, "is a written document that enshrines *only the rights and protections* established by the people who ratified it—interpreted in accordance with the public understanding of the written text when it was voted on." *Id.* (emphasis added). That means the constitution does not protect every conceivable way someone might exercise a constitutional

right. Otherwise, under PPAU's theory, laws criminalizing kidnapping would be unconstitutional because they "foreclose[]" taking another's child "as the means by which" individuals might exercise or protect their rights to privacy, religious freedom, family composition, or any other real or alleged right. PPAU Br. at 20. PPAU's "attempts to justify abortion through appeals to" broader rights "prove too much" and could lead to claimed constitutional rights to commit criminal conduct. *See Dobbs*, 142 S. Ct. at 2257.

Third, PPAU does not explain how its issue rebrand changes the analysis or outcome. Maybe PPAU hopes by eschewing an alleged right to abortion and invoking other real or alleged rights that its claims will trigger more than rational basis review or avoid SB 174's presumption of constitutionality. *See, e.g.,* PPAU Br. at 25 (arguing the presumption of constitutionality does not apply because PPAU's asserted claims "implicate heightened scrutiny"). But it is "not enough" for PPAU to assert violations of fundamental rights. *In re Adoption of B.B.*, 2020 UT 52, ¶ 25. Those rights must actually be at issue. So PPAU "bears the burden of showing that the specific right and remedy [it] asserts is guaranteed by the original public meaning of the" constitution. *Id.* That means, however PPAU wants to frame its abortion arguments, the constitutional inquiry remains the same—does the original public meaning of the constitution protect abortion as a right or as a means to exercise another right. The answer is no. Given the legal landscape before and after 1895, no one could reasonably conclude that the public understood the constitution protected an implied right to abortion or abortion as a means to exercise some other right. State Br. at 19-26, 42-47. PPAU cannot avoid the proper analysis

or conclusion by disclaiming abortion as a right and positing it as a protected means to exercise some other real or alleged constitutional guarantee.

b. PPAU next argues that the Court has used a variety of methods to interpret the constitution, including policy considerations, and should not now restrict itself to original public meaning analysis. PPAU Br. at 21-22. True, in some prior cases, the Court used less disciplined and less textual methods to interpret the constitution. But those relatively few instances are now historical anomalies, not beacons guiding the Court's current or future constitutional jurisprudence. Recently, the Court has "repeatedly reinforced the notion that the Utah Constitution is to be interpreted in accordance with the original public meaning of its terms at the time of its ratification." *State v. Antonio Lujan*, 2020 UT 5, ¶ 26, 459 P.3d 992 (citing cases). And the Court has "emphasized that it is this mode of analysis"—original public meaning—"that *controls*." *Id.* (emphasis added). PPAU's preferred interpretive approach would turn the Court into a super-legislature, usurping another branch's powers while imposing justices' whims and policy preferences through the guise of constitutional construction. The Court should again reject PPAU's undemocratic and unconstitutional approach.[5] *See also* Amicus Br. of Pro-Life Utah at 3-6.

As part of its attack against original public meaning, PPAU trivializes that methodology and the State's arguments as simply constitutionalizing whatever the 1898 Code said. PPAU Br. at 23. That is not what original-public-

[5] *Salt Lake City Corporation. v. Utah Inland Port Authority*, 2022 UT 27, provides no grounds for deviating from original public meaning in this case. State Br. at 45 n.7.

meaning analysis does nor what the State argued. Rather, the 1898 Code's prohibition against abortion provides just one part of a remarkably uniform legal landscape—including common law, territorial law, the absence of any express constitutional text, constitutional convention discussions, contemporaneous sister state law, and subsequent Utah Codes—proving that the founding-era public did not understand the Utah Constitution to protect abortion as a right or as a means to exercise some other right. State Br. at 17-26, 42-47. The 1898 Code can, as in this case, provide instructive evidence of what the 1895 public understood the constitution meant. *Id.* at 20-23; *S. Salt Lake City v. Maese*, 2019 UT 58, ¶ 46, 450 P.3d 1092. But no one argues founding era laws are "the sole determinant of constitutional meaning." PPAU Br. at 23. So PPAU's sampling of inapposite and regrettable laws from statehood does not undermine original public meaning methodology or the State's arguments. *Id.*

c. Finally, PPAU argues that any original-public-meaning analysis must follow this Court's 1984-era interpretive methods, including policy arguments. PPAU Br. at 23-24. That's because, the theory goes, Utahns approved constitutional amendments to the judicial article in 1984 that provide, in relevant part: "The court shall not declare any law unconstitutional under this constitution or the Constitution of the United States, except on the concurrence of a majority of all justices of the Supreme Court." Utah Const. art. VIII, § 2. The plain text says only that a majority of justices must concur to declare a statute unconstitutional. *See Patterson v. State*, 2021 UT 52, ¶ 91, 504 P.3d 92 (constitutional interpretation looks to plain meaning of text as

understood when it was adopted). This text says nothing about *how* the Court interprets the constitution. And PPAU never explains why, much less shows that, Utahns in 1984 would have understood this specific text to mandate this Court use any particular interpretative methodology—especially the freewheeling, anti-democratic one PPAU espouses. Something that momentous—altering separation of powers and requiring the Court to become a policy-driven super-legislature—surely would have been mentioned in the 1984 voter information guide explaining and debating the amendments. But it's not. Utah Voter Information Pamphlet 1984 at 14-20.[6] PPAU offers no textual, legal, or historical support for its argument.

In sum, the original public meaning of the constitution "controls" the analysis of PPAU's claims. And no matter how PPAU wants to frame the issue—abortion as a right or a means to exercise other alleged rights—the result remains the same. The original public meaning of the constitutional provisions PPAU invokes do not protect abortion. State Br. at 17-47. The legislature may therefore regulate the procedure as it has done in SB 174. *Kimball v. City of Grantsville City*, 57 P. 1, 4–5 (Utah 1899) ("in the absence of any constitutional restraint, express or implied, the legislature may act upon any subject within the sphere of the government"); *see also* State Br. at 35-36, 49-50 (State's interests in regulating abortion); R. 564-69 (same); Utah Code § 76-7-301.1 (same); *Dobbs*, 142 S. Ct. at 2283-84 (same).

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6 https://elections.utah.gov/Media/Default/Historical%20VIPs/1984%20VIP.compressed.pdf.

2. PPAU has shown no serious issues or possibility of prevailing on an original-public-meaning interpretation of the Utah Constitution that protects an express or implied right to abortion.

The State will not repeat the extensive legal authorities showing that the original public meaning of the Utah Constitution does not protect an express or implied right to abortion. State Br. at 16-47. PPAU does not dispute the State's historical authorities or otherwise meaningfully argue an affirmative original public meaning protecting abortion in the Utah Constitution. PPAU therefore has no possibility of prevailing on its claims under the controlling interpretive framework. *See, e.g., State v. Willis*, 2004 UT 93, ¶ 15, 100 P.3d 1218 (rejecting defendant's constitutional interpretation given lack of any evidence "to suggest that voters expressed, or were exposed to, any suggestion, expectation, or intent that the [constitutional] amendment would guarantee to felons the right to possess firearms"). That should end this appeal in the State's favor. There is no need to further address PPAU's individual constitutional claims or the other preliminary injunction factors.

Without any substantive original-public-meaning analysis, PPAU still runs through each of its constitutional claims as it did below. The State largely anticipated and already refuted those arguments and will not repeat them here. State Br. at 26-42. Plus, PPAU's (and its amici's) non-originalist arguments are irrelevant under original public meaning and need no reply. Out of an abundance of caution, however, the State replies to some of PPAU's and its amici's assertions.

Equal Political Rights. PPAU asserts SB 174 violates article IV, section 1's Equal Political Rights provision in two ways: treating women

differently than men and forcing women to stay pregnant and give birth. PPAU Br. at 27-28. It bases these claims on cases from other states. *Id.* But neither PPAU nor the cases it relies on provide any analysis of the original public meaning of Utah's Equal Political Rights provision and how it would have been understood at statehood to create or protect a right to abortion. And Amicus League of Women Voters' argument that the provision's meaning should be read as expanding to now protect abortion is not supported by *Patterson*. State Br. at 44-46. Given the legal landscape prohibiting abortion before and after statehood outlined in the State's brief, PPAU has no possibility of prevailing on this claim. *See also* Amicus Br. of Thomas More Soc'y at 5-9.

Uniform Operation of Laws. PPAU fails to show SB 174 creates any classifications for purposes of the uniform operation of laws provision. State Br. at 32-34. The Court has squarely rejected the clause's application to purported classes like PPAU's based on the choice to have an abortion. *Wood v. Univ. of Utah Med. Ctr.*, 2002 UT 134, ¶ 35, 67 P.3d 436, *abrogation on other grounds recognized by Waite v. Labor Comm'n*, 2017 UT 86, 416 P.3d 635. Similarly, the U.S. Supreme Court has rejected sex-based equal protection challenges to abortion laws because "a State's regulation of abortion is not a sex-based classification and is thus not subject to the 'heightened scrutiny' that applies to such classifications." *Dobbs*, 142 S. Ct. at 2245. Abortion laws are thus reviewed under the same deferential standard applied to other health and safety laws. *Id.* at 2246. Though not binding, this precedent is persuasive. *Wood*, 2002 UT 134, ¶ 33. Regardless, even if PPAU identified an actionable classification, SB 174 would pass muster. State Br. at 35-36.

Bodily Integrity. PPAU admits its bodily-integrity-protects-abortion argument is really a substantive due process claim based on an individual's liberty interests. PPAU Br. at 36. That's the same argument *Dobbs* rejected under federal due process because abortion is not deeply rooted in the Nation's history and tradition or implicit in the concept of ordered liberty. 142 S. Ct. at 2242, 2246-53. The State likewise showed that abortion is not deeply rooted in Utah's history and the public would not have understood the constitution to protect such a right (on its own or as part of some other right). State Br. at 19-47.

PPAU's non-originalist arguments are wrong on their own terms, State Br. at 36-38, and cannot not show an original public meaning of the constitution protecting abortion under the Utah Due Process Clause. PPAU counters that abortion was legal before "quickening" under the common law, some women sought abortions, and supposed abortifacients were available by mail and at pharmacies. PPAU Br. at 38-39. These arguments do not undermine the fact that in Utah, abortions were generally prohibited—at any time before birth—from 1876 until *Roe*. State Br. at 20-24. And "the fact that many States in the late 18th and early 19th century did not criminalize pre-quickening abortions does not mean that anyone thought the States lacked the authority to do so." *Dobbs*, 142 S. Ct. at 2255. Indeed, "common-law authorities had repeatedly condemned abortion and described it as an 'unlawful' act without regard to whether it occurred before or after quickening." *Id.* Similarly, PPAU's assertion that some people broke the law by procuring or providing abortions does not mean the general public understood the law was

unconstitutional, especially where lawbreakers were prosecuted. State Br. at 22-23. In the face of these abortion laws and prosecutions, the U.S. Supreme Court noted, "no one, as far as we are aware, argued that the laws . . . violated a fundamental right." *Dobbs*, 142 S. Ct. at 2255.

PPAU also wrongly claims this Court's decision in *Wood* already determined Utah's Due Process Clause stretches at least as far as the federal clause did in 2002. PPAU Br. at 39-41. That misreads *Wood*, which did not analyze state due process at all, much less under the original-public-meaning framework. State Br. at 46-47. PPAU's argument would also turn state due process into a one-way ratchet that must forever reach at least the furthest bounds ever set by federal substantive due process, even after those bounds are denounced as wrong. *Dobbs*, 142 S. Ct. at 2279 (overruling *Roe* and *Casey*).

Family Composition. PPAU says the "right to *form and preserve* the family" recognized in *In re J.P.*, 648 P.2d at 1373 (emphasis added), includes a right to abort unwanted children. PPAU Br. at 42. PPAU offers no original-public-meaning analysis for this connection. And there is none. State Br. at 16-47. Rather, PPAU reasons that abortion must be protected just like rights to contraception or procreation. PPAU Br. at 42-43. But abortion "is fundamentally different" from cases involving "intimate sexual relations, contraception, and marriage" or related rights because it destroys "fetal life" and an "unborn human being." *Dobbs*, 142 S. Ct. at 2243 (internal quotation marks omitted). Those rights "do not support the right to obtain an abortion." *Id.* at 2258.

Freedom of Conscience. PPAU recites some general propositions about article I, section 4 then announces that SB 174 overrides Utahn's "ability to exercise their right of conscience" to abort a child. PPAU Br. at 45. But PPAU never explains how the general principles it references compel this conclusion, much less shows how the original public meaning of "right of conscience"—or any other clause in article I, section 4—guarantees abortion rights. PPAU fails to meaningfully explain why its theory would not pave the way to invalidate myriad other criminal laws. State Br. at 38-39; PPAU Br. at 45 (merely presuming abortion is a protected right the State lacks valid interest in prohibiting). And then it conflates the right of conscience—the asserted basis for its claim—with free exercise rights to contest the State's argument that SB 174 does not require anyone to believe anything about abortion (which is how PPAU framed the issue below, R. 271). PPAU Br. at 45-46; State Br. at 39-40. But neither rights of conscience nor free exercise are absolute guarantees to do whatever one wants. *Cf. Fulton v. Philadelphia*, 141 S. Ct. 1868, 1895 n.28 (2021) (Alito, J., concurring).

Amicus religious organizations argue that SB 174 violates article 1, section 4 because the law is too similar to the policies of The Church of Jesus Christ of Latter-day Saints "on a highly controversial issue that sharply divides those of different faiths and ideologies." Amicus Br. of Religious Orgs. at 11-12. The argument misses the mark even assuming PPAU specifically raised it below or on appeal, R. 269-71; PPAU Br. at 44-45, so that an amicus can argue it now. *State v. Green*, 2004 UT 76, ¶ 35, 99 P.3d 820. First, it fails to explain how the public would have understood article I, section 4 protects

abortion rights given all the legal evidence showing abortion was illegal before and after statehood. Second, it does not articulate any workable standard and would lead to absurd results. Under Amicus's theory, SB 174 is unconstitutional because its exceptions coincide with LDS policy although a stricter abortion prohibition with fewer exceptions, like the one that existed at statehood, State Br. at 20-21, presumably would be valid. Amicus concedes its test has no limits (at 23-24), which means the State could never legislate on controversial and divisive topics. Third, the argument ignores U.S. Supreme Court precedent recognizing that a statute—about *abortion funding* no less—is not unconstitutional because it "'happens to coincide or harmonize with the tenets of some or all religions.'" *Harris v. McRae,* 448 U.S. 297, 319 (1980) (quoting *McGowan v. Maryland,* 366 U.S. 420, 442 (1961)). This Court has repeated the same point: "'[i]n many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions.'" *Green*, 2004 UT 76, ¶ 32 (quoting *McGowan,* 366 U.S. at 442). PPAU cannot prevail on its right of conscience claim. Amicus arguments fail too. *See generally* Amicus Br. of Sutherland Institute.

Privacy. PPAU provides no original-public-meaning analysis for its claim that article 1, section 14—the search and seizure provision—guarantees a right of privacy that protects abortion. Pointing to sister state decisions that conjure a non-originalist constitutional right to privacy does not help. PPAU Br. at 47. That's especially true when this Court has stated that the

expectation of privacy is "a matter of search-and-seizure law" and has not recognized "a broad, freestanding privacy right." *Schroeder v. Utah Att'y Gen.'s Off.*, 2015 UT 77, ¶ 25, 358 P.3d 1075.

B. PPAU will not suffer irreparable harm absent a preliminary injunction.

Like the district court, PPAU (and amici) improperly rely almost exclusively on alleged harm to non-party patients to show irreparable harm. PPAU Br. at 14-17. That does not satisfy PPAU's burden to show its own irreparable harm absent a preliminary injunction. State Br. at 47.

PPAU's own purported harms are mostly economic—the inability to provide abortion services. R. 247, 847. These are not irreparable. State Br. at 47-48. The cases PPAU cites are inapposite. In *Hunsaker v. Kersh*, the Court recognized that damage to "crops, fruit trees, and shade trees" in a water-rights dispute could be "fundamentally irreparable," particularly regarding trees which could "take years to replace." 1999 UT 106, ¶¶ 3, 10, 991 P.2d 67. In *System Concepts, Inc. v. Dixon*, the Court found irreparable harm through the "misappropriation of SCI's confidential information and goodwill" in the context of a small and highly competitive market. 669 P.2d 421, 428 (Utah 1983). And in *Zagg, Inc. v. Harmer*, the court of appeals found the loss of a contractual right was irreparable because the particular right at stake served as the plaintiff's "bargained-for leverage" in an "ongoing dispute." 2015 UT App 52, ¶ 8, 345 P.3d 1273. The court concluded that "no award of money damages could be reliably calculated to compensate [plaintiff] for the loss of this leverage." *Id.* ¶ 13.

PPAU is not similarly situated to the plaintiffs in any of those cases. Its claims of economic harm have no bearing on any permanent loss of infrastructure, confidentiality, or advantage in a business dispute. Any harm it faces from SB174's enforcement would be economic in nature, readily calculable in terms of lost profits, and compensable as money damages. Nor has PPAU shown it faces any kind of "total loss" scenario in which a lack of interim relief would disable its entire business and force it to close. To the contrary, PPAU alleges that it provides a wide range of services "to approximately 46,000 Utahns at its eight health centers" each year. R. 7. Utah's abortion ban does not threaten PPAU's "numerous other forms of care," *id.*, and therefore is unlikely to inflict irreparable harm on its business.

Finally, even if the Court considers alleged harm to PPAU staff—who are also not named parties—the harm would not be irreparable. State Br. at 48. PPAU does not respond to this argument.

C. The irreparable and irreversible loss of life caused by abortions outweighs any harm to PPAU.

As to the balance of harms, PPAU does not dispute case law holding that the State suffers irreparable harm whenever it is enjoined from enforcing statutes enacted by representatives of its citizens. State Br. at 49. More importantly, the State also pointed out that enjoining SB 174 imposes a particularly severe irreparable harm given the profound State and public interest at stake—the preservation of human life, both the mother's and unborn child's. *Id.* at 50 (citing Utah Code § 76-7-301.1). PPAU claims the State's interests in preserving human life, including the mother's, contradicts

the State's position in district court, which PPAU says relied solely on protecting fetal life and dismissed harm to mothers as irrelevant. PPAU Br. at 17. That is wrong. First, the State argued below that SB 174 "protects a public interest of the highest order—the preservation of human life." R. 570. The State's interest in protecting life is not limited to fetuses. SB 174 proves that much—it protects unborn lives while recognizing that even that compelling interest can be outweighed by the need to save a mother's life. *See* Utah Code § 76-7a-201(1)(a). Indeed, protecting mothers' lives *and* unborn children has been the State's express policy and position for decades. *See, e.g.,* Utah Code § 76-7-301.1. Second, the State never dismissed mothers' health concerns as irrelevant. The State simply argued below, as it does now, that PPAU—which lacks standing to represent any third-party mothers—could not assert mothers' alleged irreparable harm to bolster PPAU's lack thereof. R. 571.

Like the district court, PPAU tries to minimize the harm the preliminary injunction is causing by questioning how many lives SB 174 will actually protect. PPAU Br. at 18. That improperly turns the balance-of-harms analysis into some sort of strict scrutiny test—presuming a fundamental constitutional right to abortion. It also ignores the district court's determination that SB 174 will ensure "some Utahns . . . continue carrying a pregnancy" that they would have otherwise aborted. R. 847. PPAU also admits that SB 174 would save "many" children. PPAU Br. at 14 (stating that "if the Act were in effect, many of PPAU's patients" seeking abortions would "bear children"). So SB 174 will protect some unknown number of lives. Finally, and more fundamentally, the State rejects and denounces PPAU's (and the district court's) cold calculus

about the value of life. Every life—born and unborn—matters to the State and deserves protection. One life—if that's all SB 174 saves—is incalculably valuable and its loss is more than enough to show irreparable harm. The abortion of one unborn child necessarily and irreversibly harms the child, the State, and public interest.

PPAU counters that having a child is irreversible too. PPAU Br. at 18. That may be true. But the important difference is the mother continues living. The aborted child does not. Based on that indisputable fact alone, the balance of harms weighs strongly in the State's favor and against enjoining SB 174.

PPAU tries to rationalize the district court's (lack of) balancing based on the purported "one-sided record." PPAU Br. at 18. But the State did not need to present witness declarations or other fact evidence supporting well-settled legal harms recognized in caselaw; longstanding State interests in preserving life outlined in decades-old statutes; and the obvious, indisputable, and irreparable loss of life that abortion causes. The State argued these harms to the court. R. 565-70. The record is not one-sided. The district court could and should have considered the harms and concluded they outweighed any harm to PPAU.

D. The preliminary injunction adversely affects the public's interest in preserving life.

PPAU does not actually dispute that "democratically elected representatives . . . are in a better position than" courts "to determine the public interest[;] . . . [t]he courts' peculiar function is to say what the law is, not to second-guess democratic determinations of the public interest." *Fish v. Kobach*, 840 F.3d 710, 755 (10th Cir. 2016) (internal quotation marks omitted).

Instead, PPAU says courts must weigh the preliminary injunction factors. PPAU Br. at 18. The State agrees. But the judiciary's authority to weigh the factors against each other says nothing about the legislature's power to initially determine the public interest. PPAU also says courts determine whether a statute is constitutional. *Id.* That is true too and again says nothing rebutting legislative prerogative to declare public policy and interests.

Here, the people's political representatives have declared the State "has a compelling interest in the protection of the lives of unborn children," while recognizing situations where a woman's interests may outweigh the unborn child's right to life. Utah Code § 76-7-301.1(2), (4). SB 174 balances and seeks to protect both the unborn child and the mother's life and health and mental well-being. The preliminary injunction adversely affects that balance and the public interest.

Conclusion

For the foregoing reasons, the Court should reverse the grant of a preliminary injunction against SB 174's enforcement.

Respectfully submitted,

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Certificate of Compliance

1. This brief complies with the total type-volume limitations of Utah Rule of Appellate Procedure 24(g)(1) because the brief contains 6,672 words, excluding the parts of the brief exempted by Rule 24(g)(2).

2. This brief complies with the typeface requirements of Utah Rule of Appellate Procedure 27(b) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word in 13-point Century Schoolbook font.

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

s/ Melissa A. Holyoak
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Certificate of Service

I hereby certify that on 17 February 2023 a true, correct and complete copy of the foregoing Reply Brief of Petitioners was filed with the Court and served via United States Mail and/or electronic mail as follows:

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