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**Pro hac vice application forthcoming*

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, SALT LAKE UTAH

PLANNED PARENTHOOD ASSOCIATION OF UTAH, on behalf of itself and its patients, physicians, and staff, *Plaintiff*, v. STATE OF UTAH, *et al.* *Defendants*.	**DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION** Case No. 220903886 Judge Andrew Stone

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INTRODUCTION

The Utah Constitution does not expressly protect a right to abortion. That much is clear from the Constitution's plain text. Even Plaintiff does not dispute that conclusion.

Nor does the Utah Constitution protect an implied right to abortion.

Plaintiff disagrees, contending that Senate Bill 174—which, with specific exceptions, made abortion a crime in Utah after *Dobbs v. Jackson Women's Health Organization*, — S.Ct. —, 2022 WL 2276808 (U.S. June 24, 2022)—violates an implied constitutional right to abortion that Utahns in 1896 generally understood was protected by *not just* one but *no fewer than ten* provisions of the then-new Utah Constitution. But in 1896, abortion was already a crime in Utah, and had been for 20 years; the Utah Territorial Legislature passed its first criminal ban on abortion in 1876. Then in 1898, when adopting Utah's first state code, the first Utah State Legislature—filled with members who had just participated in Utah's 1895 Constitutional Convention—recodified that criminal abortion ban, and even expanded it to make women criminally liable for obtaining an abortion and to make abortion professional misconduct by physicians and surgeons. Those statutes remained virtually unchanged in Utah's code until 1973 when the U.S. Supreme Court decided *Roe v. Wade,* 410 U.S. 113 (1973). What's more, founding-era prosecutors charged and convicted defendants who violated those abortion bans. And when those convictions were appealed, the Utah Supreme Court never questioned the statutes' validity.

Accepting Plaintiff's view necessarily requires concluding that all that was blatantly unconstitutional. To show why that cannot be, consider a short analogy. Suppose that when the 2023 General Session of the Utah Legislature starts, a member of the Legislature files a bill to make it a crime for non-homeowners to vote in Utah elections. The idea that this conduct could be a crime under the Utah Constitution is facially absurd. Why? Because the general public understanding now—as it has been since 1896, when Utah became a State and adopted its Constitution—is that "No

property qualification shall be required for any person to vote." Utah Const. art. I, §4 (1896), currently codified in art. IV, §7 (2022). And when a statute "violates the supreme law of the state," it "is the plain duty of the courts to declare its invalidity." *Block v. Schwartz*, 76 P. 22, 23 (Utah 1904). So the Legislature would never pass that bill. If it did, no prosecutor would bring charges under it. And if charges *were* brought and the defendant convicted, the Utah Supreme Court would unanimously reverse the conviction and declare the law unconstitutional.

To rule for Plaintiff, this Court would have to accept an equally absurd proposition: that for more than 75 years, every officer in every branch of state government—legislative, executive, and judicial—openly flouted ten different provisions of the Constitution by passing, enforcing, and upholding abortion laws. In other words, accepting Plaintiff's contentions *necessarily* requires this Court to conclude that in 1896, the general public understood at least ten of Utah's new constitutional provisions to protect an implied right to abortion—though abortion had been a territorial crime for the immediately preceding twenty years; that the Framers of those (implied) guarantees immediately re-criminalized in Utah's first state penal code the very act they had just (impliedly) protected (at least ten times); that prosecutors then repeatedly invoked those criminal laws to run roughshod over that (impliedly) protected constitutional right; that the Utah Supreme Court repeatedly abdicated its "plain duty" to "declare" those abortion statutes' "invalidity," *Block*, 76 P. at 23, when appeals over abortion convictions arose; and that *every last* legislative, executive, and judicial officer in Utah between 1896 and 1973—along with millions of their fellow Utah citizens—turned a blind eye to these patent, ongoing state constitutional deprivations.

It is as if, for 77 years, Utah criminalized voting by non-homeowners then prosecuted offenders—and *no one said a peep*.

That conclusion is not just implausible. It is affirmatively wrong. The binding test for interpreting the Utah Constitution asks what ordinary speakers of the English language would have

understood the constitutional text to mean when it was adopted. When Plaintiff's ten cited provisions were adopted in 1896, not one person in Utah would have understood any one of them to protect an implied right to an abortion. That conclusion follows not just from the Constitution's plain text and the statutory history already discussed, but also from the common law and other historical materials upon which the Utah Supreme Court has repeatedly relied to discern the Constitution's objective original public meaning.

And as it was historically, so it is today: the Legislature has confirmed Utah's "compelling interest in the protection of the lives of unborn children." Utah Code Ann. §76-7-301.1(2). "It is the finding and policy of the Legislature, reflecting and reasserting the provisions of Article I, Sections 1 and 7, Utah Constitution, which recognize that life founded on inherent and inalienable rights is entitled to protection of law and due process; and that unborn children have inherent and inalienable rights that are entitled to protection by the state of Utah pursuant to the provisions of the Utah Constitution." *Id.* §76-7-301.1(1). These are precisely the types of policy judgments about abortion that "the Constitution" leaves "to the people's elected representatives." *Dobbs*, 2022 WL2276808, at *7.

And it's also why, if enough Utahns agree with Plaintiff's views about what Utah law *should* be on the "profound moral issue" of abortion, *id.* at *5, Utahns can change those policies in the same way that "'most important questions in our democracy'" are changed: "'by citizens trying to persuade one another and then voting.'" *Id.* at *7 (quoting *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in judgment in part and dissenting in part)). *Roe*

improperly prevented that political debate for almost 50 years. Since *Dobbs*, the Supreme Courts of Texas and Ohio have refused to duplicate *Roe*'s mistake.[1] This Court should not do so, either.

BACKGROUND

I. For almost 100 years before *Roe v. Wade*, Utah made abortion a crime and prosecuted violators, and the Utah Supreme Court never questioned the constitutional validity of those statutes or convictions.

Laws prohibiting abortion in Utah are older than the State itself. Beginning in 1876, Utah territorial law made abortion a crime. In 1898—after Utah had become a State and adopted its first state Constitution—the first Utah Legislature reenacted that territorial crime verbatim in our first state code, then added to it. The Legislature kept those crimes virtually unchanged until the U.S. Supreme Court decided *Roe* in 1973.

Because the Utah Supreme Court's framework for analyzing state constitutional rights makes those indisputable historical facts essential to properly adjudicating Plaintiff's claims against SB174, Defendants begin by recounting Utah's long history of abortion regulation and the relevant constitutional provisions before discussing SB174's Renewed Abortion Ban and Plaintiff's claims.

A. Utah territorial laws criminalized abortion for two decades before Utah became a State.

Utah's territorial legislature outlawed abortions beginning in 1876. Making exception for an abortion "necessary to preserve" a pregnant woman's "life," the territorial legislature made it a crime punishable by two to ten years in prison for any person to "provide[], suppl[y], or administer[] to any pregnant woman," or to "procure[] any such woman to take any medicine, drug, or substance," or to "use[] or employ[] any instrument or other means whatever, with the intent thereby to procure the miscarriage of such woman." Terr. of Utah Comp. Laws §1972 (1876) (attached as Ex. A). "As

[1] *See In re Paxton*, No. 22-0527 (Tex. July 1, 2022) (staying temporary restraining order against enforcement of Texas abortion ban); *State ex rel. Preterm Cleveland v. Yost*, No. 2022-0803 (Ohio July 1, 2022) (denying emergency stay of Ohio abortion ban).

generally used and understood in common language" at that time, "the 'procuring of an abortion' means substantially the same as 'procuring a miscarriage.'" *State v. Crook*, 51 P. 1091, 1093 (Utah 1898). Both referred to "the *criminal act of destroying the fœtus* at any time before birth." *Id.* (emphasis added).

In 1888, the territorial legislature readopted the same criminal law verbatim under the heading "Abortions." Comp. Laws of Utah, Title 9, ch. 3, §4507 (vol. II, p. 591) (1888) (attached as Ex. B).

B. In 1896, Utah became a State and adopted its first Constitution.

Against that two-decade-long backdrop of territorial laws making abortion a crime, Utahns adopted our first state Constitution in 1896 upon Utah's admission to the Union. According to Plaintiff, ten provisions among those first enacted in 1896 protect an implied right to abortion. Seven of those ten provisions remain today exactly as they were first enacted. The other three provisions have been modified slightly, mostly to change gender-specific language to gender-neutral language or to remove clauses now codified elsewhere in the Constitution.

For ease of reference, the full text of each of those ten provisions—as enacted in 1896 and (if different) as it now appears—is reproduced in full in the table below, accompanied by the provisions' constitutional headings.

Constitutional provision	**Text in 1896**	**Text in 2022**
Article I, §1	[**Inherent and inalienable rights.**] All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.	**[Inherent and inalienable rights.]** All ~~men~~ persons have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.

Article I, §2	[**All political power inherent in the people.**] All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require.	No change
Article I, §4	[**Religious liberty.**] The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; no religious test shall be required as a qualification for any office of public trust or for any vote at any election; nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof. There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment. No property qualification shall be required of any person to vote, or hold office, except as provided in this Constitution.	**[Religious liberty.]** The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; no religious test shall be required as a qualification for any office of public trust or for any vote at any election; nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof. There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment. ~~No property qualification shall be required of any person to vote, or hold office, except as provided in this Constitution.~~ (Deleted text moved to art. IV, §7)
Article I, §7	[**Due process of law.**] No person shall be deprived of life, liberty or property, without due process of law.	No change
Article I, §11	[**Courts open. Redress of injuries.**] All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from	**[Courts open -- Redress of injuries.]** All courts shall be open, and every person, for an injury done to ~~him~~ the person in his or her person, property, or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall

	prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.	be barred from prosecuting or defending before any tribunal in this State, ~~by himself~~ with or without counsel, any civil cause to which ~~he~~ the person is a party.
Article I, §14	[**Unreasonable searches forbidden -- Issuance of warrant**.] The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.	No change
Article I, §24	[**Uniform operation of laws.**] All laws of a general nature shall have uniform operation.	No change
Article I, §25	[**Rights retained by people.**] This enumeration of rights shall not be construed to impair or deny others retained by the people.	No change
Article I, §27	[**Fundamental rights.**] Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.	No change
Article IV, §1	[**Equal political rights.**] The rights of citizens of the State of Utah to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this State shall enjoy equally all civil, political and religious rights and privileges.	No change.

C. In 1898, the first Utah State Legislature reenacted and expanded criminal laws outlawing abortion.

After Utahns first adopted our State Constitution, our first State Legislature reenacted verbatim in our first state code (adopted in 1898) the 1888 territorial code's criminal ban on performing abortions. Utah Rev. Stat. Tit. 75, ch. 27, §4226 (1898) (attached as Ex. C). Chapter 27 in the 1898 code was entitled "Abortion," consistent with the 1896 Constitution's requirement that a bill's subject "be clearly expressed in its title." Utah Const. art. VI, §23 (1896).

For the next 77 years, the Utah Legislature retained this criminal ban on performing abortion—with no material changes—when it recodified Utah's criminal statutes in 1907, 1917, 1933, and 1943, and 1953. *See* Comp. Laws of Utah, Tit. 90, ch. 27, §4226 (1907) (attached as Ex. D); Comp. Laws of Utah, Tit. 119, ch. 28, §8118 (1917) (attached as Ex. E); Rev. Stat. of Utah §103-2-1 (1933) (attached as Ex. F); Utah Code §103-2-1 (1943) (attached as Ex. G). The abortion ban in Utah's 1953 code was still in force in 1973, as *Roe* itself recognized. *See* 410 U.S. at 118 n.2 (citing Utah Code Ann. §76-2-1 (1953)).

Put differently, for nearly 100 straight years—from 1876 until 1973—performing an abortion in Utah was a criminal act unless the abortion was necessary to save a pregnant woman's life. And abortion ceased to be a crime in Utah in 1973 because of *Roe*—not because of democratic changes enacted by the Legislature or by the people of Utah themselves.

Immediately after Utah became a State, the Legislature added to the territorial legislature's abortion regulations in two ways. ***First***, in 1898, the Legislature made it a crime punishable by one to five years in prison for a woman to "solicit[] of any person any medicine, drug, or substance whatever, and take[] the same," or to "submit[] to any operation, or to the use of any means whatever, with the intent thereby to procure a miscarriage, unless the same is necessary to preserve her life." Rev. Stat. of Utah Tit. 75, ch. 27, §4227 (1898) (attached as Ex. C). Like the criminal ban on

performing an abortion, this criminal prohibition on obtaining one remained part of Utah's criminal code with no material changes until 1973. *See* Comp. Laws of Utah, Tit. 90, ch. 27, §4227 (1907) (attached as Ex. D); Comp. Laws of Utah, Tit. 119, ch. 28, §8119 (1917) (attached as Ex. E); Rev. Stat. of Utah §103-2-2 (1933) (attached as Ex. F); Utah Code §103-2-2 (1943) (attached as Ex. G); *Roe*, 410 U.S. at 118 n.2 (citing Utah Code Ann. §76-2-2 (1953)). No equivalent provision exists in SB174.

Second, beginning in 1907, the Utah Legislature exercised its police power to regulate the practice of medicine 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) (attached as Ex. D). Physicians or surgeons who committed one of those acts of unprofessional conduct had their medical license revoked and were banned from practicing medicine in Utah. *Id.* §§1734-1735. When the Legislature recodified Utah law in 1917, it retained the same definition of unprofessional conduct and the same professional consequences for physicians and surgeons who committed it. *See* Comp. Laws of Utah, Tit. 85, §§4446-4447, 4448(1)-(2) (1917) (attached as Ex. E). In the 1933 and 1943 recodifications of Utah law, the Legislature retained the same definition of unprofessional conduct, but no longer specified in the Utah Code the professional consequences for committing it. *See* Rev. Stat. of Utah §79-9-18(1) (1933) (defining "unprofessional conduct" to mean "[p]rocuring, or aiding in or abetting, or offering or attempting to procure or aid in or abet the procuring of, a criminal abortion") (attached as Ex. F); Utah Code §79-9-18(1) (1943) (same) (attached as Ex. G).

D. Prosecutors charged defendants with violating Utah's criminal abortion bans, and the Utah Supreme Court never questioned the statutes' constitutionality.

Utah's original abortion ban was no paper prohibition that went unenforced by prosecutors and the courts. The Utah Supreme Court affirmed an abortion conviction in 1897, approving the trial

court's jury charge "[t]hat if the defendant used an instrument upon her with intent thereby to procure the miscarriage of the woman, and that a miscarriage was in fact thereby produced, and that the producing of the miscarriage was not necessary to save her life, you should find the defendant guilty as charged." *State v. McCoy*, 15 Utah 136, 49 P. 420, 421–22 (1897).

In a separate suit by the State against the executors of a bail bond, the Court explained the abortion ban at length and rejected an argument that "no such crime" as abortion "is known to the laws of this state." *State v. Davis*, 27 Utah 368, 75 P. 857, 858 (1904). The Court quoted Chapter 27 of the penal code in full and held that "[t]his chapter makes abortion a definite crime, and, when a miscarriage is attempted or caused, in the manner mentioned in said sections, except when necessary to preserve life, the definite crime of abortion, under this statute, is committed." *Id.* "This being so," the Court concluded, "the contention that no such crime as abortion is known to the laws of this state is without foundation." *Id.*

The Court also frequently heard cases arising from revocations of medical licenses for performing abortions—always acknowledging that abortion was a crime in state law, and never suggesting any constitutional doubts about the ban. *See, e.g.*, *Moormeister v. Golding*, 27 P.2d 447, 449 (Utah 1933), *aff'd*, 35 P.2d 307 (1934) (reviewing a revocation proceeding for alleged "unprofessional conduct in performing a criminal abortion"); *Moormeister v. Dep't of Registration of State*, 288 P. 900, 903 (Utah 1930) (denying writ of prohibition against abortion-predicated revocation proceeding); *Baker v. Dep't of Registration*, 3 P.2d 1082, 1084, 1091 (Utah 1931) (similar); *State v. Cragun*, 20 P.2d 247, 248 (Utah 1933) (affirming conviction for practicing obstetrics without a license, because defendant's license was validly revoked on charges of "attempt[ing] to procure or aid[ing] and abet[ting] in procuring a criminal abortion"). And in 1936, the Court pointed to "the alleged commission of an abortion" as an illustrative example of a matter that could come within the respective jurisdictions of the Department of Registration (for license-

revocation purposes) and the courts in its "aspect as a crime." *Tite v. State Tax Comm'n*, 57 P.2d 734, 737 (Utah 1936); *see also Denver & R.G.W.R. Co. v. Pub. Serv. Comm'n*, 100 P.2d 552, 558 (Utah 1940) (similar).

Even when the Supreme Court reversed abortion convictions, it typically remanded for a new trial, never so much as hinting that Utah's abortion ban was constitutionally suspect. In *State v. Wells*, the Court reversed an abortion conviction because the State had failed to present sufficient evidence that the abortion was not necessary to preserve the life of the woman on whom it was performed. 100 P. 681, 686-87 (Utah 1909). But the Court remanded the case for new trial, *id.* at 687, and expressly noted that prosecutors should be able to prove this element of non-necessity in the typical case, including the case then under review: "If it was not necessary to produce the miscarriage to preserve the life of the woman, *such fact could readily have been shown* by the physician, who was a witness for the state, and who had examined the woman on the day that the alleged operation was performed, and by the woman herself, who was also a witness for the state." *Id.* at 686 (emphasis added). Far from casting doubt on the ban, the Court upheld the ban as enacted by the Legislature: "The Legislature, by placing the negative in the statute, and making it a part of the clause and section creating the offense, recognized that some abortions are necessary to save the life of the woman, and that others are not." *Id.*; *see also Crook*, 51 P. at 1091 (reversing abortion conviction on double-jeopardy grounds); *State v. Clark*, 284 P.2d 700 (Utah 1955) (reversing conviction because witness's uncertain identification "was insufficient to connect this defendant with the crime"); *Sherman v. McEntire*, 179 P.2d 796 (Utah 1947) (reversing physician's license revocation because "pregnancy is a material element in the crime of abortion" and therefore "a physician's certificate to practice may not be revoked for aiding, attempting or performing a criminal abortion unless pregnancy is proved").

In reversing another conviction, the Supreme Court (while rejecting several other points of alleged error) held that despite "ample corroborating evidence," the trial judge erred by admitting the

testimony of the aborted child's father without instructing the jury to disregard his testimony if they found him to be an accomplice of the defendants. *State v. McCurtain*, 172 P. 481, 482-83 (Utah 1918). But the Court remanded for a new trial and "ha[d] no hesitancy to state that [the evidence] was sufficient on the part of the state, if believed by the jury, to carry the case to the jury, and therefore is also sufficient to sustain the verdict of guilty." *Id.* at 482. Similarly, *State v. Cragun* rejected three grounds of error in an abortion conviction, but remanded for a new trial solely because the prosecution had introduced immaterial evidence of other criminal abortions by the defendant. 38 P.2d 1071 (Utah 1934). The Court nevertheless reiterated that "[w]here the state is able to prove, as it did in the case at bar, the commission of the act and that its performance was not necessary to save the life of the woman, then the criminal intent of the defendant has been shown." *Id.* at 1078.

II. The present dispute over SB174.

A. In its 2020 General Session, the Legislature passes the Renewed Abortion Ban in SB174.

The Legislature enacted Senate Bill 174, codified at Utah Code Ann. §§76-7a-101 *et seq.*, in its 2020 General Session. 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." *Id.* §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, SB174 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).

The Act further requires that abortions be performed only by a physician, and only in a clinic or hospital (absent a medical emergency). *Id.* §201(2). It defines "abortion" generally to mean any intentional or attempted killing of a live unborn child, causing of a miscarriage, or termination of pregnancy after implantation of a fertilized ovum, by a medical procedure or substance used under

medical direction. *Id.* §101(1)(a). But the Act explicitly defines abortion not to include other medical procedures, such as delivery of a stillborn child and removal of an ectopic pregnancy. *Id.* §101(1)(b). Any person "who performs an abortion in violation of [the Act] is guilty of a second degree felony," *id.* §201(3), and further adverse action such as the revocation of a clinic's or physician's license might occur. *Id.* §201(4)-(5).

In light of then-governing legal precedent, the Legislature did not give the Act immediate effect, but instead gave it a "[c]ontingent effective date." SB174, §4. The Act was set to take effect whenever "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 [the Act]." *Id.* §4(2). The Act defined "court of binding authority" to mean the United States Supreme Court, or if the right to appeal had been exhausted, then also the United States Court of Appeals for the Tenth Circuit, the Utah Supreme Court, or Utah Court of Appeals. *Id.* §4(1). Once a qualifying court decision came down, as certified by the legislative general counsel to the Legislative Management Committee, *id.* §4(2), the Act would take immediate effect.

The Legislature passed the Act with one overriding purpose: the protection of human life, rooted in a moral conviction about the worth of each unborn child. These statements by SB174's supporters during the Legislature's proceedings on the bill are illustrative examples:

- "This bill is meant to discourage the taking of a human life. Human life, according to the state of Utah, is important and should be protected." *Hearing on S.B. 174 Before the House*, 2020 General Session, recording at 34:00 (Mar. 12, 2020) (statement of floor sponsor Rep. Karianne Lisonbee), https://le.utah.gov/av/floorArchive.jsp?markerID=111813.

- "That baby deserves a choice for life as we all do. And I think that choice is important enough to protect from a state's interest. Our job as government officials is to speak for those who are in a lot of ways are unable to speak for themselves." *Hearing on S.B. 174 Before the Senate Health and Human Services Committee*, recording at 1:05:15 (Feb. 26, 2020) (statement of floor sponsor Sen. Dan McKay), https://le.utah.gov/av/committeeArchive.jsp?timelineID=159216.

- "At the end of the day, it comes down to one reason to vote for [SB174]. If you believe that an unborn child is a human being, if you believe that they are alive, then I don't know how you can vote to end their life." *Hearing on S.B. 174 Before the Senate*, 2020 General Session, recording at 2:02:30 (Feb. 28, 2020) (statement of Sen. Daniel W. Thatcher), https://le.utah.gov/av/floorArchive.jsp?markerID=110520.

- "The primary reason [*Roe v. Wade* will not be upheld] is how far we have come as a society in making this a hospitable place for people to have children." *Hearing on S.B. 174 Before the Senate Health and Human Services Committee*, recording at 13:00 (Feb. 26, 2020) (statement of floor sponsor Sen. Dan McKay), https://le.utah.gov/av/committeeArchive.jsp?timelineID=159216

- "We can spend several years putting this back and talking about it but it really comes down to where each one of us falls philosophically…. This is really about the protection of babies and that's what the vote really comes down to." *Hearing on S.B. 174 Before the House Health and Human Services Committee*, recording at 1:12:40 (Mar. 9, 2020) (statement of Rep. Paul Ray) https://le.utah.gov/av/committeeArchive.jsp?timelineID=162345

- "[This bill] states emphatically that Utah believes that human life deserves protection from the creation of that unique human being. This bill courageously asserts that the current law of the land is wrong.... Are we willing to step up and stand for the value and dignity of all human life? Will we have the courage to say that newly created human beings have the right to live and that except in extremely rare circumstances that right to live surpasses everything? We hope that each of you today will be willing to make that statement." *Hearing on S.B. 174 Before the House Health and Human Services Committee*, recording at 54:00 (Mar. 9, 2020) (statement of Merrilee Boyack) https://le.utah.gov/av/committeeArchive.jsp?timelineID=162345

Driven by these critical social interests, the Legislature passed SB174 on March 12, 2020, and Governor Herbert signed it into law a few weeks later.

B. In *Dobbs*, the U.S. Supreme Court overrules *Roe* and *Casey*, restoring Utah's plenary authority to regulate abortion.

The Supreme Court decided *Dobbs* on June 24, holding: "The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion." 2022 WL 2276808, at *43. Because "*Roe* and *Casey* arrogated that authority," the Court "overrule[d] those decisions and return[ed] that authority to the people and their elected representatives." *Id.*

At the heart of *Dobbs* is the Court's survey of how the common law and state law treated abortion, particularly in the late nineteenth century—the same legal context in which Utah passed its

Constitution and its original criminal abortion ban. The Court concluded that "[u]ntil the latter part of the 20th century," a right to abortion "was *entirely unknown* in American law," from any source. *Id.* at *7 (emphasis added). Beginning with the common law, the Court found "no common-law case or authority ... that remotely suggests a positive right to procure an abortion at any stage of pregnancy." *Id.* at *14. Instead, "[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." *Id.* at *12.

State and territorial statutes painted an even clearer picture: "In this country during the 19th century, the vast majority of the States enacted statutes criminalizing abortion at all stages of pregnancy.... Of the nine States that had not yet criminalized abortion at all stages [by 1868], all but one did so by 1910." *Id.* at *16; *see also id.* at *43-54 (Appendix A, listing state statutory provisions in chronological order). Furthermore, "[t]he trend in the Territories that would become the last 13 States was similar: All of them"—including Utah in 1876—"criminalized abortion at all stages of pregnancy between 1850 (the Kingdom of Hawaii) and 1919 (New Mexico)." *Id.* at *16; *see also id.* at *54-57 (Appendix B, listing territorial provisions in chronological order). And as "[m]any judicial decisions from the late 19th and early 20th centuries" attested, these statutes were "spurred by a sincere belief that abortion kills a human being." *Id.* at *19 (collecting cases); *see also Memphis Ctr. for Reprod. Health v. Slatery*, 14 F.4th 409, 446 & n.11 (6th Cir.) (Thapar, J., concurring in judgment in part and dissenting in part), *reh'g en banc granted, opinion vacated*, 18 F.4th 550 (6th Cir. 2021).

None of these legal developments in the late 19th and early 20th centuries provoked opposition on the grounds that they violated constitutional or other fundamental rights. And neither the parties nor *amici* could point the Court to any "support for the existence of an abortion right that predates the latter part of the 20th century—no state constitutional provision, no statute, no judicial decision, no learned treatise." *Dobbs*, 2022 WL 2276808, at *17. Instead, "[t]he earliest sources called

to [the Court's] attention [were] a few district court and state court decisions decided shortly before *Roe* and a small number of law review articles from the same time period." *Id.*

That evidence and more like it led the Court to "[t]he inescapable conclusion … that a right to abortion is not deeply rooted in the Nation's history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973." *Id.* Even the dissenting Justices did not "dispute the fact that abortion was illegal at common law at least after quickening; that the 19th century saw a trend toward criminalization of pre-quickening abortions; that by 1868, a supermajority of States (at least 26 of 37) had enacted statutes criminalizing abortion at all stages of pregnancy; that by the late 1950s at least 46 States prohibited abortion 'however and whenever performed' except if necessary to save 'the life of the mother,' *Roe*, 410 U.S. at 139; and that when Roe was decided in 1973 similar statutes were still in effect in 30 States." *Id.* at *22; *cf. id.* at 76 & nn. 2-3 (dissenting op.).

The Court therefore repudiated *Roe* as an "'exercise of raw judicial power,'" one which had "sparked a national controversy that has embittered our political culture for a half century." *Id.* at *6 (quoting *Roe*, 410 U.S. at 222 (White, J., dissenting)). In so doing, it returned to the status quo of "the first 185 years after the adoption of the Constitution," under which "each State was permitted to address this issue in accordance with the views of its citizens." *Id.* at *5. "It is time," the Court wrote, "to heed the Constitution and return the issue of abortion to the people's elected representatives. 'The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.' That is what the Constitution and the rule of law demand." *Id.* at *7 (quoting *Casey*, 505 U.S. at 979 (Scalia, J., concurring in judgment in part and dissenting in part)).

C. SB174's Renewed Abortion Ban takes effect, once again making abortion a crime in Utah.

On the same day that the Supreme Court issued *Dobbs*, the General Counsel of the Legislature took the final step to give life to Utah's renewed criminal prohibitions on abortion: certification of the decision. General Counsel John L. Fellows wrote to the Legislative Management Committee: "Because the United States Supreme Court is a court of binding authority, and because its majority opinion authorizes a state to prohibit the abortion of an unborn child at any time during the gestational period, the contingency required by the Legislature in S.B. 174 has been met." *See* Compl., Ex. B. Thus SB174 took immediate effect from the time the General Counsel's message was sent late on June 24. *Id.*; *see* SB174, §4(2).

D. Plaintiff challenges the Renewed Abortion Ban's constitutionality, and this Court grants a TRO.

The next day, Saturday, June 25, Plaintiff filed a 23-page complaint in this Court challenging the Renewed Abortion Ban's constitutionality. Plaintiff named as Defendants the State of Utah and three State officers in their official capacities—Utah Attorney General Sean Reyes; Utah Governor Spencer Cox; and Mark Steinagel, the Director of the Utah Division of Occupational and Professional Licensing. Because *Dobbs* eliminated any basis for contending that the Act violates the United States Constitution, Plaintiff's Complaint alleges seven claims contending that SB174Renewed Abortion Ban violates ten different provisions of the Utah Constitution.

On Monday, June 27—less than 48 hours after Plaintiff sued, and before Defendants could submit any responsive briefing—this Court held a hearing on and granted Plaintiff's request for an emergency temporary restraining order. Two days later, Plaintiff moved for preliminary injunctive relief on six of the seven claims in its Complaint.[2]

[2] Although Plaintiff raised a seventh constitutional claim in its Complaint—the freedom from involuntary servitude, *see* Utah Const. art. I, §21—it does not raise this claim as a grounds for preliminary relief.

ARGUMENT

I. Plaintiff lacks 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." *Provo City Corp. v. Thompson*, 2004 UT 14, ¶9, 86 P.3d 735. "To grant standing to a litigant, who cannot distinguish himself from all citizens, would be a significant inroad on the representative form of government, and cast the courts in the role of supervising the coordinate branches of government. It would convert the judiciary into an open forum for the resolution of political and ideological disputes about the performance of government." *Baird v. State*, 574 P.2d 713, 717 (Utah 1978). Nevertheless, Plaintiff seeks to draw the Court into a dispute in which Plaintiff has no "personal stake," that is, a claim of constitutional rights belonging to people it does not represent. *Jenkins v. Swan*, 675 P.2d 1145, 1148 (Utah 1983). This Court should deny relief on this basis alone. *See Gregory v. Shurtleff*, 2013 UT 18, ¶9, 299 P.3d 1098 ("Since standing is a jurisdictional requirement, we first must determine whether Appellants have standing to bring any of their claims.").

Plaintiff does not assert its own interests. If the rights invoked in Plaintiff's complaint and preliminary injunction motion exist at all, they belong to women who would seek abortions. And the overwhelming majority of its Complaint and Motion is devoted to arguments about the legal rights of, and harms to, third-party patients who are not before the Court. But Plaintiff is not a membership organization which represents such people. If it were, it could show traditional standing through its members. *See, e.g., Utah Chapter of Sierra Club v. Utah Air Quality Bd.*, 2006 UT 74, ¶21, 148 P.3d 960. Instead, it provides services, including abortions, and contracts with patients for those services. *See* Compl. ¶¶9-13. Its only "personal stake" in this case is economic: it stands to lose business from Utah's abortion ban. But it has no interest implicated by the Act sounding in privacy, bodily integrity, equal protection, or any of the other alleged constitutional rights it attributes to individual Utahns.

Plaintiff cannot fulfill the requirements of "public interest" standing, either. 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 a real and personal interest in the dispute." *Jenkins*, 675 P.2d at 1149-50. The test for public interest standing has "two elements: (1) is the plaintiff an appropriate party; and (2) does the dispute raise an issue of significant public importance." *Gregory*, 2013 UT 18, ¶15.[3]

Neither Plaintiff's Complaint nor its motion makes either of these required showings. Despite citing *Sierra Club*, one of the Supreme Court's major precedents on public-interest standing, *see* Mem. 6, Plaintiff does not argue or offer evidence to show how it fulfills any part of the test. Indeed, Plaintiff's only concrete argument for standing is that federal-court standing is harder to show, and because (it claims) it could meet that federal standard, it has standing "[a] fortiori" in state court. But this argument fails in two respects.

First, Plaintiff would *not* shoulder a heavier burden in federal court under the pre-*Dobbs* caselaw it cites: it would have standing, if at all, under an abortion-specific exception to the general federal standing doctrine. *See, e.g., June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2118 (2020) ("We have long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations."), *abrogated on other grounds by Dobbs*; *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2322 (2016) (Thomas, J., dissenting) ("Above all, the Court has been especially forgiving of third-party standing criteria for one particular category of cases: those involving the purported substantive due process right of a woman to abort her unborn

[3] This exception to traditional standing requirements has been criticized as "incompatible with the judicial power clause in Article VIII of the Utah Constitution," "standardless," and "little more than a post-hoc justification for a preferred result." *Id.* ¶64 (Lee, J., concurring in part and dissenting in part). Defendants reserve their right to argue for a repudiation of this doctrine in the Utah Supreme Court.

child."), *abrogated on other grounds by Dobbs*. Second, the continued vitality of these forgiving federal standing precedents is at best unclear given *Dobbs*' overruling of the cases on which they were predicated. Plaintiff's argument *a fortiori* is based on faulty premises.

Plaintiff's case for public-interest standing must fail on the second element in any event. Public-interest standing is proper only when a plaintiff shows that he is an "appropriate party" to fully and fairly litigate the issues. *Gregory*, 2013 UT 18, ¶13. *Id.* Showing that "claims are unlikely to be brought by anyone else" is a "necessary part of the showing parties must make" on this issue. *Id.* ¶37. Those better-situated plaintiffs are plain here: the many women whose alleged constitutional rights would be directly threatened by Utah's abortion ban. There is no need to "construct hypothetical plaintiffs who might be seen to have traditional standing to bring at least some of [Plaintiff's] claims." *Id.* ¶30. Like the plaintiffs who asserted a federal constitutional right in *Roe v. Wade* and its companion case *Doe v. Bolton*, Utahns affected by the abortion ban could bring a constitutional challenge in their own name or form an association to do so. *Cf. Sierra Club*, 2006 UT 74, ¶34 ("An association has standing to pursue the claims of its members, whether it be two or five hundred."). Because such readily ascertainable plaintiffs could claim the traditional "personal stake" in the outcome of the dispute, Plaintiff cannot represent the "public interest" in their stead here.

II. Plaintiff neither raises a serious issue for litigation nor shows a likelihood of success on the merits.

Even if Plaintiff has standing, it cannot obtain a preliminary injunction without showing there is "a substantial likelihood that the applicant will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further litigation." Utah R. Civ. P. 65A(e)(4). Plaintiff has not made, and cannot make, either showing.

A. Utah courts presume that state statutes are constitutional and interpret the Utah Constitution to discern its objective original public meaning.

Even in an ordinary case, an "[i]njunction, being an extraordinary remedy, should not be lightly granted." *Sys. Concepts, Inc. v. Dixon*, 669 P.2d 421, 425 (Utah 1983). But this is no ordinary case—it's an attempt to invoke the Utah Constitution to interrupt and ultimately override the Legislature's judgment that, with few exceptions, abortion should again be banned in Utah. Because Plaintiff challenges the Renewed Abortion Ban's constitutionality, to obtain injunctive relief it must also overcome "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 S. Salt Lake v. Maese*, 2019 UT 58, ¶8, 450 P.3d 1092 ("When addressing a challenge to the constitutionality of a statute, we 'presume the statute to be constitutional, resolving any reasonable doubts in favor of constitutionality.'"); *Owens v. Hunt*, 882 P.2d 660, 661 (Utah 1994) ("It is axiomatic that laws enacted by the legislature are presumed to be constitutional and that the legislature is accorded wide latitude in complying with constitutional directives").

The analytical framework Plaintiff must follow to overcome that presumption of constitutionality is likewise settled. 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 of those who wrote it." *Maese*, 2019 UT 58, ¶19 n.6. 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; *see also Neese*,

2017 UT 89, ¶96 (stating original public meaning inquiry asks "what principles a fluent speaker of the framers' English would have understood a particular constitutional provision to embody").

"[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 Utah Supreme 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.* Other cases have examined "the text of the" relevant constitutional provisions, "the historical roots of the language of our constitution," and "the historical context of the society which adopted" the constitutional provisions, *Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶15, 140 P.3d 1235, 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.

Just as important, the Utah Supreme Court has been equally clear about what sorts of questions play no role in the original-public-meaning inquiry. Constitutional interpretation involves discerning textual meaning, not substituting policy preferences. Whether any given statute "is good public policy" is not a question for courts but rather "a question for the citizens of Utah, speaking through their duly elected representatives." *Richards*, 2019 UT 57, ¶1. "It's neither [a] court's right nor its vocation to make constitutional judgments based on its view of whether the legislature has made good or bad policy judgments." *Id.* ¶1 n.2. Instead, "[t]he question of the validity of a legislative act can alone be determined by reference to the constitutional inhibitions and restraints," and the "sole question in such case is whether the act violates the supreme law of the state." *Block*, 76 P. at 23. "Whenever, as to any subject within the jurisdiction of the state, the Constitutions of the state and of the United States are silent, the Legislature may speak; and when it does speak its enactment will not

be declared void simply because, in the opinion of the court, it is unwise, or opposed to justice and equity." *Id.*

Following the accepted original-public-meaning guideposts here and eschewing the impermissible ones leads to but one conclusion—SB174's Renewed Abortion Ban does not violate the Utah Constitution.

B. No text in the Utah Constitution expressly protects a right to an abortion.

The Constitution's "text is generally the best place to look for understanding." *Maese,* 2019 UT 58, ¶23; *see Haik,* 2020 UT 29, ¶15 (a court's "'job is first and foremost to apply the plain meaning of the text'"). That's why the "'starting point in interpreting a constitutional provision is the textual language itself.'" *Haik,* 2020 UT 29, ¶15; *see also Am. Bush*, 2006 UT 40, ¶16 ("We begin our analysis with the constitutional text itself.").

Plaintiff invokes ten provisions of the Utah Constitution in its motion for preliminary injunction—Article I, §§1, 2, 4, 7, 11, 14, 24, 25, 27, and Article IV, §1. Not one of those ten provisions expressly refers to "abortion." Nor does any one of them refer to a "miscarriage," a word that "[a]s generally used and understood in common language" at the time of the founding meant "substantially the same" thing as abortion. *Crook,* 51 P. at 1093.

Thus the "best place to look for understanding," *Maese,* 2019 UT 58, ¶23, suggests the best understanding is that these provisions do not protect abortion. After all, when the Constitution's plain text is "silent" on a "subject within the jurisdiction of the state"—like abortion—that silence has been read since the Founding to embody the understanding that "the Legislature may speak" and that "its enactment will not be declared void simply because, in the opinion of the court, it is unwise, or opposed to justice and equity." *Block,* 76 P. at 23.

C. Nothing in the record of the Utah Constitutional Convention suggests that the Constitution protects an implied right to abortion.

When "the plain language of the Utah Constitution does not answer the question," *Maese*, 2019 UT 58, ¶28, the Supreme 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 (examining records of constitutional convention debate to discern meaning of "inhabitants" in article XI, §6); *Maese*, 2019 UT 58, ¶¶30-33 (same to interpret scope of constitutional right to jury trial); *Am. Bush*, 2006 UT 40, ¶¶42-48 (same to interpret whether constitutional free speech guarantees protect nude dancing). Applying that same interpretive tool here further confirms that the Utah Constitution does not protect an implied right to get an abortion.

First, as far as Defendants have been able to tell, neither the word "abortion" nor the word "miscarriage" appears anywhere in the records of the Constitutional Convention. That historical fact should not be surprising given the lack of express textual protection for abortion in the Constitution itself. And the silence on this issue in the Convention debates means that those records cannot reasonably be read to support an implied right to abortion unless the Framers either (1) knew that the general public in Utah would understand the ten provisions cited in Plaintiff's motion to protect an implied abortion right, such that the Framers did not need to use the words "abortion" or "miscarriage" during the debates to clarify the provisions' textual silence; or (2) discussed the implied abortion right during the Convention debates using code words to assure the general public in 1895 that the provisions protected an implied right to "abortion" or "miscarriage" *notwithstanding* the textual silence.

The simpler and correct conclusion—that the Framers never mentioned abortion during the Convention debates because no one understood the Constitution to protect abortion—becomes obvious when examining the Framers' *actual* debates over the provisions Plaintiff cites. Nine of the ten provisions upon which Plaintiff relies appear in Article I, which is the Constitution's Declaration

of Rights. The tenth provision appears in Article IV, which covers electoral and political rights. Since the briefing schedule on Plaintiff's motion for preliminary injunction gave Defendants only a week to respond to 45 pages of briefing on 10 constitutional provisions, what follows is Defendants' best summary of the relevant parts of the debates on each provision ascertained in the allotted briefing schedule.

1. Declaration of Rights. On March 6, 1895, the Special Committee on Standing Committees to the Convention recommended establishing a Committee on the Preamble and Declaration of Rights, to consist of eleven members. *See* https://le.utah.gov/documents/conconv/03.htm. On March 8, it was reported that Mr. Heber M. Wells was selected as the chairman of that committee. *See* https://le.utah.gov/documents/conconv/05.htm.

It appears that the first mention of the Declaration of Rights during the Convention occurred on March 11, when "Mr. Eichnor offered for insertion in the Constitution an article on preamble and bill of rights." *See* https://le.utah.gov/documents/conconv/08.htm. When Mr. Creer asked "if it is stated there what is copied from that bill of rights," Mr. Eichnor responded, "If any person desires a bill of particulars on the declaration of rights, I will furnish it. I will state that I consulted forty-four constitutions, in preparing that declaration of rights." *See id.*

The first report of the Committee's work occurred on March 18, 1895. *See* https://le.utah.gov/documents/conconv/15.htm. When introducing the Committee's draft provisions, Chairman Wells acknowledged that the Committee did "not claim perfection for it by any means" and expected the draft to "be subjected to the fusilade of a hundred guns," which would, "like gold in the furnace," "purif[y] and improve[]" the draft "by the fire." *Id.* Mr. Wells then stated the Committee's view that "a constitution should not be a code of laws, but rather the magna charta of our liberties, upon which the laws may be afterwards founded." *Id.* He then implored the delegates

to scrutinize the rights specifically listed in the draft provisions so they could add to those provisions any critical rights the Committee had omitted:

> If there are rights dear to the people of Utah which we have not enumerated, we hope that you gentlemen will discover and insert them. And if, on the other hand, we have inserted rights which ought to be left to the Legislature, we shall not be offended if they are stricken out. Our desire is that the people of this commonwealth shall have all the rights and all the privileges enjoyed by the people of the other states of this Union, all the rights which a free and enlightened people, who have been too long kept in territorial bondage, have the right to expect.

Id. The Convention then decided not to read the entire draft Declaration of Rights as a whole body that day because the Committee had already taken steps to have it printed so it could be "taken by each member and carefully studied." *Id.* (statement by Mr. Evans (Weber)).

The Convention began considering the Declaration of Rights' contents in earnest on March 20, when it started reading and debating each section in the draft Declaration. *See* https://le.utah.gov/documents/conconv/17.htm. As noted, Plaintiff invokes Sections 1, 2, 4, 7, 11, 14, 24, 25, and 27 of the Declaration to support its claims. Defendants thus limit their analysis here to the debates on those nine provisions.

Section 1. As read in Convention on March 20, 1895, the draft of Section 1 stated:

> All men have equal, inherent, and inalienable rights, among which are these: To acquire, possess and protect property; to worship according to the dictates of their conscience; to peaceably assemble, protest against wrongs, and petition for redress of grievances. To freely communicate their thoughts and opinions, being responsible for the abuse of that right.

Id. Mr. Whitney moved to amend this language so it would instead read, "'All men have the inalienable right to enjoy and defend their lives, and liberties,' etc." *Id.* He explained that this amendment was intended to "improve the rhetorical construction, without changing the meaning." *Id.* After the Convention voted to approve that amendment, Mr. Whitney proposed a second one: "a transposition of the last two clauses," so that the Speech Clause would precede the Assembly Clause. *Id.* After a delegate objected on the grounds that the order was "a matter that should be properly left

to the committee on compilation and arrangement," Mr. Whitney's second proposed amendment was rejected. *Id.* No further debate occurred on draft Section 1. *See id.*

Section 2. The Convention then read draft Section 2, which stated:

> All political power is inherent in the people, and all free governments are founded on their authority and instituted for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require.

Id. Mr. Snow moved to amend this section so that instead it would read, "all political power is inherent in the people, and all free governments are founded on their authority and instituted for their equal protection and benefit, and they have the right to alter or reform the same whenever the public good may require it." *Id.* Mr. Wells opposed the amendment, and in response to Mr. Varian's question about why this section was necessary at all since (in his view) it was "simply affirming and reaffirming a principle that there is no necessity of," Mr. Wells answered that "probably one-half of the constitutions of the states in the United States have the same provision" and that "it is very pertinent to provide that all political power is inherent in the people." *Id.* After that exchange, Mr. Snow's proposed amendment was rejected. *Id.* No further debate occurred on draft Section 2. *See id.*

Section 4. Draft Section 4, in turn, was read as follows:

> The rights of conscience shall never be infringed. Perfect toleration of religious sentiment is guaranteed. The state shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; no religious test or property qualification shall be required for an office of public trust, or for any vote at any election; nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof. There shall be no union of church and state, nor shall any church dominate the state, or interfere with its functions. No public money or property shall be appropriated for or applied to any worship, exercise, or instruction, or for the support of any ecclesiastical establishment.

Id. Debate on this section consumed the rest of the day's business. *See id.* The first proposed amendment came from Mr. Roberts, who proposed adding a provision from the Tennessee Constitution stating that "No person shall be compelled to attend, erect, or support any place of

worship, or maintain any minister against his consent." *Id.* After a short debate, the Convention rejected this proposed amendment. *See id.*

The next set of proposed amendments tried to implement the view of some delegates that there "should be a property qualification" for voters participating in "'elections levying a special tax, or creating indebtedness.'" *Id.* The Convention debated those proposals at length, including lengthy discussions about whether the proposed amendments and motions to substitute amendments comported with Roberts' rules of order. *See id.* But never once in this lengthy exchange about requiring property qualifications for voting in certain kinds of elections did any delegate suggest that draft Section 4 protected an implied right to abortion (or anything like it). *See id.*

The final set of proposed amendments to Section 4 debated on March 20 involved what Mr. Roberts called the "very serious question" of whether "church property and property held for charitable institutions" could be "taxable" under Section 4's "second clause." *Id.* The ensuing lengthy debate on this clause again involved questions about Roberts' rules of order and about whether, if this clause should be included in the Constitution, it should appear here or be placed elsewhere under the purview of 'the committee on taxation and public debt." *Id.* But never once in these debates over potential taxes for church-owned or charitable property did the delegates suggest that this clause guaranteed an implied right to abortion (or anything like it). *See id.*

When the Convention resumed the next day, the Chairman acknowledged that "we still have under consideration section 4 of this article." *See* https://le.utah.gov/documents/conconv/18.htm. Mr. Snow began by moving "to strike out the word 'is' in the third line, and insert in lieu thereof the following, 'the rights of conscience shall never be infringed. Perfect toleration of religious sentiment shall forever be guaranteed.'" *Id.* With little debate, the Convention rejected that proposal. *See id.*

Mr. Eldredge then moved "to strike out all of section 4 after the word 'no' in line 12, and insert in lieu thereof, 'No public funds or property in this State, whether accruing from taxation or

otherwise, shall be apportioned or used for the purpose of founding, maintaining, or aiding, directly or indirectly, any church, religious denominations, religious or secular society, or institution, society, or undertaking, which is wholly or in part under sectarian, ecclesiastical, or secular control.'" *Id.* The Convention also debated this proposal at length, including multiple discussions about whether proper procedures had been followed under Roberts' rules of order so that the proposed amendment could be tabled and the delegates have more time to consider it. *See id.* Ultimately the proposal was tabled with no action taken on it. The critical take-away from the prior day's debates on Section 4 remained true for the debates on March 21: nothing in the delegates' debates over potential state funding for private organizations suggested that they understood Section 4 to protect an implied right to abortion. *See id.*

Section 7. The delegates also read this section on March 21. Defendants reproduce in full below the record of the Convention's debates on Section 7:

> The secretary then read section 7 as follows;
>
> Section 7. No person shall be deprived of life, liberty, or property, or be outlawed or exiled without due process of law.
>
> Mr. VAN HORNE. I move you that the section be amended by striking out the words, "or be outlawed or exiled."
>
> Seconded.
>
> Mr. WELLS. I will state that the clause was copied from one of the constitutions, I don't remember which, but I think it is covered in the liberty clause, and I have no objection to it being stricken out.
>
> The question was taken on the amendment to strike out and was agreed to.

Id. That's it. Nothing in this discussion suggests that the delegates understood Section 7 to protect an implied right to abortion. *See id.*

Section 11. The Convention first considered Section 11 on Saturday, March 23. *See* https://le.utah.gov/documents/conconv/20.htm. The clerk read Section 11 as follows:

> Sec. 11. All courts shall be open and every person, for an injury done to him in his person, property, or reputation, shall have remedy by due course of law, and right of justice shall be administered without sale, denial or delay.

Id. The first proposed amendment to this section came from Mr. Whitney, who moved to "strik[e] out the words, 'and right and justice,' and substitut[e] the word 'which' so that it will read, 'shall have remedy by due course of law, which shall be administered without sale, denial or delay.'" *Id.* The delegates approved this amendment after it was itself amended to "strik[e] out the word 'sale' and … insert[] before the word 'delay' the word 'unnecessary,'" an amendment supported by Mr. Eichnor, who thought "the words 'unnecessary delay,' are of great importance with regard to the courts." *Id.*

The delegates also approved a second proposed amendment "to add 'and no person shall be barred from prosecuting or defending before any tribunal in this State by himself or counsel any civil cause to which he is a party'" at the end of the section. *Id.* Mr. Eichnor spoke against this section on the ground that "if every man would try" to represent himself "in one of the higher courts he would discover what a mistake he had made after the verdict is against him." *Id.* But the amendment still passed after Mr. Cannon voiced his opinion "that everyone should have the right to appear and defend his property as well as to defend his person" and that the amendment "would not harm anyone." *Id.*

No further debate occurred on Section 11, and nothing in those debates suggests that the delegates thought avoiding unnecessary delays in court or letting litigants represent themselves in court protected an implied right to abortion. *See id.*

Section 14. This provision states, "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized." It was read in Convention on March 25; in full, the Convention record about this provision says: "Section 14 was read and passed without amendment." https://le.utah.gov/documents/conconv/22.htm.

Section 24. As adopted, this provision read, "All laws of a general nature shall have uniform operation." This provision's text first appears in the Convention's records on April 3, 1895, during the third reading of the Declaration of Rights. *See* https://le.utah.gov/documents/conconv/31.htm. And on that day, it appears to have been numbered Section 26. *See id.* Only one delegate commented on it: Mr. Hart "move[d] to strike out 'a' in the second line of section 26, so that it will read, 'all laws of general nature shall have uniform operation." *Id.* The Convention record for April 3 states that the "motion was agreed to," but when the Declaration of Rights was recorded and published on May 8, 1895, the article "a" appeared in this provision (which had since been renumbered as Section 24). *See* https://le.utah.gov/documents/conconv/66.htm.

The critical point for our purposes: once again, no delegate said anything suggesting that the Uniform Operation Clause protects an implied right to abortion.

Section 25: As adopted, this provision read, "This enumeration of rights shall not be construed to impair or deny others retained by the people." It appears that this provision's text shows up only once in the records of the Convention debates: on the last day's records, when the provision was reported as part of the adopted Declaration of Rights. *See id.* Thus there appears to be no record of comments on or discussion of this provision by any delegate to the Convention.

Section 27: This provision's text first appears in the records of the Convention debates on March 26, 1895, and it was adopted just as it was proposed on that day: "Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government." https://le.utah.gov/documents/conconv/23.htm. Though no delegate proposed an amendment, Mr. Varian asked Chairman Wells "how is this" provision "to be enforced—what the purpose of it is?" *Id.* He continued: "Are the individual members of the commonwealth frequently to recur to fundamental principles, and how? And if they do not, what is to become of the security of individual rights and the perpetuity of free government? And if they do not, how will we compel them

to do it, and see that every man does frequently recur to fundamental principles?" *Id.* After Mr. Varian asked that question, Mr. Van Horne moved to strike this section, and the motion was seconded. *See id.*

But Chairman Wells responded that the Committee on the Declaration of Rights "deems this" provision "to be a patriotic utterance, that frequent recurrence should be made to fundamental principles, because the tendency of the times might be as it has been in the past, not to recur very often to fundamental principles." *Id.* He continued: "When the people are oppressed and do not get their rights, it may be necessary to recur to fundamental principles. We thought it a patriotic utterance that did no harm in the declaration of rights" and said that the Committee copied it from Washington's constitution. *Id.*

Then Mr. Whitney and Mr. Richards both opposed the motion to strike. Mr. Whitney said that "This is not the first section in this document which declares a fundamental principle without guaranteeing it. We declare that all men have the inalienable right to enjoy and defend their lives and liberty. *We suppose that the Legislature shall provide how they will be secured to them*. The declaration of a general principle does not hurt anything. I think it ought to stand as it is." *Id.* (emphasis added.) In a similar vein, Mr. Richards said that "this, like some other portions of this article, is simply a declaration of rights and the criticism that was made about not being enforcible or whether it is binding upon the officer or the citizen, or the application that should be made of it, I think ought not to weigh in determining this question. It seems to me that it is there as an admonition from the great sovereign power of this State to every officer and every citizen and every person within the State, that there shall be frequent recurrence to fundamental principles, and to say that it is not enforcible in itself, is not an objection to the section." *Id.* After those two comments, the motion to strike failed.

Those discussions suggest that the Framers thought the people could invoke "fundamental principles" in response to perceived governmental oppression (statement of Chairman Wells), but also thought that "the Legislature shall provide" how citizens' "inalienable right to enjoy and defend their lives and liberty" will "be secured to them" (statement of Mr. Whitney). *Id.* Mr. Richards did not even think this provision itself was enforceable. *See id.* So whatever else might be said about the debates on this provision, they did not give content to what fundamental principles the Framers thought were necessary to secure which individual rights or continued free government. At a minimum, nothing in those comments suggests that the Framers understood Section 27 to encompass an implied right to abortion among the "individual rights" it secured. *See id.*

2. Equal Political Rights. When Weber Evans introduced at the Convention the provision that would become Article IV, §1, it read:

> Resolved, that the rights of citizens of the State of Utah to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this State shall enjoy equally all civil, political and religious rights and privileges.

https://le.utah.gov/documents/conconv/08.htm. Mr. Evans then referred this provision to the "committee on elections and suffrage" and reported that "both political parties ... have declared in favor of woman suffrage." *Id.*

The Convention debates confirm what the text and structure suggests: the Framers' debates focused overwhelmingly on equal suffrage—the first sentence's guarantee of no sex discrimination in voting or holding political office—while saying very little about the second sentence. In fact, the Delegates debated this provision for several days, and their statements universally suggest that they understood these substantive guarantees to apply only in the context of equal voting and office-holding for men and women, rather than to provide additional substantive protections outside those areas. *See, e.g.*, https://le.utah.gov/documents/conconv/25.htm (statement of Andrew Smith Anderson, supporting "granting equal suffrage to women"); *id.* (statement of Franklin Snyder

Richards, "endeavor[ing] to present...why equal suffrage for men and women should be provided in the Constitution"); *id.* (statement of Joseph Eldredge Robinson, "pledg[ing] to support the passage of a woman's suffrage act"); *id.* (statement of Orson Ferguson Whitney, responding to "arguments against woman suffrage"); *id.* (statement of Lauritz Larsen, seeing "no reason why that half of our community should not have the right to vote").

When the Delegates did mention the second sentence's text providing for equal enjoyment of "all civil, political and religious rights and privileges," their statements suggest that they thought equal enjoyment of those rights and privileges would be the *consequence of* implementing the substantive guarantee of equal suffrage in the first sentence. That is, because men and women would have an equal chance to vote and hold political office, both sexes would have an equal voice and chance to ensure that both sexes equally enjoyed whatever "civil, political and religious rights and privileges" the political process produced. Most directly on point, Franklin Snyder Richards believed that "civil and political rights and privileges as set forth in this discussion, *are incidents and phases of government*." *Id.* (emphasis added). Such rights, Mr. Richards asserted, "can only be given through the customary channels of representation." *Id*. Thus the "civil" and "political" rights here mentioned were subject to the democratic process; they were not guarantees of additional substantive rights beyond the Legislature's police power. *See id.*

Further support for that conclusion comes from Mr. Anderson, who explained that women should have the "right of assisting to mould [*sic*] the policies of the government *by casting her ballot as a protection to herself and children*." *Id.* (emphasis added). Mr. Anderson's support for this provision stemmed from the "fundamental principle that there shall be no taxation without representation." *Id*. He also lauded the "beneficial results that will accrue" from this representation for women. *Id.* And Mr. Evans likewise declared his intention to "lay the foundation and to insert in the fundamental law of the land a provision by which woman has...the inalienable and indefeasible

right *to occupy a place in the civil affairs of our government*. We are now making the fundamental law upon which all other laws must revolve as mere satellites and limitation upon others." https://le.utah.gov/documents/conconv/27.htm (emphasis added).

In short, the records of the Convention debates show that the delegates understood Article IV, §1 to provide a means for securing equal political, civil, or religious rights through exercise of the franchise equally by women and men. Nothing in the Convention debates suggests that this provision was generally understood to protect unenumerated rights, but rather to enable women to participate fully in the democratic process and in that way secure further civil, political, and religious rights and privileges to be enjoyed equally with men.

D. Abortion was a crime in Utah from 1898 until the U.S. Supreme Court decided *Roe* in 1973, and the Utah Supreme Court never questioned the constitutionality of laws imposing punishment for abortion.

Besides looking at what the Founders *said* about the Constitution, the Utah Supreme Court has repeatedly sought to discern original public meaning by looking at what the Founders *did* soon after they adopted it. One of the most important sources of "historical evidence" about "Utah's particular traditions at the time" the Constitution was adopted is the 1898 Utah Code. *Haik*, 2020 UT 29, ¶12 (internal quotation marks omitted). "The 1898 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 given the temporal proximity between the Constitution's adoption in 1896 and the first state code's adoption in 1898, that code "may help us understand the contemporaneous public meaning of certain constitutional terms and concepts." *Id.* ¶46.

Here, the 1898 code fatally undermines Plaintiff's claim that the Constitution protects an implied right to abortion. Chapter 27 in the 1898 code was entitled "Abortion," consistent with the 1896 Constitution's requirement that a bill's subject "be clearly expressed in its title." Utah Const. art. VI, §23 (1896). Section 4226 in that chapter reenacted the prior territorial criminal prohibition on

abortion, thus making it a crime punishable by two to ten years in prison for any person to "provide[], suppl[y], or administer[] to any pregnant woman," or to "procure[] any such woman to take any medicine, drug, or substance," or to "use[] or employ[] any instrument or other means whatever, with the intent thereby to procure the miscarriage of such woman" unless doing so was necessary to preserve a pregnant woman's "life." Utah Rev. Stat. Tit. 75, ch. 27, §4226 (1898) (attached as Ex. C). As noted, in the "generally used and understood … common language" at that time, "the 'procuring of an abortion'" meant "substantially the same as 'procuring a miscarriage.'" *Crook*, 51 P. at 1093.

Beyond that, in the 1898 code the first Utah State Legislature expanded its abortion regulations. The Legislature made it a new crime punishable by one to five years in prison for a woman to "solicit[] of any person any medicine, drug, or substance whatever, and take[] the same," or to "submit[] to any operation, or to the use of any means whatever, with the intent thereby to procure a miscarriage, unless the same is necessary to preserve her life." Rev. Stat. of Utah Tit. 75, ch. 27, §4227 (1898) (attached as Ex. 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 Ann. §§76-2-1, 76-2-2 (1953)). The Legislature's long, consistent treatment of abortion as a crime—broken only by U.S. Supreme Court fiat—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.

Additional evidence from Utah's founding-era "traditions" shortly after 1896 confirms that no ordinary speaker of English language in Utah could have understood the Constitution to protect an implied right to abortion. *Am. Bush*, 2006 UT 40, ¶12. First, 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) (attached as Ex. D). It reenacted those regulations in 1917, 1933, and 1943. *See* Comp. Laws of Utah, Tit. 85, §4448(1)-(2) (1917) (attached as Ex. E); Rev. Stat. of Utah §79-9-18(1) (1933) (attached as Ex. F); Utah Code §79-9-18(1) (1943) (attached as Ex. G). And between 1907 and 1933, physicians or surgeons who performed and abortion had their medical license revoked and were banned from practicing medicine in Utah. *See* Comp. Laws of Utah, Tit. 63, §§1734-1735 (1907) (attached as Ex. D); Comp. Laws of Utah, Tit. 85, §§4446-4447 (1917) (attached as Ex. E).

Second, prosecutors charged and convicted defendants who violated those abortion laws. And when cases seeking appellate review of those convictions reached the Utah Supreme Court, that Court affirmed the conviction or otherwise disposed of the appeals without questioning whether the abortion crimes violated the Constitution. *See McCoy*, 49 P. at 421-22; *Davis*, 75 P. at 858; *Wells*, 100 P. at 686-87; *Crook*, 51 P. at 1091-92; *Clark*, 284 P.2d at 701; *McCurtain*, 172 P.2d at 482-83; *Cragun*, 38 P.2d at 1071, 1079. Similarly, the Utah Supreme Court upheld revocations of medical licenses for performing an abortion, 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; *Baker*, 3 P.2d at 1084; *Cragun*, 20 P.2d at 248.

Had those convictions or laws posed potential constitutional problems, the Utah Supreme Court would have said as much. After all, that 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. So the Utah Supreme Court's actions further confirm what the 1898 code and its successors made clear: the general public at the time of the founding did not understand the Utah Constitution to protect an implied right to abortion.

E. In 1896, neither Utah territorial law, nor federal common law, nor the law in sister states recognized a constitutional right to abortion.

The Utah Supreme 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*, 2006 UT 40, ¶55, 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, give us 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, the "laws in effect at the time of the Utah Constitution's ratification clearly indicate that" Utah had already outlawed performing abortions for two decades. *Id.* ¶55; *see* Terr. of Utah Comp. Laws §1972 (1876) (attached as Ex. A); Comp. Laws of Utah, Title 9, ch. 3, §4507 (vol. II, p. 591) (1888) (attached as Ex. B). Silently going from abortion-as-acknowledged-crime to abortion-as-implied-constitutional-right would have been quite a leap—particularly since no one publicly acknowledged during the Convention debates (or anywhere else in 1896) that the Framers and members of the general public recognized that tectonic shift, *see supra* Argument §II.C. Thus "the statutory law in force at the time of the formation of our constitution demonstrate[s] that" abortion was not a constitutional right. *Am. Bush*, 2006 UT 40, ¶51.

Second, "the common law" in 1896 likewise did not recognize a constitutional right to abortion. *Id.* ¶49. This fact is both known and indisputable; the U.S. Supreme Court just held as much in *Dobbs*, and "it is not [Utah courts'] prerogative to establish doctrines that contradict binding precedent from the United States Supreme Court." *State v. Silva*, 2019 UT 36, ¶20, 456 P.3d 718. *Dobbs* sets forth in comprehensive detail the historical basis for its common-law holding, *see* 2022

WL 2276808, at *12-*16, so Defendants will not repeat that discussion. But Defendants must repeat *Dobbs*' conclusions: "At 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." *Id.* at *12. 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 *14. 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 *15. The common-law record "[i]n this country" is "similar." *Id.* at *14. "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 Plaintiff'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*, 2022 WL 2276808, at *12. 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 *16. "Of the nine States that had not yet criminalized abortion at all stages, all but one did so by 1910." *Id.* 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 19 (citing *Nash v. Meyer*, 54 Idaho 283, 301, 31 P.2d 273, 280 (1934); *State v. Ausplund*, 86 Or. 121, 131-32, 167 P.2d 1019, 1022-23 (1917); *Trent v. State*, 15 Ala. App. 485,

488, 73 So. 834, 835 (1916); *State v. Miller*, 90 Kan. 230, 233, 133 P. 878, 879 (1913); *State v. Tippie*, 89 Ohio St. 35, 39-40, 105 N.E. 75, 77 (1913); *State v. Gedicke*, 43 N.J.L. 86, 90 (1881); *Dougherty v. People*, 1 Colo. 514, 522-23 (1873); *State v. Moore*, 25 Iowa 128, 131-32 (1868); *Smith v. State*, 33 Me. 48, 57 (1851)).

* * * * *

Some historical records make for murky constitutional inquiries. This is not one of them. This undisputed and indisputable historical record about late 19th and early 20th century bans on abortion under Utah territorial law, at common law, and in other states eliminates any reasonable basis to conclude that the backdrop of "'legal presuppositions and understandings' against which" the Constitution "was drafted" protected a right to abortion. *Haik*, 2020 UT 29, ¶40.

F. Not one of the constitutional provisions Plaintiff invokes protects an implied right to abortion.

"In light of" that crushing weight of "historical evidence"—the Constitution's plain text, the Convention debates, territorial abortion bans from 1876 to 1895, expanded abortion bans in the 1898 code, founding-era criminal convictions and suspended medical licenses for performing abortions, repeated Utah Supreme Court endorsement of those punishments, and virtually unanimous condemnation of abortion at common law and in other States in 1896—"it is inconceivable that the framers of our constitution or the citizens of this state intended to protect" abortion as a "constitutional right." *Am. Bush*, 2006 UT 40, ¶65. Yet Plaintiff nonetheless argues that the Renewed Abortion Ban violates six constitutional protections drawn from ten provisions of the Utah Constitution.

None of these provisions mention abortion. To the contrary, they all date to the original 1896 Constitution, without substantial changes, and thus held force alongside abortion bans even stricter than the Act for decades. At the outset, then, there is strong reason to expect that not one of them protects a right to abortion. Defendants nonetheless address each of Plaintiff's claimed rights as

Plaintiff presents them to show why none of Plaintiff's cited authorities protects an implied right to abortion.

1. Utah's constitutional protection for parental rights does not encompass an implied right to abortion.

Plaintiff first contends (at 19-22) that SB174 contravenes certain familial and parental rights that rank among the fundamental unenumerated rights protected by Article I, §§7, 25. *See In re J.P.* 648 P.2d 1364, 1372-77 (Utah 1982). Defendants have no quarrel with *In re J.P.* and accept that case at face value. Nor need they quarrel with it because, for at least four reasons, *In re J.P.* cannot properly be read to support the proposition that the Utah Constitution protects an implied right to abortion.

First, to acknowledge that *In re J.P.* holds parental rights to be constitutionally protected does not disclose anything about the particular *substance* of those protected rights. On this score, this case is *American Bush* redux—everyone there acknowledged that the Constitution protected free speech rights; but the Court still had to decide the specific question whether nude dancing constituted constitutionally protected speech. *See* 2006 UT 40, ¶15 ("discern[ing] if the people of Utah intended to bind the hands of their duly elected officials by protecting nude dancing under the free speech clauses of their constitution"). So too here: none of the parties disputes that the Constitution protects parental rights. But the *specific* question is whether "the people of Utah intended to bind the hands of their duly elected officials by protecting" abortion as one of those protected parental rights. *Id.* Implied constitutional rights do not arise by *ipse dixit* or question begging; Plaintiff must do the work and show that the general public in Utah in 1896 recognized abortion as part of a "fundamental axiom[] of Anglo-American culture, presupposed by all our social, political, and legal institutions." *In re J.P.*, 648 P.2d at 1373. Plaintiff has not done that—and for the reasons discussed above, cannot do that.

Second, *In re J.P.*'s holding concerns only two specific aspects of parental rights. First, "the Utah Constitution recognizes and protects the inherent and retained right of a parent to maintain

parental ties to his or her child under Article I, §7 and §25." *Id.* at 1377. Second, "the right of a parent not to be deprived of parental rights without a showing of unfitness, abandonment, or substantial neglect is so fundamental to our society and so basic to our constitutional order … that it ranks among those rights referred to in Article I, §25 of the Utah Constitution." *Id.* at 1375. Invoking constitutional rights to "maintain" and preserve parents' "ties to" their children hardly supports the claimed right to *prevent* that very parent-child relationship from existing in the first place. *Id.* at 1377. So too for the other aspects of constitutionally protected parental rights discussed in *In re J.P.*: parents' "'fundamental right, protected by the Constitution, to sustain'" their "'relationship with [their] child'"—like their "right 'to direct the upbringing and education of children under their control'"—necessarily presupposes parents with a living child who needs education, upbringing, and sustaining. *Id.* at 1372. Abortion is inconsistent with that presupposition.

Third, *In re J.P.*'s reasoning in support of constitutional protections for parental rights relies extensively on U.S. Supreme Court cases that "included family relationships in the 'liberty' of which a state cannot deprive any person without due process of law under the Fourteenth Amendment to the United States Constitution." *Id.* (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). Beyond that, *In re J.P.* relied on the U.S. Supreme Court's "summar[y]" of "the legal effect of these conclusions that the rights embodied in family relationships are inherent, natural, and retained rights as follows: 'The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment.'" *Id.* at 1374 (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)). But just weeks ago, the U.S. Supreme Court plainly concluded that abortion receives no protection from the Due Process and Equal Protection Clauses: the "theory" that "the Fourteenth Amendment's Equal Protection Clause" protects a right to abortion is "squarely foreclosed by" the U.S. Supreme Court's "precedents," *Dobbs*, 2022 WL 2276808, at *10, and when considering the meaning of "the term

'liberty'" in the Due Process Clause, the "clear answer is that the Fourteenth Amendment does not protect the right to abortion," *id.* at 11. Since *In re J.P.* relied on U.S. Supreme Court caselaw to guide the scope of the protected-parental-rights inquiry, that same caselaw must also inform this inquiry—and it plainly forecloses the claim that the Constitution protects an implied right to abortion.

Fourth, *In re J.P.* itself expressly rejected the reasoning and conclusions of "substantive due process cases like *Roe v. Wade*, 410 U.S. 113 (1973), which rely on a 'right of privacy' not mentioned in the Constitution to establish other rights unknown at common law." 648 P.2d at 1375. Unlike *Roe*'s now-rejected holding on abortion, "the parental liberty right at issue in this case is fundamental to the existence of the institution of the family, which is 'deeply rooted in this Nation's history and tradition,' and in the 'history and culture of Western civilization.'" *Id.* "This rooting in history and the common law validates and limits the due process protection afforded parental rights, in contrast to substantive due process innovations undisciplined by any but abstract formulae." *Id.* In short, *Roe* was no secret to the *In re J.P.* Court—and the *In re J.P.* Court made no secret of its disdain for *Roe*.

In short, Utahns' parental rights protected by the Constitution do not encompass an implied right to abortion.

2. The Constitution's Equal Political Rights provision does not protect an implied right to abortion.

Plaintiff next contends that SB174 violates a right to abortion implied in Article IV, §1. Article IV is entitled "Elections and Right of Suffrage." Section 1 in that article is entitled "Equal Political Rights." Section 1 contains two sentences: "The rights of citizens of the State of Utah to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this State shall enjoy equally all civil, political and religious rights and privileges." Art. IV, §1. Without question, the general public understood this forward-looking provision adopted in 1896 to ensure equality in "all civil, political and religious rights and privileges" between men and women. Also

without question, in 1896 the general public did not understand abortion to be one of those "civil, political, and religious rights and privileges."

To begin, Plaintiff fights the Supreme Court's interpretive framework, invoking *Beehive Medical Electronics, Inc. v. Industrial Comm'n*, 583 P.2d 53 (Utah 1978), to contend (at 27) that Article IV, §1's "meaning cannot be static." But *Beehive Medical* did not carve out Article IV, §1 from the objective-original-public-meaning interpretive framework that the Supreme Court to every other constitutional provision. Nor does any other case that Plaintiff cites purport to apply a good-for-Article-IV-§-1-only interpretive framework. Thus no grounds exist to search for anything but this provision's objective original public meaning.

That inquiry begins with the provision's plain text. *Haik*, 2020 UT 29, ¶15. The text here does not expressly protect a right to abortion. So if Article IV, §1 protects abortion, it must do so by implication, through its guarantees either of equal rights to vote and hold office or to equal enjoyment of "all civil, political and religious rights and privileges." Plaintiff does not claim that the rights of suffrage or office-holding include an implied right to abortion, so if Article VI, §1 implies this right, it must do so under its second sentence.

But the Convention debates refute the notion that abortion was a protected "civil," "political," or "religious" right or privilege. Rather, as discussed *supra* at §II.C.2, the Convention debates focused overwhelmingly on this provision as guaranteeing equal suffrage. In fact, the Convention statements on gender equality that Plaintiff cites (at 26-27) were made in the context of advocating for Article IV, §1 as a voting-rights provision. *See* https://le.utah.gov/documents/conconv/25.htm (statement of Franklin Snyder Richards) describing Article IV, §1 as "relating to residence, property, and education qualification, registration, and other minor matters governing the exercise of the franchise" and arguing that "equal suffrage for men and women should be provided in the Constitution"); https://le.utah.gov/documents/conconv/27.htm (statement of Orson Ferguson Whitney responding to

"arguments against woman suffrage"). Newspapers at the time also reflect an understanding of Article IV, §1 as a voting-rights provision. See *Test Vote on Equal Suffrage*, Salt Lake Herald, Mar. 26, 1895, at 1 ("A second test vote has been made on woman suffrage in the constitutional convention"), https://bit.ly/3nIe5n4; *Women and the Ballot*, Salt Lake Herald, Mar. 29, 1895, at 1 (recounting that "the suffrage provision was the all-absorbing topic of debate"), https://bit.ly/3nFLS03.

And when the Delegates did mention Article IV, §1's second sentence, their statements suggest that they understood that the guarantee of equal voting and office-holding rights in the first sentence would result in men and women participating equally in the political process—and on that basis, both sexes would equally use that process to specify what further "civil," "political," or "religious" rights men and women would equally enjoy. *See, e.g.*, https://le.utah.gov/documents/concov/25.htm (statement of Franklin Snyder Richards, that "civil and political rights and privileges as set forth in this discussion, *are incidents and phases of government*" and "can only be given through the customary channels of representation") (emphasis added). Defendants have not found any Convention debate statement suggesting that the Framers understood the Equal Political Rights provision to protect any unenumerated substantive right, let alone the specific substantive right to abortion. Nor does Plaintiff's brief cite such a statement.

The remaining original-public-meaning inquiries further undercut this claim for reasons already explained. The territorial codes' abortion bans, the 1898 code's abortion bans, executive and judicial practice after ratification, and the common law all irrevocably conflict with the notion that Article IV, §1 protects an implied right to abortion.

Similarly, the earliest Utah Supreme Court decision citing Article IV, §1 supports the view that this provision does not guarantee an implied right to abortion. In *Salt Lake City v. Wilson*, 148 P. 1104 (Utah 1915), the Court held that an infrastructure tax (for roads) on men but not on women did not violate Article IV, §1 because, among other reasons, "[t]o perform labor on the public roads or

streets, or to pay the sum of $2 for the purpose of improving them, is neither a political, religious, or other civil right or privilege," and it did not "fall within the right or privilege of exercising the franchise or of holding an office." *Id.* at 1107. The Court's conclusion that performing physical labor or paying money did not constitute a protected civil, political, or religious right or privilege undermines any arguments that laws banning abortion violate this provision because carrying a child to term can result in similar consequences. *See* Mem. 8-13.

Nor do the only three cases that Plaintiff cites (at 27) for the merits of this claim support the notion that Article IV, §1 protects unenumerated substantive rights. All three dealt with gender-based judicial presumptions to resolve disputes over child custody or a child's last name. *See Pusey v. Pusey*, 728 P.2d 117, 119 (Utah 1986) ("discontinu[ing] our support, even in dictum, for the notion of gender-based preferences in child custody cases"); *Sukin v. Sukin,* 842 P.2d 922, 926 (Utah Ct. App. 1992) (reiterating *Pusey*); *Hamby v. Jacobson*, 769 P.2d 273, 277 (Utah Ct. App. 1989) (holding that "paternal preference for a child's surname is improper"). Cases rejecting gender-based presumptions adopted by courts do not support reading Article IV, §1 to protect a substantive unenumerated right.

3. The Uniform Operation of Laws Clause does not protect an implied right to abortion.

In its entirety, the Uniform Operation of Laws provision reads now just as it did when enacted in 1896: "All laws of a general nature shall have uniform operation." Utah Const. art. I, §24. Plaintiff's effort to glean from these few words an implied right to abortion fails to raise any serious legal issue, let alone a likelihood of success, for several independent reasons.

First, this claim strays from the Uniform Operation Clause's original meaning. As the Supreme Court has explained in several recent cases, the provision was "historically ... understood to be aimed 'not at legislative *classification* but at practical *operation*.'" *In re Adoption of J.S.*, 2014 UT 51, ¶66, 358 P.3d 1009 (citing *State v. Canton*, 2013 UT 44, ¶34 & n.7, 308 P.3d 517); *see also*

DIRECTV v. Utah State Tax Comm'n, 2015 UT 93, ¶47, 364 P.3d 1036 ("[T]he traditional (historical) application of the 'uniform operation' guarantee is directed to application or enforcement of the law by the executive."). Historically, therefore, "the uniform operation guarantee is 'not viewed as a limit on the sorts of classifications that a legislative body could draw in the first instance, but as a rule of uniformity in the actual application of such classifications.'" *Adoption of J.S.*, 2014 UT 51, ¶66. The Uniform Operation Clause thus requires "consistency in application of the law to those falling within the classifications adopted by the legislature" and prohibits "special privileges or exemptions therefrom," but is no basis for a facial challenge to a statute. *DIRECTV*, 2015 UT 93, ¶47. So properly understood, the Uniform Operation Clause has no bearing on Plaintiff's challenge.

Even under the "different," "modern formulation of uniform operation," Plaintiff's claim cannot succeed. *State v. Canton*, 2013 UT 44, ¶35, 308 P.3d 517. Under this modern understanding, courts "employ a three-step test" that assesses "(1) what classifications, if any, the statute creates, (2) whether different classes are treated disparately, and (3) if there is disparate treatment, whether the legislature had any reasonable objective that warrants the disparity." *Adoption of J.S.*, 2014 UT 51, ¶67 (cleaned up). The first two factors form a "threshold inquiry" into "whether a 'discriminatory classification exists.'" *State v. Drej*, 2010 UT 35, ¶34, 233 P.3d 476. "Without such a classification, the statutory scheme and the uniform operation of laws never intersect and there is no need to further inquire into the permissibility of the statute." *Id.* Analysis of the third factor is deferential: "Most classifications are presumptively permissible and thus subject to rational basis review," with only "suspect" classifications—those based on race or sex or implicating fundamental rights—triggering "heightened scrutiny." *Adoption of J.S.*, 2014 UT 51, ¶68 (citing *Canton*, 2013 UT 44, ¶36).

Plaintiff gives the Court no reason to go further than the threshold inquiry of the first two factors. Plaintiff contends (at 32) that SB174 imposes three discriminatory classifications: (1) "women as opposed to men," (2) "only those pregnant women who seek abortion, as opposed to those

who decide to carry their pregnancies to term," and (3) women seeking abortion for certain "reasons," as opposed to other reasons to which an exception in the Act might apply.[4] But the first alleged classification is not found in the Act and the latter two are not genuine classes at all under the Uniform Operation provision.

Legislation that treats abortion differently than carrying a baby to term, or that permits abortion for some reasons but not others, does not thereby "treat[] similarly situated persons disparately." *Drej*, 2010 UT 35, ¶38; *see Count My Vote, Inc. v. Cox*, 2019 UT 60, ¶34, 452 P.3d 1109 ("The constitutional prohibition is against disparate treatment of persons who are 'similarly situated.'"). The Supreme Court has squarely "h[e]ld that we do not recognize persons who choose to have an abortion, as opposed to those who choose not to, to be a class for purposes of the Uniform Operations of Law analysis." *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. The *Wood* Court could see "no reason why persons who would make a particular choice—abortion in this case—should, for constitutional purposes, be recognized as a class and treated any differently from those who would choose otherwise." *Id.* It therefore held "that the Uniform Operation of Laws provision is inapplicable"—not even requiring rational-basis review—to such so-called classifications.

Plaintiff claims (at 32 n.18) that *Wood* arrived at this holding only based on inadequate briefing. But the Court's holding could not have been clearer, and it binds this Court no matter how differently Plaintiff believes that case should have been briefed. In any event, Plaintiff offers no reason to think *Wood* is out of step with the rest of the Court's Uniform Operation jurisprudence.

[4] Plaintiff also claims (at 33) the Act discriminates against the exercise of fundamental rights, but for the reasons discussed *supra* at Argument §§II.B-E, the Act does not even implicate a fundamental right in the Utah Constitution.

Wood thus forecloses Uniform Operation challenges to SB174 based on disparate treatment of either women seeking abortion in general, or those seeking abortion for particular reasons.

To the extent Plaintiff claims SB174 is unconstitutional because it should have more exceptions, that claim fails as a matter of law. "[C]oncerns of over-inclusiveness ... are relevant only insofar as they bear on the question whether the classification that was made clears the applicable standard of scrutiny. They do not present a 'viable, standalone basis' for an equal protection claim." *In re Adoption of B.Y.*, 2015 UT 67, ¶49, 356 P.3d 1215 (internal citations omitted). What's more, like the purported class in *Wood*, these hypothetical groups are defined only as "persons who would make a particular choice," *id.*, a distinction that does not rise to constitutional significance. There are "significant differences" between each of the classes Plaintiff would draw, which "prevent" the Court from finding them all similarly situated. *Drej*, 2010 UT 35, ¶38. Indeed, it is enough that they are "arguably different, from a policy standpoint," to foreclose any review of the Legislature's choice to treat them as different. *Id.* Neither of these two classifications can trigger Uniform Operation scrutiny.

Plaintiff's proposed classification by sex also fails at the first step because SB174 does not "create" any sex-based classifications. *Adoption of J.S.*, 2014 UT 51, ¶66. Plaintiff claims (at 32) that SB174 "singles out individuals on the basis of their sex by targeting only care for pregnant 'women,' ... as opposed to care sought by men." (Quoting Utah Code Ann. §76-7a-201(1)(a), (c)). Not so. The Act is neutral on its face, and the only textual references to a "woman" are those Plaintiff draws from the statute's exceptions to its general prohibition. But "the equal protection inquiry focuses on the *actual classification* employed by the government." *Adoption of B.Y.*, 2015 UT 67, ¶49. Far from identifying any such actual classification, Plaintiff raises only an atextual "targeting" based on "disproportionate effects," Mem. 30, 32, which does not trigger constitutional scrutiny.

In any case, to the extent the Act does contain a sex-based classification, it easily passes the third factor of the modern Uniform Operation test. Plaintiff claims the appropriate level of scrutiny

for sex-based classifications remains unsettled, but Supreme Court precedent could scarcely be clearer that intermediate scrutiny applies. "[S]ex-based classifications are evaluated as a matter of intermediate scrutiny (requiring only an important governmental interest that is substantially advanced by the legislation)." *Adoption of J.S.*, 2014 UT 51, ¶69 (citing *State v. Herrera*, 895 P.2d 359, 384 (Utah 1995)). Intermediate scrutiny "does not require a precise fit between means and ends. A simple 'substantial' relation will do, and that standard does not require proof that the official action adopted by government is the 'least restrictive means' of accomplishing the government's objectives." *Id.* ¶71. Intermediate scrutiny is "particularly" "eas[y] to satisfy" where "the differential treatment of men and women is rooted in inherent differences between the sexes, and where such differences translate not into an outright bar on one of the sexes, but a regime preserving meaningful opportunities to both sexes." *Id.* ¶70 (cleaned up).

The Act clears this low bar with ease. To argue to the contrary, Plaintiff misrepresents the legislative interests behind it. Plaintiff suggests without evidence that SB174 is driven by "outdated stereotypes" or "disapproval of women who have abortions for reasons the State deems unsympathetic." Mem. 22, 34. This is misdirection. SB174's true purpose is the only one Plaintiff admits to be the "expressed view" of its supporters: to "discourage the taking of a human life." Mem. 22 (quoting *Hearing on S.B. 174 Before the H.*, 2020 Gen. Sess., recording at 34:02-08, (Utah Mar. 12, 2020) (statement of Rep. Karianne Lisonbee, floor sponsor of the Act)). And to advance the protection of unborn life, Utah has enacted a broad-reaching prohibition on ending it. The relation of the Act's provisions to this purpose could not be clearer. To the extent the Act treats men and women differently, this treatment "stems ... not from an outmoded stereotype but from a straightforward matter of biology," namely "fundamental differences between ... mothers and fathers." *Adoption of*

J.S., 2014 UT 51, ¶73, 80.[5] Thus, under Supreme Court precedent, statutes like SB174 pass heightened scrutiny under the Uniform Operation provision.

4. Any right to bodily integrity protected by the Utah Constitution does not include an implied right to abortion.

Plaintiff next contends (at 35) that SB174 "violates the fundamental right of pregnant Utahns to bodily integrity." According to Plaintiff, "the Utah Supreme Court has recognized" that "this right inheres in article I, §11." (Citing *Malan v. Lewis*, 693 P.2d 661, 674 n.17 (1984)). Plaintiff fundamentally misunderstands this provision.

Article 1, §11, known as the Open Courts Clause, provides that "[e]very person, for an injury done the person in his or her person, property, or reputation, shall have remedy by due course of law." The Supreme Court's current case law on the Open Courts Clause holds "that citizens of Utah have *a right to a remedy* for any injury." *Judd v. Drezga*, 2004 UT 91, ¶10, 103 P.3d 135 (emphasis added). So "[t]o determine whether legislation violates the Open Courts provision, we first examine whether the legislature has abrogated *a cause of action*." *Amundsen v. Univ. of Utah*, 2019 UT 49, ¶43, 448 P.3d 1224 (emphasis added). Abortion is not, and never has been, a cause of action. Plaintiff's claim thus fails at step one of the Open Courts analysis: because an abortion is not a cause of action, legislation can abrogate abortion rights without implicating Article I, §11.

Beyond that, the Utah Supreme Court has expressly stated that "article 1, section 11 rights are not properly characterized as 'fundamental.'" *Judd*, 2004 UT 91, ¶30. That conclusion alone refutes

[5] Numerous state supreme courts have likewise held that abortion restrictions do not treat men and women differently in violation of equal rights provisions, as Plaintiff contends. Mem. 29. *See Fischer v. Dep't of Pub. Welfare*, 509 Pa. 293, 313–14 (1985) (finding that the "basis for the distinction here is not sex but abortion, and the statute does not accord varying benefits to men and women because of their sex, but accords varying benefits to one class of women, as distinct from another, based on a voluntary choice made by the women"). The "prevailing view" among state supreme courts is that equal rights provisions "do[] not prohibit differential treatment among the sexes when ... that treatment is reasonably and genuinely based on physical characteristics unique to one sex." *Id*. at 314. *See also People v. Salinas,* 191 Colo. 171, 174 (1976); *State v. Rivera*, 62 Hawaii 120 (1980), *City of Seattle v. Buchanan,* 90 Wash. 2d 584, 584 (1978).

Plaintiff's contention that a "fundamental right of pregnant Utahns to bodily integrity … inheres in article I, section 11." Mem. 35.

Plaintiff's remaining cited cases only confirm that the Open Courts Clause protects the *legal causes of action* allowing redress for a bodily injury, and is not a separate fount of substantive fundamental rights. Plaintiff suggests (at 35) that *Wagner v. State*, 2005 UT 54, 122 P.3d 599, establishes a constitutional right "to be free from nonconsensual 'harmful or offensive contact.'" But *Wagner* concerns "the law of torts, and battery in particular," and confirms that tort law—not the Open Courts Clause—"was designed to protect people from unacceptable invasions of bodily integrity." *Id.* ¶57. So too for *Buchanan v. Crites*, which confirms both that "[t]he law recognizes the physical integrity of every person, and protects them from violent and invited touchings of their person by another," and that "[v]iolation of this right is known as a battery, or when there is a threat or attempt at such violation, it is an assault." 150 P.2d 100,105 (Utah 1944). Neither of these cases even cites the Open Courts Clause. So unless Plaintiff means to suggest that every person who commits the tort of battery also thereby commits a constitutional violation, these cases provide no support for finding an implied right to bodily integrity or abortion in the Open Courts Clause.

Plaintiff also suggests (at 35) that Article I, §§1 and 7 "bolster[]" the existence of their claimed "fundamental right of pregnant Utahns to bodily integrity." At best, this is argument by *ipse dixit*; no cases that Plaintiff cites in this section interpret either of those two provisions. In any event, the Utah Supreme Court has explicitly disavowed reading into the Due Process Clause any rights "not mentioned in the Constitution" where they were "unknown at common law" and not "deeply rooted in the nation's history and tradition." *In re J.P.*, 648 P.2d at 1375. Recasting abortion as an implied right with a different name like "bodily integrity" does not overcome the Utah Supreme Court's explicit refusal to import the now-defunct logic of *Roe v. Wade* into the Utah Constitution. *See id.* That's also why Plaintiff's reliance (at 36-37) on *Women of Minnesota v. Gomez,* 542 N.W.2d 17

(Minn. 1995), *Moe v. Sec'y of Admin. & Fin.*, 417 N.E.2d 387 (Mass. 1981), and *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461 (Kan. 2019), carries no weight. Those cases each relied on *Roe* and its reasoning about a right of privacy to interpret each State's constitution—an approach *In re J.P.* expressly rejected.

Plaintiff also suggests (at 35) that the Utah Constitution's search-and-seizure provision protects an implied right to bodily integrity (and thus to abortion). Article I, §14 states that "[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated." Plaintiff cites (at 35-36) just *State v. Alverez*, 2006 UT 61, 147 P.3d 425, and 2005 UT App 145, 111 P.3d 808, as case law supporting its view that Article I, §14's search-and-seizure protections encompass a right to bodily integrity. But those cases neither interpret the terms "search" or "seizure" in the Utah Constitution nor hold that a constitutional search or seizure occurs whenever "bodily integrity is threatened." Mem. 36. Rather, *Alverez* addressed whether "a warrantless search" is "lawful," and mentioned notions of bodily integrity only when considering one of three factors used to resolve the third of three *different* factors that the U.S. Supreme Court has held are relevant to a warrantless search's lawfulness. *Alverez,* 2006 UT 61, ¶¶21, 30, 34-35 (citing *Schmerber v. California*, 384 U.S. 757, 770-71 (1966), and *Winston v. Lee*, 470 U.S. 753, 761-62 (1985)). And Plaintiff does not explain how U.S. Supreme Court cases decided in 1966 and 1985 help to disclose the objective original public meaning about the substantive scope of Article I, §14's search-and-seizure protections.

Finally, Plaintiff contends that an implied constitutional right to bodily integrity "underpins the common law doctrine of informed consent in medical decision-making." Mem. 36 (citing *Nixdorf v. Hicken*, 612 P.2d 348, 353 (Utah 1980)). But *Nixdorf* did not interpret any constitutional provision; it resolved tort claims against a surgeon who left a needle in a patient's body during surgery and did not disclose that fact to the patient. *See id.* at 351. In that context, the "relationship between a doctor

and his patient creates a duty in the physician to disclose to his patient any material information concerning the patient's physical condition" that "stems from" the "patient's right to determine what shall or shall not be done with his body." *Id.* at 354. Nothing in the opinion suggests that the Utah Supreme Court thought its discussion of tort duties running from a doctor to a patient would inform the scope of any implied constitutional right for all Utahns.

5. The constitutional rights of conscience do not protect an implied right to abortion.

Article I, §4 of the Utah Constitution provides in full:

> The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; no religious test shall be required as a qualification for any office of public trust or for any vote at any election; nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof. There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment.

Plaintiff has not identified a single Utah law ever held to violate this provision by "imposing on Utahns a state-mandated view" as to "an inherently spiritual and religious" question. Mem. 39. If Plaintiff's argument were correct, such a case should not be hard to find. The State frequently legislates on morally charged issues on which various religious groups and faith traditions have strong convictions. *See, e.g.*, Utah Code Ann. §75-2a-122 (euthanasia and assisted suicide); *id.* §§30-3-1 *et seq.* (divorce); *id.* §§32b-1-101 *et seq.* (alcoholic beverages); §§34-40-101 *et seq.* (minimum wage); §§76-10-1101 *et seq.* (gambling); *id.* §§76-10-1201 *et seq.* (pornography); *id.* §§76-13-1301 *et seq.* (prostitution).

No such successful challenges to these and other laws appear, however, because Plaintiff's argument "prove[s] too much." *Dobbs*, 2022 WL 2276808, at *20. Like "appeals to a broader right to autonomy and to define one's 'concept of existence,'" *id.*, a conscience right to be free from any law on which "[d]ifferent religions" have "varying views" would be limitless. Mem. 39. "[A]t a high

level of generality," it "could license fundamental rights to illicit drug use, prostitution, and the like," and thereby overturn any number of Utah statutes. *Dobbs*, 2022 WL 2276808, at *20. While Utah's freedom of conscience is indeed "broader and more detailed" than the religion clauses of the federal First Amendment, it is not as expansive as that. *Soc'y of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 930 (Utah 1993).

Plaintiff's claim to an implied abortion right under Article I, §4 fail for another independent reason: SB174 does not intrude on conscience the way Plaintiff claims it does. Plaintiff argues (at 39) that the Act "impose[s] on Utahns a state-mandate view as to when life begins." Not so. Utahns remain free to hold whatever view they prefer on this question. SB174 does not compel Utahns to believe that life begins at the earliest stages of pregnancy any more than States with permissive abortion laws "impose" on their citizens the view that life begins only later in pregnancy or even at birth itself. In either case, the result is not coercion of citizens into one view or another, but a policy settlement subject to future amendment and reached the same way "most important questions in our democracy" are "resolved": "by citizens trying to persuade one another and then voting." *Casey*, 505 U.S. at 979 (Scalia, J., concurring in judgment in part and dissenting in part).

6. Any constitutional right to privacy does not protect an implied right to abortion.

Plaintiff purports to locate an implied right to abortion in a right to privacy derived from Article I, §14. As noted, this reads:

> Unreasonable Searches forbidden – Issues of Warrant
>
> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

Utah Const. art. 1, §14.[6] Plaintiff argues (at 41) that this language "fairly encompasses" a right to abortion in the form of "decisional privacy—the privacy of one's affairs—and to informational privacy—security from unwarranted disclosures of one's personal information." But to support those propositions, they offer only glimpses of flawed historical evidence of a purported privacy-based right to abortion from the time of Utah's founding. They cite no precedents on §14 (or any Utah cases at all) touching on abortion and privacy. Nor have they pointed to any case extending §14 outside the searches-and-seizures context of police investigations.

In support of its claim to an implied right of privacy, Plaintiff presents some evidence of early Utahns who were unopposed to at least some abortions, along with some newspaper advertisements for supposedly abortifacient drugs. Mem. 41-42 & nn.21-23. But the historical record already established that some Utahns dissented from the State's abortion ban—they broke the law and were prosecuted and convicted for it. *See supra*, Background Part I.D. Such disagreement with the ban in no way suggests that ban was (or is now) unconstitutional. Instead, for "the values and policy judgments of the people of Utah when they voted for their constitution" and "the boundaries that the citizens of Utah conceived between the conflicting societal values of individual rights and the power of a duly elected government to carry out the will of the people," the "clearest picture" comes from "the statutory and common law" of the time. *Am. Bush*, 2006 UT 40, ¶50. That picture is unmistakable: the State could freely criminalize abortion without intruding on any constitutional protection of privacy.

Turning to caselaw, Defendants are not aware of a *single case* mentioning §14 in relation to a right to privacy protecting the decision to have an abortion. The closest is *Jane L. v. Bangerter*, 794

[6] Plaintiff's Complaint also invokes Article I, §1 of the Utah Constitution as a potential source of the right to privacy, see Compl. ¶¶90-92, but Plaintiff has abandoned this potential source in its motion for a preliminary injunction.

F. Supp. 1528, 1536 (D. Utah 1992), where the U.S. District Court for the District of Utah *rejected* plaintiffs' claim that a Utah abortion law violated a "freedom of conscience and expression" protected by Article 1, §§1, 3, 14, 15, and 27 of the Utah Constitution.

That no court has drawn Plaintiff's proposed connection is unsurprising, as §14 is "a matter of search-and-seizure law," not "a broad, freestanding privacy right." *Schroeder v. Utah Att'y Gen.'s Off.*, 2015 UT 77, ¶25, 358 P.3d 1075. In *Schroeder*, the Court held that §14 did not shield certain bank records from disclosure under a valid subpoena. *Id.* ¶18. The State had argued that §14 "recognize[d] a broad right of privacy in bank records," *id.* ¶20, but the Court rejected this argument. In fact, the Court held, §14 "does provide citizens in our state with a measure of privacy," but only by shielding them specifically from "unreasonable searches and seizures." *Id.* ¶22. And although one issue in a typical §14 search case is whether the State intruded into an area where a person had a "legitimate expectation of privacy," *id.*, the Court clarified that "the issue of whether 'a person has a reasonable expectation of privacy' *is* a matter of search-and-seizure law," and cases protecting that reasonable expectation from unlawful searches do not stand for "a broad, freestanding privacy right." *Id.* ¶25; *see also Jensen ex rel. Jensen v. Cunningham*, 2011 UT 17, ¶101, 250 P.3d 465 (noting in §14 context that the Supreme Court "has never recognized that our Constitution guarantees a right to be free from unreasonable noncustodial seizure," that is, "state-imposed conditions that significantly, but not physically, restrict liberty"). Plaintiff's search here for just such a broad, freestanding protection contradicts the Utah Supreme Court's holding that §14 simply does not work that way.

Plaintiff cites (at 40-41) just two Utah cases for its privacy claim, neither of which do the work Plaintiff needs. First, *Redding v. Brady* does agree that "there should be such a right which protects against any wrongful or unseemly intrusion into what should properly be regarded as one's personal affairs." 606 P.2d 1193, 1195 (Utah 1980). But *Redding* never mentions §14; it does not locate the right to privacy in any particular constitutional provision at all, and indeed fails to specify

whether the "right to privacy" it acknowledges is part of the U.S. Constitution, the Utah Constitution, the Utah statute disputed in the case, or some combination. *See, e.g.*, *id.* at 1195 n.5 (citing U.S. Supreme Court cases and a national treatise for right to privacy); *id.* at 1197 n.12 ("We so decide this case on the record as presented to the district court, and on the basis of our statutory law."). *Redding* also says little to define the right to privacy, finding it "somewhat difficult to define with precision the line of demarcation between that which is public and that which is private" and pointing generally to "commonly accepted standards of social propriety." *Id.* at 1195. The case likely has no application here because it concerned only the disclosure of *information*—in that case, public-employee salaries, *id.*—and not the very different question of whether certain *conduct* is so personal in nature as to beyond the power of the State to regulate.

But if *Redding*'s discussion of privacy has any application here, it does not help Plaintiff. The Court held in favor of disclosure, stating that "[p]rivacy in the sense of freedom to withhold personal financial information from the government or the public has received little constitutional protection," and it accordingly sided in favor of the public interests—there, freedom of the press and transparency in public institutions—over the individual "right of privacy of the employees" at stake. *Id.* at 1196.

Even less helpful is Plaintiff's reliance (at 41) on *Allen v. Trueman, Judge of the 2d Jud. Dist.*, 110 P.2d 355 (Utah 1941). To be sure, the Court said there that §14 protects "the individual against oppressive invasion of his personal rights." *Id.* at 360. But *Allen* identifies this "protection" as the primary "purpose of the interdiction against unreasonable searches and seizures," *id.*, not as a generalized right to privacy. It does not extend §14's reach beyond the search-and-seizure context.

Plaintiff also cites (at 41-42) a number of out-of-state decisions, claiming they support an implied right to privacy. But Plaintiff's recourse to sister-state caselaw ignores the state courts that have *rejected* any privacy right to abortion—or, pre-*Dobbs*, any such right more protective than the

federal right.[7] And besides reading their respective constitutions with a range of interpretive methods, many of these sister-state courts confronted substantively different constitutional guarantees, including express rights of privacy absent from the Utah Constitution.[8]

In any event, if any of these cases (from Utah or elsewhere) could be read to suggest some broader right to privacy in the Utah Constitution, *Schroeder* has authoritatively removed all doubt. As discussed, *Schroeder* clarified that no previous Utah Supreme Court cases about §14 could be read to extend beyond the search-and-seizure context into a "a broad, freestanding privacy right" *Schroeder*, 2015 UT 77, ¶ 25. The Court cannot look past that recent holding to any shadows or hints Plaintiff discerns in earlier cases. SB174 does not implicate any guarantee of Article I, §14.

G. SB174 satisfies any level of scrutiny.

The preceding sections dispel all doubt: SB174 does not implicate any constitutional right, much less a fundamental one. And because SB174 does not implicate any rights "deemed to be 'fundamental,'" the "rational basis test" that applies "[g]enerally" in "substantive due process cases" applies here. *Judd*, 2004 UT 91, ¶30, 103 P.3d 135 (quoting *Wells v. Children's Aid Soc'y of*

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[7] *See, e.g.*, *Mahaffey v. Att'y Gen.*, 564 N.W.2d 104, 109, 114 (1997) (agreeing "that the Michigan Constitution provides a generalized right of privacy" but holding that this "right of privacy ... does not include the right to abortion"); *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, 2022 WL 2182983, at *2 (Iowa June 17, 2022) (holding "the Iowa Constitution is not the source of a fundamental right to an abortion necessitating a strict scrutiny standard of review for regulations affecting that right"); *Pro-Choice Mississippi v. Fordice*, 716 So. 2d 645, 655 (Miss. 1998) (adopting *Casey* framework for abortion restrictions, although court had "previously analyzed cases involving the state constitutional right to privacy under a strict scrutiny standard," because "abortion issue is much more complex than most cases involving privacy rights").

[8] *See, e.g.*, *Valley Hosp. Ass'n v. Mat-Su Coal. for Choice*, 948 P.2d 963, 968 (Alaska 1997) (citing Alaska Const. art. I, §22 ("The right of the people to privacy is recognized and shall not be infringed.")); *Armstrong v. State*, 296 Mont. 361, 989 P.2d 364, 372 (1999) (citing Mont. Const. art. II, §10 ("The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.")); *In re T.W.*, 551 So. 2d 1186, 1191–92 (Fla. 1989) (citing Fla. Const. art. I, §23 (adopted 1980) (providing right to "be let alone and free from governmental intrusion into [one's] private life.")); *Am. Acad. of Pediatrics v. Lungren*, 16 Cal. 4th 307, 326, 940 P.2d 797 (1997) (recognizing "the state constitutional right of privacy embodied in explicit constitutional language not present in the federal Constitution") (citing Cal. Const. art. I, §1).

Utah, 681 P.2d 199, 206 (Utah 1984)); *see also Salt Lake City Corp. v. Utah Inland Port Auth.*, 2022 UT 27, ¶17, --- P.3d --- (applying rational-basis review in Uniform Operation Clause challenge "since the legislature's classification does not involve a suspect classification or a fundamental right").

Rational-basis review "afford[s]" the Legislature a "wide degree of discretion." *State v. Chettero*, 2013 UT 9, ¶22, 297 P.3d 582. For "[r]ational basis scrutiny requires only that a classification bear some conceivable relation to a legitimate government purpose or goal." *Id.*; *see also L.C. Canyon Partners, L.L.C. v. Salt Lake Cnty.*, 2011 UT 63, ¶12 n.2, 266 P.3d 797 ("Laws limiting rights, other than fundamental rights, are constitutional with respect to substantive due process and equal protection if the laws are rationally related to a legitimate goal of government.") (internal quotation marks omitted).

Two specific points about rational-basis review warrant particular mention. First, "[t]his 'conceivable relation' standard does not require documentary evidence or other actual proof to sustain a classification." *Chettero*, 2013 UT 9, ¶22. "After all, the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the classification selected is a rational way to correct it, even if it exacts a needless, wasteful requirement." *Id.* (cleaned up); *see also Taylorsville City v. Mitchell*, 2020 UT 26, ¶44, 466 P.3d 148 (rational-basis review "not limited to an actual purpose identified by the government").

Second, "rational basis analysis is limited 'to determin[ing] whether the legislature overstepped the bounds of its constitutional authority in enacting [the statute at issue], not whether it made wise policy in doing so.'" *State v. Candedo*, 2010 UT 32, ¶19, 232 P.3d 1008 (quoting *Judd*, 2004 UT 91, ¶15, 103 P.3d 135).

SB174 "easily clears this low hurdle." *Taylorsville City*, 2020 UT 26, ¶45, 466 P.3d 148. The Act's sponsors and supporters made no secret about what governmental interest the bill serves: "This

bill is meant to discourage the taking of a human life. Human life, according to the state of Utah, is important and should be protected." *Hearing on S.B. 174 Before the House*, 2020 General Session, recording at 34:00 (Mar. 12, 2020) (statement of floor sponsor Rep. Karianne Lisonbee), *see also supra* at Background §II.A (collecting similar statements in legislative record). Even *Roe* itself acknowledged "the State's important and legitimate intertest in potential life." 410 U.S. at 163. And SB174's ban on abortion except in limited, specific circumstances bears more than "some conceivable relation" to that legitimate goal. *Chettero*, 2013 UT 9, ¶22, 297 P.3d 582. Because abortion terminates "life or potential life," *Casey*, 505 U.S. at 852, the Legislature "might [have] thought that" banning abortion "is a rational way to correct" that problem, *Chettero*, 2013 UT 9, ¶22 (cleaned up). The Legislature was thus well within "the bounds of its constitutional authority in enacting" SB174, regardless of the Court's views about whether the Legislature "made wise policy in doing so." *Candedo*, 2010 UT 32, ¶19 (internal quotation marks omitted).

Though the historical record uniformly cuts against a finding that SB174 implicates an implied constitutional right to abortion, if the Court disagrees and holds that such a right exists—thereby making SB174 subject to heightened scrutiny, *see In re Adoption of J.S.*, 2014 UT 51, ¶68—the Act still passes muster. "Under the strict scrutiny standard, a fundamental right is protected except in the limited circumstance in which an infringement of it is shown to be narrowly tailored to protect a compelling governmental interest." *Matter of Adoption of K.T.B.*, 2020 UT 51, ¶ 40, 472 P.3d 843, 856 (cleaned up).

The Legislature has declared that "[t]he State of Utah has a compelling interest in the protection of the lives of unborn children." Utah Code Ann. §76-7-301.1(2). "It is the intent of the Legislature to protect and guarantee to unborn children their inherent and inalienable right to life as required by Article I, Sections 1 and 7, Utah Constitution." *Id.* §76-7-301.1(3). And "[i]t is the finding and policy of the Legislature, reflecting and reasserting the provisions of Article I, Sections 1 and 7,

Utah Constitution, which recognize that life founded on inherent and inalienable rights is entitled to protection of law and due process; and that unborn children have inherent and inalienable rights that are entitled to protection by the State of Utah pursuant to the provisions of the Utah Constitution." *Id.* §76-7-301.1(1). These legislative declarations and findings mirror in all material respects legislative findings in the adoption context that the Utah Supreme Court deemed sufficient to "satisfy the strict scrutiny standard's 'compelling interest' prong." *Matter of Adoption of K.T.B.*, 2020 UT 51, ¶42, 472 P.3d 843.

And as it turns out, those compelling interests also comport with *Roe*'s full lifespan. Even *Roe* recognized that a State's "important interests in safeguarding health, in maintaining medical standards, and in protecting potential life" would "[a]t some point in pregnancy … become sufficiently compelling to sustain regulation of the factors that govern the abortion decision." 410 U.S. at 154. *Roe* reasoned that this "'compelling' point is at viability," *id.* at 163, though it expressly acknowledged that this conclusion conflicted with prior decisions from some "[c]ourts sustaining state laws" on the ground "that the State's determinations to protect health or prenatal life are dominant and constitutionally justifiable," *id.* at 156.

Dobbs, of course, rejected *Roe*'s reasoning. And in doing so, *Dobbs* vindicated the views of Justice White that a State's interest, "if compelling after" one point in pregnancy, "is equally compelling before" that point, *see Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 795 (1986) (White, J., dissenting); and of Justice O'Connor that "*potential* life is no less potential in the first weeks of pregnancy than it is at viability or afterward," meaning "[t]he choice of viability as the point in time at which the state interest in *potential* life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward," *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 461 (1983) (O'Connor, J., dissenting); *see also id.* ("I believe that the State's interest in protecting potential human life exists throughout the pregnancy.");

Thornburgh, 476 U.S. at 795 (White, J., dissenting) ("The State's interest is in the fetus as an entity in itself, and the character of this entity does not change at the point of viability under conventional medical wisdom.").

What's more, SB174's restrictions furthering Utah's compelling interest in protecting unborn children and guaranteeing to them "their inherent and inalienable right to life as required by Article I, Sections 1 and 7, Utah Constitution," Utah Code Ann. §76-7-301.1(3), also satisfy "strict scrutiny's 'narrowly tailored' prong." *Matter of Adoption of K.T.B.*, 2020 UT 51, ¶43. That prong asks "whether the challenged provisions were 'necessary' to achieve the state's purpose." *Id.* Because abortion terminates "life or potential life," *Casey*, 505 U.S. at 852, SB174's ban on abortion is both necessary and essential to furthering the State's interest in protecting and preserving unborn life. Every step away from SB174's lines is a step toward allowing more abortion—and thus toward the loss of more "life or potential life," *id*.

That SB174 contains limited exceptions to the abortion ban does not change this analysis. For one thing,

> It is also the policy of the Legislature and of the state that, in connection with abortion, a woman's liberty interest, in limited circumstances, may outweigh the unborn child's right to protection. These limited circumstances arise when the abortion is necessary to save the pregnant woman's life or prevent grave danger to her medical health, and when pregnancy occurs as a result of rape or incest. It is further the finding and policy of the Legislature and of the state that a woman may terminate the pregnancy if the unborn child would be born with grave defects.

Utah Code Ann. §76-7-301.1(4). The exception allowing abortion to preserving a pregnant woman's life has existed in Utah's abortion statutes since statehood. *See* Utah Rev. Stat. Tit. 75, ch. 27, §4226 (1898) (attached as Ex. C). And exceptions for pregnancies occurring due to rape or incest, or for unborn children who would be born with grave birth defects, merely reflect that "[m]en and women of good conscience" grappled seriously with the "profound moral and spiritual implications of terminating a pregnancy even in its earliest stage," *Casey*, 505 U.S. at 850, and concluded that

allowing abortion in those few circumstances "may outweigh" the otherwise overriding state interest in protecting unborn life, Utah Code Ann. §76-7-301.1(4). Thus, SB174 satisfies any level of constitutional scrutiny.

* * * * *

Whatever else might be said about Plaintiff's claims, the discussion above confirms that they are not likely to succeed on the merits. Nor does Plaintiff present "serious issues on the merits which should be the subject of further litigation." Utah R. Civ. P. 65A(e)(4). Courts have provided little guidance on how to interpret this alternative basis for showing an entitlement to preliminary equitable relief. In one sense, all issues that are litigated are serious to those litigating them, and abortion is no exception. *See Dobbs*, 2022 WL 2276808, at *5 ("Abortion presents a profound moral issue on which Americans hold sharply conflicting views."). But for this part of Rule 65A(e)(4) to have any meaning, a plaintiff must at least show that the issues being litigated are open questions of law, not previously addressed by courts, on which it *might* prevail on the merits, even if it is not *likely* to prevail. Here, Plaintiff's claims are squarely foreclosed by existing precedent as explained above. And even if Plaintiff's claims were open questions of law—and they are not—Plaintiff still cannot overcome the presumption of constitutionality that attaches to SB174. Accordingly, the issues here do not qualify as "serious" ones that would support equitable relief under Rule 65A, and Plaintiff's motion must be denied on that basis alone.

III. The strong public interest in SB174 is an independent reason to deny relief.

A preliminary injunction "may issue only upon a showing by the applicant that ... [t]he order or injunction, if issued, would not be adverse to the public interest." Utah R. Civ. P. 65A(e)(3). The public interest therefore is not a factor simply to be balanced against others. Rather, a showing of serious issues for litigation or even a likelihood of success is irrelevant if Plaintiff cannot show that an injunction is in the public interest. *Cf. Supernova Media, Inc. v. Pia Anderson Dorius Reynard &*

Moss, LLC, 2013 UT 7, ¶60, 297 P.3d 599 ("Because here [on motion to seal court records] the facts in the record do not show that the public interest was considered ... the district court abused its discretion when it granted the sealing order, and the order must be set aside."); *Butler, Crockett & Walsh Dev. Corp. v. Pinecrest Pipeline Operating Co.*, 909 P.2d 225, 231 (Utah 1995) ("Failure of the trial court to make findings on all material issues is reversible error unless the facts in the record are 'clear, uncontroverted, and capable of supporting only a finding in favor of the judgment.'").

There is a strong public interest in the enforcement of valid state statutes. *State In re Schreuder*, 649 P.2d 19, 25 (Utah 1982) (recognizing "the public interest in the enforcement of the criminal laws and the punishment and rehabilitation of offenders"); *State ex rel. R.W.*, 717 P.2d 258, 260 (Utah 1986) (similar); *State v. Forshee*, 611 P.2d 1222, 1224 (Utah 1980) (similar); *Jensen v. Schwendiman*, 744 P.2d 1026, 1028 (Utah Ct. App. 1987) (recognizing that a stay would be adverse to the public interest "by weakening the enforcement potential" of a state statute); *see also 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."). And here especially, Utah's challenged abortion ban protects a public interest of the highest order—the preservation of human life. *See supra*, Background Part II.A., Argument Part II.F. Furthering that interest outweighs any harm that denying equitable relief might cause. *See* Utah R. Civ. P. 65A(e)(2). 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 Utah's abortion ban is constitutionally sound, and Plaintiff cannot swing the public interest in its favor merely by claiming it raises "serious issues" in need of further litigation. If Plaintiff's Complaint does indeed present "serious issues," then the public interest demands that the statutes remain in force while these issues are addressed in the courts.

IV. Plaintiff will not suffer irreparable harm without a preliminary injunction.

Finally, a preliminary injunction requires a showing that "*[t]he applicant* will suffer irreparable harm" without such relief." Utah R. Civ. P. 65A(e)(1) (emphasis added). But most of the harms Plaintiff raises to make this showing are to non-parties with no representation in this suit. *See* Mem. 7-16. As for harm to itself, Plaintiff points only to loss of business. Mem. 16 (SB174 "will eliminate [Plaintiff and its staff's] ability to offer abortion services to Utahns"). But such economic damage is ordinarily not irreparable, as Plaintiff could recover damages for lost profits if its claims are successful. *See, e.g.*, *Hunsaker v. Kersh*, 1999 UT 106, ¶9, 991 P.2d 67 ("'Irreparable injury' justifying an injunction is that which cannot be adequately compensated in damages or for which damages cannot be compensable in money."); *Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986) ("Injury is generally not irreparable if compensatory relief would be adequate.").

Plaintiff cites several cases (at 16) which held business or economic loss to be irreparable for purposes of a preliminary injunction motion, but all those cases are readily distinguishable. In *Hunsaker*, 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. 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 money damage award could reliably be calculated to compensate [the plaintiff] for the loss of bargained-for leverage that it would suffer."

Plaintiff 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 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 Plaintiff 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, Plaintiff has alleged that it provides a wide range of services "to approximately 46,000 Utahns at its eight health centers" each year. Compl. ¶9. Utah's abortion ban does not threaten Plaintiff's "numerous other forms of care," *id.*, and therefore is unlikely to inflict irreparable harm on Plaintiff's business.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiff's motion.

DATED: JULY 7, 2022

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ELECTRONIC FILING CERTIFICATE

I certify that on this 7th day of July 2022, I caused to be served via electronic court filing a true and correct copy of the foregoing **DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION** to the following:

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