No. 20220696-SC

IN THE
SUPREME COURT OF THE STATE OF UTAH

---

PLANNED PARENTHOOD ASSOCIATION OF UTAH,
on behalf of itself and its patients, physicians, and staff,
*Respondent*,
v.
STATE OF UTAH, et al.,
*Petitioners*.

---

# BRIEF OF RESPONDENT

---

On appeal from the Third Judicial District Court, Salt Lake County,
Honorable Andrew Stone, District Court No. 220903886

---


Melissa A. Holyoak
Utah Solicitor General
Stanford E. Purser
Deputy Solicitor General
Lance F. Sorenson
Assistant Attorney General
UTAH ATTORNEY GENERAL'S OFFICE
PO Box 140856
Salt Lake City, Utah 84114

*Attorneys for Petitioners*

Troy L. Booher (9419)
J. Frederic Voros, Jr. (3340)
Dick J. Baldwin (14587)
ZIMMERMAN BOOHER
341 South Main Street, Fourth Floor
Salt Lake City, Utah 84111
tbooher@zbappeals.com
fvoros@zbappeals.com
dbaldwin@zbappeals.com
(801) 924-0200

*Attorneys for Respondent*


---

Additional counsel on following page

**Additional Parties and Counsel**

Tyler R. Green
CONSOVOY MCCARTHY PLLC
222 S. Main Street, 5th Floor
Salt Lake City, Utah 84101

*Attorney for Petitioners*

Julie Murray (pro hac vice)
Hannah Swanson
(pro hac vice motion forthcoming)
PLANNED PARENTHOOD FEDERATION OF AMERICA
1110 Vermont Avenue, NW, Suite 300
Washington, DC 20005
julie.murray@ppfa.org
hannah.swanson@ppfa.org
(202) 803-4045

Camila Vega (pro hac vice)
PLANNED PARENTHOOD FEDERATION OF AMERICA
123 William Street, 9th Floor
New York, New York 10038
camila.vega@ppfa.org
(212) 261-4548

John Mejia (13965)
Valentina De Fex (17785)
ACLU OF UTAH FOUNDATION, INC.
311 South State Street, Suite 310
Salt Lake City, Utah 84111
jmejia@acluutah.org
vdefex@acluutah.org
(801) 521-9862

*Attorneys for Respondent*

## Current and Former Parties

### Petitioners

Defendants State of Utah, Governor Spencer Cox, Attorney General Sean Reyes, and Mark B. Steinagel, in his official capacity as the Director of the Utah Division of Occupational and Professional Licensing

Represented by Melissa A. Holyoak, Stanford E. Purser, and Lance F. Sorenson of the Utah Attorney General's Office

Amici curiae in support of Petitioners:

- American Association of Pro-Life Obstetricians and Gynecologists, represented by Frank D. Mylar of Mylar Law, P.C.
- American College of Pediatricians, represented by Thaddeus W. Wendt of Feller & Wendt, LLC and Christopher E. Mills of Spero Law LLC
- Pro-Life Utah, represented by Thomas R. Lee, John J. Nielsen, and James C. Phillips of Lee Nielsen
- Sutherland Institute, represented by William C. Duncan
- Thomas More Society and Family Watch International, represented by William C. Duncan and Paul Benjamin Linton
- Utah Eagle Forum, represented by Julia Payne of Alliance Defending Freedom and Brady Brammer of Brammer Ranck, LLP
- Utah Legislature, represented by John L. Fellows and Robert H. Rees of the Office of Legislative Research and General Counsel

### Respondent

Plaintiff Planned Parenthood Association of Utah, on behalf of itself and its patients, physicians, and staff

Represented by Troy L. Booher, J. Frederic Voros, Jr., and Dick J. Baldwin of Zimmerman Booher; John Mejia and Valentina De Fex of ACLU of Utah Foundation, Inc.; and Julie Murray, Hannah Swanson, and Camila Vega of Planned Parenthood Federation of America

## TABLE OF CONTENTS


CURRENT AND FORMER PARTIES ..... i

TABLE OF AUTHORITIES ..... v

INTRODUCTION ..... 1

STATEMENT OF THE ISSUES ..... 2

STATEMENT OF THE CASE ..... 3

A. The Criminal Abortion Ban ..... 3

B. This Litigation and the Act's Impact ..... 5

1. *PPAU's submissions* ..... 5

2. *The State's response* ..... 6

C. The Preliminary Injunction and Subsequent Proceedings ..... 6

SUMMARY OF ARGUMENT ..... 8

ARGUMENT ..... 9

I. PPAU HAS STANDING ..... 9

II. THE TRIAL COURT CORRECTLY FOUND THAT THE ACT WOULD CAUSE IRREPARABLE HARM AND THAT THE EQUITIES AND PUBLIC INTEREST FAVOR RELIEF ..... 13

III. THE DISTRICT COURT CORRECTLY HELD THAT "AT LEAST SERIOUS ISSUES" ON THE MERITS EXIST ..... 19

A. The State employs the wrong method of constitutional interpretation ..... 20

1. *Neither the Constitution nor precedent compels the Court to analyze the Act's constitutionality based solely on original public meaning* ..... 21

2. *In any event, the State misapplies the original-public-meaning analysis* ..... 23

3. *The State erroneously relies on a presumption of constitutionality* ..... 25

B. PPAU has raised far more than serious issues as to the Equal Rights Provision ..... 25

C. PPAU has presented, at minimum, serious legal issues as to its claim under the Uniform Operation of Law ("UOL") Clause ..... 33

D. PPAU has presented at least serious issues for litigation over its bodily integrity claim ..... 36

E. PPAU has presented more than a serious issue for litigation as to its family-composition claim ..... 41

F. PPAU has presented more than a serious issue for litigation as to its freedom-of-conscience claim ..... 44

G. PPAU has raised at least serious issues as to the merits of its privacy claim ..... 46

CONCLUSION ..... 48

CERTIFICATE OF COMPLIANCE ..... 50

CERTIFICATE OF SERVICE ..... 51

## Addenda

A Order Granting Plaintiff's Motion for a Preliminary Injunction, Jul. 19, 2022 [R.846-51]

B Determinative Provisions

Utah Code § 76-5-201
Utah Code § 76-7-301.1
Utah Code § 76-7-302
Utah Code § 76-7-302.5
Utah Code § 76-7-305.5
Utah Code § 76-7a-101
Utah Code § 76-7a-201
Utah Const. art. I, § 2
Utah Const. art. I, § 4
Utah Const. art. I, § 7
Utah Const. art. I, § 11
Utah Const. art. I, § 14
Utah Const. art. I, § 24
Utah Const. art. I, § 25
Utah Const. art. I, § 26
Utah Const. art. IV, § 1
Utah Const. art. VIII, § 1
Utah Const. art. VIII, § 2

## TABLE OF AUTHORITIES

Federal Cases

*Babbitt v. United Farm Workers Nat'l Union*,
442 U.S. 289 (1979) ..... 10

*Bellotti v. Baird*,
443 U.S. 622 (1979) ..... 18

*Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*,
447 U.S. 557 (1980) ..... 31

*Craig v. Boren*,
429 U.S. 190 (1976) ..... 3, 12

*Dobbs v. Jackson Women's Health Organization*,
142 S. Ct. 2228 (2022) ..... 3, 11

*Doe v. Bolton*,
410 U.S. 179 (1973) ..... 11

*Hunter v. Underwood*,
471 U.S. 222 (1985) ..... 34

*Jane L. v. Bangerter*,
102 F.3d 1112 (10th Cir. 1996) ..... 41

*June Med. Servs. L.L.C. v. Russo*,
140 S. Ct. 2103 (2020) ..... 11

*Planned Parenthood of Southeastern Pennsylvania v. Casey*,
505 U.S. 833 (1992) ..... 41

*Roe v. Wade*,
410 U.S. 113 (1973) ..... 3, 39, 43

*Roman Cath. Diocese of Brooklyn v. Cuomo*,
141 S. Ct. 63 (2020) ..... 14

*Schrier v. Univ. of Co.*,
427 F.3d 1253 (10th Cir. 2005) ..... 18

*Singleton v. Wulff*,
428 U.S. 106 (1976) ..... 11

*Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*,
805 F.2d 351 (10th Cir. 1986) ..... 19

*United States v. Virginia*,
518 U.S. 515 (1996) ..... 28, 30

*Wooley v. Maynard*,
430 U.S. 705 (1977) ..... 46

State Cases

*438 Main St. v. Easy Heat, Inc.*,
2004 UT 72, 99 P.3d 801 ..... 17

*Allen v. Trueman*,
100 Utah 36, 110 P.2d 355 (1941) ..... 46

*Am. Acad. of Pediatrics v. Lundgren*,
16 Cal. 4th 307, 940 P.2d 797 (1997) ..... 46

*Am. Fork City v. Crosgrove*,
701 P.2d 1069 (Utah 1985) ..... 24

*Anderson v. Provo City Corp.*,
2005 UT 5, 108 P.3d.701 ..... 35

*Aquagen Int'l, Inc. v. Calrae Trust*,
972 P.2d 411 (Utah 1998) ..... 3

*Armstrong v. State*,
1999 MT 261, 989 P.2d 364 ..... 12, 46

*Bailey v. Bayles*,
2002 UT 58, 52 P.3d 1158 ..... 12

*Beehive Med. Elec., Inc. v. Indus. Comm'n*,
583 P.2d 53 (Utah 1978) ..... 27

*Beynon v. St. George-Dixie Lodge No. 1743, Benevolent & Protective Ord. of Elks*,
854 P.2d 513 (Utah 1993) ..... 31

*Blackrock Copper Mining & Mill Co. v. Tingey*,
98 P. 180 (Utah 1908) ..... 22

*Blue Cross & Blue Shield of Utah v. State*,
779 P.2d 634 (Utah 1989) ..... 30

*Brown v. Div. of Water Rts. of Dep't of Nat. Res.*,
2010 UT 14, 228 P.3d 747 ..... 3

*Centro de la Familia de Utah v. Carter*,
2004 UT 43, 94 P.3d 261 ..... 20

*Cooper v. Utah Light & Ry. Co.*,
102 P. 202 (Utah 1909) ..... 21

*Corp. of President of Church of Jesus Christ of Latter-Day Saints v. Wallace*,
573 P.2d 1285 (Utah 1978) ..... 14

*Count My Vote, Inc. v. Cox*,
2019 UT 60, 452 P.3d 1109 ..... 33, 36

*DeBry v. Noble*,
889 P.2d 428 (Utah 1995) ..... 25

*DIRECTV v. Utah State Tax Comm'n*,
2015 UT 93, 364 P.3d 1036 ..... 33

*Doe v. Maher*,
40 Conn. Supp. 394, 515 A.2d 134 (Super. Ct. 1986) ..... 27, 47

*Ellison v. Barnes*,
63 P. 899 (Utah 1901) ..... 21

*Fann v. State*,
251 Ariz. 425, 493 P.3d 246 (2021) ..... 19

*Gallivan v. Walker*,
2002 UT 89, 54 P.3d 1069 ..... 34, 35

*Gammon v. Federated Milk Producers Ass'n, Inc.*,
364 P.2d 417 (Utah 1961) ..... 22

*Grafilo v. Wolfsohn*,
33 Cal.App.5th 1024, 245 Cal.Rptr.3d 564 (2019) ..... 47

*Gregory v. Shurtleff*,
2013 UT 18, 299 P.3d 1098 ..... 9, 12, 13

*Hamby v. Jacobson*,
769 P.2d 273 (Utah Ct. App. 1989) ..... 27, 32

*Hodes & Nauser, MDs, P.A. v. Schmidt*,
440 P.3d 461 (Kan. 2019) ..... 25, 29, 30, 38

*Hogs R Us v. Town of Fairfield*,
2009 UT 21, 207 P.3d 1221 ..... 9

*Hope v. Perales*,
83 N.Y.2d 563, 634 N.E.2d 183 (1994) ..... 47

*Hunsaker v. Kersh*,
1999 UT 106, 991 P.2d 67 ..... 17

*In re Adoption of B.Y.*,
2015 UT 67, 356 P.3d 1215 ..... 36

*In re Adoption of J.S.*,
2014 UT 51, 358 P.3d 1009 ..... 29, 30, 42

*In re Adoption of K.C.J.*,
2008 UT App 152, 184 P.3d 1239 ..... 36

*In re Boyer*,
636 P.2d 1085 (Utah 1981) ..... 37

*In re Castillo*,
632 P.2d 855 (Utah 1981) ..... 41

*In re J.P.*,
648 P.2d 1364 (Utah 1982) ..... 38, 41, 42, 43

*In re T.W.*,
551 So. 2d 1186 (Fla. 1989) ..... 47

*Int'l Harvester Credit Corp. v. Pioneer Tractor & Implement, Inc.*,
626 P.2d 418 (Utah 1981) ..... 22

*J.J.N.P. Co. v. State, By & Through Div. of Wildlife Res.*,
655 P.2d 1133 (Utah 1982) ..... 25

*Jenkins v. Swan*,
675 P.2d 1145 (Utah 1983) ..... 9

*Jones v. Jones*,
2015 UT 84, 359 P.3d 603 ..... 25, 30

*King v. State*,
818 N.W.2d 1 (Iowa 2012) ..... 26

*KUTV, Inc. v. Conder*,
668 P.2d 513 (Utah 1983) ..... 24

*Lacher v. Venus*,
177 Wis. 558, 188 N.W. 613 (1922) ..... 41

*Laws v. Grayeyes*,
2021 UT 59, 498 P.3d 410 ..... 9

*Malan v. Lewis*,
693 P.2d 661 (Utah 1984) ..... 35, 37

*Mitchell v. Commonwealth*,
78 Ky. 204 (1879) ..... 39

*Moe v. Sec'y of Admin. & Fin.*,
382 Mass. 629, 417 N.E.2d 387 (1981) ..... 38

*Mohanty v. St. John Heart Clinic*,
225 Ill.2d.52, 866 N.E.2d 85 (2006) ..... 19

*N.M. Right to Choose/NARAL v. Johnson*,
126 N.M. 788, 975 P.2d 841 (1998) ..... 28, 29

*Neese v. Utah Bd. of Pardons & Parole*,
2017 UT 89, 416 P.3d 663 ..... 21

*Nixdorf v. Hicken*,
612 P.2d 348 (Utah 1980) ..... 37

*P.I.E. Employees Fed. Credit Union v. Bass*,
759 P.2d 1144 (Utah 1988) ..... 22

*Parkinson v. Watson*,
291 P.2d 400 (Utah 1955) ..... 22

*Patterson v. State*,
2021 UT 52, 504 P.3d 92 ..... 24

*People v. City Council of Salt Lake City*,
64 P. 460 (Utah 1900) ..... 21

*Planned Parenthood Great Nw., Haw., Alaska, Ind., Ky. v. Idaho*,
No. 49817-2022, 2022 WL 2433644 (Idaho Jan. 5, 2023) ..... 16

*Planned Parenthood of Mich. v. Att'y Gen. of the State of Mich.*,
No. 22-000044, 2022 WL 7076177 (Mich. Cl. Ct. Sept. 7, 2022) ..... 27, 28

*Planned Parenthood S. Atl. v. State*,
No. 2022-001062, 2023 WL 107972 (S.C. Jan. 5, 2023) ..... 30, 46

*Pusey v. Pusey*,
728 P.2d 117 (Utah 1986) ..... 27, 29, 32

*Rampton v. Barlow*,
464 P.2d 378 (Utah 1970) ..... 22

*Redding v. Brady*,
606 P.2d 1193 (Utah 1980) ..... 46

*Right to Choose v. Byrne*,
91 N.J. 287, 450 A.2d 925 (1982) ..... 47

*S. Salt Lake City v. Maese*,
2019 UT 58, 450 P.3d 1092 ..... 20, 23

*S. Utah Wilderness All. v. Kane Cnty. Comm'n*,
2021 UT 7, 484 P.3d 1146 ..... 3

*Salt Lake City Corp. v. Utah Inland Port Auth.*,
2022 UT 27, --- P.3d --- ..... 22, 33

*Shelledy v. Lore*,
836 P.2d 786 (Utah 1992) ..... 2, 10, 11

*Soc'y of Separationists, Inc. v. Whitehead*,
870 P.2d 916 (Utah 1993) ..... 20, 44

*Sonntag v. Ward*,
2011 UT App 122, 253 P.3d 1120 ..... 9

*State Bd. of Educ. v. State Bd. of Higher Educ.*,
505 P.2d 1193 (Utah 1973) ..... 22

*State ex rel. Morrison v. Sebelius*,
179 P.3d 366 (Kan. 2008) ..... 26

*State ex rel. Shields v. Barker*,
167 P. 262 (Utah 1917) ..... 22

*State in Int. of E.R.*,
2021 UT 36, 496 P.3d 58 ..... 13

*State in Int. of J.M.S.*,
2011 UT 75, 280 P.3d 410 ..... 16

*State in re P.L.L.*,
597 P.2d 886 (Utah 1979) ..... 42

*State v. Alverez*,
2006 UT 61, 147 P.3d 425 ..... 37

*State v. Angilau*,
2011 UT 3, 245 P.3d 745 ..... 35

*State v. Beaver*,
2022 WL 17038564, --- S.E.2d --- (W. Va. Nov. 17, 2022) ..... 25

*State v. Betensen*,
378 P.2d 669 (Utah 1963) ..... 22

*State v. Canton*,
2013 UT 44, 308 P.3d 517 ..... 26, 33

*State v. Eldredge*,
76 P. 337 (Utah 1904) ..... 21

*State v. Emerich*,
13 Mo. App. 492 (1883) ..... 39

*State v. Galvin*,
491 P.3d 325 (Alaska 2021) ..... 19

*State v. Gardner*,
947 P.2d 630 (Utah 1997) ..... 20

*State v. Hamilton*,
710 P.2d 174 (Utah 1985) ..... 24

*State v. Holtgreve*,
200 P. 894 (Utah 1921) ..... 25

*State v. Johnson*,
814 So. 2d 390 (Fla. 2002) ..... 47

*State v. Outzen*,
2017 UT 30, 408 P.3d 334 ..... 36

*State v. Robinson*,
2011 UT 30, 254 P.3d 183 ..... 33

*State v. Span*,
819 P.2d 329 (Utah 1991) ..... 10

*State v. Steadman*,
214 S.C. 1, 51 S.E.2d 91 (1948) ..... 39

*State v. Tiedemann*,
2007 UT 49, 162 P.3d 1106 ..... 18, 22

*State v. Walker*,
2011 UT 53, 267 P.3d 210 ..... 23

*Sukin v. Sukin*,
842 P.2d 922 (Utah Ct. App. 1992) ..... 27, 32

*Sys. Concepts, Inc. v. Dixon*,
669 P.2d 421 (Utah 1983) ..... 17

*T.L.S. v. Mont. Advoc. Program*,
2006 MT 262, 334 Mont. 146, 144 P.3d 818 ..... 47

*Timpanogos Planning & Water Mgmt. Agency v. Central Utah Water Conservancy Dist.*,
690 P.2d 562 (Utah 1984) ..... 24

*Univ. of Utah v. Bd. of Examiners*,
295 P.2d 348 (Utah 1956) ..... 22

*Utah Chapter of Sierra Club v. Utah Air Quality Bd.*,
2006 UT 73, 148 P.3d 975 ..... 9, 10

*Utah Cnty. ex rel. Cnty. Bd. of Equalization of Utah Cnty. v. Intermountain Health Care, Inc.*,
709 P.2d 265 (Utah 1985) ..... 24

*Utah Med. Prod., Inc. v. Searcy*,
958 P.2d 228 (Utah 1998) ..... 18, 19

*Utah Safe to Learn-Safe to Worship Coal., Inc. v. State*,
2004 UT 32, 94 P.3d 217 ..... 29

*Valley Hosp. Ass'n v. Mat-Su Coal. for Choice*,
948 P.2d 963 (Alaska 1997) ..... 47

*Vega v. Jordan Valley Med. Ctr., LP*,
2019 UT 35, 449 P.3d 31 ..... 25

*Wagner v. State*,
2005 UT 54, 122 P.3d 599 ..... 37

*Ward Terry & Co. v. Hensen*,
75 Wyo. 444, 297 P.2d 213 (1956) ..... 32

*Women of State of Minn. by Doe v. Gomez*,
542 N.W.2d 17 (Minn. 1995) ..... 38

*Wood v. University of Utah Medical Center*,
2002 UT 134, 67 P.3d 436 ..... 35, 39, 40, 41

*Zagg, Inc. v. Harmer*,
2015 UT App 52, 345 P.3d 1273 ..... 17

Constitutional Provisions

Utah Const. art. I, § 2 ..... 42

Utah Const. art. I, § 4 ..... 44

Utah Const. art. I, § 7 ..... 36

Utah Const. art. I, § 11 ..... 37

Utah Const. art. I, § 14 ..... 46

Utah Const. art. I, § 24 ..... 33

Utah Const. art. I, § 25 ..... 26, 42

Utah Const. art. I, § 26 ..... 32, 42

Utah Const. art. IV, § 1 ..... 26, 31

Utah Const. art. VIII, § 1 ..... 9

Utah Const. art. VIII, § 2 ..... 24

Statutes

Utah Code § 76-2-202 ..... 4

Utah Code § 76-3-203 ..... 4

Utah Code § 76-3-301 ..... 4

Utah Code § 76-3-302 ..... 4

Utah Code § 76-5-201 ..... 16

Utah Code § 76-7-301.1 ..... 45

Utah Code § 76-7-302 ..... 4, 19

Utah Code § 76-7-302.5 ..... 4

Utah Code § 76-7-305.5 ..... 31

Utah Code § 76-7a-101 ..... 34

Utah Code § 76-7a-201 ..... passim

Utah Code § 78B-6-408 ..... 10

Rules

Utah R. Civ. P. 1 ..... 13

Utah R. Civ. P. 52 ..... 18

Utah R. Civ. P. 65A ..... passim

Other

2020 Utah Laws Ch. 279, § 4 ..... 3

H.B. 92, 66th Leg., Budget Sess. (Wyo. 2022) ..... 16

S.B. 174, 2020 Leg., Gen. Sess. (Utah 2020) ..... 1, 48

*Can you deliver a baby and vote? The effect of the first stages of parenthood on voter turnout*, 29 J. Elections, Pub. Op. & Parties 61 (2019) ..... 28

*Innovation and Accommodation: The Legal Status of Women in Territorial Utah, 1850–1896,* Women in Utah History (eds. Patricia Lyn Scott & Linda Thatcher 2005) ..... 46

*Proceedings & Debates of Convention Assembled to Adopt a Constitution for the State of Utah,* 25th Day, at 429 (March 28, 1893) ..... 32

*Standing to Assert Constitutional Jus Tertii*, 88 Harv. L. Rev. 423 (1975) ..... 11

*Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267 (2007) ..... 30

*The History of Suffrage and Equal Rights Provisions in State Constitutions*, 10 BYU J. Pub. L. 117 (1996) ..... 26

*Understanding Why Women Seek Abortions in the US*, 13 BMC Women's Health 1 (2013) ..... 31

*What Goes Around Comes Around: The New Relevancy of State Constitution Religion Clauses*, 38 Val. U. L. Rev. 353 ..... 44

## INTRODUCTION

For half a century, the United States Constitution guaranteed Utahns—like all Americans—the right to have an abortion, thus protecting their intimate moral and medical decisions from coercive governmental intrusion. But on June 24, 2022, the U.S. Supreme Court eliminated that guarantee. The preliminary injunction since entered in this case enjoins a state law banning abortion, thus preserving the status quo ante while this state's courts assess whether the ban violates the Utah Constitution's independent protections. The preliminary injunction is in this respect unremarkable.

What *is* remarkable here is the challenged statute. Senate Bill 174 would make providing abortion a second-degree felony under almost all circumstances, rendering it impossible for patients to receive this medical care in Utah. *See* S.B. 174, 2020 Leg., Gen. Sess. (Utah 2020) (codified at Utah Code tit. 76, ch. 7A) (the "Act" or the "Criminal Abortion Ban"). The Act would thus criminalize conduct that for half a century has been not only legal *but constitutionally protected*. The district court wisely concluded that, before the Act subjects Utahns to such a cataclysmic reordering of their private lives, Utah courts should determine whether the Act is unconstitutional.

When entering a preliminary injunction, the district court had before it powerful party, expert, and patient declarations submitted by Planned Parenthood Association of Utah ("PPAU"), while the State submitted no evidence. The district court ultimately ruled that PPAU is an appropriate plaintiff with standing to sue on behalf of itself, its staff, and its patients; that PPAU and its patients would suffer irreparable harm from the Act; and that other relevant equitable factors support the injunction. The court also concluded that

each of the state constitutional claims at issue presents serious merits questions justifying a preliminary injunction under Utah Rule of Civil Procedure 65A.

The State now asks this Court to disregard the district court's well-supported factual findings and to conclude that PPAU cannot prevail on *any* of its constitutional claims. Because the order on appeal is well-supported factually and legally, it should be affirmed.

## STATEMENT OF THE ISSUES

**1.** Does PPAU have standing to obtain a preliminary injunction against the Act on behalf of itself and its patients where it has demonstrated that (a) the Act injures PPAU, and a decision in PPAU's favor would redress those injuries; (b) PPAU, as a party directly regulated by the Act, meets third-party standing criteria that permit it to vindicate patients' rights; and (c) in any event, PPAU is an appropriate party to bring this case of significant public importance?

**2.** Did the district court abuse its discretion in finding—based on an unrebutted evidentiary record—that PPAU, its patients, and its staff will suffer irreparable harm if the Act takes effect, and that the equities and public interest favor relief?

**3.** Did the district court abuse its discretion in concluding that PPAU has raised at least serious issues on the merits of the six constitutional claims asserted to support a preliminary injunction?

*Preservation*: PPAU raised and, as applicable, responded to these issues in its preliminary-injunction memorandum, R.235–76, and reply, R.670–92.

The State has not preserved arguments addressing PPAU's third-party standing on behalf of patients under *Shelledy v. Lore*, 836 P.2d 786, 789 (Utah 1992), or PPAU's third-

party standing on behalf of staff. *See* R.523–25; *Craig v. Boren*, 429 U.S. 190, 193 (1976) (holding that federal third-party standing is prudential, not jurisdictional, and challenges can be forfeited).

*Standard of Review*: The Court reviews the grant of a preliminary injunction for an abuse of discretion, *Aquagen Int'l, Inc. v. Calrae Trust*, 972 P.2d 411, 413 (Utah 1998), with respect to both the application of Rule 65A factors and the district court's standing assessment. *See Brown v. Div. of Water Rts. of Dep't of Nat. Res.*, 2010 UT 14, ¶ 15, 228 P.3d 747; *S. Utah Wilderness All. v. Kane Cnty. Comm'n*, 2021 UT 7, ¶ 16, 484 P.3d 1146.

## STATEMENT OF THE CASE

### A. The Criminal Abortion Ban

In 2020, the Utah Legislature adopted the Act, which bars abortion in nearly all circumstances. Instead of making the Act immediately operative, the Legislature provided that it would take effect only if binding authority held that a state may prohibit abortion at any point in pregnancy. 2020 Utah Laws Ch. 279, § 4(2).

On June 24, 2022, the U.S. Supreme Court issued its opinion in *Dobbs v. Jackson Women's Health Organization* ("*Dobbs*"), 142 S. Ct. 2228 (2022), which overruled *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny. In so doing, the court eliminated a half century of precedent protecting a federal due process right to abortion. The court made clear, though, that states, including state courts, remain free to make their own decisions about abortion. *Dobbs*, 142 S. Ct. at 2328.

The Criminal Abortion Ban took effect that day, immediately making the performance of abortion in Utah a second-degree felony in nearly all cases. Utah Code

§ 76-7a-201(3). Under the Act, abortion providers and other staff who aid in the performance of a prohibited abortion face one to fifteen years in prison, as well as criminal fines. *Id.* §§ 76-7a-201(3), 76-3-203(2), 76-3-301(1)(a), 76-3-302(1); *see also id.* § 76-2-202 (liability for any person who "solicits, requests, commands, encourages, or intentionally aids" in a criminal offense). In addition, abortion clinics and staff face licensing and other professional penalties. *Id.* § 76-7a-201(4)–(5).[1] The law does not expressly protect women from investigation or prosecution for their role in requesting or receiving a prohibited abortion.[2]

The Act's prohibition is subject to only three limited exceptions, where (1) abortion is necessary to protect a woman's life or to prevent "a serious risk of substantial and irreversible impairment of a major bodily function of the" woman (the "death or permanent injury exception"); (2) two maternal-fetal medicine physicians confirm that a fetus has either a "uniformly lethal" health condition or a brain abnormality that would leave the fetus "in a mentally vegetative state" after birth; or (3) a woman's pregnancy resulted from rape or incest and her physician confirms that the assault was reported to law enforcement, irrespective of her wishes (the "reported rape exception"). *Id.* § 76-7a-201. Unlike Utah's other mandatory reporting laws, such as those applicable to suspected child abuse, the Act's

[1] The State describes the Act as requiring that abortions be performed only by a physician and in a clinic or hospital. Br. Pet'rs ("State Br.") 4. However, Utah has long imposed those requirements, which are not at issue here. R.849 n.1; Utah Code §§ 76-7-302, -302.5.

[2] PPAU uses "women" as a short-hand for people who are or may become pregnant, but people of all gender identities, including transgender men and gender-diverse individuals, may become pregnant and seek abortion, and are also harmed by the Act.

rape reporting requirement applies only if a health care professional *actually* provides an abortion to the patient. If the patient—after learning of the reporting requirement from her doctor—is chilled from obtaining services, no reporting is required. R.91, ¶¶ 52–53. Moreover, the reporting requirement applies only where a woman obtains an abortion, not any other form of health care. *Id*.

### B. This Litigation and the Act's Impact

PPAU is one of only two outpatient abortion providers in Utah. When the Act took effect, PPAU and its staff were forced to immediately stop providing abortions covered by the Act. PPAU filed a lawsuit against the State in the Third District Court on behalf of itself, its patients, and its staff. It brought seven state constitutional claims, alleging that the Act violated its patients' (1) right to sex equality; (2) right to the uniform operation of laws; (3) right to bodily integrity; (4) right to determine their own family composition and to parent; (5) rights of conscience; (6) right to decisional and informational privacy; and (7) right to be free from involuntary servitude. R.59–69. PPAU obtained a temporary restraining order against the Act. It then sought a preliminary injunction based on all but the involuntary servitude claim.

**1.** ***PPAU's submissions*****.** PPAU submitted declarations from (1) Dr. David Turok, PPAU's director of surgical services and a board-certified obstetrician-gynecologist who provides abortions, attesting to the Act's harmful impact on PPAU, its staff, and its patients; (2) Colleen Heflin, Ph.D., a sociologist who addressed the Act's impact on women and families with low incomes; (3) Lauren Hunt on behalf of the Rape Recovery Center in Utah, addressing the Act's impact on sexual assault survivors; and (4) several PPAU

patients whose abortion appointments would have to be cancelled without a preliminary injunction. R.281–336; R.338–89; R.397–409; R.713–29. The declarations, in addition to addressing the Act's harmful impact on PPAU, its patients, and its staff, also described barriers that patients would face in bringing their own lawsuits to challenge the Act. *See, e.g.*, R.716; R.797–98, 42:24–43:03. Major medical organizations also filed an amicus brief supporting an injunction. R.618–47.

**2. *The State's response*.** The State submitted no written evidence and called no witnesses to rebut PPAU's declarations or to support its allegation that enjoining the Act would harm the State and the public. The State described its interest in the Act as serving "one overriding purpose: the protection of human life, rooted in a moral conviction about the worth of each unborn child." R.518; *see also* R.567–68. It raised no other state interests to justify the Act's adoption. Although the State challenged PPAU's standing to represent patients, it did not object to PPAU's standing to represent PPAU staff or to the court's consideration of staff injuries in assessing any of the equities.

### C. The Preliminary Injunction and Subsequent Proceedings

At the conclusion of the preliminary-injunction hearing, the district court orally granted the injunction and later issued a written decision. It "easily conclude[d]" that it had jurisdiction, explaining that PPAU "demonstrated an injury in its own right and to its patients" and that "enjoining the Act would redress those injuries." R.849. It also concluded, in the alternative, that PPAU has "representative standing because it is an appropriate party to litigate this case of significant public import." *Id.* Given these findings,

the district court did not address PPAU's argument that it qualifies for third-party standing on behalf of patients, if such standing is required.

The district court further concluded that all four preliminary-injunction factors under Rule 65A favored PPAU, and in particular, that PPAU made a "strong showing" of irreparable harm to itself, its patients, and its staff. R.847. In examining the equities, the court acknowledged the State's asserted interest in the preservation of fetal life, but concluded that it was "unclear on this record whether and to what extent the Act will ultimately further" the State's goals. *Id*. As to the merits, the Court determined, for each of the claims asserted, that PPAU had raised "at least serious issues on the merits that should be the subject of further litigation." R.848. It emphasized that its consideration of the "novel and complicated issues" in the case would "benefit from further development," including through the introduction of additional facts. R.849. Given the district court's finding as to the "serious issues" standard, the court had no need to reach the question whether PPAU is also likely to prevail on its claims.

This Court subsequently permitted the State to appeal the injunction order but denied a stay of that order. The parties are currently conducting fact discovery.

## SUMMARY OF ARGUMENT

The preliminary injunction should be affirmed. First, the trial court correctly concluded that PPAU is an appropriate plaintiff. The Act threatens PPAU and its staff with criminal and other sanctions and reputational harm, and a decision in PPAU's favor would redress those and other injuries. Nothing more is required to show that PPAU has jurisdictional standing. PPAU also has third-party standing, to the extent such standing is required. And even if PPAU had not demonstrated these other forms of standing, it would have public-interest standing as a party with the resources necessary to zealously litigate this case and every incentive to do so.

Second, the district court appropriately exercised its discretion to find that PPAU, its patients, and its staff would suffer irreparable harm under the Act and that the balance of equities and public interest support a preliminary injunction. On appeal, the State does not come close to overcoming the extensive, one-sided record supporting the injunction, and its various quibbles with the district court's analysis mischaracterize that court's rationale, ignore on-point precedent, or both.

Third, the district court correctly concluded that each of the six state constitutional claims at issue raises serious merits questions warranting further litigation. The State's contrary arguments rest on an extreme form of "originalism" inconsistent with Utah precedent, ignore the broad range of interpretive tools used by Utah courts, and do not in any way undermine the merits of PPAU's specific claims.

## ARGUMENT

### I. PPAU HAS STANDING

Utah courts are common law courts of general jurisdiction. Utah Const. art. VIII, § 1. Unlike federal courts, their judicial power "is not constitutionally restricted by the language of Article III of the United States Constitution requiring 'cases' and 'controversies.'" *Gregory v. Shurtleff*, 2013 UT 18, ¶ 12, 299 P.3d 1098. Indeed, "there are reasons to believe that the Utah Constitution may not actually impose [traditional] standing requirements, and that the better way to view the[se requirements] are as prudential standards that [courts] generally impose upon would-be litigants." *Laws v. Grayeyes*, 2021 UT 59, ¶ 84, 498 P.3d 410 (Pearce, J., concurring).

Even under the most stringent view of this Court's standing jurisprudence, the district court was correct when it concluded that it had jurisdiction. R.849.

**1.** PPAU has shown that it has what has traditionally been described as jurisdictional standing in Utah, including that it has a "distinct and palpable injury that gives rise to a personal stake in the outcome of the dispute." *Sonntag v. Ward*, 2011 UT App 122, ¶ 3, 253 P.3d 1120 (internal quotation marks omitted). PPAU faces the threat of criminal and licensing penalties if it provides prohibited abortions. It also faces substantial reputational harms, either from ceasing to provide abortion to patients or from providing abortion in violation of the Act and facing associated criminal risk. R.247. These harms are cognizable and ensure that PPAU has a concrete stake in the case. *E.g.*, *Utah Chapter of Sierra Club v. Utah Air Quality Bd.*, 2006 UT 73, ¶ 14, 148 P.3d 975; *Jenkins v. Swan*, 675 P.2d 1145, 1151 (Utah 1983). Moreover, as the district court found, these harms are a

direct result of the new law, and a decision "enjoining the Act would redress th[e]se injuries." R.849; *see also* R.670. That is all that is required to satisfy Utah's "traditional [standing] test." *Hogs R Us v. Town of Fairfield*, 2009 UT 21, ¶¶ 8–10, 207 P.3d 1221.

The State counters (at 10–11) that PPAU lacks standing because it alleges a violation of third parties' rights, not its own. But this Court has repeatedly recognized exceptions to the "general rule [] that a litigant must assert his own legal rights and interests." *Shelledy*, 836 P.2d at 789 (internal quotation marks omitted). As the State concedes (at 12), for example, the Court has long permitted associations to sue on behalf of their members to vindicate members' rights. *Utah Chapter of Sierra Club*, 2006 UT 73, ¶ 21; *see also State v. Span*, 819 P.2d 329, 340 (Utah 1991) (right of criminal defendants to assert equal-protection rights of prospective jurors).

The reasons for finding standing for parties to assert third parties' rights in those cases apply with equal or greater force here, where a health care provider seeks to vindicate the rights of patients to whom the provider has both legal and ethical obligations. *Cf.* Utah Code § 78B-6-408 (authorizing declaratory judgment actions by anyone "whose rights, status, or other legal relations are affected by a [challenged] statute"). Indeed, PPAU and its staff are directly regulated by the Act and, if prosecuted, could defend on the ground that the Act is unconstitutional. It would make no sense to force PPAU or its doctors to "first expose [themselves] to actual arrest or prosecution to be entitled to challenge" the Act's validity. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979).

**2.** Even assuming the Act's direct impact on PPAU were insufficient to establish standing, PPAU satisfies the standard for third-party standing articulated in

*Shelledy*, 836 P.2d at 789. That standard is met where (1) there is "some substantial relationship between the claimant and the third parties"; (2) there is an "impossibility of the [rights-holders] asserting their own constitutional rights"; and (3) there is a "need to avoid [the] dilution of third parties' constitutional rights that would result" if third-party standing were not permitted. *Id.* (internal quotation marks omitted). This standard's second prong is less stringent than the language implies, permitting third-party standing where practical barriers discourage suit by the rights-holder, even if suit is not technically impossible. *See id.* (relying on Note, *Standing to Assert Constitutional Jus Tertii*, 88 Harv. L. Rev. 423, 425 (1975), which discusses this prong in the context of claims that may be difficult to bring).[3]

As an initial matter, the State forfeited any objection to PPAU's third-party standing under the *Shelledy* standard—a prudential, rather than jurisdictional, requirement. *See supra* p. 2–3. And PPAU satisfies that standard in any event. The relationship between an abortion provider and a patient is substantial because patients cannot "secure an abortion without the aid of a physician." *Singleton v. Wulff*, 428 U.S. 106, 117 (1976) (plurality op.). A "woman's exercise of her right to an abortion" is thus "necessarily at stake" with respect

[3] This Note endorsed federal third-party standing for abortion providers suing on behalf of patients. *See Standing to Assert Constitutional Jus Tertii*, 88 Harv. L. Rev. at 432 & n.51. And federal courts—whose jurisdiction is more limited than Utah courts—have "long permitted abortion providers to invoke the rights of their actual or potential patients." *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2118 (2020) (plurality op.) (collecting cases), *abrogated on other grounds by Dobbs*, 142 S. Ct.; *id.* at 2139 n.4 (Roberts, C.J., concurring). Contrary to the State's suggestion (at 14), these federal decisions pre-date *June Medical Services* and extend to abortion regulations and outright bans. *See, e.g.*, *Doe v. Bolton*, 410 U.S. 179 (1973), *abrogated on other grounds by Dobbs*, 142 S. Ct. 2228.

to a law that directly regulates her doctor. *Id.*; *accord Armstrong v. State*, 1999 MT 261, ¶ 10, 989 P.2d 364. Even on appeal, the State does not argue otherwise. *See* State Br. 14.

As to the rest of *Shelledy*'s requirements, evidence demonstrates why patients are unlikely to bring their own suits, including because of a lack of knowledge, time, and resources; fear of being in court; and fear for their anonymity. *See generally* R.713–29 (patient declarations). And by targeting PPAU's abortion services, the Act necessarily dilutes the rights of patients who rely on those services and face barriers to bringing their own claims. *See, e.g.*, *Craig*, 429 U.S. at 197.

Because this Court may affirm on any legal ground apparent on the record, *Bailey v. Bayles*, 2002 UT 58, ¶ 10, 52 P.3d 1158, it may affirm the district court's standing decision on the ground that PPAU has third-party standing under *Shelledy*.

**3.** Finally, PPAU qualifies for public-interest standing, which allows Utah courts to exercise jurisdiction over any case of significant public importance brought by an appropriate party. *Gregory*, 2013 UT 18, ¶ 15. The State effectively concedes (at 12–13) the importance of this case. And as the district court found (R.849), PPAU is an appropriate plaintiff. PPAU can adequately develop the legal and factual record required, and the threats of prosecution and other adverse government action against it give PPAU a clear incentive to do so. *E.g.*, R.801.

The State argues (at 13–14) that PPAU lacks public-interest standing because patients could instead bring suit. But PPAU submitted declarations from pregnant Utahns that demonstrate in detail why patients affected by the Act are unlikely to sue. *See supra* p. 11. The State submitted no evidence to rebut that showing, and it does not suggest PPAU

is unwilling, unable, or unlikely to represent the interests of pregnant Utahns at least as fully as they themselves would. Nor does the State explain how individual patients could possibly respond to discovery requests that the State has now served on PPAU in this very case, seeking extensive information about PPAU's abortion services as a whole.

At bottom, the State exalts form over substance by demanding, for example, that the pseudonymous declarants in this case "form an association" to litigate this matter or "join PPAU's suit [as plaintiffs,] letting it and its attorneys do the heavy lifting." State Br. 13. Neither gambit would do anything "to achieve the just, speedy, and inexpensive determination" of this action. Utah R. Civ. P. 1.

In any event, this Court has already rejected the legal contention that a plaintiff asserting public-interest standing must be the *most* appropriate party to bring suit. *Gregory*, 2013 UT 18, ¶¶ 14–18. PPAU is, at the very least, *an* appropriate party to bring the case. Nothing more is required.

## II. THE TRIAL COURT CORRECTLY FOUND THAT THE ACT WOULD CAUSE IRREPARABLE HARM AND THAT THE EQUITIES AND PUBLIC INTEREST FAVOR RELIEF

All the evidence in the record—since the State put forward *none*—supports the district court's finding that a preliminary injunction is necessary to prevent irreparable harm, and that the equities and public interest also favor the injunction. R.847–48. Despite this one-sided record and the deference owed to the district court's factual findings, *see, e.g.*, *State in Int. of E.R.*, 2021 UT 36, ¶ 15, 496 P.3d 58, the State now asks the Court to reject the district court's determinations wholesale. Its arguments lack merit.

**1.** The State faults the district court for considering the harm that the Act will cause to PPAU's patients, because, in the State's view, "patients are not parties to this case." State Br. 47. However, because PPAU has standing to sue on behalf of patients, *see supra* Part I, harms to patients are appropriately considered to assess irreparable harm and the equities. *E.g.*, *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67–68 (2020).

These harms are substantial. First, the loss of a constitutional right is alone sufficient to justify injunctive relief. *See Corp. of President of Church of Jesus Christ of Latter-Day Saints v. Wallace*, 573 P.2d 1285, 1287 (Utah 1978).

Second, if the Act were in effect, many of PPAU's patients would be unable to leave the state for abortions and would be forced to carry their pregnancies to term and bear children. Even in an uncomplicated pregnancy, an individual experiences a wide range of physiological challenges that put pregnant patients at greater risk of blood clots, nausea, hypertensive disorders, and anemia, among other complications. R.287–88. Pregnancy can also aggravate preexisting health conditions, including hypertension, diabetes, kidney disease, and autoimmune disorders, or lead to the development of new and serious health conditions, such as preeclampsia, deep vein thrombosis, and gestational diabetes. R.287. Moreover, pregnancy can induce or exacerbate mental health conditions or trigger a recurrence of mental illness. R.288–89.

Separate from pregnancy, labor and childbirth are themselves significant medical events with many risks. R.289. Each year, five to ten Utahns die as a result of pregnancy complications. R.393–4, 116:23–117:10. And the risk of mortality from pregnancy and childbirth is more than 12 times greater than from legal previability abortion. R.289. The

health risks of childbirth are not limited to mortality. Complications during labor occur at a rate of over 500 per 1,000 hospital stays, and the vast majority of childbirth delivery stays have a complicating condition. R.290. Potential adverse events include hemorrhage, transfusion, ruptured uterus or liver, stroke, unexpected hysterectomy (the surgical removal of the uterus), and perineal laceration (the tearing of the tissue around the vagina and rectum). *Id*. In Utah, more than one in five deliveries also occurs by cesarean section ("C-section"), an open abdominal surgery that carries risks of hemorrhage, infection, and blood clots, among others. R.291.

Forcing women to give birth also has long-term consequences for the course of their lives, their families' economic stability, and the well-being of their existing children. R.287–95; R.358–63.

Third, the Act would harm even those patients who are ultimately able to have an abortion, either by traveling out of state for medical care or by staying in Utah and self-managing their own abortions outside the medical system. Patients with resources to travel would still be forced to remain pregnant against their will, with all the attendant risks and medical consequences, until they could obtain out-of-state care, and they would likely obtain such care later in pregnancy than if they had abortion access in Utah. R.296. They would also suffer the additional costs and burdens associated with substantial travel—at minimum more than 540 miles round-trip from Salt Lake City—and might need to compromise the confidentiality of their abortion decision to obtain assistance with child

care or transportation. R.295–6; R.344, 356–7.[4] Patients who instead attempt to self-manage their own abortions in Utah would potentially risk criminal investigation and prosecution, *see, e.g.*, Utah Code § 76-5-201(1)(a)(ii); *State in Int. of J.M.S.*, 2011 UT 75, ¶ 21, 280 P.3d 410, and in some instances use methods that are unsafe, R.75, ¶¶ 5, 22.

Fourth, even patients who qualify for one of the Act's exceptions would be harmed. Those with rapidly worsening medical conditions—who, prior to the Act, could have obtained an abortion without explanation—would be forced to wait for care until their conditions became deadly or threatened permanent impairment so as to meet the Act's death and permanent injury exception. R.296. Patients facing devastating fetal diagnoses would be forced to prove, based on the written concurrence of two specialists, that the diagnosis qualifies for abortion, a process likely to delay care and increase the expense and emotional toll of such a diagnosis, R.297. And sexual assault survivors would be forced to go through the fraught process of coming forward about the assault to law enforcement to have the option of legally obtaining an abortion, a daunting requirement forced on no other autonomous patient in Utah's medical system. R.298; *see also* R.401 (estimated 88% of sexual assault victims do not report their assault).

[4] At this time, the closest out-of-state abortion providers are in Jackson, Wyoming (272 miles from Salt Lake City, one way); and Steamboat Springs, Colorado (329 miles). R.295. The closest second-trimester provider is in Durango, Colorado (392 miles). R.296. The continued availability of abortion in Wyoming depends on the outcome of litigation challenging that state's abortion ban, which is currently enjoined. H.B. 92, 66th Leg., Budget Sess. (Wyo. 2022); Prelim. Inj. Order, *Johnson v. Wyoming*, No. 18732 (D. Wyo. Aug. 10, 2022). The Idaho Supreme Court recently upheld that state's abortion ban, eliminating services there. *Planned Parenthood Great Nw., Haw., Alaska, Ind., Ky. v. Idaho*, No. 49817-2022, 2022 WL 2433644 (Idaho Jan. 5, 2023).

**2.** Even if the State were correct that the preliminary-injunction inquiry considers only harms to the plaintiff itself, PPAU has shown such harms. The district court found that PPAU and its staff would "suffer reputational harm or the threat of criminal and licensing penalties." R.847; *see also* R.281–2, 299; R.642–5.[5] And "[l]oss of business and goodwill may constitute irreparable harm susceptible to injunction." *Hunsaker v. Kersh*, 1999 UT 106, ¶ 10, 991 P.2d 67; *Zagg, Inc. v. Harmer,* 2015 UT App 52, ¶ 8, 345 P.3d 1273. Given the case law, and the State's failure to introduce countervailing evidence, the district court did not act contrary to the "clear[]…weight of the evidence" in holding that PPAU had established irreparable injury. *Sys. Concepts, Inc. v. Dixon*, 669 P.2d 421, 425 (Utah 1983) (internal quotation marks omitted).

**3.** With respect to the equities and public interest, the State faults the district court for ignoring interests "on the State side of the balance," including a purported interest in "maternal health and safety." State Br. 49. But in the district court, the State asserted a singular interest in protecting fetal life, and it dismissed harm to Utahns seeking abortion as legally irrelevant. R.571–72. It also never relied on the many other interests it now seeks to advance to support reversal of the preliminary injunction (at 49). The State, therefore, forfeited these arguments for appeal. *438 Main St.*, 2004 UT 72, ¶ 51.

Moreover, even if the State had raised these arguments, it offered no supporting evidence. In such circumstances, it was not erroneous—much less *clearly* so—to give

[5] Although the State suggests (at 48) that the court erred in considering harm to PPAU staff, the State forfeited this objection by not raising it below. *438 Main St. v. Easy Heat, Inc.*, 2004 UT 72, ¶ 51, 99 P.3d 801.

greater weight to PPAU's unrebutted evidence than the State's speculation as to the public interest and equities. *Utah Med. Prod., Inc. v. Searcy*, 958 P.2d 228, 231 (Utah 1998) (citing Utah R. Civ. P. 52(a)).

**4.** The State errs when it claims (at 50) that the district court discounted the State's asserted interest in fetal life. The court clearly acknowledged that asserted interest; it simply found that the current record does not demonstrate to what extent the Act would actually further such an interest. R.414–15; *see also* R.803, 48:20–21.

The State is likewise incorrect in asserting (at 50) that the *Legislature's* assessment of the public interest is determinative. It is the role of courts, not the Legislature, to weigh factors relevant to a preliminary injunction. Utah R. Civ. P. 65A. And Utah courts remain the final arbiters of whether legislation is consistent with this state's constitution. *State v. Tiedemann*, 2007 UT 49, ¶ 33, 162 P.3d 1106.

Similarly, while the State contends (at 49) that a preliminary injunction is inappropriate because abortion is "irreversible," so is bearing a child. "[T]he abortion decision is one that simply cannot be postponed, or it will be made by default with far-reaching consequences." *Bellotti v. Baird*, 443 U.S. 622, 643 (1979). The district court navigated these considerations not by minimizing an interest in fetal life, but by recognizing the one-sided record before it and maintaining the status quo. R.415.

**5.** The State's contention (at 10) that the Act represents the "status quo" is incorrect. The status quo is based on "the reality of the existing status and relationship between the parties" before the dispute began. *Schrier v. Univ. of Co.*, 427 F.3d 1253, 1260 (10th Cir. 2005) (internal quotation marks omitted). Access to legal abortion before

viability has been the rule in Utah for half a century, and in fact remains codified in a separate portion of the Code. *See* Utah Code § 76-7-302(a) ("An abortion may be performed in this state only under the following circumstances," which include where the fetus "is not viable"). Moreover, even when the Act briefly took effect in June 2022, PPAU contested its constitutionality, and it filed suit just one day later. R.6; R.34–5; R.48.

## III. THE DISTRICT COURT CORRECTLY HELD THAT "AT LEAST SERIOUS ISSUES" ON THE MERITS EXIST

Under Utah Rule of Civil Procedure 65A, preliminary-injunction applicants must show *either* "a substantial likelihood that [they] will prevail on the merits," *or* that "the case presents serious issues on the merits which should be the subject of further litigation." Utah R. Civ. P. 65A(e)(4); *Utah Med. Prod., Inc.*, 958 P.2d at 232. "[S]erious [merits] issues" are those that are so "substantial, difficult and doubtful, as to make them a fair ground for litigation," that is, they are based on arguments that are "not frivolous." *Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 358, 359 (10th Cir. 1986) (internal quotation marks omitted).[6]

PPAU easily meets the threshold for presenting "serious issues" on the merits, and it is in fact likely to prevail on the claims at issue in the preliminary-injunction order. The

[6] Rule 65A's standard originated from Tenth Circuit precedent applying the federal preliminary-injunction framework. Utah R. Civ. P. 65A, Advisory Comm. Note ¶ (e). While the Tenth Circuit has since abandoned the "serious issues" standard, Rule 65A expressly contains a "serious issues" prong, and that language therefore controls in all state civil litigation. Numerous other jurisdictions use a test similar or identical to Utah's, even absent comparable text. *E.g.*, *State v. Galvin*, 491 P.3d 325, 332–33 (Alaska 2021); *Fann v. State*, 251 Ariz. 425, 432, 493 P.3d 246 (2021); *Mohanty v. St. John Heart Clinic*, 225 Ill.2d. 52, 290, 866 N.E.2d 85 (2006).

State does not show otherwise. Instead, the bulk of the State's brief attempts to prove that no enumerated "right to abortion" exists in Utah. That is a straw man. The Utah Constitution "enshrines principles, not application of those principles." *S. Salt Lake City v. Maese*, 2019 UT 58, ¶ 70, n.23, 450 P.3d 1092. Accordingly, PPAU need not show that the Act violates a "right to abortion," as the State claims. The Act is unconstitutional because it forecloses abortion as the means by which individuals exercise substantive rights.

To the extent the State *does* address PPAU's specific claims, it invites this Court to decide core merits issues. But doing so at this early stage of litigation would be patently inappropriate, particularly given the narrow scope of the preliminary-injunction inquiry and the complexity of the constitutional claims at stake. *Centro de la Familia de Utah v. Carter*, 2004 UT 43, ¶¶ 5–6, 94 P.3d 261 (findings and conclusions at the preliminary-injunction stage "cannot provide a basis for disposing of [a] case on the merits"). The only question at this stage is whether serious merits issues exist as to the claims raised in this case, and for the reasons discussed below, the answer to that question is yes.

### A. The State employs the wrong method of constitutional interpretation.

The State's entire merits discussion hinges on its view that the "original public meaning" of the Constitution's text as of 1895 controls, and that this meaning—along with a presumption of constitutionality—precludes relief in PPAU's favor. But as demonstrated below, precedent and practice permit this Court to consider a variety of sources to interpret the Constitution, including "historical and textual evidence, sister state law, and policy arguments in the form of economic and sociological materials." *State v. Gardner*, 947 P.2d 630, 633 (Utah 1997) (quoting *Soc'y of Separationists*, 870 P.2d 916, 921 n.6 (Utah 1993)).

And contrary to the State's claim, no presumption of constitutionality can save the Act from invalidity.

### 1. *Neither the Constitution nor precedent compels the Court to analyze the Act's constitutionality based solely on original public meaning.*

At the time of early statehood, this Court relied on several considerations when interpreting constitutional language—none of which included the original public meaning of the text. In some cases, the court emphasized the need to discern the "intention of the framers."[7] *State v. Eldredge*, 76 P. 337, 339 (Utah 1904). In other cases, the Court emphasized sister state interpretations of similar constitutional provisions, as well as practical considerations, such as the Constitution's "future operation." *People v. City Council of Salt Lake City*, 64 P. 460, 462–63 (Utah 1900); *see Ellison v. Barnes*, 63 P. 899, 902–03 (Utah 1901); *Cooper v. Utah Light & Ry. Co.*, 102 P. 202, 206–07 (Utah 1909). And in other cases, the Court recognized that constitutions are to be interpreted in "light of the conditions and necessities in which the provisions originated, and in view of the purposes sought to be attained and secured." *People ex rel. O'Meara v. City Council,* 64 P. 460, 462 (Utah 1900).

Over the ensuing decades, this Court continued to employ a variety of interpretive

[7] As Justice Lee pointed out, "original public meaning originalism" should "be distinguished from original intent originalism." *Neese v. Utah Bd. of Pardons & Parole*, 2017 UT 89, ¶ 154, 416 P.3d 663 (Lee, J., dissenting) (quotation marks omitted). The latter is a distinct, and misguided, attempt to discern constitutional framers' thoughts. *Id.* & n.33.

methods, emphasizing the framers' intent;[8] resorting to sister state law;[9] examining textual evidence, historical practice, and policy;[10] and seeking an interpretation that was "sensible and realistic in its application to the affairs of life[, looking] to the background which produced it and the purpose it sought to accomplish."[11]

As the State observes (at 17–18), this Court more recently employed a new method of interpretation: original public meaning. But the Court has never applied that approach to the exclusion of all others—indeed, it took more than 100 years for the original-public-meaning approach to appear in Utah. Nor has the Court overruled the vast body of precedents recognizing and applying other interpretive methods. Just last term, for example, this Court acknowledged that the "historical understanding of [the Uniform Operation Clause] is not in line with its modern interpretation," and then proceeded to apply that modern interpretation. *Salt Lake City Corp. v. Utah Inland Port Auth.*, 2022 UT 27, ¶¶ 11–28, --- P.3d ---. Today, as in the past, "[h]istorical arguments" simply "do not represent a *sine qua non* in constitutional analysis." *Tiedemann*, 2007 UT 49, ¶ 37.

---

[8] *E.g.*, *Blackrock Copper Mining & Mill Co. v. Tingey*, 98 P. 180, 183 (Utah 1908); *State ex rel. Shields v. Barker*, 167 P. 262, 263 (Utah 1917); *Univ. of Utah v. Bd. of Examiners*, 295 P.2d 348, 361 (Utah 1956); *State Bd. of Educ. v. State Bd. of Higher Educ.*, 505 P.2d 1193, 1195 (Utah 1973); *P.I.E. Employees Fed. Credit Union v. Bass*, 759 P.2d 1144, 1146 (Utah 1988).

[9] *E.g.*, *Parkinson v. Watson*, 291 P.2d 400, 405 (Utah 1955); *Rampton v. Barlow*, 464 P.2d 378, 385–90 (Utah 1970).

[10] *E.g.*, *State v. Betensen*, 378 P.2d 669, 669 (Utah 1963); *Int'l Harvester Credit Corp. v. Pioneer Tractor & Implement, Inc.*, 626 P.2d 418, 420 (Utah 1981).

[11] *Gammon v. Federated Milk Producers Ass'n, Inc.*, 364 P.2d 417, 418 (Utah 1961).

The State nonetheless insists (at 17–18) that history and tradition in the 1890s should be treated as dispositive of the Constitution's meaning, effectively arguing that if abortion was illegal in 1895, it can be prohibited now. That is incorrect and would produce absurd results. Under the State's view, it would be consistent with the Utah Constitution today to:

- Reenact laws declaring interracial marriages "void" (and to do so in language so repugnantly racist that PPAU will not repeat it here), Utah Rev. Stat. § 1184 (1898) (R.698);
- Criminalize the employment of women to play music or to dance in any place where two or more persons assemble, *id*. §§ 4244-45 (R.699);
- Authorize minor children to be bound to apprenticeships, *id*. § 74 (R.697); and
- Criminalize the sale of liquor to all Native Americans and any persons cohabitating with a Native American woman, Laws of the State of Utah, ch. 76, § 1 (1896) (R.703).

Clearly, the fact that a specific law existed in 1895 cannot be the sole determinant of constitutional meaning. The Utah Constitution "enshrines principles, not application of those principles." *Maese*, 2019 UT 58, ¶ 70, n.23. And if a law is inconsistent with these principles when they are properly applied, the law is unconstitutional, even if people in 1895 did not appreciate that fact.

**2. *In any event, the State misapplies the original-public-meaning analysis.***

Even if the State were correct that an original-public-meaning approach should apply, the Court would first have to apply that approach to article VIII, section 2, the portion of the Utah Constitution governing the scope of judicial power. *See State v. Walker*, 2011 UT 53, ¶ 34, 267 P.3d 210 (Lee, J., concurring). That section grants to this Court the authority to "declare any law unconstitutional under this constitution" on the concurrence

of a majority of all justices. Utah Const. art. VIII, § 2. Article VIII, section 2's current text dates to 1984, when constitutional provisions governing the judicial department were completely revised. *State v. Hamilton*, 710 P.2d 174, 175 (Utah 1985).

Accordingly, even under the original-public-meaning doctrine, the scope of this Court's review, and specifically its power of constitutional interpretation, is defined by "how the words" of article VIII, section 2 "would have been understood by a competent and reasonable speaker of the language" in 1984. *Patterson*, 2021 UT 52, ¶ 91; *see id.* ¶ 92 (recognizing that "when the people of Utah amend the constitution," this Court must "look to the meaning that the public would have ascribed to the amended language when it entered the constitution"); State Br. 44–45 (addressing *Patterson*).

Utahns in 1984 would have understood that constitutional provisions are "not limited by their historical roots," *Am. Fork City*, 701 P.2d at 1073, and that constitutional interpretation should also include, for example, an analysis of sister state interpretations of similar provisions, *e.g.*, *KUTV, Inc. v. Conder*, 668 P.2d 513, 518–20 (Utah 1983); and policy arguments in the form of economic and sociological materials, *Utah Cnty. ex rel. Cnty. Bd. of Equalization of Utah Cnty. v. Intermountain Health Care, Inc.*, 709 P.2d 265, 272–74 (Utah 1985); *Timpanogos Planning & Water Mgmt. Agency v. Central Utah Water Conservancy Dist.*, 690 P.2d 562, 567 (Utah 1984). Therefore, the original-public-meaning doctrine, applied faithfully, would nevertheless dictate that the people of Utah intended for this Court, when interpreting the Utah Constitution, to weigh a variety of considerations and not be bound by the perspectives of Utahns in 1895.

### 3. *The State erroneously relies on a presumption of constitutionality.*

In defending the Act, the State invokes (at 17) a presumption of constitutionality for legislative acts, but that presumption "is extended to statutes not affecting fundamental rights or based on suspect classifications." *J.J.N.P. Co. v. State, By & Through Div. of Wildlife Res.*, 655 P.2d 1133, 1138 (Utah 1982). The presumption does not apply where, as here and discussed *infra*, the constitutional rights at issue implicate heightened scrutiny. *See id.*; *Jones v. Jones*, 2015 UT 84, ¶ 27, 359 P.3d 603; *see also, e.g.*, *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 499 (Kan. 2019) (per curiam); *State v. Beaver*, 2022 WL 17038564, at *27, --- S.E.2d --- (W. Va. Nov. 17, 2022).

Moreover, the presumption on which the State relies dictates only that statutes should be construed in ways that avoid invalidity, and that, in close cases, doubts as to constitutionality should be resolved in the Legislature's favor. *Vega v. Jordan Valley Med. Ctr., LP*, 2019 UT 35, ¶ 12, 449 P.3d 31. The doctrine does not vitiate this Court's power to interpret the constitution. *DeBry v. Noble*, 889 P.2d 428, 440 (Utah 1995). Utah courts have a "duty" to "safeguard the rights of the individual whenever such rights are invaded from whatever source." *State v. Holtgreve*, 200 P. 894, 900 (Utah 1921).

## B. PPAU has raised far more than serious issues as to the Equal Rights Provision.

**1.** Since Utah became a state in 1896, it has guaranteed civil, political, and religious equality between the sexes, as enshrined in the Equal Rights Provision:

> 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.

Utah Const. art. IV, § 1. This provision, one of the first of its kind, stands out among state constitutions for its breadth. Carrie Hillyard, *The History of Suffrage and Equal Rights Provisions in State Constitutions*, 10 BYU J. Pub. L. 117, 126–29, 137 (1996). The provision's first sentence is an affirmative guarantee of women's right to vote, while the second guarantees all persons not just a right to be free from sex-based discrimination in other aspects of life but also a positive entitlement to "enjoy equally" all rights and privileges, regardless of sex. Utah Const. art. IV, § 1; *see also*, *e.g.*, *King v. State*, 818 N.W.2d 1, 64 (Iowa 2012) (discussing unique role of state constitutions in establishing "positive commitments in the[ir] constitutional frameworks"); *State ex rel. Morrison v. Sebelius*, 179 P.3d 366, 381 (Kan. 2008) (same).

The rights and privileges covered by the Equal Rights Provision include those on which other PPAU claims rely—the right to determine one's family composition, the right to bodily integrity, the right to freedom of conscience, and the right to privacy. They also include all other rights "retained by the people," even if not expressly enumerated. Utah Const. art. I, § 25. The Equal Rights Provision not only ensures that all citizens will enjoy these rights, but that they will do so equally.

The structure of the Utah Constitution likewise confirms that article IV, section 1 confers a positive right on Utahns for the enjoyment of all civil, political, and religious rights. The Constitution elsewhere establishes a negative right under the Uniform Operations Clause to be free from unjustified sex-based classifications that cannot satisfy heightened scrutiny. *See, e.g.*, *State v. Canton*, 2013 UT 44, ¶ 36, 308 P.3d 517, 525. The Equal Rights Provision must have independent meaning.

Precedent, too, confirms that the Equal Rights Provision is best understood as a "matrix for achieving the goal of abolishing discriminatory practices which ought to be abolished," irrespective of the specific rights on which those discriminatory practices impinge. *Beehive Med. Elec., Inc. v. Indus. Comm'n*, 583 P.2d 53, 60 (1978). The provision has repeatedly provided the basis to invalidate laws that—though once "seemingly . . . benign[]," *id.*—rely directly or indirectly "on gender as a determining factor" for the availability of a right or privilege. *Pusey v. Pusey*, 728 P.2d 117, 119–20 (Utah 1986) (invalidating "arbitrary maternal preference" in custody disputes); *Sukin v. Sukin*, 842 P.2d 922, 926 (Utah Ct. App. 1992) (holding that custody could not "be based, directly or indirectly, on gender-based preferences or stereotypes"); *Hamby v. Jacobson*, 769 P.2d 273, 277 (Utah Ct. App. 1989) (invalidating "paternal preference for a child's surname").

**2.** The Criminal Abortion Ban violates the Equal Rights Provision for two reasons. First, it treats men and women differently by expressly singling out care for pregnant "*wom[e]n*," while leaving untouched the medical care available to men. Utah Code § 76-7a-201(1)(a), (c) (emphasis added). It is irrelevant that this classification may be premised on a physical characteristic unique to one sex. "Since time immemorial, women's biology and ability to bear children have been used as a basis for discrimination against them." *Doe v. Maher*, 40 Conn. Supp. 394, 444, 515 A.2d 134 (Super. Ct. 1986); *Planned Parenthood of Mich. v. Att'y Gen. of the State of Mich.*, No. 22-000044, 2022 WL 7076177, at *16 (Mich. Cl. Ct. Sept. 7, 2022) (recognizing that abortion ban "deprives *only women* of their ability to thrive as contributing participants in [the] world outside the[ir] home"). While "[i]nherent differences between men and women" are "cause for

celebration," they "may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women." *United States v. Virginia*, 518 U.S. 515, 533–34 (1996) (internal quotation marks & citation omitted).

Second, the Criminal Abortion Ban disproportionately impairs women's ability to fully enjoy civil, political, and religious rights and privileges by forcing them to remain pregnant and give birth against their will. Under the Act, the moment a woman receives a positive pregnancy test, the government seizes a significant measure of her bodily autonomy, and in turn "her ability to work or go to school," and to determine "the shape of her present and future life." *Planned Parenthood of Mich.*, 2022 WL 7076177, at *16; *see also N.M. Right to Choose/NARAL v. Johnson*, 126 N.M. 788, ¶ 40, 975 P.2d 841 (1998).

These harms are substantial. *See generally* R.280–389; R.713–29. For example, as compared to women who receive an abortion, women denied an abortion are less likely to be employed full-time, more likely to receive public assistance, and more likely to not have enough money to meet basic living needs. R.296; *see also* R.362, ¶ 43. In addition, women who seek but are denied an abortion are, when compared to those who are able to access abortion, more likely to lower their future goals and less likely to be able to exit abusive relationships. R.295. And women's political participation is depressed in the months after childbirth; while turnout eventually increases, it "remain[s] significantly lower compared to prior levels."[12]

[12] Yosef Bhatti *et al.*, *Can you deliver a baby and vote? The effect of the first stages of parenthood on voter turnout*, 29 J. Elections, Pub. Op. & Parties 61, 62, 78 (2019).

**3.** Under this Court's precedent, laws that either directly single out women for disfavorable treatment or disproportionately impair their ability to enjoy civil and political rights and privileges warrant the application of *at least* intermediate constitutional scrutiny. *See Pusey*, 728 P.2d at 119–20. And as PPAU argued in the district court, strict scrutiny is the form of review that should actually apply to this claim. R.253–55; *see also, e.g.*, *N.M. Right to Choose*, 126 N.M. 788, ¶¶ 2, 37 (applying strict scrutiny under New Mexico's Equal Rights Amendment to hold that a "rule prohibiting state funding for certain medically necessary abortions denie[d] Medicaid-eligible women equality of rights under law"); *Hodes*, 440 P.3d at 496 (explaining why strict scrutiny has been applied by "a majority of other courts" that have determined their state constitutions protect a patient's abortion decision).

Where heightened scrutiny applies, "the burden of proof shifts to the State to show that a challenged provision" is appropriately tailored to advance a sufficiently strong state interest. *Utah Safe to Learn-Safe to Worship Coal., Inc. v. State*, 2004 UT 32, ¶ 24, 94 P.3d 217. The State has not come close to meeting its burden of showing that the Act "substantially advance[s]" an "important government[] interest," *In re Adoption of J.S.*, 2014 UT 51, ¶¶ 69, 358 P.3d 1009 (emphasis omitted), as required under intermediate scrutiny, or that the Act is the "least restrictive means" available to further a "compelling government[] interest," *id.* (emphasis omitted), as required to satisfy strict scrutiny.

As an initial matter, the State has not demonstrated that its sole interest asserted in the district court—an interest in fetal life—is sufficiently strong to justify a ban on abortion at all stages of pregnancy. In particular, a "compelling interest" must be "not only

extremely weighty, possibly urgent, but also rare—much rarer than merely legitimate interests and rarer too than important interests." *Hodes*, 440 P.3d at 493 (quoting Richard H. Fallon Jr., Strict Judicial Scrutiny, 54 UCLA L. Rev. 1267, 1273 (2007))). Yet the State has presented no "proof" to support such a finding here. *Jones v. Jones*, 2015 UT 84, ¶ 32, 359 P.3d 603. The State's other purported interests—suggested for the first time on appeal and wholly lacking in record support—also cannot suffice. *See Virginia*, 518 U.S. at 533 (to satisfy heightened scrutiny, state interest "must be genuine, not hypothesized or invented post hoc in response to litigation").

Moreover, the State provides no basis for overturning the district court's factual determination that "it is unclear on this record whether and to what extent the Act will ultimately further its legislative goals." R.847; *see also, e.g.*, *Adoption of J.S.*, 2014 UT 51, ¶ 70 (emphasizing stringency of this inquiry even under intermediate scrutiny). That factual determination is confirmed by the under- and over-inclusion of the statute's exceptions, some of which bear no relation to the State's asserted goal of protecting fetal life. *See* Utah Code Ann. § 76-7a-201(1)(b)–(c) (permitting abortion based on a "severe [fetal] brain abnormality" or in cases of rape and incest); *Blue Cross & Blue Shield of Utah v. State*, 779 P.2d 634, 645 (Utah 1989) (considering over-inclusion in constitutional analysis); *see also, e.g.*, *Planned Parenthood S. Atl. v. State*, No. 2022-001062, 2023 WL 107972, at *11 (S.C. Jan. 5, 2023) (lead op.) ("While the State has an interest in fetal life . . . , we agree with Petitioners that the Act's six-week ban does not serve that interest.").

The Act's invalidity under heightened scrutiny is also confirmed by the fact that the State has foregone less restrictive means of advancing its interest. Women seeking

abortions often do so for financial reasons, a need to care for other children, and because of their pregnancy timing. R. 285–6; *see also* M. Antonia Biggs et al., *Understanding Why Women Seek Abortions in the US*, 13 BMC Women's Health 1 (2013). Utah could advance its interest in fetal life by taking steps to support pregnant and parenting women, such as by ensuring access to prenatal care and adequate medical leave for childbirth. R.291–2. *Cf.* Utah Code § 76-7-305.5(2)(g) (recognizing relevance of public and private resources to women's abortion decisions). Instead, the State has imposed a categorical ban on abortion at all stages of pregnancy, which it cannot do. *Cf. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 n.9 (1980) (invalidating "blanket ban" on commercial speech where more limited regulations would have furthered the State's interests).

**4.** The State claims (at 30) that PPAU cannot prevail on its article IV, section 1 claim because that guarantee must be read narrowly as a "voting-rights provision." According to the State, the second sentence of the provision addressing the equal enjoyment of civil, political, and religious rights has no operative effect but instead is a mere prediction of what will result from allowing women to vote. That interpretation is wrong for at least four reasons.

First, the State's reading of article IV, section 1 cannot be squared with the Constitution's text. It would render the second sentence of the Equal Rights Provision wholly superfluous, contrary to well established canons of construction that avoid such a result. *Beynon v. St. George-Dixie Lodge No. 1743, Benevolent & Protective Ord. of Elks*, 854 P.2d 513, 518 n.21 (Utah 1993). The State's reading also conflicts with article I, section 26, under which all sections of the Constitution are "mandatory and prohibitory, unless by

express words they are declared to be otherwise." Utah Const. art. I, § 26.

Second, the State's reading defies precedent. Utah courts have repeatedly applied the Equal Rights Provision outside the realm of voting rights. *Pusey*, 728 P.2d at 119–20 (custody disputes); *Sukin*, 842 P.2d at 926 (same); *Hamby*, 769 P.2d at 277 (paternal preference for a child's surname).[13]

Third, the State's reading of article IV, section 1, if correct, would lead to implausible consequences. It would render the provision totally irrelevant to laws with the purpose and effect of barring women but not men from, for example, working outside the home or joining the Utah Bar. And as read by the State, Utah's Equal Rights Provision would, despite its more specific text, provide women *less* protection from sex discrimination than the Uniform Operations Clause and the U.S. Constitution's Equal Protection Clause.

Fourth, the constitutional debates do not confirm, as the State erroneously contends (at 30–31), that the original understanding of the provision was limited to suffrage and political office. The State's cherry-picked rendition of the history relies on only two delegates, while ignoring other statements suggesting delegates understood the provision expansively. One delegate, for example, suggested that the provision gave women "equal rights with men, *not only to vote*, but to hold office and *enjoy all the rights* that men enjoy." Proceedings & Debates of Convention Assembled to Adopt a Constitution for the State of

[13] Wyoming courts have likewise interpreted a nearly identical constitutional provision as extending beyond voting and public office. *Ward Terry & Co. v. Hensen*, 75 Wyo. 444, 297 P.2d 213 (1956).

Utah, 25th Day, at 429 (March 28, 1893) (transcript available at https://le.utah.gov/documents/conconv/25.htm) (statement of John Chidester) (emphasis added).

For all of these reasons, PPAU has demonstrated not only serious issues as to its Equal Rights Claim, but also that it is likely to prevail on this claim.

### C. PPAU has presented, at minimum, serious legal issues as to its claim under the Uniform Operation of Law ("UOL") Clause.

Article I, section 24 of the Utah Constitution contains a general "state-law counterpart to the federal Equal Protection Clause." *Canton*, 2013 UT 44, ¶ 35. Under this provision, "[a]ll laws of a general nature shall have uniform operation." Utah Const. art. I, § 24. Contrary to the State's suggestion (at 31–32), this Court uses a modern understanding of the UOL clause to interpret the constitutionality of state statutes. *See Salt Lake City Corp.*, 2022 UT 27, ¶¶ 11–28. And under this formulation, PPAU is likely to prevail and has, at minimum, raised substantial merits issues.

**1.** Utah courts apply a "three-step inquiry" to UOL claims under the modern constitutional formulation, asking "(1) whether the statute creates any classifications; (2) whether the classifications impose any disparate treatment on persons similarly situated; and (3) if there is disparate treatment, whether the legislature had any reasonable objective that warrants the disparity." *Count My Vote, Inc. v. Cox*, 2019 UT 60, ¶ 29, 452 P.3d 1109 (quoting *State v. Robinson*, 2011 UT 30, ¶ 17, 254 P.3d 183).

The third and final step of this formulation "incorporates varying standards of scrutiny." *Canton*, 2013 UT 44, ¶ 36. When the classification implicates a "suspect class" or "fundamental rights," a heightened standard of review applies. *Id.*; *see also DIRECTV*

*v. Utah State Tax Comm'n*, 2015 UT 93, ¶ 50, 364 P.3d 1036; *Gallivan v. Walker*, 2002 UT 89, ¶ 42, 54 P.3d 1069.

**2.** The Act imposes three relevant classifications. First, as discussed above in Section III.B, the Act singles out women for less favorable treatment and disadvantages them as a class compared to men.[14] Second, the Act disadvantages women seeking abortions in circumstances the Legislature condemns as compared to those who seek abortion in circumstances the State finds sympathetic, as exemplified by the Act's exceptions. Utah Code § 76-7a-201(1). Third, the Act distinguishes between patients who seek to exercise their right to bodily integrity by having an abortion, as opposed to those who seek to exercise that right by carrying their pregnancies to term.

The State contends (at 33) that the "first alleged classification" distinguishing women from men "is not found in the Act" and therefore does not exist. To the contrary, the Act clearly expresses the Legislature's view that only women obtain abortions. It provides, for example, an exception to the ban where necessary to prevent the "death of *the woman* on whom the abortion is performed." Utah Code § 76-7a-201(1)(a) (emphasis added); *see also id.* § 76-7a-201(1)(c) (same with respect to some cases where the "woman is pregnant as a result of" rape or incest); *id.* § 76-7a-101 (excluding from the definition of

[14] That people of various genders become pregnant and seek abortion does not change this analysis, given that the Act's purpose and effect is to enforce the gendered role differentiation that subordinates women as a class. *Cf. Hunter v. Underwood*, 471 U.S. 222, 229–33 (1985) (constitutional provision with the purpose and effect of disenfranchising Black voters violated the federal Equal Protection Clause notwithstanding its disenfranchisement of some white voters too).

abortion certain instances in which the "consent of the pregnant woman" is not obtained). The State's suggestion (at 34) that this Court should ignore the plain text of the "statute's exceptions" is at odds with precedent. In *Malan v. Lewis*, this Court made clear that the relevant analysis for UOL claims should focus not only on the challenged statute's prohibition, but also on "exceptions to th[e] classification[]," which in that case were "created by other statutes." 693 P.2d 661, 671 (Utah 1984). In fact, a statute may create a classification for a UOL claim even if that classification is "not expressly created by the statute," but "result[s] from the application and operation of the statute." *Gallivan*, 2002 UT 89, ¶ 44.

The State also errs (at 33) when it relies on *Wood v. University of Utah Medical Center*, 2002 UT 134, 67 P.3d 436, *abrogation on other grounds recognized by Waite v. Utah Lab. Comm'n*, 2017 UT 86, 416 P.3d 635, to argue that the other two classifications identified by PPAU "are not genuine classes" because they rest on individuals' choices. At most, *Wood* left open the question as to whether an immutable characteristic could support a relevant classification for a UOL claim. *See* 2002 UT 134, ¶ 35. Since *Wood* was decided in 2002, this Court has routinely applied the UOL clause to classifications beyond those involving immutable traits. *See, e.g.*, *Anderson v. Provo City Corp.*, 2005 UT 5, ¶ 17, 108 P.3d 701 (classes of "occupying and nonoccupying [property] owners"); *State v. Angilau*, 2011 UT 3, ¶ 24, 245 P.3d 745 (classifications of criminal defendants based on the

"severity of [criminal] offense"); *State v. Outzen*, 2017 UT 30, ¶ 18, 408 P.3d 334 (classifications based on ingestion of a controlled substance).[15]

**3.** As to the third prong of the UOL analysis—whether the legislature was justified in treating classes differently—heightened scrutiny applies to the challenged classifications because they impose disparate treatment not only on the basis of sex but also on the basis of fundamental rights to familial decision-making, bodily integrity, and privacy. *Count My Vote, Inc.*, 2019 UT 60, ¶ 29. And for the reasons discussed above, the Act cannot survive such review. *See supra* Section III.B.3.

### D. PPAU has presented at least serious issues for litigation over its bodily integrity claim.

PPAU has presented at least serious issues on the merits of its substantive due process claim, which rests on a constitutionally protected interest in bodily integrity, and it is in fact likely to prevail at judgment.

**1.** Article I, section 7 of the Utah Constitution prohibits the State from depriving individuals of their "liberty . . . without due process of law." This guarantee has both procedural and substantive components, *In re Adoption of K.C.J.*, 2008 UT App 152, ¶ 14,

[15] The State's reliance on *In re Adoption of B.Y.*, 2015 UT 67, 356 P.3d 1215, is similarly misplaced. In that case, the litigant's UOL claim failed because he did not challenge "the rationality of the classification that was made by the legislature" and instead "assert[ed] only that *further classification* would have been better." *Id.* ¶ 50. In contrast PPAU challenges the Act's actual classifications and contends that, for purposes of the State's asserted interest in fetal life, patients harmed by the Act are similarly situated to those treated differently by the Act's line-drawing.

184 P.3d 1239, and its substantive aspects encompass "legal protection [for] a person's bodily integrity." *Malan*, 693 P.2d at 674 n.17.

This legal tradition respecting bodily integrity is evident throughout Utah law. In the context of search and seizures, for example, Utah courts have held that bodily integrity is threatened by "intruding into the suspect's living room, eavesdropping on phone calls, or compelling the suspect to go to the police station with the officers." *State v. Alverez*, 2006 UT 61, ¶ 34, 147 P.3d 425. A right to bodily integrity also underpins the common-law doctrine of informed consent. *Nixdorf v. Hicken*, 612 P.2d 348, 354 (Utah 1980) ("This duty to inform stems from . . . the patient's right to determine what shall or shall not be done with his body." (citation omitted)); *see also, e.g.*, *Wagner v. State*, 2005 UT 54, ¶¶ 51, 57, 122 P.3d 599 (recognizing that "the law of torts, and battery in particular, was designed to protect people from unacceptable invasions of bodily integrity"). And the open-courts clause provides that "every person, for an injury done to the person in his or her person, property, or reputation, shall have remedy by due course of law." Utah Const. art. I, § 11. By focusing on harms to one's "person," not just property, this clause, too, confirms a historical tradition of protecting bodily integrity. *See also, e.g.*, *In re Boyer*, 636 P.2d 1085, 1089 (Utah 1981) (discussing "an individual's liberties of self-determination, right of privacy, . . . or right to make one's own . . . medical decisions").

By forcing Utahns to remain pregnant and give birth, the Act impinges on these personal decisions, requiring PPAU's patients to unwillingly submit to more than nine months of dramatic physical transformation as well as childbirth, and endure increased physical risks, including an increased risk of death and invasive medical interventions.

R.287–91; *supra* Part II. The Act would remove the decision whether to endure these risks and hardships from the person who will endure them and vest it in the government at all stages of pregnancy. Because the Act impinges on a fundamental right to bodily integrity, it is subject to heightened scrutiny, which it cannot survive. *See supra* Part III.B.3.

**2.** The State largely ignores the scope of article I, section 7, stating only that this Court "disapprove[s]" the application of substantive due process to rights that "were 'unknown at common law' and not 'deeply rooted in the nation's history and tradition.'" State Br. 36–37 (quoting *In re J.P.*, 648 P.2d at 1375). But as the cases just discussed from tort, search-and-seizure, and other contexts demonstrate, protection of bodily integrity *is* deeply rooted in Utah. The State suggests (at 37) that these examples are irrelevant because PPAU's claim arises under substantive due process. But PPAU uses these examples not to suggest that it is bringing the same claims as litigants in these cases, but to show that Utah has long recognized a fundamental principle of protection for bodily integrity and has done so in a range of legal areas. *See also supra* Part III.B.1 (explaining how this and other rights asserted by PPAU are incorporated into the Equal Rights Provision).

That protection is consistent with the law in sister states, many of which have found that bodily integrity is fundamental and necessarily extends to a person's decision whether to have an abortion. *See, e.g.*, *Women of State of Minn. by Doe v. Gomez*, 542 N.W.2d 17, 27 (Minn. 1995); *Moe v. Sec'y of Admin. & Fin.*, 382 Mass. 629, 648–49, 417 N.E.2d 387 (1981); *Hodes*, 309 Kan. 610, 616–18, 646–50, 678.

And even if this Court were to focus more narrowly on abortion in Utah's history, as the State urges, PPAU has still demonstrated that it is likely to prevail. At common law,

abortion was legal before "quickening," *see, e.g.*, *State v. Steadman*, 214 S.C. 1, 7, 51 S.E.2d 91, 93 (1948); *Mitchell v. Commonwealth*, 78 Ky. 204, 208 (1879); *State v. Emerich*, 13 Mo. App. 492, 495 (1883), *aff'd*, 87 Mo. 110 (1885), a term that roughly corresponds to 16–18 weeks of pregnancy, *see, e.g.*, *Roe*, 410 U.S. at 132. Moreover, even though Utah banned abortion at the time of its founding, women still sought abortions,[16] particularly before "quickening." Abortifacients were widely available both through the mail and at pharmacies,[17] and prosecutions were rare. *See* R.678–79 (discussing professional conduct cases).

**3.** PPAU's substantive due process claim also follows directly from this Court's decision in *Wood*, 2002 UT 134. *Wood* considered the constitutionality of the Utah Wrongful Life Act, which barred tort claims based on an allegation that a person would have been aborted "but for the act or omission of another" person, including a healthcare provider. *Id.* ¶ 1 (quoting Utah Code § 78–11–24 (2002)). A patient raising one of these

---

[16] *See, e.g.*, B.O.L. Potter, M.D., Letter, *That Abortion Case*, Salt Lake City Trib., Nov. 6, 1884, at 4, available at https://newspapers.lib.utah.edu/search?facet_type=%22page%22&gallery=1&rows=200&parent_i=13120260#g3.

[17] *E.g.*, Advertisement, *Mesmin's French Female Pills*, Daily Enquirer, Apr. 10, 1893, at 2, available at https://newspapers.lib.utah.edu/search?facet_type=%22page%22&gallery=1&rows= 200&parent_i=1466218#g1; Advertisement, *Dr. Mott's Pennyroyal Pills*, Ogden Daily Standard, May 2, 1893, at 2, available at https://newspapers.lib.utah.edu/search?facet_type=%22page%22&gallery=1&rows=200&parent_i=7514821#g1; Advertisement, *Dr. Martel's Female Pills*, Deseret Evening News, Sept. 12, 1910, at 9, available at https://newspapers.lib.utah.edu/details?id=2356700&month_t=%22september%22&q=female+pills&rows=200&sort=date_tdt+asc%2Cparent_i+asc%2Cpage_i+asc&year_start=1910&year_end=2021; Amanda Hendrix-Komoto, *The Other Crime: Abortion and Contraception in Nineteenth- and Twentieth-Century Utah*, 53 Dialogue 33, 41–42 (2020).

tort claims argued that the Act violated both federal and state due process protections by having the "purpose and effect" of "unduly burden[ing] a fundamental constitutional right—the right of a woman to abort an unviable fetus." *Id.* ¶ 16.

This Court first rejected the federal due process argument based in part on the lack of evidence that the law infringed on the abortion right. It nevertheless recognized that under *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), *overruled by Dobbs*, 142 S. Ct. at 2284, a law that "place[d] a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" was unconstitutional. *Wood*, 2002 UT 134, ¶¶ 25–26, 29.

The *Wood* Court then rejected the challenger's state due process claim, expressly incorporating "the reasons given above under the federal due process analysis." *Id.* ¶ 29. It explained:

> At this time we do not interpret the Utah Constitution to give any further protection to plaintiffs than does the federal constitution. We note that our state constitution may, under some circumstances, provide greater protections for our citizens than are required under the federal constitution. Nevertheless, in this instance, we find no compelling need to interpret the Utah Constitution differently from the United States Constitution.

*Id.* Accordingly, while *Wood* did not define the outer limits of state due process protection for the abortion decision, this Court did conclude that the state standard is *at least* as protective as the federal due process standard was in 2002, when *Wood* was decided.

Under that standard, PPAU is likely to prevail on its due process claim. Going farther than the law at issue in *Wood*, the Act is intended to prohibit abortion, including at the very earliest stages of pregnancy, and it "place[s] a substantial obstacle in the path of

[*every*] woman seeking an abortion" in Utah. *Id.* ¶ 17 (quoting *Casey*, 505 U.S. at 877); *see Jane L. v. Bangerter*, 102 F.3d 1112, 1118 (10th Cir. 1996) (invalidating Utah's previability abortion ban under the federal "substantial obstacle" standard).

The State's attempts to diminish *Wood*'s significance are unavailing. While the State claims (at 46–47) that *Wood* only briefly analyzed the state due process claim, it ignores this Court's express incorporation of twelve earlier paragraphs analyzing the federal claim, *Wood*, 2002 UT 134, ¶¶ 17–28. And even if the State were correct that *Wood* stands, at best, for the proposition that this Court "was not going to stretch the Utah Constitution past federal constitutional abortion precedents" as they stood in 2002, State Br. 46–47, PPAU would still prevail under that reading of the Court's decision.

### E. PPAU has presented more than a serious issue for litigation as to its family-composition claim.

**1.** PPAU has raised serious legal issues in support of its claim that the Utah Constitution protects Utahns' right to determine for themselves how to compose their families and to parent, and that the Act infringes on that right. Indeed, PPAU is likely to prevail on this claim.

The "constitutionally guaranteed right to form and preserve the family is one of the basic principles for which organized government is established." *In re J.P.*, 648 P.2d at 1373 (quoting *Lacher v. Venus*, 177 Wis. 558, 569, 188 N.W. 613 (1922)); *see also, e.g.*, *In re Castillo*, 632 P.2d 855, 856 (Utah 1981) ("[T]he ideals of individual liberty which . . . [are] essential in [a] free society . . . protect the sanctity of one's home and family."). Accordingly, "[t]he rights inherent in family relationships—husband-wife, parent-child,

and sibling—are the most obvious examples of rights retained by the people," *In re J.P.*, 648 P.2d at 1373, and protected under the Utah Constitution, *see* Utah Const. art. I, §§ 2, 25, 26; *see also supra* Part III.B.1 (explaining how this right is enforceable through the Equal Rights Provision's protections).

Nor is there any doubt that the Act impinges on these rights without sufficient justification. The record demonstrates that 49% percent of people who seek abortions are already parents, R.349, and 45% of PPAU's abortion patients report earning less than 130% of the federal poverty level, R.54. Being forced to carry a pregnancy to term and give birth frequently results in a parent's diminished ability to meet existing children's "intellectual, emotional, and social" needs, an impact that the State entirely ignores. *State in re P.L.L.*, 597 P.2d 886, 888–89 (Utah 1979); R.242, 244–45; *see also* R.720; R.723–24. Moreover, the Act violates Utahns' right to determine their own family composition by forcing pregnant people to establish a parent-child relationship that they otherwise seek to avoid. *See In re Adoption of J.S.*, 2014 UT 51, ¶ 78 (Utah law treats "mother's parental rights and responsibilities as fully matured at the time of the child's birth," irrespective of later adoption); *supra* Part III.B.2.

**2.** The State contends that PPAU cannot prevail on its family-composition claim for two primary reasons.

*First*, the State argues (at 28) that while Utahns with children have a right to raise and care for those children, Utahns have no constitutional right to "*prevent* . . . [a] parent-child relationship from existing." This argument proves too much. If the State were correct, the Utah legislature could adopt laws that prohibit married couples from purchasing birth

control or that require married couples to procreate. The Utah Constitution's protections are not so flimsy, even when an individual's desire *not* to become a parent "contradict[s] [the State's] officially approved values." *In re J.P.*, 648 P.2d at 1376. Instead, Utah's protection for family autonomy, including families without children, "helps to assure the diversity characteristic of a free society." *Id.*

Recognition of an individual's constitutional right *not* to have a child is also grounded in Utah's long tradition of protecting citizens' right to establish their families—broadly defined—free from unjustified government interference. As early as 1852, for example, the Utah territory allowed divorce not only for adultery and desertion, but also when "the parties [could not] live in peace and union together."[18] And early in statehood, Utah granted an unusual degree of authority over family matters to probate courts, in part to ensure that family practices, like polygamy, were shielded from federal court intervention.[19] The decision whether to "bear[] and rais[e]" children is similarly significant, *In re J.P.*, 648 P.2d at 1376 (internal quotation marks omitted), and it fits squarely within what early Utahns would have considered a decision reserved to the family unit.

Second, the State misreads *In re J.P.* when it contends (at 28) that this Court "expressly rejected the reasoning and conclusions" of *Roe*, 410 U.S. 113, such that any

[18] Lisa Madsen Pearson & Carol Cornwall Madsen, *Innovation and Accommodation: The Legal Status of Women in Territorial Utah, 1850–1896*, at 44, in Women in Utah History (eds. Patricia Lyn Scott & Linda Thatcher 2005), available at https://digitalcommons.usu.edu/cgi/viewcontent.cgi?article=1108&context=usupress_pubs. (quoting 1852 Utah Statute).

[19] *Id*. at 41.

parental liberty right under Utah law cannot extend to decisions involving abortion. To the extent this Court criticized *Roe* in *In re J.P.*, it did so only with respect to an implied federal privacy right. Irrespective of whether the U.S. Constitution's Fourteenth Amendment protects a right to abortion rooted in privacy, the Utah Constitution nevertheless protects a right to determine the size and scope of one's family.

### F. PPAU has presented more than a serious issue for litigation as to its freedom-of-conscience claim.

Given historical tensions between the Church of Jesus Christ of Latter-day Saints and non-members of the Church, the "citizens of Utah know, perhaps better than those of any other state, what evils can befall people, communities, and government when religious strife is pervasive." *Soc'y of Separationists, Inc.*, 870 P.2d at 940. As a result, Utah has one of the broadest state constitutional protections in the country regarding religion and matters of conscience. *Id.* at 935–36; *see also, e.g.*, Hon. Christine M. Durham, *What Goes Around Comes Around: The New Relevancy of State Constitution Religion Clauses*, 38 Val. U. L. Rev. 353, 354, 361 & n. 54 (2004). "[N]o other state constitution forbids"—as the Utah Constitution does—"the union of church and state [and] the domination or interference by any church with state functions." *Soc'y of Separationists, Inc.*, 870 P.2d at 940. Article I, section 4 also uniquely protects "rights of conscience," stating without qualification that they "shall *never* be infringed." Utah Const. art. I, § 4 (emphasis added).

PPAU is likely to prevail on its claim under article I, section 4, and at minimum has shown that serious merits issues exist for litigation. Some Utahns are called as a matter of conscience to end their pregnancies, determining, for example, that they have an obligation

to do so where they cannot economically or emotionally care for a child. R.713–29. Some may be called to protect their own health or well-being by having an abortion, R.286–87, and conclude, consistent with the teaching of their faith but contrary to the State's view, that abortion does not end the "lives of unborn children," Utah Code § 76-7-301.1. In each of these cases, the Act would override Utahns' ability to exercise their rights of conscience in favor of the State's preferred view as to when, pursuant to the Act, abortion is justified.

The State (at 39) and its amici argue that if PPAU could prevail on its article I, section 4 claim, the State would be powerless to prevent other crimes. But the State points to no example of an individual who, as a matter of conscience or religious belief, successfully challenged laws proscribing prostitution or murder, for example.[20] That is no surprise: any applicable legal analysis would account for the strength of the State's interests and the fit of the criminal restriction. Moreover, unlike laws that prohibit Utahns from performing these types of criminal acts, the Criminal Abortion Ban requires Utahns to affirmatively take action that is at odds with their own consciences, and to do so for *months* during pregnancy and childbirth.

Nor can the Act be upheld on the ground urged by the State (at 39) that it does not actually require Utahns to *believe* that abortion is immoral. If that were the standard, article I, section 4's strong protections, and in particular its guarantee of religious *exercise*, would be a dead letter. In addition, Utah's exceedingly broad guarantee for conscience would, in

[20] *Compare, e.g.*, Religious Coal. for Reprod. Choice, www.rcrc.org (last visited Jan. 20, 2023) (describing national, interfaith coalition that seeks to advance reproductive health and justice).

fact, provide less protection than the narrower federal First Amendment. *See, e.g.*, *Wooley v. Maynard,* 430 U.S. 705 (1977). That cannot be the law.

### G. PPAU has raised at least serious issues as to the merits of its privacy claim.

Utah's right to privacy is rooted in article I, section 14, of the Utah Constitution, which provides in relevant part 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" (emphasis added). Its protection prevents "intrusion into" matters "which might result in shame or humiliation, or merely violate one's pride in keeping [one's] private affairs to [one]self." *Redding v. Brady*, 606 P.2d 1193, 1195 (Utah 1980); *Allen v. Trueman*, 100 Utah 36, 110 P.2d 355, 360 (1941) (describing right as protecting "the individual against oppressive invasion" of "personal rights"). Accordingly, Utahns' right to privacy "in their persons" fairly encompasses a right to both decisional privacy—the privacy of one's affairs—and informational privacy—security from disclosures of personal information.

**1.** An individual's pregnancy and decision to form family relationships is one such "activit[y] and manner of living that would generally be regarded as being of such personal and private nature as to belong to [one]self and to be of no proper concern to others." *Redding*, 606 P.2d at 1195. Generations of women have grown to have a reasonable expectation that their right to private decision-making about their bodies includes an ability to decide to end a pregnancy. Numerous other state supreme courts have so held. *See, e.g.*, *Planned Parenthood S. Atl.*, 2023 WL 107972 (lead op.); *id.* at *49 (Few, J., concurring in judgment); *Armstrong*, 1999 MT 261, ¶ 47; *Am. Acad. of Pediatrics v.*

*Lundgren*, 16 Cal. 4th 307, 327, 940 P.2d 797 (1997); *Hope v. Perales*, 83 N.Y.2d 563, 575, 634 N.E.2d 183 (1994); *Maher*, 40 Conn. Supp. 394, 426; *Valley Hosp. Ass'n v. Mat-Su Coal. for Choice*, 948 P.2d 963, 964, 968–69 (Alaska 1997); *In re T.W.*, 551 So.2d 1186, 1192–93 (Fla. 1989); *Right to Choose v. Byrne*, 91 N.J. 287, 303–04; 450 A.2d 925 (1982).

The Act's infringement on Utahns' fundamental right to privacy by banning abortion throughout pregnancy is another basis on which the law is invalid, and for all the reasons discussed in Part III.B.3, the Act cannot possibly withstand scrutiny.

**2.** The Act likewise violates patients' right to informational privacy. Under the reported rape exception, a patient seeking an abortion is forced either to report the assault or to authorize their physician to do so, regardless of the patient's wishes. This report would disclose a patient's private information, including information likely to reveal that they are seeking or obtained an abortion. R.405. Law enforcement would then have authority to pursue a prosecution against the perpetrator without the patient's consent, in some cases making her identity and details of her assault (and possibly abortion) public. R.401.

A patient's medical information "is as much entitled to privacy from unauthorized public or bureaucratic snooping as" as is information traditionally protected against unreasonable searches and seizures, such as a "person's bank account, the contents of [one's] library or [one's] membership in the NAACP." *Grafilo v. Wolfsohn*, 33 Cal.App.5th 1024, 1034, 245 Cal.Rptr.3d 564 (2019); *accord T.L.S. v. Mont. Advoc. Program*, 2006 MT 262, ¶ 25, 334 Mont. 146, 144 P.3d 818; *State v. Johnson*, 814 So.2d 390, 393 (Fla. 2002) (per curiam).

Against these weighty privacy interests, the State has no legitimate, much less compelling, interest in the Act. For example, the reported rape exception requires that the rape have been reported *only* with respect to patients who actually obtain abortions, not to a patient who considers abortion but refuses to report. Utah Code § 76-7a-201(1)(c)(ii). And a patient receiving any other form of care need not disclose their status as a crime victim to receive treatment, nor are their doctors required (except in limited circumstances involving vulnerable populations) to report the crime. *See* R.298; *see also* R.401, 404.

At bottom, the transparent goal of the Act and its rape exception is to discourage sexual assault survivors from exercising their fundamental rights and to perpetuate harmful stereotypes about survivors and romanticized notions of pregnancy. *See, e.g.*, *Hearing on S.B. 174 Before the S.*, 2020 Gen. Sess., *supra*, recording at 2:15:56–2:16:19 (Utah Feb. 28, 2020) (statement of Sen. Daniel McCay, the Act's sponsor) (contending that carrying a pregnancy to term after rape is often "powerful and healing" for women). That goal is not even rational, and the Act cannot in any event suffice under heightened scrutiny. *See supra* Part III.B.3.

## CONCLUSION

For all these reasons, the Court should affirm the trial court's order granting a preliminary injunction.

DATED this 20th day of January, 2023.

/s/ Troy L. Booher
Troy L. Booher
J. Frederic Voros, Jr.
Dick J. Baldwin
ZIMMERMAN BOOHER
341 South Main Street, Fourth Floor
Salt Lake City, UT 84111
tbooher@zbappeals.com
fvoros@zbappeals.com
dbaldwin@zbappeals.com
(801) 924-0200

/s/ John Mejia
John Mejia
Valentina De Fex
ACLU OF UTAH FOUNDATION, INC.
311 South State Street, Suite 310
Salt Lake City, UT 84111
jmejia@acluutah.org
vdefex@acluutah.org
(801) 521-9862

/s/ Julie A. Murray
Julie A. Murray (pro hac vice)
Hannah Swanson
(pro hac vice motion forthcoming)
PLANNED PARENTHOOD FEDERATION OF AMERICA
1110 Vermont Avenue, NW, Suite 300
Washington, DC 20005
julie.murray@ppfa.org
hannah.swanson@ppfa.org
(202) 803-4045

Camila Vega (pro hac vice)
PLANNED PARENTHOOD FEDERATION OF AMERICA
123 William Street, 9th Floor
New York, NY 10038
camila.vega@ppfa.org
(212) 261-4548

*Attorneys for Respondent Planned Parenthood Association of Utah*

## CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with Utah Rule of Appellate Procedure 24(g) because it contains 13,908 words, not counting those portions of text that Rule 24(g)(2) excludes from the word limit.

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

3. This brief contains no nonpublic information and complies with Utah Rule of Appellate Procedure 21(h).

DATED this 20th day of January, 2023.

/s/ Troy L. Booher

## CERTIFICATE OF SERVICE

This is to certify that on the 20th day of January, 2023, I caused the Brief of Respondent to be served via email on:

Melissa A. Holyoak (melissaholyoak@agutah.gov)
Stanford E. Purser (spurser@agutah.gov)
Lance F. Sorenson (lancesorenson@agutah.gov)
UTAH ATTORNEY GENERAL'S OFFICE
*Attorneys for Petitioners*

Tyler R. Green (tyler@consovoymccarthy.com)
CONSOVOY MCCARTHY PLLC
*Attorney for Petitioners*

Frank D. Mylar (office@mylarlaw.com)
MYLAR LAW, P.C.
*Attorney for American Association of Pro-Life Obstetricians and Gynecologists*

Thaddeus W. Wendt (thaddeuswendt@fellerwendt.com)
FELLER & WENDT, LLC
*Attorney for American College of Pediatricians*

Christopher E. Mills (cmills@spero.law)
SPERO LAW LLC
*Attorney for American College of Pediatricians*

Thomas R. Lee (tom@leenielsen.com)
John J. Nielsen (john@leenielsen.com)
James C. Phillips (jcphillips@chapman.edu)
LEE NIELSEN
*Attorneys for Pro-Life Utah*

William C. Duncan (billduncan56@gmail.com)
*Attorney for Sutherland Institute*

William C. Duncan (billduncan56@gmail.com)
Paul Benjamin Linton (c/o billduncan56@gmail.com)
*Attorneys for Thomas More Society and Family Watch International*

Julia Payne (jpayne@adflegal.org)
ALLIANCE DEFENDING FREEDOM
*Attorneys for Utah Eagle Forum*

Brady Brammer (bbrammer@brfirm.com)
BRAMMER RANCK, LLP
*Attorneys for Utah Eagle Forum*

John L. Fellows
Robert H. Rees (rrees@le.utah.gov)
OFFICE OF LEGISLATIVE RESEARCH AND GENERAL COUNSEL
*Attorneys for Utah Legislature*

/s/ Troy L. Booher

# Addendum A

**The Order of the Court is stated below:**
**Dated:** July 19, 2022 08:43:04 AM
**/s/** ANDREW H STONE
District Court Judge

THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY, UTAH

| | |
|---|---|
| PLANNED PARENTHOOD ASSOCIATION OF UTAH, on behalf of itself and its patients, physicians, and staff,<br><br>*Plaintiff*,<br><br>v.<br><br>STATE OF UTAH, *et al.*,<br><br>*Defendants*. | **ORDER GRANTING PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION**<br><br>Case No. 220903886<br><br>Judge Andrew Stone |

This matter came before the Court on Plaintiff Planned Parenthood Association of Utah's ("PPAU's") Motion for a Preliminary Injunction. The Motion seeks relief under Rule 65A of the Utah Rules of Civil Procedure against Defendants the State of Utah; Sean D. Reyes, in his official capacity as the Attorney General of the State of Utah; Spencer Cox, in his official capacity as the Governor of Utah; and Mark B. Steinagel, in his official capacity as the Director of the Utah Division of Occupational and Professional Licensing (collectively, "Defendants"). Having considered the Motion and Responses thereto; the Declarations of David Turok, Colleen Helfin, Lauren Hunt, Jane Doe, Alex Roe, and Ann Moe; the brief of Amici American College of Obstetricians & Gynecologists, et al; and the arguments presented in a hearing before this Court on July 11; and for good cause shown, the Court hereby GRANTS the Motion as follows:

**Findings and Conclusions**

The Court finds:

1. On June 24, 2022, Senate Bill 174, 2020 Leg., Gen Sess. (Utah 2020) (codified at Utah Code Ann. tit. 76, ch. 7A) (the "Act") went into effect.

2. As a result of the Act, PPAU and its staff, who provide abortions among other sexual and reproductive health care in Utah, stopped performing all abortions in the state, effective immediately, unless those abortions were eligible for one of the Act's exceptions. Turok Decl. ¶¶ 4, 21. PPAU resumed providing abortions that would otherwise be prohibited by the Act, after the Court granted its motion for a temporary restraining order on June 27, 2022.

3. PPAU has made a strong showing that, without a preliminary injunction, the Act will cause irreparable harm to PPAU, its patients, and its staff. If left in place, the Act will force some Utahns to continue carrying a pregnancy that they have decided to end, with all of the physical, emotional, and financial costs that entails. *Id.* ¶ 5; *see also id.* ¶¶ 21–43. Some Utahns will turn to self-managed abortion by buying pills or other items online and outside the U.S. health care system, which may in some cases be unsafe and threaten their health. *Id.* ¶ 22. Others will try to go out of state for abortions, if they have the means to do so, likely resulting in delayed care and imposing additional physical, emotional, and financial costs on these individuals and their families. Heflin Decl. ¶¶ 21–24; 37–40; see also Doe Decl. ¶ 11;Roe Decl. ¶ 8; Moe Decl. ¶¶ 19–21. Even Utahns who are able to obtain an abortion under one of the law's narrow exceptions will suffer irreparable harm. Turok Decl. ¶¶ 44–54. Finally, PPAU and its staff will also suffer harms, including the threat of criminal and licensing penalties, reputational harm, and harm to their livelihoods. *See id.* ¶ 3; *see also* ACOG Br. 17–21 (discussing the impact of the Act on the ethical obligations of medical professionals).

4. The balance of harms weighs in PPAU's favor. While PPAU, its patients, and its staff will suffer irreparable harm without a preliminary injunction, it is unclear on this record whether and to what extent the Act will ultimately further its legislative goals.

5. The issuance of a preliminary injunction is in the public interest. A preliminary injunction would maintain the status quo while the constitutional issues in this case can be resolved on the merits.

6. PPAU also has demonstrated that there are at least serious issues on the merits that should be the subject of further litigation, specifically as to: (1) a right to equal protection under Utah's Equal Rights Amendment (article IV, section 1 of the Utah Constitution); (2) a right to the uniform operation of laws under article I, sections 2 and 24 of the Utah Constitution; (3) a right to bodily integrity under article I, sections 1, 7, and 11 of the Utah Constitution, *see, e.g.*, *Malan v. Lewis*, 693 P.2d 661, 674 n.17 (Utah 1984); *Wood v. Univ. of Utah Med. Ctr.*, 2002 UT 134, ¶¶ 28–29, 67 P.3d 436; (4) a right to determine one's own family composition under article I, sections 2, 25, and 27 of the Utah Constitution, *see, e.g.*, *In re J.P.*, 648 P.2d 1364, 1372–74 (Utah 1982) (recognizing a person's right to maintain parental ties); (5) a right of conscience under article I, section 4 of the Utah Constitution, *see, e.g.*, *Soc'y of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 935 (Utah 1993) (Utah Constitution protects "religious exercise and freedom of conscience in general" and prevents "the imposition of civil limitations based on one's religious beliefs or lack thereof"); and (6) a right to privacy under article I, sections 1 and 14 of the Utah Constitution, *see, e.g.*, *Redding v. Brady*, 606 P.2d 1193, 1195 (Utah 1980) (right to privacy under Utah Constitution "should extend to protect against intrusion into or exposure of not only things which might result in actual harm or damage, but also to things which might result in shame or humiliation, or merely violate one's pride in keeping [] private affairs to [one]self").

7. To be clear, the Court is not deciding the merits of Plaintiff's claims at this time.

Rather, based on the arguments presented, the Court is of the view that this case raises novel and complicated issues, and that Plaintiff may prevail on one or more of its claims. The Court's consideration of these issues will benefit from further development, including through any facts that the parties may wish to introduce in the normal course.

8. The Court easily concludes that it has jurisdiction. PPAU has demonstrated an injury in its own right and to its patients, *see supra* ¶ 3, and a decision by this Court enjoining the Act would redress those injuries, *see Sonntag v. Ward*, 2011 UT App 122, ¶ 3, 253 P.3d 1120. The Court also concludes that PPAU, alternatively, has representative standing because it is an appropriate party to litigate this case of significant public import. *Utah Chapter of Sierra Club v. Utah Air Quality Bd.*, 2006 UT 74, ¶¶ 35-39, 148 P.3d 960, 972; *Gregory v. Shurtleff*, 2013 UT 18, ¶¶ 14–18, 299 P.3d 1098.

**Preliminary Injunction**

Based on the foregoing, and the entire record before the Court, the Court exercises its discretion under Utah Rule of Civil Procedure 65A to GRANT PPAU's Motion for Preliminary Injunction.

The Court hereby ENJOINS AND RESTRAINS Defendants and their officers, employees, servants, agents, appointees, or successors from administering and enforcing the Act with respect to any abortion provided while this Order is in effect, including in any future enforcement actions for conduct that occurred during the pendency of this injunction.[1]

---

1 At the preliminary injunction hearing, Defendants sought clarification that any preliminary injunction order would not prevent them from enforcing other provisions of the Utah Code that regulate abortion, specifically Utah's prohibition on providing post-viability abortions and abortions after 18 weeks of pregnancy. *See* Utah Code §§ 76-7-302, 76-7-302.5. The Court confirms that its order does not restrict the administration or enforcement of these laws, which PPAU does not challenge in this case.

The Court also hereby ORDERS Defendant State of Utah to provide a copy of this Preliminary Injunction to all county and local prosecutors.

IT IS FURTHER ORDERED that the security requirement of Utah Rule of Civil Procedure 65A is waived due to the fact that "the injunction carries no risk of monetary loss to the [D]efendant[s]." *See Corp. of President of Church of Jesus Christ of Latter-Day Saints v. Wallace*, 573 P.2d 1285, 1287 (Utah 1978).

This Preliminary Injunction is effective immediately upon entry and shall remain in effect pending the final resolution of this case, unless earlier extended or dissolved by the Court.

**End of Order**

**Entered as of the date and time indicated on the first page above.**

**In accordance with Utah R. Civ. P. 10(e) and Utah State District Courts E-filing Standard No. 4, this Order does not bear the handwritten signature of the Court, but instead displays an electronic signature at the top of the first page of this Order.**

**CERTIFICATE OF SERVICE**

I hereby certify that on July 11, 2022, I caused the foregoing to be electronically filed and served on the following via the method indicated:

Via ECF:

DAVID N. WOLF
E-mail: dnwolf@agutah.gov
LANCE SORENSON
Email: lancesorenson@agutah.gov
OFFICE OF THE UTAH ATTORNEY GENERAL

Via E-mail:

TYLER GREEN
Email: tyler@consovoymccarthy.com
CONSOVOY MCCARTHY PLLC

/s/ Troy L. Booher

# Addendum B

West's Utah Code Annotated
Title 76. Utah Criminal Code
Chapter 5. Offenses Against the Individual (Refs & Annos)
Part 2. Criminal Homicide

U.C.A. 1953 § 76-5-201

# § 76-5-201. Criminal homicide--Designations of offenses--Exceptions--Application of consensual altercation defense

Effective: May 4, 2022
Currentness

(1)(a) As used in this section:

(i) "Abortion" means the same as that term is defined in Section 76-7-301.

(ii) "Criminal homicide" means an act causing the death of another human being, including an unborn child at any stage of the unborn child's development.

(b) The terms defined in Section 76-1-101.5 apply to this section.

(2) The following are criminal homicide:

(a) aggravated murder;

(b) murder;

(c) manslaughter;

(d) child abuse homicide;

(e) homicide by assault;

(f) negligent homicide; and

(g) negligently operating a vehicle resulting in death.

  

(3) Notwithstanding Subsection (2), an actor is not guilty of criminal homicide if:

(a) the death of an unborn child is caused by an abortion;

(b) the sole reason for the death of an unborn child is that the actor:

(i) refused to consent to:

(A) medical treatment; or

(B) a cesarean section; or

(ii) failed to follow medical advice; or

(c) a woman causes the death of her own unborn child, and the death:

(i) is caused by a criminally negligent act or reckless act of the woman; and

(ii) is not caused by an intentional or knowing act of the woman.

(4) The provisions governing a defense of a consensual altercation as described in Section 76-5-104 apply to this part.

**Credits**

Laws 1973, c. 196, § 76-5-201; Laws 1983, c. 90, § 3; Laws 1983, c. 95, § 1; Laws 1991, c. 10, § 7; Laws 1991, 1st Sp.Sess., c. 2, § 1; Laws 1995, c. 291, § 6, eff. May 1, 1995; Laws 2002, c. 327, § 1, eff. May 6, 2002; Laws 2010, c. 13, § 1, eff. March 8, 2010; Laws 2022, c. 116, § 21, eff. May 4, 2022; Laws 2022, c. 181, § 51, eff. May 4, 2022.

Notes of Decisions (35)

U.C.A. 1953 § 76-5-201, UT ST § 76-5-201

Current with laws through the 2022 Third Special Session. Some statutes sections may be more current, see credits for details.

**End of Document**

West's Utah Code Annotated
Title 76. Utah Criminal Code
Chapter 7. Offenses Against the Family (Refs & Annos)
Part 3. Abortion

U.C.A. 1953 § 76-7-301.1

# § 76-7-301.1. Preamble--Findings and policies of Legislature

Currentness

(1) 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.

(2) The state of Utah has a compelling interest in the protection of the lives of unborn children.

(3) 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.

(4) 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 damage 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.

**Credits**

Laws 1991, c. 1, § 2; Laws 1991, c. 288, § 1; Laws 1991, 1st Sp.Sess., c. 2, § 3.

Notes of Decisions (3)

U.C.A. 1953 § 76-7-301.1, UT ST § 76-7-301.1
Current with laws through the 2022 Third Special Session. Some statutes sections may be more current, see credits for details.

**End of Document**

West's Utah Code Annotated
Title 76. Utah Criminal Code
Chapter 7. Offenses Against the Family (Refs & Annos)
Part 3. Abortion

U.C.A. 1953 § 76-7-302

# § 76-7-302. Circumstances under which abortion authorized

Effective: September 1, 2022
Currentness

(1) As used in this section, "viable" means that the unborn child has reached a stage of fetal development when the unborn child is potentially able to live outside the womb, as determined by the attending physician to a reasonable degree of medical certainty.

(2) An abortion may be performed in this state only by a physician.

(3) An abortion may be performed in this state only under the following circumstances:

(a) the unborn child is not viable; or

(b) the unborn child is viable, if:

(i) the abortion is necessary to avert:

(A) the death of the woman on whom the abortion is performed; or

(B) a serious risk of substantial and irreversible impairment of a major bodily function of the woman on whom the abortion is performed;

(ii) two physicians who practice maternal fetal medicine concur, in writing, in the patient's medical record that the fetus:

(A) has a defect that is uniformly diagnosable and uniformly lethal; or

(B) has a severe brain abnormality that is uniformly diagnosable; or

(iii)(A) the woman is pregnant as a result of:

  

(I) rape, as described in Section 76-5-402;

(II) rape of a child, as described in Section 76-5-402.1; or

(III) incest, as described in Subsection 76-5-406(2)(j) or Section 76-7-102; and

(B) before the abortion is performed, the physician who performs the abortion:

(I) verifies that the incident described in Subsection (3)(b)(iii)(A) has been reported to law enforcement; and

(II) complies with the requirements of Section 80-2-602.

(4) An abortion may be performed only in an abortion clinic or a hospital, unless it is necessary to perform the abortion in another location due to a medical emergency.

**Credits**

Laws 1974, c. 33, § 2; Laws 1991, c. 1, § 3; Laws 1991, 1st Sp.Sess., c. 2, § 4; Laws 2004, c. 90, § 90, eff. May 3, 2004; Laws 2009, c. 38, § 1, eff. May 12, 2009; Laws 2010, c. 13, § 5, eff. March 8, 2010; Laws 2018, c. 282, § 5, eff. May 8, 2018; Laws 2019, c. 189, § 13, eff. May 14, 2019; Laws 2019, c. 208, § 2, eff. May 14, 2019; Laws 2022, c. 335, § 52, eff. Sept. 1, 2022.

Notes of Decisions (12)

U.C.A. 1953 § 76-7-302, UT ST § 76-7-302

Current with laws through the 2022 Third Special Session. Some statutes sections may be more current, see credits for details.

**End of Document**

West's Utah Code Annotated
Title 76. Utah Criminal Code
Chapter 7. Offenses Against the Family (Refs & Annos)
Part 3. Abortion

U.C.A. 1953 § 76-7-302.5

# § 76-7-302.5. Circumstances under which abortion prohibited

Effective: May 14, 2019
Currentness

Notwithstanding any other provision of this part, a person may not perform or attempt to perform an abortion after the unborn child reaches 18 weeks gestational age unless the abortion is permissible for a reason described in Subsection 76-7-302(3)(b).

**Credits**
Laws 2019, c. 208, § 3, eff. May 14, 2019.

U.C.A. 1953 § 76-7-302.5, UT ST § 76-7-302.5
Current with laws through the 2022 Third Special Session. Some statutes sections may be more current, see credits for details.

**End of Document**

West's Utah Code Annotated
Title 76. Utah Criminal Code
Chapter 7. Offenses Against the Family (Refs & Annos)
Part 3. Abortion

U.C.A. 1953 § 76-7-305.5

# § 76-7-305.5. Requirements for information module and website

Effective: May 12, 2020
Currentness

(1) In order to ensure that a woman's consent to an abortion is truly an informed consent, the department shall, in accordance with the requirements of this section, develop an information module and maintain a public website.

(2) The information module and public website described in Subsection (1) shall:

(a) be scientifically accurate, comprehensible, and presented in a truthful, nonmisleading manner;

(b) present adoption as a preferred and positive choice and alternative to abortion;

(c) be produced in a manner that conveys the state's preference for childbirth over abortion;

(d) state that the state prefers childbirth over abortion;

(e) state that it is unlawful for any person to coerce a woman to undergo an abortion;

(f) state that any physician who performs an abortion without obtaining the woman's informed consent or without providing her a private medical consultation in accordance with the requirements of this section, may be liable to her for damages in a civil action at law;

(g) provide a geographically indexed list of resources and public and private services available to assist, financially or otherwise, a pregnant woman during pregnancy, at childbirth, and while the child is dependent, including:

(i) medical assistance benefits for prenatal care, childbirth, and neonatal care;

(ii) services and supports available under Section 35A-3-308;

(iii) other financial aid that may be available during an adoption;

  

(iv) services available from public adoption agencies, private adoption agencies, and private attorneys whose practice includes adoption; and

(v) the names, addresses, and telephone numbers of each person listed under this Subsection (2)(g);

(h) describe the adoption-related expenses that may be paid under Section 76-7-203;

(i) describe the persons who may pay the adoption related expenses described in Subsection (2)(h);

(j) except as provided in Subsection (4), describe the legal responsibility of the father of a child to assist in child support, even if the father has agreed to pay for an abortion;

(k) except as provided in Subsection (4), describe the services available through the Office of Recovery Services, within the Department of Human Services, to establish and collect the support described in Subsection (2)(j);

(l) state that private adoption is legal;

(m) describe and depict, with pictures or video segments, the probable anatomical and physiological characteristics of an unborn child at two-week gestational increments from fertilization to full term, including:

(i) brain and heart function;

(ii) the presence and development of external members and internal organs; and

(iii) the dimensions of the fetus;

(n) show an ultrasound of the heartbeat of an unborn child at:

(i) four weeks from conception;

(ii) six to eight weeks from conception; and

(iii) each month after 10 weeks gestational age, up to 14 weeks gestational age;

(o) describe abortion procedures used in current medical practice at the various stages of growth of the unborn child, including:

  

(i) the medical risks associated with each procedure;

(ii) the risk related to subsequent childbearing that are associated with each procedure; and

(iii) the consequences of each procedure to the unborn child at various stages of fetal development;

(p) describe the possible detrimental psychological effects of abortion;

(q) describe the medical risks associated with carrying a child to term;

(r) include relevant information on the possibility of an unborn child's survival at the two-week gestational increments described in Subsection (2)(m);

(s) except as provided in Subsection (5), include:

(i) information regarding substantial medical evidence from studies concluding that an unborn child who is at least 20 weeks gestational age may be capable of experiencing pain during an abortion procedure; and

(ii) the measures that will be taken in accordance with Section 76-7-308.5;

(t) explain the options and consequences of aborting a medication-induced abortion;

(u) include the following statement regarding a medication-induced abortion, “Research indicates that mifepristone alone is not always effective in ending a pregnancy. You may still have a viable pregnancy after taking mifepristone. If you have taken mifepristone but have not yet taken the second drug and have questions regarding the health of your fetus or are questioning your decision to terminate your pregnancy, you should consult a physician immediately.”;

(v) inform a pregnant woman that she has the right to view an ultrasound of the unborn child, at no expense to her, upon her request;

(w) inform a pregnant woman that she has the right to:

(i) determine the final disposition of the remains of the aborted fetus;

(ii) unless the woman waives this right in writing, wait up to 72 hours after the abortion procedure is performed to make a determination regarding the disposition of the aborted fetus before the health care facility may dispose of the fetal remains;

  

(iii) receive information about options for disposition of the aborted fetus, including the method of disposition that is usual and customary for a health care facility; and

(iv) for a medication-induced abortion, return the aborted fetus to the health care facility for disposition; and

(x) provide a digital copy of the form described in Subsection 26-21-33(3)(a)(i); and

(y) be in a typeface large enough to be clearly legible.

(3) The information module and website described in Subsection (1) may include a toll-free 24-hour telephone number that may be called in order to obtain, orally, a list and description of services, agencies, and adoption attorneys in the locality of the caller.

(4) The department may develop a version of the information module and website that omits the information in Subsections (2)(j) and (k) for a viewer who is pregnant as the result of rape.

(5) The department may develop a version of the information module and website that omits the information described in Subsection (2)(s) for a viewer who will have an abortion performed:

(a) on an unborn child who is less than 20 weeks gestational age at the time of the abortion; or

(b) on an unborn child who is at least 20 weeks gestational age at the time of the abortion, if:

(i) the abortion is being performed for a reason described in Subsection 76-7-302(3)(b)(i) or (ii); and

(ii) due to a serious medical emergency, time does not permit compliance with the requirement to provide the information described in Subsection (2)(s).

(6) The department and each local health department shall make the information module and the website described in Subsection (1) available at no cost to any person.

(7) The department shall make the website described in Subsection (1) available for viewing on the department's website by clicking on a conspicuous link on the home page of the website.

(8) The department shall ensure that the information module is:

(a) available to be viewed at all facilities where an abortion may be performed;

  

(b) interactive for the individual viewing the module, including the provision of opportunities to answer questions and manually engage with the module before the module transitions from one substantive section to the next;

(c) produced in English and may include subtitles in Spanish or another language; and

(d) capable of being viewed on a tablet or other portable device.

(9) After the department releases the initial version of the information module, for the use described in Section 76-7-305, the department shall:

(a) update the information module, as required by law; and

(b) present an updated version of the information module to the Health and Human Services Interim Committee for the committee's review and recommendation before releasing the updated version for the use described in Section 76-7-305.

**Credits**

Laws 1981, c. 61, § 1; Laws 1982, c. 18, § 1; Laws 1985, c. 42, § 1; Laws 1993, c. 70, § 3; Laws 1996, c. 185, § 3, eff. July 1, 1996; Laws 1996, c. 311, § 2, eff. Sept. 1, 1996; Laws 1997, c. 174, § 60, eff. July 1, 1997; Laws 1997, c. 221, § 2, eff. Sept. 1, 1997; Laws 1998, c. 13, § 88, eff. May 4, 1998; Laws 2006, c. 116, § 7, eff. May 1, 2006; Laws 2006, c. 207, § 5, eff. May 1, 2006; Laws 2009, c. 57, § 2, eff. May 12, 2009; Laws 2010, c. 314, § 3, eff. May 11, 2010; Laws 2013, c. 278, § 65, eff. May 14, 2013; Laws 2016, c. 362, § 2, eff. May 10, 2016; Laws 2017, c. 399, § 2, eff. May 9, 2017; Laws 2018, c. 282, § 9, eff. May 8, 2018; Laws 2020, c. 251, § 9, eff. May 12, 2020.

U.C.A. 1953 § 76-7-305.5, UT ST § 76-7-305.5
Current with laws through the 2022 Third Special Session. Some statutes sections may be more current, see credits for details.

**End of Document**

West's Utah Code Annotated
Title 76. Utah Criminal Code
Chapter 7A. Abortion Prohibition
Part 1. Definitions

U.C.A. 1953 § 76-7a-101

# § 76-7a-101. Definitions

Effective: June 24, 2022
Currentness

As used in this chapter:

(1)(a) "Abortion" means:

(i) the intentional termination or attempted termination of human pregnancy after implantation of a fertilized ovum through a medical procedure carried out by a physician or through a substance used under the direction of a physician;

(ii) the intentional killing or attempted killing of a live unborn child through a medical procedure carried out by a physician or through a substance used under the direction of a physician; or

(iii) the intentional causing or attempted causing of a miscarriage through a medical procedure carried out by a physician or through a substance used under the direction of a physician.

(b) "Abortion" does not include:

(i) removal of a dead unborn child;

(ii) removal of an ectopic pregnancy; or

(iii) the killing or attempted killing of an unborn child without the consent of the pregnant woman, unless:

(A) the killing or attempted killing is done through a medical procedure carried out by a physician or through a substance used under the direction of a physician; and

(B) the physician is unable to obtain the consent due to a medical emergency.

(2) "Abortion clinic" means a type I abortion clinic licensed by the state or a type II abortion clinic licensed by the state.

  

(3) “Department” means the Department of Health.

(4) “Down syndrome” means a genetic condition associated with an extra chromosome 21, in whole or in part, or an effective trisomy for chromosome 21.

(5) “Hospital” means:

(a) a general hospital licensed by the department; or

(b) a clinic or other medical facility to the extent the clinic or other medical facility is certified by the department as providing equipment and personnel sufficient in quantity and quality to provide the same degree of safety to a pregnant woman and an unborn child as would be provided for the particular medical procedure undertaken by a general hospital licensed by the department.

(6) “Incest” means the same as that term is defined in Section 80-1-102.

(7) “Medical emergency” means a condition which, on the basis of the physician's good faith clinical judgment, so threatens the life of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death, or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function.

(8) “Physician” means:

(a) a medical doctor licensed to practice medicine and surgery in the state;

(b) an osteopathic physician licensed to practice osteopathic medicine in the state; or

(c) a physician employed by the federal government who has qualifications similar to an individual described in Subsection (8)(a) or (b).

(9) “Rape” means the same as that term is defined in Title 76, Utah Criminal Code.

(10)(a) “Severe brain abnormality” means a malformation or defect that causes an individual to live in a mentally vegetative state.

(b) “Severe brain abnormality” does not include:

(i) Down syndrome;

  

(ii) spina bifida;

(iii) cerebral palsy; or

(iv) any other malformation, defect, or condition that does not cause an individual to live in a mentally vegetative state.

**Credits**

Laws 2020, c. 279, § 1, eff. June 24, 2022; Laws 2021, c. 262, § 80.

**Editors' Notes**

**PRELIMINARY INJUNCTION**

<The Third Judicial District Court for Salt Lake County, Utah, J. Stone, granted a preliminary injunction on July 11, 2022 in Planned Parenthood Assoc. of Utah v. State of Utah, No. 220903886, 2022 WL 2314099, enjoining and restraining Defendants from administering and enforcing Utah Senate Bill 174, Gen. Sess. (2020) (codified at Utah Code Ann. tit. 76, ch. 7A).>

U.C.A. 1953 § 76-7a-101, UT ST § 76-7a-101

Current with laws through the 2022 Third Special Session. Some statutes sections may be more current, see credits for details.

**End of Document**

U.C.A. 1953 § 76-7a-201

# § 76-7a-201. Abortion prohibition--Exceptions--Penalties

Effective: June 24, 2022
Currentness

(1) An abortion may be performed in this state only under the following circumstances:

(a) the abortion is necessary to avert:

(i) the death of the woman on whom the abortion is performed; or

(ii) a serious risk of substantial and irreversible impairment of a major bodily function of the woman on whom the abortion is performed;

(b) two physicians who practice maternal fetal medicine concur, in writing, in the patient's medical record that the fetus:

(i) has a defect that is uniformly diagnosable and uniformly lethal; or

(ii) has a severe brain abnormality that is uniformly diagnosable; or

(c)(i) the woman is pregnant as a result of:

(A) rape;

(B) rape of a child; or

(C) incest; and

(ii) before the abortion is performed, the physician who performs the abortion:

(A) verifies that the incident described in Subsection (1)(c)(i) has been reported to law enforcement; and

  

(B) if applicable, complies with requirements related to reporting suspicions of or known child abuse.

(2) An abortion may be performed only:

(a) by a physician; and

(b) in an abortion clinic or a hospital, unless it is necessary to perform the abortion in another location due to a medical emergency.

(3) A person who performs an abortion in violation of this section is guilty of a second degree felony.

(4) In addition to the penalty described in Subsection (3), the department may take appropriate corrective action against an abortion clinic, including revoking the abortion clinic's license, if a violation of this chapter occurs at the abortion clinic.

(5) The department shall report a physician's violation of any provision of this section to the state entity that regulates the licensing of a physician.

**Credits**

Laws 2020, c. 279, § 2, eff. June 24, 2022.

**Editors' Notes**

**PRELIMINARY INJUNCTION**

<The Third Judicial District Court for Salt Lake County, Utah, J. Stone, granted a preliminary injunction on July 11, 2022 in Planned Parenthood Assoc. of Utah v. State of Utah, No. 220903886, 2022 WL 2314099, enjoining and restraining Defendants from administering and enforcing Utah Senate Bill 174, Gen. Sess. (2020) (codified at Utah Code Ann. tit. 76, ch. 7A).>

U.C.A. 1953 § 76-7a-201, UT ST § 76-7a-201

Current with laws through the 2022 Third Special Session. Some statutes sections may be more current, see credits for details.

West's Utah Code Annotated
Constitution of Utah
Article I. Declaration of Rights

U.C.A. 1953, Const. Art. 1, § 2

# Sec. 2. [All political power inherent in the people]

Currentness

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.

Notes of Decisions (70)

U.C.A. 1953, Const. Art. 1, § 2, UT CONST Art. 1, § 2
Current with laws through the 2022 Third Special Session. Some statutes sections may be more current, see credits for details.

End of Document

West's Utah Code Annotated
Constitution of Utah
Article I. Declaration of Rights

U.C.A. 1953, Const. Art. 1, § 4

# Sec. 4. [Religious liberty]

Currentness

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.

**Credits**

Laws 1999, S.J.R. 5, § 1, adopted at election Nov. 7, 2000, eff. Jan. 1, 2001.

Notes of Decisions (84)

U.C.A. 1953, Const. Art. 1, § 4, UT CONST Art. 1, § 4
Current with laws through the 2022 Third Special Session. Some statutes sections may be more current, see credits for details.

**End of Document**

West's Utah Code Annotated
Constitution of Utah
Article I. Declaration of Rights

U.C.A. 1953, Const. Art. 1, § 7

# Sec. 7. [Due process of law]

Currentness

No person shall be deprived of life, liberty or property, without due process of law.

Notes of Decisions (789)

U.C.A. 1953, Const. Art. 1, § 7, UT CONST Art. 1, § 7
Current with laws through the 2022 Third Special Session. Some statutes sections may be more current, see credits for details.

End of Document

West's Utah Code Annotated
Constitution of Utah
Article I. Declaration of Rights

U.C.A. 1953, Const. Art. 1, § 11

# Sec. 11. [Courts open--Redress of injuries]

Effective: January 1, 2021
Currentness

All courts shall be open, and every person, for an injury done to 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 be barred from prosecuting or defending before any tribunal in this State, with or without counsel, any civil cause to which the person is a party.

**Credits**
Laws 2019, S.J.R. 7, § 2, eff. Jan. 1, 2021.

Notes of Decisions (219)

U.C.A. 1953, Const. Art. 1, § 11, UT CONST Art. 1, § 11
Current with laws through the 2022 Third Special Session. Some statutes sections may be more current, see credits for details.

**End of Document**

West's Utah Code Annotated
Constitution of Utah
Article I. Declaration of Rights

U.C.A. 1953, Const. Art. 1, § 14

# Sec. 14. [Unreasonable searches forbidden--Issuance of warrant]

Currentness

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.

Notes of Decisions (844)

U.C.A. 1953, Const. Art. 1, § 14, UT CONST Art. 1, § 14
Current with laws through the 2022 Third Special Session. Some statutes sections may be more current, see credits for details.

**End of Document**

West's Utah Code Annotated
Constitution of Utah
Article I. Declaration of Rights

U.C.A. 1953, Const. Art. 1, § 24

# Sec. 24. [Uniform operation of laws]

Currentness

All laws of a general nature shall have uniform operation.

Notes of Decisions (390)

U.C.A. 1953, Const. Art. 1, § 24, UT CONST Art. 1, § 24
Current with laws through the 2022 Third Special Session. Some statutes sections may be more current, see credits for details.

End of Document

West's Utah Code Annotated
Constitution of Utah
Article I. Declaration of Rights

U.C.A. 1953, Const. Art. 1, § 25

# Sec. 25. [Rights retained by people]

Currentness

This enumeration of rights shall not be construed to impair or deny others retained by the people.

Notes of Decisions (6)

U.C.A. 1953, Const. Art. 1, § 25, UT CONST Art. 1, § 25
Current with laws through the 2022 Third Special Session. Some statutes sections may be more current, see credits for details.

End of Document

West's Utah Code Annotated
Constitution of Utah
Article I. Declaration of Rights

U.C.A. 1953, Const. Art. 1, § 26

# Sec. 26. [Provisions mandatory and prohibitory]

Currentness

The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.

Notes of Decisions (7)

U.C.A. 1953, Const. Art. 1, § 26, UT CONST Art. 1, § 26
Current with laws through the 2022 Third Special Session. Some statutes sections may be more current, see credits for details.

End of Document

West's Utah Code Annotated
Constitution of Utah
Article IV. Elections and Right of Suffrage

U.C.A. 1953, Const. Art. 4, § 1

# Sec. 1. [Equal political rights]

Currentness

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.

Notes of Decisions (21)

U.C.A. 1953, Const. Art. 4, § 1, UT CONST Art. 4, § 1
Current with laws through the 2022 Third Special Session. Some statutes sections may be more current, see credits for details.

**End of Document**

West's Utah Code Annotated
Constitution of Utah
Article VIII. Judicial Department (Refs & Annos)

U.C.A. 1953, Const. Art. 8, § 1

# Sec. 1. [Judicial powers--Courts]

Currentness

The judicial power of the state shall be vested in a Supreme Court, in a trial court of general jurisdiction known as the district court, and in such other courts as the Legislature by statute may establish. The Supreme Court, the district court, and such other courts designated by statute shall be courts of record. Courts not of record shall also be established by statute.

**Credits**
Laws 1984, 2nd Sp.Sess., S.J.R. 1, adopted at election Nov. 6, 1984, eff. July 1, 1985.

Notes of Decisions (112)

U.C.A. 1953, Const. Art. 8, § 1, UT CONST Art. 8, § 1
Current with laws through the 2022 Third Special Session. Some statutes sections may be more current, see credits for details.

**End of Document**

West's Utah Code Annotated
Constitution of Utah
Article VIII. Judicial Department (Refs & Annos)

U.C.A. 1953, Const. Art. 8, § 2

# Sec. 2. [Supreme court--Chief justice--Declaring law unconstitutional--Justice unable to participate]

Currentness

The Supreme Court shall be the highest court and shall consist of at least five justices. The number of justices may be changed by statute, but no change shall have the effect of removing a justice from office. A chief justice shall be selected from among the justices of the Supreme Court as provided by statute. The chief justice may resign as chief justice without resigning from the Supreme Court. The Supreme Court by rule may sit and render final judgment either en banc or in divisions. The court shall not declare any law unconstitutional under this constitution or the Constitution of the United States, except on the concurrence of a majority of all justices of the Supreme Court. If a justice of the Supreme Court is disqualified or otherwise unable to participate in a cause before the court, the chief justice, or in the event the chief justice is disqualified or unable to participate, the remaining justices, shall call an active judge from an appellate court or the district court to participate in the cause.

**Credits**

Laws 1943, S.J.R. 2; Laws 1984, 2nd Sp.Sess., S.J.R. 1, adopted at election Nov. 6, 1984, eff. July 1, 1985.

Notes of Decisions (8)

U.C.A. 1953, Const. Art. 8, § 2, UT CONST Art. 8, § 2
Current with laws through the 2022 Third Special Session. Some statutes sections may be more current, see credits for details.

**End of Document**