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Idaho Supreme Court
Melanie Gagnepain, Clerk of the Court
By: Brad Thies, Clerk

# IN THE SUPREME COURT OF THE STATE OF IDAHO

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAII, ALASKA, INDIANA, KENTUCKY, on behalf of itself, its staff, physicians and patients, and CAITLIN GUSTAFSON, M.D., on behalf of herself and her patients,

Petitioners,

v.

STATE OF IDAHO; BRAD LITTLE, in his official capacity as Governor of the State of Idaho; LAWRENCE WASDEN, in his official capacity as Attorney General of the State of Idaho; JAN M. BENNETTS, in her official capacity as Ada County Prosecuting Attorney; GRANT P. LOEBS, in his official capacity as Twin Falls County Prosecuting Attorney; IDAHO STATE BOARD OF MEDICINE; IDAHO STATE BOARD OF NURSING; and IDAHO STATE BOARD OF PHARMACY,

Respondents,

and

SCOTT BEDKE, in his official capacity as Speaker of the House of Representatives of the State of Idaho; CHUCK WINDER, in his capacity as President Pro Tempore of the Idaho State Senate; and the SIXTY-SIXTH IDAHO LEGISLATURE,

Intervenor-Respondents.

Docket No. 49899-2022

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BRIEF OF IDAHO LEGISLATURE

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Monte Neil Stewart, ISB No. 8129
11000 Cherwell Court
Las Vegas, Nevada 89144
Telephone: (208)514-6360
monteneilstewart@gmail.com

Daniel W. Bower, ISB No. 7204
MORRIS BOWER & HAWS PLLC
1305 12th Ave. Rd.
Nampa, Idaho 83686
Telephone: (208) 345-3333
Fax No.: (208) 345-4461
dbower@morrisbowerhaws.com

*Attorneys for Intervenor-Respondents*

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

**Cases:**

**Statutes:**

## STATEMENT OF THE CASE

This is the Idaho Legislature's Brief in response to the July 25, 2022 Verified Petition for Writ of Prohibition and Application for Declaratory Judgment ("Petition") filed by Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, and Caitlin Gustafson, M.D. (collectively "Petitioners").

Given the Petitioner's two other pending proceedings before this Court, Idaho Supreme Court Case Nos. 49615-2022 ("First Case") and 49817-2022 ("Second Case"), and the admitted overlap and redundancy of argument found in those two proceedings and this proceeding ("Third Case"), the Legislature incorporates and references the arguments contained in its briefs in the First and Second Cases.

Here, Petitioners once again renew their attacks on Idaho's Fetal Heartbeat Preborn Child Protection Act ("Heartbeat Act").[1] We say "renew" because in their First Case, the Petitioners challenged most all of the Heartbeat Act while focusing in particular on the portion previously referenced as Senate Bill 1309, now codified as Idaho Code §§18-8804, 18-8805. In this latest misguided attempt to attack Idaho's abortion laws, Petitioners make three arguments. First, they request that this Court read into the Idaho constitution a privacy interest that encompasses abortion. *See* Petitioners' Brief in Support of Verified Petition for Writ of Prohibition and Application for Declaratory Judgment filed on July 25, 2022 ("Br.") at 9. Second, Petitioners claim that the Heartbeat Act violates the equal protection language of both the Idaho Constitution and the Idaho Human Rights Act. Br. at 10. Third, Petitioners assert that the Heartbeat Act is impermissibly vague. Br. at 10-13.

[1] The entirety of Idaho Code Title 18, Chapter 88 constitutes the Heartbeat Act.

It is only the last argument—the void-for-vagueness argument—that has not already been raised and argued, either in the First or Second Case, and is the only argument that will be addressed in this Brief.[2]

## ARGUMENT

A. The Heartbeat Act does not Violate Idaho Constitution's Due Process Clause

The Legislature has previously provided the legal standard for evaluating Petitioners' meritless due process claim that Idaho Code § 18-622 is "void-for-vagueness." Those standards also apply to Petitioners' meritless due process "void-for-vagueness" claim related to the Heartbeat Act and are incorporated herein by reference. *See* September 2, 2022 Brief of the Legislature (Second Case) at 21-28.

Petitioners' vagueness arguments fail to appreciate both the substantial hurdle that they must overcome and this Court's obligation to seek a statutory interpretation that upholds the Heartbeat Act's constitutionality. "Generally speaking, 'the party asserting the unconstitutionality of a statute bears the burden of showing its invalidity and must overcome a strong presumption of validity.'" *See Olsen v. J.A. Freeman Co*., 117 Idaho 706, 709, 791 P.2d 1285, 1288 (1990) (citing *Leliefeld v. Johnson*, 104 Idaho 357, 659 P.2d 111 (1983)); *see also State v. Cobb*, 132 Idaho 195, 197, 969 P.2d 244, 246 (1998) (internal citation omitted) ("There is a strong presumption of the validity of an ordinance, and an appellate court is obligated to seek an interpretation of a statute that upholds its constitutionality."). Indeed, as this Court held in *Cobb*, a "statute should not be held void for uncertainty if any practical interpretation can be given it." *Id*. Here, that substantial

[2] The Legislature has submitted briefs in case numbers 49615-2022 and 49817-2022, responding in full to Petitioners' other substantive arguments. *See* April 28, 2022 Brief of Idaho Legislature (First Case) and September 2, 2022 Brief of Idaho Legislature (Second Case). Those briefs and the arguments therein are incorporated herein by reference as they directly address Petitioners' privacy and equal protection arguments.

burden has not been met, particularly where there is no defect in the plain and ordinary meaning of the words that comprise the Heartbeat Act—specifically the words in its exceptions (the Petitioners' particular target).

As noted in the Legislature's prior briefing, this Court has adopted the framework for applying the void-for-vagueness doctrine set forth in *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). *See State v. Bitt*, 118 Idaho 584, 585-86, 798 P.2d 43, 44–45 (1990).[3] Applying this framework, the Heartbeat Act is not impermissibly vague because there is "a core of circumstances to which the statute or ordinance could be unquestionably constitutionally applied." *Id*. at 588, 798 P.2d at 47. As with Idaho Code § 18-622, Petitioners ignore this standard in their attack on the Heartbeat Act—a tacit admission that it is a burden they cannot meet.

Here, Petitioners argue that the Heartbeat Act's "medical emergency" and "rape and incest" exceptions are vague and constitute a violation of the Idaho Constitution's due process clause because they are not sufficiently clear to give "guidance to medical professionals." Br. at 10-12. Petitioners further contend the "trigger" and timing of the Heartbeat Act is also vague and unconstitutional. *Id*. at 12-13. Per *Bitt*, this is not enough. By simply attacking these exceptions and timing issues, Petitioners' arguments themselves illustrate that they cannot negate "a core of

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[3] That framework is a three-step approach. First, "the court must ask whether the ordinance regulates constitutionally protected conduct." *Bitt*, 118 Idaho, *Id.* at 588, 798 P.2d at 47. Second, the court "asks whether the ordinance precludes a significant amount of the constitutionally protected conduct." *Id.* When the answer is yes, "then the ordinance is quite likely overbroad and must be restricted in its application or rewritten." *Id.* But when the answer at steps one or two is negative, "then the [third] step is to ask whether (a) the ordinance gives notice to those who are subject to it, and (b) whether the ordinance contains guidelines and imposes sufficient discretion on those who must enforce the ordinance." *Id.* This step "can be satisfied and the enactment found constitutional" whenever a court finds "a core of circumstances to which the statute or ordinance could be unquestionably constitutionally applied." *Id.* In this case, where Petitioners cannot argue that the conduct is constitutionally protected, the focus is on the third step.

circumstances to which the statute or ordinance could be unquestionably constitutionally applied." *Bitt* requires a holistic approach; Petitioners' arguments are anything but holistic; rather they are piecemeal. Thus, on this basis alone, Petitioners' assertions of void-for-vagueness are baseless.

Even if *Bitt* were not controlling, the specific attacks on the language of the Heartbeat Act exceptions are also without basis. The words of the Heartbeat Act's "medical emergency" exception are plainly determinable and provide notice sufficient to satisfy due process. *See Cobb*, 132 Idaho at 197, 969 P.2d at 246 ("The void for vagueness doctrine is an aspect of due process requiring that the meaning of a criminal statute be determinable."). Here, Petitioners first take issue with the Heartbeat Act's definition of a "medical emergency." That definition provides that a "medical emergency" is a "condition that, in reasonable medical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function." *See* Idaho Code § 18-8801(5).

This language is anything but vague. The medical provider must exercise reasonable medical judgment to determine whether the medical condition of the pregnant mother necessities an abortion to avert death. This is a clear and objective standard. There is nothing vague in this definition. Rather, the statute appropriately creates an objective standard that requires the medical provider to act "reasonably."[4] Individuals of "common understanding" do not have to guess as to what constitutes a "medical emergency."

[4] Using an objective standard is particularly appropriate in the current context. The Seventh Circuit has held that statutes requiring physicians to employ reasonable judgment are not unconstitutionally vague because that "is the same standard by which all" medical decisions are judged and clearly "provides physicians with more than 'fair warning' as to what conduct is expected of them in order to avoid the imposition of liability." *See Karlin v. Foust*, 188 F.3d 446, 464 (7th Cir. 1999). Likewise, other courts have warned that governments must be given some leeway in regulating medical practices since "medical care cannot be boiled down to a precise mathematical formula"

Similarly, the language of the "rape and incest" exception is not impermissibly vague. That exception allows for an abortion where the pregnant woman "has reported the act of rape or incest to a law enforcement agency and provided a copy of such report to the physician who is to perform the abortion…." Idaho Code §§ 18-8804(1)(a)-(b). Despite this plain language, Petitioners assert that it is unclear what "report" needs to be given and that the statute therefore "forces" doctors to guess as to the meaning of criminal law. Br. at 12. It does no such thing.

Again, Petitioners fail to appreciate the plain and ordinary meaning of the language and what it requires. The requirement is simply that where a pregnant woman has "reported" to law enforcement the "act of rape or incest," she provide a copy of that very criminal report to the physician before the abortion is performed. The statute does not require the physician to make a judgment call or to evaluate the veracity of the criminal report that was made to law enforcement; there is simply no textual support for such reading. Straining to read into the statute such a requirement would be contrary to well-established Idaho law requiring this Court to seek an interpretation that sustains constitutionality, rather than undermining it. *See Cobb*, 132 Idaho at 197, 969 P.2d at 246 ("[A]n appellate court is obligated to seek an interpretation of a statute that upholds its constitutionality.") (citing *State v. Newman*, 108 Idaho 5, 13 n.12, 696 P.2d 856, 864 n.12 (1985)). Consequently, there is no need for a "subjective" standard as to this particular exception. There is no invitation to second guess or interpret criminal law. A medical provider who falls within the exception must simply be provided a copy of the report the pregnant woman made to law enforcement wherein she reported the act of rape or incest.

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but "must be grounded in what, from time to time, other health professionals consider to be acceptable standards of health care." *Varandani v. Bowen*, 824 F.2d 307, 312 (4th Cir. 1987); *see also United States v. Collier*, 478 F.2d 268, 272 (5th Cir. 1973) ("[S]tatutes affecting medical practice need not delineate the precise circumstances constituting the bounds of permissible practice.").

Thus, where it is generally presumed that legislative acts are constitutional, that the Legislature has acted within its constitutional powers, and where any doubt concerning the interpretation of a statute is to be resolved in favor of that which will render the statute constitutional, Petitioners' argument that the language of the exceptions is not determinable is without merit. *See Walsh v. Swapp Law, PLLC*, 166 Idaho 629, 641, 462 P.3d 607, 619 (2020). The Heartbeat Act demonstrably contains a core of circumstances where the Act can be constitutionally applied. Accordingly, it does not run afoul of the void-for-vagueness doctrine.

B. The Assertion that the Heartbeat Act's Trigger Provision is Unconstitutionally Vague is Moot

Petitioners also assert that the Heartbeat Act is unconstitutional because a "person of ordinary intelligence [is] unable to determine when the statute in fact takes effect." Br. at 13. Because the Heartbeat Act's criminal provisions are now effective, this argument is moot. Indeed, this Court confirmed the same in its August 12, 2022 Opinion:

> There is no dispute that the criminal liability provision [of the Heartbeat Act] was triggered on July 20, 2022, when the United States Court of Appeals for the Eleventh Circuit upheld a Georgia law prohibiting abortions after a detectable human heartbeat. *See SisterSong Women of Color Reprod. Just. Collective v. Governor of Ga.*, __ F.4th __, 2022 WL 2824904 (11th Cir. July 20, 2022). As of August 19, 2022, the State will be able to criminally enforce the Heartbeat Act's prohibition on abortions and, in turn, carry out its duty to ensure the laws of Idaho are faithfully executed. *See* I.C. § 18-8805(1).

August 12, 2022 Opinion (Docket Nos. 49615, 49817, and 49899), p.12. Given this Court's clear directive that the Heartbeat Act is effective, there is no live issue. *Bradshaw v. State*, 120 Idaho 429, 432, 816 P.2d 986, 989 (1991) ("It is clear that a case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome."). Petitioners' contentions regarding the effective date of the Heartbeat Act's criminal provisions must therefore be dismissed.

## CONCLUSION

For all the reasons set forth above, and asserted in prior briefing incorporated herein by reference, the Legislature of the State of Idaho respectfully requests that this Court enter an order dismissing the Petition, with prejudice.

Dated this 2nd day of September, 2022.

*/s/ Daniel W. Bower*
Daniel W. Bower
MORRIS BOWER & HAWS, PLLC

*/s/ Monte Neil Stewart*
Monte Neil Stewart

*Attorneys for Intervenor-Respondents*

## CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2022, I filed and served the foregoing via the Odyssey File and Serve system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

| | | |
|---|---|---|
| Michael J. Barlett<br>BARTLETT & FRENCH LLP<br>1002 W. Franklin St.<br>Boise, ID 83702 | ☐<br>☐<br>☐<br>☒ | U.S. Mail<br>Hand Delivered<br>Facsimile: 208-629-2460<br>iCourt: michael@bartlettfrench.com |

*Attorneys for Petitioners*

| | | |
|---|---|---|
| Alan E. Schoenfeld<br>Rachel E. Craft<br>WILMER CUTLER PICKERING HALE AND<br>DORR LLP<br>New York, NY Office | ☐<br>☐<br>☐<br>☒ | U.S. Mail<br>Hand Delivered<br>Facsimile: 212-230-8888<br>iCourt: alan.schoenfeld@wilmerhale.com<br>rachel.craft@wilmerhale.com |

*Attorneys for Petitioners*

| | | |
|---|---|---|
| Sofia C. Brooks<br>WILMER CUTLER PICKERING HALE AND<br>DORR LLP<br>Boston, MA Office | ☐<br>☐<br>☐<br>☒ | U.S. Mail<br>Hand Delivered<br>Facsimile: 617-526-5000<br>iCourt: sofie.brooks@wilmerhale.com |

*Attorneys for Petitioners*

| | | |
|---|---|---|
| Steven L. Olsen<br>Megan A. Larrondo<br>Dayton P. Reed<br>STATE OF IDAHO ATTORNEY GENERAL<br>954 W. Jefferson Street, 2nd Floor<br>PO Box 83720<br>Boise, ID 83720-0010 | ☐<br>☐<br>☐<br>☒ | U.S. Mail<br>Hand Delivered<br>Facsimile: 202-854-8073<br>iCourt: megan.larrondo@ag.idaho.gov<br>dayton.reed@ag.idaho.gov |

*Attorneys for Respondents*

*/s/ Daniel W. Bower*
Daniel W. Bower

## CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A. R. 34.1, and that an electronic copy was served on each party at the following email addresses:

Petitioners:

Michael J. Barlett: michael@bartlettfrench.com
Alan E. Schoenfeld: alan.schoenfeld@wilmerhale.com
Rachel E. Craft: rachel.craft@wilmerhale.com
Sofia C. Brooks: sofie.brooks@wilmerhale.com

Respondents:

Megan A. Larrondo: megan.larrondo@ag.idaho.gov
Dayton P. Reed: dayton.reed@ag.idaho.gov

Supreme Court Clerk: sctbriefs@idcourts.net

Dated and certified this 2nd day of September, 2022.

*/s/ Daniel W. Bower*
Daniel W. Bower