Electronically Filed
6/27/2022 8:52 AM
Idaho Supreme Court
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IN THE SUPREME COURT FOR 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.

Case No. **49817-2022**

PETITIONERS' BRIEF IN SUPPORT OF VERIFIED PETITION FOR WRIT OF PROHIBITION AND APPLICATION FOR DECLARATORY JUDGMENT

ORIGINAL JURISDICTION

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STATEMENT OF THE CASE

A. Nature Of The Case And Course Of Proceedings

Well before the U.S. Supreme Court overturned *Roe*, the Idaho Legislature enacted a series of laws that, if given effect, would end legal abortion in the State of Idaho. The most draconian is the "Total Abortion Ban," which was passed in 2020. It criminalizes all abortion and will subject "[e]very person who performs or attempts to perform" an abortion to between two and five years' imprisonment. Idaho Code § 18-622(2). Petitioners bring this petition to challenge the constitutionality of the Total Abortion Ban (also "the Ban" or "the Total Ban") under the Idaho Constitution.

Although the Total Abortion Ban subjects medical professionals to years of imprisonment, the real costs will be borne by their current and future patients—anyone who can become pregnant in the State. The many Idahoans who would otherwise be able to obtain safe abortion care in Idaho will be forced to obtain abortion care elsewhere (if they can find it) or to carry their pregnancies to term. And while the Total Abortion Ban ostensibly provides affirmative defenses for rape, incest, and saving the life of the patient, vague language and obtuse procedural hurdles render these supposed carveouts impotent.

The Total Abortion Ban was patently illegal when it was enacted because the U.S. Constitution, as interpreted by the U.S. Supreme Court, guaranteed the right to a pre-viability abortion. Thus, the Total Abortion Ban only springs into life 30 days after a "triggering" event, which will soon transpire: The U.S. Supreme Court's *judgment* in *Dobbs v. Jackson Women's*

Health Organization, 2022 WL 2276808 (U.S. June 24, 2022). Unless this Court intervenes, the Total Abortion Ban will take effect on or around August 18, 2022.

The Total Abortion Ban violates the Idaho Constitution in at least three separate ways. *First*, the Total Abortion Ban violates the Idaho Constitution's guarantee of the fundamental right to privacy in making intimate familial decisions. *Second*, the Ban violates the Idaho Constitution's equal protection clause, as well as the Idaho Human Right Act's prohibition against sex discrimination, because it impermissibly treats women and men differently based on discriminatory gender stereotypes. *Third*, the Ban violates the Idaho Constitution's due process clause because it is unconstitutionally vague. Petitioners seek a declaration that the Total Abortion Ban is unconstitutional under the Idaho Constitution and the Idaho Human Rights Act. Petitioners further seek a writ of prohibition preventing (1) inferior Idaho courts from giving effect to the Total Abortion Ban's unlawful criminal cause of action, (2) Idaho law enforcement officials from enforcing the unlawful Ban, and (3) Idaho professional licensing boards from enforcing the Ban's unlawful suspension and revocation requirements.

B. Statement Of Facts

1. Petitioners' Interests

Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky (Planned Parenthood) currently operates two health centers in Idaho—one in Meridian, and the other in Twin Falls. *See* Decl. of K. Smith ("Smith Decl."), Ex. 1, ¶ 2.[1] Planned Parenthood's mission is

[1] Since Petitioners filed their case in the SB 1309 litigation on March 30, 2022, Planned Parenthood has closed its Boise health center. *See* Smith Decl. ¶ 2 n.1.

to provide comprehensive reproductive health care services, which are vital for public health, especially for medically underserved populations—of which there are many in the State. *See id.* ¶ 16.[2] Planned Parenthood's health centers provide services to these communities and others, including screening for breast and cervical cancer, testing and treatment for various infections, access to contraception and vaccines, and annual wellness checks. *See id.* ¶¶ 2, 7. The health centers currently also offer abortion, including medication abortion up to 77 days (or 11 weeks) as measured from the first day of a patient's last menstrual period (LMP), and (at one of the centers) procedural abortion up to 15.6 weeks LMP. *See id.* ¶ 8. The centers are the only generally available abortion providers in the State of Idaho. *See id.* ¶ 10.

Dr. Caitlin Gustafson is a licensed physician based in Valley County, where she practices family medicine, obstetrics, and gynecology. *See* Decl. of C. Gustafson ("Gustafson Decl."), Ex. 2, ¶¶ 2-3. She has served as a family doctor in Idaho for nearly two decades. *See id.* ¶ 2. Dr. Gustafson also provides abortions for Planned Parenthood. *See id.* ¶ 3.

2. The Total Abortion Ban

The Total Abortion Ban is part of the Legislature's multi-year effort to ban abortion access in Idaho. The State previously sought to ban abortions at twenty weeks, which the federal courts struck down pursuant to nearly fifty years of precedent, beginning with *Roe v. Wade*, 410 U.S. 113

[2] The federal government has designated fifty Medically Underserved Population Areas in the State, including portions of 39 of the State's 44 counties. This data was compiled using the search tool provided by the Health Professionals Shortage Area maintained by the United States Health Resources & Services Administration. *See* MUA Find, https://data.hrsa.gov/tools/shortage-area/mua-find (accessed June 24, 2022).

(1973), holding that States cannot ban abortion prior to viability. *See McCormack v. Hiedeman*, 900 F. Supp. 2d 1128, 1149-1151 (D. Idaho 2013), *aff'd sub nom. McCormack v. Herzog*, 788 F.3d 1017, 1029 (9th Cir. 2015).

In 2020, the Legislature enacted the Total Abortion Ban, which criminalizes abortion at all stages of pregnancy. *See* Idaho Code § 18-622(2) ("Every person who performs or attempts to perform an abortion … commits the crime of criminal abortion."). The Total Abortion Ban threatens punishment of between two and five years' imprisonment. *See id.* In addition, the "professional license of any health care professional who performs or attempts to perform an abortion" or assists in doing so "shall be suspended by the appropriate licensing board for" at least six months, and "shall be permanently revoked upon a subsequent offense." *Id.* The Total Abortion Ban contains two "affirmative defense[s]," which require a defendant to "prove[]" them "by a preponderance of the evidence." *Id.* § 18-622(3). The first affirmative defense allows a physician to perform an abortion after "determin[ing], in his good faith medical judgment and based on the facts known to the physician at the time, that the abortion was necessary to prevent the death of the pregnant woman." *Id.* § 18-622(3)(a)(ii).[3] The second affirmative defense allows a physician to perform an abortion after a patient has "reported the act of rape or incest to a law

[3] Even then, the physician must have performed the "abortion in the manner that, in his good faith medical judgment and based on the facts known to the physician at the time, provided the best opportunity for the unborn child to survive, unless, in his good faith medical judgment, termination of the pregnancy in that manner would have posed a greater risk of the death of the pregnant woman." Idaho Code § 18-622(3)(a)(iii). The same requirement applies to the rape and incest affirmative defense. *See id.* § 18-622(3)(b)(iv).

enforcement agency" and provided the physician a copy of that report. *Id.* § 18-622(3)(b)(ii).[4] Recognizing that the Total Abortion Ban was unconstitutional when enacted, the Legislature provided that it would become effective only upon a triggering event: 30 days after the U.S. Supreme Court issues a judgment that "restores to the states their authority to prohibit abortion." *Id.* § 18-622(1)(a).

In 2021, the Legislature enacted the "Fetal Heartbeat Ban," which criminalizes abortions performed after "a fetal heartbeat has been detected," Idaho Code § 18-8804(1)—commonly understood to occur at about six weeks of pregnancy—and subjects "[e]very licensed health care professional who knowingly or recklessly performs or induces an abortion" to between two and five years' imprisonment, *id.* § 18-8805(2). Recognizing that the Fetal Heartbeat Ban was also patently unconstitutional under federal constitutional law because it banned pre-viability abortions, the Legislature also subjected the Fetal Heartbeat Ban to a triggering event. The Fetal Heartbeat Ban can become effective 30 days after "the issuance of the judgment in any United States appellate court case in which the appellate court upholds a restriction or ban on abortion for a preborn child because a detectable heartbeat is present on the grounds that such restriction or ban does not violate the United States constitution." *Id.* § 18-8805(1). The triggering event for the Fetal Heartbeat Ban has not yet transpired. If both the Total Abortion Ban and the Fetal Heartbeat Law are both enforceable, the Total Abortion Ban "shall supersede" the Fetal Heartbeat Ban. *See* Idaho Code § 18-8805(4).

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[4] If the patient is a minor, she or her guardian must have reported the rape or incest to either a law enforcement agency or to child protective services. *See* Idaho Code § 18-622(b)(iii).

Not content to wait for the triggering event for the Fetal Heartbeat Law or the Total Abortion Ban, the Legislature in March 2022 enacted SB 1309, which purported to add a private cause of action for civilian enforcement of the Fetal Heartbeat Law, SB 1309 § 3(1). On March 30, 2022, Petitioners filed in this Court a verified petition for a writ of prohibition and an application for a declaratory judgment regarding SB 1309. *See Planned Parenthood Great Northwest et al. v. State of Idaho,* Idaho Supreme Court 49615-2022. On April 8, 2022, this Court entered an order staying the implementation of SB 1309, and implementation of the law remains stayed. This Court has set oral argument for August 3, 2022.

3. The Total Abortion Ban's Effect On Petitioners And Their Patients

Absent intervention by this Court, the Total Abortion Ban will make it impossible for Idahoans to access essential reproductive care within Idaho, except in the narrowest of circumstances if at all. Petitioners will be forced to cease providing abortion care in Idaho entirely because they fear criminal prosecution and imprisonment and losing their medical licenses. *See* Gustafson Decl. ¶ 15. The Total Abortion Ban's limited affirmative defenses will be, in practice, impossible for Petitioners to interpret and will not allow them to provide necessary care given the great risk of potential penalties.

The Total Abortion Ban will leave patients seeking abortions with no option but to seek care out-of-state, a daunting task for many patients but especially for those who are low-income or seeking to conceal their abortion from abusive partners or family members. *See id.* ¶¶ 23-25; Smith Decl. ¶¶ 9, 21. Of the providers that are currently available, the nearest would be in Salt Lake City, Utah (347 miles one-way from Meridian, 220 miles one-way from Twin Falls); Reno,

Nevada (413 miles one-way from Meridian, 450 miles one-way from Twin Falls), Bend, Oregon (310 miles one-way from Meridian, 444 miles one-way from Twin Falls), Kennewick, Washington (279 miles one-way from Meridian, 414 miles one-way from Twin Falls) and Walla Walla, Washington (244 miles one-way from Meridian, 380 miles one-way from Twin Falls). *See* Smith Decl. ¶ 11.

People seeking an abortion out of State will need to gather more money to cover higher travel costs (not just for gas, but potentially also for overnight lodging and meals).[5] *See id.* ¶ 21. They will likely lose additional income from taking time off work. And it will be harder to find substitute family care. *See id.* These challenges are especially serious for people with lower incomes, who are already medically underserved and constitute a substantial portion of Petitioners' patients. *See id.* Nearly 75 percent of those who seek abortions nationwide have poverty-level incomes.[6] *See id.* ¶ 9. For some, these heightened challenges will be impossible to overcome; for

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[5] Studies have confirmed that "greater distances to abortion facilities are associated with increased burden among patients, including higher associated out-of-pocket costs, greater difficulty getting to the clinic, negative mental health outcomes, higher likelihood of emergency room-based follow-up care, delayed care, and decreased use of abortion services." Fuentes & Jerman, *Distance Traveled to Obtain Clinical Abortion Care in the United States and Reasons for Clinic Choice*, 28 J. Women's Health 1623, 1623-1624 (2019); *see also, e.g.*, Jerman et al., *Barriers to Abortion Care and Their Consequences for Patients Traveling for Services: Qualitative Findings from Two States*, 49 Persp. on Sexual & Reprod. Health 95, 95, nn.11-12 (2017); Barr-Walker et al., *Experiences of Women Who Travel for Abortion: A mixed Methods Systematic Review* 14 PLoS ONE 1, tbl. 3 (Apr. 9, 2019), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0209991.

[6] Jerman et al., *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008*, at 11, Guttmacher Inst. (May 2016), https://www.guttmacher.org/sites/default/files/report_pdf/characteristics-us-abortion-patients-2014.pdf.

others, they will appreciably delay their access to an abortion. *See id.* ¶ 21; Gustafson Decl. ¶ 23.

Delay in accessing abortion poses risks to patients' health because, although abortion is very safe, the health risk associated with an abortion increases with gestational age. *See* Smith Decl. ¶ 23; Gustafson Decl. ¶ 13. Delay also increases medical costs because procedures become more expensive as gestational age increases. *See* Smith Decl. ¶ 22. Patients can find themselves in a vicious cycle of delaying while gathering funds only to find the procedure more expensive than anticipated, requiring further delay, or causing them to time out of care altogether. *See id.*

If patients cannot access abortion in Idaho and cannot make the trip out of State, the Total Abortion Ban will force patients to carry the pregnancy to term or attempt to self-manage an abortion outside the medical system. *See id.* ¶¶ 22, 26; Gustafson Decl. ¶ 23. Research demonstrates that being forced to continue a pregnancy against one's will jeopardizes a woman's physical, mental, and emotional health.

The risk of mortality from pregnancy and childbirth is roughly 14 times greater than for legal pre-viability abortion.[7] And there is a crisis of maternal mortality in this country and in Idaho. By one measure, in 2016 Idaho had the nation's thirteenth-highest maternal mortality rate.[8] In Idaho, fifteen women died between 2018 and 2019 while pregnant or within one year of

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[7] Raymond & Grimes, *The comparative safety of legal induced abortion and childbirth in the United States*, 119:2 Obstetrics & Gynecology 215, 219 (Feb. 2018), https://pubmed.ncbi.nlm.nih.gov/22270271/.

[8] Ungar, *What States Aren't Doing To Save New Mothers' Lives*, USA Today (Sept. 19, 2018), https://www.usatoday.com/in-depth/news/investigations/deadly-deliveries/2018/09/19/maternal-death-rate-state-medical-deadly-deliveries/547050002.

pregnancy, all of which were preventable.[9] Among the contributing factors to these deaths were "lack of access" to adequate medical care and "lack of continuity of care."[10] Also, one study projected a 21% increase in maternal mortality overall and a projected 33% increase for non-Hispanic Black individuals if a total ban on abortion comes into effect.[11]

Denying abortion care also will affect the stability and well-being of Idaho families. The existing children of women who are denied abortions are "more likely to live in a household in which their mother reported not having enough money to pay for food, housing, and transportation," and these children also had "lower child development scores."[12] And being denied an abortion harms the children ultimately born from that pregnancy as well. Children born after women are denied abortions experience "poorer maternal bonding than … subsequent children of women who received an abortion."[13]

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9 Idaho Dep't of Health & Welfare, *2018 Maternal Deaths in Idaho*, 3 (2021); Idaho Dep't of Health & Welfare, *2019 Maternal Deaths in Idaho*, 4 (2021).

10 Idaho Dep't of Health & Welfare, *2019 Maternal Deaths in Idaho* at 4.

11 *See* Grossman et al., *The Impending Crisis of Access to Safe Abortion Care in the US*, JAMA INTERNAL MED., (June 23, 2022), 10.1001/jamainternmed.2022.2893 (*citing* Amanda Jean Stevenson, *The Pregnancy-Related Mortality Impact of a Total Abortion Ban in the United States: A Research Note on Increased Deaths Due to Remaining Pregnant*, DEMOGRAPHY 2019 28 (2021), https://doi.org/10.1215/00703370-9585908).

12 Foster et al., *Effects of Carrying an Unwanted Pregnancy to Term on Women's Existing Children*, 205 J. Pediatr. 183, 185-187 (2019).

13 Foster et al., *Comparison of Health, Development, Maternal Bonding, and Poverty Among Children Born After Denial of Abortion vs After Pregnancies Subsequent to an Abortion*, 172 JAMA Pediatr. 1053, 1058 (2018).

Troublingly, the negative impacts of prohibiting abortions are often most severe for those who are already marginalized. For example, people experiencing intimate partner violence who are forced to continue their pregnancies are subject to more violence than those who are able to end their pregnancies.[14] This violence, in turn, may lead to "negative birth outcomes, including low birth weight, pre-term delivery and neonatal death," and exposure to domestic abuse can negatively impact a child's emotional well-being.[15] In addition, many people who seek abortions are already poor,[16] and denying these people abortions only compounds the problem. People who want but cannot access an abortion are more likely to be marginally employed, unemployed, or enrolled in public safety net programs compared to those who obtain an abortion.[17] Thus, people who are struggling financially are both more likely to be those seeking an abortion and those who can least afford to face the financial setbacks associated with being denied the procedure. In addition, the Total Abortion Ban will add to the anguish of patients and their families who receive fetal diagnoses incompatible with sustained life after birth—forcing patients to carry doomed pregnancies and suffer the physical and emotional pains of labor and delivery, knowing all the while that their child will not survive. *See* Smith Decl. ¶ 25. Moreover, Idahoans experiencing

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14 Roberts et al., *Risk of Violence from the Man Involved in the Pregnancy after Receiving or Being Denied an Abortion*, 12 BMC Med., at 5 (2014).

15 *Id.* at 6.

16 Tavernise, *Why Women Getting Abortions Now Are More Likely to Be Poor*, N.Y. Times (July 9, 2019), https://www.nytimes.com/2019/07/09/us/abortion-access-inequality.html ("Half of all women who got an abortion in 2014 lived in poverty, double the share from 1994 ….").

17 Foster et al., *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United State*, 108 Am. J. Pub. Health 407, 409-413 (2018).

pregnancy risks or complications that may seriously and permanently impair their health, but in a way that does not meet the Ban's limited life affirmative defense, will be forced to remain pregnant and suffer serious and potentially life-long harms to their health. Even those whose dire situations may technically qualify for the life affirmative defense may still be refused care because providers fear being held criminally liable under the Total Abortion Ban.

The cessation of abortion services in Idaho will be devastating to the people of Idaho.

ISSUES PRESENTED

I

Is the Total Abortion Ban unconstitutional because it violates the Idaho Constitution by denying the fundamental right to privacy in making intimate familial decisions?

II

Is the Total Abortion Ban unconstitutional because it violates the equal protection guarantees of the Idaho Constitution and the Idaho Human Rights Act in impermissibly treating women and men differently based on discriminatory gender stereotypes?

III

Is the Total Abortion Ban unconstitutional because it is unconstitutionally vague in violation of Article I, § 13 of the Idaho Constitution?

JURISDICTION

The Idaho Constitution confers original jurisdiction on this Court to issue "writs of mandamus, certiorari, prohibition, and habeas corpus, and all writs necessary or proper to the complete exercise of its appellate jurisdiction." Idaho Const. art. V, § 9. Pursuant to the Court's

Rules, "[a]ny person may apply to the Supreme Court for the issuance of any extraordinary writ or other proceeding over which the Supreme Court has original jurisdiction." Idaho App. R. 5(a).

This Court has exercised its original jurisdiction when a petitioner "alleges sufficient facts concerning a possible constitutional violation of an urgent nature." *Reclaim Idaho v. Denney*, 169 Idaho 406, —, 497 P.3d 160, 172 (2021) (cleaned up). Indeed, in just the last several years, this Court has exercised its original jurisdiction to consider petitions regarding a range of urgent constitutional issues. *See, e.g.*, *id.*, 497 P.3d at 194 (considering petition of organizations seeking declaration that two laws violated Idahoans' constitutional rights regarding referenda and initiatives); *Ybarra v. Legislature by Bedke*, 166 Idaho 902, 906, 466 P.3d 421, 425 (2020) (considering petition of Superintendent of Public Instruction regarding appropriation bills related to Legislature's funding and staffing of her department); *Regan v. Denney*, 165 Idaho 15, 20, 437 P.3d 15, 20 (2019) (considering individual's petition regarding constitutionality of initiative resulting in potential delegation of lawmaking authority to federal government); *Coeur D'Alene Tribe v. Denney*, 161 Idaho 508, 513-514, 387 P.3d 761, 766-767 (2015) (considering Tribe's petition regarding Secretary of State's non-discretionary constitutional duty to certify law after invalid gubernatorial veto attempt).

This case fits squarely in that tradition. Without prompt judicial intervention, Petitioners and their patients will suffer grievous constitutional violations. If the Total Abortion Ban comes into effect on or around August 18, 2022, abortions in Idaho will be banned at any gestational age, full stop. *See* Idaho Code § 18-622(1); *cf. Regan*, 165 Idaho at 21 (potential constitutional violation was "of an urgent nature due to the 90-day time requirement in" the relevant law).

Petitioners are seeking relief on an emergency basis, as soon as possible but no later than August 18, 2022. Petitioners seek a declaration that the Total Abortion Ban is unconstitutional under the Idaho Constitution. *See Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 123-124, 15 P.3d 1129, 1131-1132 (2000).

Petitioners also seek a writ of prohibition preventing (1) inferior Idaho courts from giving effect to the Total Abortion Ban's unlawful criminal cause of action, (2) Idaho law enforcement officials from enforcing the unlawful Ban, and (3) Idaho professional licensing boards from enforcing the Ban's unlawful suspension and revocation requirements. "A writ of prohibition 'arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person.'" *Re Petition for Writ of Prohibition*, 168 Idaho 909, 917, 489 P.3d 820, 828 (2021) (quoting Idaho Code § 7-401). "The term 'jurisdiction' has a specific meaning in the context of a writ of prohibition." *Id.*, 168 Idaho at 919 (citing *Schweitzer Basin Water Co. v. Schweitzer Fire Dist.*, 163 Idaho 186, 189, 408 P.3d 1258, 1261 (2017)). In the context of a writ of prohibition, "'jurisdiction' includes 'power or authority conferred by law.'" *Id.* (quoting *Henry v. Ysursa*, 148 Idaho 913, 915, 231 P.3d 1010, 1012 (2008)). Of course, state courts, law enforcement officials, and professional licensing boards are without the power or authority to enforce unconstitutional laws. *See Dumas v. Bryan*, 35 Idaho 557, 562, 207 P. 720, 722 (1922) ("'An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.'" (quoting *Norton v. Shelby Cnty.*, 118 U.S. 425, 442 (1886))). Thus, a writ of prohibition is an appropriate remedy.

Both the law enforcement officer defendants[18] and the professional licensing board defendants[19] are appropriate defendants in this action because, in Idaho, state officials and boards can be sued directly to restrain them from proceeding in excess of their jurisdiction. *See Reclaim Idaho*, 497 P.3d at 194 (granting "petition for a writ of prohibition preventing the Secretary of State from enforcing" an unconstitutional provision); *Van Valkenburgh*, 135 Idaho at 129 (indicating that Court would issue writ "prohibiting the Secretary of State from carrying out the directions" set forth in unconstitutional portions of Idaho statute); *Coeur D'Alene Tribe*, 161 Idaho at 524 ("[T]he history of the use of writs of prohibition in Idaho 'shows that it has been used against the contemplated actions of public officers, boards and commissions of the state in numerous instances.'") (quoting *Chastain's, Inc. v. State Tax Comm'n*, 72 Idaho 344, 351, 241 P.2d 167, 170 (1952)); *Baker v. Gooding Cnty.*, 25 Idaho 506, 509, 138 P. 342, 345 (1914); *Balderston v. Brady*, 17 Idaho 567, 569, 107 P. 493, 495 (1910). The State of Idaho is also an

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[18] The law enforcement officer defendants are Brad Little (Governor), Lawrence Wasden (Attorney General), Jan M. Bennetts (Ada County Prosecuting Attorney), and Grant P. Loebs (Twin Falls County Prosecuting Attorney). Prosecuting Attorneys Bennetts and Loebs bear primary responsibility for enforcing the Total Abortion Ban in Ada and Twin Falls Counties, respectively. *See* Idaho Code § 31-2227. Attorney General Wasden has the duty, "[w]hen required by the public service, to repair to any county in the state and assist the prosecuting attorney thereof in the discharge of duties." *Id.* § 67-1401(7). And Governor Little bears the responsibility to ensure that Idaho's "laws are faithfully executed." Idaho Const. art. IV, § 5.

[19] The professional licensing board defendants are the Idaho State Board of Medicine, the Idaho State Board of Nursing, and Idaho State Board of Pharmacy. The Board of Medicine is charged with disciplining individuals licensed to practice medicine in Idaho who perform (or aid and abet the performance of) an unlawful abortion. *See* Idaho Code § 54-1814(6). The Board of Nursing has the duty to suspend or revoke nursing licenses. *See id.* § 54-1404(2). And the Board of Pharmacy is responsible for suspending and revoking pharmaceutical licenses. *See id.* § 54-1718(1)(d).

appropriate defendant in this action because, in Idaho, the State can be directly sued for violations of the Idaho Constitution. *See Tucker v. State*, 162 Idaho 11, 18, 394 P.3d 54, 61 (2017) (explaining that "sovereign immunity is inapplicable when constitutional violations are alleged" because "a contrary rule would render constitutional rights meaningless"). Here, Petitioners assert violations of the Idaho Constitution.

This Court has original jurisdiction. It should exercise its jurisdiction, address the petition on the merits, and grant the requested relief.[20]

ARGUMENT

A. The Total Abortion Ban Violates The Idaho Constitution By Denying Idahoans The Fundamental Right To Privacy In Making Intimate Familial Decisions

The Total Abortion Ban denies Idahoans their fundamental right to make intimate decisions concerning their families, mandating instead that pregnant Idahoans carry a pregnancy to term regardless of the individual private circumstances confronting each family. Destructive of this State's concept of ordered liberty, the Total Abortion Ban is unconstitutional.

To determine whether the Idaho Constitution protects a particular fundamental right, this Court examines whether the right is either (1) "expressed as a positive right" in the Constitution,

[20] If this Court sees fit to entertain this petition but sets a briefing and/or oral argument schedule that extends beyond August 18, 2022, Petitioners respectfully request that this Court issue either (1) an alternative or peremptory writ of prohibition or (2) a stay of the implementation of the Total Abortion Ban to preserve the status quo (under which the Total Abortion Ban is not enforceable) during the pendency of this case. *See* Idaho App. R. 5(d); Idaho App. R. 13(g); Idaho Code § 7-403; *Pfirman v. Probate Ct. of Shoshone Cnty.*, 57 Idaho 304, 308-310, 64 P.2d 849, 850-851 (1937) (confirming this Court's authority to issue alternative writ of prohibition while considering whether plaintiff/petitioner is entitled to writ of prohibition).

or (2) "implicit in [Idaho]'s concept of ordered liberty." *Idaho Schs. for Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 581-582, 850 P.2d 724, 732-733 (1993); *Van Valkenburgh*, 135 Idaho at 126 (citing *Evans*, 123 Idaho at 581-582); *see also Reclaim Idaho*, 497 P.3d at 181 ("This Court has consistently recognized that a right is fundamental … if it is implicit in Idaho's concept of ordered liberty." (cleaned up)). The fundamental right to privacy in making intimate familial decision is implicit in Idaho's concept of ordered liberty.

1. This Court's Precedents, And Associated Constitutional Provisions, Guarantee Idahoans' Fundamental Right To Privacy In Making Intimate Decisions

Petitioners ask this Court to make explicit what is implicit in the Idaho Constitution and in this Court's precedents: The right to privacy in making intimate familial decisions is a fundamental right protected by the Idaho Constitution.

First, for 50 years, this Court has stated that the right to decide whether to procreate is a fundamental right under the Idaho Constitution. *See Stucki v. Loveland*, 94 Idaho 621, 623 n.14, 495 P.2d 571, 573 n.14 (1972); *Newlan v. State*, 96 Idaho 711, 713-714, 535 P.2d 1348, 1350 (1975); *Tarbox v. Tax Comm'n of Idaho*, 107 Idaho 957, 960 n.1, 695 P.2d 342, 345 n.1 (1984) (quoting *Newlan*, 535 P.2d at 1350); *Evans*, 123 Idaho at 582 ("[T]his Court has stated that procreation is a fundamental right, and the right to procreate is not explicitly mentioned in the state constitution."); *see also Planned Parenthood of Idaho, Inc. v. Kurtz*, 2001 WL 34157539, at *11 (Idaho Dist. Ct. Aug. 17, 2001) ("This Court finds that procreation is a fundamental right."). That is little surprise, since the fundamental right to decide whether to procreate is one of the cornerstone rights in the western legal tradition. *See Skinner v. Okla. ex rel. Williamson*, 316 U.S.

535, 541 (1942). Indeed, high courts in other States—including those whose constitutions contain no explicit right of privacy and those that long criminalized abortion—have also held that their constitutions protect the fundamental right to decide whether to procreate. *See, e.g.*, *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 486 (Kan. 2019) (Kansas Constitution protects "right to make decisions about parenting and procreation" and thus also protects right to terminate pregnancy)). The right to procreate—and to choose *not* to—are critical components of the right to privacy in making intimate familial decisions because "decisions whether to accomplish or to prevent conception are among the most private and sensitive" anyone can make. *Carey v. Population Servs., Int'l*, 431 U.S. 678, 685 (1977).

Second, this Court long ago recognized that the Idaho Constitution protects some degree of personal autonomy. In *Murphy v. Pocatello School District No. 25*, this Court struck down a school district regulation that allowed a principal to suspend a student based on the student's hair length. 94 Idaho 32, 33, 480 P.2d 878, 879 (1971). The *Murphy* Court held that "the right to wear one's hair in a manner of his choice" was a "protected right of personal taste" safeguarded by: (1) Article I, § 1 of the Idaho Constitution, which recognizes individuals' "inalienable rights," such as those to enjoy life and liberty and to pursue happiness, (2) Article I, § 21 of the Idaho Constitution, which establishes that the Constitution's "enumeration of rights shall not be construed to impair or deny other rights retained by the people," and (3) the Ninth Amendment to the U.S. Constitution, which corresponds to Article I, § 21 of the Idaho Constitution. *See id.*, 94 Idaho at 38 & n.1. The *Murphy* Court relied heavily on the Constitution's reservation of rights provision:

> What is clear from an examination of the history and origin of the Ninth Amendment is that the absence of a specific constitutional provision dealing with the rights of privacy, personal t[a]ste, the right to be left alone, and the like, does not compel the conclusion that no such right exists. On the contrary, the opposite conclusion is compelled.

Id., 94 Idaho at 37; *see Smylie v. Williams*, 81 Idaho 335, 339, 341 P.2d 451, 453 (1959) (citing Art. I, § 21 and noting that Idaho Constitution "is an instrument of limitation and not of grant"). The personal autonomy reflected in Article I, § 21's reservation of rights also supports the right to privacy in making intimate familial decisions. *Cf. Griswold v. Connecticut*, 381 U.S. 479, 484-485 (1965) (relying, in part, on the Ninth Amendment in recognizing right to marital privacy).

Third, also relying on Art. I, § 21, this Court has interpreted the Idaho Constitution to protect parents' fundamental right to decide how to raise and educate their children. In *Electors of Big Butte Area v. State Board of Education*, this Court recognized "that under our constitution parents have a right to participate in the supervision and control of the education of their children." 78 Idaho 602, 612, 308 P.2d 225, 231 (1957). The *Big Butte* Court located that fundamental right in Art. I, § 21, because it was a "right[] accorded to parenthood before the [Idaho] constitution was adopted," and so it was "retained by the people." *Id.*; *see also Martin v. Vincent*, 34 Idaho 432, 434, 201 P. 492, 493 (1921) ("The right of a parent to the custody, control, and society of his child is one of the highest known to the law."); *In re Doe*, 155 Idaho 36, 39, 304 P.3d 1202, 1205 (2013).[21] The fundamental rights of parenthood that this Court has held are protected by the Idaho

[21] Although the *Doe* Court was not construing the Idaho Constitution's due process clause, it made clear that its holding applied to that clause. *See In re Doe*, 155 Idaho at 39 n.2 (noting the similarity between the federal due process clause and Art. I, § 13 of the Idaho Constitution, remarking that the latter "may in some instances be broader.").

Constitution are closely related to the right to privacy in making intimate familial decisions. *Cf. Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (listing the right to "establish a home and bring up children" alongside other intimate rights as those protected under Fourteenth Amendment's liberty interest).

Fourth, this Court has made clear that where bodily privacy is concerned, the Idaho Constitution is more protective than the U.S. Constitution. The Idaho Constitution includes an analogue to the Fourth Amendment to the U.S. Constitution. *See* Idaho Const. art. I, § 17 (providing, in 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."). This Court has previously held that "Article I, § 17, in some instances, provides greater protection than the parallel provision in the Fourth Amendment of the U.S. Constitution." *State v. Donato*, 135 Idaho 469, 472, 20 P.3d 5, 8 (2001); *see also State v. Guzman*, 122 Idaho 981, 998, 842 P.2d 660, 677 (1992) (holding that good-faith exception to exclusionary rule does not exist under Idaho Const. art. I, § 17). Indeed, some Idaho courts have referred to the "expansiveness of Idaho's protection of privacy" under the Idaho Constitution. *See, e.g.*, *Kurtz*, 2001 WL 34157539, at *10; *see also id.* ("[P]rivacy has been generally considered a more broadly protected right under the Idaho Constitution than under the United States Constitution."). This broad right to privacy as recognized in search and seizure law also supports the right to privacy in making intimate familial decisions. *See Griswold*, 381 U.S. at 484-485 (relying, in part, on the Fourth Amendment in recognizing right to marital privacy); *cf. Katz v. United States*, 389 U.S. 347, 350 (1967).

Fifth, many sources—including this Court—have noted that the common law did not prohibit abortions undertaken before quickening, which is defined as the "first fetal movements [] felt by the mother" and which "often occurs between the 16th to the 22nd week of pregnancy."[22] *See, e.g.*, *State v. Alcorn*, 7 Idaho 599, 606, 64 P. 1014, 1016 (1901) (acknowledging that, at common law, abortion before quickening was not a crime); *People v. Belous*, 458 P.2d 194, 198 (Cal. 1969) ("[A]bortion before quickening was not a crime at common law."); *State v. Cooper*, 22 N.J.L. 52, 58 (1849) ("We are of [the] opinion that the procuring of an abortion by the mother, or by another with her assent, unless the mother be quick with child, is not an indictable offence at the common law …."); *Commonwealth v. Parker*, 50 Mass. (9 Met.) 263, 265-266 (1845) ("[A]t common law, no indictment will lie, for attempts to procure abortion with the consent of the mother, until she is quick with child.").[23] High courts in other States have noted that fact in holding that their constitutions protect a right to privacy that includes the ability to obtain an abortion. *See Pro-Choice Miss. v. Fordice*, 716 So. 2d 645, 651-653 (Miss. 1998).

Sixth, Article I, § 1 of the Idaho Constitution strongly supports the recognition of the fundamental right to privacy in making intimate familial decisions. Article I, § 1 is titled "Inalienable rights of man," and it declares:

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[22] Bryant et al., *Fetal Movement*, Nat'l Library of Med. (May 8, 2022), https://www.ncbi.nlm.nih.gov/books/NBK470566.

[23] Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 281-282 (1992) ("At the opening of the nineteenth century, abortion was governed by common law, and was not a criminal offense if performed before quickening[.]").

> All men are by nature free and equal, and have certain inalienable rights, among which are enjoying and defending life and liberty; acquiring, possessing and protecting property; pursuing happiness and securing safety.

Idaho Const. art. I, § 1. This clause—the Idaho Constitution's natural rights guarantee—independently protects the right that Petitioners assert here.

This Court has recognized that Section 1's invocation of "inalienable rights" embodies the concept of natural rights, which are "conceived as part of natural law" and are "therefore thought to exist independently of rights created by government or society." Black's Law Dictionary (11th ed. 2019) ("natural right" definition under "right"); *see Newland v. Child*, 73 Idaho 530, 537, 254 P.2d 1066, 1069 (1953) (holding, for example, that "[t]he right to own and enjoy private property" is protected by Art. I, § 1 because "[i]t is one of the natural, inherent and inalienable rights of free men," and so "[i]t is not a gift of our constitutions, because it existed before them"); *Parsons v. State*, 113 Idaho 421, 427, 745 P.2d 300, 306 (Ct. App. 1987) (noting that Section 1 "recognizes that all people enjoy natural, inalienable rights," and remarking that the provision "echo[es] the principles of government stated by the authors of the Declaration of Independence").

Section 1 is not duplicative of Section 13 of the Idaho Constitution, which contains an analog to the U.S. Constitution's due process clause. Indeed, Section 1's language is expansive: It sets forth a non-exhaustive list of inalienable rights. *See* Idaho Const. art. I, § 1 ("All men are by nature free and equal, and have certain inalienable rights, *among which are* …" (emphasis added)). And it should be interpreted expansively. At the Idaho Constitutional Convention in 1889, a delegate objected to the inclusion of the phrase "nor to be deprived of life, liberty or property without due process of law" in Article I, § 13 on the basis that it was duplicative of the

guarantees of Article I, § 1.[24] But the phrase was included over that objection. Thus, Section 1 should be read to protect more rights than Section 13. Many other state high courts have interpreted natural rights provisions in their constitutions as more protective than the U.S. Constitution.[25] The right to privacy in making intimate familial decisions is an "inalienable right" protected by Section 1.

2. There is Broad Recognition Of A Right To Privacy In Making Intimate Familial Decisions

The associated rights just described—many of which this Court has already recognized—all interrelate and reflect the fact that the Idaho Constitution has long protected the right to privacy and that the right to privacy protects the making of intimate familial decisions. High courts in other States have recognized that these (and similar) fundamental rights collectively articulate a zone of privacy concerning intimate familial decisions that is constitutionally protected. *See, e.g.*, *Women of Minn. by Doe v. Gomez*, 542 N.W.2d 17, 26-27 & n.10 (Minn. 1995) (holding that

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[24] *See* 1 *Proceedings and Debates of the Constitutional Convention of Idaho, 1889*, at 287-288 (I.W. Hart, ed. 1912).

[25] *See, e.g.*, *Right to Choose v. Byrne*, 91 N.J. 287, 303 (1982) (referring to protections under natural rights provision of New Jersey Constitution as "more expansive [] than that of the United States Constitution"); *Hodes & Nauser*, 440 P.3d at 472-73 (similar); *Women's Health Ctr. of W. Va., Inc. v. Panepinto*, 191 W.Va. 436, 442 (1993) (stating that West Virginia Constitution's inherent rights clause "both permits and requires us to interpret [its] guarantees independent from federal precedent"). Indeed, state high courts have long interpreted natural rights provisions to protect a number of unenumerated rights, such as those relating to personal autonomy, bodily integrity, and self-determination. *See, e.g.*, *Hodes & Nauser*, 440 P.3d at 480-483 (citing many such cases and concluding: "At the heart of a natural rights philosophy is the principle that individuals should be free to make choices about how to conduct their own lives, or, in other words, to exercise personal autonomy"); Calabresi & Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 Tex. L. Rev. 1299, 1441 (2015).

several provisions of Minnesota Constitution—although not containing explicit privacy guarantee—combined to establish privacy right large enough to protect woman's right to choose to terminate pregnancy).[26] Indeed, the vast majority of the seventeen state appellate courts that have addressed whether their state constitutions independently protect a person's "decisions regarding … pregnancy from unjustifiable government interference" have found that they do. *See Hodes & Nauser*, 440 P.3d at 504-505 (Biles, J., concurring) (collecting cases). Courts in California, Kansas, Michigan, Minnesota, Montana, and Wisconsin have recognized that the right

[26] Courts of Appeals in Alaska, California, Florida, Kansas, New Jersey, Ohio, Massachusetts, Minnesota, Mississippi, Montana, and Washington all have recognized that the fundamental right to privacy encompasses a person's decision whether to terminate a pregnancy. *See Hodes & Nauser*, 440 P.3d at 466 (Kansas Constitution protects "right to make decisions about parenting and procreation" and thus also protects right to terminate pregnancy); *Fordice*, 716 So. 2d at 653 ("While we do not interpret our Constitution as recognizing an explicit right to an abortion, we believe that autonomous bodily integrity is protected under the right to privacy … [and p]rotected within the right of autonomous bodily integrity is an implicit right to have an abortion."); *Planned Parenthood of The Great N.W. v. State*, 375 P.3d 1122, 1137 (Alaska 2016) ("It has long been established that the Alaska Constitution's privacy clause guarantees the fundamental right to choose between pregnancy termination and carrying to term."); *Cmte. to Defend Reprod. Rts. v. Myers*, 29 Cal. 3d 252, 275 (1981) (California Constitution's right to privacy protects right to choose whether to bear children); *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1254 (Fla. 2017) ("Florida's constitutional right of privacy encompasses a woman's right to choose to end her pregnancy."); *Byrne*, 91 N.J. at 306 (striking restriction of Medicaid funding for medically necessary abortions based on a recognized right to privacy); *Gomez*, 542 N.W.2d at 27 ("We therefore conclude that the right of privacy under the Minnesota Constitution encompasses a woman's right to decide to terminate her pregnancy"); *Planned Parenthood League of Ma., Inc. v. Att'y Gen.*, 424 Mass. 586, 589 (1997) (describing right to abortion as fundamental); *Armstrong v. State*, 296 Mont. 361, 376 (1999); *Preterm Cleveland v. Voinovich*, 89 Ohio App. 3d 684, 691 (1993) ("[I]t would seem almost axiomatic that the right of a woman to choose whether to bear a child is a liberty within the [state constitution's] protection"); *State v. Koome*, 84 Wash. 2d 901, 904 (1975) (en banc) (right of privacy in Washington Constitution protects right to abortion); *see also Doe v. Maher*, 40 Conn. Supp. 394, 425-426 (1986) ("It is absolutely clear that the right of privacy is implicit in Connecticut's ordered liberty" and "stands in a separate category as a fundamental right protected by the state constitution").

to privacy and related rights protect bodily autonomy.[27] Persuasive authority supports the conclusion that the right to privacy in making intimate familial decisions is a fundamental right under the Idaho Constitution, independent from the federal Constitution.

3. The Total Ban Is Neither Necessary Nor Narrowly Tailored to Achieving the State's Asserted Goals

Legislation that implicates fundamental rights is met with strict scrutiny and must be declared unconstitutional unless it is "necessary to serve a compelling state interest" and "narrowly tailored to achieve that interest." *Reclaim Idaho*, 497 P.3d at 185 (quoting *Bradbury v. Idaho Jud. Council*, 136 Idaho 63, 69, 28 P.3d 1006, 1012 (2001)). The Total Ban cannot satisfy that standard.

First, the State cannot have a compelling interest in preventing individuals from exercising the fundamental right to end an unplanned pregnancy beginning at the earliest stages of pregnancy, as the Total Ban does. The State's proffered rationale for the Total Abortion Ban is to protect fetal

[27] *Myers*, 29 Cal. 3d at 275 (California Constitution protects a "woman's interest in life, health, and personal bodily autonomy" and "also her right to decide for herself whether to parent a child"); *Hodes & Nauser*, 440 P.3d at 480-483 ("At the heart of a natural rights philosophy is the principle that individuals should be free to make choices about how to conduct their own lives, or, in other words, to exercise personal autonomy"); *Mays v. Snyder*, 323 Mich. App. 1, 58-59 (2018) (substantive due process encompasses "an individual's right to bodily integrity"); *Gomez*, 524 N.W.2d at 27 (no right "more sacred" or more "carefully guarded by the common law" than "right of every individual to the possession and control of his own person"); *Gryczan v. State*, 283 Mont. 433, 450-51 (1997) (Montana's Constitution "explicitly protects individual or personal-autonomy privacy as a fundamental right"); *State ex rel. Jones v. Gerhardstein*, 135 Wis. 2d 161, 174 (1986) (recognizing "fundamental right to physical privacy or bodily autonomy").

life and women's health.[28] Even if a State interest in fetal life could justify a ban on abortion at some point in pregnancy, no State interest could justify an absolute ban, and any law that does so unquestionably violates the strict scrutiny standard.

Even if the proffered rationales did qualify as compelling state interests, the Total Ban is not narrowly tailored to achieve those interests. As an initial matter, the Ban sweeps too broadly, criminalizing constitutionally protected conduct without exception: § 18-622(2) declares that "[e]very person who performs or attempts to perform an abortion as defined in this chapter commits the crime of criminal abortion." The Total Abortion Ban lacks functional affirmative defenses and substitutes the State's judgment about what is best for each family in Idaho for the independent and private judgment of Idahoans. Idaho has many better alternatives for its stated policy objectives that do not unconstitutionally discriminate against women. The fact that these many alternatives better achieve the stated legislative purpose of the Total Abortion Ban demonstrates that the Ban is not narrowly tailored. This lack of fit renders the Ban unconstitutional. *See Reclaim Idaho,* 497 P.3d at 189-191.

First, the simplest option for decreasing unintended pregnancies is increased access to contraception. Studies show that access to free reversible female contraception lowers abortion

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[28] *See, e.g.*, Ertelt, *Idaho Governor Signs Bill Banning Abortions: 'Abortion Is Not Health Care'*, LifeNews.com (Mar. 27, 2020), https://www.lifenews.com/2020/03/27/idaho-governor-signs-bill-banning-abortions-abortion-is-not-health-care; Idaho Senate Affairs Committee Minutes, Tuesday Mar. 10, 2020, https://lso.legislature.idaho.gov/MediaPub/2020/AgendaMinutes/200310_ssta_0800AM-Minutes.pdf.

rates.[29] Despite the obvious link between access to contraception and abortion rates, areas of Idaho are "contraception deserts," with over 102,000 women living in counties with only one health center that provides the full range of contraceptive methods, and over 17,000 women living in counties without a single such health center.[30] The Idaho Legislature recently *rejected* a bill that would have extended the maximum prescription period for contraceptives.[31]

Alternatively, Idaho can more effectively further its goals by increasing access to healthcare and strengthening social assistance programs. A 2018 United Health Foundation report on the Health of Women and Children ranked Idaho 25th out of all States in overall health of women and children and cited a "high percentage of uninsured women" as a key challenge in the State.[32] Women in Idaho currently face shortages of qualified doctors, a problem that has persisted for over a decade. For example, in 2012, Idaho had the fourth-lowest ratio of maternal-fetal

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[29] Finer & Zolna, *Declines in Unintended Pregnancy in the United States, 2008-11*, 374 New Eng. J. Med. 843, 851 (2016) (explaining the decline in the rate of unintended pregnancy as explained by increased contraception use); Dreweke, *New Clarity for the U.S. Abortion Debate: A Steep Drop in Unintended Pregnancy is Driving Recent Abortion Declines*, Guttmacher Pol'y Rev. (Mar. 18, 2016), https://www.guttmacher.org/gpr/2016/03/new-clarity-us-abortion-debate-steep-drop-unintended-pregnancy-driving-recent-abortion.

[30] Power to Decide, *Birth Control Access*, https://powertodecide.org/what-we-do/access/birth-control-access (accessed June 24, 2022).

[31] Duggan, *House Kills Increased Access To Contraceptives Bill*, Idaho Press (Mar. 14, 2022), https://www.idahopress.com/news/local/house-kills-increased-access-to-contraceptives-bill/article_1eeedfce-f2d9-5228-9d8d-e48f635a80be.html.

[32] United Health Found., *2018 Health of Women and Children Report* (2018), https://www.americashealthrankings.org/learn/reports/2018-health-of-women-and-children-report/state-summaries-idaho.

medicine doctors to live births of any State in the country.[33] In 2011, the American Academy of Family Physicians identified Idaho as one of the five States that would face serious shortages of family medicine physicians by 2020.[34] Access to care on Idaho's four federally recognized Indian reservations is of particular concern because Idaho's Indian Health Services, the primary source of healthcare on reservations, is chronically underfunded.[35] The troubling effects of these failures to provide care are borne out in the State's health data, including the State's maternal mortality data. *See supra*. There are several steps the State could take to address the lack of access to healthcare that would more straightforwardly protect the lives and health of Idahoans. For example, access to regular health care and checkups could reduce pregnancy-related deaths by up to 60 percent.[36] Similarly, access to early prenatal care greatly reduces the risk of death in infancy.[37]

Alternatively, Idaho could focus resources on helping support those Idahoans who want to

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[33] Rayburn et al., *Maternal-Fetal Medicine Workforce in the United States*, 9 Am. J. Perinatology 741, 741 (Oct. 2012), https://pubmed.ncbi.nlm.nih.gov/22773289.

[34] Schmitz et al., *Idaho Rural Family Physician Workforce Study: The Community Apgar Questionnaire*, Int'l Elec. J. of Rural and Remote Health Rsch., Ed., Practice, & Pol'y 2 (July 25, 2011), https://search.informit.org/doi/pdf/10.3316/informit.334331421912335.

[35] Marley, *Segregation, Reservations, and American Indian Health*, 33 Wicazo Sa Rev. 49, 51 (2018), https://doi.org/10.5749/wicazosareview.33.2.0049.

[36] Petersen et al., *Vital Signs: Pregnancy-Related Deaths, United States, 2011–2015, and Strategies for Prevention, 13 States, 2013–2017*, 68 Morbidity & Mortality Weekly Report 423, 423 (May 10, 2019).

[37] Dep't of Health & Hum. Servs., Off. on Women's Health, *Prenatal Care*, https://www.womenshealth.gov/a-z-topics/prenatal-care (Feb. 22, 2021) (newborns whose mothers did not have early prenatal care are almost five times more likely to die in infancy).

be parents to have the needed resources. Women who seek abortions commonly cite lack of financial resources among the reasons for their decision.[38] American Indian women face particular economic hardship because they are paid just 59.7 cents for every dollar paid to white non-Hispanic men.[39] As a result, American Indian adults are more likely than white, non-Hispanic adults to be food insecure.[40] Instead, Idaho recently chose to do the opposite. Unlike many other States, Idaho elected to end pandemic SNAP benefits in March 2021, thereby reducing the amount of assistance given to needy families.[41] Idaho is also not among the group of 23 States that has passed a Pregnant Workers' Fairness Act.[42] Rather than providing any of these resources, Idaho instead targets Idahoans with coercive restrictions that compel pregnancy while providing inadequate support for that pregnancy.

Any of these potential policy changes would have better met the Legislature's asserted goals than the current discriminatory law. "The legislature's duty to give effect to the people's

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38 Biggs et al., *Understanding Why Women Seek Abortions in the US*, 13:29 BMC Women's Health, at 2 (2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3729671.

39 Chilers & Hegewisch, *State-by-State Earnings for American Indian and Alaska Native Women: Wage Gaps Across the States*, Inst. Women's Pol'y Res. 1 (Sept. 28, 2020), https://iwpr.org/iwpr-issues/race-ethnicity-gender-and-economy/state-by-state-earnings-for-american-indian-and-alaska-native-women-wage-gaps-across-the-states.

40 Sagaskie, *The Impact of Colonization: Food Insecurity Among American Indian and Alaskan Native Adults*, 33 Mich. Socio. Rev. 101, 102 (2019).

41 Duffy, *The 18 States Which Will Not Provide Extra Food Stamps Next Month*, U.S. Sun (May 9, 2022), https://www.the-sun.com/money/5296896/states-ending-emergency-snap-food-stamps.

42 A Better Balance, *Map Of Pregnant Workers' Fairness Acts* (July 19, 2018), https://www.abetterbalance.org/resources/map-state-pregnant-worker-fairness-laws.

rights is not a free pass to override constitutional constraints and legislate a right into non-existence, even if the legislature believes doing so is in the people's best interest." *Reclaim Idaho*, 497 P.3d at 183. The Total Abortion Ban must be declared unconstitutional.

B. The Total Abortion Ban Violates The Equal Protection Guarantees Of The Idaho Constitution And The Idaho Human Rights Act

The Total Abortion Ban violates the right to equal protection set forth in the Idaho Constitution and the Idaho Human Rights Act because the Total Abortion Ban forces women[43] to endure the burdens and risks of pregnancy, childbirth, and parenting based on outdated stereotypes about their societal role. In doing so, the Total Abortion Ban "denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities." *United States v. Virginia*, 518 U.S. 515, 532 (1996). Such discriminatory and unequal treatment is both constitutionally and statutorily prohibited.

1. The Constitutional Right To Equal Protection In Idaho

The Equal Protection Clause of the Idaho Constitution declares that government exists to provide for the "equal protection and benefit" of the people. *See* Idaho Const. art. I, § 2. The Constitution also enumerates certain "inalienable rights" of the people of the State, including that

[43] Although people of all gender identities may become pregnant, seek abortions, and bear children, Petitioners use the terms "woman" and "women" because these are recognized terms in equal protection jurisprudence and because abortion restrictions have the effect of subordinating women as a class by policing their compliance with discriminatory sex-based stereotypes. In addition, because the Ban speaks only in terms of "women," Petitioners follow suit for ease of reference and clarity.

all people "are by nature free and equal." *Id.* § 1. By their terms, these provisions provide Idahoans with a right to equal protection under the law. Idaho courts have confirmed that, as a general matter, these guarantees are "substantially equivalent" to the right to equal protection under the federal Constitution. *Rudeen v. Cenarrusa*, 136 Idaho 560, 568, 38 P.3d 598, 606 (2001). Both the federal and the state rights are grounded in the principle that "all persons in like circumstances should receive the same benefits and burdens of the law." *Alpine Vill. Co. v. City of McCall*, 154 Idaho 930, 937, 303 P.3d 617, 624 (2013).

Idaho courts use a framework akin to the one employed for federal claims to analyze claims under the Idaho equal protection provisions. This involves a three-step process. First, a court "identif[ies] the classification that is being challenged." *Rudeen*, 136 Idaho at 569. Second, it "determine[s] the standard under which the classification will be judicially reviewed." *Id.* Idaho jurisprudence recognizes three different standards of review: (1) strict scrutiny, which is analogous to the federal standard, (2) means-focus scrutiny, which is often employed in circumstances when intermediate scrutiny would apply in the federal context, and (3) low level or rational basis review. *Id.* Finally, the third step is for the court to "determine whether the appropriate standard has been satisfied." *Id.*

Classifications involving gender are typically reviewed under the middle standard. *See State v. LaMere*, 103 Idaho 839, 842, 655 P.2d 46, 49 (1982). This means-focus standard is "employed where the discriminatory character of a challenged statutory classification is apparent on its face." *State v. Mowrey*, 134 Idaho 751, 755, 9 P.3d 1217, 1221 (2000) (cleaned up). This quality is sometimes alternatively described as a requirement that the statute be "obviously

invidiously discriminatory." *State v. Hart*, 135 Idaho 827, 830, 25 P.3d 850, 853 (2001); *see also Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 396, 987 P.2d 300, 308 (1999) (means-focus standard applies where "the classification at issue involves a fundamental right or is invidiously discriminatory"). "In order for a classification to be considered obviously invidiously discriminatory, it must distinguish between individuals or groups either odiously or on some other basis calculated to excite animosity or ill will." *Hart*, 135 Idaho at 830 (cleaned up). A statute that "create[s] two or more plainly discernible classes of similarly situated persons and purposely … grant[s] one class a benefit, or … exempt[s] it from a burden" where "logically" all people would receive equal treatment, meets this definition. *State v. Breed*, 111 Idaho 497, 501, 725 P.2d 202, 206 (Ct. App. 1986).

For example, in *Jones v. State Board of Medicine*, where the means-focus standard was first adopted, this Court held that a statute limiting recovery for medical malpractice claims created a discriminatory classification because "although the Act [was] … designed to insure continued health care to the citizens of Idaho[,] it c[ould not] do other than confer an advantage on doctors and hospitals at the expense of the more seriously injured and damaged persons." 97 Idaho 859, 871, 555 P.2d 399, 411 (1976). Because "the discriminatory character" of the classification was "apparent on [the] face" of the statute, lawmakers were required to show more than simply that the law could "reasonably be said to promote the health, safety, and welfare of the public." *Id*.

Instead, "a more stringent judicial inquiry" into the means by which the law accomplished its legislative purpose is required for this type of law. *Jones*, 97 Idaho at 871. Courts must consider "whether the legislative means substantially furthers some specifically identifiable legislative

end." *Id*. at 867. This is more stringent than rational basis both in terms of the interest, which must be "specifically identifiable," and the tailoring of the law, which must "substantially further[]" the stated purpose, not simply be reasonably related to it. *Id*. A law violates these requirements "where there is … a patent indication of a lack of relationship between the classification and the declared purpose of the statute." *Mowrey*, 134 Idaho at 755. In the context of gender classifications specifically, this inquiry leads to the conclusion that "[w]here … the State's … purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex." *Murphey v. Murphey*, 103 Idaho 720, 722, 653 P.2d 441, 443 (1982).

2. The Total Ban Is Subject To Means-Focus Scrutiny

a. Laws That Discriminate On The Basis Of Sex Are Subject To Means-Focus Scrutiny

Both Idaho and federal courts have established that laws involving gender classifications must be reviewed with heightened scrutiny. This Court has held that laws that "discriminat[e] between males and females" are subject to means-focus review. *See Jones*, 97 Idaho at 867 (discussing *Harrigfeld v. Dist. Ct.*, 95 Idaho 540, 511 P.2d 822 (1973)); *LaMere*, 103 Idaho at 842 ("When a challenge to a gender-based classification is raised this Court will follow the test set out by the U.S. Supreme Court and require that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." (cleaned up)). In the federal context, discrimination on the basis of sex is also subject to heightened scrutiny. *See Virginia*, 518 U.S. at 533-534; *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 728-

734 (2003).

This "skeptical scrutiny" is required due to the "long and unfortunate history of sex discrimination" in the United States. *Virginia*, 518 U.S. at 531. For the vast majority of the nation's history, women were denied the right to vote, to contribute equally in the workplace, and to enjoy the benefits that men enjoyed in many other areas. *Id*. at 531-533. The justification for these discriminatory practices was often that women were required to remain "the center of home and family life" and therefore were required to sacrifice their minds and bodies in service of this biologically bestowed obligation. *Hibbs*, 538 U.S. at 729. The Idaho Legislature was among the culprits of this unfair treatment. One of the landmark cases regarding women's rights was the invalidation of an Idaho law that "provid[ed] dissimilar treatment for men and women who [were] … similarly situated" because it reflected a preference for the decision making and work of men without any consideration of actual quality or credentials. *Reed v. Reed*, 404 U.S. 71, 77 (1971). Accordingly, such laws, whether enacted by the Idaho Legislature or another governing body, must be viewed with reservation.

Idaho courts, including this Court, have similarly recognized the invidious nature of legislative provisions founded on discriminatory stereotypes. In *Murphey v. Murphey*, the court explained that "[c]lassifications which perpetuate or encourage sexual stereotypes necessarily burden those persons—of either gender—whose social and economic preferences or conditions do not conform to the stereotypical model." 103 Idaho at 723. This Court went on to say that allowing "the state to create such classifications, at least in the absence of a substantial relationship between the classifications and an otherwise valid state goal, would be abhorrent to art. I, § 2 of the Idaho

Constitution." *Id*. Laws like the Total Abortion Ban, that substantially burden women by forcing them into the home and into the role of mother without their consent, are inherently discriminatory and must be reviewed under the heightened scrutiny of the means-focus test.

b. The Total Abortion Ban Is Invidiously Discriminatory

Even if classifications based on gender did not automatically warrant heightened scrutiny, the Total Abortion Ban is still subject to the means-focus test because it is discriminatory on its face. This law purposefully places a host of burdens on women, with no equivalent burdens on men. The manner in which the law singles out women based on their gender alone is suspect and violates the Idaho Equal Protection Clause. *See Hart*, 135 Idaho at 830; *Breed*, 111 Idaho at 501.

Invidious classifications of the kind that Idaho courts have previously held to be unconstitutional are apparent in the statutory text of the Total Abortion Ban, which criminalizes performing or attempting to perform "an abortion as defined in this chapter." Idaho Code § 18-622(2). The statute defines abortion as "the use of any means to intentionally terminate the clinically diagnosable pregnancy of a woman." *Id.* § 18-604(1). Not only does this provision single out abortions—a medical procedure that substantially impacts women and does not equivalently impact men—as the only medical procedure prohibited, but the statute actually singles out the "pregnancy of a woman" and "a pregnant woman" as those who are being denied access to this procedure. Thus, the law "cannot do other than confer an advantage on" men and society at large "at the expense of" the women being forced to carry these unwanted pregnancies and bear the burdens and consequences of the resulting births—and this unequal treatment between groups is precisely the situation in which means-focus review is required. *Jones*, 97 Idaho at 871.

Indeed, the Court has recognized that laws based on similarly blatant classifications were subject to means-focus review. In *Thompson v. Hagan*, this Court held that the Idaho automobile guest statute created an "impermissible classification scheme" because it "deni[ed] automobile guests a negligence cause of action against their host, but allow[ed] negligence actions against the host by paying passengers, guests in other automobiles, drivers of other automobiles and pedestrians." 96 Idaho 19, 24, 523 P.2d 1365, 1369 (1974). And in *Idaho Schools for Equal Educational Opportunity v. Evans*, this Court held that a statute that "treat[ed] chartered school districts differently than non-chartered school districts in their respective powers to levy additional taxes" was blatantly discriminatory and required review under the means-focus standard. 123 Idaho at 582. *Thompson* and *Evans* focused on whether the laws in question selected certain groups for preferential treatment and found that heightened scrutiny applied where such a classification existed—this scrutiny is all the more necessary where the classification burdens a historically marginalized group.

The Total Abortion Ban treats women, who would be forced to carry a pregnancy, give birth, and become a parent unwillingly, differently than men, who bear no equivalent burden. The law is designed to deprive only women of the right to choose whether or not to be a parent and to their bodily autonomy. This obvious classification is only made more invidious in light of the historical oppression of women in the particular area of the work associated with bearing and raising children. The statute then must be viewed with suspicion and analyzed stringently.

3. Under The Means-Focus Test, The Total Ban Is Unconstitutional Because It Does Not Bear A Substantial Relation To The Achievement Of Its Stated Objectives And Purposes

For the same reasons that the Total Abortion Ban does not survive strict scrutiny, explained *supra*, it is also unconstitutional under means-focus review. The "legislative means" that the Total Abortion Ban employs do not "substantially further[] some specifically identifiable legislative end." *Jones*, 97 Idaho at 867. Though the legislative history reflects a purported intent to protect unborn children and fetal life, there are many ways to achieve this goal that are more effective than denying women access to abortions. These alternatives also lack the discriminatory character of the Total Abortion Ban. In light of the host of non-discriminatory, better tailored alternatives, the Total Abortion Ban cannot be said to substantially further their nominal legislative goals.

Indeed, Idaho courts analyzing similarly ill-fitting laws have found that they violate the Constitution's equal protection guarantee. Merely naming ostensibly valid legislative interests without employing statutory means that substantially further those interests is not enough. *Murphey*, 103 Idaho at 722. Where, as here, the statute lacks a sufficient connection "between those purposes and the creation of a gender-based classification," a law that employs discriminatory classifications is unconstitutional. *Id*. Both Idaho and federal courts have accordingly struck down similarly invidious laws as violative of the right to equal protection.

For example, in analyzing a federal equal protection claim, the United States Supreme Court has noted that even where an Idaho law preferencing similarly situated men above women was "not without some legitimacy," "[t]he crucial question … [was] whether [the state law] advance[d] that objective in a manner consistent with the command of the Equal Protection

Clause." *Reed*, 404 U.S. at 76. Because it did not, the U.S. Supreme Court held that the law was unconstitutional. *Id.* Similarly, this Court has struck down a range of policies that discriminated on the basis of sex without an adequate justification. *See Murphey*, 103 Idaho at 723 (statute allowing awards of alimony only to women violated equal protection clause because it perpetuated harmful gender stereotypes); *Credit Bureau of E. Idaho, Inc. v. Lecheminant*, 149 Idaho 467, 470, 235 P.3d 1188, 1191 (2010); *Suter v. Suter*, 97 Idaho 461, 467, 546 P.2d 1169, 1175 (1976); *Williams v. Paxton*, 98 Idaho 155, 163, 559 P.2d 1123, 1131 (1976).

The Total Abortion Ban is equivalently discriminatory and lacks adequate justification. Legal challenges to abortion fundamentally implicate "a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship." *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting). Given the fundamental rights at stake, Idaho Code § 18-622 is unconstitutional under the heightened scrutiny with which it must be reviewed.

4. The Total Abortion Ban Violates The Idaho Human Rights Act's Prohibition of Sex Discrimination

The Idaho Human Rights Act prohibits "discriminat[ion] against a person because of, or on a basis of, … sex" in a variety of contexts, including in the workplace, in educational facilities, and in places of public accommodation. Idaho Code § 67-5909. This Court has interpreted "this statutory provision [as] explicitly prohibit[ing] discrimination on the basis of sex" both in the workplace and in many other areas of society. *Idaho Comm'n on Hum. Rts. v. Campbell*, 95 Idaho 215, 216-217, 506 P.2d 112, 113-114 (1973). The State is similarly prohibited from engaging in conduct that discriminates on the basis of sex. *See* Idaho Code § 67-5909A. In enforcing the Total

Abortion Ban, the State of Idaho will force women to remain pregnant against their will, and thereby violate Idaho Code Section 67-5909 by depriving women of their statutory right to equal enjoyment of public accommodations, education, and employment.

Requiring a woman to carry a pregnancy to term rather than having an abortion hinders her ability to pursue educational goals, access equal employment opportunities, and enjoy other public benefits and imposes huge costs on her. For example, pregnancy-related illness may make an employee miss excessive amounts of work. *See Keller v. Ameritel Inns, Inc.*, 164 Idaho 636, 641, 434 P.3d 811, 816 (2019) (employee discharged because of "absences resulting from her pregnancy-related illness"). Similarly, studies show that women forced to carry a pregnancy to term face higher unemployment rates and lower salaries.[44] And women who are denied access to abortions typically receive fewer years of education and are less likely to enter or complete college.[45] Indeed, women are less likely to have and achieve their aspirational life goals in general if they have been denied an abortion.[46]

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[44] Foster et al., *supra* note 17, at 409 (finding unemployment rates significantly higher and income lower among group forced to carry a pregnancy to term at six months after abortion was sought); *see also* Jones, *At a Crossroads: The Impact of Abortion Access on Future Economic Outcomes*, Am. Univ. Working Paper at 18 (2021), https://doi.org/10.17606/0Q51-0R11 ("Among those who had a teen pregnancy, there is evidence that abortion access improved future employment, earnings, and managerial roles by 33%, 41%, and 2-fold, respectively.").

[45] Jones, Am. Univ. Working Paper, *supra* note 44, at 14-15 (finding that "access to abortion from age 15 to 23 increases years of education by 0.80 (6%), increases the probability of entering college by 0.21 (41%) and increases the probability of completing college by 0.18 (72%)").

[46] Upadhyay et al., *The Effect of Abortion on Having and Achieving Aspirational One-Year Plans*, 15 BMC Women's Health, at 1 (2015), https://bmcwomenshealth.biomedcentral.com/track/pdf/10.1186/s12905-015-0259-1.pdf.

By denying women access to equal opportunities in various public spaces, and by restricting their exercise of basic rights while failing to impose any equivalent restriction on men, the Total Abortion Ban violates the Idaho Human Rights Act. *See* Idaho Code § 67-5909(5) (prohibiting "deny[ing] an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of a place of public accommodation"); *Idaho Comm'n on Hum. Rts.*, 95 Idaho at 216 (restricting men's right to freely express themselves in the form of hair length restrictions without applying same restrictions to women stated a claim under the Idaho Human Rights Act).

C. The Total Abortion Ban Violates The Idaho Constitution's Due Process Clause

Multiple provisions of the Total Abortion Ban violate the right to due process in Article I, § 13 of the Idaho Constitution because they are "written in terms so ambiguous that persons of common intelligence must necessarily guess at [their] meaning and differ as to [their] application." *State v. Bitt*, 118 Idaho 584, 585, 798 P.2d 43, 44 (1990) (cleaned up). The Idaho Constitution grants the right to be free from "depriv[ation] of life, liberty or property without due process of law." Idaho Const. art I, § 13. Included within this right to due process is the requirement that "a statute defining a crime [must] be sufficiently explicit so all persons may know what conduct on their part will subject them to its penalties." *State v. Lenz*, 103 Idaho 632, 634, 651 P.2d 566, 568 (Ct. App. 1982) (citing U.S. Const. amend. 14; Idaho Const. art. 1, § 13; *State v. Evans*, 73 Idaho 50, 245 P.2d 788 (1952)). The Total Abortion Ban violates this guarantee because it fails to give a sufficient explanation of what (1) the term "clinically diagnosable pregnancy," (2) the requirement that an abortion performed "to prevent the death of a pregnant woman," or (3) the

process of performing an abortion in the manner that provides the "best opportunity for the unborn child to survive" might mean in practice. Because physicians facing the complexities of assessing a woman's health or performing abortion procedures will have no reliable way of ensuring that their conduct is legal, the Total Abortion Ban must be declared unconstitutional.

1. The Idaho Constitution Requires That Laws Give Citizens Fair Notice Of The Conduct That Is Prohibited

The Idaho Constitution guarantees due process to Idaho citizens under the law. Part of this guarantee requires that "the meaning of a criminal statute be determinable." *State v. Cobb,* 132 Idaho 195, 197, 969 P.2d 244, 246 (1998). To fulfill the requirements of Article I, Section 13 of the Idaho Constitution, due process "requires that all 'be informed as to what the State commands or forbids' and that 'men of common intelligence' not be forced to guess at the meaning of the criminal law." *Id.* (quoting *Smith v. Goguen,* 415 U.S. 566, 574 (1974)). While this Court has said that the "scope of [the Idaho] due process clause is not *necessarily* the same" as that of the federal Constitution, the Court has noted that is "substantially" so. *Cootz v. State*, 117 Idaho 38, 40, 785 P.2d 163, 165 (1989) (emphasis added).

Under both the federal Constitution and the Idaho Constitution, a statute will be considered "void for vagueness if it fails to give adequate notice to people of ordinary intelligence concerning the conduct it proscribes or if it invites arbitrary and discriminatory enforcement." *State v. Leferink,* 133 Idaho 780, 783, 992 P.2d 775, 778 (1999); *Cobb*, 132 Idaho at 197; *see also Johnson v. United States*, 576 U.S. 591, 595 (2015). While claimants "must overcome a strong presumption of validity," *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 709, 791 P.2d 1285, 1288 (1990), and

courts must "seek an interpretation of the statute that upholds its constitutionality," *State v. Newman*, 108 Idaho 5, 13 n.12, 696 P.2d 856, 864 n.12 (1985), sometimes such a reading is impossible. *See State v. Cook*, 165 Idaho 305, 312, 444 P.3d 877, 884 (2019) (holding that "[n]either this statute, nor our case law, afford" sufficient clarity for citizens to "know how to comply with this statute").

When a statute is deemed vague, the remedy depends on the type of challenge. A challenge can be "as applied," meaning that the court limits its consideration to the individual application of that statute to a particular individual, or "facial," meaning that the court "scrutinize[s] the statute for intolerable vagueness on its face." *See Cobb*, 132 Idaho at 197 ("The threshold question in any vagueness challenge is whether to scrutinize the statute for intolerable vagueness on its face or whether to do so only as the statute is applied in the particular case."). For facial challenges, older decisions held that the law had to be "impermissibly vague in all of its applications." *Id.* at 199 (quoting *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 489 (1982)). But the United States Supreme Court recently affirmed that for criminal laws, a law may be unconstitutionally vague even when there is "some conduct that clearly falls within the provision's grasp." *Johnson v. United States*, 576 U.S. 591, 598 (2015). Indeed, as a general matter, when a law imposes criminal penalties as the Total Abortion Ban does, "[a] void for vagueness challenge is more favorably acknowledged and a more stringent vagueness test will be applied." *Cobb*, 132 Idaho at 198. Accordingly, pointing to some examples of behavior that are obviously within the ambit of a criminal statute is not enough. The inquiry is holistic, and it turns on whether a person is required to "guess at" the statute's meaning and may "differ as to its application." *Leferink*, 133

Idaho at 783.

2. The Total Abortion Ban Cannot Meet The Standard To Supply Due Process Under Law And Is Void for Vagueness

The Total Abortion Ban criminalizes performing or attempting to perform an abortion, defined as "the use of any means to intentionally terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child." Idaho Code § 18-604(1). The Ban has two narrow affirmative defenses: one related to the pregnant woman's life (the life affirmative defense) and one related to pregnancies resulting from rape or incest (the rape or incest affirmative defense). The life affirmative defense allows a physician to raise an affirmative defense that the abortion was "necessary to prevent the death of the pregnant woman" in the "good faith medical judgment" of that physician "based on the facts known to the physician at the time." Idaho Code § 18-622(3)(a)(ii). The life and rape or incest affirmative defenses are only available if the physician performs the abortion "in the manner that, in [the physician's] good faith medical judgment and based on the facts known to the physician at the time, provided the best opportunity for the unborn child to survive," unless this "would have posed a greater risk of the death of the pregnant woman." *Id*. § 18-622(3)(a)(iii).

The following sections discuss three provisions of the Ban, each of which is unconstitutionally vague: (1) "clinically diagnosable pregnancy"; (2) "necessary to prevent the death of the pregnant woman"; and (3) "in the manner that … provided the best opportunity for the unborn child to survive." Those attempting to comply with each provision "must necessarily

guess at its meaning" and would likely "differ as to its application."[47] *Leferink*, 133 Idaho at 783. The consequence of this lack of clarity is that, in practice, physicians will be forced to forego providing not only potentially legal abortions but also needed care for miscarriages because it is impossible to tell from the statute whether this conduct is legal or not.

a. The Term "Clinically Diagnosable Pregnancy" Is Not Defined In The Statute, Which Renders The Statute Unconstitutionally Vague

The definition of "abortion" in Section 18-604 does not adequately describe the conduct prohibited by the Ban. The Total Abortion Ban applies to terminations of a "clinically diagnosable pregnancy," but there are many standards by which the medical community measures whether a patient is pregnant. For example, physicians look at elevated hormone levels, ultrasounds, and home pregnancy test results as different ways of detecting a pregnancy. *See* Gustafson Decl. ¶ 15. And having a "clinically diagnosable pregnancy," meaning that a woman meets these various

[47] The rape or incest affirmative defense creates an affirmative defense if the abortion was performed after the physician received either a copy of a police report reporting "the act of rape or incest to a law enforcement agency" for adults, or—for abortions performed on minors—a copy of a report made by the minor's parents reporting "the act of rape or incest to a law enforcement agency or child protective services." Idaho Code § 18-622(3)(b)(ii)-(iii). Again, as with the life affirmative defense, the physician is required to use the method that provides the best opportunity for the unborn child to survive. *Id*. § 18-622(3)(b)(iv). The requirement that a patient or a patient's parents provide copies of reports from a law enforcement agency or child protective services before a physician is permitted to obtain an abortion is also unfairly prohibitive. Idaho Governor Brad Little has expressed hesitations about similar legislation with the same requirement because "[t]he challenges and delays inherent in obtaining the requisite police report render the exception meaningless for many" especially "those vulnerable women and children who lack the capacity or familial support to report incest and sexual assault." *See* Moseley-Morris, *Idaho Governor Signs Bill Effectively Banning Most Abortions*, Idaho Cap. Sun (Mar. 23, 2022), https://idahocapitalsun.com/2022/03/23/idaho-governor-signs-bill-effectively-banning-most-abortions/. This requirement adds to the unconstitutional vagueness of the Ban and deters physicians from performing legal abortions. *See* Gustafson Decl. ¶ 21.

criteria, does not necessarily translate to having a healthy or viable pregnancy. Even women with non-viable pregnancies in which the fetus develops outside the uterus (ectopic pregnancies) and women who have recently miscarried, and therefore will not be able to safely have a child and need medical care to prevent complications from these conditions, have elevated hormones and would likely test positive on a home pregnancy test. *See id.* ¶¶ 15, 20. The term "clinically diagnosable pregnancy" does not provide notice to physicians as to whether treating these conditions—which requires the exact same treatment as performing any abortion—could later be judged to be the termination of a clinically diagnosable pregnancy under this law. *See id.*

Nor can the statute be given a limiting judicial construction, because doctors often use a range of methods to determine pregnancy, and furthermore there is no "apparent legislative intent" from which the court could draw a limiting construction. *See Leferink*, 133 Idaho at 784 (vagueness finding may be avoided by a limiting construction that is "consistent with the apparent legislative intent"). Physicians will be unable to determine from the statute whether they are permitted to perform critical care or not. People who do not receive proper care for miscarriages and ectopic pregnancies face a range of serious complications including death.[48] *See* Gustafson Decl. ¶ 20.

When an abortion statute uses "imprecise terms" terms susceptible to multiple meanings like this, it can "operate to inhibit a physician's provision of legal … services because individuals

[48] *See* Cleveland Clinic, *Ectopic Pregnancy*, https://my.clevelandclinic.org/health/diseases/9687-ectopic-pregnancy (accessed June 24, 2022) ("An ectopic pregnancy needs to be treated right away to avoid injury to the fallopian tube, other organs in the abdominal cavity, internal bleeding and death.").

will not know whether the ordinance allows their conduct, and may choose not to exercise their rights for fear of being criminally punished." *McCormack v. Herzog*, 788 F.3d 1017, 1032 (9th Cir. 2015) (cleaned up). That is precisely the problem here, and the Court should find the statute unconstitutionally vague as in *Herzog*.

b. The Requirement That An Abortion Be "Necessary To Prevent The Death Of The Pregnant Woman" Is Unconstitutionally Vague

The second aspect of the Total Abortion Ban that is unconstitutionally vague is the life affirmative defense, which allows physicians to assert an affirmative defense to a banned abortion if it was "necessary to prevent the death of the pregnant woman." Idaho Code § 18-622(3)(a)(ii). The statute gives no indication whether the risk of death must be imminent or substantial in order to perform the abortion, and, by definition, carrying a pregnancy to term increases a woman's risk of death when compared with the risk of death associated with obtaining an abortion.[49] *See* Gustafson Decl. ¶ 19; Smith Decl. ¶ 24. Nothing in the statute, however, explains whether this is the correct interpretation, or whether there must be a certain percentage chance that death will occur if the procedure is not performed, and, if so, what percentage is acceptable versus not.

Though the statute refers to the "good faith medical judgment … based on the facts known to the physician at the time," Idaho Code § 18-622(3)(a)(ii), this provides no more clarity because there is no medical consensus as to what "necessary to prevent the death of the pregnant woman" means. When faced with similar laws doctors explain that "[t]here's no bright line in medicine or

[49] Therefore, if this provision were to be given its broadest possible reading, abortions would always be permitted because they prevent the possibility of the pregnant woman's death by definition.

science that says, 'OK you are officially dying.'"[50] Pregnant people can sometimes die if they do not receive an abortion for a pregnancy with a placental abruption, an infection, or preeclampsia, but none of these is certain to cause death if the woman does not receive an abortion. *See* Gustafson Decl. ¶ 19. There is often no way to accurately calculate the risk of death, even in a physician's good faith medical judgment. *See id.* ¶¶ 17-20. An abortion in these circumstances may or may not turn out to be "necessary to prevent the death of the pregnant woman." As the Third Circuit has observed assessing other vague abortion laws, specifying the actor's state of mind ameliorates vagueness only when "the procedure itself [is defined] or readily susceptible of identification." *Planned Parenthood of Cent. New Jersey v. Farmer*, 220 F.3d 127, 138 (3d Cir. 2000). Where it is unclear what procedure would satisfy the statute's requirements, no amount of "medical judgment" is enough.

This issue of undefined risk is exactly what led the United States Supreme Court in *Johnson v. United States* to declare that a law requiring the court to assess whether a particular crime involved conduct that presented a risk of physical injury was unconstitutionally vague. 576 U.S. 591, 597 (2015). In *Johnson*, the Court held that the residual clause of the Armed Career Criminal Act was unconstitutionally vague because it required courts to assess whether a crime presented "a serious potential risk of physical injury to another." *Id*. at 594, 597. The Court held that "[b]y combining indeterminacy about how to measure the risk posed by a crime with indeterminacy

[50] Healy, *With Roe Set to End, Many Women Worry About High-Risk Pregnancies* N.Y. Times (June 20, 2022), https://www.nytimes.com/2022/06/20/us/abortion-high-risk-pregnancy.html.

about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id*. at 598. So too here: The Total Abortion Ban combines the uncertainty inherent in assessing the risk of death for a particular pregnancy with the uncertainty of how much risk, and over what time period, is required for an abortion to "prevent" a pregnant person's death. *Johnson* confirms that this requirement is impermissibly vague.

Nor can the Court "seek an interpretation of the statute that upholds its constitutionality" because, even reading in some limiting principle about the likelihood of death or the imminence of death, there is still no way to accurately say whether a woman would die if she did not receive the abortion in question. *Newman*, 108 Idaho at 13 n. 12. Even if the Court read the statute in a way that allowed some set amount of risk, calculating risk in the first place is an impossible task. For example, women with cardiomyopathy who become pregnant are more likely to die than women without this condition, but many women also survive pregnancies despite the condition. *See* Gustafson Decl. ¶ 19. Cardiomyopathy could also cause a woman to suffer long term health risks that could someday lead to her death. *Id*. Other courts faced with similarly vague requirements have held them to be unconstitutional, explaining that "reasonable minds may well differ" over vague terms without a defined medical meaning, and "[i]t is constitutionally impermissible to force a physician to guess at the meaning of this inherently vague term and risk" not only professional but criminal sanctions if he or she guesses wrong. *Farmer*, 220 F.3d at 137-138; *see also Herzog*, 788 F.3d at 1031 (striking down abortion provisions that used vague undefined terms that were also not "terms of art with specific definitions in the medical context").

It would be difficult for a physician to ever prove that an abortion performed under the life affirmative defense was legal. This would likely chill physicians from performing abortions at all.

c. Abortions Cannot Be Performed To Allow An Unborn Child To Survive

Under both the life and the rape or incest affirmative defenses, the physician must perform the abortion "in the manner that, in [the physician's] good faith medical judgment and based on the facts known to the physician at the time, provided the best opportunity for the unborn child to survive," unless this method "would have posed a greater risk of the death of the pregnant woman." Idaho Code § 18-622(3)(a)(iii). But the phrase "best opportunity for the unborn child to survive" is vague in multiple important ways. Most fundamentally, the entire premise of performing an abortion in which the unborn child survives is flawed. *See* Gustafson Decl. ¶ 18. The Idaho Legislature recognized this fact by defining abortion in the statute as a procedure "to intentionally terminate the clinically diagnosable pregnancy of a woman with *knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child*." Idaho Code § 18-604(1) (emphasis added). An abortion is, by definition, as recognized in this statute and in the medical community more generally, a procedure in which the fetus does not continue to live once it is removed from the woman's uterus. *Id.*; Gustafson Decl. ¶ 18. The two affirmative defenses to the Total Abortion Ban make no attempt to reconcile this conflict or explain how a physician would satisfy the requirement that the fetus have the "best opportunity" to survive a procedure with no chance of survival. And there is no way to interpret this statute in a manner that would save it, *cf. Newman*, 108 Idaho at 13 n.12, because the interpretation suggested by the language in Section 18-622 is directly precluded by the definition given in Section 18-604 and

vice versa. Accordingly, the "best opportunity" provision violates the right to due process set forth in the Idaho Constitution.

The other vague element of the "best opportunity" requirement is the lack of any language defining the timeframe associated with it. Abortions performed early in pregnancy, well before viability, provide no opportunity for the fetus to survive. *See* Gustafson Decl. ¶ 18. The provision does not make clear whether an abortion in the first trimester is acceptable because it offers the "best" (despite being zero) opportunity to survive at that point in time, or whether a physician must wait until later in pregnancy and then perform a labor induction, though a labor induction is not considered an abortion in medical terms. And, even if the statute is interpreted as requiring the physician to wait, the provision is still vague because it gives no guidance to physicians as to when the chance of survival would be high enough for the fetus to survive. There is no way to know whether the statute allows a physician to perform an abortion at one, both, or neither of these points in a pregnancy under either of the categories of affirmative defenses. Forcing physicians to guess at whether their conduct is legal violates due process.

Vague laws are dangerous and "offend several important values," including the right to "steer between lawful and unlawful conduct." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Allowing a vague law to remain on the books threatens to "trap the innocent by not providing fair warning" and exposes citizens to the "dangers of arbitrary and discriminatory application." *Id*. at 108-109. All three of these issues—the vagueness of the term "clinically diagnosable pregnancy," the vagueness of the requirement that an abortion be "to prevent the death of the pregnant woman," and the requirement that the abortion be performed "in the manner that

… provided the best opportunity for the unborn child to survive"—create these risks and would be enough alone to find Section 18-622 unconstitutionally vague. Together, these unclear provisions render the statute functionally meaningless, and, for the reasons already explained, no limiting constructions are possible. Physicians have no notice of how to comply with the law or what acts are prohibited. This violates the fundamental right to due process.

CONCLUSION

This Court has the sole power to safeguard and elucidate rights in the Idaho Constitution, which the Total Abortion Ban aims to erode. The Ban is unconstitutional for that reason and is unconstitutionally vague. For the foregoing reasons, this Court should declare the Ban unconstitutional and issue a writ of prohibition that forbids Idaho courts from giving effect to the Ban's criminal causes of action; Idaho law enforcement officials from enforcing the unconstitutional Ban, and Idaho professional licensing boards from enforcing the Ban's unlawful suspension and revocation requirements.

Dated: June 24, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2022, I electronically filed the foregoing with the Clerk of the Court using the iCourt e-file system, and caused the following parties or counsel to be served by electronic means and Federal Express:

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MICHAEL J. BARTLETT

Exhibit 1

IN THE SUPREME COURT FOR 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.	Case No. _____

DECLARATION OF KRISTINE SMITH IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION AND APPLICATION FOR DECLARATORY JUDGMENT

I, Kristine Smith, hereby declare as follows:

1. I am over the age of eighteen. I make this declaration based on personal knowledge of the matters stated herein and on information known or reasonably available to my organization. If called to do so, I am competent to testify as to the matters contained herein.

Personal Background

2. I am the Area Service Director of Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, and in my position I am responsible for the health centers in the State

of Idaho. I have worked for Planned Parenthood since 2012, and I have been the Area Service Director for eight years. Planned Parenthood is a not-for-profit corporation organized under the laws of the State of Washington and doing business in Idaho. We are the largest provider of reproductive health services in Idaho, operating two health centers in the State: one in Meridian and one in Twins Falls.[1] Planned Parenthood provides a broad range of reproductive and sexual health services to many individuals of all genders, both adults and teens. Those services include, but are not limited to, well person examinations, birth control, testing and treatment for sexually transmitted infections, cancer screening, and pregnancy testing. Physicians at Planned Parenthood provide both medication and procedural abortions.

3. I am responsible for management of the Planned Parenthood health centers in Idaho and therefore am familiar with our operations, including the services we provide and the communities we serve. I submit this declaration in support of Petitioners' Verified Petition for Writ of Prohibition and Application for Declaratory Judgment seeking a declaration that Idaho's "Total Abortion Ban" is unlawful and unenforceable under the Idaho Constitution and seeking a writ of prohibition forbidding Idaho courts, law enforcement officials and professional licensing boards from giving effect to the law.

4. I understand that the Total Abortion Ban makes it a felony to provide or to attempt to provide an abortion at all stages of pregnancy in the State of Idaho, without exception.

[1] Since Petitioners filed their case in the SB 1309 litigation on March 30, 2022, Planned Parenthood has closed its Boise health center. *See* https://www.idahostatesman.com/news/local/community/boise/article262325747.html (last accessed June 24, 2022).

Violations are punishable by a prison term of two to five years and by suspension—or, for repeat offenders, permanent revocation—of the health care provider's medical license.

5. I understand the Total Abortion Ban permits medical providers to defend against prosecution by proving that an abortion was medically necessary to prevent the death of a pregnant woman or that it was provided upon receipt of documentation indicating that a pregnant woman had reported a case of rape or incest to the authorities. Even with these defenses, this Ban places our medical staff in danger of losing both their livelihoods and their liberty should they perform any abortions.

6. I understand that absent judicial relief, Planned Parenthood will be forced to stop performing all abortion services 30 days after the Supreme Court issued its judgment in the *Dobbs v. Jackson Women's Health Organization* case.

Planned Parenthood's Services in Idaho

7. Planned Parenthood operates two health centers in Idaho, located in Meridian and Twin Falls. At these health centers, patients can receive testing, treatment and vaccines for certain sexually transmitted infections, cervical cancer screening, mammogram referrals, fibroids evaluations, and annual wellness checks, among other services. In 2021, Planned Parenthood's Idaho health centers served 7,930 patients in 12,908 patient encounters. Our health centers also offer abortion.

8. Planned Parenthood's health center in Meridian offers in-clinic procedural and medication abortion. The health center in Twin Falls currently offers only medication abortion. Medication abortion is available through 11 weeks (77 days) LMP, and procedural abortion is available through 15.6 weeks LMP.

9. In 2021, Planned Parenthood's Idaho health centers provided over 1,500 abortions. Of these patients who seek Planned Parenthood's services, about half had private insurance, and the other half were either "self-pay" or covered by Medicaid. Of the patients seeking abortion care at the Idaho health centers in 2021, approximately 70 percent were white and approximately 30 percent were African American, Asian, Native American, Pacific Islander, multi-racial or other/unknown. Because, in Idaho, neither Medicaid nor private insurance are legally allowed to pay for abortions, in practice, all abortions in Idaho are self-funded. Nearly 75 percent of pregnant persons who seek abortions nationwide live under 200 percent of the federal poverty level; and nearly 49 percent live under the federal poverty level.[2] Currently, 10.1 percent of Idaho's population lives in poverty. The poverty rate among women between 18 and 64 years old is 12.7 percent. The rate is also disproportionately high among people of color; as of 2020, 19.7 percent of Asian-Americans, 18.2 percent of Latinos, and 29.2 percent of Native Americans in Idaho live below the poverty line. The federal poverty level is widely considered an inadequate measure of poverty, as it does not take into account the cost of child care, medical expenses, utilities or taxes. (In 2021, the federal poverty level for a family of four was $26,500.) Thus, there are more Idaho residents struggling with poverty than these statistics indicate.

Abortion Services in Idaho

10. Planned Parenthood's health centers are the only generally available abortion services providers in the State of Idaho. If the Total Abortion Ban were allowed to take effect—

[2] *See* Jenna Jerman et al., *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008*, GUTTMACHER INST. 11 (May 2016), https://www.guttmacher.org/sites/default/files/report_pdf/characteristics-us-abortion-patients-2014.pdf.

and, thus, if Planned Parenthood is forced to stop providing abortions—Idaho abortion patients will have to travel out of State to obtain care.

11. But there are no out-of-state providers currently offering abortions near either Ada or Twin Falls Counties. Of the providers that are currently available,[3] the nearest would be in Salt Lake City, Utah (347 miles one-way from Meridian, 220 miles one-way from Twin Falls), Reno, Nevada (413 miles one-way from Meridian, 450 miles one-way from Twin Falls), Bend, Oregon (310 miles one-way from Meridian, 444 miles one-way from Twin Falls), Kennewick, Washington (279 miles one-way from Meridian, 414 miles one-way from Twin Falls) and Walla Walla, Washington (244 miles one-way from Meridian, 380 miles one-way from Twin Falls).

The Need for Additional Services

12. I know from my experience managing the Idaho clinics for Planned Parenthood that the people of Idaho need more healthcare services, not less. Idaho has the fourth lowest ratio of maternal-fetal medicine doctors to live births of any state in the country. Idaho citizens face a serious shortage of family medicine doctors, and the State's Indian Health Services is chronically underfunded. As a result, Idaho has the thirteenth highest maternal mortality rate in the country.[4] Access to regular healthcare has been shown to reduce pregnancy-related deaths by up to 60 percent. The risk of death in infancy also declines significantly if pregnant people are provided access to early and regular prenatal care.

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[3] As of June 24, 2022, these locations currently offer abortion services, but I understand that this may change in the days and weeks to come.

[4] *See* Laura Ungar, *What States Aren't Doing To Save New Mothers' Lives*, USA TODAY (Sept. 19, 2018, updated Dec. 15, 2019), https://www.usatoday.com/in-depth/news/investigations/deadly-deliveries/2018/09/19/maternal-death-rate-state-medical-deadly-deliveries/547050002/.

13. Idahoans also need improved access to contraceptives and a comprehensive sex education program to reduce unwanted pregnancies. Fewer than 10 percent of Idaho middle schools and only about 20 percent of Idaho high schools teach critical sexual health education topics.[5] Teen pregnancy rates are above average in the state and nearly 50 percent of reported abortions in Idaho occur in people under age 25.[6] More than 100,000 women in Idaho currently live in counties with only one health center; and 17,000 women live in counties with no health center at all.[7]

14. The State could do much more to support and protect families and children. For example, the State ended pandemic-related SNAP benefits in March 2021, and Native American women in Idaho are paid less than 60 cents for every dollar paid to a White non-Hispanic man in Idaho. People who want to access an abortion and do not receive one are more likely to be marginally employed, unemployed, or enrolled in public safety net programs compared to those who obtained an abortion.[8] Children born to mothers who were denied an abortion are thus more likely to live in a household without adequate resources to pay for food, housing, and

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[5] U.S. C.D.C., *Characteristics of Health Programs Among Secondary Schools* (2018), https://www.cdc.gov/healthyyouth/data/profiles/pdf/2018/CDC-Profiles-2018.pdf.

[6] U.S. C.D.C., Nat'l Center Health Statistics, *Teen Birth Rate by State* (2020), https://www.cdc.gov/nchs/pressroom/sosmap/teen-births/teenbirths.htm; U.S. C.D.C., Abortion Surveillance -United States, 2019 (2021), https://www.cdc.gov/mmwr/volumes/70/ss/ss7009a1.htm.

[7] Power to Decide, Birth Control Access, https://powertodecide.org/what-we-do/access/birth-control-access (last visited June 8, 2022).

[8] *See* Diana G. Foster et al., *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United State*, 108 AM. OF J. PUB. HEALTH 407, 409-13 (2018).

transportation[9]—and they are more likely to experience poorer maternal bonding than subsequent children of women who received an abortion.[10]

The Effects of the Bans

15. My understanding of the Total Abortion Ban is that it will ban all abortions in the state at all stages of a pregnancy, other than two affirmative defenses that we will not be able to implement given their confusing and vague language. If the Total Abortion Ban goes into effect, Planned Parenthood will be forced to stop providing abortion services entirely.

16. The provision of abortion services is essential to Planned Parenthood's mission: to provide comprehensive reproductive health care services, which are vital for public health, especially for medically underserved populations—of which there are many in the State. Portions of 39 of the State's 44 counties have been designated by the federal government as Medically Underserved Population Areas.

17. The Total Abortion Ban will therefore prevent Planned Parenthood and our dedicated team of medical professionals from fulfilling its mission.

18. Most fundamentally, the Ban seriously harms our patients by severely limiting access to safe and legal abortions in their home State. Many pregnant people will not be able to travel to the closest out-of-state providers to obtain abortions.

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9 *See* Diana G. Foster et al., *Effects of Carrying an Unwanted Pregnancy to Term on Women's Existing Children*, 205 J. PEDIATR. 183, 185-87 (2019).

10 *See* Diana G. Foster et al., *Comparison of Health, Development, Maternal Bonding, and Poverty Among Children Born After Denial of Abortion vs After Pregnancies Subsequent to an Abortion*, 172 JAMA PEDIATR. 1053, 1058 (2018).

19. I understand that after Texas passed Senate Bill 8, many Texas residents had to travel to health centers providing abortion services in surrounding States to obtain abortions. Some Texas residents were forced to travel as far as Illinois to obtain abortion services. I believe that Idaho residents will also be forced to travel very long distances across the Northwest and beyond to obtain care.

20. People who want an abortion generally seek one as soon as possible, but face many logistical challenges that can delay access to abortion.

21. The need to travel long distances to obtain an abortion can significantly burden access to care, as many patients will need to raise additional funds for travel (not only for gas, but potentially also for overnight lodging and meals) and arrange for childcare and time off work, which could result in more loss of income. Some patients will not be able to access abortion at all because travel is simply too burdensome for them. Others may be significantly delayed. These challenges are especially burdensome for people with lower incomes, who are already medically underserved and constitute a substantial portion of Planned Parenthood's patients.

22. Delay also increases the costs associated with the procedure itself, as it becomes more expensive later in pregnancy. Patients can find themselves in a vicious cycle of delaying while gathering the necessary funds, but then find the procedure has gotten more expensive and thus need to further delay. Some patients may be so delayed that they are pushed too far into pregnancy and are no longer able to have an abortion.

23. Delays in accessing abortion, or being unable to access abortion at all, also pose risks to patients' health because, while abortion is a very safe procedure throughout pregnancy, the risks of abortion increase with gestational age.

24. If individuals are forced to carry a pregnancy to term against their will, that too can pose a risk to their physical health, as childbirth is far riskier than abortion, as well as their mental and emotional health and the stability and wellbeing of their family, including existing children. People are fourteen times more likely to die from carrying a pregnancy to term than from receiving a legally induced abortion.[11]

25. I know from my experience that forced pregnancy will particularly add to the anguish of patients and their families who receive fetal diagnoses that are incompatible with sustained life after birth—forcing patients to carry doomed pregnancies for months and suffer the physical and emotional pains of labor and delivery, knowing all the while that their child will not survive.

26. Some patients who are unable to access legal abortion may attempt an abortion on their own without access to accurate medical information. These burdens will fall most heavily on patients who already face barriers to accessing health care, including patients with low incomes, patients of color, patients who live on tribal lands, and patients who live the farthest from health centers, because these patients will have the most difficulty traveling to obtain care elsewhere.

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[11] *See* Michele Goodwin, Opinion, *Banning Abortion Doesn't Protect Women's Health*, N.Y. TIMES (July 9, 2021), https://www.nytimes.com/2021/07/09/opinion/roe-abortion-supreme-court.html; *see also* Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTET. & GYNECOL. 215, 217 (2012).

Pursuant to Idaho Code § 9-1406, I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 24, 2022, in Seattle, WA.

Kristine Smith

Exhibit 2

IN THE SUPREME COURT FOR 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.	Case No. _____

DECLARATION OF CAITLIN GUSTAFSON, M.D., IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION AND APPLICATION FOR DECLARATORY JUDGMENT

I, Caitlin Gustafson, M.D., hereby declare as follows:

1. I am over the age of eighteen. I make this declaration based on personal knowledge of the matters stated herein and on information known or reasonably available to me. If called to do so, I am competent to testify as to the matters contained herein.

Personal Background

2. I am a physician licensed to practice medicine in the State of Idaho since 2004 and have been a practicing doctor in Idaho for nearly two decades. I have been a board-certified Family Physician with a fellowship in Obstetrics since 2007.

3. My practice is based in Valley County, Idaho, where I practice family medicine, obstetrics, and gynecology. In addition to my private practice, I provide abortions at Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky (Planned Parenthood) in Meridian, Idaho. I also provide telehealth services for patients of Planned Parenthood. A significant number of my patients are from rural and other underserved communities.

4. I submit this declaration in support of Petitioners' Verified Petition for Writ of Prohibition and Application for Declaratory Judgment seeking a declaration that Idaho Code § 18-622 (the Total Abortion Ban) is unconstitutional. I have read the Total Abortion Ban and understand that it will subject "[e]very person who performs or attempts to perform" an abortion at every stage of pregnancy, subject to extremely limited exceptions, to between two and five years' imprisonment. Idaho Code § 18-622.

5. If allowed to come into effect, the Total Abortion Ban would force me to stop performing all or nearly all abortions, as well as jeopardize other care that I provide to women who are experiencing a miscarriage or complications related to pregnancy.

6. The facts and opinions included here are based on my education, training, practical experience, information, and personal knowledge I have obtained as a family physician and an abortion provider; my attendance at professional conferences; review of relevant medical literature; and conversations with other medical professionals.

Abortion Generally

7. There are two methods of abortion: medication abortion and procedural abortion. Both methods are effective in terminating a pregnancy. Complications from both medication and procedural abortion are rare (indeed, rarer than complications from childbirth), and when they occur, they can usually be managed in an outpatient clinic setting, either at the time of the abortion or in a follow-up visit.[1]

8. Medication abortion involves the administration of two medications, which are taken orally: mifepristone and misoprostol. As performed in Idaho, a Planned Parenthood patient takes the first medication in the health center and then, typically twenty-four to forty-eight hours later, takes the second medication at a location of their choosing, most often at their home, which causes the uterus to contract and expel its contents in a process similar to a miscarriage.

9. During a procedural abortion, clinicians open the cervix and then empty the uterine contents by using suction aspiration alone or in conjunction with instruments. Procedural abortion is also sometimes referred to as "surgical abortion," but procedural abortion is not what is commonly understood as "surgery" because it does not involve an incision.

10. People seek abortions for many complicated and personal reasons. Some patients, for example, seek an abortion because they lack sufficient financial resources or support from a partner or family to provide the healthy environment the child would need. Others seek abortions

[1] *See* Nat'l Acads. of Scis., Eng'g & Med., *The Safety & Quality of Abortion Care in the United States* 77-78, 161-62 (2018); Ushma Upadhyay et al., *Incidence of Emergency Department Visits and Complications After Abortion*, 125 OBSTET. & GYNECOL. 175 (2015); Ushma Upadhyay et al., *Abortion-related Emergency Department Visits in the United States: An Analysis of a National Emergency Department Sample*, 16 BMC MED. 88 (2018).

because continuing with the pregnancy could pose a greater risk to their health.[2] Approximately 60 percent of women having abortions already have at least one child.

11. Legal abortion is one of the safest services in modern health care. Abortion is far safer than carrying a pregnancy to term. The mortality rate for childbirth is approximately 14 times higher than for first-trimester abortion, and every pregnancy-related complication is more common among women having live births than among those having abortions. For example, due to the physiology of an advancing pregnancy, the further a pregnancy advances the likelihood of infections, hemorrhage, blood clots and hypertensive disease increases, while underlying respiratory and heart conditions can also be exacerbated. Also, one study projected a 21% increase in maternal mortality overall and a projected 33% increase for non-Hispanic Black individuals if a total ban on abortion comes into effect.[3]

12. Abortion is also extremely common. Nationwide, roughly one out of four women will have an abortion before the age of 45.

13. Although abortion is a very safe medical procedure, the health risks associated with it increase with gestational age.[4] As the American College of Obstetricians and Gynecologists (ACOG) and other well-respected medical professional organizations have observed, abortion "is an essential component of comprehensive health care" and "a time-sensitive service for which a

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2 *See* M. Antonio Biggs et al., *Understanding Why Women Seek Abortions in the US*, 13 BMC WOMEN'S HEALTH 29 (2013).

3 *See* Daniel Grossman et al., *The Impending Crisis of Access to Safe Abortion Care in the US*, JAMA INTERNAL MED., (June 23, 2022), 10.1001/jamainternmed.2022.2893 (*citing* Amanda Jean Stevenson, *The Pregnancy-Related Mortality Impact of a Total Abortion Ban in the United States: A Research Note on Increased Deaths Due to Remaining Pregnant*, DEMOGRAPHY 2019 28 (2021), https://doi.org/10.1215/00703370-9585908).

4 *See* Nat'l Acads., *supra* note 1, at 77-78, 161-62.

delay of several weeks, or in some cases days, may increase the risks [to patients] or potentially make it completely inaccessible."[5]

The Total Abortion Ban's Effects

14. I have reviewed the provisions of Section 18-622, the Total Abortion Ban, and Section 18-604, the related statutory definitions, which ban abortions at all stages of pregnancy and which establish severe criminal penalties for physicians who provide that care. In light of this serious risk of criminal liability—and in light of the cost and disruption of defending myself—I will not be able to provide abortions for my patients if the Total Abortion Ban is allowed to take effect (unless I am confident that providing care satisfies one of the extremely vague and narrow affirmative defenses, as set forth below). This will have devastating effects on my patients.

15. In fact, I fear that under the Total Abortion Ban, I will be subject to prosecution for non-abortion care provided to pregnant patients that will take time, money for defense, and emotional energy even if I am able to prevail ultimately in that prosecution. For example, the Total Abortion Ban applies to terminations of a "clinically diagnosable pregnancy." *Id.* However, there are many standards by which the medical community measures whether a patient is pregnant, which makes it impossible for me to be sure that I am providing lawful care to my pregnant patients and patients suffering miscarriage. Consequently, I fear providing care to some patients because providing this care could potentially expose me to criminal penalties. I understand from my experience, training, and education that a "clinically diagnosable pregnancy" means that a woman meets one or more of various indicia for pregnancy, such as elevated hormone levels, ultrasounds,

[5] ACOG et al., *Joint Statement on Abortion Access During the COVID-19 Outbreak* (Mar. 18, 2020), https://www.acog.org/news/news-releases/2020/03/joint-statement-on-abortion-access-during-the-covid-19-outbreak.

and a positive home pregnancy test result. But these indicia do not necessarily translate to having a healthy or viable pregnancy. A woman's hormone levels, for example, remain elevated for a period of time even after a woman has miscarried and the fetus no longer has a heartbeat.

16. Though the Total Abortion Ban contains affirmative defenses, they are too vague to inform me of whether the provision of lifesaving care would be lawful. Thus, despite the availability of affirmative defenses, I may be chilled in my ability to provide potentially lifesaving care.

17. My understanding is that there are two very narrow exceptions to the Total Abortion Ban: one related to the pregnant woman's life (the life defense) and one related to pregnancies resulting from rape or incest (the rape or incest defense). The life defense allows a physician to raise as an affirmative defense that the abortion was "necessary to prevent the death of the pregnant woman" in the "good faith medical judgment" of that physician "based on the facts known to the physician at the time." Idaho Code § 18-622(3)(a)(ii). I am not able to form a good faith medical judgment about matters for which there is no medical consensus, as I explain further below.

18. I understand that the life and rape or incest defenses are only available if the physician performs the abortion "in the manner that, in [the physician's] good faith medical judgment and based on the facts known to the physician at the time, provided the best opportunity for the unborn child to survive," unless this method "would have posed a greater risk of the death of the pregnant woman." *Id.* § 18-622(3)(a)(iii). The medical community recognizes an abortion as a procedure in which the fetus does not continue to live once it is removed from the woman's uterus. It is impossible to provide this care while providing "the best opportunity for the unborn child to survive." *Id.* I would not know whether the statutory language required me to wait to

perform the abortion because the chances of survival are greater later in the pregnancy, and if so, how long I would be required to wait.

19. It would be very difficult, if not impossible, for me to implement the life defense and provide care to a pregnant person whose life may be at risk. "Necessary to prevent the death of the pregnant woman" is not a medical term of art and could have multiple different definitions. For example, women can sometimes die if they do not receive an abortion following placental abruption, an infection, or the onset of preeclampsia, but none of these is certain to cause death if the woman does not receive an abortion. Also, pregnant women with cardiomyopathy are more likely to die than women without this condition, but many women also survive pregnancies despite the condition. Pregnant women with this condition could also suffer long-term consequences that could lead to a woman's death long after the pregnancy.

20. This affirmative defense also may not be available if I provide care for women with non-viable pregnancies such as an ectopic pregnancy, in which the fetus develops outside the uterus, or if I provide care to women who have recently miscarried. In either case, the woman will not be able to safely have a child and will need medical care to prevent complications from these conditions. Those women could have elevated hormones and would likely test positive on a home pregnancy test, fulfilling one definition of a "clinically diagnosable pregnancy," though their own health (and life) may be at risk and there is no possible continuation of a pregnancy to term.[6] The statute does not provide notice to physicians as to whether treating these conditions could later be

[6] *See* Cleveland Clinic, *Ectopic Pregnancy*, https://my.clevelandclinic.org/health/diseases/9687-ectopic-pregnancy ("An ectopic pregnancy needs to be treated right away to avoid injury to the fallopian tube, other organs in the abdominal cavity, internal bleeding and death.") (last visited June 24, 2022).

judged to be the termination of a clinically diagnosable pregnancy under Sections 18-604 and 18-622 and such care could subject me to criminal consequences.

21. Also, I understand that the rape or incest defense creates an affirmative defense if the abortion was performed after the physician received either a copy of a police report reporting "the act of rape or incest to a law enforcement agency" for adults, or—for abortions performed on minors—a copy of a report made by the minor's parents reporting "the act of rape or incest to a law enforcement agency or child protective services." Idaho Code § 18-622(3)(b)(ii)-(iii). I am not experienced in reviewing police or child protective services reports, and I would not know how to assess such a report or be confident that the report was genuine. I do not know how I could be sure to comply with the requirements for an affirmative defense under the rape or incest defense. Also, in my experience, women are often fearful or reluctant to report cases of rape and incest to anyone, let alone government officials.

22. Consequently, if the Total Abortion Ban goes into effect, I will be forced to stop providing all or nearly all abortions. I believe other providers will be forced to do the same, and therefore, abortion will become unavailable in Idaho. Even for abortions that arguably fall within the affirmative defense carve-outs in the statute, I will likely not be able to provide care to patients because there is no reliable way to determine whether a particular abortion would qualify under the vague language describing these affirmative defenses.

23. This means that many pregnant women who seek abortion care for reasons including a risk to their health, because the pregnancy result from rape or incest, because they believe they do not have the resources to care for a child, and many other reasons, will be unable to access abortion in Idaho. Some patients will be forced to travel hundreds of miles to obtain

time-sensitive medical care, which would unavoidably result in delays in obtaining abortions. Other patients, unable to make that out-of-state trip because of the barriers they face, may be forced to carry an unintended pregnancy to term.

24. Individuals forced to carry an unwanted pregnancy to term also may find it harder to bring themselves and their families out of poverty.[7] Persons who wanted but could not access an abortion are more likely to be marginally employed, unemployed, or enrolled in public safety net programs compared to those who obtained an abortion.[8]

25. And in many cases, those who are victims of partner violence will face increased difficulty escaping that relationship because of new financial, emotional, and legal ties with that partner.[9]

26. The Total Abortion Ban will disproportionately affect persons of color and indigenous individuals in Idaho, who already struggle with accessing adequate health care.[10]

27. The Total Abortion Ban is not based in medicine, denies my patients access to safe and legal abortion care that I am trained to provide, and will greatly harm many Idahoans.

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[7] *See* Ushma Upadhyay et al., *The Effect of Abortion on Having and Achieving Aspirational One-Year Plans*, 15 BMC WOMEN'S HEALTH 102 (2015); Diana G. Foster et al., *Effects of Carrying an Unwanted Pregnancy to Term on Women's Existing Children*, 205 J. PEDIATR. 183 (2019); Foster et al., *Comparison of Health, Development, Maternal Bonding, and Poverty Among Children Born After Denial of Abortion vs After Pregnancies Subsequent to an Abortion*, 172 JAMA PEDIATR. 1053 (2018).

[8] *See* Diana G. Foster et al., *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United State*, 108 AM. J. OF PUB. HEALTH 407, 409-13 (2018).

[9] *See* Sarah C.M. Roberts et al., *Risk of Violence from the Man Involved in the Pregnancy after Receiving or Being Denied an Abortion*, 12 BMC MED. 144 (2014).

[10] *See* Tennille L. Marley, *Segregation, Reservations, and American Indian Health*, 33:2 WICAZO SA REV. 49, 51 (Fall 2018), https://doi.org/10.5749/wicazosareview.33.2.0049.

Pursuant to **Idaho Code § 9-1406, I declare under penalty of perjury that the foregoing is** true and correct.

Executed on June 24, 2022, in McCall, Idaho.

Caitlin Gustafson MD

Caitlin Gustafson, M.D.