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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. **49899-2022**

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

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STATEMENT OF THE CASE

A. Nature Of The Case And Course Of Proceedings

Petitioners are familiar to this Court, and the basis for this petition builds upon the prior two that Petitioners filed earlier this year, challenging SB 1309 (No. 49615-2022, filed in March 2022) and this State's Total Abortion Ban (No. 49817-2022, filed in June 2022). This petition challenges Idaho's ban on abortion after fetal or embryonic cardiac activity can be detected, which amounts to a criminal prohibition on abortion in the State of Idaho at approximately six weeks from the first day of a patient's last menstrual period (LMP). *See* Idaho Code §§ 18-8804, 18-8805. It is possible that the Six Week Ban may become effective *before* any other abortion ban in Idaho, as explained in more detail below. The triggering event for the Six Week Ban may have come to pass last week when the U.S. Court of Appeals for the Eleventh Circuit upheld Georgia's Six Week Ban. *See SisterSong Women of Color Reprod. Just. Collective v. Governor of Ga.*, --- F.4th ----, 2022 WL 2824904 (11th Cir. July 20, 2022). Thus, unless this Court intervenes, it appears that the Six Week Ban will become effective on or around August 19, 2022. *See* Idaho Code § 18-8805(1).

It is necessary for Petitioners to bring this challenge because of the piecemeal and unlawful way in which the Idaho Legislature has attempted to ban abortion. Not satisfied with criminalizing abortion once, the Legislature did it twice (in 2020 and 2021)—and then, for good measure, added a private right of action as well in 2022, hoping to make that unconstitutional ban effective through a bounty hunter system of private enforcement. The first and most severe attempt to ban the procedure, the "Total Abortion Ban" passed in 2020, will criminalize all abortion in the State of

Idaho. *See* Idaho Code § 18-622(2). The Total Abortion Ban is slated to become effective 30 days after the expected issuance of the U.S. Supreme Court's judgment in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). Petitioners have brought a petition challenging the Total Abortion Ban under the Idaho Constitution and requesting relief before it takes effect. *See Planned Parenthood Great Northwest v. State*, No. 49817-2022 (Idaho Sup. Ct.). Once the Total Abortion Ban becomes effective, it will "supersede" the Six Week Ban. Idaho Code § 18-8805(4).

But until the Total Abortion Ban becomes effective—or if this Court stays or invalidates the Total Abortion Ban—the "Six Week Ban," enacted in 2021 and amended in 2022, will take effect. The Six Week Ban (or "the Ban") criminalizes the knowing or reckless performance of an abortion after a "fetal heartbeat" as defined in the Ban has been detected, which is commonly understood to occur at approximately six weeks LMP. *See* Idaho Code §§ 18-8804, 18-8805. The Ban has only two narrowly drawn exceptions. *See id.* § 18-8804. Health care professionals who violate the Ban will face between two and five years of imprisonment. And health care professionals who are found to violate the Ban face severe professional consequences, apparently under a strict liability standard, *see id.* §§ 18-8805(2)-(3).

The Six Week Ban is "perhaps less onerous" than the resolutely draconian Total Abortion Ban, "but it is no less unconstitutional," nor any less devastating for Idahoans, and for predominantly the same reasons. *Francis v. Franklin*, 471 U.S. 307, 317 (1985). *First*, it violates the Idaho Constitution's guarantee of the fundamental right to privacy in making intimate familial decisions. *Second*, it 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*, it violates the Idaho Constitution's due process clause because it is unconstitutionally vague.

Petitioners therefore respectfully request that the law be invalidated and declared unconstitutional. Additionally, Petitioners request that this Court expedite review of this Petition and include this Petition when it hears argument on August 3 (the same day as oral argument on procedural questions will be heard in the challenges to SB 1309 and the Total Abortion Ban). Further, Petitioners request that this Court issue an alternative writ and enter a stay as to the Six Week Ban pending the outcome of this litigation.[1]

B. Statement Of Facts

1. Petitioners' Interests

Petitioners are the same as in the Total Abortion Ban, and their interests are substantially the same as already identified in the Total Abortion Ban and the SB1309 cases. Rather than repeating themselves here, Petitioners simply incorporate the relevant sections of their prior briefs. *See* Br. ISO SB 1309 Petition 3-4; Br. ISO Total Abortion Ban Petition 2-3.

[1] In the briefs requesting a stay of SB 1309 and the Total Abortion Ban pending outcome of this litigation, Petitioners argue that "[a]lthough it may expedite the Court's business and minimize expense to hear these two cases together, the Court need not consider the shared legal question to resolve either case, and consolidation may therefore be inappropriate, especially because both cases can be resolved on narrower, well-established legal grounds." Pet'rs' Total Abortion Ban Br. in Resp. to Order Setting Hr'g 9-10; *see also* Pet'rs' SB 1309 Br. in Resp. to Order Setting Hr'g 10 (same). These cases remain capable of separate resolution on narrow and distinct legal grounds, and Petitioners believe that formal consolidation of the three abortion-related legal challenges is unnecessary.

2. The Six Week Ban

As explained in Petitioners' brief in support of their petition in the Total Abortion Ban litigation, the Six Week Ban is part of the Legislature's multi-year effort to ban abortion in Idaho. In 2020, the Legislature enacted the Total Abortion Ban, which criminalizes abortion at all stages of pregnancy. *See* Idaho Code § 18-622. Petitioners incorporate here the summary of the Total Abortion Ban in the relevant section of their prior brief. *See* Br. ISO Total Abortion Ban Petition 3-6.

In 2021, the Legislature enacted the Six Week Ban, which prohibits any person from "perform[ing] an abortion on a pregnant woman when a fetal heartbeat has been detected." Idaho Code § 18-8804. "Fetal heartbeat" is defined as "embryonic or fetal cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac." *Id.* § 18-8801(2). In a typically developing pregnancy, an ultrasound can generally detect embryonic cardiac activity beginning at approximately six weeks of pregnancy. *See* Exhibit 1, Declaration of Caitlin Gustafson ("Gustafson Decl.") at ¶¶ 6, 9. The Six Week Ban thus prohibits virtually all abortions after approximately six weeks LMP—before many patients even know they are pregnant. *See id.*

Licensed health care professionals who knowingly or recklessly perform or induce an abortion in violation of the Six Week Ban are subject to between two and five years' imprisonment. and they are also subject to professional consequences—a mandatory six-month license suspension for the first offense, and a permanent revocation for a second offense, even if they unintentionally violate the Ban. *See* Idaho Code § 18-8805(2)-(3). The Six Week Ban has exceedingly narrow exceptions: An abortion after approximately six weeks of pregnancy is permissible only in the

case of a narrowly and vaguely defined "medical emergency" or in the case of rape or incest, but only if previously reported to law enforcement or, in the case of a minor, to child protective services. *Id.* § 18-8804. A "medical emergency" is defined as "a condition that, in reasonable medical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function." *Id.* § 18-8801(5).[2]

As with the Total Abortion Ban, the Legislature recognized that the Six Week Ban was unconstitutional when enacted and thus subjected it to a triggering event. The Six Week Ban becomes 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." Idaho Code § 18-8805(1). As described above, that triggering event may now have come to pass, and if so, the Six Week Ban would take effect on or around August 19, 2022.

Separately, the Legislature in March 2022 enacted SB 1309, which purported to add a private cause of action for civilian enforcement of the Six Week Ban, SB 1309 § 3(1). On March

[2] When the statute was amended in 2022, the Legislature removed language that would have allowed providers to rely on their "good faith" medical judgment in acting under the medical emergency exception. *See* 2022 Idaho Sess. Laws Ch. 152 § 1 (amending the definition of "medical emergency" to replace "on the basis of the physician's good faith clinical judgment" with "in reasonable medical judgment"). While the prior language is itself not protective for providers for the reasons explained in Petitioners' Total Abortion Ban brief, *see* Br. ISO Total Abortion Ban Petition 45-48, this exception as amended is even worse, as it allows prosecution if someone later decides that a provider's determination (made in good faith) was not reasonable.

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 v. State*, No. 49615-2022 (Idaho Sup. Ct.). On April 8, 2022, this Court entered an order staying the implementation of SB 1309. This Court has set oral argument on certain questions related to those two petitions for August 3, 2022.

3. The Six Week Ban's Effect On Petitioners And Their Patients

Absent intervention by this Court, the Six Week Ban will make it practically impossible for Idahoans to access essential reproductive care. Because the Ban prohibits virtually all abortions after approximately six weeks LMP, many patients will not realize that they are pregnant until they have already passed the point where they can obtain a legal abortion. Correspondingly, Petitioners will be forced to cease providing abortions in Idaho entirely for fear of losing their medical licenses and criminal prosecution and imprisonment. *See* Gustafson Decl. ¶ 13. The Six Week Ban's "medical emergency" exception 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. Further, Idaho Governor Brad Little recognized in his signing statement for the 2022 amendments that the rape or incest exception was an empty and futile provision: the "challenges and delays inherent in obtaining the requisite police report render the exception meaningless for many," especially for those who "lack the capacity or familial support to report incest and sexual assault." K. Moseley-Morris, *Idaho Governor Signs Bill Effectively Banning Most Abortions*, Idaho Cap. Sun (Mar. 23, 2022).

The Six Week Ban will leave most patients seeking abortions with no option but to seek out-of-state care, 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. As detailed extensively in Petitioners' brief in the Total Abortion Ban litigation, the nearest providers are hundreds of miles away, thereby posing substantial financial and logistical obstacles to pregnant patients seeking abortions. *See* Br. ISO Total Abortion Ban Petition 6-11. Even those who can afford and coordinate such a trip will face significant delays in receiving care, resulting in higher medical costs and potential health risks. *See id.* at 7-9. Those who cannot make the trip out of the State will either be forced to carry the pregnancy to term or will attempt to self-manage an abortion outside the medical system. *See id.* at 8. Predictably, the onus of the injuries will fall heaviest on those who are already the most vulnerable and disadvantaged members of society. *See id.* at 10-11.

ISSUES PRESENTED

I

Does the Six Week Ban violate the Idaho Constitution by denying the fundamental right to privacy in making intimate familial decisions?

II

Does the Six Week Ban violate the equal protection guarantees of the Idaho Constitution and the Idaho Human Rights Act because it impermissibly treats women and men differently based on discriminatory gender stereotypes?

III

Does the Six Week Ban violate the Idaho Constitution's due process clause because it is impermissibly vague?

JURISDICTION

For substantially the same reasons identified in Petitioners' brief in the Total Abortion Ban litigation, this Court has original jurisdiction to hear this case, and it should exercise that jurisdiction given the imminent "constitutional violation[s] of an urgent nature." *Reclaim Idaho v. Denney*, 169 Idaho 406, ---, 497 P.3d 160, 172 (2021) (cleaned up); *see* Br. ISO Total Abortion Ban Petition 11-15.[3] In addition, Respondents here are proper Respondents for the reasons Petitioner have already identified. *See* Br. ISO Total Abortion Ban Petition 14-15 & nn.18-19.

If the Six Week Ban comes into effect, abortions in Idaho will be banned upon detection of a "fetal heartbeat." Petitioners thus seek relief on an emergency basis, as soon as possible but no later than August 19, 2022. Specifically, Petitioners seek a declaration that the Six Week 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

[3] For the reasons identified in Petitioner's Total Abortion Ban Brief in Response to Order Setting Hearing (at 14-15), if this Court sees fit to entertain this petition but sets a briefing and/or oral argument schedule that extends beyond August 19, 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 Six Week Ban to preserve the status quo (under which the Six Week 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).

prohibition preventing (1) inferior Idaho courts from giving effect to the unlawful Ban, (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.

ARGUMENT

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

For the same reasons Petitioners have already identified, the Idaho Constitution protects the fundamental right to privacy in making intimate familial decisions. *See* Br. ISO SB 1309 Petition 34-39; Br. ISO Total Abortion Ban Petition 15-24. The Six Week Ban violates this right for substantially the reasons set forth in Petitioners' brief in support of their petition challenging the Total Abortion Ban. *See* Br. ISO Total Abortion Ban Petition 24-29.

More specifically, the Ban is not necessary, nor is it narrowly tailored to achieving the State's asserted goals in enacting it, which are primarily protecting fetal life, but also include protecting the health of the mother. *See* Idaho Code § 18-8802(8) (fetal life); *id.* § 18-8804 (medical emergency exception). The Ban is not necessary because the State cannot have a compelling interest in preventing individuals from exercising the fundamental right to end an unplanned pregnancy in the earliest stages of pregnancy, and it is not narrowly tailored because there are many better, less-discriminatory alternatives to achieve Idaho's stated policy objectives, such as (1) increased access to contraception, (2) increasing access to health care and strengthening social assistance programs, or (3) making more resources available to would-be parents. *See* Br. ISO Total Abortion Ban Petition 25-29. The Six Week Ban therefore unconstitutionally infringes on Idahoans' fundamental rights.

B. The Six Week Ban Violates The Guarantee Of Equal Protection In The Idaho Constitution And The Idaho Human Rights Act

Again, for the same reasons Petitioners have already identified, the Idaho Constitution and the Idaho Human Rights Act guarantee all Idahoans equal protection under the law. *See* Br. ISO Total Abortion Ban Petition 29-32, 37. For substantially the same reasons as pertain to the Total Abortion Ban, *see id.* at 32-39; *see also* Br. ISO SB 1309 Petition 31-33, the Six Week Ban contravenes this equal protection commitment.

More specifically, the Six Week Ban is discriminatory on its face and therefore is subject to heightened scrutiny under the means-focus standard. *See State v. LaMere*, 103 Idaho 839, 842, (1982). Not only does the Six Week Ban single out abortions—a medical procedure that substantially affects women and does not equivalently affect men—as the only medical procedure prohibited, but it actually singles out "a pregnant woman" as the type of person being denied access to this procedure. Idaho Code § 18-8804. In turn, the law is unconstitutional under means-focus scrutiny because it does not bear a substantial relation to the achievement of its stated objectives and purposes. Additionally, in enforcing the Six Week Ban, the State of Idaho will violate the Idaho Human Rights Act by depriving women of their statutory right to equal enjoyment of public accommodations, education, and employment.

C. The Six Week Ban Violates The Idaho Constitution's Due Process Clause Because It Is Unconstitutionally Vague

As discussed in detail in the Total Abortion Ban papers, the Idaho Constitution prohibits vague laws and requires that laws give citizens fair notice of what conduct is prohibited. *See* Br. ISO Total Abortion Ban Petition 39-42. Just as the Total Abortion Ban's affirmative defense to

prevent the death of a pregnant woman is vague, *see id.* at 45-48, so too are the Fetal Heartbeat law's "medical emergency" exception, rape and incest exception, and its trigger provision.

More specifically, the Six Week Ban defines a "medical emergency" to mean "a condition that, in reasonable medical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function." Idaho Code § 18-8801(5). The requirements that permit an abortion to be performed only "to avert [the patient's] death" or to avoid "serious risk of substantial and irreversible impairment of a major bodily function" do not give sufficient guidance to medical professionals attempting to comply with the law. Such vague provisions are unconstitutional because "[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." *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 137-138 (3d Cir. 2000); *see also Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 205 (6th Cir. 1997) ("The determination of whether a medical emergency or necessity exists … is fraught with uncertainty and susceptible to being subsequently disputed by others."). Further, unlike the Total Ban, the language does not even permit providers to rely "good faith medical judgment" in determining whether an emergency permits abortion care. The statutory language in the Six Week Ban is even more problematic: Even if a provider determines a "medical emergency" exists, this determination could later be decided to be not "reasonable." And professional licensure penalties could be imposed without *any* scienter at all.

The statute is likewise unconstitutionally vague for its provision requiring that a woman—to obtain an abortion under the rape or incest exception—"has reported the act of rape or incest to a law enforcement agency and provided a copy of such report to the physician who is to perform the abortion," and the related provision for minors. Idaho Code §§ 18-8804(1)(a)-(b). These provisions suffer two related flaws. First, the Ban requires that physicians—not lawyers or judges—determine whether a given narrative on a police report meets the complicated statutory elements for rape or incest under Idaho law. This forces doctors "to guess at the meaning of the criminal law." *State v. Cobb*, 132 Idaho 195, 197, 969 P.2d 244, 246 (1998). Moreover, the statute is vague as to what standard applies to a doctor's guess about whether a given police report sufficiently alleges rape or incest. The provision refers neither to an objective "reasonableness" standard nor a subjective "good faith" standard, and the statute's *mens rea* terms "knowingly" or "recklessly" likewise fail to indicate whether the standard is objective or subjective. And the professional licensure penalties can be imposed without any intent at all. This again forces a physician to guess at the meaning of the law, *see Cobb*, 132 Idaho at 197, and subjects them to "subsequent[] dispute by others" and strict liability professional consequences if they guess wrong. *Voinovich*, 130 F.3d at 205 (holding that confusion over an objective or subjective standard for a medical professional renders a statute void for vagueness).

Finally, the statute has an unconstitutionally vague trigger provision that renders a person of ordinary intelligence unable to determine when the statute in fact takes effect. The Federal Rules of Appellate Procedure indicate that judgments are entered while mandates are issued. *Compare* Fed. R. App. P. 36 (titled "Entry of Judgment") *with* Fed. R. App. P. 41 (titled "Mandate:

Contents; Issuance and Effective Date; Stay"); *see State v. Schulz*, 151 Idaho 863, 867, 264 P.3d 970, 974 (2011) ("[W]here words are employed in a statute which had at the time a well-known meaning at common law ... they are presumed to have been used in that sense unless the context compels to the contrary.") (citation omitted); *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) ("[A] 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary, contemporary, common meaning … at the time Congress enacted the statute.'"). But the Idaho legislature drafted that the "section shall become effective thirty (30) days following the *issuance of the judgment* in any United States appellate court." Idaho Code § 18-8805(1) (emphasis added). Interpreting the preamble such that an entering of judgment in any United States appellate court suffices as a triggering event would render the word "issuance" superfluous. This is contrary to widely accepted statutory interpretation practices. *See State v. Burke*, 166 Idaho 621, 623, 462 P.3d 599, 601 (2020) (advising courts to "giv[e] effect 'to all the words and provisions of the statute so that none will be void, superfluous, or redundant.'"). The vagueness doctrine requires notice of when a law is to take effect, which the statutory language here does not afford.

CONCLUSION

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; Idaho law enforcement officials from enforcing the unconstitutional Ban; and Idaho professional licensing boards from enforcing the Ban's unlawful suspension and revocation requirements. This Court should grant that relief by August 18, 2022 (the day before the Six Week Ban would likely take effect if

triggered by the Sixth Circuit's decision in *SisterSong*), or it should stay the implementation of the Six Week Ban during the pendency of this case.

Dated: July 25, 2022

Respectfully submitted,

/s/ Michael J. Bartlett

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CERTIFICATE OF SERVICE

I hereby certify that on July 25, 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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/s/ Michael J. Bartlett
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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 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 Planned Parenthood patients. 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 Sections 18-8804 and 18-8805 (the "Six Week Ban" or the "Ban") are unconstitutional. I have read the Six Week Ban and understand that it makes it a felony for "[e]very licensed health care professional" to "knowingly or recklessly perform[] or induce[] an abortion" "when a fetal heartbeat has been detected" and that this could result in two to five years of imprisonment, as well as revocation of my medical license. Idaho Code §§ 18-8804, 18-8805.

5. A "fetal heartbeat" is defined in the Ban as "embryonic or fetal cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac." *Id.* § 18-8801(2).

6. If allowed to come into effect, the Six Week Ban would force me to stop performing abortions past the time when a "fetal heartbeat" as defined by the law can be detected, which occurs at approximately six weeks of pregnancy. It would also jeopardize other care that I provide to

women who are experiencing complications related to pregnancy past the time when embryonic or fetal cardiac activity can be detected.

7. 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

8. As I described at length in my declaration submitted in support of the Petitioners in their challenge to S.B. 1309, there are two methods of abortion, both of which are effective in terminating a pregnancy: medication abortion and procedural abortion. *See* Decl. of C. Gustafson ¶¶ 6-8, *Planned Parenthood of Great Northwest v. State*, No. 49615-2022 (Idaho Mar. 30, 2022) ("Gustafson S.B. 1309 Decl."). Legal abortion is one of the safest services in modern health care and is far safer than carrying a pregnancy to term, although the associated health risks increase with gestational age such that a prolonged delay in obtaining an abortion could increase the health risk for patients—or make it impossible to receive treatment altogether. *See id.* ¶¶ 21, 23. Abortion is also extremely common: One-quarter of women nationwide will have had an abortion before turning 45. *See id.* ¶ 22.

The Six Week Ban's Effects

9. I have reviewed the provisions of Sections 18-8804 and 18-8805, the Six Week Ban; and Sections 18-8801 and 18-8803, the related statutory definitions. I understand these provisions ban abortions when a "fetal heartbeat" as the law defines it has been detected (as early as six weeks after the first day of the patient's last menstrual period (LMP)) and establish severe

penalties for physicians who provide that care. In view of this serious risk of criminal liability and professional penalties—and given the cost and disruption of defending myself—if the Ban takes effect, I will not be able to provide most abortions for my patients (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, especially since—as I noted in my S.B. 1309 declaration—many patients do not know they are pregnant at six weeks LMP and thus seek abortion care only after cardiac activity is detectable. *See* Gustafson S.B. 1309 Decl. ¶ 15.

10. My understanding is that there are two very narrow exceptions to the Six Week Ban: one related to the pregnant woman's life (the medical emergency exception) and one related to pregnancies resulting from rape or incest (the rape or incest exception). The medical emergency exception allows a physician to provide an abortion "in the case of a medical emergency." Idaho Code § 18-8804(1). A "medical emergency" is defined as "a condition that, in reasonable medical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function." *Id.* § 18-8801(5). This language is too vague to provide me any guidance as to whether my provision of care would be lawful.

11. Unlike the Total Ban, the language does not even allow me to rely on my "good faith medical judgment" in determining whether an emergency permits me to provide care. While that is not protective for the reasons I stated in another previous declaration, *see* Decl. of C. Gustafson ¶¶ 17-18, *Planned Parenthood of Great Northwest v. State*, No. 49817-2022 (Idaho Mar. 30, 2022) ("Gustafson Total Ban Decl."), the language here is even worse—I could determine

that a "medical emergency" exists, only to be second guessed if someone later decides that determination was not "reasonable."

12. It would be very difficult, if not impossible, for me to implement the medical exception and provide care to a pregnant person whose life may be at risk. "[I]n reasonable medical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function" are not medical terms of art and could have multiple different definitions. For example, women can sometimes die or suffer long-term harm 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 or those consequences 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. I also would not be sure this example would be viewed as creating a "serious risk of substantial and irreversible impairment of a major bodily function."

13. In fact, I fear that under the Six Week Ban, I will be subject to prosecution or professional consequences 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 court. It is not clear that the affirmative defense will apply to the care I provide for patients with non-viable pregnancies such as an ectopic pregnancy, in which the fetus develops outside the uterus, or to the care I provide care to women who have an inevitable pregnancy loss. In either case, the pregnancy

cannot continue to develop and she will need gynecological care to prevent potentially life threatening complications from these conditions. Those women could have fetuses with detectable cardiac activity, though their own health (and life) may be at risk and there is no possible continuation of a pregnancy to term.[1] The statute does not provide notice to physicians as to whether treating these conditions could later be judged to be unreasonable and in violation of Sections 18-8804 and 18-8805. It is therefore not clear whether providing such care could subject me to criminal or licensure consequences.

14. Also, I understand that the rape or incest exception applies 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 §§ 18-8804(1)(a), (b). 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 exception under the rape or incest exception. Also, in my experience, women are often fearful or reluctant to report cases of rape and incest to anyone, let alone government officials, and the process of reporting often leads to further trauma.

15. For the same reasons I provided in my S.B. 1309 declaration, the Six Week Ban's terminology is, in many cases, medically inaccurate. *See* Gustafson S.B. 1309 Decl. ¶¶ 11-14.

[1] *See* Cleveland Clinic, *Ectopic Pregnancy*, https://my.clevelandclinic.org/health/diseases/9687-ectopic-pregnancy (last visited July 23, 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.").

And many patients do not know they are pregnant at six weeks LMP. *See id.* ¶ 15. Even under the best circumstances, a patient has (at most) two weeks to decide whether to have an abortion and resolve every financial and logistical hurdle associated with abortion care in Idaho. *See id.* ¶¶ 15-16. As a result, abortion will become unavailable after approximately six weeks LMP in Idaho, thereby depriving most patients of access to safe and legal abortions, which may be the essential healthcare they need to preserve their health or even their lives in some cases. *See id.* ¶¶ 17-19. The myriad consequences of such an outcome would be severe for many people, especially those who are lower income, are victims of domestic violence, and/or are members of racial minority groups. *See id.* ¶¶ 20-26.

16. The Six Week 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.

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

Executed on July 25, 2022, in McCall, Idaho.

Caitlin Gustafson MD

Caitlin Gustafson, M.D.