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Idaho Supreme Court
Melanie Gagnepain, Clerk of the 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,

and

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

Intervenors-Respondents.

Case No. 49899-2022

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

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PROCEDURAL BACKGROUND

The Idaho Legislature has enacted three interrelated statutes that ban abortion in the State, including the Six Week Ban at issue in this Petition.[1] This Ban imposes criminal and licensing penalties for performing an abortion after detection of a "fetal heartbeat," *see* I.C. § 18-8805, which, as that phrase is defined in the Ban, *see id*. § 18-8801(2), is commonly understood to occur at around six weeks from the first day of the patient's last menstrual period ("LMP"), Gustafson Decl. ISO Six Week Ban Petition ¶ 6.

By its terms, the Six Week Ban took effect 30 days following "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." I.C. § 18-8805(1). This provision was triggered when the United States Court of Appeals for the Eleventh Circuit entered judgment in *SisterSong Women of Color Reproductive Justice Collective v. Governor of Georgia*, 40 F.4th 1320 (11th Cir. 2022), on July 20, 2022. *Planned Parenthood Great Nw. v. State*, No. 49615, 2022 WL 3335696, at *8 (Idaho Aug. 12, 2022) (stating that "[a]s of August 19, 2022, the State will be able to criminally enforce" the Six Week Ban).

In enacting the Six Week Ban, the Idaho Legislature further specified that if both the Six Week Ban and the Total Abortion Ban—which is at issue in a separate but related Petition before

[1] The three statutes are the "Total Abortion Ban" or "Total Ban," Idaho Code ("I.C.") § 18-622, the Six Week Ban, I.C. § 18-8801 to § 18-8805, and the "Civil Liability Law" or "SB 1309," which creates civil liability for violations of the Six Week Ban, I.C. § 18-8807.

this Court— are enforceable, the Total Abortion Ban "shall supersede" the criminal and licensing provisions of the Six Week Ban. I.C. § 18-8805(4). The Total Abortion Ban, which the Legislature also enacted with a trigger date, took effect on August 25, 2022. *See generally Planned Parenthood Great Nw.*, 2022 WL 3335696. Thus, the Total Abortion Ban is currently in effect, with the exception of abortions permitted under the narrow injunction entered by the federal court "as applied to medical care required by the Emergency Medical Treatment and Labor Act (EMTALA)." *United States v. Idaho*, No. 22-CV-00329, 2022 WL 3692618, at *15 (D. Idaho Aug. 24, 2022).

ARGUMENT

In the time since this Petition was filed, the landscape of the abortion statutes has shifted, at some points day by day, leading to significant confusion not only about what actions the laws permit, but also about which laws control at any given moment. The Six Week Ban's criminal and licensing provisions were in force from August 19, 2022 until August 25, 2022, when the Total Ban became enforceable, with limited exception due to the federal injunction, and thus "supersede[d]" the Six Week Ban. I.C. § 18-8805(4). This Court should, therefore, address the Total Ban first.

Petitioners' challenge to the Six Week Ban, however, remains live even beyond the narrow exceptions in the federal injunction because the Six Week Ban's substantive provisions also control civil penalties as a result of SB 1309 (challenged in the Petition in Docket No. 49615-2022), such that any abortion performed in Idaho must currently clear not only the requirements of the Total Ban, but also SB 1309. Further, if Petitioners prevail in their challenge to the Total

Ban, the Six Week Ban's criminal and licensing penalties at issue here could again become enforceable in all relevant cases. This Petition is therefore not moot.

Substantively, Respondents' arguments in opposition fail for largely the same reasons as their arguments in the Total Ban briefing. The Idaho Constitution protects the right to bodily autonomy and to intimate familial decisions, including the right of procreation, and this encompasses the right to abortion. As abortion is a fundamental right, the Court must apply heightened scrutiny, under which the Six Week Ban fails. Like the Total Ban, the Six Week Ban also violates the Idaho Constitution's equal protection provisions and is void for vagueness on its face. Moreover, the tangle of statutes itself creates unconstitutional vagueness problems, as it subjects physicians to conflicting standards at the risk of criminal, civil, and professional sanction.

I. Respondents' Procedural Arguments Are Meritless

Respondents gesture at a series of purported procedural deficiencies in opposition to the Petition. For the reasons described in the Total Ban reply brief, *see* Reply Br. ISO Total Ban Petition 5-11, these arguments are meritless. The Court can properly exercise original jurisdiction because this challenge asserts a "possible constitutional violation of an urgent nature," *Reclaim Idaho v. Denney*, 169 Idaho 406, 418, 497 P.3d 160, 172 (2021), Petitioners have sued the necessary and proper parties, and Petitioners have standing, both as directly injured abortion providers and under Idaho's third-party standing test.

II. The Petition Is Not Moot

Respondents argue that the Petition is "largely moot." State Opp. 6. This argument is both contrary to principles of justiciability and undermined by Respondents' concession that

"Petitioners' claims are not entirely moot[.]" *Id.* n.5. It is true that the Six Week Ban was largely superseded on August 25, 2022, when the Total Abortion Ban took effect. This Court should, therefore, address the Total Ban first. If the Court concludes that the Total Ban is unconstitutional, then there will be an open question of statutory interpretation as to whether—having been superseded—the Six Week Ban snaps *back* into place.[2] Petitioners request that, should the Court declare the Total Ban unconstitutional, it then consider permitting supplementary briefing on the status of the Six Week Ban, if it would be helpful to the Court. If those penalties could spring back, then this case is certainly not moot.

Regardless, Petitioners' challenges to the Six Week Ban remain live at present in two respects. The general rule for mootness is that an action is "moot where the judgment, if granted, would have no effect either directly or collaterally on the plaintiff, the plaintiff would be unable to obtain further relief based on the judgment and no other relief is sought in the action." *See Idaho Sch. for Equal Educ. Opportunity By & Through Eikum v. Idaho State Bd. of Educ. By & Through Mossman*, 128 Idaho 276, 282, 912 P.2d 644, 650 (1996). But here, the Six Week Ban continues to apply in Idaho. First, as all parties acknowledge, just prior to the Total Ban coming into effect, the federal injunction blocked enforcement of the Total Abortion Ban where it conflicts with

[2] Indeed, though the State argues that Petitioners' arguments as to the Six Week Ban are moot, it simultaneously contends without analysis in the Total Ban briefing that "[i]f Section 622 is found unenforceable, the Heartbeat Act's criminal and licensing penalties are enforceable." Total Ban Opp. Br. 5 n.4. This is a complex issue that requires its own analysis should the Court declare the Total Ban unconstitutional, but the State's position proves that controversy regarding the Six Week Ban remains live, or at least satisfies the exception to mootness for "an otherwise moot issue [that] raises concerns of substantial public interest." *Ameritel Inns, Inc. v. Greater Boise Auditorium Dist.*, 141 Idaho 849, 852, 119 P.2d 624, 627 (2005).

EMTALA, such that the Six Week Ban's criminal and licensing provisions remain enforceable in some limited circumstances, which Respondents appear to acknowledge. Respondents provide no support for their contention that a Petition being "largely moot," even if that were true, warrants treating it as if it were entirely moot. In addition, SB 1309 (the civil provisions of the Six Week Ban) remain in force.

III. The Six Week Ban Is Unconstitutional

Petitioners showed in their opening brief that the Six Week Ban violates the Idaho Constitution in at least three separate ways. None of Respondents' arguments in opposition is persuasive.

A. The Six Week Ban Denies Idahoans The Fundamental Rights To Bodily Autonomy And To Make Intimate Familial Decisions As Guaranteed In The Idaho Constitution.

The Six Week Ban eviscerates a pregnant person's rights to bodily autonomy and to make intimate familial decisions, which is implicit in Idaho's concept of ordered liberty, as described in the Total Ban reply brief. Reply Br. ISO Total Ban Petition 11-18. Though the right to make intimate decisions concerning one's own body and family, like other fundamental rights, can be regulated, the Six Week Ban sweeps too broadly to survive the heightened scrutiny that protects the fundamental rights of Idahoans. The Six Week Ban is a blanket prohibition at an extremely early stage of pregnancy, with insufficient exceptions for the life and health of the patient, that tramples the constitutional rights of the citizens of Idaho by banning abortion at a point in pregnancy before many patients are even aware that they are pregnant, *see* Gustafson Decl. ISO Six Week Ban Petition ¶ 9.

B. The Six Week Ban Denies Idahoans Equal Protection Under The Law

For the reasons explained in the Total Ban reply brief, the State's argument that barring abortion does not constitute sex-based discrimination, and that such discrimination would be subject to rational basis review, is incorrect. *See* Reply Br. ISO Total Ban Petition 47-50. Specifically, the Six Week Ban singles out "a pregnant woman" and prohibits abortions, a medical procedure that substantially impacts women and does not equivalently impact men, thereby violating the Idaho Constitution's guarantee of equal protection. The Six Week Ban also deprives women of their statutory right to equal enjoyment of public accommodations, education, and employment and therefore also violates the Idaho Human Rights Act. In so discriminating, the Ban is subject to heightened scrutiny under the means-focus standard. *See Jones v. State Bd. of Med.*, 97 Idaho 859, 871, 555 P.2d 399, 411 (1976); *Idaho Comm'n on Hum. Rts. v. Campbell*, 95 Idaho 215, 216-217, 506 P.2d 112, 113-114 (1973). As described in the Total Ban reply brief, the Legislature had a host of non-discriminatory, better-tailored alternatives to advance its interests that lack the discriminatory character of the Six Week Ban. *See* Reply Br. ISO Total Ban Petition 35-36, 49.

C. The Six Week Ban Is Unconstitutionally Vague On Its Face

The Six Week Ban's medical emergency exception and rape exception both render the statute unconstitutionally vague. Nothing that the State alleges in opposition can save it.

As described in the Total Ban reply, Respondents and Respondent-Intervenors mischaracterize both federal and Idaho vagueness jurisprudence. *See* Reply Br. ISO Total Ban Petition 36-39. Decisions like *Johnson v. United States*, 576 U.S. 591 (2015), squarely reject that

"a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." *Id.* at 602. Instead, the standard for vagueness is whether the law is "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Id.* at 595-596 (holding that the phrase "conduct that presents a serious potential risk of physical injury to another" is void for vagueness).

Under that standard, the Six Week Ban is unconstitutionally vague. 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." I.C. § 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. *See Johnson*, 576 U.S. at 595-596 (holding that a phrase about "serious potential risk" was void for vagueness); *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 137-138 (3d Cir. 2000) (holding that it is "constitutionally impermissible to force a physician to guess at the meaning of this inherently vague term and risk" where there are not only professional but criminal sanctions "if he or she guesses wrong"); *Women's Med. Prof. 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.").[3]

For example, a patient, who is not exhibiting symptoms, could present in the office of a medical provider with an ectopic pregnancy. The physician knows from her training that, while the patient is currently not experiencing pain or exhibiting any clear life-threatening symptoms, this could change rapidly. *See, e.g.*, Cleveland Clinic, *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."). Or a patient could present with preterm rupture of membranes towards the beginning of her second trimester. Her only symptom at that moment may be leaking fluid, but if the pregnancy continues, her risk of life-threatening infection and other complications is extremely high. *See, e.g.*, Sklar et. al, *Maternal Morbidity After Preterm Premature Rupture of Membranes At <24 Weeks' Gestation*, Am. J. of Obstetrics & Gynecology (Nov. 21, 2021). In each of these instances, it is unclear to the physician if, at that moment, an abortion is necessary to "avert [the patient's] death" or if "delay will create serious risk of substantial and irreversible impairment of a major bodily function," I.C. § 18-8801(5), because the statute is vague as to the level of risk and the immediacy required. So—because she cannot know

[3] Respondents' cases discussing medical-emergency provisions, State Opp. 13, precede *Johnson* by decades, and regardless, are inapposite. In *United States v. Vuitch*, for example, defendant argued only that the word "health" was ambiguous because it could be read to include physical health, mental health, or both. 402 U.S. 62, 69-72 (1971) (interpreting "health" to include both mental and physical health and therefore finding no vagueness problem). But unlike the discrete possible meanings of the term "health" in *Vuitch*, the Six Week Ban uses a vague phrase that creates a crime somewhere along a spectrum of a health emergency, while offering insufficient notice of where on that spectrum behavior converts from innocent to criminal.

whether she is subjecting herself to criminal and civil liability and the loss of her medical license—she may be forced to disregard her training and send the patient away, even when those life-threatening symptoms will often inevitably develop. *See also* Gustafson Decl. ISO Six Week Ban Petition ¶ 12-13; Laura Leslie, *NC Abortion Law Exceptions Too Vague, Critics Say*, WRAL.com (Aug. 22, 2022) (reporting on a similar medical-emergency exception in North Carolina, which caused a physician to ask "[s]o [the patient] start[s] developing kidney failure. But is that enough?").

Similarly, the Six Week Ban does not even permit providers to arguably rely on good faith judgment in determining whether an emergency exists. The Six Week Ban's definition of medical emergency definition instead relies instead on an improper objective standard. I.C. § 18-8801(5); *see also Voinovich*, 130 F.3d at 205. Moreover, the professional licensure penalties appear to be able to be imposed without any scienter at all. I.C. § 18-8805(3).

Respondents contend that the rule of lenity or the doctrine of constitutional avoidance can limit the damage that these vague provisions will cause to potential defendant doctors. State Opp. 13. But these separate doctrines—which even in the best circumstances provide cold comfort to criminal defendants—do nothing to resolve physician uncertainty about whether the law permits them to provide potentially-lifesaving abortions, and would improperly force physicians to risk felony convictions to obtain that clarification. *Cf. Ex Parte Young*, 209 U.S. 123, 145-147 (1908) (explaining that, where disobedience of a law risks prison and fines, individuals do not need to violate the law to test its validity).

The second exception, ostensibly for victims of rape or incest, is effective only where "the woman has reported the act of rape or incest to a law enforcement agency and provided a copy of such report to the physician who is to perform the abortion." I.C. § 18-8804(1)(a). A similar exception applies to minors that also permits using reports that were made to child protective services. *Id.* § 18-8804(b).

Respondents argue that this exception provides "no invitation to second guess or interpret criminal law," apparently because the physician need not "make a judgment call or evaluate the veracity of the criminal report." Leg. Opp. 5. But Petitioners never claimed that the medical provider would need to determine the credibility of the report; instead, Petitioners explained that a provider would need to evaluate whether the factual narrative provided in the report constitutes rape or incest. This would force a physician—not a judge or lawyer—to guess at the elements of rape or incest to determine whether a given police report narrative fits those crimes, prior to providing care. The exceptions further offer neither an objective reasonableness standard, nor a subjective good-faith standard, on which a provider could rely, compounding their vagueness. *See Voinovich*, 130 F.3d at 205. Forcing an individual to guess at the meaning of a criminal law can render a statute void for vagueness, and this Court should strike down this statute on that basis.

IV. Since the Petition Was Filed, The Tangled Idaho Statutory Scheme Has Raised Additional Constitutional Problems

As described above, Idaho's statutory abortion scheme has been greatly altered since this Petition was filed. While the Total Ban superseded the criminal and licensing penalty provisions of the Six Week Ban since August 25, the federal injunction has rendered the Total Ban

unenforceable in some respects, complicating the application of that superseding clause. In addition, SB 1309, the civil provisions of the Six Week Ban, has gone into effect. These subsequent developments have called into further question whether the Six Week Ban can be constitutionally applied in any circumstances, civilly or criminally. *See* Reply Br. ISO Total Ban Petition 44-47.

Specifically, the Six Week Ban and SB 1309 encompass conduct that might otherwise be lawful under the Total Ban, thereby subjecting a physician to vague, conflicting requirements, both with respect to the different medical-emergency provisions in the statutes and to the standards by which a medical provider's actions are evaluated. The Six Week Ban and SB 1309 provide an exception for "medical emergencies," defined as "condition[s] that, in reasonable medical judgment, so complicate[] 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." I.C. § 18-8801(5) (emphases added). The Total Ban, by contrast, provides an affirmative defense for when an abortion was "necessary to prevent the death of the pregnant woman." I.C. § 18-622(3)(a)(ii). Only the Six Week Ban and SB 1309, therefore, impose an explicit immediacy requirement. Similarly, the Total Ban's affirmative defense imposes a subjective standard, *id.* ("in his good faith medical judgment"), while the medical emergency exception under the Six Week Ban and SB 1309 follows an objective standard, *id.* § 18-8801(5) ("in reasonable medical judgment").

While the language in both statutes is vague on its own (as discussed *supra* and in Reply Br. ISO Total Ban Petition at 36-46), combined, the statutes force medical providers to stake

criminal, civil, and professional penalties on unclear, contradictory standards—a circumstance that courts have concluded violates constitutional prohibitions on vagueness. For example, the Total Ban could conceivably allow a physician to treat a condition like an ectopic pregnancy or to perform an abortion in order to then treat a patient's life-threatening cancer with chemotherapy or radiation—something which cannot be done while a fetus is in utero—even if the eventually life-threatening cancer or ectopic pregnancy would be unlikely to kill the patient tomorrow or otherwise "immediate[ly]." I.C. § 18-8801(5); *see, supra*, Cleveland Clinic, *Ectopic Pregnancy*; Kelcie Moseley-Morris, *OBGYNs Speak Out: Doctors Say Idaho's Abortion Laws Will Cause Harm To Patients*, Idaho Capital Sun (Aug. 19, 2022) (describing a patient who needed an abortion prior to restarting chemotherapy). But, that same physician must also consider, in the midst of trying to decide whether to be provide care to a seriously ill patient, if she may then then be liable under SB 1309, since the patient's condition may not have "necessitate[d] the *immediate* abortion of her pregnancy." I.C. § 18-8801(5) (emphasis added). Similarly, while Respondents assert that a physician may be able to rely on her own good faith judgment to determine whether an abortion was "necessary to prevent the patient's death" for purposes of the Total Ban, the Six Week Ban and SB 1309 (if compliance with either were required) would appear to overlay an objective standard such that good faith alone would be insufficient. And while subjecting a medical provider to "subsequent[] dispute by others" when they provide emergency care is suspect on its own, *see* Br. ISO Six Week Ban Pet. 12; *Voinovich*, 130 F.3d at 205, this constitutional failure multiplies when a statutory scheme is vague as to whether an objective or subjective standard applies to the defendant's conduct, *see Voinovich*, 130 F.3d at 205. No reasonable medical provider could know

how to conform potentially lifesaving care to these muddled requirements, rendering the statutes, individually and in combination, unconstitutionally vague.

CONCLUSION

The scheme developed by the Legislature to remove a fundamental right from Idahoans is clearly unconstitutional. For the foregoing reasons this Court should declare the Six Week Ban unconstitutional in its entirety and issue a writ of prohibition that forbids Idaho courts from giving effect to it.

Dated: September 9, 2022

Respectfully submitted,
/s/ Michael J. Bartlett

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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 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:

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