

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

**VERIFIED PETITION FOR WRIT OF PROHIBITION AND APPLICATION FOR
DECLARATORY JUDGMENT**

ORIGINAL JURISDICTION

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** Pro hac vice applications forthcoming*

INTRODUCTION

Petitioners Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky (Planned Parenthood) and Caitlin Gustafson, M.D., by and through their attorneys, bring this original action seeking a declaration that Idaho Code Sections 18-8804 and 18-8805 (the “Six Week Ban” or the “Ban”) are unlawful and unenforceable under the Idaho Constitution and the Idaho Human Rights Act, and seeking a writ of 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. Petitioners respectfully request relief by August 18, 2022, which is estimated to be the day before the Six Week Ban may become effective.¹

The Six Week Ban was passed in 2021 and criminalizes the knowing or reckless performance of an abortion after a “fetal heartbeat” has been detected, which is commonly understood to occur at approximately six weeks from the last menstrual period (“LMP”). *See* Idaho Code §§ 18-8804, 18-8805. Unless their conduct falls within one of two narrowly drawn exceptions, *see id.* § 18-8804, health care professionals who violate the Ban will face between two and five years’ imprisonment and loss of professional licenses. *See id.* §§ 18-8805(2)-(3). Rather than make the Six Week Ban effective immediately, the legislature determined that it would

¹ Because as of the time of this filing, the Supreme Court has yet to issue a judgment in *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022), it is possible that the Six Week Ban could briefly become effective in Idaho *before* the Total Abortion Ban.

become effective “thirty (30) days following the issuance of the judgment in any United States appellate court case in which the appellate court upholds [a similar] restriction.” *Id.* § 18-8805(1).

On June 27, 2022, in the immediate wake of *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022), Petitioners filed an original action in this Court seeking the same relief with respect to the Total Abortion Ban. *See* Idaho Code § 18-622. In that case, Petitioners noted that the triggering event for the Six Week Ban had not yet transpired. *See* Br. ISO Petition at 5. Now, it may have: On July 20, 2022, 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); *see also* Order of the Court, *SisterSong Women of Color Reprod. Just. Collective v. Governor of Ga.*, --- F.4th ----, 2022 WL 2824904 (11th Cir. July 20, 2022) (No. 20-13024) (hereinafter “*SisterSong Order*”) (“Judgment entered as to Appellant John S. Antalis, et al.”). 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).

The Six Week Ban violates Idaho law for the same reasons that the Total Abortion Ban does. *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 guarantee, as well as the Idaho Human Rights 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 schedule oral argument on this Petition for August 3 (the same day as oral argument on procedural questions posed by the Court will be heard in the challenges to SB 1309 and the Total Abortion Ban), and that this Court enter a stay as to the Six Week Ban pending the outcome of this litigation.²

JURISDICTION

1. The bases for this Court’s jurisdiction and the grounds on which Petitioners seek relief are the same as in the Total Abortion Ban litigation. Rather than repeating themselves here, Petitioners simply incorporate paragraphs 1-5 of that petition. *See* Verified Petition for Writ of Prohibition and Application for Declaratory Judgment ¶¶ 1-5, *Planned Parenthood Great Northwest v. State*, No. 49817-2022 (Idaho June 27, 2022) (“Total Ban Petition”).

PARTIES

2. The parties are the same as in the Total Abortion Ban litigation, and the Respondents are appropriate parties for the same reasons as identified in Petitioners’ petition in that case. Rather than repeating themselves here, Petitioners simply incorporate paragraphs 6-10 of that petition. Total Ban Petition ¶¶ 6-10.

² In their briefs requesting that this Court stay SB 1309 and the Total Abortion Ban pending the outcome of this litigation, Petitioners stated 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’ Br. in Resp. to Order Setting Hr’g at 9-10, No. 49615-2022; *see also* Pet’rs’ Br. in Resp. to Order Setting Hr’g at 10, No. 49817-2022 (same). Petitioners have the same position with respect to this third Petition.

FACTS COMMON TO ALL CLAIMS³

The Six Week Ban

3. The Six Week Ban 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[.]” Idaho Code §§ 18-8804, 18-8805.

4. An “abortion” is 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 preborn child.” *Id.* § 18-8801(1).

5. A “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).

6. In a typically developing pregnancy, ultrasound can generally detect embryonic cardiac activity, as defined by the Act, beginning at approximately six weeks of pregnancy. The Ban thus prohibits virtually all abortions after approximately six weeks LMP—before many patients even know they are pregnant. Indeed, for patients with regular menstrual periods, six weeks of pregnancy is only two weeks after the patient’s first missed period.

7. The Ban requires “[a]ny person who intends to perform or induce an abortion on a pregnant woman” to “determine if there is the presence of any fetal heartbeat[.]” *Id.* § 18-8803. “The person who determines the presence or absence of any fetal heartbeat must record in the

³ The facts in this case largely resemble the facts at play in the S.B. 1309 litigation, No. 49615-2022. The statute is the same, although the penalties and methods of inflicting those penalties are different.

pregnant woman’s medical record the estimated gestational age of the preborn human individual or individuals, the method used to test for the fetal heartbeat, the date and time of the test, and the results of the test.” *Id.*

8. A health care professional who violates the Ban’s prohibition faces between two and five years of imprisonment. *Id.* § 18-8805(2).

9. “The professional license of any health care professional who performs or induces an abortion or who assists in performing or inducing an abortion ... shall be suspended by the appropriate licensing board for a minimum of six (6) months upon a first offense and shall be permanently revoked upon a subsequent offense.” *Id.* § 18-8805(3).

10. The Six Week Ban provides for two exceptions: (1) the “medical emergency” exception and (2) the “rape or incest” exception. *See id.* § 18-8804.

11. Regarding (1), “[a] person may [] perform an abortion on a pregnant woman when a fetal heartbeat has been detected ... in the case of a medical emergency.” *Id.* § 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).

12. Regarding (2), “[a] person may [] perform an abortion on a pregnant woman when a fetal heartbeat has been detected ... in the case of rape ... or in the case of incest.” *Id.* § 18-8804(1). But to qualify for the exception, before the abortion the woman must have “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.” *Id.* § 18-8804(1)(a). If the woman is a minor or subject to guardianship, the report can have been made either to law enforcement or child protective services, and can have been made either by the woman or by her parents or guardians. *See id.* § 18-8804(1)(b).

13. When enacted in 2021, the Six Week Ban was patently unconstitutional because it criminalized pre-viability abortions. The Legislature knew that, and so made the Six Week Ban’s enforceability reliant on a triggering event. As relevant here, that triggering event is “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).

14. On June 20, 2022, the U.S. Court of Appeals for the Eleventh Circuit issued an opinion upholding Georgia’s Six Week Ban. *See SisterSong*, 2022 WL 2824904. That same day, it issued an order: “Judgment entered as to Appellant John S. Antalis, et al.” *SisterSong* Order.

15. Thus, the Six Week Ban’s triggering event may have come to pass.

16. Without this Court’s intervention, it seems that the Six Week Ban will become enforceable on or around August 19, 2022. *See Idaho Code* § 18-8805(1).

The Ban’s Effects on Petitioners and Their Patients

17. The Six Week Ban will ban abortions in Idaho after approximately six weeks LMP. For substantially the same reasons identified in paragraphs 19-31 of Petitioners’ petition in the Total Abortion Ban case and paragraphs 27-38 of Petitioners’ petition in the SB 1309 case, the Six

Week Ban will impose severe and irreparable harm on Petitioners and their patients. *See* Total Ban Petition ¶¶ 19-31; Verified Petition for Writ of Prohibition and Application for Declaratory Judgment ¶¶ 27-38, *Planned Parenthood Great Northwest v. State*, No. 49615-2022 (Idaho Mar. 30, 2022) (“SB 1309 Petition”).

18. Indeed, as Petitioners noted, SB 1309’s ruinous civil liability amounted to a ban on abortions performed after a fetal heartbeat has been detected. *See, e.g.*, SB 1309 Petition ¶ 11. The Six Week Ban makes that same conduct criminal.

19. Although the Six Week Ban would permit some abortions outlawed under the Total Abortion Ban, it would nonetheless ban abortion for many of Petitioners’ patients.

CLAIMS FOR RELIEF

I.

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

20. Petitioners incorporate the preceding paragraphs.

21. For the same reasons identified in paragraphs 33-38 of Petitioners’ petition in the Total Abortion Ban case and in paragraphs 64-69 of Petitioners’ petition in the SB 1309 case, the Idaho Constitution protects the fundamental right to privacy in making intimate familial decisions.

22. The Fetal Abortion Ban violates this right for substantially the same reasons set forth in Petitioners’ brief in support of their petition challenging the Total Abortion Ban. *See* Br. ISO Petition at 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).

II.

The Ban Violates The Guarantee Of Equal Protection In The Idaho Constitution And The Idaho Human Rights Act

23. Petitioners incorporate the preceding paragraphs.

24. For the same reasons identified in paragraphs 40-44 of Petitioners' petition in the Total Abortion Ban case, the Six Week Ban violates the Idaho Constitution's guarantee of equal protection and the Idaho Human Rights Act's prohibition against gender discrimination.

25. More specifically, the Six Week Ban is discriminatory on its face and therefore is subject to heightened scrutiny under the mean-focus standard. *See State v. LaMere*, 103 Idaho 839, 842, 655 P.2d 46, 49 (1982). Not only does the Six Week Ban single out abortions—a medical procedure that substantially impacts women and does not equivalently impact 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, the Six Week Ban violates the Idaho Human Rights Act by depriving women of their statutory right to equal enjoyment of public accommodations, education, and employment.

III.

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

26. Petitioners incorporate the preceding paragraphs.

27. As set forth in paragraph 46 of Petitioners' petition in the Total Abortion Ban case, the Idaho Constitution contains a prohibition against vague laws. For substantially the same reasons set forth in paragraph 49 of the same petition, the Six Week Ban's medical emergency exception is unconstitutionally vague.

28. 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 *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 205 (6th Cir. 1997).

29. The Six Week Ban also includes an exception for rape or incest, 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.” Idaho Code § 18-8804(a). A similar exception applies to minors that also permits using reports that were made to child protective services. *Id.* § 18-8804(b). The rape and incest exception renders the entire statute void for vagueness because it fails to adequately set out the standard that a physician should follow when determining whether a police report narrative sufficiently meets the legal criteria for rape or incest—it offers neither an objective reasonableness standard, nor a subjective good-faith standard, nor both. *See Voinovich*, 130 F.3d at 205 (holding that confusion over an objective or subjective standard for a physician to follow renders a statute void for vagueness).

30. The Six Week Ban also includes a trigger provision 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). But under the Federal Rules of Appellate Procedure, 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). Interpreting the preamble to find that an entering of judgment in any United States appellate court suffices as a triggering event would render the word “issuance” superfluous. *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’”) (quoting *Schulz*, 151 Idaho at 866, 264 P.3d at 973). The Six Week Ban therefore fails to provide the notice required for a statute to survive a void-for-vagueness challenge.

PRAYER FOR RELIEF

Petitioners respectfully request that this Court grant the following emergency relief as soon as possible and no later than August 18, 2022:

- (a) Declare that the Six Week Ban violates the Idaho Constitution because it:
 - a. violates the fundamental right to privacy in making intimate familial decisions;
 - b. violates the guarantee of equal protection; and
 - c. is unconstitutionally vague and therefore void.
- (b) Declare that the Six Week Ban violates the Idaho Human Rights Act because it discriminates on the basis of sex.
- (c) Issue a writ of prohibition preventing (1) inferior Idaho courts from giving effect to the unconstitutional Six Week Ban, (2) Idaho law enforcement officials from enforcing the unconstitutional Ban, and (3) Idaho professional licensing boards from enforcing the Ban's unlawful suspension and revocation requirements.
- (d) If it is inclined to hear oral arguments, to schedule oral argument on this Petition for August 3, 2022.
- (e) If it is inclined to set a briefing and/or oral argument schedule that extends beyond August 18, 2022, 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.
- (f) Award to Petitioners their attorneys' fees and costs.

(g) Award such other and further relief as this Court shall deem just and reasonable.

Dated on this 25th day of July, 2022.

Respectfully submitted,

/s/ Michael J. Bartlett
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** Pro hac vice applications forthcoming*

VERIFICATION

Caitlin Gustafson, M.D., being duly sworn, deposes and says:

I am one of the petitioners in this action. I have read the foregoing Petition for Writ of Prohibition and Alternative Writ of Prohibition and Application for Declaratory Judgment and know the contents thereof. The contents are true to my knowledge.

Caitlin Gustafson
Caitlin Gustafson, M.D.

State of Idaho

County of Valley

Signed and sworn to before me on 01/25/2022.

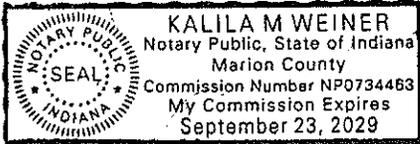
Melinda S. Carr



VERIFICATION

Rebecca Gibron, being duly sworn, deposes and says:

I am the Acting Chief Executive Officer of Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Petitioner in this action. I have read the foregoing Petition for Writ of Prohibition and Alternative Writ of Prohibition and Application for Declaratory Judgment and know the contents thereof. The contents are true to my knowledge.



Rebecca Gibron
Rebecca Gibron
Kalila M. Weiner

State of IN
County of Marion

Signed and sworn to before me on July 25, 2022

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

MICHAEL J. BARTLETT