

**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. \_\_\_\_\_

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

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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 Section 18-622(2) (the Total Abortion Ban or the Ban) is 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 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. Petitioners respectfully request relief by August 18, 2022, as Respondents appear to be taking the position that the Total Abortion Ban becomes effective on August 19, 2022.

The Total Abortion Ban makes it a felony for “[e]very person” to “perform[] or attempt[] to perform an abortion.” Idaho Code § 18-622(2). Anyone who violates the Ban’s blanket prohibition will be subject to between two and five years’ imprisonment. *Id.* A health care professional who violates the Total Abortion Ban will have his or her professional license suspended for at least six months upon a first offense—and revoked permanently upon a second. *See id.* The Total Abortion Ban provides for just two extremely narrow affirmative defenses, which the provider charged with violating the Total Abortion Ban must prove by a preponderance of the evidence. *See id.* § 18-622(3). The first (the life exception) 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.” *Id.* § 18-622(3)(a)(ii). The second (the rape or incest exception) allows a physician to raise as an affirmative defense that he or she performed the abortion after receiving a copy of a police report (or a report to child protective services, in the case of a minor) regarding “the act of rape or incest.” *Id.* §§ 18-622(3)(b)(ii)-(iii). In all cases, the physician must use the method that provides “the best opportunity for the unborn child to survive,” unless that method “would have posed a greater risk of the death of the pregnant woman.” *Id.* §§ 18-622(3)(a)(iii), (b)(iv).

The Total Abortion Ban violates Idaho law 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 Rights 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 therefore respectfully request that the law be invalidated and declared unconstitutional.

## **JURISDICTION**

1. This Court has “original jurisdiction 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; Idaho Code § 1-203; *id.* § 7-402.

2. “Any 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).

3. The Court exercises its original jurisdiction when petitions have alleged sufficient facts concerning a possible constitutional violation of an urgent nature. *See Reclaim Idaho v. Denney*, 169 Idaho 406, —, 497 P.3d 160, 172 (2021).

4. This Petition challenges the Total Abortion Ban’s violation of:

- a. the Idaho Constitution’s protection of the fundamental right to privacy in making intimate familial decisions;
- b. the Idaho Constitution’s guarantee of equal protection;
- c. the Idaho Human Rights Act; and
- d. the Idaho Constitution’s due process clause.

5. With the Total Abortion Ban set to take effect, the issue is of urgent statewide importance. Petitioners have no other adequate remedy at law, and the people of Idaho need clarity from this Court as to the constitutionality of the challenged statute. This matter calls for the Court’s immediate review.

### **PARTIES**

6. Petitioner Planned Parenthood is a not-for-profit corporation organized under the laws of the State of Washington and doing business in Idaho. It is the largest provider of reproductive health services in Idaho, operating two health centers in the State, one in Ada County (Meridian) and one in Twin Falls County (Twin Falls). Planned Parenthood provides a broad

range of reproductive and sexual health services, including, but not limited to, well person examinations, birth control, testing and treatment for sexually transmitted infections, cancer screening, and pregnancy testing. In Idaho, Planned Parenthood's physicians provide medication abortion through 77 days (or 11 weeks) LMP and procedural abortion through 15.6 weeks LMP. If the Total Abortion Ban comes into effect, Planned Parenthood's medical professionals will be faced with imprisonment and ruinous professional penalties if they attempt or perform abortions in Idaho. Planned Parenthood brings this lawsuit on behalf of itself, its medical professionals, and its current and future patients.

7. Petitioner Dr. Caitlin Gustafson is a licensed physician based in Valley County who practices family medicine and obstetrics and gynecology. Dr. Gustafson provides procedural abortions each month at Planned Parenthood's health center in Meridian, Idaho, as well as medication abortion care for Planned Parenthood patients. Dr. Gustafson provides abortion services until 13.6 weeks LMP. Dr. Gustafson is threatened with criminal penalties and professional consequences under the Total Abortion Ban, as are other medical professionals who provide abortions in Idaho. Dr. Gustafson brings this lawsuit on behalf of herself and her current and future patients.

8. Respondent the State of Idaho is obligated to abide by the Idaho Constitution, which is "the supreme law of the land." *State v. Village of Garden City*, 74 Idaho 513, 524, 265 P.2d 328, 333 (1953). The State of Idaho has enacted the Total Abortion Ban, which, if it comes into effect, will violate the Idaho Constitution and the Idaho Human Rights Act.

9. Respondents Brad Little, Lawrence Wasden, Jan M. Bennetts, and Grant P. Loebs

are law enforcement officials in Idaho who have the authority to enforce the Total Abortion Ban, if it comes into effect.<sup>1</sup> In Idaho, state officials can be sued directly to restrain them from proceeding in excess of their jurisdiction. *See, e.g., Reclaim Idaho*, 497 P.3d at 194 (granting “petition for a writ of prohibition preventing the Secretary of State from enforcing” an unconstitutional provision). Idaho state officials are without authority to enforce the Total Abortion Ban because it is unconstitutional. *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 Cty.*, 118 U.S. 425, 442 (1886))); *Boundary Backpackers v. Boundary Cty.*, 128 Idaho 371, 379, 913 P.2d 1141, 1149 (1996) (an unconstitutional statute is “null, void, and unenforceable in its entirety”).

10. Respondents Idaho State Board of Medicine, Idaho State Board of Nursing, and Idaho State Board of Pharmacy are professional licensing boards charged with the duty of suspending and revoking the licenses of doctors, nurses, and pharmacists in Idaho, respectively. *See Idaho Code* §§ 54-1814(6), 54-1404(2), 54-1718(1)(d). The Boards are without authority to

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<sup>1</sup> The law enforcement officer defendants are Brad Little (Governor), Lawrence Wasden (Attorney General), Jan M. Bennetts (Ada County Prosecuting Attorney), and Grant P. Loeb (Twin Falls County Prosecuting Attorney). Prosecuting Attorneys Bennetts and Loeb 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.

enforce the Total Abortion Ban because it is unconstitutional. *See Dumas*, 207 P. at 722; *Boundary Backpackers*, 913 P.2d at 1149.

## FACTS COMMON TO ALL CLAIMS

### *The Total Abortion Ban*

11. The Total Abortion Ban makes it a felony for “[e]very person” to “perform[] or attempt[] to perform an abortion.” Idaho Code § 18-622(2).

12. 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 unborn child ....” Idaho Code § 18-604(1).

13. Anyone who violates the Ban’s blanket prohibition faces between two and five years of imprisonment. Idaho Code § 18-622(2).

14. “The professional license of any health care professional who performs or attempts to perform an abortion or who assists in performing or attempting to perform 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.” Idaho Code § 18-622(2).

15. The Total Abortion Ban provides for two affirmative defenses, which the defendant must prove by a preponderance of the evidence. *See* Idaho Code § 18-622(3). The first is the life exception. Under the life exception, the physician may perform an abortion if “[t]he physician determined, 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). The second is the rape or incest exception. Under the rape or incest exception, the

physician may perform an abortion after receiving a copy of a police report (or a report to child protective services, in the case of a minor) regarding “the act of rape or incest.” *Id.* § 18-622(3)(b)(ii)-(iii). It is a requirement for both affirmative defenses that the physician use the method that provides “the best opportunity for the unborn child to survive,” unless that method “would have posed a greater risk of the death of the pregnant woman.” *Id.* § 18-622(3)(a)(iii), (b)(iv).

16. When it was enacted in 2020, the Total Abortion Ban was patently unconstitutional because it criminalized pre-viability abortions. The Legislature knew that, and so made the Total Abortion Ban’s enforceability reliant on a triggering event. As relevant here, that triggering event is “[t]he issuance of the judgment in any decision of the United States [S]upreme [C]ourt that restores to the states their authority to prohibit abortion.” Idaho Code § 18-622(1)(a).

17. In *Dobbs v. Jackson Women’s Health Organization*, 2022 WL 2276808 (U.S. June 24, 2022), which was decided on June 24, 2022, the United States Supreme Court overturned *Roe v. Wade*. The judgment in that case, when entered, will “restore[] to the States their authority to prohibit abortion.”

18. Without this Court’s intervention, the Total Abortion Ban will become enforceable 30 days after the issuance of the judgment in the *Dobbs* case. *See* Idaho Code § 18-622(1)(a). The earliest possible date that the Total Abortion Ban will become effective is August 18, 2022, as Supreme Court rules specify that a “mandate” will issue 25 days from issuance of the *Dobbs*

opinion. *See* U.S. Sup. Ct. R. 45.<sup>2</sup> Consistent with the Office of the Attorney General’s analysis,<sup>3</sup> the triggering event has yet to occur and will not occur until July 19, 2022 at the earliest, which will start the 30-day statutory period before the Ban goes into effect.

*The Ban’s Effects on Petitioners and Their Patients*

19. Access to abortion is critical for the ability of Idahoans to control their lives. Pregnancy and childbirth impact an individual’s physical and mental health, finances, and personal relationships. Whether to take on the health risks and responsibilities of pregnancy and parenting is a personal and consequential decision that must be left to the individual to determine without governmental interference. Pregnant Idahoans have the right to determine their own futures and make private decisions about their lives and relationships. Access to safe and legal abortion is essential to effectuating those rights.

20. Guided by their individual health needs, values, and circumstances, Idahoans seek abortion for a variety of deeply personal reasons, including medical, familial, and financial

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<sup>2</sup> While the Supreme Court’s opinion was entered on the docket on June 24, the judgment will not issue for at least another 25 days. *See* U.S. Sup. Ct. R. 41 (“Opinions of the Court will be released by the Clerk immediately upon their announcement from the bench, or as the Court otherwise directs.”); U.S. Sup. Ct. R. 44.1 (“Any petition for the rehearing of any judgment or decision of the Court on the merits shall be filed within 25 days after entry of the judgment or decision, unless the Court or a Justice shortens or extends the time.” (emphasis added)); U.S. Sup. Ct. R. 45.1-3. The Supreme Court Rules, along with Stern & Gressman, draw a distinction between the entering of judgment and the issuance of judgment to the lower court, which occurs 25 days after the entry of judgment, unless a timely petition for rehearing has been filed, in which case judgment is issued upon disposition of that petition. *See* Stephen M. Shapiro, et al., Supreme Court Practice § 15.8, p. 848 (10th ed.).

<sup>3</sup> *See* <https://idahocapitalsun.com/2022/06/24/idahos-trigger-law-will-abolish-abortions-30-days-after-scotus-ruling-overturning-roe-v-wade/>.

concerns. Those reasons can include preserving their health, protecting their ability to care and provide for their children, financial concerns about the ability to work or go to school while pregnant or parenting, or complicated family circumstances. Without the ability to decide whether to continue a pregnancy, Idahoans will lose the right to make critical decisions about their health, bodies, lives, and futures.

21. Because medical professionals who provide abortions in Idaho in violation of the Total Abortion Ban risk lengthy imprisonment and permanent professional consequences, the Total Abortion Ban leaves Petitioners and other medical professionals in Idaho no choice but to cease providing abortion services in Idaho except in the rarest circumstances. The Total Abortion Ban's limited affirmative defenses are, in practice, impossible for Petitioners to interpret and will not allow them to provide necessary care given the great risk of violating the Ban.

22. The Total Abortion Ban will leave Idahoans seeking abortions with no option but to try 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. 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).<sup>4</sup>

23. 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). They will likely lose additional income from taking time off work. And it will be harder to find substitute family care. These challenges are especially serious for people with lower incomes, who are already medically underserved and constitute a substantial portion of Petitioners' patients. Nearly 75 percent of those who seek abortions nationwide have poverty-level incomes. For some, these heightened challenges will be impossible to overcome; for others, they will appreciably delay their access to an abortion.

24. 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. Delay also increases medical costs because procedures become more expensive as gestational age increases. 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.

25. If patients cannot make the trip out of State, the Total Abortion Ban will force some patients to terminate their unwanted pregnancies outside a clinical setting, which could put them at medical or legal risk.

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<sup>4</sup> Though these locations currently offer abortion services as of June 24, 2022, this may change in the days and weeks to come.

26. For many individuals, the Total Abortion Ban will altogether foreclose the ability to access abortion, thus forcing them to carry their pregnancies to term and give birth, which carries a risk of death fourteen times higher than that associated with abortion.

27. Being forced to continue a pregnancy against one's will jeopardizes a person's physical, mental, and emotional health, as well as the stability and well-being of their family, including their children. The children of parents who are denied abortions are more likely to live in a household lacking enough money to pay for food, housing, and transportation.

28. The negative impacts of prohibiting abortions are often most severe for those who are already marginalized. For example, victims of domestic violence are at an increased risk of harm during pregnancy. For Idahoans experiencing intimate partner violence, forced pregnancy exacerbates the risk of new or increased violence, and further—often permanently—tethers the victim and the victim's family to their abuser.

29. In addition, many people who seek abortions are already poor, and denying these people abortions only compounds the problem. People who want but cannot access an abortion are more likely to be marginally employed or unemployed. 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 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.

30. Idahoans experiencing 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 exception, 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 exception may still be refused care because providers fear being held criminally liable under the Total Abortion Ban.

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

## CLAIMS FOR RELIEF

### I.

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

32. Petitioners incorporate the preceding paragraphs.

33. The right to privacy in making intimate familial decisions is protected as a fundamental right under the Idaho Constitution because it is "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).

34. This Court's precedents support the conclusion that the Idaho Constitution protects a fundamental right to privacy in making intimate familial decisions. As this Court has recognized for almost 50 years, 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, 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*,

850 P.2d at 732-733. This Court long ago held that the Idaho Constitution (art. I, §§ 1 and 21) protects some degree of personal autonomy. *See Murphy v. Pocatello Sch. Dist. No. 25*, 94 Idaho 32, 38, 480 P.2d 878, 884 (1971). Furthermore, this Court has interpreted the Idaho Constitution (art. I, § 21) to protect parents' fundamental right to decide how to raise and educate their children. *See Electors of Big Butte Area v. State Bd. of Educ.*, 78 Idaho 602, 612, 308 P.2d 225, 231 (1957). And, in the analogous area of search and seizure law, the Idaho Constitution (art. I, §17) is more protective than the U.S. Constitution. *See, e.g., State v. Donato*, 135 Idaho 469, 472, 20 P.3d 5, 8 (2001). This Court has also recognized that abortions before quickening were not criminalized at common law. *See State v. Alcorn*, 7 Idaho 599, 606, 64 P. 1014, 1016 (1901).

35. Article I, § 1 of the Idaho Constitution guarantees that “[a]ll 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 “natural rights” provision is expansive, and the right to privacy in making intimate familial decisions is an “inalienable right” protected by Article 1, § 1.

36. High courts in numerous other States have relied on some combination of the foregoing rights to hold that their constitutions protect the right to privacy in making intimate familial decisions, or a similar right that encompasses a patient's right to choose to terminate a pregnancy.

37. Privacy in making intimate familial decisions is, therefore, a fundamental right protected by the Idaho Constitution.

38. The Total Abortion Ban violates this right because it is not narrowly tailored to achieving its aims. Rather than banning all abortion, the State could have, for instance, increased access to contraception or healthcare and strengthened social assistance programs, which would have better protected children and pregnant people without infringing on citizens' fundamental rights. The Total Abortion Ban is thus unconstitutional.

## II.

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

39. Petitioners incorporate the preceding paragraphs.

40. The Idaho Constitution requires 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) (quoting *Bon Appetit Gourmet Foods, Inc. v. State, Dep’t of Employment*, 117 Idaho 1002, 1003, 793 P.2d 675, 676 (1989)).; *see also* Idaho Const. art. I, §§ 1, 2. 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.

41. The Total Abortion Ban violates the Idaho Constitution’s guarantee of equal protection because it forces women<sup>5</sup> to endure the burdens and risks of pregnancy, childbirth, and parenting based on outdated stereotypes about their societal role.

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<sup>5</sup> 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

42. The Total Abortion Ban is subject to means-focus scrutiny because it classifies on the basis of gender, *see State v. LaMere*, 103 Idaho 839, 842, 655 P.2d 46, 49 (1982), and it is “obviously invidiously discriminatory,” *State v. Hart*, 135 Idaho 827, 830, 25 P.3d 850, 853 (2001). The Ban purposefully places a host of burdens on women, with no equivalent burdens on men. 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. That classification is especially invidious in light of the historical oppression of women in the particular area of the work associated with bearing and raising children.

43. There are many ways to achieve the State’s apparent goals that are more effective than denying women access to abortions. In light of the host of non-discriminatory, better tailored alternatives, the Total Abortion Ban does not substantially further the Legislature’s goals.

44. The Total Abortion Ban also violates the Idaho Human Rights Act because it discriminates against women on the basis of their sex. Idaho Code § 67-5909. In enforcing the Total Abortion Ban, the State of Idaho will force women to remain pregnant against their will, and thereby deprive women of their statutory right to equal enjoyment of public accommodations, education, and employment.

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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.

### III.

#### **The Total Abortion Ban Violates The Idaho Constitution's Due Process Clause Because It Is Unconstitutionally Vague**

45. Petitioners incorporate the preceding paragraphs.

46. The Idaho Constitution guarantees due process of law. *See* Idaho Const. art. I, § 13 (“No person shall ... be deprived of life, liberty, or property without due process of law.”). This “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.” *State v. Cobb*, 132 Idaho 195, 197, 969 P.2d 244, 246 (1998). Statutes must be sufficiently definite to give “people of ordinary intelligence a reasonable opportunity to know what is prohibited” and to “avoid arbitrary and discriminatory enforcement.” *State v. Leferink*, 133 Idaho 780, 783, 992 P.2d 775, 778 (1999).

47. The Total Abortion Ban violates these guarantees because it fails to give any explanation of what the following might mean in practice: (1) the term “clinically diagnosable pregnancy,” (2) the provision that an abortion may be performed only “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.” Because physicians facing the complexities of actually assessing a patient’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.

48. Regarding (1), the term “clinically diagnosable pregnancy” is undefined in the statute, and it is reasonably subject to numerous different interpretations: There are many standards by which the medical community measures whether a patient is pregnant. The imprecise language thus operates “to inhibit a physician’s provision of legal ... services because individuals

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).

49. Regarding (2), the provision that permits an abortion to be performed only “to prevent the death of a pregnant woman” does not give physicians sufficient guiding principles. 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 patient’s risk of death when compared with the risk of death associated with obtaining an abortion. 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).

50. Regarding (3), the requirement that the physician perform an abortion in the manner that provides the “best opportunity for the unborn child to survive” in order to qualify for an affirmative defense is fundamentally flawed and illogical, and it does not provide sufficient guidance to physicians attempting to comply with it.

51. Because physicians facing the complexities of actually assessing a patient’s health or performing abortion procedures will be unable to reliably ensure that their conduct is legal, the Total Abortion Ban must be declared unconstitutional.

## **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, as Respondents appear to take the position that the Total Abortion Ban takes effect the next day:

- (a) Declare that the Total Abortion 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 Total Abortion 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 Total Abortion Ban's unconstitutional criminal cause of action, (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 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 Total Abortion Ban to preserve the status quo (under which the Total Abortion Ban is not enforceable) during the pendency of this case.
- (e) Award to Petitioners their attorneys' fees and costs.
- (f) Award such other and further relief as this Court shall deem just and reasonable.

Dated on this 24th day of June, 2022.

Respectfully submitted,

/s/ Michael J. Bartlett  
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**VERIFICATION**

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

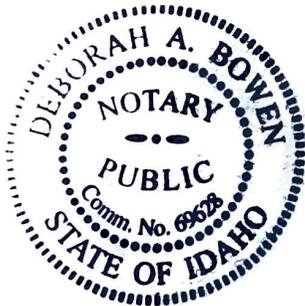
I am one of the petitioners in this action. I have read the foregoing Petition for Writ of Prohibition and Alternative Writ of Prohibition and Application for Declaratory Judgment and know the contents thereof. The contents are true to my knowledge.

Caitlin Gustafson MD  
Caitlin Gustafson, M.D.

State of Idaho

County of Jerome

Signed and sworn to before me on 6/24/2022.

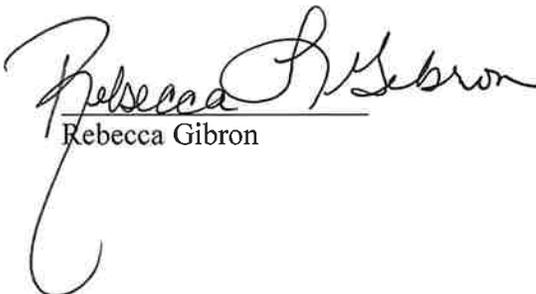


Deborah A. Bowen

VERIFICATION

Rebecca Gibron, being duly sworn, deposes and says:

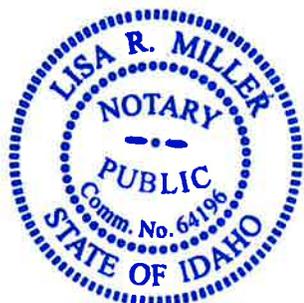
I am the Acting Chief Executive Officer of Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Petitioner in this action. I have read the foregoing Petition for Writ of Prohibition and Alternative Writ of Prohibition and Application for Declaratory Judgment and know the contents thereof.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

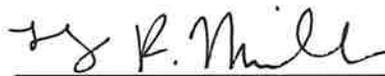
  
Rebecca Gibron

State of Idaho

County of Ada

Signed and sworn to before me on June 27, 2022.



  
Notary Public for Idaho  
Residing at Boise, ID  
My commission expires 7 | 3 | 24

**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:

**State of Idaho**  
Office of the Attorney General  
Civil Litigation Division  
954 West Jefferson Street, 2nd Floor  
Boise, Idaho 83702  
ecf@ag.idaho.gov

/s/ Michael J. Bartlett  
\_\_\_\_\_  
MICHAEL J. BARTLETT