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Idaho's Amended Abortion Laws: Summary and Updated FAQs

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UPDATE: On September 28, 2023, the Ninth Circuit Court of Appeals stayed the federal district court of Idaho's preliminary injunction that enjoined enforcement of Idaho's criminal abortion ban in EMTALA cases. The net effect is that Idaho's criminal abortion ban now applies even in EMTALA cases except (1) if the abortion is necessary to save the life of the mother or (2) in the case of rape or incest if certain conditions are met. See *United States v. Idaho*, No. 23-35440 (9th Cir. 2023), attached. Refer to our October 2 Health Law Update, "No More EMTALA Exception to Idaho's Total Abortion Ban," for additional information.

The Idaho legislature has amended Idaho's abortion laws. This health law update briefly summarizes key changes and updates our FAQs to address the new developments.

Total Abortion Ban. The Idaho legislature addressed some of the concerns by providers but declined to add an exception based on the health of the mother. As amended effective July 1, 2023,

- The total abortion ban does not apply to ectopic or molar pregnancies.¹
- Instead of characterizing them as affirmative defenses, the total abortion ban now excludes abortions that (i) are necessary to save the life of the mother or (ii) follow reported rape or incest.² This will shift the burden of proof relating to the exceptions from the defendant to the prosecutors.
- The rape and incest exception only applies if the abortion is performed during the first trimester of pregnancy.³

Civil Liability Statute. The civil liability statute allows certain family members to sue providers for performing illegal abortions. The legislature added even more teeth to the civil liability statute by:

- Eliminating defenses that defendants that might otherwise try to assert such as ignorance or mistake of law, parental consent, comparative fault, or belief that the Idaho law is unconstitutional.⁴
- Further restricting a defendant's ability to obtain an award of costs and fees even if successful in its defense.⁵

Abortion Trafficking. The legislature also passed a new "abortion trafficking" law that, effective May 5, 2023, makes it a crime for an adult to recruit, harbor or transport a pregnant minor within Idaho to obtain an abortion (including an abortion out-of-state) without the consent of the

parent or guardian.⁶ Parental or guardian consent is an affirmative defense, but the fact that the abortion provider is in another state is not.⁷ Violations will result in prison of two to five years.⁸ Planned Parenthood has vowed to challenge the abortion trafficking statute.

Given these developments, we have updated our answers to common questions concerning Idaho's abortion laws.

1. What is an “abortion” in Idaho?

Idaho generally defines “abortion” 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....⁹

“Unborn child” means “an individual organism of the species Homo sapiens from fertilization until live birth.”¹⁰ “Clinically diagnosable pregnancy” is not defined.

As recently amended, “abortions” do not include:

- (a) The use of an intrauterine device or birth control pill to inhibit or prevent ovulations, fertilization, or the implantation of the fertilized ovum within the uterus;
- (b) The removal of a dead unborn child;
- (c) The removal of an ectopic or molar pregnancy; or
- (d) The treatment of a woman who is no longer pregnant.¹¹

2. Does termination of an ectopic or non-viable fetus pregnancy constitute an “abortion” under Idaho law?

Not for purposes of the total abortion ban. As discussed above, the total abortion ban was recently amended to confirm that the “abortion” does not include “the removal of an ectopic or molar pregnancy.”¹² Moreover, in its January 2023 opinion upholding the total abortion ban, the Idaho Supreme Court stated,

The Total Abortion Ban only prohibits “abortion[s] as defined in [Title 18, Chapter 6],” I.C. § 18-622(2)—and ectopic and non-viable pregnancies do not fall within that definition. For

purposes of the Total Abortion Ban, the only type of “pregnancy” that counts for purposes of prohibited “abortions” are those where the fetus is “developing[.]” See I.C. §§ 18-622(2), -604(11)....¹³

This conclusion is consistent with I.C. § 18-617, which is structured so that the prohibition on chemical abortions does not apply to treatment of ectopic pregnancies.¹⁴

The Idaho Supreme Court confirmed that the foregoing analysis does not apply to liability under Idaho's 6-week ban (to the extent it is not superseded by the total abortion ban) or the civil liability statute; however, the 6-week ban and the civil liability statute both contain a “medical emergency” exception that, according to the Court, would apply to ectopic and non-viable pregnancies.¹⁵

3. Under what circumstances may an abortion be performed in Idaho?

a. Abortions of a clinically diagnoseable pregnancy are illegal unless the abortion is performed by a physician and:

- (i) The physician determines the abortion is necessary to prevent the death of the pregnant woman and the physician performs the abortion in a manner that provides the best opportunity for the unborn child to survive; or
- (ii) In the case of rape or incest, (a) the abortion is performed during the first trimester of pregnancy; (b) the woman (or if the woman is a minor or has a guardian, the woman or their parent, or guardian) reported the rape or incest to law enforcement; and (c) the woman, parent or guardian provides a copy of the report to the physician prior to the abortion.¹⁶

Significantly, whether the abortion is “necessary to prevent the death of the pregnant woman” and “perform[ed] in a manner that provides the best opportunity for the unborn child to survive” are measured by the physician's subjective good faith. As explained by the Idaho Supreme Court:

The plain language of [“the life of the mother”] provision leaves wide room for the physician's “good faith medical judgment” on whether the abortion was “necessary to prevent the death of the pregnant woman” based on those facts known to the physician at that time. This is clearly a subjective standard, focusing on the particular physician's judgment. [T]he statute does not require objective certainty, or a particular level of immediacy, before

the abortion can be “necessary” to save the woman’s life. Instead, the statute uses broad language to allow for the “clinical judgment that physicians are routinely called upon to make for proper treatment of their patients.” See *Spears v. State*, 278 So.2d 443, 445 (Miss. 1973) (“This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.”).¹⁷

b. At present, based on the federal District Court of Idaho’s operative preliminary injunction, abortions may be performed to the extent required by EMTALA,¹⁸ i.e.,

- (i) A pregnant woman comes to a hospital or hospital-based urgent care center seeking emergency care;¹⁹
- (ii) Practitioners at the hospital determine that abortion is necessary to avoid (a) placing the health of the pregnant woman in serious jeopardy; (b) a serious impairment to bodily functions of the pregnant woman; or (c) a serious dysfunction of any bodily organ or part of the pregnant woman;²⁰ and
- (iii) The pregnant woman has not been admitted as an inpatient at the hospital.²¹

c. Partial-birth abortions are prohibited unless necessary to save the life of the pregnant woman.²² The federal district court did not address partial-birth abortions in the EMTALA lawsuit.

d. Chemical abortions are likely prohibited unless necessary to save the life of the mother, or in the case of rape or incest, or to treat ectopic pregnancies.²³ It is not entirely clear whether the total abortion ban in § 18-622 would supersede the chemical abortion statute: neither the Idaho Supreme Court nor the federal district court addressed the interaction between § 18-617 and § 18-622. Attorney General Labrador’s letter assumes that use of abortion pills would violate § 18-622.

4. What are the penalties for performing an illegal abortion?

Any person who performs or attempts to perform an illegal abortion commits a felony punishable by: (i) between two (2) and five (5) years in prison; and (ii) suspension of his/her professional license for at least six (6) months for a first offense, and permanent revocation for subsequent violations.²⁴

5. Is a provider at risk for assisting or referring a patient to obtain an

abortion?

a. **Assisting in or referring a patient for an abortion.** A licensed healthcare professional who assists in an illegal abortion is subject to suspension of his/her professional license for at least six (6) months for a first offense, and permanent revocation for subsequent violations.²⁵ Section 18-622 does not define what constitutes “assisting” in the abortion.

On March 27, 2023, Idaho's Attorney General Raul Labrador published a letter in which he opined that:

Idaho law prohibits an Idaho medical provider from either referring a woman across state lines to access abortion services or prescribing abortion pills for the woman to pick up across state lines. Idaho law requires the suspension of a health care professional's license when he or she “assists in performing or attempting to perform an abortion.” Idaho Code § 18-622(2). The plain meaning of assist is to give support or aid. An Idaho health care professional who refers a woman across state lines to an abortion provider or who prescribes abortion pills for the woman across state lines has given support or aid to the woman in performing or attempting to perform an abortion and thus has violated the statute.²⁶

However, in response to a lawsuit filed by Planned Parenthood,²⁷ Attorney General Labrador withdrew the letter, explaining that the letter was not intended as a guidance document and suggested that it was not an official Attorney General opinion.²⁸ In a hearing concerning the lawsuit, Labrador's attorney reportedly told the court that the written withdrawal made it as if the March 27 letter had never been written.²⁹ The March 27 letter and its withdrawal have no precedential value; however, the fact that it has been withdrawn suggests that the Attorney General has reconsidered his broad interpretation of “assisting in abortion” and that referring a patient for an out-of-state abortion would not necessarily violate Idaho's statute.

The penalty for assisting an abortion in violation of § 18-622 is limited to adverse action against a person's license to practice³⁰; accordingly, only licensed healthcare providers may be subject for assisting an abortion under that statute. The fact that the crime only applies to licensed healthcare providers may suggest that it was only intended to apply to these healthcare providers who were actually involved in the clinical aspects of the abortion, although we may

need further court or legislative guidance to confirm its scope.

b. Aiding and abetting an abortion. It is not entirely clear to what extent a person who acts as an accomplice or accessory or who aids and abets an abortion in Idaho may be criminally liable.

(i) Persons who act in good faith on the order or under the direction of a licensed physician are generally protected from liability for illegal abortions. For example, no hospital, nurse, or other healthcare personnel are deemed to act as an accomplice or accessory to an illegal abortion if they provide services in good faith in reliance on the directions or order of a physician.³¹

(ii) Idaho Code § 18-606 states that a person who acts as an accomplice or accessory “to any violation of section 18-605” commits a felony and (i) shall be fined up to \$5,000, and (ii) imprisoned from one (1) to five (5) years.³² Idaho's new total abortion ban, § 18-622, effectively supersedes § 18-605, but makes no reference to § 18-606. Instead, § 18-622 states that those who assist in an illegal abortion shall be subject to suspension or revocation of his/her professional license,³³ but it does not extend criminal liability to those who assist. Accordingly, it appears that the legislature intended to put in place a new penalty structure through § 18-622 that supersedes § 18-606 and § 18-606 is no longer enforceable.

(iii) Idaho's general criminal statutes state that “[a]ll persons concerned in the commission of a crime, ... whether they directly commit the act constituting the offense or aid and abet in its commission, or, not being present, have advised and encouraged its commission ... are principals in any crime so committed.”³⁴ “To ‘aid and abet’ means to assist, facilitate, promote, encourage, counsel, solicit or incite the commission of a crime.”³⁵ It is possible that a prosecutor might rely on the general “aiding and abetting” statute to prosecute those who facilitate an illegal abortion; however, as discussed above, by failing to modify § 18-606 to refer to § 18-622 and/or establishing a separate, specific penalty for those who “assist” in an abortion in § 18-622, the legislature arguably intended to foreclose “aiding and abetting” claims against those who are not performing or actually “assisting” in the abortion.

c. Trafficking abortions for minors. As discussed above, effective May 5, 2023, an adult commits the crime of “abortion trafficking” if he or she:

with intent to conceal an abortion from the parents or guardian of a pregnant, unemancipated minor, either procures an abortion ... or obtains an abortion-inducing drug for the pregnant minor to use for an abortion by recruiting,

harboring or transporting the pregnant minor within [Idaho].³⁶

The key to liability is engaging in such conduct without the knowledge and consent of the parent or guardian: “[i]t shall be an affirmative defense [if] a parent or guardian of the pregnant minor consented to trafficking of the minor.”³⁷ Violations are punishable by prison for two (2) to five (5) years.³⁸

6. May a pregnant woman be prosecuted for obtaining an abortion?

The Idaho Supreme Court affirmed that “the Total Abortion Ban does not subject the mother to any criminal penalties, I.C. 18-622(5).”³⁹ However, that statute states, “nothing in this section” shall be construed to subject a woman to criminal liability for an abortion.⁴⁰ A different section, § 18-606(2), still states that a woman who knowingly submits to or solicits an illegal abortion for herself is guilty of a felony and (i) shall be fined up to \$5,000, and (ii) imprisoned from one (1) to five (5) years.⁴¹ The Idaho Supreme Court did not address the interaction between §§ 18-622(5) and 18-606(2). Consequently, it may not be entirely clear whether a pregnant woman may be prosecuted, although one would assume that § 18-622 was intended to supersede § 18-606(2) and protect pregnant women from prosecution.

7. May providers be sued for performing an abortion?

- a. If an abortion is attempted, induced, or performed after a fetal heartbeat is or should have been detected,⁴² the mother, father, grandparent, sibling, aunt, or uncle of the preborn child may sue medical professionals who knowingly or recklessly attempted or performed the abortion⁴³ unless:
 - i. There is a medical emergency, *i.e.*, “a condition that … 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”;⁴⁴ or
 - ii. In the case of rape or incest, the woman reported the rape or incest to law enforcement and provided a copy of the report to the physician prior to the abortion;⁴⁵ or
 - iii. In the case of rape or incest of a woman who is a minor or subject to guardianship, the woman, her parent, or her guardian reported the rape or incest to law enforcement and provided a copy of the report to the physician prior to the abortion;⁴⁶ or
 - iv. The person bringing the lawsuit impregnated the mother through rape or incest;⁴⁷ or

Presumably, the provider performed the abortion consistent

with and pursuant to her/his obligations under EMTALA.

b. The plaintiffs in a successful lawsuit may recover (i) damages, (ii) statutory damages of at least \$20,000, and (iii) costs and fees.⁴⁸ As discussed above, the statute limits the defenses that a defendant may assert as well as the defendant's ability to recover costs and fees.

8. Who may perform an abortion?

- a. Under Idaho law, only physicians may lawfully perform an abortion.⁴⁹ It may be that other practitioners may perform the abortion if necessary to comply with EMTALA.
- b. Only licensed physicians and those licensed or registered healthcare providers acting under the direct supervision or on the order of a physician may advertise items or services to induce an abortion; others who do so are guilty of a felony.⁵⁰

9. Where may abortions be performed?

- a. During the first 13 weeks of pregnancy, abortions may be performed (i) in a hospital or (ii) in a physician's regular office or a clinic, which office or clinic is properly staffed and equipped and has a satisfactory arrangement with a local hospital to render emergency care if needed.⁵¹
- b. After 13 weeks of pregnancy, abortions must be performed in hospitals.⁵²

10. What limits apply to abortifacients?

- a. Under Idaho law, "abortifacients" are defined to include mifepristone, misoprostol, and/or other chemical or drug used to cause an abortion. However, the term does not apply to the use of such drugs to treat ectopic pregnancy.⁵³
- b. Persons may not sell or advertise abortifacients unless (i) the sale, offer, or display is to a physician or druggist or their intermediary; or (ii) the sale is made upon prescription or order of a physician.⁵⁴
- c. No physician may give, sell, dispense, administer, prescribe, or provide an abortifacient to effect a chemical abortion unless the physician (i) may assess the duration of the pregnancy accurately; (ii) has determined, if clinically feasible, that the unborn child is within the uterus and not ectopic; (iii) can surgically intervene in cases of incomplete abortion or severe bleeding, or, if the physician does not have admitting privileges at a local hospital, has made a documented plan and arrangements with other physicians to provide emergency care; (iv) provides required information as described more fully below; and (v) makes reasonable efforts to ensure that the patient returns for a follow-up visit to confirm that the pregnancy has been terminated and to assess the patient's medical condition.⁵⁵

d. As discussed above, the limits on the use of abortifacients do not apply to ectopic pregnancies.⁵⁶

11. What physical, mental, or emotional conditions of the mother will permit abortions?

a. Abortions may be performed to save the life of the pregnant woman.⁵⁷ This does not include situations in which the pregnant woman may or will take action to harm herself.⁵⁸

b. As discussed above, if EMTALA applies, abortions may be performed if necessary to avoid (a) placing the health of the pregnant woman in serious jeopardy; (b) a serious impairment to bodily functions of the pregnant woman; or (c) a serious dysfunction of any bodily organ or part of the pregnant patient woman.⁵⁹ According to HHS, “[e]mergency medical conditions involving pregnant patients may include, but are not limited to, ectopic pregnancy, complications of pregnancy loss, or emergent hypertensive disorders, such as preeclampsia with severe features.”⁶⁰

12. May an abortion be performed if the fetus has conditions that make viability improbable or that may result in severe birth defects?

As discussed above, the Idaho Supreme Court concluded that the total abortion ban does not apply to non-viable pregnancies, and the “medical emergency” exception would likely apply in the case of the 6-week ban or civil liability law.⁶¹ However, that exception would appear not to apply if the child may be born alive with severe birth defects.

13. What procedures must be followed before performing an abortion?

Physicians, hospitals, and other facilities performing an abortion must do the following:

a. Except in the case of a medical emergency, determine the probable post-fertilization age of the unborn child through appropriate tests, examinations, and inquiries of the pregnant woman.⁶² However, this requirement is part of Idaho's 20-week abortion ban, I.C. § 18-501 *et seq.* That ban along with the requirement to determine the post-fertilization age of the unborn child would appear to be moot given the total abortion ban.

b. Obtain informed consent from the pregnant woman.⁶³ A physician, hospital, or other facility may refuse to perform an abortion if the pregnant woman refuses regardless of her age or competence.⁶⁴

c. Except in the case of a medical emergency, at least 24 hours before the abortion is performed, the physician, hospital, or other facility must comply with the following:

i. Provide to the patient information published by the Idaho Department of Health and Welfare (DHW) concerning

abortions. The information is available at <https://healthandwelfare.idaho.gov/services-programs/children-families/about-pregnancy-abortion-and-adoption-resources>. The attending physician or his/her agent must certify that the information was timely provided as required.⁶⁵

ii. The attending physician or her/his agent must inform the patient by telephone or in person that (i) ultrasound imaging and heartbeat monitoring are available so that the woman may view the unborn child; and (ii) the DHW information and website described above list facilities that offer such services at no cost. If the woman contacts the abortion facility by e-mail, the facility must inform the woman of the foregoing information in a larger font than the rest of the e-mail.⁶⁶

d. Do not collect a fee for an abortion until after providing the required information to the pregnant woman.⁶⁷

e. If an ultrasound is used to perform an abortion, prior to the abortion the physician or her/his agent must (i) inform the woman that she has the right to view the ultrasound image of her unborn child before an abortion is performed; (ii) if requested, allow the woman to view the ultrasound; (iii) offer a physical picture of the ultrasound image; and (iv) provide such other information which in the attending physician's judgment is relevant to the woman's decision concerning the abortion.⁶⁸

f. For chemical abortions, the physician must satisfy the following: (i) have the ability to assess the duration of the pregnancy; (ii) determine, if clinically feasible, that the unborn child to be aborted is within the uterus and not ectopic; (iii) have the ability to provide surgical intervention if needed or, if the physician does not have admitting privileges at a local hospital, the physician must have a documented plan to provide emergency care through other qualified physicians; (iv) have a written agreement with such other physicians to provide emergency care if required; (v) inform the pregnant woman that she may need access to medical facilities equipped to provide blood transfusions and resuscitation, if necessary; (vi) if the appropriate medical facility is other than a local hospital emergency room, the physician must provide the patient with the name, address, and telephone number of such facility in writing; and (vii) make reasonable efforts to ensure the patient returns for a follow-up visit to confirm that the pregnancy has been terminated and to assess the patient's condition.⁶⁹

g. Except in the case of a medical emergency, before performing or inducing an abortion, determine whether there is a fetal heartbeat, and record in the pregnant woman's record whether or not the heartbeat is present, the estimated gestational age of the preborn child, the testing method, and the date and time of the test.⁷⁰ This requirement is intended to implement Idaho's fetal heartbeat law, the criminal portions of which were superseded by Idaho's total ban on

abortions.⁷¹ It is, however, relevant to any defense of a civil lawsuit, especially if the healthcare professional seeks to recover costs and fees.⁷²

14. May an unemancipated minor consent to their own abortion in Idaho?

- a. Under Idaho law, the attending physician must generally secure written consent to perform an abortion on an unemancipated minor from one of the following: (i) one of the minor's parents or the minor's guardian or conservator;⁷³ or (ii) a district court judge after an appropriate hearing.⁷⁴
- b. The attending physician is not required to obtain parental or judicial consent if either: (i) the pregnant minor certifies that the pregnancy resulted from rape or sexual conduct with the minor's parent, stepparent, uncle, grandparent, sibling, adoptive parent, legal guardian, or foster parent; or (ii) a medical emergency exists, and the attending physician documents the emergency in the minor's medical record.⁷⁵
- c. Physicians performing an abortion on an unemancipated minor are protected from criminal or administrative liability based on the failure to obtain informed consent if (i) prior to performing the abortion, the physician obtains either positive identification or other documentary evidence from which a reasonable person would have concluded that the woman seeking the abortion was either an emancipated minor or was not then a minor, and (ii) the physician retained a legible photocopy of such evidence.⁷⁶

15. What are the reporting requirements for abortions?

- a. Within 15 days after an induced abortion, the attending physician must complete, file, and submit the induced abortion reporting form to the Bureau of Vital Statistics.⁷⁷ See <https://healthandwelfare.idaho.gov/providers/vital-records/vital-records>.
- b. If the physician performed an abortion without providing the required DHW and ultrasound information described above to the patient, within 30 days after the abortion the attending physician or his/her agent must deliver to DHW a report signed by the attending physician denoting the medical emergency that excused compliance with the requirement to provide the information. The report should preserve the anonymity of the patient.⁷⁸

16. What are the penalties for failing to comply with the procedures or reporting requirements for abortions?

An attending physician who performs an abortion but knowingly fails to provide the required information, offer an ultrasound, or report the abortion as described above (i) may be subject to professional discipline; (ii) shall be fined \$100 for each month of noncompliance; and (iii) may be subject to

civil contempt sanctions.⁷⁹ In addition, physicians who fail to timely submit the report containing information concerning post-fertilization age may be subject to a \$500 fine for each 30-day period the report is late.⁸⁰

17. Are physicians, hospitals, or other facilities required to perform abortions?

Under Idaho law, no healthcare professional shall be required to render any healthcare service that violates his or her conscience,⁸¹ provided that (i) the professional may not engage in illegal discrimination;⁸² and (ii) in a life-threatening situation, the professional must provide treatment and care until an alternate healthcare professional capable of treating the emergency is found.⁸³ Similarly, hospitals may generally elect not to furnish facilities or admit patients for abortion,⁸⁴ but they may still be obligated to comply with laws such as EMTALA that require appropriate emergency care or treatment of patients who have been admitted.

¹ I.C. § 18-604(1).

² I.C. § 18-622.

³ I.C. § 18-622.

⁴ I.C. § 18-8807(10).

⁵ I.C. § 18-8807(11).

⁶ I.C. § 18-623(1).

⁷ I.C. §§ 18-623(2)-(3).

⁸ I.C. § 18-623(5).

⁹ I.C. § 18-604(1).

¹⁰ I.C. §§ 18-502(9) and 18-604(5).

¹¹ I.C. § 18-604(1), as amended effective 7/1/23.

¹² I.C. § 18-604(1)(c).

¹³ *Planned Parenthood v. Idaho*, Nos. 49615, 49817, 49899 (Idaho Jan. 5, 2023) at p.88 (hereafter “Opinion”).

¹⁴ Idaho Code § 18-617 generally prohibits the use of abortifacients to effect a chemical abortion, but expressly states that “abortifacient” does not apply “when used to treat ectopic pregnancy.” I.C. § 18-617(1)(1). Section 18-617(2) requires physicians performing a chemical abortion to first determine “that the unborn child to be aborted is within the uterus and not ectopic.” I.C. § 18-617(2)(b).

¹⁵ Opinion at p.88-89 (“[W]e cannot use the same reasoning when it comes to the 6-Week Ban or the Civil Liability Law because the definition of “abortion” as applied to those laws, I.C. § 18-8801(1), does not contain a

definition of “pregnancy” like that found under the Total Abortion Ban. See I.C. § 18-8801(1)–(5) (not defining “pregnancy”). Nevertheless, applying a limiting judicial construction, we conclude that ectopic, and non-viable pregnancies plainly fall within the “medical emergency” exception under the 6-Week Ban and Civil Liability Law (an exception the Total Abortion Ban does not contain). See I.C. § 18-8801(5)”).

¹⁶ I.C. § 18-622, as amended effective 7/1/23.

¹⁷ Opinion at p.89-92.

¹⁸ Memorandum Decision and Order (8/24/22), *United States v. State of Idaho*, Case No. 1:22-cv-00329-BLW (hereafter “Memorandum and Order”).

¹⁹ EMTALA applies if a patient comes to a Medicare-participating hospital or certain hospital-based entities seeking emergency care. 42 U.S.C. § 1395dd(a); 42 C.F.R. § 489.24(a). For more information about the apparent scope of the district court’s decision, see <https://www.hollandhart.com/idaho-abortion-law-the-limited-emtala-exception>.

²⁰ Memorandum and Order at p.39.

²¹ According to EMTALA regulations, a hospital’s EMTALA obligations end once a patient has been admitted as an inpatient. 42 C.F.R. § 489.24(a)(1)(ii).

²² I.C. § 18-613(1). “Partial-birth abortion” means “(i) Deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the physician knows will kill the partially delivered living fetus; and (ii) Performs the overt act, other than completion of delivery, that kills the partially delivered living fetus. *Id.* at § 18-613(2)(b).

²³ See I.C. §§ 18-617 and 622. “Chemical abortions” means “the exclusive use of an abortifacient or combination of abortifacients to effect an abortion.” I.C. § 18-617(1)(b).

²⁴ I.C. § 18-622.

²⁵ I.C. § 18-622.

²⁶ Letter from Attorney General R. Labrador dated 3/27/23, available at https://759dc218-b8c7-48ed-a4df-e92eb29273e5.filesusr.com/ugd/be9708_de4a35f4a6854c0690cf88ecc810f97a.pdf.

²⁷ *Planned Parenthood v. Labrador*, Case No. 1:23-cv-142 (D. Idaho 2023), available at https://www.plannedparenthood.org/uploads/filer_public/1c/c6/1cc67a69-

3bcb-463c-bbef-eb475a58169d/id_complaint_1.pdf.

²⁸ See <https://www.cnn.com/2023/04/07/politics/idaho-abortion-referrals-guidance-rescinded/index.html>.

²⁹ *Id.*

³⁰ I.C. § 18-622.

³¹ I.C. § 18-606; *see also* I.C. § 18-603.

³² I.C. § 18-606(1), emphasis added.

³³ I.C. § 18-622(2).

³⁴ I.C. § 18-204.

³⁵ *State v. Wilson*, 165 Idaho 64, 67, 438 P.3d 302, 305 (2019) (quoting *State v. Smith*, 161 Idaho 782, 787, 391 P.3d 1252, 1257 (2017); *see also* Idaho Crim. Jury Instr. 311 and 312.

³⁶ I.C. § 18-623(1)..

³⁷ I.C. § 18-623(2).

³⁸ I.C. § 18-623(5).

³⁹ Opinion at p.11.

⁴⁰ I.C. § 18-622(5), emphasis added.

⁴¹ I.C. § 18-606(2).

⁴² Idaho Code § 18-8803 requires that the person performing the abortion must first attempt to determine whether a fetal heartbeat is present and record such determination in the woman's medical record along with the gestational age of the preborn child, the method used to test for the fetal heartbeat, the date and time of the test, and the results of the test.

⁴³ I.C. § 18-8807(1).

⁴⁴ I.C. § 18-8801(5). The Idaho Supreme Court affirmed that the "medical emergency" exception is judged by an objective standard, *i.e.*, "This standard simply requires the physician to exercise 'reasonable medical judgment' when determining whether the medical condition of the pregnant mother necessitates an abortion 'to avert' her death or avoid a 'serious risk of substantial and irreversible impairment of a major bodily function.'" (Opinion at p.96).

⁴⁵ I.C. § 18-8804(b).

⁴⁶ I.C. § 18-8804(a).

⁴⁷ I.C. § 18-8807(3).

⁴⁸ I.C. § 18-8807(1)(a)-(c).

⁴⁹ I.C. § 18-608A.

⁵⁰ I.C. § 18-603.

⁵¹ I.C. § 18-608(1). In *McCormack*, the Ninth Circuit held that the requirements that the clinic be “properly” staffed and equipped and have “satisfactory” transfer agreements with hospitals is unconstitutionally vague and unenforceable in a criminal action. 788 F.3d at 1030-31.

⁵² I.C. § 18-608(2)-(3).

⁵³ I.C. § 18-617(a).

⁵⁴ I.C. § 18-607.

⁵⁵ I.C. § 18-617(2)-(3).

⁵⁶ I.C. § 18-617(1)(a).

⁵⁷ I.C. § 18-622(3).

⁵⁸ I.C. § 18-622(3)(a)(ii).

⁵⁹ Memorandum and Order at p.39.

⁶⁰ (CMS QSO-22-22-Hospitals (7/1/2022 as rev'd 8/25/22) at p.4, available at <https://www.cms.gov/files/document/qso-22-22-hospitals.pdf>).

⁶¹ Opinion at p.10, 88-89.

⁶² I.C. § 18-504(1).

⁶³ I.C. § 18-609(1).

⁶⁴ I.C. § 18-610.

⁶⁵ I.C. § 18-609(4).

⁶⁶ I.C. § 18-609(5).

⁶⁷ I.C. § 18-609(5).

⁶⁸ I.C. § 18-609(6).

⁶⁹ I.C. § 18-617(c)-(d).

⁷⁰ I.C. § 18-8803.

⁷¹ I.C. § 18-8805(4).

⁷² I.C. § 18-8807(4).

⁷³ I.C. § 18-609A(1).

⁷⁴ I.C. § 18-609A(2).

⁷⁵ I.C. § 18-609A(7).

⁷⁶ I.C. § 18-614.

⁷⁷ I.C. § 39-261(a).

⁷⁸ I.C. § 18-609(7).

⁷⁹ I.C. §§ 18-506(3) and 18-609(9).

⁸⁰ I.C. § 18-506(3).

⁸¹ I.C. § 18-611(2).

⁸² I.C. § 18-611(5).

⁸³ I.C. § 18-611(6).

⁸⁴ I.C. § 18-612.

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