Holland & Hart

Kim Stanger

Partner
208.383.3913
Boise
kcstanger@hollandhart.com

Idaho Abortion Laws: Idaho Supreme Court Upholds Laws but Offers Important Clarifications

Insight — 01/11/2023

On January 5, 2023, the Idaho Supreme Court upheld Idaho's near Total Abortion Ban (I.C. § 18-622), its 6-Week Abortion Ban (I.C. 18-8804 to -8805), and its related Civil Liability Law (I.C. § 18-8807). *Planned Parenthood v. State of Idaho*, No. 49615, 49817, 49899 (Idaho 1/5/23) ("Opinion"), available here. Those laws are discussed more fully in our client alert titled Idaho Abortion Laws: New Law and EMTALA Exception Now Effective. However, in its recent opinion, the Court included several important clarifications.

1. The Abortion Laws Do Not Apply to Ectopic Pregnancies or Abortions of Non-Viable Fetuses.

The treatment of ectopic pregnancies has been a major concern of healthcare providers since the new laws took effect. In its Opinion, the Idaho Supreme Court held that the criminal Total Abortion Ban does not apply to ectopic pregnancies or the termination of a non-viable fetus. As explained by the Court,

> 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) (defining "pregnancy" as "the reproductive condition of having a *developing fetus in the body* and commences with fertilization." (emphasis added)). In the case of ectopic pregnancies, any "possible infirmity for vagueness" over whether a fetus could properly be deemed a "developing fetus" (when the fallopian tube, ovary, or abdominal cavity it [is] implanted in *necessarily cannot support its growth*) can be resolved through a "limiting judicial construction, consistent with the apparent legislative intent[.]" *See Cobb*, 132 Idaho at

> 198–99, 969 P.2d at 247–48.
>
> Consistent with the legislature's goal of protecting prenatal fetal life at all stages of development where there is some chance of survival outside the womb, we conclude a “developing fetus” under the definition of “pregnancy” in Idaho Code section 18-604(11), does not contemplate ectopic pregnancies. Thus, treating an ectopic pregnancy, by removing the fetus is plainly not within the definition of “abortion” as criminally prohibited by the Total Abortion Ban (I.C. § 18-622(2)). In addition, because a fetus must be “developing” to fall under the definition of “pregnancy” in Idaho Code section 18-604(11), non-viable pregnancies (i.e., where the unborn child is no longer developing) are plainly not within the definition of “abortion” as criminalized by the Total Abortion Ban (I.C. § 18-622(2)).

Opinion at p.88; *see also id.* at p.10 (“[E]ctopic and non-viable pregnancies do not fall within the Total Abortion Ban's definition of 'abortion'”).

The foregoing analysis does not apply to the 6-Week Ban or the Civil Liability Law because of their different definitions of “abortion”; nevertheless, the Idaho Supreme Court concluded that termination of ectopic pregnancies or non-viable fetuses would fit within those statutes' exceptions for “medical emergencies”:

> Of note, we 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).

Opinion at 88-89. These clarifications are consistent with the current language in the Idaho statute prohibiting chemical abortions, I.C. § 18-617, and should provide significant assurance to physicians and other providers rendering care in such cases.

2. The Exception for Abortions to Save the Life of the Mother

Depends on the Physician's Subjective Good Faith Judgment.

Since the laws took effect, providers have also been justifiably concerned that the Total Abortion Ban criminalizes all abortions; the exceptions to save the life of the mother or for rape or incest must be plead and proven as affirmative defenses. I.C. § 18-622. As explained by the Supreme Court, the potential net effect is that

> a physician who performed an "abortion" as defined in Idaho Code section 18-604(1) and prohibited by section 18-622(2), could be charged, arrested, and confined until trial even if the physician initially claims they did it to preserve the life of the mother, or based on reported rape or incest. Only later, at trial, would the physician be able to raise the affirmative defenses available in the Total Abortion Ban (I.C. § 18-622(3)) to argue it was a justifiable abortion that warrants acquittal and release.

Opinion at p.78. Of course, as a practical matter, prosecutors are unlikely to pursue cases in which affirmative defenses are likely to apply. And in this case, the Idaho Supreme Court interpreted the statute in a manner so as to make such defenses easier to prove: it confirmed that the "life of the mother" defense depends on the subjective good faith judgment of the physician, not an objective standard:

> 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.").

Opinion at p.89; *see also id.* at p.90 ("The Total Abortion Ban …. imposes a subjective standard based on the individual physician's good faith

medical judgment, that the abortion was necessary to prevent the death of the woman"). This somewhat deferential, subjective standard should provide some comfort—although not enough to assuage all fears—for those physicians who are forced to make the tough call between saving the life of the fetus or the life of the mother.

3. The Subjective Standard Also Applies to the Requirement That the Abortion Be Performed in a Manner That Provides the Best Opportunity of the Unborn Child to Survive.

To fit within the exceptions under the Total Abortion Ban, the statute contains a somewhat confusing additional requirement that:

> [t]he physician performed or attempted to perform the abortion in the manner that, in his good faith medical judgment and based on the facts known to the physician at the time, provided the best opportunity for the unborn child to survive, unless, in his good faith medical judgment, termination of the pregnancy in that manner would have posed a greater risk of the death of the pregnant woman.

I.C. § 18-622(3)(a)(iii). This requirement seems out of place given that abortions, by definition, are intended to terminate the life of the fetus. The Idaho Supreme Court recognized this "textual difficulty" but offered its interpretation of the requirement:

> Section 18-622(3)(a)(iii) simply requires that if a physician decides an abortion is necessary to save the life of the mother (I.C. § 18-622(3)(a)(ii)) or rape or incest has been reported (I.C. § 18-622(3)(b)(ii)–(iii)), the physician cannot automatically proceed to terminate the pregnancy in a manner that would necessarily end the life of the unborn child. Instead, the physician must first, using his "good faith medical judgment" and "the facts known" to him at the time, provide "the best opportunity for the unborn child to survive, unless, in his good faith medical judgment" using that method will pose "a greater risk of the death of the pregnant woman." *See* I.C. § 18-622(3)(a)(iii).
>
> In other words, this means that if a woman is to have an unborn child removed from her body based on the preservation of her life, having been raped, or the victim of incest requirements—when the unborn child is viable outside of her womb—the physician must remove that unborn child in

> a manner that provides the best opportunity for survival (e.g., vaginal delivery or cesarean delivery) and cannot remove the child using a method which will necessarily end its life (e.g., dilation and extraction, or partial-birth abortions). The exception to this is when, in the physician's "good faith medical judgment," a method that would save the unborn child's life poses a "greater risk of the death of the pregnant woman." *See* I.C. § 18-622(3)(a)(iii). This reading comports with the legislature's apparent attempt, when crafting the Total Abortion Ban, to protect the life of the unborn child where it is possible. And it plainly has a "core of circumstances" to which any ordinary person would unquestionably understand it applies (e.g., late term pregnancies).

Opinion at p.92. And, importantly, the Idaho Supreme Court affirmed that,

> like the "necessary" to save the life of the mother requirement, this requirement is purely subjective and merely requires a good faith judgment call by the physician without needing to be objectively "correct."

Id.

4. The EMTALA Exception Does Not Apply to the 6-Week Abortion Ban, but the Medical Emergency Exception Does.

The Idaho Supreme Court acknowledges that, under the Federal Court's current injunction, Idaho's Total Abortion Ban does not apply in those cases in which EMTALA applies. Opinion at p.14; *United States v. Idaho*, No. 1:22-CV-00329-BLW, 2022 WL 3692618 at *15 (D. Idaho 8/24/22). The Idaho Supreme Court noted, however, that the federal injunction only applies to the Total Abortion Ban; it does not apply to Idaho's 6-Week Ban, which ban would apply in those cases in which the Total Abortion Ban is stayed. Opinion at p.19; *see also id*. at p.93 ("[T]he preliminary injunction does not apply to the 6-Week Ban."). Nevertheless, the Idaho Supreme Court concluded that this has little practical effect for providers because both the 6-Week Ban (if it applies) and the Civil Liability Law contain an exception for "medical emergencies," which the statute defines 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.

I.C. § 18-8801(5). Thus, in EMTALA cases, providers who perform abortions to avert impairment to the mother are protected from the Total Abortion Ban, the 6-Week Abortion Ban, and the Civil Liability Law. *See* Opinion at p.19 ("[T]he 6-Week Ban and Civil Liability Law have a "medical emergency" exemption … which appears to apply in nearly identical circumstances in which EMTALA might preclude the Total Abortion Ban from being enforced.").

Providers should note that the "medical emergency" exceptions under the 6-Week Ban and Civil Liability Law operate differently than the exceptions under the Total Abortion Ban. First, under the 6-Week Ban and Civil Liability Law, the "medical emergency," rape, and incest exceptions are exemptions to prohibited abortions; they are not affirmative defenses. I.C. § 18-8804(1). Second, unlike the Total Abortion Ban, the "medical emergency" exception depends on an objective standard, not a subjective standard. As the Idaho Supreme Court explained,

> the objective "reasonable medical judgment" requirement for judging when there is a "medical emergency"… is not as broad as the subjective "good faith" standard under the Total Abortion Ban…. 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." *See* I.C. § 18-8801(5).

Opinion at p.96.

5. It Is Up to the Legislature and Voters to Change the Laws.

Ultimately, the Idaho Supreme Court concluded that its job in the case was to interpret and apply the Idaho Constitution according to its meaning at the time it was drafted, not to "usurp[] the policy-making role of the legislature [in violation of] the separation of powers that forms the basis of our government." Opinion at p.76. Applying that standard, the Court determined that the Idaho Constitution never guaranteed a fundamental right to an abortion and, accordingly, the Total Abortion Ban, 6-Week Ban, and Civil Liability Law do not violate the Idaho Constitution. In so holding, however, the Court repeatedly emphasized that it is ultimately the responsibility of Idaho voters and their legislatures to determine "the deeply moral and political question of abortion." Opinion at p.4. "If the people of Idaho are dissatisfied with the policy choices the legislature has made or wish to enshrine a fundamental right to abortion in the Idaho Constitution, they can make these choices for themselves through the ballot box." *Id.* Accordingly, healthcare providers or other citizens wishing to change the current abortion laws should contact their legislators and

work to implement needed changes, hopefully at the legislative session that has just begun.