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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

STACY SEYB, M.D., *Plaintiff,* *v.* MEMBERS OF THE IDAHO BOARD OF MEDICINE, in their official capacities; *et al.*, *Defendants.*	Case No. 1:24-cv-00244-BLW **DEFENDANTS MEMBERS OF THE IDAHO BOARD OF MEDICINE AND 41 COUNTY PROSECUTORS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

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INTRODUCTION[1]

There is no constitutional right to an abortion. *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022); *Planned Parenthood Great Nw. v. State*, 171 Idaho 374, 522 P.3d 1132 (Idaho 2023). Plaintiff's case runs headlong into binding precedent, and so the Court should reject Plaintiff's attempt to relitigate abortion under the Fourteenth Amendment.

Even before the Court can reach the merits, however, Plaintiff also fails to establish Article III standing. The Complaint could not be clearer that Dr. Seyb is attempting to litigate claims on behalf of potential patients—he is not advancing his own claims. In fact, he makes only two brief cameo appearances in twenty-seven-pages. His patients also appear only as an undifferentiated mass. Plaintiff nowhere alleges that he has personally been injured by the named Defendants or by Idaho's abortion laws. Nor does he allege specific facts relating to any particular patient or claim a relationship with any individual whom he believes needs an abortion that is prohibited by Idaho's laws. The Supreme Court rejected such third-party litigation just this past term, and this Court should do so here. *FDA v. All. for Hippocratic Med.*, 602 U.S. 367 (2024).

[1] This Motion to Dismiss is being filed on behalf of the individual members of the Board of Medicine and 41 of the 42 county prosecuting attorneys represented by the Office of the Attorney General. Defendant Randy Neal, Bonneville County Prosecuting Attorney, fully joins in the arguments made in this memorandum, but files a separate motion to dismiss and memorandum for the reasons set forth in his separate memorandum.

LEGAL STANDARD

This motion is brought pursuant to Federal Rule of Civil Procedure 12(b)(1) and (b)(6). A Rule 12(b)(1) jurisdictional attack may be "either facial or factual." *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000) (citation omitted). "A 'facial' attack accepts the truth of the plaintiff's allegations but asserts that they 'are insufficient on their face to invoke federal jurisdiction.' The district court resolves a facial attack as it would a motion to dismiss under Rule 12(b)(6): Accepting the plaintiff's allegations as true and drawing all reasonable inferences in the plaintiff's favor, the court determines whether the allegations are sufficient as a legal matter to invoke the court's jurisdiction." *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (citations omitted).

As for those issues brought under Rule 12(b)(6), the Court must examine the complaint to determine whether the complaint states sufficiently detailed factual allegations to rise the entitlement to relief "above the speculative level," taking those allegations as true. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A "formulaic recitation of the elements of a cause of action will not do" nor is it enough to plead "a legal conclusion couched as a factual allegation." *Id.* (citations omitted).

ARGUMENT

The critical failure of the Complaint is the failure to describe an injury-in-fact—whether an injury to Dr. Seyb or to specific patients—resulting from the Fetal Heartbeat Preborn Child Protection Act ("Heartbeat Act")[2] or the Defense of Life Act.[3]

[2] Idaho Code §§ 18-8801 et seq.
[3] Idaho Code § 18-622.

Plaintiff alleges no specific injury to himself anywhere in the complaint. He does not allege that he has any economic injury related to the challenged laws. Nor does he allege that he has any patient who needs an abortion. Plaintiff does not even allege that he has, will, or ever plans to perform an abortion. These deficiencies are fatal to his standing for the same reasons discussed in *Alliance*. Rather than an injury to himself or his patients, Dr. Seyb alleges "only a general legal, moral, ideological, or policy objection to a particular government action." *Alliance*, 602 U.S. at 381. With no allegations regarding an injury-in-fact to Dr. Seyb or to a specific patient of his, Plaintiff has no standing.

I. Plaintiff has sued improper Defendants.

Plaintiff lacks standing to sue the named Defendants because, even under his theory, they lack a traceable connection to the claims in the Complaint. Standing is a threshold inquiry to invoke Article III jurisdiction. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). Standing requires an injury to plaintiff that is "fairly traceable to the challenged conduct of the defendant." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (cleaned up) (citation omitted). To satisfy this requirement, Plaintiff must allege how the named defendants will act to enforce the challenged laws against him, or how the "[g]overnment action or conduct has caused or will cause the injury they attribute to [the challenged laws]." *California v. Texas*, 593 U.S. 659, 670 (2021). Put another way, Plaintiff must draw a "line of causation between" the official sued and the claimed injury. *Dep't of Educ. v. Brown*, 600 U.S. 551, 567 (2023) (quoting *Allen*

v. Wright, 468 U.S. 737, 755–56 (1984)).[4] Plaintiff bears the burden of establishing every element of standing. *Lujan*, 504 U.S. at 561 (citation omitted).

A. The County prosecutors for jurisdictions in which Dr. Seyb does not practice are not proper defendants.

Plaintiff's failure to allege he practices in the County Prosecutor Defendants' jurisdiction is fatal to this Court's jurisdiction on those claims. Standing requires an injury-in-fact that is traceable to the conduct of a named party. To sue a prosecutor, Plaintiff must allege that there is a reasonable likelihood of enforcement of acts against him by each named Defendant. *See Eu*, 979 F.2d at 704. This is because "[r]emedies . . . ordinarily 'operate with respect to specific parties'" not on "legal rules in the abstract." *California*, 593 U.S. at 672 (quoting *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 488–89 (2018) (Thomas, J., concurring)); *see also cf. Labrador v. Poe*, 144 S.Ct. 921, 927 (2024) (Mem.) (Gorsuch, J., concurring) and *id.* at 931 (Kavanaugh, J., concurring).

The Complaint pleads that Plaintiff is a doctor at St. Luke's in Boise, Dkt. 1 at ¶ 15, and Plaintiff only brings a lawsuit on that basis. *Id.* Right out of the gate, this knocks out 43 of 44 prosecutors—the St. Luke's Hospital where Plaintiff works is in one county, Ada County. Relief as to any county prosecutor that does not have jurisdiction over a place where abortions are performed by Dr. Seyb cannot redress

[4] Thus, in addition to arguing lack of traceability and redressability, Defendants assert their immunity under the Eleventh Amendment. To fit under the *Ex parte Young* exception, the unlawful act to be restrained must be an act by the named defendants. *Los Angeles Cnty. Bar Ass'n v. Eu,* 979 F.2d 697, 704 (9th Cir. 1992).

any of his injuries. By operation of geography alone, 43 of the named prosecutors are not proper defendants.

B. The Idaho Board of Medicine members are not proper defendants.

The Idaho Board of Medicine is not a proper Defendant in a suit to enjoin Idaho's criminal abortion statute. Once again, only defendants with a "fairly direct" "connection with the enforcement" of the challenged laws are subject to suit in an official capacity. *Eu*, 979 F.2d at 704 (citations omitted). Separately, injuries are only fairly traceable to a defendant "where there is a causal connection between the injury and the defendant's challenged conduct." *Wit v. United Behav. Health*, 79 F.4th 1068, 1083 (9th Cir. 2023) (citing *Lujan*, 504 U.S. at 560).

Here, the Idaho Board of Medicine has no role in enforcing criminal statutes, including the two challenged here. *See* Idaho Code §§ 31-2227, 31-2604. The only connection that Plaintiff alleges as to the Board is their ministerial duty to revoke or suspend a license for violations, but this duty arises only after conviction. As an Idaho court has already found, the members of the Board are not proper parties because they have no role in prosecuting either the Defense of Life Act or Heartbeat Act. *Adkins v. State of Idaho*, Mem. Dec. and Order on Mot. to Dismiss, No. CV01-23-14744 at 11 n.1; 12–13 (Dec. 29, 2023) (citing Idaho Code §§ 18-622(1); -8805(3)); *accord Planned Parenthood Greater Nw. v. Labrador*, 684 F.Supp.3d 1062, 1089 (D. Idaho 2023) (denying injunction against Board of Medicine). Because the Board members have no role in pursuing a conviction, they are not proper Defendants.

II. Plaintiff lacks ordinary or third-party standing.

Plaintiff's complaint contains 132 paragraphs. Exactly one alleges facts about Plaintiff, his practice, or his patients. Dkt. 1 ¶ 15. In it, Plaintiff claims to assert the rights of himself and his patients. This is the last we hear about either.[5] This pro forma inclusion of a practicing physician and undifferentiated mass of hypothetical patients does not create standing.

Standing requires an injury that is both "actual or imminent" and "concrete and particularized." *Lujan*, 500 U.S. at 555. "For an injury to be particularized, it must affect the plaintiff in a personal and individual way." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (cleaned up) (citation omitted) (collecting cases). Put differently, "Article III requires a plaintiff to first answer a basic question: What's it to you?" *Alliance*, 602 U.S. at 379 (citation and internal quotation marks omitted). And while "[p]articularization is necessary to establish injury in fact . . . it is not sufficient." *Spokeo*, 578 U.S. at 339. The injury must be concrete, "real and not abstract." *Alliance*, 602 U.S. at 381 (citation omitted).

The Supreme Court's recent rearticulation of Article III standing in *Alliance for Hippocratic Medicine* is helpful here. In that case, pro-life doctors sued the FDA for the agency's approval of mifepristone. In resolving the question of whether those doctors had standing to sue on their own behalf, the Court noted that the doctors were not alleging that they themselves were regulated but that the government was

[5] While using Plaintiff's name, Paragraph 107 speculates about potential or contingent harms to "like" doctors or patients, again, without identifying specific patients, or even referring specifically to Dr. Seyb's practice.

unlawfully regulating (or not regulating) someone else. 602 U.S. at 382. This kind of standing is "ordinarily substantially more difficult to establish." *Id.* (quoting *Lujan*, 504 U.S. at 562). This is because Article III causation requires "linking [Plaintiff's] asserted injuries to the government's regulation" and "rules out attenuated links—that is, where the government action is so far removed from its distant (even if predictable) ripple effects." *Id.* at 382–83 (citations omitted). Akin to the doctors in *Alliance*, Plaintiff rests on the effect of the challenged laws on the undifferentiated mass of potential patients throughout the State of Idaho, rather than an injury to himself or to his *actual* patients. This leaves him with no ability to show a direct connection between the challenged government action and any injury.

As for plaintiff's claim to be suing on behalf of his patients, third party standing is a "narrow circumstance" in which a third-party may assert the rights of another party in court when "the third party . . . demonstrate[s] the constitutional prerequisites to standing *along with* two additional showings," commonly called prudential prongs. *HPG Corp. v. Aurora Loan Servs., LLC*, 436 B.R. 569, 580 (E.D. Cal. 2010) (emphasis added); *see also Singleton v. Wulff*, 428 U.S. 106, 114 (1976). In addition to an injury to the Plaintiff, "a close relationship with the person who possesses" another injury in fact, and the existence of "a hindrance to the possessor's ability to protect [her] own interests," must be pled. *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (cleaned up). Alleging that "others" are harmed is not enough. *Alliance*, 602 U.S. at 385–86. Moreover, "even when [courts] have allowed litigants to assert the interests of others, the litigants themselves still must have suffered an

injury in fact, thus giving them a sufficiently concrete interest in the outcome of the issue in dispute. The third-party standing doctrine does not allow doctors to shoehorn themselves into Article III standing simply by showing that their patients have suffered injuries or may suffer future injuries." *Alliance*, 602 U.S. at 393 n.5 (internal quotation and citation omitted).

A. Plaintiff lacks the elements of third-party standing because he never articulates who the underlying patients (or their injuries) are.

Assuming for a moment that Plaintiff has properly pled an injury in fact to himself, he has failed to plead the elements of third-party standing because he does not allege that he has a current patient suffering an injury in fact. Because Plaintiff has alleged no patients of his currently 'requiring' (or even desiring) an abortion, he cannot assert such patients' rights on their behalf—he has no relationship with hypothetical women who need an abortion, nor does he say why these hypothetical women cannot come into court themselves.

The first necessary factual showing is whether there is a sufficiently confidential relationship between the third-party litigant and the party not in court. *Singleton*, 428 U.S. at 114–15. The second showing is whether "there is some genuine obstacle to [the] assertion" of the injury suffered by the person not in court. *Id.* at 116. Indeed, courts presume that in the absence of such a genuine obstacle "[e]ven where the relationship is close, the reasons for requiring persons to assert their own rights will generally still apply." *Id.* A party cannot bootstrap themselves into court on third party standing without pleading that an actual *someone else* actually suffers an injury in fact. In other words, "one to whom application of a statute is constitutional will not

be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *Houston v. Roe*, 177 F.3d 901, 907 (9th Cir. 1999) (citation omitted); *Alliance*, 602 U.S. at 393 n.5.

The Ninth Circuit has prevented unspecific third-party standing by denying standing where the out-of-court party's injury-in-fact is purely speculative. In *Lee v. State of Oregon*, 107 F.3d 1382, 1386 (9th Cir. 1997), the court considered the proposed third-party standing of doctors and residential care facilities to challenge the constitutionality of Oregon's assisted suicide law. The court rejected this theory on the basis that the injury of patients served by those doctors and facilities was, itself, speculative. *Id.* at 1390. Where those "unnamed patients would not have standing to assert their own interests, their doctors and care-givers cannot have standing to assert interests on their behalf." *Id.* Here, we likewise know nothing about Plaintiff's patients, and, consequently, know nothing about any injury to them. No patients are alleged to have any of the 'medical indications' that Plaintiff apparently believes warrant an abortion. In order for the Court to base its decision on anything other than hypotheticals, and for the Plaintiff to have standing in this case, Plaintiff must have identified a real patient who claims she needs an abortion now based on her particular circumstances. Plaintiff's failure to do so negates both prudential prongs of third-party standing.

Put another way,! "[u]nder Article III, federal courts do not adjudicate hypothetical or abstract disputes. Federal courts do not possess a roving commission

to publicly opine on every legal question . . . . And federal courts do not issue advisory opinions . . . . In sum, under Article III, a federal court may resolve only 'a real controversy with real impact on real persons.'" *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423–24 (2021) (quoting *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 87 (2019)). Without identifying a "real impact on real persons," Plaintiff simply asks the Court to issue an advisory opinion, and Plaintiff therefore lacks standing.

The Complaint's battery of out of context statistics and articles about other doctors or patients that are not pled is equally insufficient. *See* Dkt. 1 at ¶¶ 107-122. Analysis of injury-in-fact "'cannot be reduced to considering probability merely in terms of quantitative percentages,' . . . but must instead focus qualitatively on whether the plaintiff has made 'an *individualized* showing that there is a very significant possibility that the future harm will ensue.'" *Lee*, 107 F.3d at 1388–89 (quoting *Nelsen v. King Cnty.*, 895 F.2d 1248, 1250 (9th Cir. 1990)). All plaintiff offers here is mere "naked statistical assertion" when "the district court must make an individualized inquiry." *Id.* at 1250–52.

Here, Plaintiff's choice to plead cherry-picked statistics and generalized theories of harm instead of real legal injuries to real patients negates the first prudential prong of third party standing—that he has a close connection with the claimant herself. *Singleton*, 428 U.S. at 114–15. On all fours with this choice, the U.S. Supreme Court has specifically rejected an attorney's claim of third party standing relating to unnamed hypothetical future clients, finding that the "attorneys before us do not have a 'close relationship' with their alleged 'clients'; indeed, they have no

relationship at all." *Kowalski*, 543 U.S. at 131. Similarly, Plaintiff's assertion of standing on behalf of unidentified "hypothetical future" patients is not a "close relationship," but rather "no relationship at all." *Id.*

The second prudential prong, that Plaintiff *affirmatively show* that the woman herself is not in court due to some hindrance to her assertion of her own rights, is also unmet. Without an actual pregnant woman with a 'medical indication' for an abortion underlying Plaintiff's third-party standing, this showing is impossible. This is because such a theoretical patient's injury is purely speculative. In *Lee*, the Ninth Circuit noted that even a broad legal change that could be applied to all patients (in that case, a reduction in the standard of care) would not be sufficient to confer standing "without an allegation that an *individual* patient has suffered or will imminently suffer some concrete and particularized injury as a result of the reduction in the standard of care." 107 F.3d at 1390 n.5 (emphasis added). No such patient makes even a passing appearance in the instant complaint.[6] Because the prudential standing elements are not met for third-party standing, the Court must reject claims brought on behalf of undescribed patients.

B. Plaintiff has not pled an injury to himself.

The U.S. Supreme Court just last month made clear that for third-party standing, "the litigants themselves still must have suffered an injury in fact, thus giving them a sufficiently concrete interest in the outcome of the issue in dispute . . . .

[6] Nor does the hypothetical gravity of a hypothetical injury change the analysis. Even where "the asserted injury is the threat of death [, this] does not mean *that the plaintiff* is relieved from the requirement of asserting some significant possibility of injury." *Lee*, 107 F.3d at 1389–90 (citation omitted) (emphasis added).

The third-party standing doctrine does not allow doctors to shoehorn themselves into Article III standing simply by showing that their patients have suffered injuries or may suffer future injuries." *Alliance*, 602 U.S. at 393 n.5. Because Plaintiff has not sufficiently alleged an injury to himself, he lacks standing to sue both on his own behalf and on behalf of his patients.

The most that Plaintiff says about an alleged injury to himself is that the Defense of Life Act and Heartbeat Act "prevent him from providing appropriate care to all of his patients." Dkt. 1 ¶ 15. But that is not an injury to him personally. "[A] plaintiff must allege 'such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *In re Hydroxycut Mktg. and Sales Prac. Litig.*, 801 F.Supp.2d 993, 1002 (S.D. Cal. 2011) (quoting *Warth*, 422 U.S. at 498–99). Even those who come into court to vindicate a "widely shared" injury-in-fact, are still required to have injury that is personal to themselves. *See Novak v. U.S.*, 795 F.3d 1012, 1018 (9th Cir. 2015). This extends beyond Article III's *constitutional* requirements to the *prudential* requirements for standing—if Plaintiff's complaint arguably states a claim, but the content "amounts to generalized grievances that are more appropriately resolved by the legislative and executive branches," then the Plaintiff lacks standing. *Flintkote Co. v. Gen. Acc. Assur. Co.*, 410 F.Supp.2d 875, 883 (N.D. Cal. 2006) (citations omitted).

Here, Plaintiff fails to allege how he is personally injured by Idaho's abortion bans. Being an attending physician in maternal-fetal medicine at St. Luke's, and the

allegation that he is "prevent[ed] from providing appropriate care to all patients," tells us nothing about the impact of the challenged laws personally upon Plaintiff. Indeed, Plaintiff's claims for relief relate only to the alleged injuries Idaho's abortion laws cause to the pregnant women, not to him personally. *See* Complaint, Dkt. 1 at ¶¶ 123-127 (Count 1); ¶¶ 128-132 (Count II). Plaintiff fails to allege an economic harm to himself by no longer being able to make money by providing abortions, and again, doesn't even allege that he personally performs abortions. *Cf. Isaacson v. Mayes*, 84 F.4th 1089, 1097 (9th Cir. 2023).

Similarly, Plaintiff has failed to allege an injury in fact because he has not alleged any of the county prosecuting attorneys are likely to enforce the challenged statutes against him. *See Idaho Fed. of Tchrs. v. Labrador*, No. 1:23-cv-00353-DCN, 2024 WL 3276835 at *5 (D. Idaho July 2, 2024) (slip op.) (discussing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) and *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000)). The Plaintiff "must allege a genuine, credible, specific threat of imminent prosecution by [a county prosecutor] to establish standing." *Idaho Fed.*, 2024 WL 3276835 at *5. Apart from a bare comment as to general prosecutorial authority and the "existence of a proscriptive statute," Plaintiff alleges no facts suggesting the laws will be enforced or are threatened to be enforced against him. *See* Dkt. 1 at ¶¶ 16, 61. This is not sufficient, *Thomas*, 220 F.3d at 1139, and requires dismissal. *Idaho Fed.*, 2024 WL 3276835 at *7.

Plaintiff's failure to plead an injury to himself personally shows that he lacks standing, and the Court should dismiss the Complaint.

III. The two claims fail as a matter of law.

In addition to dismissal under Rule 12(b)(1), Plaintiff's claims should be dismissed for failure to state a claim under Rule 12(b)(6).

A. Plaintiff fails to make a proper as-applied challenge.

The same lack of specific allegations that doom Plaintiff's standing also doom his as-applied challenge. "[A]n as-applied challenge is wholly fact dependent: Do the determinative facts shown by the evidence fall on the protected side of the applicable rule of constitutional privilege?" *Young v. Hawaii*, 992 F.3d 765, 779 (9th Cir. 2021) (quoting Henry Paul Monaghan, Overbreadth, 1981 Sup. Ct. Rev. 1, 5, 32 n.134 (cleaned up)) (cert. granted, vacated and remanded on other grounds 142 S.Ct. 2895 (mem.) in light of *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022)). Put differently, an as-applied challenge depends on the application of *particular* facts to *particular* litigants. *See e.g.*, *U.S. v. Jimenez*, 191 F.Supp.3d 1038, 1041 (N.D. Cal. 2016) (citation omitted) (as-applied challenge "must be examined in the light of the facts *of the case at hand*"). Courts accordingly reject as-applied challenges that require speculation "as to prospective facts." *Hoye v. City of Oakland*, 653 F.3d 835, 859 (9th Cir. 2011) (collecting cases); *see also Moody v. NetChoice, LLC*, 144 S.Ct. 2383, 2397 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450–51 (2008)).

The Ninth Circuit's decision in *Young v. Hawaii* is instructive here. "Our review of the record demonstrates that, although Young peppered his pleadings with the words 'application' and 'enforcement,' he never pleaded facts to support an as-applied challenge." *Young*, 992 F.3d at 779. This rule is all the more applicable here—

while the word "application" or some derivative appears briefly (*see* Dkt. 1 at ¶¶ 124, 125), the examples of "medically indicated abortion" are all speculative or hypothetical. *See* Dkt. 1 at ¶¶ 80-106. There are no facts before the Court about specific patients. *See Pilz v. Inslee*, No. 3:21-cv-05735-BJR, 2022 WL 1719172 at *3 (W.D. Wash. 2022) (rejecting as-applied challenge based on "generalized references, 'peppered' throughout the complaint" to enforcement). With no facts regarding actual patients 'needing' an abortion having been pled to sustain an as-applied challenge, Count I fails.

B. There is no due process right to 'medically indicated' abortion.

There is no constitutional right to an abortion. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022). To the contrary, "[a] law regulating abortion, like other health and welfare laws, is entitled to a 'strong presumption of validity.'" *Id.* at 301 (citing *Heller v. Doe*, 509 U.S. 312, 319 (1993)). "It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests." *Id.* (citation omitted). "[W]hen such regulations are challenged under the Constitution, courts cannot 'substitute their social and economic beliefs for the judgment of legislative bodies.'" *Dobbs*, 597 U.S. at 300 (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963)).

Plaintiff asks the Court to substitute his judgment—that medical indications of myriad kinds justify an abortion—for the judgment of the people of Idaho who have stated any exceptions in law. A law regulating abortion is reviewed for rational basis, like any other health and welfare law that regulates the practice of medicine. *Dobbs*, 597 U.S. at 301; *see also Judge Rotenberg Educ. Ctr., Inc. v. F.D.A.*, 3 F.4th 390, 400

(D.C. Cir. 2021) ("Choosing what treatments are or are not appropriate for a particular condition is at the heart of the practice of medicine," which states traditionally regulate) (collecting cases). There is no authority for the proposition that a substantive due process right exists for any particular medical or mental health treatment, and indeed, the state can generally prohibit treatment that it deems harmful. *Pickup v. Brown*, 740 F.3d 1208, 1235-36 (9th Cir. 2014) (*abrogated on other grounds by Nat'l Inst. of Fam. and Life Adovocs. v. Becerra*, 585 U.S. 755, 766-67 (2018)). Here, the state has made the determination that an abortion is harmful to an unborn child and prohibits it except in the weightiest of circumstances, such as when "necessary to prevent the death" of the mother. Idaho Code § 18-622(2)(a)(i); -8802 ("The legislature finds and declares that . . .[t]he life of each human being begins at fertilization, and preborn children have interests in life, health, and well-being that should be protected.").

Under rational basis, the calculus is simple. The acts relate to the purpose of protecting unborn children. Idaho Code §§ 18-601; -8801. They do so by prohibiting abortion, as defined by statute, except in limited circumstances. Idaho Code §§ 18-622(2)(a)(i); -8804(1). The protection of unborn children is a rational basis for a state to prohibit abortion, "and it follows that [Plaintiff's] constitutional challenge[s] must fail." *Dobbs*, 597 U.S. at 301.

C. The Idaho Defense of Life Act does not violate the Equal Protection Clause.

Last, Plaintiff brings a challenge under the Equal Protection clause of the Fourteenth Amendment to the Defense of Life Act only. *See* Dkt. 1 at ¶¶ 129-132. The

Court's equal protection analysis consists of three steps: (1) identify the classification, (2) identify a control group of individuals similarly situated in respects relevant to the challenged policy, and (3) identify and apply the appropriate level of scrutiny. *Gallinger v. Becerra*, 898 F.3d 1012, 1016 (9th Cir. 2018).

Plaintiff's complaint alleges that the applicable classification in the Defense of Life Act is pregnant women at risk of death from self-harm, and that the control group would be pregnant women at risk of death from all other causes. Dkt. 1 ¶ 129. The Idaho Supreme Court, however, has stated that the Act only engages in one form of classification, "medical providers who perform abortions versus those who do not." *Planned Parenthood,* 171 Idaho at 441, 522 P.3d at 1199. This accords with other post-*Dobbs* circuit precedent on abortion—abortion laws apply to, and are enforceable against, abortionists. *See Raidoo v. Moylan*, 75 F.4th 1115, 1125 (9th Cir. 2023). Thus, because Plaintiff's alleged classification is not supported by the law, his equal protection claim fails.

Even if Plaintiff's classification is accurate, the classes are not similarly situated. To prevail, the Plaintiff "must first show that a class that is similarly situated has been treated disparately." *Boardman v. Inslee*, 978 F.3d 1092, 1117 (9th Cir. 2020) (cleaned up). The regulations at issue are targeted at the justification for an abortion, not the women who might engage in self-harm. In other words, a woman who needs an abortion to prevent her death because of a physical ailment that will lead to her death absent an abortion is not similarly situated to a woman who might engage in self-harm, but is physically healthy. Because the women in the two classes

are not similarly situated, Plaintiff's claim fails.

Further, even if Plaintiff has alleged a valid classification, the statute would be subject to rational basis review. "*If* the two groups are similarly situated, we determine the appropriate level of scrutiny and then apply it." *Roy v. Barr*, 960 F.3d 1175, 1181 (9th Cir. 2020). "Laws are subject to strict scrutiny when they discriminate against a suspect class, such as a racial group, or when they discriminate based on any classification but impact a fundamental right, such as the right to vote. Laws are subject to intermediate scrutiny when they discriminate based on certain other suspect classifications, such as gender. When no suspect class is involved and no fundamental right is burdened, Courts apply a rational basis test to determine the legitimacy of the classifications." *Satanic Temple v. Labrador*, No. 1:22-CV-00411-DCN, 2024 WL 357045, at *11 (D. Idaho Jan. 31, 2024) (citations omitted). Women who are "at risk of self-harm" are not a protected class. Neither are women with mental illness. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445–46 (1985). Because no protected class is facially (or even implicitly) at issue, this is no basis for invoking heightened scrutiny.

Next, Idaho abortion laws do not impact a fundamental right. The focus of the challenged abortion laws is on preventing abortion except when legislatively prescribed exceptions apply, and there is no fundamental right to an abortion. *Cf. Satanic Temple*, 2024 WL 357045 at *11 ("Defendants are not infringing on [the alleged fundamental right to have sex] because the regulations at issue do not focus on sex; the regulations focus on abortion. And there is no fundamental right to

abortion under the Idaho constitution or the United States Constitution.").

Since there is no protected class and since there is no fundamental right to an abortion, the Court must apply rational basis in evaluating the statutes. Both the U.S. Supreme Court and the Idaho Supreme Court have held that abortion laws clearly pass rational basis. *See Dobbs*, 597 U.S. at 301; *Planned Parenthood*, 171 Idaho at 390–91, 522 P.3d at 1148–49. Therefore, Plaintiff's Equal Protection claim fails.[7]

CONCLUSION

For the foregoing reasons, this Court should dismiss the Complaint in its entirety. Defendants reserve the right to seek attorneys' fees under 42 U.S.C. § 1988 for actions "found to be unreasonable, frivolous, meritless, or vexatious." *Legal Servs. of N. Cal., Inc. v. Arnett*, 114 F.3d 135, 141 (9th Cir. 1997) (cleaned up).

DATED: July 16, 2024.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: /s/ *Aaron M. Green*
AARON M. GREEN
Deputy Attorney General

[7] Plaintiff alleges at Dkt. 1 ¶ 131 that the laws were "motivated by animus against people with mental illness." There are no allegations that support this bare legal assertion. *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977) (showing of discriminatory purpose necessary to overcome deference to legislative balancing under rational basis); *Romer v. Evans*, 517 U.S. 620, 633 (1996) (animus found where constitutional amendment "identifie[d] persons by a single trait and then denie[d] them protection across the board."). On their face, the abortion statutes do not "identif[y] persons by a single trait and then den[y] them protection across the Board," and Plaintiffs have pled nothing to support even an inference of discriminatory or unlawful purpose.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 16, 2024, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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AND I FURTHER CERTIFY that on such date, the foregoing was served on the following non-CM/ECF registered participants in the manner indicated:

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