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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' MOTION TO DISMISS

Defendants David A McClusky III, Member of the Idaho Board of Medicine; Jared C. Morton, Member of the Idaho Board of Medicine; Mark Steven Grajcar, Member of the Idaho Board of Medicine; Keith Davis, Member of the Idaho Board of Medicine; Paula Phelps, Member of the Idaho Board of Medicine; Guillermo Guzman Trevino, Member of the Idaho Board of Medicine; Michele Chadwick, Member of the Idaho Board of Medicine; Thomas Neal, Member of the Idaho Board of Medicine; Christian G. Zimmerman, Member of the Idaho Board of Medicine; Paul E. Anderson, Member of the Idaho Board of Medicine; Kedrick Wills, Member of Idaho Board of Medicine; Jan Bennetts, Ada County Prosecuting Attorney; Christopher Boyd, Adams County Prosecuting Attorney; Stephen F. Herzog, Bannock County Prosecuting Attorney; Adam McKenzie, Bear Lake Prosecuting Attorney; Mariah Dunham, Benewah County Prosecuting Attorney; Ryan Jolley, Bingham County Prosecuting Attorney; Matthew Fredback, Blaine County Prosecuting Attorney; Alex Sosa, Boise County Prosecuting Attorney; Louis Marshall, Bonner County Prosecuting Attorney; Randy Neal, Andrakay Pluid, Boundary County Prosecuting Attorney; Steve Stephens, Butte County Prosecuting Attorney; Jim Thomas, Camas County Prosecuting Attorney; Bryan Taylor, Canyon County Prosecuting Attorney; S. Doug Wood, Caribou County Prosecuting Attorney; McCord Larsen, Cassia County Prosecuting Attorney, Janna Birch, Clark County Prosecuting Attorney; Clayne Tyler, Clearwater County Prosecuting Attorney; Vic Pearson, Franklin County Prosecuting Attorney; Lindsey Blake, Fremont County Prosecuting Attorney; Eric Thomson, Gem County Prosecuting Attorney; Trevor Misseldine, Gooding County

Prosecuting Attorney; Kirk MacGregor, Idaho County Prosecuting Attorney; Mark Taylor, Jefferson County Prosecuting Attorney; Sam Beus, Jerome County Prosecuting Attorney; Stanley Mortensen, Kootenai County Prosecuting Attorney; William W. Thompson Jr., Latah County Prosecuting Attorney; Bruce Withers, Lemhi County Prosecuting Attorney; Zachary Pall, Lewis County Prosecuting Attorney; Richard Roats, Lincoln County Prosecuting Attorney; Rob Wood, Madison County Prosecuting Attorney; Lance Stevenson, Minidoka County Prosecuting Attorney; Justin Coleman, Nez Perce County Prosecuting Attorney; Ethan Rawlings, Oneida County Prosecuting Attorney; Chris Topmiller, Owyhee County Prosecuting Attorney; Mike Duke, Payette County Prosecuting Attorney; Brock Bischoff; Power County Prosecuting Attorney; Benjamin Allen, Shoshone County Prosecuting Attorney; Bailey Smith, Teton County Prosecuting Attorney; Grant Loebs, Twin Falls County Prosecuting Attorney; Brian Naugle, Valley County Prosecuting Attorney, and Delton Walker, Washington County Prosecuting Attorney move pursuant to Rule 12(b)(1) and (b)(6) to dismiss this action with prejudice for lack of subject matter jurisdiction and failure to state a claim.

In support of this motion, Defendants file the attached memorandum of law.

DATED: July 16, 2024.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

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

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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/s/ *Aaron M. Green*
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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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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

DECLARATION OF AARON M. GREEN

I, Aaron M. Green, Deputy Attorney General of the State of Idaho, hereby declare and swear as follows.

1. I am 18 years of age or older and competent to testify.
2. I am counsel of record in the above captioned matter.
3. Attached as Exhibit A to this declaration is a true and correct copy of the Memorandum Decision and Order on Motion to Dismiss filed on December 29, 2023, in the Fourth Judicial District of the State of Idaho in case *Adkins v. State of Idaho*, No. CV01-23-14744.

I declare the foregoing is true and correct under penalty of perjury.

DATED: July 16, 2024.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

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

CERTIFICATE OF SERVICE

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Attorneys for Plaintiff

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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Pro se Defendants

/s/ *Aaron M. Green*
Aaron M. Green
Deputy Attorney General

Exhibit A

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JENNIFER ADKINS; JILLAINE ST.MICHEL; KAYLA SMITH; REBECCA VINCEN-BROWN; EMILY CORRIGAN, M.D., on behalf of herself and her patients; JULIE LYONS, M.D., on behalf of herself and her patients; and IDAHO ACADEMY OF FAMILY PHYSICIANS, on behalf of itself, its members, and its members' patients,

Plaintiffs,

vs.

STATE OF IDAHO; BRAD LITTLE, in his official capacity as Governor of the State of Idaho; RAÚL LABRADOR, in his official capacity as Attorney General of the State of Idaho; and IDAHO STATE BOARD OF MEDICINE,

Defendants.

Case No. CV01-23-14744

MEMORANDUM DECISION AND ORDER ON MOTION TO DISMISS

The demise of *Roe v. Wade*, 410 U.S. 113 (1973), gave effect to Idaho statutes that severely restrict abortions. Plaintiffs are women those statutes harmed during pregnancies, physicians prevented from providing care according to their medical judgment, and a medical association concerned about implications for patient care. They challenge those statutes' constitutionality. Defendants—the State of Idaho and its governor, attorney general, and board of medicine—move to dismiss. The motion was argued and taken under advisement on December 14, 2023. For the reasons that follow, it is granted in part and denied in part.

I.

BACKGROUND

A year and a half ago, in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), the United States Supreme Court overruled *Roe* and subsequent opinions recognizing a constitutional right to abortion.

Anticipating *Roe*'s eventual overruling, the 2020 Idaho legislature enacted a statute that broadly criminalizes performing abortions, to take effect shortly after the issuance of a United States Supreme Court opinion like the one in *Dobbs*. 2020 Idaho Sess. Laws ch. 284, § 1. This statute (as amended, "General Abortion Ban") makes performing an abortion a felony punishable by prison time and, if the defendant is a licensed healthcare provider, a mandatory license suspension (for a first offense) or revocation (for a subsequent offense). I.C. § 18-622(1). Some abortions, though, aren't criminalized by the General Abortion Ban. First, an abortion performed by a physician isn't criminalized if "[t]he physician determined . . . that the abortion was necessary to prevent the death of the pregnant woman," so long as the physician "performed or attempted to perform the abortion in the manner that . . . provided the best opportunity for the unborn child to survive, unless . . . termination of the pregnancy in that manner would have posed a greater risk of the death of the pregnant woman." I.C. § 18-622(2)(a) (emphasis added). Second, an abortion isn't criminalized if it was performed by a physician during a pregnancy's first trimester and the pregnant woman had reported to authorities that she was a victim of rape or incest. I.C. § 18-622(2)(b).

Additionally, the 2021 Idaho legislature enacted a statute that broadly criminalizes performing abortions after a fetal heartbeat is present, to take effect shortly after the issuance of an opinion by a federal circuit court finding any similar law constitutional. 2021 Idaho Sess. Laws ch. 289. This statute (as amended, "Fetal Heartbeat Law") works in much the same way as the General Abortion Ban. *See* I.C. §§ 18-8801 to -8805. The Fetal Heartbeat Law includes, however, a somewhat broader medical exception than the General Abortion Ban. Performing an abortion after a fetal heartbeat is present doesn't violate the Fetal Heartbeat Law not only if an "immediate abortion" is necessary to "avert . . . death" but also if "a delay will create serious risk of substantial and irreversible impairment of a major bodily function." I.C. § 18-8801(5); *see also* I.C. § 18-8804(1). That said, the General Abortion Ban has primacy over the Fetal Heartbeat Law; the Fetal Heartbeat Law says that "[i]n the event both [laws] are enforceable," it is "supersede[d]" by the General Abortion Ban. I.C. § 18-8805(4); *see also Planned Parenthood Great Nw. v. State*, 171 Idaho 374, ___, 522 P.3d 1132, 1161 (2023).

The General Abortion Ban and Fetal Heartbeat Law are referenced collectively in this decision as "Idaho's Abortion Laws." Their constitutionality was at issue in the just-cited *Planned Parenthood* case, which was decided about a year ago. There, the Idaho Supreme Court rejected an array of constitutional challenges to Idaho's Abortion Laws, holding most notably that the Idaho Constitution doesn't recognize an implicit fundamental right to abortion. 171 Idaho at ___–__, 522 P.3d at 1161–1209.

Plaintiffs Jennifer Adkins, Jillaine St.Michel, Kayla Smith, and Rebecca Vincen-Brown each became pregnant shortly before or shortly after *Roe* was overruled. (Compl. ¶¶ 5, 21, 23, 40, 42, 57, 60, 78–79.) They lived in Idaho at the time, and all but Smith continue to live in Idaho. (*Id.* ¶¶ 5, 21, 40, 57, 76, 78.) Grave fetal abnormalities, maternal-health concerns, or both complicated their pregnancies. (*Id.* ¶¶ 21–95.) Each desired abortion care, but because of the General Abortion Ban, each had to travel out of state to obtain it. (*Id.*)

Plaintiffs Emily Corrigan and Julie Lyons are licensed physicians who were practicing medicine in Idaho before *Roe* was overruled and have continued to do so. (*Id.* ¶¶ 96, 123.) Dr. Corrigan is an obstetrician whose practice includes providing abortion care. (*Id.* ¶¶ 96, 99.) Dr. Lyons practices family medicine. (*Id.* ¶¶ 123.) They say their practices—and their patients—have been harmed by Idaho's Abortion Laws; they can no longer provide all the care they consider appropriate, they struggle to ascertain whether some of the care they wish to provide would subject them to the risk of criminal prosecution and loss of licensure, some of the specialists to whom their patients could've been referred have left Idaho, and their patients suffer delays and attendant risks and complications that wouldn't have been an issue before *Roe* was overruled. (*Id.* ¶¶ 96–105, 123–31.)

Finally, Plaintiff Idaho Academy of Family Physicians ("IAFP") is a membership organization whose members are physicians (including Dr. Lyons), medical residents, and medical students. (*Id.* ¶¶ 106, 123.) IAFP sees Idaho's restrictive abortion laws as "government overreach" that inappropriately intrudes

into physician-patient relationships. (*Id.* ¶ 109.) Its members are concerned about the risk of criminal prosecution and loss of licensure they face under those laws, as well as about the health risks those laws impose on their patients. (*Id.* ¶ 111–16.)

On September 11, 2023, Plaintiffs banded together to file suit against the State of Idaho, Governor Brad Little, Attorney General Raúl Labrador, and the Idaho State Board of Medicine to seek relief from Idaho's restrictive abortion laws. They assert five claims. (*Id.* ¶¶ 315–49.)

Claim I seeks a declaratory judgment on two points. (*Id.* ¶¶ 315–21.) The first is that, under I.C. § 18-622(2) and § 18-8801(5), a physician may "provide a pregnant person with abortion care when the physician determines, in their good faith judgment and in consultation with the pregnant person, that the pregnant person has an emergent medical condition that poses a risk of death or a risk to their health (including their fertility)." (*Id.* ¶ 319.) The second is as follows:

> Idaho's abortion bans do not preclude a physician from providing abortion care where, in the physician's good faith judgment and in consultation with the pregnant person, a pregnant person has: a medical condition or complication of pregnancy that poses a risk of infection, bleeding, or otherwise makes continuing a pregnancy unsafe for the pregnant person; a medical condition that is exacerbated by pregnancy, cannot be effectively treated during pregnancy, or requires recurrent invasive intervention; and/or a fetal condition where the fetus is unlikely to survive the pregnancy and sustain life after birth.

(*Id.* ¶ 320.)

Claim II—entitled "Ultra Vires" and seemingly asserted against every defendant other than the State of Idaho, (*see id.* at 87 & ¶¶ 322–25)—appears to seek an injunction against "enforcement of Idaho's abortion bans against any physician who provides an abortion to a pregnant person after determining that, in

the physician's good faith medical judgment, the pregnant person has an emergent medical condition for which abortion would prevent or alleviate a risk of death or risk to their health (including their fertility)." (*Id.* ¶ 324.)

Claim III seeks a declaratory judgment that the Idaho Constitution—by recognizing "enjoying and defending life" and "pursuing happiness and securing safety" as "inalienable rights," Idaho Const. art. I, § 1—entitles pregnant women to abortion care if "an emergent medical condition . . . poses a risk of death or risk to their health (including their fertility), and an abortion would prevent or alleviate such risk." (Compl. ¶¶ 326–32.) Claim III also seeks an injunction against enforcing Idaho's Abortion Laws in that situation. (*See id.* ¶ 333.)

Claim IV seeks similar declaratory and injunctive relief under article I, § 2 of the Idaho Constitution on equal-protection grounds. (*Id.* ¶¶ 334–41.) Plaintiffs' theory is that Idaho law broadly refuses abortion care to women with a legitimate medical need for it, but people who aren't pregnant are neither "prevent[ed] . . . from accessing critical medical treatment" nor "force[d] . . . to unnecessarily suffer severe illnesses and injuries and undergo mental anguish." (*Id.* ¶ 336.)

Finally, Claim V—presumably asserted only by Dr. Corrigan, Dr. Lyons, and IAFP—is a substantive due process claim under article I, §§ 1 and 13 of the Idaho Constitution, (*id.* ¶¶ 342–49), contending that licensed physicians have a constitutional right "to practice their profession by providing abortion to treat emergent medical conditions that pose a risk to a pregnant person's life or health (including their fertility)," (*id.* ¶ 344).

On October 31, 2023, Defendants moved to dismiss these claims under Rule 12(b)(6) for failure to state any potentially viable claim for relief. (Mem. Supp. Defs.' Mot. Dismiss 4–19.) They also argue that Plaintiffs lack standing to sue Governor Little, Attorney General Labrador, and the Board of Medicine, so the complaint must be dismissed under Rule 12(b)(1) as to them. (*Id.* at 19–23.) As already noted, Defendants' motion was argued and taken under advisement on December 14, 2023. It is ready for decision.

II.

LEGAL STANDARD

A. Defendants' Rule 12(b)(1) motion

The proper legal standard to apply in deciding a Rule 12(b)(1) motion depends on whether the movant's jurisdictional challenge is facial or factual. *Owsley v. Idaho Indus. Comm'n*, 141 Idaho 129, 133 n.1, 106 P.3d 455, 459 n.1 (2005) (citing *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990)). A facial challenge argues that the complaint's factual allegations, taken as true, don't support the exercise of subject-matter jurisdiction, while a factual challenge presents evidence of unpleaded facts and argues that they defeat subject-matter jurisdiction. *See id.*; *Von Lossberg v. State*, 170 Idaho 15, 19, 506 P.3d 251, 255 (2022); 5B A. Benjamin Spencer, *Federal Practice and Procedure* § 1350 (3d ed.), Westlaw (database updated Apr. 2023). Here, the jurisdictional challenge is facial; Defendants present no evidence of unpleaded facts. Consequently, the Rule 12(b)(6) standard governs their jurisdictional challenge. *See Owsley*, 141 Idaho at 133 n.1, 106 P.3d at 459 n.1.

B. Defendants' Rule 12(b)(6) motion

A claim is subject to dismissal under Rule 12(b)(6) if it is unsubstantiated by well-pleaded factual allegations. *See* I.R.C.P. 12(b)(6). When dismissal is sought on that basis, the trial court accepts as true all well-pleaded factual allegations—those that aren't "purely conclusory"—and decides whether they state a legally viable claim. *Orrock v. Appleton*, 147 Idaho 613, 618, 213 P.3d 398, 403 (2009). If they don't, dismissal is appropriate, but leave to amend must be granted unless the deficiencies are incurable. *E.g.*, *Bolden-Hardge v. Off. of Cal. State Controller*, 63 F.4th 1215, 1220 (9th Cir. 2023). In other words, outright dismissal is appropriate only if "it appears beyond doubt that the [claimant] can prove no set of facts in support of his claim that would entitle him to relief." *Luck v. Rohel*, 171 Idaho 51, 518 P.3d 350, 354 (2022) (quoting *Paslay v. A&B Irrigation Dist.*, 162 Idaho 866, 869, 406 P.3d 878, 881 (2017)).

III.

ANALYSIS

"Concepts of justiciability, including standing, identify appropriate or suitable occasions for adjudication by a court." *Associated Press v. Second Jud. Dist.*, 172 Idaho 113, ___, 529 P.3d 1259, 1264 (2023) (quoting *Coeur d'Alene Tribe v. Denney*, 161 Idaho 508, 513, 387 P.3d 761, 766 (2015)). "As a sub-category of justiciability, standing is a threshold determination that must be addressed before reaching the merits." *Zeyen v. Pocatello/Chubbuck Sch. Dist. No. 25*, 165 Idaho 690, 698, 451 P.3d 25, 33 (2019) (citing *Martin v. Camas Cty. ex rel. Bd. Comm'rs*, 150 Idaho 508, 513, 248 P.3d 1243, 1248 (2011)). So, the Court begins with the

argument that Plaintiffs lack standing to pursue their claims against Governor Little, Attorney General Labrador, and the Board of Medicine—in other words, against anyone but the State. (*See* Mem. Supp. Defs.' Mot. Dismiss 19–23.) This is Defendants' Rule 12(b)(1) challenge. After deciding it, the Court turns to whether the complaint states any potentially viable claim for relief, as is necessary to survive Defendants' accompanying Rule 12(b)(6) challenge.

A. Governor Little, Attorney General Labrador, and the Board of Medicine aren't proper defendants.

"Idaho courts have, again and again, reaffirmed a commitment to the federal standards for Idaho's standing doctrine." *Tidwell v. Blaine Cnty.*, ___ Idaho ___, __, 537 P.3d 1212, 1221 (2023) (collecting cases). Under federal standards, "[t]he standing inquiry focuses on whether the plaintiff is the proper party to bring this suit." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). Or, as the Idaho Supreme Court recently put it, "[w]hen an issue of standing is raised, the focus is not on the merits of the issues raised, but upon the party who is seeking the relief," because "a party can have standing to bring an action, but then lose on the merits." *Midtown Ventures, LLC v. Capone*, No. 49679, 2023 WL 8499308, at *5 (Idaho Dec. 8, 2023) (quoting *Bagley v. Thomason*, 149 Idaho 806, 808, 241 P.3d 979, 981 (2010)). Defendants argue, essentially, that Governor Little, Attorney General Labrador, and the Board of Medicine have so little authority to enforce Idaho's Abortion Laws that no one—Plaintiffs included—may sue them on the grounds Plaintiffs have sued them. (*See* Mem. Supp. Defs.' Mot. Dismiss 19–23.)

In its recent *Planned Parenthood* opinion, the Idaho Supreme Court held that the State is a proper defendant to an action challenging the constitutionality of Idaho's Abortion Laws. 171 Idaho at ___, 522 P.3d at 1158 ("It is neither procedurally improper nor unusual to name the State of Idaho as a party in a case seeking declaratory relief when a constitutional violation is alleged."). Citing that holding, Defendants recognize that "the State is a proper defendant in this action." (Mem. Supp. Defs.' Mot. Dismiss 19–20.) Indeed, any declaratory or injunctive relief that Plaintiffs manage to obtain against the State would bind Governor Little, Attorney General Labrador, and the Board of Medicine. *See Planned Parenthood*, 171 Idaho at ___, 522 P.3d at 1158 ("[W]hen the State of Idaho is named as a respondent, the relief may issue against those persons the State is comprised of (i.e., all its officers, employees, and agents)."). Consequently, it makes sense to leave technical arguments about standing aside at first to ask whether anything is accomplished by suing—along with the State—Governor Little, Attorney General Labrador, and the Board of Medicine.

Plaintiffs say they didn't sue Idaho's forty-four county prosecutors—who have primacy in prosecuting violations of criminal laws (including Idaho's Abortion Laws), I.C. §§ 31-2227, -2604—because "[r]elief against the State itself would . . . bind county prosecutors." (Pls.' Opp'n Defs.' Mot. Dismiss 25.) If, as Plaintiffs say, there is no need to sue the county prosecutors because county prosecutors will be bound by the outcome anyway, then surely there is no need to sue Governor Little, Attorney General Labrador, and the Board of Medicine. Governor Little and

Attorney General Labrador have merely secondary enforcement authority, exercisable if county prosecutors fail or refuse to enforce criminal laws or need assistance in doing so. *See* I.C. §§ 31-2227(3), 67-802(7), -1401(7). Plaintiffs don't allege that county prosecutors are expected to either fail or refuse to enforce, or need assistance in enforcing, Idaho's Abortion Laws. Plaintiffs don't make a case that Governor Little or Attorney General Labrador is likely to get involved in prosecuting violations of those laws. Further, though the Board of Medicine must suspend or revoke a healthcare provider's license upon a conviction under those laws, I.C. §§ 18-622(1), -8806(3), that duty is ministerial and arises only in the event of a conviction in a criminal prosecution it has no role in pursuing.[1] So, joining Governor Little, Attorney General Labrador, and the Board of Medicine to this suit against the State accomplishes nothing.

Redundant defendants—those whose inclusion "provides no opportunity for further relief" than would be available in their absence—may be dismissed in the interest of efficiency and judicial economy. *Utah Gospel Mission v. Salt Lake City Corp.*, 316 F. Supp. 2d 1201, 1246 (D. Utah 2004); *see also Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles Cnty. Sheriff Dep't*, 533 F.3d 780, 799 (9th Cir. 2008) ("When both a municipal officer and a local government entity are named, and the

[1] Plaintiffs express doubt that the Board of Medicine must await a conviction to suspend a license based on a violation of Idaho's Abortion Laws. (Pls.' Mem. Opp'n Defs.' Mot. Dismiss 24.) If either of those laws is the authority for the suspension, however, a conviction must be awaited. That's the upshot of statutory language creating a criminal offense and then penalizing the offender with a license suspension "upon [an] offense." I.C. §§ 18-622(1), -8805(3).

officer is named only in an official capacity, the court may dismiss the officer as a redundant defendant."); *Jungels v. Pierce*, 825 F.2d 1127, 1129 (7th Cir. 1987) ("Actually there is one defendant—the city—not two; for the complaint names the mayor as a defendant in his official capacity only, which is the equivalent of suing the city. . . . [N]othing was added by suing the mayor in his official capacity."); *Joseph v. Boise State Univ.*, 998 F. Supp.2d 928, 948 (D. Idaho 2014) ("Suing employees in their official capacities is redundant where the entity is sued as well."); *Doe v. Douglas Cnty. Sch. Dist. RE-1*, 775 F. Supp. 1414, 1416 (D. Colo. 1991). This approach is commendable for decluttering litigation without diminishing the relief available to successful plaintiffs.

The Idaho Rules of Civil Procedure "should be construed and administered to secure the just, speedy and inexpensive determination of every action and proceeding." I.R.C.P. 1(b). Those aims are furthered by eliminating redundant defendants. A claim asserted in a pleading may be dismissed for "failure to state a claim upon which relief can be granted." I.R.C.P. 12(b)(6). With Rule 1(b) firmly in mind, the Court construes Rule 12(b)(6) to allow the dismissal of redundant defendants. Indeed, a claim against a redundant defendant isn't one "upon which relief can be granted" because the redundant defendant's inclusion in the litigation doesn't broaden the relief available to the plaintiff.

Having been sued along with the State, under whose umbrella their roles exist, Governor Little, Attorney General Labrador, and the Board of Medicine are redundant defendants. The claims against them are dismissed for failure to state a

claim upon which relief can be granted. As to the Board of Medicine, the dismissal is without leave to amend, as no new battery of allegations can fix the problem that the Board of Medicine has no authority to institute criminal prosecutions under Idaho's Abortion Laws. As to Governor Little, the dismissal is also without leave to amend; beyond being a redundant defendant, he is entitled to dismissal on standing grounds.[2] But as to Attorney General Labrador, the dismissal is with leave to amend. If Plaintiffs can, consistent with their obligations under I.R.C.P. 11, allege facts showing that Attorney General Labrador is likely to begin exercising his secondary authority to prosecute violations of Idaho's Abortion Laws, they may file an amended complaint within twenty-one days from the entry of this order.

Given these rulings, Claim II—the "Ultra Vires" claim, which isn't asserted against the State, (Compl. ¶¶ 322–25)—must be dismissed in its entirety. This is no real loss for Plaintiffs. During the hearing, Plaintiffs' counsel characterized Claims I and II as statutory claims (and Claims III, IV, and V as constitutional

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[2] Standing to sue doesn't exist without, among other things, "a sufficient causal connection between the injury and the conduct complained of.'" *Tucker v. State*, 162 Idaho 11, 19, 394 P.3d 54, 62 (2017) (quoting *State v. Philip Morris, Inc.*, 158 Idaho 874, 881, 354 P.3d 187, 194 (2015)). In other words, the plaintiff's alleged injuries must be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id.* at 21, 394 P.3d at 64 (quoting *Bennett v. Spear*, 520 U.S. 154, 167 (1997)). When the causal link between the plaintiff's alleged injuries and the defendant's conduct is "too attenuated," the plaintiff lacks standing to sue. *Id.* Governor Little's predecessor was dismissed on standing grounds in *Tucker* because this causal link was too attenuated, *id.* at 21–23, 394 P.3d at 64–66, and though the subject matter there and here are dissimilar, the attenuation between the alleged injuries and the duties of the governorship is much the same.

claims). Claim II is derivative of Claim I, so it couldn't succeed unless Claim I succeeds. And, if Claim I succeeds, the resulting declaratory and injunctive relief against the State would—as Plaintiffs say—bind Governor Little, Attorney General Labrador, the Board of Medicine, and all other state officers or agencies just as if Claim II had succeeded. Claim II is, in other words, mere surplusage.

Left to consider is whether any of Plaintiffs' claims against the State is potentially viable.

B. Faithful application of precedent compels the dismissal of some, but not all, of Plaintiffs' claims against the State.

Plaintiffs assert four claims against the State. The Court considers them in turn, assessing whether any states a potentially viable claim for relief.

1. Claim I: the claim for a declaratory judgment

Claim I, described more fully above, seeks a declaratory judgment concerning the circumstances in which I.C. §§ 18-622(2) and 18-8801(5) allow abortions. (Compl. ¶¶ 315–21.) Plaintiffs specify, of course, the circumstances in which they think abortions are allowed. (*Id.* ¶¶ 319–20.) The State argues for dismissal on the theory that Plaintiffs are wrong about the circumstances in which abortions are allowed. (Mem. Supp. Defs.' Mot. Dismiss 4–8.) Plaintiffs might not be entitled to the particular declaration they seek, but that doesn't mean they aren't entitled to some declaration. "Any person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder." I.C. § 10-1202. Plaintiffs—some of them, at

least—are persons whose rights are affected by sections 18-622(2) and 18-8801(5), and they have raised questions about the construction of those statutes. Hence, Claim I states a claim upon which relief can be granted, even though the declaration Plaintiffs ultimately receive may not be the one they want.

2. Claim III: the claim under article I, § 1

As already mentioned, Claim III seeks declaratory and injunctive relief under article I, § 1 of the Idaho Constitution, (Compl. ¶¶ 326–33), which recognizes "enjoying and defending life" and "pursuing happiness and securing safety" as "inalienable rights," Idaho Const. art. I, § 1. Plaintiffs claim that, by doing so, article I, § 1 entitles pregnant women to abortion care if "an emergent medical condition . . . poses a risk of death or risk to their health (including their fertility), and an abortion would prevent or alleviate such risk." (Compl. ¶ 332.)

The State says Claim III is foreclosed by the Idaho Supreme Court's opinion in *Planned Parenthood*. (Mem. Supp. Defs.' Mot. Dismiss 10–12.) Plaintiffs counter that the claim under article I, § 1 in *Planned Parenthood* was a facial challenge to Idaho's Abortion Laws, unlike their as-applied challenge. (Pls.' Mem. Opp'n Defs.' Mot. Dismiss 16–17.) As the parties agree, *Planned Parenthood* didn't involve an as-applied challenge. *See* 171 Idaho at ___, 522 P.3d at 1147 ("Apart from their central claim that these laws violate an implicit fundamental right to abortion purportedly contained in the Idaho Constitution, Petitioners also raise various facial challenges . . . ."). That matters not, according to the State, because Plaintiffs don't make a true as-applied challenge. (Mem. Supp. Defs.' Mot. Dismiss 8–10.)

A facial challenge requires a showing that the challenged law "is unconstitutional in all of its applications." *Planned Parenthood*, 171 Idaho at ___, 522 P.3d at 1201. But Plaintiffs don't claim that Idaho's Abortion Laws violate article I, § 1 in all their applications. Instead, they hope to show, as just noted, that Idaho's Abortion Laws violate article I, § 1 by denying abortion care to pregnant women with "an emergent medical condition that poses a risk of death or risk to their health (including their fertility), and an abortion would prevent or alleviate such risk." (Compl. ¶ 332.) This is a mere subset of the situations to which Idaho's Abortion Laws apply. Because Claim III seeks not the wholesale invalidation of Idaho's Abortion Laws but instead a ruling that they violate article I, § 1 in a subset of the situations to which they apply, it is an as-applied claim.[3]

By rejecting a facial challenge to Idaho's Abortion Laws under article I, § 1 in *Planned Parenthood*, the Idaho Supreme Court determined that those laws are constitutional in at least some applications, not that they are constitutional in every application. In other words, the Idaho Supreme Court, presented with only a facial challenge, didn't take the judicially immodest step of prejudging—and rejecting—every conceivable as-applied challenge that might be made in a future case.

Worthy of particular mention is Plaintiffs' as-applied theory that pregnant women have the constitutional right to abortion under article I, § 1 if the denial of

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[3] Indeed, as *Planned Parenthood* explains, arguments about "uncertainties at the margin when it comes to the application of [Idaho's Abortion Laws] . . . are only appropriate in as-applied challenges." 171 Idaho at ___, 522 P.3d at 1202 (internal quotation marks omitted). Plaintiffs make such arguments.

abortion care risks their fertility. (Compl. ¶ 332.) *Planned Parenthood* holds that no implicit fundamental right to abortion can be found in article I, § 1. 171 Idaho at ___–__, 522 P.3d at 1176–1195. But it notes the settled law that "procreation is a fundamental right," despite being unmentioned in the Idaho Constitution, because "[r]ights which are not directly guaranteed by the state constitution may be considered to be fundamental if they are implicit in our State's concept of ordered liberty." *Id.* at ___, 522 P.3d at 1170 (quoting *Idaho Schs. for Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 582, 850 P.2d 724, 733 (1993)). *Planned Parenthood* doesn't grapple with whether Idaho's Abortion Laws unconstitutionally abridge the fundamental right to procreation implicit in article I, § 1 by making it a crime to provide abortion care to pregnant women who may be sterilized, and thus unable to procreate, without abortion care. As applied to that narrow context, Idaho's Abortion Laws might be subjected to strict scrutiny, *see, e.g.*, *Reclaim Idaho v. Denney*, 169 Idaho 406, 431, 497 P.3d 160, 185 (2021), rather than rational-basis review, which was the standard the *Planned Parenthood* court applied, 171 Idaho at ___–__, 522 P.3d at 1195–97. The Court can't now say whether Idaho's Abortion Laws would survive strict scrutiny in that respect, were they subjected to it.

Accordingly, Claim III survives the State's motion to dismiss.

3. Claim IV: the claim under article I, § 2

In Claim IV, Plaintiffs assert that Idaho's Abortion Laws violate the guarantee of equal protection in article I, § 2 of the Idaho Constitution by denying pregnant women treatment for "an emergent medical condition that poses a risk of death or risk to their health (including their fertility)" when other people aren't

denied treatment as needed to avert those same risks. (Compl. ¶ 337.) In assessing Claim IV's viability, the Court doesn't write on a clean slate. Instead, the Court must faithfully apply pertinent precedent, most notably the Idaho Supreme Court's *Planned Parenthood* opinion. Analyzing an equal-protection claim made under the Idaho Constitution "involves three steps: (1) identifying the classification under attack; (2) identifying the level of scrutiny under which the classification will be examined; and (3) determining whether the applicable standard has been satisfied." *Planned Parenthood*, 171 Idaho at ___, 522 P.3d at 1197. The Court begins with the first step, where the *Planned Parenthood* opinion looms large.

Plaintiffs attack an alleged statutory classification between pregnant women and people who aren't pregnant. (Pls.' Mem. Opp'n Defs.' Mot. Dismiss 17–18.) This is subtly different from a classification alleged in *Planned Parenthood*: that Idaho's Abortion Laws classify based on sex and gender. 171 Idaho ___, 522 P.3d at 1197 ("Petitioners contend that [Idaho's Abortion Laws] violate equal protection because . . . the laws invidiously discriminate on the basis of sexual stereotypes, gender, and against medical providers who provide abortion services."). According to *Planned Parenthood*, however, "none of [Idaho's Abortion Laws] classifies on the basis of sex . . . because men and women are not similarly situated when it comes pregnancy and abortion." *Id.* at ___, 522 P.3d at 1198. Instead, in its view, "[t]he only classification these laws create is between medical providers who perform or assist in abortions and medical providers who do not." *Id.* at ___, 522 P.3d at 1200. Plaintiffs reject this framing of the classification under attack. (Pls.' Mem. Opp'n

Defs.' Mot. Dismiss 18.) But *Planned Parenthood* held that Idaho's Abortion Laws make "only" one classification, and it isn't the classification Plaintiffs say it makes. Plaintiffs don't satisfactorily explain how Claim IV is viable, despite being premised on an alleged classification different from the "only" classification Idaho's Abortion Laws make according to *Planned Parenthood*.

Even if Plaintiffs may challenge the classification they see in Idaho's Abortion Laws, notwithstanding *Planned Parenthood*'s holding that those laws make "only" a different one, *Planned Parenthood* flouts Claim IV in a second way: it throws cold water on the notion that, for purposes of an equal-protection challenge to Idaho's Abortion Laws, pregnant women are similarly situated to people who aren't pregnant.

The Equal Protection Clause of the United States Constitution is "essentially a direction that all persons similarly situated should be treated alike." *In re Doe*, 170 Idaho 901, 906–07, 517 P.3d 830, 835–36 (2022) (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)). Put another way, "[a]t its core, equal protection prohibits the government from treating similarly situated persons differently." *Sound Aircraft Servs., Inc. v. Town of E. Hampton*, 192 F.3d 329, 335 (2d Cir. 1999). Though these cases apply the federal constitution, whereas Claim IV is made under the Idaho Constitution, the core principle they recognize is germane because the guarantee of equal protection in the Idaho Constitution operates on the same core principle. Indeed, according to the Idaho Supreme Court, "[t]he principle underlying the equal protection clauses of both the Idaho and United States

Constitutions is that all persons in like circumstances should receive the same benefits and burdens of the law." *Med. Recovery Servs., LLC v. Strawn*, 156 Idaho 153, 159, 321 P.3d 703, 709 (2014) (quoting *Bon Appetit Gourmet Foods, Inc. v. Dep't of Emp.*, 117 Idaho 1002, 1003, 793 P.2d 675, 676 (1989)).

In rejecting an equal-protection challenge to Idaho's Abortion Laws under article I, § 2 of the Idaho Constitution, *Planned Parenthood* held that "men and women are not similarly situated when it comes pregnancy and abortion" because "only women are capable of pregnancy; thus, only women can have an abortion." 171 Idaho at ___, 522 P.3d at 1198. It follows that pregnant women aren't similarly situated to people who aren't pregnant when it comes to pregnancy and abortion; only pregnant women can have an abortion. *Planned Parenthood* compels the conclusion pregnant women aren't similarly situated to people who aren't pregnant when it comes to access to abortion care. For this second reason, then, the Court determines that Claim IV isn't viable.

Claim IV must be dismissed. The dismissal is without leave to amend because, given *Planned Parenthood*, Plaintiffs aren't capable of alleging some other set of facts that would make it potentially viable.

4. Claim V: the claim under article I, §§ 1 and 13

Finally, Claim V seeks a declaratory judgment that Idaho's Abortion Laws violate the substantive due process right of licensed physicians under article I, §§ 1 and 13 of the Idaho Constitution "to practice their profession by providing abortion to treat emergent medical conditions that pose a risk to a pregnant person's life or health (including their fertility)." (Compl. ¶ 345.) This claim presumably is made

only by Dr. Corrigan, Dr. Lyons, and IAFP; the others have no evident standing to seek relief based on the alleged constitutional rights of physicians. In any event, it simply isn't possible to conclude that Claim V is potentially viable.

First, the Idaho Supreme Court's general conclusion in *Planned Parenthood* that women have no constitutional right to abortion care practically compels the conclusion that physicians have no constitutional right to perform abortions; the broad-based outlawing of abortion undeniably harms women who want abortion care but can't get it more gravely than it harms physicians who are denied the opportunity to provide it.

Second, while "the pursuit of an occupation is a liberty and property interest to which . . . due process protections . . . attach and may not be prohibited by the legislature unless necessary to protect the health, safety or welfare of the citizenry," the constitutional right to pursue an occupation "does not impede the power of the legislature to regulate callings that are related to the public health so long as such regulations are not arbitrary or unreasonable." *Jones v. State Bd. of Med.*, 97 Idaho 859, 868, 555 P.2d 399, 408 (1976)). Though their ability to provide abortion care has been severely curtailed, physicians remain broadly able to practice medicine. Further, Plaintiffs concede that, in this context, the rational-basis test applies. (Pls.' Mem. Opp'n Defs.' Mot. Dismiss 21.) The Idaho Supreme Court has upheld Idaho's Abortion Laws as valid exercises of the legislature's police power, "rationally related to . . . legitimate governmental interests." *Planned Parenthood*, 171 Idaho at ___, 522 P.3d at 1195. Given that holding, this Court can't conclude that those

laws' limited abridgment of the medical care that licensed physicians may provide amounts to a violation of their substantive due process rights.

Claim V is dismissed. The dismissal is without leave to amend because Plaintiffs have no way to cure Claim V's legal deficiencies.

Accordingly,

IT IS ORDERED that Defendants' motion to dismiss is granted in part and denied in part. Claims I and III survive. Claim II is dismissed with leave to amend as to Attorney General Labrador but without leave to amend as to Governor Little and the Board of Medicine. Claims IV and V are dismissed without leave to amend.

Jason D. Scott 12/29/2023 9:12:01 AM

Jason D. Scott
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that on 12/29/2023, I served a copy of this document as follows:

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