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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

STACY SEYB, M.D.,

Plaintiffs,

v.

MEMBERS OF THE IDAHO BOARD OF MEDICINE, in their official capacities; *et al.*,

Defendants.

Case No. 1:24-cv-00244-BLW

RESPONSE TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT [DKT. 48]

INTRODUCTION

The Court should not let this case linger any longer. The Court's scheduling order (Dkt. 42) required that "[m]otions to amend pleadings … must be filed on or before November 19, 2024," and Plaintiff waited until December 20, 2024, to file the instant motion. Plaintiff's motion to amend comes about five months after he was put on notice of the standards of a facial versus factual attack on standing and given notice of Defendants' objection to his affidavit. He had months before the November 19, 2024, scheduling order deadline expired to amend his pleading and chose instead to stand on his operative complaint. The Court's comments at the motion to dismiss hearing do not constitute good cause for ignoring the deadline. Plaintiff was not diligent in seeking to amend his complaint. The inquiry should end there, and the motion denied.

Beyond this foundational problem with the motion's timing, Plaintiff's proposed First Amended Complaint ("FAC") is futile. His amendment fails to state an injury to himself—the bedrock prerequisite to any party coming into an Article III court regardless of the theories Plaintiff wants to advance, and regardless of any third-party claims. A one-paragraph blurb restating general allegations about Plaintiff's medical practice that says nothing about *his* injury, *his* close relationship to a real patient who claims to be in present need of an abortion, and nothing about why *that* patient cannot come into Court is not good enough. Beyond this, the change fails to fix his waiver of disputed issues, fix an as-applied challenge lacking any facts to apply, and—crucially—his amendment does not fix the absence of any relevant supporting text, history, or tradition for his due process or equal protection claims.

Plaintiff should not be permitted to flout scheduling deadlines, but even if he could show diligence, his complaint cannot be saved. The Court should deny the motion for leave to amend complaint and resolve the pending motions to dismiss.[1]

LEGAL STANDARD

"[L]eave to amend a pleading is not automatic." *BCS Bus. Consulting Servs. Pet. Ltd. v. Baker*, ___ F.Supp.3d ____, 2024 WL 4848789 at *6 (C.D. Cal. Nov. 4, 2024) (citation and internal quotation marks omitted). At the outset, a proposed amendment filed after the deadline set forth in the scheduling order is governed by the good cause standard for amendment to pleadings, which focuses on "the diligence of the party seeking the amendment." *Ashby v. Mortimer*, 337 F.R.D. 652, 657 (D. Idaho 2020) (citing *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604 (9th Cir. 1992)); *see also* F.R.C.P. 16(b)(4). "Moreover, carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief." *Johnson*, 975 F.2d at 609. "If the party was not diligent, then the inquiry should end." *Ashby*, 337 F.R.D. at 657 (quoting *Johnson*, 975 F.2d at 609).

If, and only if, the Court finds good cause, the Court then considers whether amendment is proper under Rule 15(a) by considering five factors, "(1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment, and (5) whether plaintiff

[1] To the extent the Court grants the motion for leave to amend, the Court should nonetheless rule on the pending motions to dismiss as the proposed FAC is, with the exception of a single additional paragraph, identical to the original complaint. *Zimmerman v. PeaceHealth*, 701 F.Supp.3d 1099, 1108 (W.D. Wash. 2023) (citing 6 Wright & Miller, Fed. Prac. & Proc. § 1476 (3d ed. 1998) (July 7, 2023 update).

has previously amended his complaint." *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990).

"Futility of amendment can, by itself, justify the denial of a motion for leave to amend." *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). "An amendment is futile when 'no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense.'" *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 656 (9th Cir. 2017) (citation omitted). "The standard for assessing whether a proposed amendment is futile therefore is the same as the standard imposed under Rule 12(b)(6)" though viewed through the lens of the requirement that Courts freely grant leave "when justice so requires." *Ni-Q, LLC v. Prolacta Bioscience, Inc.*, 407 F.Supp.3d 1153, 1161 (D. Or. 2019) (second quote citation omitted). It is only after the failure by Defendants to show futility that any presumption in favor of amendment applies. *See Foman v. Davis*, 371 U.S. 178, 182 (1962) ("*In the absence* of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant . . . futility of amendment, etc.—the leave sought should . . . be 'freely given.'") (emphasis added) (quoting F.R.C.P. 15(a)).

ARGUMENT

Plaintiff should be denied leave to amend for two reasons. First, Plaintiff's lack of diligence in seeking to amend the complaint means that he lacks good cause, which he must have for a post-scheduling order amendment. Second, even if good cause exists, the proposed amendment is futile.

I. Because Plaintiff was not diligent in amending the complaint before the scheduling deadline, the motion must be denied.

Plaintiff's lack of diligence here short-circuits his motion. "When a district court enters a pretrial scheduling order establishing a deadline for amending the pleadings, as the court did here, a motion to amend is governed by Rule 16(b)." *Kamal v. Eden Creamery, LLC*, 88 F.4th 1268, 1277 (9th Cir. 2023) (citing *Johnson*, 975 F.2d at 607–08). Under this rubric, it is not the Rule 15(a) "freely given" standard that applies, but rather the "good cause" standard under Rule 16(b). *Johnson*, 975 F.2d at 607–08 (declining to apply Rule 15(a) in favor of Rule 16(b)); *accord Jackson v. Laurete, Inc.*, 186 F.R.D. 605, 606–07 (E.D. Cal. 1999) (same).

Here, Plaintiff's deadline to amend his Complaint was November 19, 2024. *See* Dkt. 42 at ¶ 2. Plaintiff was put on notice of the deficiencies in his complaint related to his failure to allege injury at the time of the Motion to Dismiss. Dkt. 25-1 (filed July 16, 2024). He was further notified of the deficiencies in responding to such a facial attack under Rule 12(b)(1) with an affidavit by Defendants' citation of binding Ninth Circuit authority in Defendants' reply on August 20, 2024. Dkt. 41 at 3-4 n.1 (citing *American Diabetes Assoc. v. U.S. Dep't of Army*, 938 F.3d 1147 (9th Cir. 2019)). What did Plaintiff do with this information? Nothing whatsoever. Only after the Court stated to counsel at the motion to dismiss hearing on December 10, 2024, that his lack of standing allegations might pose a problem, did Plaintiff seek to amend his Complaint. This does not constitute diligence.[2]

[2] Underscoring the point, having assured the Court that he would move with alacrity, it *still* took Plaintiff 10 more days to copy-paste his affidavit into the FAC and move for leave to amend.

Kamal and *Jackson* are directly on point. In *Kamal*, Plaintiffs waited months (passing the scheduling order deadline) after learning of a planned merger of a defendant company with a third-party to file an amended complaint naming the third-party as a defendant. 88 F.4th at 1274. The Ninth Circuit rejected the argument that plaintiffs needed the details of the merger to allege liability—instead holding plaintiffs accountable for their knowledge of the merger going back to the joint discovery plan. *Id.* at 1277. Likewise, Plaintiff cannot suggest he needed any additional information after Defendants' Motion to Dismiss, and certainly cannot do so after the Reply Memorandum noted Defendants' objection to his declaration. Similarly, in *Jackson*, the District Court found Plaintiff showed no diligence where the party 1) did not alert the Court to need to amend before the deadline, and 2) failed to demonstrate "her inability to comply with the [Scheduling Order] results from her having become aware of information that she could not have reasonably foreseen at the time[.]" 186 F.R.D. at 609. Here, Plaintiff has done neither.

"[T]he burden lies with the plaintiff to prosecute his case properly," *Kamal,* 88 F.4th at 1277 (quoting *Johnson*, 975 F.2d at 610 (internal quotation marks omitted)). At the very least Plaintiff was aware of the need to amend the complaint to add in the facts contained in his affidavit at the time of Defendants' objection to the consideration of his affidavit and citation to Ninth Circuit precedent in Defendants' reply. Nevertheless, Plaintiff waited five months after the objection and weeks after the scheduling order deadline to file his motion to amend his complaint. Plaintiff was not diligent, and he therefore lacks good cause.

II. Plaintiff's lack of standing makes the FAC futile.

Plaintiff lacks standing because he himself lacks an injury—the one-paragraph addition in the proposed FAC does not change this. For that reason, and because he fails to show the requisite close relationship and hindrance to a specific patient who wants an abortion, he lacks third-party standing. Because the FAC fails to cure the Complaint's standing deficiencies, the FAC is futile.

A. The amendment adds nothing to establish Dr. Seyb's injury as to all Defendants.

The additional material meant to establish Dr. Seyb's injury, and therefore his standing, fails to do so. The "irreducible constitutional minimum of standing" contains three elements, the first of which being "the *plaintiff* must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and *particularized*; and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (cleaned up) (citations omitted) (emphasis added). To be abundantly clear, the Court added in *Lujan*, "[b]y particularized, we mean that the injury must affect *the plaintiff* in a personal and individual way." *Id.* at n.1 (emphasis added).

Put yet another way, "to bring a claim for prospective injunctive relief, 'the plaintiff must demonstrate that *he* has suffered or is threatened with a concrete and particularized legal harm, coupled with a sufficient likelihood that *he* will again be wronged in a similar way.'" *Fellowship of Christian Athletes v. San Jose Unif. Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 680–81 (9th Cir. 2023) (quoting *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc)) (cleaned up) (emphases added); *accord Ariz. All. for Retired Americans v. Mayes*, 117 F.4th 1165,

1173 (9th Cir. 2024) (Injury "must be particularized, meaning that it affects *the plaintiff individually*, not in a generalized manner.") (emphasis added). Plaintiff's mere disagreement with Idaho's abortion laws will not do; even when he wants to perform abortions. *Mayes*, 117 F.4th at 1173 (collecting cases). Because *he* has no *right* to perform an abortion and is not asserting in this case that he has a right to perform abortions he has nothing more than a generalized interest.

The amendment to the Complaint adds nothing that was not in the insufficient declarations attached to the Response to Motion to Dismiss. *See* Dkt. 48-2 ¶ 16. Plaintiff approximates how many abortions he has performed in the past, approximates how many patients he refers out of state, and fails to describe the circumstances of a single one. The only "harm" described here is Plaintiff's inability to perform abortions. Because this is neither a constitutional nor pecuniary injury to Plaintiff as described in the FAC, these additional facts are irrelevant and cannot serve to support standing.

In short, the amendment to the complaint fails to describe an invasion of *plaintiff's* "legally protected interest." *Lujan v. Defs. of Wildlife*, 504 U.S. at 560; *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("*he* claims deters the exercise of *his* constitutional rights"). Plaintiff possesses no legally protected interest in performing abortions per se. *Lambert v. Yellowley*, 272 U.S. 581, 596 (1926); *Leigh v. Olson*, 497 F.Supp. 1340, 1345 n.2 (D.N.D. 1980); *see also* Dkt. 49. For a pre-enforcement challenge, in addition to showing an intent to engage in conduct proscribed by statute, he must also show that it is *his* conduct that is legally protected by a constitutional interest. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014); *Babbit v. United Farm Workers*

Nat'l Union, 442 U.S. 289, 298 (1979). Yet, the only allegation that could possibly pertain to Plaintiff's ostensible injury is that "[b]ut for Idaho's abortion bans, he would continue to provide abortion care [sic] in Idaho." Dkt. 48-2 at 7. Plaintiff has no constitutional right to perform abortions. Put simply, if Plaintiff does not have an inherent right (or other protected interest of his own) to do the thing that he would go to jail for, he lacks a particularized injury even though his intended behavior is criminalized. Intent to perform a proscribed act, on its own, is not sufficient to give rise to an injury to challenge the proscription.

Plaintiff's new allegations simply restate the inadequate content of his declaration in opposition to the motion to dismiss. *See* Dkt. 41 at 3–4. He has no personal right to perform abortions, and therefore lacks any injury to his constitutional rights. He alleges no other form of injury in the FAC apart from the purported injury to someone else's constitutional rights. Because that is not sufficient to show particularized injury, the FAC fails.

B. Without injury as to himself, Plaintiff cannot sue to vindicate the rights of others.

Plaintiff fails to satisfy third-party standing prerequisites on the front end and the back end: he lacks standing himself; and even if he had standing, he cannot sue on behalf of hypothetical patients.

i. Plaintiff lacks an injury and therefore does not have standing in his own right.

Third party standing requires three elements "(1) the litigant has suffered an 'injury in fact'; (2) the litigant has a close relation to the third party; and (3) there is some hindrance to the third party's ability to protect his or her own interests[]." *Lee v. State of Oregon*, 107 F.3d 1382, 1390 (9th Cir. 1997) (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)). After *Dobbs*,

Courts must apply the same third-party standing principles to abortion cases that it would apply in any other context. *SisterSong Women of Color Reprod. Just. Coll. v. Gov. of Georgia*, 40 F.4th 1320, 1327–28 (11th Cir. 2022) ("[T]o the extent that this Court has distorted legal standards because of abortion, we can no longer engage in those abortion distortions in the light of a Supreme Court decision instructing us to cease doing so.").

It is telling that apart from *June Medical*—a decision expressly disapproved by the Supreme Court *specifically for distorting* "the Court's third-party standing doctrine"—Plaintiff offers nothing affirmative to support his standing when the Court expressly invited him to present his best case for his third-party standing when he lacks an injury. *See* Dkt. 47; *but see Dobbs*, 597 U.S. 215, 286–87 (2022).[3] Supreme Court and Ninth Circuit caselaw is clear: Plaintiff's injury must be his own; and only once he has that first-party standing can he pull third-party claims with him through the courthouse door. *Fleck and Assoc., Inc. v. City of Phoenix*, 471 F.3d 1100, 1105 (9th Cir. 2006); *see also* Dkt. 49 (collecting cases). Here Plaintiff has only presented a general policy objection to Idaho's laws. *See* Dkt. 33 at 22. His attempt at standing remains futile and must be rejected because no amendment can cure this defect.

[3] Plaintiff suggests that *Dobbs*' failure to decide whether Jackson Women's Health Center had standing to sue Mississippi (when no party raised the issue) means that, really, freewheeling third-party standing must exist for abortionists. Dkt. 47. This argument whistles past the relevant graveyard: what the Court *actually said* at footnote 61 and the surrounding *stare decisis* discussion. The Court should decline to look for elephants in mouseholes; reading what *Dobbs* says is enough.

ii. Plaintiff cannot satisfy third party standing with respect to hypothetical patients.

While argument at the Motion to Dismiss hearing focused on the front end of third-party standing (that is, why Dr. Seyb must be injured) attention must be given to the back end: whose rights is it, exactly, that Dr. Seyb is trying to vindicate? He's already given the Court one answer that should be *per se* disqualifying: he is not "seeking relief from the statutes as applied to himself or specific patients." Dkt. 33 at 22. But even if he hadn't conceded this point, his reference to only hypothetical or abstract patients means that he cannot show the second and third elements of third-party standing: a close relationship and a hindrance to the other party coming into court herself. *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004).

His answers to binding circuit precedent raise even more problems. Consider *Lee*, 107 F.3d 1382. Despite standing for the proposition that third-party standing by a doctor was not available because *known* terminally ill patient harms were speculative, Plaintiff responds, despite not pleading a single patient who actually needs an abortion, that *Lee* is distinguishable because "the Abortion Bans directly harm Dr. Seyb's patients by preventing them from obtaining abortion care in Idaho." Dkt. 33 at 21 n.6. The first problem: what patients? The indistinguishable mass in the complaint? The ones for whom Dr. Seyb says he *isn't* bringing an action? Dkt. 33 at 22. Why can't they sue on their own behalf? What specific Article III injury do they suffer and under what conditions? Plaintiff's non-response begs every question that third-party standing poses and fails to distinguish *Lee* in any meaningful way. The second problem is that a hypothetical patient's injury is just as speculative here as it was in *Lee*; if not more so—at least *Lee* had named and identified patients to speak of. Here, we have nothing

except an indistinguishable mass of patients who may want an abortion at some point in the future.

Similarly, *Nelsen v. King County*—which goes unmentioned and undistinguished by Plaintiff—forecloses any argument based on abstract patients like those that Plaintiff raised in footnote 6 of his response and now includes in one (again) indistinguishable mass in his proposed FAC. Dkt. 48-2 ¶ 16. In *Nelsen*, 895 F.2d 1248, 1251–52 (9th Cir. 1990), the court stated that "we cannot base a determination of standing upon naked statistical assertion. Our analysis must be individualized and must consider all the contingencies that may arise in the individual case before the future harm will ensue." To say that Plaintiff can assert the rights of patients who face a hypothetical abortion, a hypothetical hindrance from coming to court, and even a hypothetical relationship if he is not the woman's doctor yet is to stand several steps below Plaintiffs in *Nelsen*. Further, it violates the clear holding of *Kowalski* that future or hypothetical close relationships do not suffice for third-party standing. 543 U.S. at 130–31 ("This *existing* attorney-client relationship is, of course, quite distinct from the *hypothetical* attorney-client relationship posited here.").

* * * * *

"In other words, prudential rules and their exceptions cannot salvage a case where constitutional standing is lacking." *Pioneers Mem. Healthcare Dist. v. Imperial Valley Healthcare Dist.*, ___ F.Supp.3d ____, 2024 WL 3858135 at *5 (S.D. Cal. Aug. 19, 2024) (citing *Fleck*, 471 F.3d at 1105). Plaintiff has already said "[h]e is not . . . seeking relief from the statutes as applied to himself or specific patients." Dkt. 33 at 22. Beyond dooming an as-applied challenge as

discussed below, Plaintiff might as well have said he is not seeking relief by way of Article III standing. *Powers*, *Kowalski*, *Fleck*, and nearly every other third-party standing case describes standing as requiring a litigant with an injury to himself, a close relationship with a known third-party, and a hindrance to that third-party's right to coming to court.

Plaintiff's own concession (Dkt. 33 at 22) means that he fails two of these three elements (first-party injury and close relationship) right out of the gate. And looking to the proposed FAC, with no details about any specific patient, this Court is in no better position than the Courts in *Nelsen* and *Kowalski* to determine what, if any, hindrance exists to such women coming into federal court or whether they have any current special relationship with Plaintiff. *Dobbs*' express holding that *June Medical* distorted third-party standing doctrine brings abortion back into the mainstream with all other cases. Plaintiff has *no* special ability to conjure hypothetical patients from the ether to bring *himself* into federal court. Third-party standing allows one meritorious plaintiff with Article III standing to assist other viable plaintiffs by bringing their claims with him. None of these exist here, and so the Complaint is futile.

C. The FAC adds no facts supporting injury as to prosecutors outside of Ada County.

As the Court indicated at the motion to dismiss hearing, there is at best an ethereal connection between Dr. Seyb's practice in Ada County and 43 of the 44 county prosecutors. Plaintiff has failed to develop this theory of injury further, stating only what was said in his declaration about Plaintiffs coming from various vague corners of the State without identifying a single other county with specificity. As noted in the motion to dismiss briefing, "[r]emedies . . . ordinarily 'operate with respect to specific parties'" not on "legal rules in the abstract."

California v. Texas, 593 U.S. 659, 672 (2021) (quoting *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 488–89 (2018) (Thomas, J., concurring)). Because Plaintiff at this late date has not identified any way in which he is injured by any defendant, and much less county prosecutors beyond Ada County, he lacks standing. The Court should deny leave to amend with respect to the proposed FAC as this issue remains unaddressed.

III. The FAC's as-applied challenges are futile.

Any continuation of Plaintiff's as-applied challenges is untenable: these challenges ought to be construed as facial challenges and rejected pursuant to *Dobbs*. Admitting that he is not seeking relief "as applied to himself or specific patients," Plaintiff suggested at the hearing on the motion to dismiss that he could seek relief as to a class of hypothetical abortions. This is not compatible with the scope of as-applied challenges. Start with *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010). The Court makes plain the distinction between facial and as-applied challenges; it isn't based on a category (like, say, a type of abortion for a given condition) but whether the desired relief "reach[es] beyond the particular circumstances of the[] plaintiff[]." *Id.* at 194 (citing *United States v. Stevens*, 559 U.S. 460, 472–73 (2010)).

The Ninth Circuit (and others) have been consistent in the key distinctions between facial and as-applied challenges: "an 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) (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)); *see also* Dkt. 25-1 at 20 (correctly noting procedural history of *Young* and collecting cases).

This is consistent across the federal courts and continues to be the appropriate distinction between facial and as applied challenges. *Shultz v. Alabama*, 42 F.4th 1298, 1318–19 (11th Cir. 2022) ("an as-applied challenge addresses whether 'a statute is unconstitutional on the facts of a particular case or to a particular party.'") (quoting *Black's Law Dictionary* 223 (7th ed. 1999)) (case citation and internal quotes omitted); *U.S. v. One (1) Palmetto St. Armory PA-15 Machinegun Receiver Frame*, 822 F.3d 136, 141 (3d Cir. 2016) ("We agree with the District Court that Watson offers no facts to distinguish why the challenged laws should not apply to him. Therefore, we will treat Watson's claim as a facial challenge."); *see also United States v. Aguilar-Cruz*, No. 4:23-cr-06024-MKD, 2024 WL 2064053 at *8-9 (E.D. Wash. May 8, 2024) (citing *Young*). Because Plaintiff offers no facts relating to himself, or his patients, he has no such challenge to bring.

But assume for the sake of argument that the Supreme Court in *Reed* meant that a plaintiff could bring a complaint somewhere in the middle of a facial and as-applied challenge: not quite facial in that some applications are left uncontested, but not quite as-applied either because there is some "reach" beyond the plaintiff's facts. *Cf. Reed*, 561 U.S. at 194 (noting only that the parties *contested* whether the challenge was properly facial or as applied). Even if true, that cannot help Plaintiff. Why? Because Plaintiff, regardless of label, must satisfy facial challenge standards "to the extent" that his challenge "reach[es] beyond the particular circumstances of th[is] plaintiff[]." *Id.* Where is Plaintiff "reaching beyond" in this case? Unlike

John Doe, Plaintiff's *entire lawsuit* is a reach: "[h]e is not . . . seeking relief from the statutes as applied to himself or specific patients." Dkt. 33 at 22. Thus, it's irrelevant whether it is even possible to state a half-and-half facial/as-applied claim here; Plaintiff's claim contains *no* circumstances applicable to himself, so *everything* is subject to facial challenge standards. Thus, to the extent that Plaintiff brings as applied challenges, it is futile to allow amendment because these ought to be construed as facial challenges and dismissed pursuant to *Dobbs*.

IV. Plaintiff's waiver with respect to animus makes the FAC futile as to those claims.

Plaintiff's proposed FAC contains the same claims based on animus that Plaintiff failed to defend during the motion to dismiss briefing. Plaintiff has neither added new allegations to support a claim of animus, *see* Dkt. 25-1 at 25 n.7; Dkt. 41 at 16, nor has he explained why his deficient claim was adequately pled despite asking for surplus pages to respond to the Motion to Dismiss. *See generally* Dkt. 33. Nonetheless, despite abandoning the claim, it shows up again in the FAC. Dkt. 48-2 ¶¶ 132–33. To the extent that the Court grants leave to amend, this claim should be excluded because it is a naked attempt to avoid the pending motion without adding new supporting material touching on animus.

V. Plaintiff's merits claims are futile.

The Court should also consider whether the merits analysis under Rule 12(b)(6) suggests that Plaintiff's FAC is futile. It is. There is no need to spend months on discovery in futility when the history of a deeply rooted right is not a fact not peculiarly within State's knowledge, and when taking their best crack at an overlength response, Plaintiff comes up short. *See Arcell v. Google LLC*, ___ F.Supp.3d ____, 2024 WL 3738422 at *6 (N.D. Cal. Aug. 9, 2024). Plaintiff offered nothing new at the hearing in the way of historical presentation

related to the deep rooted-ness of a right to abortion, however drawn. The Court, if it gets all the way to the question of whether amendment is futile on the merits, should conclude that the FAC claims lack historical support under the Fourteenth Amendment.

Again, to find an unenumerated right to abortion under the Fourteenth Amendment, Plaintiff is obliged to start with the text. *Dobbs*, 597 U.S. at 235. Yet, he opted to say nothing about the text in the Response to the Motion to Dismiss or at the hearing. *See generally* Dkt. 33. We're not even told which of the Fourteenth Amendment's specific guarantees—life, liberty, or property—we are supposed to be talking about. *But see Dobbs,* 597 U.S. at 235–36 (criticizing *Roe v. Wade*, 410 U.S. 113, 153 (1973) for its "remarkably loose treatment of the constitutional text" as a rationale for declining to apply stare decisis). The textual support for Plaintiff's claim is as absent under the FAC as under the initial complaint. *See e.g.* Dkt. 48-2 ¶¶ 124-128.

But assuming we could just pick one of the three rights at random, the Court in *Dobbs* has instructed us further as to what to do next. "In deciding whether a right falls into either of these categories, the Court has long asked whether the right is 'deeply rooted in [our] history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty.'" *Dobbs*, 597 U.S. at 237 (quoting *Timbs v. Indiana*, 586 U.S. 146 (2019); *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010); *Washington v. Glucksberg*, 521 U.S. 702 (1997)). "And in conducting this inquiry, we have engaged in a careful analysis of the history of the right at issue." *Id.* at 238. In each of the cases that the majority then cites, *affirmative* evidence of the right at issue is considered: a right to protection against excessive fines being embedded in the Magna Carta, the right to bear arms in the history of the Second Amendment text itself as well as State

constitutions leading to the adoption of the Fourteenth Amendment. By contrast, the Court rejects such a right (suicide) when such self-harm had been criminalized in the common law tradition for centuries. *Glucksberg*, 521 U.S. 702.

Notice the absence of, well, absence. None of these cases reasoned that a right is deeply and objectively embedded in the Nation's history and tradition from the *lack* of evidence *against* the purported right. Nor is an affirmative defense evidence of an underlying right—and Plaintiff cites no case in support of such a principle—as such a defense "admits that the [defendant] committed a crime but asserts that the crime was justified and is therefore legally blameless." *United States v. Idaho*, 623 F.Supp.3d 1096, 1109 (D. Idaho 2022).

One could also rehash the other historical tidbits Plaintiff brings to bear; or the arguments that the Court has heard already on Equal Protection. It will suffice to say that a post-ratification English criminal case, the absence of historical evidence concerning convictions for certain abortions (though, saying nothing about abortions generally), and a hail-Mary argument concerning a broader right to medical treatment (that only exists in the prison context under the Eighth Amendment), collectively do not provide even the barest scrap of support for Plaintiff's constitutional theory. There's nothing that Plaintiff could learn in discovery that could change the history of fundamental rights or abortions. Plaintiff takes the history as he finds it: threadbare, not an affirmative right to abortion deeply and objectively rooted. It does not support him.

This case lacks standing, merits, and diligence in amendment, and the Court should therefore deny the motion to amend and let this case fall away on the pending motions to

dismiss. *Dobbs* already decided that there is no constitutional protection for abortions to preserve the mother's health. 597 U.S. at 248–49, n.35 (reviewing history of abortion laws and noting that pre-*Roe* tradition reveals that by the 1950s all states but four and the District of Columbia excluded abortions done except when to save the life of the mother, with only three jurisdictions clearly allowing abortion to preserve the "health" of the mother). If nothing else, that fact should be the end of this case.

CONCLUSION

For the foregoing reasons, the motion for leave to amend should be denied for lacking good cause, and on the basis of futility.

DATED: January 10, 2025.

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 January 10, 2025, 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:

Via first class mail, postage prepaid and addressed as follows:

Shondi Lott
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Mountain Home, ID 83647
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Justin Oleson
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Pro se Defendants

/s/ Aaron M. Green
AARON M. GREEN