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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

STACY SEYB, M.D.,	)	Case No.: 1:24-cv-00244-BLW
	)	
Plaintiff,	)	
	)	**REPLY IN FURTHER**
v.	)	**SUPPORT OF PLAINTIFF'S**
	)	**MOTION FOR LEAVE TO**
MEMBERS OF THE IDAHO BOARD OF	)	**AMEND THE COMPLAINT**
MEDICINE, in their official capacities; *et al.*,	)	**[DKT. # 48]**
	)	
Defendants.	)	

Plaintiff respectfully submits this reply in further support of his motion for leave to amend the complaint [Dkt. # 48]. The State's contention that Plaintiff failed to act with diligence in seeking to amend the complaint ignores that Plaintiff acted promptly in response to the State's motions to dismiss to disclose additional facts that support his standing. Further, the State's contention that amendment would be futile simply rehashes arguments that it made in support of its motions to dismiss, which Plaintiff has already refuted in his prior briefing. Accordingly, the Court should grant Plaintiff leave to amend the complaint, deny the pending motions to dismiss, and allow this case to proceed expeditiously to a determination on the merits.

I. All Parties Agree That Granting Plaintiff Leave to Amend the Complaint Would Not Moot the Pending Motions to Dismiss.

As an initial matter, all parties agree that granting Plaintiff leave to amend the complaint would not moot the pending motions to dismiss because all new allegations in the proposed amended complaint were included in Plaintiff's consolidated response to the motions to dismiss [Dkt. # 33-1]. *See* Resp. to Pl.'s Mot. for Leave to Amend Compl. [Dkt. # 50] ("Defs.' Resp.") at 2 n.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 [amended complaint] is, with the exception of a single additional paragraph, identical to the original complaint."); *id.* at 7 ("The amendment to the Complaint adds nothing that was not in the . . . declarations attached to the Response to Motion to Dismiss."). It is therefore unnecessary, and it would disserve judicial economy, for the Court to require the State to refile its motions to dismiss in response to the proposed amended complaint, should leave be granted to file it, which would restart the timeclock for briefing and resolution of those motions.

II. Plaintiff Has Acted With Diligence.

Plaintiff maintains that the Court may properly consider the declaration he submitted in response to the motions to dismiss.[1] *See* Decl. of Stacy Seyb. M.D. [Dkt. # 33-1]. He now seeks leave to amend the complaint in an excess of caution, to avoid any possibility that he will need to refile this case, delaying its ultimate resolution on the merits, given that the case concerns matters of life and death for his patients.

Plaintiff filed the declaration well in advance of the deadline for amending the complaint—indeed, before the Court had even set the deadline. *See* Mem. of Law in Supp. of Pl.'s Mot. for Leave to Amend the Compl. [Dkt. # 48] ("Pl.'s Mem.") at 1. Initially, a hearing on the motions to dismiss was scheduled for November 7, 2024, Docket Entry [Dkt. # 43], before the November 19, 2024, deadline for amending the complaint, Case Management Order [Dkt. # 42] at 2. But the State requested a continuance to enable it to better prepare for trial in another matter, and Plaintiff consented as a matter of professional courtesy. *See* Unopposed Mot. to Reschedule Hearing on Defs.' Mots. to Dismiss [Dkt. # 44] at 1. Thus, the reason that the proceedings on the motions to dismiss were delayed past the deadline for amending the

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[1] The State fails to cite any legal authority to support its contention that, on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), a responding party cannot submit evidence outside the pleadings unless the moving party does so first. Indeed, the only authority it cites, *American Diabetes Association v. U.S. Department of the Army*, 938 F.3d 1147, 1151 (9th Cir. 2019), holds only that, when the moving party presents evidence outside the pleadings on a Rule 12(b)(1) motion, the non-moving party *must* respond with evidence and cannot simply rely on its factual allegations. It does not prohibit the non-moving party from presenting evidence outside the pleadings in the first instance, to expedite the proceedings and eliminate any doubt as to the court's jurisdiction. *See id.* Indeed, such a rule would be contrary to the interpretive guidance in the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 1 ("These rules . . . should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.").

complaint was not the result of a lack of diligence by Plaintiff, but rather, of the State's request for a delay.

That Plaintiff not only disclosed the facts that he now seeks to add to the complaint months in advance of the deadline for amendment, but attested to them in a declaration made under penalty of perjury, makes this case distinguishable from *Kamal v. Eden Creamery, LLC*, 88 F.4th 1268 (9th Cir. 2023), and *Jackson v. Laureate, Inc.*, 186 F.R.D. 605 (E.D. Cal. 1999), where the courts and defendants were blindsided by new facts after the deadline to amend. Indeed, in *Kamal*, the plaintiff sought to change its entire theory of the case "approximately six weeks before the deadline to complete discovery and eight months after the deadline to amend the pleadings," and the district court found that "allowing amendment would prejudice Defendants because discovery would have to be reopened, which would increase the cost of litigation and delay resolution of the case." 88 F.4th at 1274. Here, in contrast, no discovery beyond exchange of initial disclosures has yet to take place, and the discovery period remains open for another three months. *See* Case Management Order [Dkt. # 42] at 3.

Accordingly, the Court should find that Plaintiff acted with diligence and good cause exists to excuse the November 19, 2024, deadline for amendment.

III. Amendment Would Not Be Futile.

A. Dr. Seyb Has Standing.

The State makes no new arguments about standing in its most recent brief. It simply rehashes the arguments it made in support of its motions to dismiss. For the reasons explained in Plaintiff's response to the motions to dismiss, Pl.'s Consolidated Resp. in Opp'n to Defs.' Mots. to Dismiss [Dkt. # 33] ("Pl.'s MTD Resp.") at 5-12, and supplemental brief, Pl.s' Suppl. Mem. of Law in Opp'n to Defs.' Mots. to Dismiss [Dkt. # 47] ("Pl.'s Suppl. Mem.") at 1-2, these arguments lack merit.

Notably, Dr. Seyb suffers an injury in fact from the State's threatened enforcement of the Abortion Bans against him if he provides abortion care to patients with serious medical needs. Prior to enactment of the bans, Dr. Seyb provided hundreds of medically indicated abortions in Idaho. Proposed Am. Compl. [Dkt. # 48-2] ¶ 16. Dr. Seyb no longer provides abortions in Idaho because he fears criminal prosecution or professional discipline for violating the Abortion Bans. *Id.* But for the Abortion Bans, Dr. Seyb would continue to provide abortion care in Idaho to patients with serious medical needs, rather than refer those patients out of state. *Id.* Threatened enforcement of the Abortion Bans therefore injures Dr. Seyb by burdening his liberty.[2] As explained in Plaintiff's supplemental brief, Dr. Seyb's injury in fact need not be an injury to a constitutional right, Pl.'s Suppl. Mem. at 1-2—although liberty is protected by the Constitution, U.S. Const. amend. XIV, § 1. Rather, *any* injury that meets the standard set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), is sufficient to convey standing.

Threatened enforcement of the Abortion Bans is evidenced by two sets of state actions. The first is Idaho's aggressive defense of its ability to enforce the Ban Throughout Pregnancy against healthcare providers who perform abortions to stabilize patients experiencing medical

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[2] The State's citation to *Nelson v. King County*, 895 F.2d 1248, 1251-52 (9th Cir. 1990), is inapposite. There, former residents of a municipal inpatient treatment center located next to a landfill sought money damages for alleged violations of their constitutional rights as well as an injunction requiring the center to relocate away from the landfill. *Id.* at 1249. The Ninth Circuit held that the plaintiffs lacked standing to seek prospective injunctive relief because they failed to demonstrate a likelihood that they would receive treatment at the center again in the future. *See id.* 1251-52. In particular, the court explained that it could not base a determination of standing on a "naked statistical assertion" about the percentage of people who repeat the treatment center's programs, but instead must make an "individualized inquiry" into the plaintiffs' likelihood of receiving future treatment at the center. *Id.* Here, Dr. Seyb does not rely on naked statistics about the number of people seeking abortion care in Idaho to establish his injury. Instead, he relies on his personal experience of providing abortion care on a regular basis before the Abortion Bans took effect, and having to refer patients out of state on a regular basis since the Abortion Bans took effect. Proposed Am. Compl. [Dkt. # 48-2] ¶ 16.

emergencies. *See* Pl.'s MTD Resp. at 10-11; *see generally United States v. Idaho*, 623 F. Supp. 3d 1096, 1107 (D. Idaho 2022), *appeals docketed*, No. 23-35440 (9th Cir. June 28, 2023) and No. 23-35450 (9th Cir. July 3, 2023), *cert before judgment granted by* 144 S. Ct. 541 (2024), *cert. dismissed as improvidently granted sub nom. Moyle v. United States*, 603 U.S. 324 (2024). The second is the State's refusal to disavow enforcement of the Abortion Bans as applied to medically indicated abortion care. Indeed, in a recent pair of cases, the Ninth Circuit reaffirmed its view that a plaintiff's ability to establish a credible threat of enforcement "often rises or falls with the enforcing authority's willingness to disavow enforcement." *Planned Parenthood Great Nw., Haw., Alaska, Ind., Ky. v. Labrador*, 122 F.4th 825, 838-39 (2024) (quoting *Peace Ranch, LLC v. Bonta*, 93 F.4th 482, 490 (9th Cir. 2024)); *accord Matsumoto v. Labrador*, 122 F.4th 787, 797-98 (9th Cir. 2024).

B. Dr. Seyb Has Third-Party Standing to Vindicate His Patients' Constitutional Rights.

For the reasons explained in Plaintiff's prior briefing, Dr. Seyb satisfies the requirements for third-party standing to assert his patients' constitutional rights. *See* Pl.'s MTD Resp. at 12-13. The State persists in citing the wrong test for third-party standing. Although Plaintiff has repeatedly cited the correct test—stated in *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004), and elsewhere—the State has made no effort to distinguish it or explain why it should not apply here. In *Kowalski*, the Supreme Court reiterated that it permits third-party standing in cases where enforcement against the plaintiff would impact the rights of third parties. 543 U.S. at 130 ("And '[i]n several cases, this Court has allowed standing to litigate the rights of third parties when enforcement of the challenged restriction *against the litigant* would result indirectly in the

violation of third parties' rights.'" (citations omitted)).[3] If this condition is satisfied, a court need not inquire into whether a plaintiff has a close relationship with the rights holder or whether that person faces a hindrance to protecting their own rights. *See id.* at 130. Here, the Abortion Bans prohibit Dr. Seyb from providing medically indicated abortion care to some patients with serious medical needs, indirectly infringing on those patients' constitutional rights. Dr. Seyb therefore meets the requirements for third-party standing.

In addition, the State wrongly contends that *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022), implicitly overruled the robust body of precedent concerning third-party standing. This argument is unavailing for two reasons. First, the plaintiffs in *Dobbs*, an abortion clinic and a doctor who wished to provide abortion care, relied on third-party standing to assert the constitutional rights of their patients. *See* 597 U.S. at 233 ("Respondents are an abortion clinic, Jackson Women's Health Organization, and one of its doctors."). If the Supreme Court had held that such plaintiffs lack third-party standing, then the doctrine of constitutional avoidance would have weighed strongly in favor of reversing the lower court's judgment on that basis without reaching the constitutional issue. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). The fact that the Court decided the constitutional issue demonstrates that it did not hold that the plaintiffs lacked standing to raise it in the first place.

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[3] In *Kowalski*, the Supreme Court concluded that a pair of attorneys lacked third-party standing to assert claims on behalf of prospective clients seeking representation in appellate matters only after noting that the facts of the case were distinguishable from cases in which enforcement of the challenged restriction against a litigant would result indirectly in the violation of third parties' rights. *Id.* at 130 (noting that such cases are not "implicated here"). The policy at issue in *Kowalski* did not prohibit the plaintiffs from representing any defendant in an appellate proceeding. *Id.* at 127-28. Indeed, it did not impose any restrictions on the plaintiffs at all. *Id.* Instead, it barred courts from appointing appellate counsel to represent certain defendants. *Id.*

Second, it would strain credulity to conclude that the *Dobbs* Court intended to overrule decades of settled jurisprudence concerning third-party standing implicitly, by an offhand comment, rather than explicitly in the same manner that it addressed the constitutional jurisprudence concerning abortion. As Judge Myron Thompson of the Middle District of Alabama said in May: "The Attorney General misreads *Dobbs* insofar as he suggests that the Supreme Court, in eight words, upended the law of standing. *Dobbs* was not a case about standing, and it did not overrule any precedent except where the Court explicitly said so." *Yellowhammer Fund v. Att'y Gen. of Alabama*, 733 F. Supp. 3d 1167, 1184 (M.D. Ala. May 6, 2024).

C. The State Misapprehends the Nature of As-Applied Challenges.

The State mistakenly insists that an as-applied challenge must challenge a statute's application to the plaintiff *per se*, rather than to a particular course of conduct in which the plaintiff seeks to engage. *See* Defs.' Resp. at 13-15. "As a general matter, a facial challenge is a challenge to an entire legislative enactment or provision." *Hoye v. City of Oakland*, 653 F.3d 835, 857 (9th Cir. 2011); *accord Idaho*, 623 F. Supp. 3d at 1107. "A paradigmatic as-applied attack, by contrast, challenges only one of the rules in a statute, a subset of the statute's applications, or the application of the statute to a specific factual circumstance, under the assumption that a court can 'separate valid from invalid subrules or applications.'" *Hoye*, 653 F.3d at 857 (citations omitted); *accord Idaho*, 623 F. Supp. 3d at 1107. Here, Dr. Seyb challenges the Abortion Bans as applied to medically indicated abortion care so that he may provide such care to his patients. *See* Proposed Am. Compl. [Dkt. # 48-2] ¶¶ 7, 9 & pp. 25-27 (setting forth Plaintiff's request for relief); *see also id.* ¶¶ 81-107 (explaining circumstances in which abortion care is medically indicated). Thus, this case constitutes a "paradigmatic as-applied attack" on the Abortion Bans. *Hoye*, 653 F.3d at 857.

The State's reliance on *Doe v. Reed*, 561 U.S. 186 (2010), is misplaced. There, the Court explained that, to the extent a plaintiff seeks relief that would reach beyond the plaintiff's particular circumstances, the plaintiff must "satisfy our standards for a facial challenge *to the extent of that reach*." *Id.* at 194 (emphasis added). That is just another way of saying that plaintiffs must demonstrate that each application of a statute they seek to invalidate is unconstitutional. That is precisely what Dr. Seyb intends to do here.

D. Dr. Seyb's Equal Protection Claim is Not Futile.

The State asserts that Dr. Seyb's animus claim is futile. Defs.' Resp. at 15. But Dr. Seyb does not allege an animus claim; he alleges an equal protection claim and includes allegations concerning animus in support of that claim. *See* Proposed Am. Compl. [Dkt. # 48-2] ¶¶ 130-33. Demonstrating that the Ban Throughout Pregnancy's differential treatment of pregnant people at risk of death from self-harm and pregnant people at risk of death from other causes is motivated by animus against people with mental illness is one way of establishing that it violates the Equal Protection Clause. *See U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."); *see also Romer v. Evans*, 517 U.S. 620, 632 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985). But it is not the only way. A court may conclude that a statute lacks the rational basis needed to satisfy the bare minimum of equal protection review even absent a finding of animus or intentional discrimination. *See Navarro v. Block*, 72 F.3d 712, 717 (9th Cir. 1995). Moreover, proving that legislation was motivated by animus against the disadvantaged group does not require evidence about the subjective motivations of individual legislators; animus may be inferred from a wildly disproportionate fit between a statute's means and ends, *see Romer*, 517 U.S. at 632 ("[I]ts sheer

breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects . . . ."), from a statute's practical impact on a disadvantaged group, *see Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993) ("Apart from the text, the effect of a law in its real operation is strong evidence of its object."), or from a lack of other plausible explanations, *see City of Cleburne*, 473 U.S. at 450 ("The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the [developmentally disabled] . . . ."), among other things. Accordingly, Dr. Seyb's equal protection claim is not futile.

E. Dr. Seyb's Substantive Due Process Claim is Not Futile.

For the reasons explained in Plaintiff's prior briefing, Dr. Seyb's substantive due process claim is not futile. *See* Pl.'s MTD Resp. at 15-27. Moreover, the State is incorrect that discovery could not yield any information relevant to Plaintiff's argument that the right to medically indicated abortion care is deeply rooted in the nation's history and tradition. *See* Defs.' Mem. at 17. Plaintiff intends to offer expert testimony concerning the legal status and societal treatment of medically indicated abortion care prior to the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by Dobbs*, 597 U.S. at 231.

CONCLUSION

For the reasons set forth above and in Plaintiff's prior briefing, the Court should grant Plaintiff's motion for leave to amend the complaint.

Dated: January 24, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on January 24, 2025, the foregoing document was filed with the Clerk of the Court using the CM/ECF system, which will cause a copy to be served upon all counsel of record.

In addition, a copy of the foregoing document was sent via first-class mail to the following Defendants at the addresses listed below:

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