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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO
SOUTHERN DIVISION

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAII, ALASKA, INDIANA, KENTUCKY, on behalf of itself, its staff, physicians and patients, **CAITLIN GUSTAFSON, M.D.**, on behalf of herself and her patients, and **DARIN L. WEYHRICH, M.D.**, on behalf of himself and his patients,

Plaintiffs,

v.

RAÚL LABRADOR, in his official capacity as Attorney General of the State of Idaho; **MEMBERS OF THE IDAHO STATE BOARD OF MEDICINE** and **IDAHO STATE BOARD OF NURSING**, in their official capacities, **COUNTY PROSECUTING ATTORNEYS**, in their official capacities,

Defendants.

Case No. 1:23-cv-142

MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Under Federal Rule of Civil Procedure 65, Plaintiffs Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky ("Planned Parenthood"), and Darin L. Weyhrich, M.D., respectfully move for a temporary restraining order and preliminary injunction against Raúl Labrador in his official capacity as Attorney General of the State of Idaho, County Prosecuting Attorneys ("County Prosecuting Attorneys") in the following Idaho counties Ada, Adams, Bannock, Bear Lake, Benewah, Bingham, Blaine, Boise, Bonner, Bonneville, Boundary, Butte, Camas, Canyon, Caribou, Cassia, Clark, Clearwater, Custer, Elmore, Franklin, Fremont, Gem, Gooding, Idaho, Jefferson, Jerome, Kootenai, Latah, Lemhi, Lewis, Lincoln, Madison, Minidoka, Nez Perce, Oneida, Owyhee, Payette, Power, Shoshone, Teton, Twin Falls, Valley, and Washington, named in their official capacities, and the members of the Idaho State Board of Medicine, and the Idaho State Board of Nursing, named in their official capacities, to prohibit enforcement of Idaho Code § 18-622(2) as interpreted by Attorney General Labrador. Plaintiffs' arguments in support of this motion are fully set forth in the attached memorandum of law and supporting declarations.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 5, 2023, I filed the foregoing electronically though the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Not Applicable (no defendant has yet appeared)

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Case No. 1:23-cv-142

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

Shortly after the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), Idaho's ban on abortion went into effect, stripping Idahoans of the longstanding right to choose to terminate a pregnancy. On March 27, 2023, Attorney General Labrador ("Labrador") issued a letter interpreting Idaho law to prohibit health care providers from giving patients truthful and accurate information about out-of-state abortion services, including referrals for such services, or anything else deemed to "assist" the patient in obtaining an abortion out of state (the "Labrador Interpretation"). The Labrador Interpretation is an unprecedented overreach that infringes on the rights of Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky ("Planned Parenthood"), Caitlin Gustafson, M.D., and Darin L. Weyhrich, M.D. (collectively, "Plaintiffs") under the First Amendment and the Due Process and Dormant Commerce Clauses, and, if vindicated, could permit the State to prohibit abortions occurring in other states where such conduct is wholly legal. As a result, Plaintiffs—who provide comprehensive reproductive health care consistent with Idaho law—have stopped providing critical information to their patients regarding lawful, out-of-state abortion care when desired by the patient, and are left in grave uncertainty as to what actions may expose them to penalties under the extreme and unconstitutional Labrador Interpretation.

Labrador's overreach puts state government in the exam room with the health care provider and patient, making their communications about abortions that are legal in other states fodder for a potential licensing—or even criminal—case against the provider. Moreover, the Labrador Interpretation is inconsistent with *Dobbs*, which permitted each individual state to regulate abortion and did not "prevent the numerous states that readily allow abortion from continuing to readily allow abortion." *Dobbs*, 142 S. Ct. at 2305 (Kavanaugh, J., concurring) (listing *amici* states supporting abortion provider-plaintiff)).

Absent immediate relief from this Court, the Labrador Interpretation will continue to violate Plaintiffs' constitutional rights each and every day it remains in effect, and will continue to prevent Plaintiffs from counseling their patients about all appropriate medical treatments, including about abortion in states where it is legal. Plaintiffs seek a temporary restraining order and injunctive relief to block this unconstitutional and unprecedented application of Idaho law.

FACTUAL BACKGROUND

A. Idaho's Criminalization of Abortion

For nearly fifty years, physicians provided safe and legal abortions to Idahoans. Following the U.S. Supreme Court's ruling in *Dobbs*, Idaho laws restricting abortion, including Idaho Code § 18-622 (the "Total Abortion Ban"), were allowed to go into effect, forcing Idahoans seeking abortions to flee the state to obtain one—or to carry their pregnancies to term if they could not do so.

Idaho Code § 18-622 makes it a felony to perform or attempt to perform an abortion, carrying a penalty of two to five years in prison. The statute also imposes professional licensing penalties for any "health care professional who performs or attempts to perform an abortion or who assists in performing or attempting to perform an abortion in violation of this subsection." *Id.* The statute mandates that the provider's license be suspended for six months upon the first offense, and permanently revoked upon the second. *Id.*

On March 27, 2023, Labrador responded to Representative Brent Crane's inquiry about the scope of Idaho's abortion prohibitions. In his letter, Labrador asserted that the Total Abortion Ban's professional licensing provision bars medical providers from "referring a woman across state lines to access abortion services." Compl. Ex. 1 (March 27, 2023 Letter from Labrador to Representative Brent Crane) at 2. Labrador also broadly interpreted the term "assist" in Idaho Code § 18-622 to mean "give support or aid." *Id.*

The Labrador Interpretation thus announces two premises with respect to § 18-622(2). First, he claims that Idaho law prohibits health care providers from providing assistance to Idahoans in need of out-of-state abortion services by giving them information about and/or making referrals for abortion services in states where such services are legal. And second, the necessary conclusion of his Interpretation is that Idaho's Total Abortion Ban applies not only to abortions performed within the state, but also to abortions performed elsewhere, because he interprets an abortion performed out-of-state as an abortion that triggers the license suspension, which only applies to an abortion performed "*in violation of this subsection*." Idaho Code § 18-622(2) (emphasis added). The only way that could be true is if an out-of-state abortion violates Idaho's Total Abortion Ban.

B. Labrador's Threatened Enforcement Is Irreparably Harming Plaintiffs And Their Patients

Plaintiffs provide comprehensive reproductive health care in Idaho, which included abortions before the Total Abortion Ban went into effect.[1] Weyhrich Decl. ¶¶ 3, 8, 12; Gibron Decl. ¶¶ 4, 9-10, 12-14; Gustafson Decl. ¶¶ 3, 8. Although no Plaintiff has provided an abortion in Idaho since the Total Abortion Ban took effect, all continue to see some patients who choose to seek abortion care in states where doing so is legal. This includes those for whom abortions may be medically appropriate or necessary to protect the patient's health, as well as those who choose abortion for any of a range of other personal, family, or economic reasons. Weyhrich Decl. ¶¶ 9-11; Gibron Decl. ¶ 11; Gustafson Decl. ¶¶ 9-11.

[1] Dr. Weyhrich and Dr. Gustafson have practiced obstetrics and gynecology in Idaho for nearly two decades. Weyhrich Decl. ¶ 2; Gustafson Dec. ¶ 2. Planned Parenthood, the largest provider of reproductive health services in Idaho, provides a broad range of reproductive and sexual health services, including, but not limited to: testing, treatment and vaccines for certain sexually transmitted infections, cervical cancer screening, mammogram referrals, fibroids evaluations, and annual wellness checks. Gibron Decl. ¶ 9. It employs licensed health professionals in Idaho and neighboring states. Gibron Decl. ¶¶ 10, 13, 14, 24.

Pregnant patients may require abortions for a variety of serious health reasons, including high-risk diabetes or hypertension. Weyhrich Decl. ¶ 10. Other pregnant patients may require abortions following placental abruption or infection or the onset of pre-eclampsia—serious health risks that can result in death if pregnant patients continue their pregnancies. Gustafson Decl. ¶ 10. Other pregnant patients may require abortions as a result of high-risk health conditions or treatments unrelated to pregnancy, including, for instance, cancer treatments, which could put the pregnant woman's health and even life at risk if forced to carry to term. Other patients seek abortions because of serious fetal anomalies or because the pregnancy resulted from rape or incest. Gibron Decl. ¶ 11; Gustafson Decl. ¶ 11; Weyhrich Decl. ¶¶ 9, 11.

After the imposition of the Total Abortion Ban, but before the Labrador Interpretation, the practice of Planned Parenthood and Dr. Gustafson was to counsel patients about their available options, including carrying the pregnancy to term or abortion.[2] Gibron Decl. ¶ 12; Gustafson Decl. ¶ 12. As part of this conversation, Planned Parenthood and Dr. Gustafson would provide patients with information about out-of-state abortions and provide referrals and other information that helped patients make the necessary scheduling and travel arrangements; when necessary, Dr. Gustafson would talk with out-of-state doctors to facilitate continuity of care. Gibron Decl. ¶ 13; Gustafson Decl. ¶ 13. Planned Parenthood staff would also help patients schedule appointments at one of its Washington health centers or give them information about health centers operated by other providers in states where abortion is legal. Gibron Decl. ¶ 14.

As a result of the Labrador Interpretation and under threats of loss of their professional licenses and, potentially, criminal prosecution, Plaintiffs can no longer advise patients about

[2] Dr. Weyhrich did not treat any patients needing out-of-state recommendations for abortion providers during this time. Weyhrich Decl. ¶ 12.

options for terminating their pregnancies and the availability of legal, out-of-state options, nor can they assist patients by making referrals or scheduling appointments, including in the context of medically complex pregnancies as well as for the range of other reasons that patients choose abortion. Gibron Decl. ¶¶ 15-17; Gustafson Decl. ¶¶ 16-17; Weyhrich Decl. ¶ 14. This has devastating consequences for Plaintiffs, who can no longer speak freely about medical treatments with their patients or help them with basic information about how to access those treatments, and who are forced to act contrary to both medical ethics and the standard of care. Gibron Decl. ¶ 17; Gustafson Decl. ¶¶ 18, 20; Weyhrich Decl. ¶¶ 15-19.

It also has devastating consequences for Plaintiffs' patients. Gibron Decl. ¶¶ 18-21; Gustafson Decl. ¶¶ 19, 21; Weyhrich Decl. ¶ 20. Without access to referrals or other guidance, patients will be unable to access abortions in other states or inhibited from doing so because they do not have the guidance of a trusted physician and must rely on less accurate information. Gibron Decl. ¶ 18; Gustafson Decl. ¶¶ 21, 24; Weyhrich Decl. ¶¶ 21-22. Such patients may be forced to carry their pregnancies to term, which can have serious medical consequences and social and economic effects on pregnant patients and their families. Gibron Decl. ¶ 20; Gustafson Decl. ¶ 22; Weyhrich Decl. ¶ 25. Other patients may ultimately be able to access abortions, but their care will be delayed or compromised for lack of a referral. Gibron Decl. ¶ 19; Gustafson Decl. ¶ 21; Weyhrich Decl. ¶ 26. Delays in care can result in dire health consequences. Gibron Decl. ¶ 20; Gustafson Decl. ¶ 25; Weyhrich Decl. ¶¶ 26-28.

The Labrador Interpretation also leaves Plaintiffs profoundly uncertain about what conduct could expose them to civil, or even criminal, charges. For example, some providers who are licensed in both Idaho and another state want to provide abortions outside of Idaho, but fear that doing so could result in revocation of their Idaho licenses despite the fact that abortion is lawful in

those other states. Gustafson Decl. ¶ 15; Gibron Decl. ¶ 22. This leaves Plaintiffs with the untenable choice of giving up their Idaho licensure, limiting the lawful medical services they provide in other states because of fear that Idaho will attempt to enforce its Total Abortion Ban even as to abortions that take place in other states, or attempting to guess what information or medical services will lead to such enforcement efforts. *See* Gustafson Decl. ¶ 15; Gibron Decl. ¶ 24.

LEGAL STANDARD

In deciding whether to grant a temporary restraining order or preliminary injunction, the Court must consider four factors: (1) likelihood of success on the merits; (2) whether the plaintiffs are likely to suffer irreparable harm in the absence of preliminary relief; (3) whether the balance of equities tips in the plaintiffs' favor; and (4) whether an injunction is in the public interest. *Perlot v. Green*, 609 F. Supp. 3d 1106, 1115 (D. Idaho 2022) (citing *Short v. Brown*, 893 F.3d 671, 675 (9th Cir. 2018)); *see Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush and Co., Inc.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001) (explaining that the analysis for a preliminary injunction and a temporary restraining order is "substantially identical"). "[A] stronger showing of one element may offset a weaker showing of another." *Recycle for Change v. City of Oakland*, 856 F.3d 666, 669 (9th Cir. 2017). A preliminary injunction is thus warranted even when the plaintiff raises only "serious questions" on the merits so long as "the balance of hardships tips sharply in [the plaintiff's] favor." *Puente Ariz. v. Arpaio*, 821 F.3d 1098, 1103 n.4 (9th Cir. 2016). Plaintiffs readily satisfy each factor.

ARGUMENT

Plaintiffs have demonstrated that they are entitled to injunctive relief.[3] *First,* Plaintiffs are overwhelmingly likely to prevail on the merits of their claims that Labrador's unprecedented interpretation of Idaho law violates the First Amendment, the Dormant Commerce Clause, and the Due Process Clause. *Second*, Plaintiffs have established that they and their patients will suffer irreparable harm, including constitutional injury and medical harm, if the Labrador Interpretation stands. *Third*, Plaintiffs have established that the balance of equities weighs in their favor. *Finally*, Plaintiffs have established that injunctive relief is in the public interest.

I. Plaintiffs Are Likely To Succeed On The Merits Of Their Claims

Plaintiffs are overwhelmingly likely to prevail on the merits. Given that they are entitled to injunctive relief upon showing that they have "a substantial case for relief on the merits," they readily satisfy this requirement. This does not require Plaintiffs "to show that it is more likely than not that [they] will win on the merits," *W. Watersheds Project v. Zinke*, 336 F. Supp. 3d 1204, 1218 (D. Idaho 2018) (internal quotation marks omitted), but Plaintiffs have nevertheless

[3] At the request of a prosecuting attorney, Labrador has the authority to "in effect deputize himself … to stand in the role of a county prosecutor, and in that role exercise the same power to enforce the statute that the prosecutor would have." *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919-20 (9th Cir. 2004) (concluding state attorney general was proper defendant in challenge to Idaho abortion statute). He is also in a position to influence state licensing boards to apply his interpretation of Idaho law. *See Culinary Workers Union, Loc. 226 v. Del Papa*, 200 F.3d 614, 618-19 (9th Cir. 1999) (state attorney general is proper defendant when he can "encourage local law enforcement" to enforce a statute). The individual members of the Idaho State Board of Medicine and the Idaho State Board of Nursing are defendants in their official capacities, and are members of professional licensing boards charged with the duty of suspending and revoking the licenses of doctors, nurses, and pharmacists in Idaho, respectively. *See* Idaho Code §§ 54-1814(6), 54-1404(2), 54-1718(1)(d). The County Prosecuting Attorneys are proper defendants as they bear primary responsibility for enforcing Idaho Code § 18-622(2) in their respective Idaho counties. *See* Idaho Code § 31-2227. Defendants are without authority to enforce Idaho Code § 18-622(2) in connection with out-of-state abortions, because doing so is unconstitutional. *See Commonwealth of Mass. v. Mellon*, 262 U.S. 447, 488 (1923); *Sanders Cnty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 748-49 (9th Cir. 2012).

established that they *are* likely to prevail on three separate constitutional claims: violations of the First Amendment, the Dormant Commerce Clause, and the Due Process Clause.

A. The Labrador Interpretation Is An Impermissible Content- And Viewpoint-Based Regulation Of Speech That Violates The First Amendment

By preventing Plaintiffs from providing their patients with information about essential health care that is legal where it is being provided, the Labrador Interpretation of the Total Abortion Ban violates the First Amendment's guarantee of free speech.

The government may not regulate speech because of its message, ideas, subject matter, or content, and laws that do so are presumptively unconstitutional. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). Such restrictions are subject to strict scrutiny, which requires the government to prove that the restriction is narrowly tailored to serve a compelling state interest. *Id.* Speech restrictions are even more egregious when the government targets particular views taken by speakers on a subject (rather than targeting all views on a given subject). *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Labrador's interpretation of Idaho Code § 18-622(2) to prohibit information or referrals for out-of-state abortions is a content- and viewpoint-based speech restriction that furthers no legitimate government interest, much less a compelling one, and is not narrowly tailored.

First, the Total Abortion Ban as interpreted by Labrador is a content- and viewpoint-based restriction on speech that penalizes medical providers for providing any "support or aid" to a woman seeking abortion, including "refer[ring] a woman across state lines to an abortion provider." Compl. Ex. 1. Under the Labrador Interpretation, health care providers are silenced on a single topic—abortion—meaning that the speech restriction is content-based. It is, moreover, viewpoint discriminatory, because health care providers can provide information and referrals about out-of-state resources like anti-abortion counseling centers or prenatal care. Because it is a

content and viewpoint discriminatory speech restriction, the Labrador Interpretation of the Total Abortion Ban is subject to strict scrutiny.

Second, the Labrador Interpretation of the Total Abortion Ban furthers no legitimate state interest, much less a compelling one. Idaho has no compelling interest in preventing its medical providers from counseling their patients about medical treatments that are legal and available in other states or referring them to providers who provide those treatments out of state. *See Bigelow v. Virginia*, 421 U.S. 809, 827-28 (1975) (explaining that state's "asserted interest" "in shielding its citizens from information about activities outside [its] borders, activities that [its] police powers do not reach" is "entitled to little, if any weight"). Similarly, the government has no compelling interest in preventing a physician or medical professional from recommending certain treatment. *See Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002) (upholding injunction of statute that imposed licensing penalties on physicians who recommended medical marijuana). Idaho "may not, under the guise of exercising internal police powers, bar" Plaintiffs "from disseminating information about an activity that is legal" in another state. *Bigelow*, 421 U.S. at 824-25.

Third, the fact that Labrador has targeted provider-patient speech does not save his overbroad interpretation of the Total Abortion Ban, as professional speech is entitled to the same scope of First Amendment protections as other speech, with narrow exceptions that do not apply here. *National Ass'n of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371-72 (2018) ("Speech is not unprotected merely because it is uttered by 'professionals.'"). These exceptions are for mandated disclosure of "factual, noncontroversial information in their 'commercial speech,'" *id.*, and for "regulations of professional conduct that incidentally burden speech," *id.* at 2373. But Idaho Code § 18-622, as interpreted by Labrador, is not an incidental burden on speech, but rather a direct restriction on professionals' ability to provide medical information, opinions,

and referrals. The Ninth Circuit recently identified that professional speech, which is subject to the full protections of the First Amendment, includes discussing a restricted treatment with patients, recommending that patients obtain a restricted treatment from out-of-state providers, and expressing their opinions about the treatment or topic more generally. *Tingley v. Ferguson*, 47 F.4th 1055, 1073 (9th Cir. 2022). Plaintiffs here are speaking in exactly this way: discussing abortion and recommending that patients obtain abortions "from out-of-state providers." *Id*.

Finally, even if Labrador's content and viewpoint discriminatory censorship served a compelling interest (which it does not), Defendants cannot prove that it is narrowly tailored to further that interest because it sweeps in a large swath of obviously protected speech. *See Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (government bears burden of proof). When a plaintiff offers a plausible, less-restrictive alternative, "it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *Victory Processing, LLC v. Fox*, 937 F.3d 1218, 1228 (9th Cir. 2019) (internal quotation marks omitted). Numerous less-restrictive alternatives exist. Namely, where allegedly harmful speech is at issue, a state or individuals may attempt to engage in counterspeech to advocate their positions. *See Bigelow*, 421 U.S. at 824 (noting that a state may "seek to disseminate information so as to enable its citizens to make better informed decisions when they leave"); *United States v. Alvarez*, 567 U.S. 709, 726 (2012) ("The Government has not shown, and cannot show, why counterspeech would not suffice to achieve its interest."). There is no indication that Idaho or Labrador have attempted such counterspeech, nor can they show that such counterspeech would be ineffective to achieve the government's purpose.

B. The Labrador Interpretation Of The Total Abortion Ban Violates The Due Process Clause By Penalizing Extraterritorial Conduct That Is Legal In The State Where It Occurs

The Labrador Interpretation of the Total Abortion Ban violates fundamental tenets of due process because it is premised on the incorrect notion that Idaho law can punish conduct that occurs wholly outside its borders. *BMW of N.A., Inc. v. Gore*, 517 U.S. 559, 573 n.19 (1996). The Labrador Interpretation necessarily implies that Idaho can reach out-of-state abortions because Labrador interprets an abortion performed out-of-state as an abortion that triggers the license suspension, which only applies to an abortion performed "*in violation of this subsection*." Idaho Code § 18-622(2) (emphasis added). In other words, according to Labrador, at least some subset of out-of-state abortions *must* violate Idaho's Total Abortion Ban.

"A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003). Accordingly, it is long-established that a state cannot prosecute a person "for doing within the territorial limits of [another state] an act which that [separate] state had specially authorized him to do." *Nielsen v. State of Oregon*, 212 U.S. 315, 321 (1909). Acts that are "done within the territorial limits of [one state], under authority and license from that state … cannot be prosecuted and punished by … [a different] state." *Id.*

The Supreme Court has reiterated this principle time and time again and has even done so specifically in the context of abortion-related speech. In *Bigelow v. Virginia*, it held that Virginia could not criminalize the publication of an advertisement concerning the availability of abortion services in New York that were, at the time of publication and prosecution, illegal in Virginia but legal in New York. 421 U.S. at 824. The Court explained that a "State does not acquire power or

supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State." *Id*. To the contrary, it concluded that "[t]he Virginia Legislature could not have regulated the advertiser's activity in New York, *and obviously could not have proscribed the activity in that State*." *Id*. at 822-23 (emphasis added). Similarly, Virginia also could not "prevent its residents from traveling to New York to obtain those services or … prosecute them for going there." *Id*. at 824; *accord Dobbs*, 142 S. Ct. at 2309 (Kavanaugh, J., concurring) (state cannot "bar a resident of that State from traveling to another State to obtain an abortion"). In short, "Virginia possessed no authority to regulate the services provided in New York." *Bigelow*, 421 U.S. at 822-24 (citations and footnotes omitted).[4]

The prohibition on punishing out-of-state conduct that is legal where it occurs is based on both structural and fairness concerns. Structurally, state laws simply "have no force of themselves beyond the jurisdiction of the State" under the principles of federalism and comity. *BMW*, 517 U.S. at 571 n.16; *State Farm*, 538 U.S. at 422 (explaining that it is a "basic principle of federalism" that each state holds sole authority for "what conduct is permitted or proscribed within its borders," including the right to "determine what measure of punishment," is appropriate for that conduct); *see also White v. Ford Motor Co.*, 312 F.3d 998, 1013 (9th Cir. 2002) (under *BMW*'s due process principles, "no state can be permitted to impose its policies on other states"), *opinion amended on denial of reh'g*, 335 F.3d 833 (9th Cir. 2003). And from a fairness perspective, "[t]o punish a

[4] Much of the Court's analysis of extraterritoriality has arisen in cases addressing punishment in the form of punitive damages for out-of-state conduct. In *BMW*, for example, the Court addressed whether an Alabama punitive damages award against BMW satisfied the requirements of due process. 517 U.S. at 572. BMW had adopted a national policy of not advising customers of predelivery damage in certain circumstances, *id.* at 562, a policy that was "consistent with the laws of roughly 25 States" but that ran afoul of Alabama's consumer protection laws, *id.* at 565. The Court held that while Alabama could punish BMW for engaging in unlawful behavior within its borders, it would violate due process to punish a defendant for engaging in out-of-state conduct that was lawful in the place where it transpired. *Id.* at 572.

person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *BMW*, 517 U.S. at 573 n.19 (quotation marks and citation omitted)). This analysis applies equally to Labrador's attempts to penalize conduct in Idaho (such as provision of information or other "assistance") that violates no Idaho law *unless* the out-of-state abortion is itself prohibited under Idaho law. And finally, although *BMW*'s analysis of these principles focused on non-criminal sanctions, its application is all the more important where the logical extension of the Labrador Interpretation could be a criminal prosecution. *See id.* ("[W]e have never held that a sentencing court could properly punish lawful conduct.") (emphasis omitted)).

These cases are controlling here and require that the attempted extraterritorial application of the Total Abortion Ban be enjoined. The Labrador Interpretation that some abortions performed outside of Idaho are nonetheless abortions "in violation of this subsection" flouts the due process limits on extraterritorial punishment, and specifically the interconnected principles of comity and fairness central to the Court's due process analysis. *First*, by reaching beyond its borders to criminalize the very conduct other states have authorized, Idaho is "infringing on the policy choices of other States." *BMW*, 517 U.S. at 572. "[E]ach State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders," yet Idaho seeks to impose its own judgment on other states in violation of "basic principle[s] of federalism." *State Farm*, 538 U.S. at 422. *Second*, Idaho's overreach is profoundly unfair to the out-of-state health care providers whose conduct it claims is prohibited and will subject them to professional sanction or even (by the same logic) criminal penalties. Planned Parenthood employs health care providers licensed to provide abortion services outside of Idaho, including in Washington, and Dr. Gustafson would like to provide abortions in Oregon in the future. Gibron Decl. ¶ 24; Gustafson Decl. ¶ 15. By providing abortion care in Washington and Oregon they are "doing an act which [Washington

and Oregon] … authorized and gave [them] … license[s] to do." *Nielsen*, 212 U.S. at 321. The fact that providers who perform abortions under a license in another state may *also* be licensed in-state does not allow Idaho to "regulate the services provided" in another state by virtue of those providers' Idaho licenses. *Bigelow*, 421 U.S. at 824.

The same is true for citizens of Idaho who travel to another state to receive an abortion. *See Bigelow*, 421 U.S. at 824 (states do not acquire power over the affairs of other states simply because its citizens travel there). When a patient or a health care provider travels outside of Idaho to receive or perform an abortion that occurs out of state, that conduct is beyond Idaho's jurisdiction to regulate. Any in-state effects of that conduct are equally irrelevant to the due process problems created by out-of-state enforcement. *State Farm*, 538 U.S. at 421.

C. The Labrador Interpretation Of The Total Abortion Ban Violates The Dormant Commerce Clause By Penalizing Extraterritorial Conduct That Is Legal In The State Where It Occurs

In addition to violating due process, the Labrador Interpretation of the Total Abortion Ban violates the Dormant Commerce Clause by threatening to impose licensing or even criminal sanctions on health care providers or third parties predicated on lawful conduct "wholly outside of the State's borders." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989); *see also South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2090-91 (2018).

The Supreme Court has long recognized that the Commerce Clause's "affirmative grant of authority to Congress [to regulate commerce among the states] also encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce." *Healy*, 491 U.S. at 326 n.1 (citing *Hughes v. Oklahoma*, 441 U.S. 322, 326, and n.2 (1979); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 534-35 (1949)). Under the Dormant Commerce Clause, "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid

regardless of whether the statute's extraterritorial reach was intended by the legislature." *Healy*, 491 U.S. at 336; *see also Wayfair*, 138 S. Ct. at 2091 ("State laws that discriminate against interstate commerce face a virtually per se rule of invalidity.") (internal quotation marks omitted)).

These limitations on state authority apply even to out-of-state activity that has spillover effects in the regulating state. *See Healy*, 491 U.S. at 336 ("whether or not [out-of-state] commerce has effects within the State" is irrelevant to the analysis). For example, in *Sam Francis Foundation v. Christies*, 784 F.3d 1320 (9th Cir. 2015) (en banc), the Ninth Circuit "easily conclude[d]" that a law requiring the payment of royalties "to the artist after a sale of fine art whenever the seller resides in California" violated the Dormant Commerce Clause as applied to out-of-state transactions. *Id*. at 1323 (internal quotation marks omitted). Those transactions involved state citizens and could have impacted state funds, but the court nevertheless concluded that the law was unconstitutional to the extent it purported to "directly regulate[] the conduct of the seller or the seller's agent for a transaction that occurs wholly outside the State." *Id*. at 1324; *see also Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 666 (7th Cir. 2010) (Indiana cannot regulate Nevada casinos even if Indiana residents were becoming addicted to gambling "and this was leading to bankruptcies that were playing havoc with family life and the Indiana economy").

Under these principles, the Labrador Interpretation that the Total Abortion Ban criminalizes abortion services provided outside of Idaho is patently unconstitutional. The medical services at issue in this case—the provision of abortion in other states—unquestionably constitute commerce under the Dormant Commerce Clause. *See Summit Health, Ltd. v. Pinhas,* 500 U.S. 322, 329-30 (1991) (holding that surgery performed on out-of-state residents was a protected form of interstate commerce). By purporting to prohibit the provision of abortion in other states, Idaho

is attempting to "directly control[] commerce occurring wholly outside [its] boundaries," and thereby "exceed[ing] the inherent limits of the enacting State's authority." *Healy*, 491 U.S. at 336.

II. Plaintiffs Will Be Irreparably Harmed By The Denial Of Their Constitutional Rights And Their Inability To Care For Their Patients

Plaintiffs have shown a likelihood of irreparable harm without injunctive relief. Injury need not "be certain to occur; a strong threat of irreparable injury before trial is an adequate basis." *Diamontiney v. Borg*, 918 F.2d 793, 795 (9th Cir. 1990). A threatened violation of constitutional rights constitutes irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Farris v. Seabrook*, 677 F.3d 858, 868 (9th Cir. 2012).

In the absence of injunctive relief, Plaintiffs and their patients have been and will continue to be deprived of freedom of speech, due process, the protections of the Dormant Commerce Clause. Indeed, from the moment it issued, the Labrador Interpretation has violated Plaintiffs' constitutional rights and will continue to do so until the Court remedies this threat. Such constitutional violations alone show irreparable harm. *Farris*, 677 F.3d at 868.

Moreover, Plaintiffs have shown by their factual allegations a likelihood of irreparable harm to themselves and their patients. Absent an injunction, Plaintiffs' ability to accomplish their professional mission will be irreparably damaged, as they cannot provide information and opinions about out-of-state care that, consistent with their medical training and ethical obligations, they would otherwise recommend and provide to their patients. Plaintiffs' patients will lose access to necessary medical information and crucial health care, suffer potentially catastrophic medical problems, including death, and lose trust in the medical system as a whole. *See supra* at p. 5. And Plaintiffs will be left in grave uncertainty as to what conduct in connection with out-of-state abortions may expose them to licensing or other penalties in Idaho, chilling their provision of

abortions and risking further isolating Idaho patients by cutting them off from critical health care in other states. *See supra* at pp. 4-6.

III. The Balance Of Equities And Public Interest Favor An Injunction

Finally, both the public interest and the balance of equities are strongly in Plaintiffs' favor. "[E]nforcement of an unconstitutional law is always contrary to the public interest[.]" *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013). And, in the context of First Amendment claims like Plaintiffs', a likelihood of success on the merits "compels a finding that … the balance of the hardships tips sharply in Plaintiff's favor." *American Beverage Ass'n v. City & County of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019) (internal quotation marks omitted). Similarly, the Ninth Circuit has "consistently recognized the significant public interest in upholding First Amendment principles." *Id.*

The Ninth Circuit has also "repeatedly recognized that individuals' interests in sufficient access to health care" are paramount, and that the public interest and balance of equities weigh in favor of an injunction where such access would be lost. *See, e.g.*, *Dominguez v. Schwarzenegger*, 596 F.3d 1087, 1098 (9th Cir. 2010), *vacated and remanded on other grounds by Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606 (2012). As Plaintiffs have explained, denying the injunction risks significant harm to their patients and their medical practices. *See supra* at pp. 4-6. By contrast, granting the injunction would simply allow Plaintiffs to communicate fully with patients about their options, and with providers in states where abortion is legal and allow providers to provide legal healthcare pursuant to their licenses in those states without threat of penalty by Idaho. It would not harm the State's alleged public interest, as it would not allow abortions to occur in Idaho (a prohibition that Idaho apparently believes is in the public interest) and would simply permit patients to access legal medical care in other states. As explained *supra* at pp 11-

14, Idaho does not have an interest in regulating legal activity in other states. The equities and public interest, therefore, favor Plaintiffs.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for a temporary restraining order and/or preliminary injunction should be granted.

Respectfully submitted,
/s/ Colleen R. Smith

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO
SOUTHERN DIVISION

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAII, ALASKA, INDIANA, KENTUCKY, on behalf of itself, its staff, physicians and patients, **CAITLIN GUSTAFSON, M.D.**, on behalf of herself and her patients, and **DARIN L. WEYHRICH, M.D.**, on behalf of himself and his patients,

Plaintiffs,

v.

RAÚL LABRADOR, in his official capacity as Attorney General of the State of Idaho; **MEMBERS OF THE IDAHO STATE BOARD OF MEDICINE** and **IDAHO STATE BOARD OF NURSING**, in their official capacities, **COUNTY PROSECUTING ATTORNEYS**, in their official capacities,

Defendants.

Case No. 1:23-cv-142

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** Pro hac vice applications forthcoming*

DECLARATION OF REBECCA GIBRON

I, Rebecca Gibron, hereby declare as follows:

1. I am over the age of eighteen. I make this declaration based on personal knowledge of the matters stated herein and on information known or reasonably available to my organization. If called to do so, I am competent to testify as to the matters contained herein.

Personal Background

2. I am the CEO of Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky ("Planned Parenthood"), a not-for-profit corporation organized under the laws of the State of Washington and doing business in Idaho. I submit this declaration in support of Plaintiffs' Motion for a Temporary Restraining Order and/or Preliminary Injunctive Relief.

3. In that position I am responsible for Planned Parenthood's operations, including its health centers in the State of Idaho. I have worked for Planned Parenthood or its predecessor organizations since 1997, and I have served as its CEO since December 2021. Prior to becoming CEO, I worked for Planned Parenthood and its predecessor organizations in a variety of roles, including as the Chief Operating Officer and the CEO of Planned Parenthood of Idaho.

4. Planned Parenthood is the largest provider of reproductive health services in Idaho, operating two health centers in the State in Ada County and Twin Falls County. We provide a broad range of reproductive and sexual health services, including but not limited to, well person examinations, birth control, testing and treatment for sexually transmitted infections, cancer screening, and pregnancy testing. Planned Parenthood's licensed providers provide both medication and procedural abortions in states where it is legal to do so but have not provided any abortions in Idaho since the abortion ban at issue in this case took effect last summer.

5. I am chiefly responsible for the internal management and business operations of Planned Parenthood. My primary goal is to ensure that all of our patients have access to quality

healthcare services. As a result of my responsibilities, I am familiar with our operations, including the services we provide and the communities we serve.

6. I understand that Idaho law makes it a felony for any person to "perform[] or attempt[] to perform an abortion." Idaho Code § 18-622(2) (the "Total Abortion Ban"). I also understand that the law also provides for the revocation of suspension of health care professionals' licenses when licensed professional assists with an abortion that itself violates the law.

7. I also understand that, on March 27, 2023, Idaho Attorney General Raúl Labrador issued a letter interpreting Idaho's criminal prohibitions on abortion. I have read Attorney General Labrador's letter and understand it to interpret the statute to bar medical providers from referring patients across state lines for abortions. Based on this interpretation, the Total Abortion Ban would put our staff at risk of ruinous penalties for providing information about abortion in states where it is lawful. In the absence of judicial relief, we will be unable to provide Idaho patients with quality reproductive healthcare services, including the provision of information to patients in Idaho health centers. As a result, Planned Parenthood's pregnant patients would face serious health risks because we would be unable to provide them with necessary care, as detailed below.

8. The Attorney General's interpretation also turns on reading Idaho's abortion ban to apply in some way to at least some abortions in other states. This interpretation of Idaho law risks further isolating Idaho patients by cutting them off from critical health care in other states that is legal in those states. I fear that Planned Parenthood, or our providers and other staff, may face attempts to impose licensing or even criminal penalties if they provide abortions to Idahoans in states where abortion is lawful.

Planned Parenthood's Services in Idaho

9. Planned Parenthood operates two health centers in Idaho, located in Meridian and Twin Falls. At these health centers, patients can receive testing, treatment and vaccines for certain sexually transmitted infections, cervical cancer screening, mammogram referrals, fibroids evaluations, and annual wellness checks, among other services. In 2021, Planned Parenthood's Idaho health centers served 7,930 patients in 12,908 patient encounters.

10. Until the Supreme Court decided *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), Planned Parenthood centers, including in Idaho, provided both medication and procedural abortions. After state laws banning abortion went into effect in Idaho, Planned Parenthood stopped providing abortions in Idaho. Our health centers provide abortion in other states where doing so is legal, including in Washington.

11. Although Planned Parenthood is no longer able to provide abortions in Idaho, our Idaho health centers continue to see pregnant patients who would elect to have an abortion for economic, family, medical, or other personal reasons.

12. Before Attorney General Labrador's letter, our health center staff would engage with these patients in a discussion about their pregnancy options, treatment plan and need for further care based on their decision and would provide a packet of printed information depending on what the patient needed.

13. The packet of information would include general information about different pregnancy options, including abortion; a list of "Abortion Providers Nearest to You" that lists both health centers operated by both Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky and other providers in Washington, Montana, Nevada, Wyoming, Oregon, and Utah; a

sheet with information about funds that can help with travel and/or appointment costs; and a flier on "Abortion law in Idaho" that states that abortion is banned in Idaho.

14. If the patient wanted to go to one of our health centers in a nearby state that is part of Planned Parenthood Great Northwest, Hawai'i, Alaska, Indiana, Kentucky, our staff in Idaho could schedule an appointment for them. If the patient wanted to go to a health center that is not part of Planned Parenthood, staff would provide patients with the information about other providers so that they could call themselves.

The Effects of the Attorney General's Interpretation of Idaho Code Section 18-622

15. Informing patients about and referring patients for abortion services is essential to Planned Parenthood's mission: to provide comprehensive reproductive health care services, which are vital for public health, especially for medically underserved populations—of which there are many in the State. Portions of 39 of the State's 44 counties have been designated by the federal government as Medically Underserved Population Areas.

16. The Attorney General's overbroad interpretation of Idaho Code § 18-622 will prevent Planned Parenthood and our dedicated team of medical professionals from fulfilling this mission.

17. Medical providers will be unable to ensure care for their patients by recommending providers who can provide the necessary care that Idaho does not permit. Doctors, nurses, and other staff in Idaho will be forced to stop providing information and recommendations about abortion services because they fear criminal prosecution and losing their professional licenses.

18. Many patients will not know how to access an abortion in another state or will choose not to do so because the information did not come from a trusted medical source. Patients may not even know that abortion remains legal in other states, or in which states it remains legal.

19. Many patients will face delays in finding this information and accessing care. These delays and disruptions in care come with serious health, social, and socioeconomic risks.

20. Delays in accessing abortion, or being unable to access abortion at all, pose risks to patients' health because, while abortion is a very safe procedure throughout pregnancy, the risks of abortion increase with gestational age. Additionally, if individuals are forced to carry a pregnancy to term against their will, that can pose a risk to both their physical health, as childbirth is far riskier than abortion, as well as their mental and emotional health and the stability and wellbeing of their family, including existing children. Some patients who are unable to access legal abortion may attempt an abortion on their own without access to accurate medical information.

21. These harms will be widespread, but they will fall hardest on those who already face the biggest barriers to information and care—low-income individuals, patients in rural areas, and communities of color.

22. Beyond the harms to our patients, Planned Parenthood's staff fear they could be subjected to attempts to bring civil or even criminal charges against them, based on the Attorney General's interpretation of the Total Abortion Ban.

23. This is in part because The Attorney General's interpretation seems calculated to increase confusion about what remains legal and what does not, by construing Idaho's abortion ban to apply in some way to at least some abortions in other states.

24. Planned Parenthood providers are also concerned about the licensure penalties for providing referrals to patients for out-of-state abortions or otherwise giving "support or aid," which the Attorney General says violates the law. This is especially true for providers who are licensed in Idaho and another state. Some Planned Parenthood providers who are licensed in Idaho wish to

provide abortions outside of Idaho but fear that doing so could result in the revocation of their Idaho licenses despite the fact that abortion is lawful in those other states. Other Planned Parenthood providers who are licensed in Idaho and another state may choose to give up their Idaho licenses altogether to avoid the Attorney General's threats to their licenses.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 5, 2023 in Boise Idaho

Rebecca Gibron

Rebecca Gibron

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO
SOUTHERN DIVISION

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAII, ALASKA, INDIANA, KENTUCKY, on behalf of itself, its staff, physicians and patients, **CAITLIN GUSTAFSON, M.D.**, on behalf of herself and her patients, and **DARIN L. WEYHRICH, M.D.**, on behalf of himself and his patients,

Plaintiffs,

v.

RAÚL LABRADOR, in his official capacity as Attorney General of the State of Idaho; **MEMBERS OF THE IDAHO STATE BOARD OF MEDICINE** and **IDAHO STATE BOARD OF NURSING**, in their official capacities, **COUNTY PROSECUTING ATTORNEYS**, in their official capacities,

Defendants.

Case No. 1:23-cv-142

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Attorneys for Physician Plaintiffs

** Pro hac vice applications forthcoming*

DECLARATION OF CAITLIN GUSTAFSON, M.D.

I, Caitlin Gustafson, M.D., hereby declare as follows:

1. I am over the age of eighteen. I make this declaration based on personal knowledge of the matters stated herein and on information known or reasonably available to my organization. If called to do so, I am competent to testify as to the matters contained herein.

Personal Background

2. I am a physician licensed to practice medicine in the State of Idaho since 2004 and have been a practicing doctor in Idaho for nearly two decades. I have been a board-certified family medicine physician with a fellowship in obstetrics since 2007.

3. I practice family medicine, obstetrics, and gynecology. Because of size and resource limitations at the rural hospital and clinic where I practice, I primarily serve lower-risk hospitalized patients and refer higher-risk patients to larger hospitals better able to offer a higher level of care. A significant number of my patients are from rural and other underserved communities, mostly located in Northern Idaho. In addition to my hospital practice, I previously provided care at Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, in Meridian, Idaho, and will be doing so at Planned Parenthood Columbia Willamette, in Oregon in the near future.

4. I submit this declaration in support of Plaintiffs' Motion for a Temporary Restraining Order and/or Preliminary Injunctive Relief. I have read the letter from Attorney General Labrador, including his statement that "Idaho law prohibits an Idaho medical provider from . . . referring a woman across state lines to access abortion services." Compl. Ex. 1 at 2.

5. I have also read Attorney General Labrador's statement that "Idaho law requires the suspension of a health care professional's license when he or she" refers a woman for out-of-state abortion services. *Id*.

6. Unless and until this Court prevents Idaho authorities from implementing the Attorney General's interpretation of the law, I will be forced to violate medical ethics and basic principles of patient care by refusing to provide information and referrals to patients seeking abortion care in other states that Idaho bars me from providing. The Attorney General is effectively compelling me to abandon my patients by silencing myself rather than communicate the information to patients and to out-of-state healthcare providers that helps to facilitate access to safe health care. This appalling intrusion into my trusted relationships with my patients is the antithesis of good medical practice and will harm my patients and my relationship with them.

7. The facts and opinions included here are based on my education, training, practical experience, information, and personal knowledge I have obtained as a family medicine physician and as an abortion provider; my attendance at professional conferences; review of relevant medical literature; and conversations with other medical professionals.

My Practice Prior to the Attorney General's Actions

8. Prior to the point when Idaho's abortion ban took effect, I provided medication and procedural abortion care for patients seeking such services. Once the ban took effect, I stopped providing abortions in Idaho.

9. As the American College of Obstetricians and Gynecologists recognizes, a pregnant person has three options: carry the pregnancy to term and parent; give birth and give the

baby up for adoption; or pregnancy termination.[1] Although I am no longer able to provide abortions in Idaho, I continue to see pregnant patients who decide to have an abortion for a myriad of reasons. Among the multitude of reasons that a person may decide to have an abortion are that continuing the pregnancy imposes risks to the patient's physical or mental health; that the patient has been the victim of sexual abuse or trauma; that the patient lacks the financial stability to care for a child; fetal anomalies; and many other reasons.

10. A myriad of health conditions may lead some patients to consider abortion. For example, some pregnant patients may require abortions following placental abruption, an infection, or the onset of pre-eclampsia. As a result, these patients could face serious health risks, or even death, if they continue their pregnancies. Similarly, pregnant women with cardiomyopathy may seek abortions because they are more likely to die than women without this condition and, without an abortion, may suffer long-term health consequences that could lead to death later in the pregnancy or even long after labor and delivery. Such risks could be avoided or mitigated through termination of the pregnancy.

11. Some pregnant patients may require abortions as a result of high-risk health conditions unrelated to pregnancy, such as cancer treatments, which could put the pregnant woman's health and even life at risk if forced to carry to term.

12. Before Attorney General Labrador's letter, my care for pregnant patients would include options counseling, which involves an open-ended conversation with the patient that would cover giving birth, adoption, and abortion. If the patient said they were considering terminating the pregnancy, I would provide details about their different abortion options and discuss with them

[1] *See* PREGNANCY CHOICES: RAISING THE BABY, ADOPTION, AND ABORTION, https://www.acog.org/womens-health/faqs/pregnancy-choices-raising-the-baby-adoption-and-abortion (last visited April 5, 2023).

which one made the most sense for their situations. I would also explain that, under Idaho law, abortion services are unavailable in Idaho clinics and hospitals. I would provide them with information about where abortion services remain legal and advise them on their out-of-state options for abortion care. Depending on where patients were in their decision-making process, I might have several conversations with them over multiple days.

13. When requested to, or when medically advisable, I would provide an out-of-state referral for an abortion provider outside of Idaho. In some instances, this would involve speaking not only to the patient (to tell them about the care that I am unable to provide and how to access it) but also to out-of-state providers to help facilitate continuity of care and provide medically pertinent information to the receiving physician. For instance, if a patient presented with a medically complex pregnancy—such as a severe autoimmune disorder or a heart condition— and needed abortion care, I would typically make phone calls to abortion providers out-of-state in order to communicate the patient's relevant medical history and clinical presentation. Similarly, some patients have complex mental health or social histories, which make it necessary to communicate with providers out of state to ensure that patients receive medical care that is tailored to their specific needs.

Impact of the Attorney General's Letter on My Practice

14. Having reviewed Attorney General Labrador's letter, I understand that, from now on, if I were to have conversations with patients concerning the availability of abortion services outside of Idaho, or if I were to recommend or make a referral to an out-of-state abortion provider or speak to that provider to discuss pertinent details of a patient's history or clinical status to assist the provision of safe care, my professional license could be suspended and/or revoked.

15. I further fear that, due to the conclusions articulated in the Attorney General's letter, I could be subject to prosecution for providing abortion services or information related to abortion care in Oregon through my anticipated future work with Planned Parenthood Columbia Willamette, even though such care—provided pursuant to my Oregon medical license—is perfectly legal in Oregon. In light of the disruption to my livelihood and liberty that such adverse licensure action or prosecution would entail, I am deeply concerned about my ability to provide care and information both within and outside of Idaho absent a court order blocking the enforcement of this harmful interpretation of Idaho law.

16. I understand that being charged with a crime is not the same thing as being convicted, and being brought before the medical licensing board is not necessarily the same thing as having one's license suspended or revoked. But I cannot afford to jeopardize my freedom or my ability to practice medicine in the face of the Attorney General's threats. Consequently, I will not be able to provide necessary information to these patients or adhere to the standard of care in medicine that I was trained to follow (which requires physicians provide a referral when they are unable to provide the needed services) because doing so could potentially cause me to permanently lose my livelihood and prevent me from ever practicing medicine again.

17. As a result of the Attorney General's letter, therefore, when my patients require abortions, I am now forced to tell them that I am unable to help them and that I cannot say anything about their abortion options in other states, even though that care is lawful in those states.

18. This letter therefore has a very strong chilling effect on my ability to speak with, counsel, and care for my patients, which is contrary to my ethical obligation to care for my patients and to provide them with information about all appropriate medical options. It is also contrary to the standard of care in medicine that I, and all other physicians, are taught.

Serious Harm to Patients

19. This government-mandated silence about abortion will have devastating effects for my patients, who will likely suffer serious mental and physical health consequences if they cannot receive that care. It will also negatively impact me as a provider because I am being prevented from adequately caring for my patients.

20. As a physician, my job is to get my patients the care they need. That may mean providing the care myself, or it may mean ensuring that the patient has access to information, resources, and referrals so they can obtain care that I am unable to provide. But it is untenable for a physician to censor herself and refuse to provide information that a patient needs—it is a breach of my basic duties as a healthcare provider.

21. Such state-mandated censorship will have disastrous impacts on my patients. It will delay their access to safe care and in some cases prevent them from accessing that care altogether.

22. Patients who are unable to obtain information on out-of-state abortion options in time will be forced to carry an unwanted pregnancy to term. This may make it more difficult to bring themselves and their families out of poverty.[2] Persons who wanted, but could not access, an abortion are more likely to be marginally employed, unemployed, or enrolled in public safety net programs compared to those who obtained an abortion.[3]

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[2] Upadhyay et al., *The Effect of Abortion on Having and Achieving Aspirational One-Year Plans*, 15 BMC Women's Health 102 (2015); Foster et al., *Effects of Carrying an Unwanted Pregnancy to Term on Women's Existing Children*, 205 J. Pediatr. 183 (2019); Foster et al., *Comparison of Health, Development, Maternal Bonding, and Poverty Among Children Born After Denial of Abortion vs After Pregnancies Subsequent to an Abortion*, 172 JAMA Pediatr. 1053 (2018).

[3] *See* Foster et al., *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United State*, 108 Am. J. of Pub. Health 407, 409-13 (2018).

23. And in many cases, those who are victims of partner violence will face increased difficulty escaping that relationship because of new financial, emotional, and legal ties with that partner.[4]

24. Stifling access to information on abortions will also disproportionately affect persons of color and indigenous individuals in Idaho who already struggle with accessing adequate health care.[5] To take just one example, many of my patients were born in other countries and do not have lawful immigration status in the United States. Many of them also do not speak fluent English. For these patients, it is absolutely essential that their health care providers be able to speak openly about their options and to provide them information about and referrals to abortion providers out of state when they request that care. I fear that, if one of these patients were unable to receive information about their options concerning abortion from their trusted medical provider, they would not have anywhere else to turn.

25. There are also medical circumstances when a person's health or life will be placed at risk if they are unable to access timely out-of-state abortion care with the information and assistance that I provided until the Attorney General deemed it unlawful. For example, I know that when I have patients seeking abortions who are past a certain gestational age or who have underlying medical conditions that complicate treatment, there are certain out-of-state providers who are able to provide the care they need and others who are not. For example, until the Attorney General issued his letter, I could tell a patient who was 20 weeks pregnant and with a medically complicated pregnancy that her best out-of-state option for abortion care was in Portland or Seattle,

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4 *See* Roberts et al., *Risk of Violence from the Man Involved in the Pregnancy after Receiving or Being Denied an Abortion*, 12 BMC Med. 144 (2014).

5 Marley, *Segregation, Reservations, and American Indian Health*, 33:2 Wicazo Sa Rev. 49, 51 (Fall 2018), https://doi.org/10.5749/wicazosareview.33.2.0049.

because many other hospitals and clinics cannot provide appropriate care for such patients. Moreover, I could—and did—correspond with the care team there to ensure that they were well-positioned to give the patient the care she needed. But now that I am muzzled by the Attorney General's letter, how is my patient supposed to know hospitals are best suited to provide the care she needs?

26. The Attorney General's censorship forces me to act in a manner that is contrary to my medical training, denies my patients access to safe care that I am trained to provide, impedes my right to speak to and counsel my patients, and will greatly harm many Idahoans.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 4, 2023, in McCall, Idaho.

Caitlin Gustafson MD

Caitlin Gustafson, M.D.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO
SOUTHERN DIVISION

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAII, ALASKA, INDIANA, KENTUCKY, on behalf of itself, its staff, physicians and patients, **CAITLIN GUSTAFSON, M.D.**, on behalf of herself and her patients, and **DARIN L. WEYHRICH, M.D.**, on behalf of himself and his patients,

Plaintiffs,

v.

RAÚL LABRADOR, in his official capacity as Attorney General of the State of Idaho; **MEMBERS OF THE IDAHO STATE BOARD OF MEDICINE** and **IDAHO STATE BOARD OF NURSING**, in their official capacities, **COUNTY PROSECUTING ATTORNEYS**, in their official capacities,

Defendants.

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** Pro hac vice applications forthcoming*

DECLARATION OF DARIN L. WEYHRICH, M.D.

I, Darin L. Weyhrich, M.D., hereby declare as follows:

1. I am over the age of eighteen. I make this declaration based on personal knowledge of the matters stated herein and on information known or reasonably available to my organization. If called to do so, I am competent to testify as to the matters contained herein.

Personal Background

2. I am a physician licensed to practice medicine in the State of Idaho since 2002 and have been a practicing doctor in Idaho for over two decades. I have been board-certified in obstetrics and gynecology ("OB/GYN") since 2005.

3. My practice is based in Boise, Idaho, where I provide comprehensive women's healthcare to patients, including practicing primary care, obstetrics, and gynecology.

4. I submit this declaration in support of Plaintiffs' Motion for a Temporary Restraining Order and/or Preliminary Injunctive Relief. I have read the letter from Attorney General Labrador, including his statement that "Idaho law prohibits an Idaho medical provider from . . . referring a woman across state lines to access abortion services." Compl. Ex. 1 at 2.

5. I have also read Attorney General Labrador's statement that "Idaho law requires the suspension of a health care professional's license when he or she" refers a woman for out-of-state abortion services. *Id*.

6. Absent relief from this Court, the Attorney General's announced interpretation of Idaho's laws will bar me and other physicians from providing information to patients about the availability of safe, legal abortion care in other states, including referrals for such care. And that prohibition would silence me and other physicians on the topic of abortion alone—when I and other providers talk to patients about any other form of healthcare, be it colonoscopies or cancer

treatments or prenatal care (including by providing information and referrals for such healthcare out of state), we do so without fear of punishment. This one-sided restriction on the topic of abortion harms me and my patients, preventing patients from getting information about necessary—and potentially life-saving—care from their chosen healthcare provider.

7. The facts and opinions included here are based on my education, training, practical experience, information, and personal knowledge I have obtained as an OB/GYN; my attendance at professional conferences; review of relevant medical literature; and conversations with other medical professionals.

Practices Before Attorney General Labrador's Letter

8. Until the Supreme Court decided *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), I provided both medication and surgical abortions in Idaho consistent with the state's laws. After state laws banning abortion went into effect in Idaho, I stopped providing abortions to patients.

9. Although I am no longer able to provide abortions in Idaho, I continue to have pregnant patients who would choose to have an abortion for economic, family, or personal reasons, to protect their health, or because of fetal anomalies.

10. For example, some pregnant patients may require abortions because they have high-risk diabetes, are hypertensive, or have received a kidney transplant and therefore will face serious health risks or even death if they carry a pregnancy to term. Pregnancy increases insulin resistance for those with diabetes, and those with hypertensive disorders are at a much higher risk of developing pre-eclampsia, which can be a life-threatening condition.

11. I also have patients who have expressed to me that they would seek an abortion if their prenatal screening, provided at eight to nine weeks of pregnancy, shows abnormal results or

certain serious genetic conditions. Since abortion became illegal in Idaho, patients who are considering undergoing such screening have asked whether I could refer them out of state for an abortion if the prenatal screening shows severe fetal anomalies.

12. Before Attorney General Labrador's letter, I advised these patients that, if they needed me to do so, I could recommend providers who perform abortion services in states where abortion is legal. In the months since abortion became illegal in Idaho, I have not had a patient who actually needed an out-of-state recommendation for an abortion provider, but my typical practice in that situation would be to discuss with patients seeking abortions their options for abortion care in other states and to recommend or refer them to abortion providers in other states.

13. Should it be necessary, I would also assist patients by calling colleagues with whom I am familiar in other states, if appropriate to facilitate continuity of care.

Current Practices

14. In light of Attorney General Labrador's letter, I understand that I could face serious penalties—namely the suspension and/or revocation of my professional license—if I were to recommend out-of-state abortion providers to patients or even to simply talk with them about the availability of abortion services outside of Idaho. In light of the disruption to my livelihood that such adverse licensure action would entail, I am presently not able to discuss the availability of abortion services in other states or recommend abortion providers out of state, nor will I be able to do so absent a court order blocking the enforcement of this harmful interpretation of Idaho law.

15. I fear that, due to the Attorney General's letter, I would be subject to disciplinary action by the State Board of Medicine if I were to make statements recommending that patients seek care with out-of-state providers. Even if I were to prevail in such a proceeding, it would take time, money, and emotional energy to mount a defense, and I cannot afford to jeopardize my

livelihood in such a manner in the face of these threats. Consequently, I will not be able to provide necessary information to these patients because doing so could potentially cause me to permanently lose my livelihood and prevent me from ever practicing medicine again.

16. Therefore, if I have patients who require abortions currently or in the future, I will be forced to tell those patients that I am unable to help them and that I cannot say anything about their abortion options in other states even though that care is lawful in those states.

17. So much as explaining the availability of abortions in other states or telling my patients a phone number for an out-of-state abortion provider appears to qualify as illegal conduct under the Attorney General's letter, and I cannot risk breaking the law or losing my medical license if the law indeed applies to that conduct, as his interpretation of the statute suggests.

18. This letter therefore has a very strong chilling effect on my ability to speak with, counsel, and care for my patients.

19. This government-mandated silence is deeply troubling to me and contrary to my ethical obligation to care for my patients and provide them information about all appropriate medical options. All the more troubling is the fact that the government has singled out one component of healthcare—pregnancy-related information and referrals—and has censored speech about one facet of this care: abortion. I can provide patients with information about where to get prenatal care out-of-state and make referrals for such care. But when it comes to abortion, the government would penalize my speech. In effect, the government is distorting my conversations with patients, allowing me to speak on some topics and silencing me on others.

Serious Harm to Patients

20. My inability to counsel my patients about obtaining abortions in other states will have devastating effects for my patients, who will likely suffer serious health consequences if they

cannot receive that care, and it will also negatively impact me as a provider because I cannot adequately care for my patients.

21. If they cannot discuss with me the options for abortion care in other states, some of my patients will not know how to obtain an abortion in another state, or they will choose not to do so because they are not being referred to a doctor that is trusted by their primary treating physician.

22. Neither the patient nor I can be confident of the quality of care when I am not able to provide my professional opinion or draw on my professional experience about the right provider for a certain patient.

23. Pregnant patients, like any other medical patient, have an inherent right to make decisions about their bodies and medical treatment in coordination with their doctors.

24. These patients have a right to know all options for care in order to make an informed choice about their preferred course of treatment. By limiting my ability to counsel patients, the Attorney General's letter limits patients' abilities to understand medical risks and options for addressing those risks to best protect their health and well-being.

25. There are also medical circumstances when a person's life will be placed at risk if they are unable to terminate their pregnancies.

26. A patient may also face serious health consequences if they require emergency care for a non-viable pregnancy and that care is delayed because they are not able to connect with out-of-state providers as quickly, absent my referral or guidance.

27. For example, for a patient with an 18-week pregnancy whose membranes are ruptured, there is no chance of survival for the fetus and a great risk of potentially deadly infection for the pregnant patient. In these circumstances, if there is still fetal cardiac activity, I would have to wait for the pregnant patient to get so sick that the patient is at risk of imminent death before

acting. Previously, before the letter from Attorney General Labrador, I could work with local hospitals and physicians to arrange for transporting that person out of state to receive appropriate healthcare; however, I do not believe that would be possible in light of the Attorney General's letter indicating that providing "aid or support" for an abortion—including an out-of-state abortion—is a violation of Idaho's abortion ban. I am aware of colleagues who have experienced similar situations in their practices.

28. Waiting until a pregnant person's death is imminent to provide any assistance is clearly a serious detriment to the health of the patient, and it would not be surprising if care by that point came too late to avoid serious health consequences or death.

29. This law is contrary to my medical training, denies my patients access to safe care, and chills my right to speak to and counsel my patients. It will greatly harm many Idahoans.

Pursuant to 28 USC § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 4, 2023, in Boise, Idaho.

Darin L. Weyhrich, M.D.