No. 23-35518

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAII, ALASKA, ET AL.,
Plaintiffs-Appellees,

v.

RAÚL LABRADOR, ET AL.,
Defendant-Appellant,

On Appeal from the United States District Court
for the District of Idaho

No. 1:23-cv-00142-BLW
The Honorable B. Lynn Winmill

EXCERPTS OF RECORD INDEX VOLUME

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

PLANNED PARENTHOOD GREATER NORTHWEST, 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-00142-BLW

MEMORANDUM DECISION AND ORDER

INTRODUCTION

This case involves a challenge to Attorney General Raúl Labrador's interpretation of Idaho's criminal abortion statute, Idaho Code § 18-622. Earlier

this year, Attorney General Labrador drafted a letter interpreting this sentence of Section 18-622: "The professional license of any health care professional who . . . ***assists*** in performing or attempting to perform an abortion . . . shall be suspended . . . ." That letter interprets the "assisting" language to include providing information about or referring patients to legal out-of-state abortion services. Plaintiffs Planned Parenthood Greater Northwest, Caitlin Gustafson, M.D., and Darin L. Weyhrich, M.D. (collectively the "Medical Providers"), seek to enjoin the Attorney General, Members of the Idaho State Board of Medicine and Board of Nursing,[1] and the Prosecuting Attorneys for every Idaho county from bringing criminal cases and licensing actions based on that statutory interpretation. *See Plf.s' Motion*, Dkt. 2. Following the Medical Providers' request for a preliminary injunction, Attorney General Labrador and certain county prosecutors (collectively "the State") filed a competing motion to dismiss (Dkt. 41), claiming that various justiciability doctrines demand that the complaint be dismissed.[2]

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[1] The Idaho State Board of Medicine and Board of Nursing have yet to appear in this matter. Thus, neither party has lodged an opposition to the Medical Providers' request for a preliminary injunction or joined in the State's motion to dismiss.

[2] Those prosecutors include: Jan Bennetts, Ada County Prosecutor; Chris Boyd, Adams County Prosecutor; Alex Gross, Boise County Prosecutor; Andrakay Pluid, Boundary County Prosecutor; Jim Thomas, Camas County Prosecutor; McCord Larsen, Cassia County Prosecutor; (Continued)

For the reasons explained below, the Court will: (1) grant the Medical Providers' motion for a preliminary injunction as it pertains to Attorney General Labrador; (2) deny the motion with respect to the members of the Idaho State Board of Medicine and Board of Nursing; and (3) deny the State's motion to dismiss.

BACKGROUND

A. Procedural and Historic Background

Overturning nearly fifty years of precedent, the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), withdrew a federally protected right, returning the regulation of abortion to the province of the individual states. In the following summer, Idaho's criminal abortion statute first went into effect. That law provides that "every person who performs or attempts to perform an abortion . . . commits the crime of criminal

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Trevor Misseldine, Gooding County Prosecutor; Mark Taylor, Jefferson County Prosecutor; Rob Wood, Madison County Prosecutor; Lance Stevenson, Minidoka County Prosecutor; Cody Brower, Oneida County Prosecutor; Benjamin Allen, Shoshone County Prosecutor; Grant Loebs, Twin Falls County Prosecutor; and Brian Naugle, Valley County Prosecutor. *See* Dkt. 41. However, since the motion was filed, most of the county prosecutors have joined in the joint motion and opposition to the preliminary injunction. *See* Dkts. 108, 113, and 130.

abortion." Idaho Code § 18-622.[3]

Criminal abortion is a felony punishable by at least two, and up to five, years' imprisonment. *Id*. § 18-622(2). 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*. In such an event, the provider's license must be suspended for six months upon the first offense, and permanently revoked upon the second. *Id*. Unsurprisingly, the interpretation and potential prosecution of Idaho's criminal abortion statute is a polarizing and often discussed topic throughout the state.

On March 27, 2023, Attorney General Labrador sent a letter to Idaho Representative Brent Crane responding to his request for an opinion on the scope of Idaho's criminal abortion statute and whether that law "prohibit[ed] referring women across state lines to obtain abortion services." *See Crane Letter*, Dkt. 1-1. In relevant part, the Attorney General's letter states:

> Idaho law prohibits an Idaho medical provider from either referring a woman across state lines to access abortion services or prescribing abortion pills for the woman to pick up across state lines. Idaho law

[3] At the time this lawsuit was instigated, a prior version of Idaho's criminal abortion statute was in effect. *See* I.C. § 18-622 (eff. July 1, 2023). However, as discussed below, the relevant language in the prior version of the statute is unchanged.

> requires the suspension of a health care professional's license when he or she "*assists* in performing or attempting to perform an abortion." Idaho Code § 18-622(2) (emphasis added). The plain meaning of assist is to give support or aid. An Idaho health care professional who refers a woman across state lines to an abortion provider or who prescribes abortion pills for the woman across state lines has given support or aid to the woman in performing or attempting to perform an abortion and has thus violated the statute.

Id. at 2 (emphasis original). Although the State claims the letter was intended to be private, it was soon after disseminated to Stanton International—a pro-life organization—which posted the letter on its public website and used it in fundraising efforts. *See Def.s' Br.* at 3-4; Dkt. 41-1; *see also Idaho Attorney General Issues Legal Analysis Affirming the Prohibition of Abortion Pills*, Stanton Int'l, https://stantoninternational.org/chemicalabortion/ (last visited June 24, 2023).

On April 5, 2023, the Medical Providers sued. In their complaint, the Medical Providers raise First Amendment, Fourth Amendment, and dormant commerce clause challenges to the interpretation laid out in the Crane Letter. *See Compl*, Dkt. 1. Despite alleging multiple constitutional violations, the Medical Providers seek uniform relief: a finding that Attorney General Labrador's interpretation is unconstitutional because it extends the enforcement of Idaho Code § 18-622 to legal conduct outside of Idaho's borders. *See id*. at 18. In conjunction with the complaint, the Medical Providers filed a motion for a temporary restraining order and preliminary injunction to bar any prosecution under the Crane

Letter interpretation.[4] *See Plf.s' Motion*, Dkt. 2.

Following the Medical Providers' motion, the Court scheduled a status conference for April 7, 2023, to discuss a scheduling conflict with the parties and to determine the necessity for an immediate emergency hearing.[5] In the hours preceding the scheduling conference, the State provided the parties and this Court with a new letter from Attorney General Labrador titled "Withdrawal of the March 27 Letter." *See Withdrawal Letter*, Dkt. 42-2. In this letter, the Attorney General explained that "[d]ue to subsequent events in the legislative process and my determination that your request was not one I was required to provide under Idaho law, [the Crane Letter] analysis is now void." *Id.* at 1. The Withdrawal Letter was signed and dated that same day. *Id.*

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[4] Although the Medical Providers broadly seek to enjoin "the enforcement of Idaho Code § 18-622(2) as interpreted by Attorney General Labrador[,]" *Plf.s' Motion* at 2, Dkt. 2, it appears that the actual relief sought is to enjoin the enforcement of Idaho's criminal abortion statute in a way that would prohibit doctors from providing information or referring women to legal out-of-state abortion services. *See also Compl.* at 18, Dkt. 1. While the Medical Providers provided ample argument regarding protected speech, its discussion on any legal activity outside of the state is sparse. Without sufficient briefing, the Court will focus on the interpretation's prohibition of referring women to legal out-of-state abortion services or providing information about said services.

[5] Based on the Court's schedule, it could not hold a hearing on the Medical Providers' motion until April 24, 2023, at the earliest. The Court gave the Medical Providers the option to have the motion heard by a visiting judge or to postpone a hearing until the earliest available date on the Court's calendar.

At the status conference, the Medical Providers stated that despite the withdrawal of the Crane Letter, they remained concerned about the threat of enforcement of Idaho's criminal abortion laws under that interpretation and maintained that they are still forced to withhold vital information and recommendations about legal abortion services. *See Gibron Suppl. Decl.* ¶ 8-9, Dkt. 35-2; *Gustafson Suppl. Decl.* ¶ 6-9, Dkt. 35-3; *Weyhrich Suppl. Decl.* ¶ 6-7, Dkt. 35-4. While the Medical Providers opted to forgo an emergency hearing, the Court ultimately set an expedited briefing schedule for the preliminary injunction, which allowed the State an opportunity to file a motion to dismiss in conjunction with its response.[6] *See* Dkt. 39.

On April 14, 2023, the State filed a combined response and motion to dismiss under Federal Rule of Civil Procedure 12(b)(1). *See Def.s' Br.*, Dkt. 41-1. In its opposition and motion to dismiss, the State elected not to address the constitutionality of the Crane Letter interpretation. *Id*. Instead, the State focused entirely on this Court's Article III power, maintaining that the case should be dismissed under all three justiciability doctrines—standing, ripeness, and

[6] During the status conference, counsel for Attorney General Labrador indicated that a motion to dismiss may be forthcoming. Given the overlap in the "likelihood of success" analysis and a potential motion to dismiss, the Court found that hearing both motions together would promote judicial economy.

mootness—and that Attorney General Labrador is not a proper defendant because he is entitled to sovereign immunity. *Id*.

On April 20, 2023, the parties' pending motions were fully briefed in accordance with the expedited schedule set by the Court. *See* Dkt. 85. However, on April 21, 2023, the Friday before the oral argument was scheduled, St. Luke's Health System, Ltd. ("St. Luke's") and the States of Washington, Arizona, California, Colorado, Delaware, Hawai'i, Illinois, Maine, Minnesota, Nevada, New Jersey, New York, Oregon, Rhode Island, and the District of Columbia (collectively the "Amici States") requested leave to file Amici Curiae briefs in support of the Medical Providers' motion for a preliminary injunction. *See* Dkts. 86 and 94. The Amici States also requested to be admitted pro hac vice without the designation of local counsel, as they did not seek to present an argument at the hearing. *See* Dkt. 93. The State opposed allowing both Amici to file their memoranda and the Amici States' request to have the local counsel requirement waived. *See* Dkts. 88, 96, and 97.

On April 24, 2023, the Court heard oral argument on the motion for a preliminary injunction, motion to dismiss, and addressed the Amicis' submitted memoranda. During the hearing, the Court granted St. Luke's and the Amici States' motions to file; however, the Court conditioned the Amici States pro hac

admission, and consideration of their memoranda, on obtaining local counsel before the following Thursday.[7] The Court also provided the State with additional time to file an opposition to the Amici States' memorandum due to the limited opportunity the State had to respond before the hearing.

Three days later, in addition to its opposition, the State asked the Court for leave to file supplemental briefing to address two specific issues. *See* Dkt. 106. First, the State wanted to address the impact of the Withdrawal Letter, which interpreted Attorney General Labrador's authority to prosecute violations of the criminal abortion statute. *Id.* at 3. Second, apparently regretting the choice to litigate the case "solely on the ground that no Article III controversy exists[,]" the State sought "the opportunity to brief the extent to which Plaintiffs' intended conduct here—counseling and referrals for out-of-state abortions—constitutes protected speech under the First Amendment." *Id.*

On May 2, 2023, the Court denied the State's motion for leave to file supplemental briefing reasoning that both issues could have been addressed in accordance with the original briefing schedule. *See May 2, 2023 MDO* at 2, Dkt. 114. This Court further explained that "Plaintiffs have waited several weeks for

[7] The Amici States successfully obtained local counsel and were granted pro hac admission on April 27, 2023. *See* Dkt. 102.

urgent relief—due in part to the Court's calendar—and the Court will not impose further delay for matters that could and should have been brought sooner." *Id*. at 3.

Despite the Court rejecting the submission of supplemental briefing, the State proceeded to file three separate notices of supplemental declarations regarding the Court's subject-matter jurisdiction. *See* Dkts. 116, 117, and 121. In each notice, the State provided identical declarations from various county prosecutors claiming that they were submitted in "connection with the Court's 'independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party.'" *Id*. (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006)). The Medical Providers soon after filed a motion to strike the supplemental declarations, claiming that they were non-compliant with the local rules, untimely, and irrelevant. *See* Dkt. 122.

Nonetheless, the State continued to present its defense in the following weeks. First, the Attorney General's Office filed a notice of appearance on behalf of another group of county prosecutors.[8] *See* Dkts. 123-25. Then, on March 9, 2023, that same group of prosecutors filed a separate motion to dismiss and

[8] Those individual county prosecutors included Adam McKenzie, Bear Lake County; Bryan Taylor, Canyon County; S. Douglas Wood, Caribou County Prosecutor; Justin Coleman, Nez Perce County Prosecutor.

response to the Medical Providers' preliminary injunction.[9] *See* Dkts. 127 and 128. The Attorney General's office then filed additional notices of appearance for various county prosecutors, additional declarations, and joinder notices.

All totaled, the State provided thirty-two identical declarations stating that, among other things, the individual prosecutors did not receive the Crane Letter until this litigation, did not regard the letter as guidance or a directive, and that none of the Medical Providers have a facility in their respective county. *See, e.g.*, *Marshall Decl.* ¶¶ 2-4, 10, Dkt. 116-1; *Dunham Decl.* ¶¶ 2-4, 10, Dkt. 116-2; *Allen Decl.* ¶¶ 2-4, 10, Dkt. 116-3. Additionally, out of the 44 county prosecutors, all but three have joined in the March 9, 2023 motion to dismiss, *see* Dkts. 131, 135, and 145, and the Attorney General's Office now represents all but two of the county prosecutors. *See* Dkts. 36, 89, 103, 110, 118, 123, 134, and 142.

With that complex procedural background set out, the Court will now address The Medical Providers' motion to strike (Dkt. 122), and the competing motions for a preliminary injunction (Dkt. 2) and to dismiss (Dkt. 41). However, the Court will separately issue a ruling on the prosecutors' motion to dismiss (Dkt. 127), which will also address the various declarations filed by the State.

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[9] While those prosecutors filed a separate motion to dismiss and response, both filings' supporting memorandums were identical.

LEGAL STANDARD

The Medical Providers seek a preliminary injunction to enjoin Attorney General Labrador, the Idaho State Board of Medicine and Board of Nursing, and the Prosecuting Attorneys for each of Idaho's counties from enforcing Idaho Code § 18-622(2) under the interpretation presented in the Crane Letter. "A preliminary injunction is 'an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Fraihat v. United States Immigration & Customs Enf't*, 16 F.4th 613, 635 (9th Cir. 2021) (citation omitted).

To obtain relief, the Medical Providers must establish that: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *Winter v. NRDC*, 555 U.S. 7, 24 (2008). As to the last two factors, "[w]here the government is a party to a case in which a preliminary injunction is sought, the balance of the equities and public interest factors merge." *Padilla v. Immigration & Customs Enf't*, 953 F.3d 1134, 1141 (9th Cir. 2020).

"A district court has considerable discretion in granting injunctive relief and in tailoring its injunctive relief." *United States v. AMC Entm't, Inc.*, 549 F.3d 760,

768 (9th Cir. 2008). Generally, a court must ensure that the relief is "tailored to eliminate only the specific harm alleged" and not "overbroad." *E.&J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1297 (9th Cir. 1992). "[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

Conversely, the State seeks dismissal of this action under Federal Rules of Civil Procedure 12(b)(1). *See Def.s' Motion to Dismiss*, Dkt. 41. Rule 12(b)(1) provides that an action may be dismissed for lack of subject matter jurisdiction. Federal courts are of "limited jurisdiction[,]" and the plaintiff bears the burden to prove the requisite federal subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. of Am.*, 511 U.S. 375, 377 (1994). A challenge pursuant to Rule 12(b)(1) may be facial or factual. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). A facial 12(b)(1) motion involves an inquiry confined to the allegations in the complaint, whereas a factual 12(b)(1) motion permits the court to look beyond the complaint to extrinsic evidence. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). Where both jurisdictional and merits grounds are presented in a motion, the Court looks to the jurisdictional issues first. *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007).

The State's attack here is factual, as it relies on extrinsic evidence (i.e., the

Withdrawal Letter and supporting declarations not in the pleadings) and does not assert a lack of subject-matter jurisdiction based solely on the pleadings. Thus, the Court may look beyond the complaint without converting the motion into one for summary judgment and need not presume the truthfulness of the allegations in the complaint. *White*, 227 F.3d at 1242.

ANALYSIS

A. Post-Hearing Filings

As a threshold matter, the Court will address the various filings submitted after oral argument, including the Medical Providers' motion to strike, the various declarations from county prosecuting attorneys, the latest motion to dismiss, and the opposition to the motion for preliminary injunction. *See* Dkts. 116, 117, 121, 122, 127, and 128. For the reasons below, the Court will deny the Medical Providers' motion to strike but will refrain from considering the declarations until it renders a decision on the second motion to dismiss (Dkt. 127).

As noted, just days after the Court denied the State's request for leave to file supplemental briefing, the State began filing declarations from various county prosecutors without reference or connection to any pending motion. *See* Dkts. 116, 117, 121, 132, 133, 135, 139, and 146. In all, the State provided twenty-four "independent" declarations in connection with their jurisdictional arguments, *Id.*,

which the Medical Providers seek to strike.[10] *See* Dkt. 122.

To support their motion to strike, the Medical Providers argue that the State failed to seek leave to file the declarations and that they do not comply with the local rules, were untimely, and are irrelevant to the pending motions. *See Plf.s' Br.* at 2, Dkt. 122. In response, the State argues that no leave was required nor were the declarations untimely because they "relate to a matter of mandatory, rather than discretionary, consideration by the Court: the Court's subject matter jurisdiction." *Def.s' Response* at 2, Dkt 126.

While the Court generally agrees with the Medical Providers and would usually strike such untimely and non-compliant filings, in this instance, it concurs with the State. As the State accurately notes, courts have an "independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party[,]" *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006) (citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999)), and subject-matter jurisdiction "can never be forfeited or waived." *Id.* (quoting *United States v. Cotton*, 535 U.S. 625, 630 (2002)). After reviewing the identical

[10] Although the Medical Providers' motion to strike only pertains to the declarations filed before they filed their motion (Dkts. 116, 117, and 121), the Court assumes the motion is pertinent to all similarly filed declarations.

declarations, it appears that they may raise a factual dispute regarding the Court's jurisdiction over the various county prosecutors. Thus, it will deny the Medical Providers' motion to strike.

Nevertheless, the Court will refrain from considering those declarations until it issues a decision addressing the later filed motion to dismiss (Dkt. 127). A separate motion is a better means of addressing all the motions related to the individual county prosecutors because even though some prosecutors were listed on the first motion to dismiss and response, aside from a limited argument regarding service, the State made no attempt to differentiate between the Attorney General and the individual prosecutors.[11] More importantly, outside of a single generally applicable sentence in its reply brief, the State's arguments and exhibits are almost entirely focused on Attorney General Labrador. *See Def.s' Reply* at 5, Dkt. 85.

In fact, it was not until a group of county prosecutors filed a separate motion to dismiss on March 9, 2023—long after oral argument was held—that the State presented any argument focused on the county prosecutors. As a result, the Medical Providers could not substantively respond to the arguments and

[11] As discussed below, the State has since waived any such service argument.

declarations regarding the individual prosecutors until that juncture. *See* Dkts. 127 and 128. As mentioned, since that second motion to dismiss was filed, all but three county prosecutors have joined in the motion.[12] By issuing a separate decision, the Court will be able to adequately address all the individual county prosecutors with the benefit of a more developed record to resolve the factual issues around jurisdiction. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (noting that where there are both jurisdictional and merits grounds, courts should look to the jurisdictional issues first); *see also LA All. for Hum. Rts. v. Cnty. of Los Angeles*, 14 F.4th 947, 956 (9th Cir. 2021) ("We must assure ourselves that Plaintiffs have standing and that jurisdiction otherwise exists before we review the merits of the district court's preliminary injunction decision[.]").

Accordingly, the Court will defer making any determinations on the individual county prosecutors. This decision will address only Attorney General Labrador.

B. Defendant-Specific Jurisdictional Challenges

[12] Of the three country prosecutors that have not joined in the second motion to dismiss, Justin Oleson, Custer County Prosecutor, and Richard Roats, Lincoln County Prosecutor, are not represented by the Attorney General's office, nor have they joined the State's original motion to dismiss.

The Court will begin with the State's defendant-specific jurisdictional challenges, which it claims "frustrate a complete adjudication of the Plaintiff's claims and show that a preliminary injunction would be both unlawful and ill-advised." *Def.s' Br.* at 6-7, Dkt. 41-1. Specifically, Defendants argue that the Medical Providers' claims against Attorney General Labrador are barred by the Eleventh Amendment and suffer from the lack of proper service over several country prosecutors. *See id*.

1. Eleventh Amendment sovereign immunity

The State first argues that the Medical Providers' suit against Attorney General Labrador is barred by sovereign immunity under the Eleventh Amendment "because he has no legal authority to institute the prosecutions that [the Medical Providers] claim to fear." *Id*. at 7. That argument is foreclosed under Ninth Circuit precedent.

The Eleventh Amendment has consistently been "construed to prohibit federal courts from entertaining suits brought by a state citizen against the state or its instrumentality in the absence of consent." *Mecinas v. Hobbs*, 30 F.4th 890, 903 (9th Cir. 2022) (quoting *Culinary Workers Union, Loc. 226 v. Del Papa*, 200 F.3d 614, 619 (9th Cir. 1999)). But as both parties acknowledge, *Ex parte Young*, 209 U.S. 123 (1908) creates an exception for actions seeking "injunctive relief against

state officers in their official capacities for their alleged violations of federal law so long as the state officer has some connection with enforcement of the act." *Id*. (quoting *Coal. To Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1134 (9th Cir. 2012)) (internal citations omitted). The Ninth Circuit has recently explained that the "modest [connection] requirement" under *Ex parte Young* merely demands that the implicated state official have a relevant role that goes beyond "a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision." *Id*. (quoting *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919 (9th Cir. 2004)).

Applying this analysis, the Ninth Circuit has already affirmatively answered whether the *Ex parte Young* exception applies to Attorney General Labrador. *See Wasden* 376 F.3d at 919. In *Planned Parenthood of Idaho, Inc. v. Wasden*, the Ninth Circuit addressed a nearly identical argument that the Attorney General was not a proper defendant under *Ex Parte Young* because, without direct enforcement power, he was immune from suit. 376 F.3d at 919. Relying on the "assistance powers the attorney general expressly retains under revised section 67-1401(7)," the Ninth Circuit squarely rejected this argument. *Id.* at n.7. As the court explained:

> Under Idaho law, the attorney general may "assist" county prosecutors in a "collaborative effort," but may not "assert[ ] dominion and control" over prosecutions against the county prosecutor's wishes. *Newman v. Lance*, 129 Idaho 98, 922 P.2d 395, 399–401 (1996); *see*

> *also* Idaho Code § 67–1401(7). Idaho's governor may also direct the attorney general to assist a local prosecutor. *Id.* § 67–802(7).
>
> However, and determinatively here, unless the county prosecutor objects, "[t]he attorney general may, in his assistance, *do every act* that the county attorney can perform." *Newman*, 922 P.2d at 399 (quoting *State v. Taylor*, 59 Idaho 724, 87 P.2d 454, 457 (1939)) (emphasis added). That is, the attorney general may in effect deputize himself (or be deputized by the governor) to stand in the role of a county prosecutor, and in that role exercise the same power to enforce the statute the prosecutor would have. That power demonstrates the requisite causal connection for standing purposes. An injunction against the attorney general could redress plaintiffs' alleged injuries, just as an injunction against the Ada County prosecutor could. For the same reasons, both defendants are properly named under *Ex parte Young*.

Id. at 919–20.

To avoid this precedent, the State claims—in a single unsupported sentence—that *Wasden* is "no longer good law because it construed a prior version of the attorney general statute and the Supreme Court has now repudiated its past abortion cases, which had 'diluted the strict standard for facial constitutional challenges.'" *Def.s' Br.* at 8, Dkt. 41-1 (quoting *Dobbs*, 142 S. Ct. at 2275); *see also Def.s' Reply* at 3, Dkt. 85. The Court is unpersuaded.

While the State accurately notes that Idaho Code § 67-1401 has undergone amendments since *Wasden*, the assisting language in the statute that the Ninth Circuit relied on remains unchanged. *Compare Id*. ("[w]hen required by the public service, [he is] to repair to any county in the state and assist the prosecuting

attorney thereof in the discharge of duties.") (quoting I.C. § 67-1401(7) (2003)) *with* I.C. § 67-1401(7) (same). Thus, the subsequent changes to the statute have no effect on the reasoning in *Wasden*, nor do they call into question its holding.

Further, the State has failed to explain why *Dobbs* would somehow render the Ninth Circuit's Eleventh Amendment analysis in *Wasden* inapplicable. Nor can it. Under the applicable standard, Ninth Circuit precedent is "effectively overruled" when "the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority." *Miller v. Gammie*, 335 F.3d 889, 890, 893 (9th Cir. 2003) (en banc). "The clearly irreconcilable requirement is a high standard." *Close v. Sotheby's, Inc.*, 894 F.3d 1061, 1073 (9th Cir. 2018) (quotation omitted). "[I]t is not enough for there to be some tension between the intervening higher authority and prior circuit precedent, or for the intervening higher authority to cast doubt on the prior circuit precedent." *Id.* (quotation omitted).

Although the precedential effect is unquestionable, *Dobbs* does not abrogate, or even call into question, *every* aspect of *every* case involving an abortion statute. *See Def.s' B.* at n.4, Dkt. 41-1. This is especially true where, like here, the issue at hand is a general principle that far exceeds the scope of *Dobbs* or even abortion cases generally. That is, the sovereign immunity analysis hinges on a state actor's

connection or ability to enforce a law regardless of the law's subject matter.[13] Notably, *Dobbs* does not even address a sovereign immunity argument. Simply put, the Court has no reason to find that the sovereign immunity analysis in *Wasden* is irreconcilable with the Supreme Court's decision in *Dobbs*.

Accordingly, the Court finds, as the Ninth Circuit did in *Wasden*, that Attorney General Labrador is not entitled to Eleventh Amendment immunity under *Ex parte Young*. *See* 376 F.3d at 919.

2. Service

The State argues that there is no personal jurisdiction over certain prosecutors, claiming that the Medical Providers have "properly served some of the county prosecutors, but for others, [they have] failed to follow the service requirements[.]" *Def.s' Br*. at 10; Dkt. 41-1. The State, however, waived any service arguments. *See Def.s' Reply* at n.1; Dkt 85; Dkt. 138 ("the undersigned County Prosecutor Defendants wish to clarify that they agreed that they would not contest that they were served as of the date reflected on the docket, provided that

[13] Although *Wasden* is an abortion case, the Eleventh Amendment analysis was based on the Attorney General's connection to the enforcement of a criminal statute; the subject matter of the challenged statute did not have any effect on the Court's reasoning. Thus, while *Wasden* is particularly relevant to the case at hand, that is not because the underlying challenges in both cases relate to abortion statutes. Rather it is because both focus on the language of Idaho Code § 67-1401(7) and the application of the "assisting" power of the Attorney General.

Plaintiffs agreed that their deadline to respond to the complaint would be 21 days from April 28, 2023.") Further, as discussed, the Court has already deferred ruling on the individual prosecutors. Therefore, the Court need not address service.

C. Article III Jurisdiction

The State argues that this case exceeds the Court's Article III authority. Although the justiciability concepts are intertwined, the State appears to challenge the Court's jurisdiction under all three requirements: standing, ripeness, and, to some extent, mootness. The Court will address each in turn.

1. Standing

Article III of the United States Constitution limits a federal court's exercise of judicial power to "actual, ongoing cases or controversies." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). As such, suits for declaratory or injunctive relief must present a live controversy justiciable under Article III. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126–27 (2007) (declaratory judgment); *L.A. v. Lyons*, 461 U.S. 95, 102 (1983) (injunctive relief). The doctrine of standing gives meaning to these constitutional limits by "identify[ing] those disputes which are appropriately resolved through the judicial process." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014).

"To establish Article III standing, a plaintiff must show (1) an injury in fact,

(2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision." *Id*. (cleaned up). "Each element of standing 'must be supported with the manner and degree of evidence required at the successive stages of the litigation.'" *Unified Data Servs., LLC v. Fed. Trade Comm'n*, 39 F.4th 1200, 1209 (9th Cir. 2022) (quoting *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011).[14]

First Amendment challenges, like the Medical Providers' pre-enforcement challenge here, "present unique standing considerations" such that "the inquiry tilts dramatically toward a finding of standing."[15] *Tingley v. Ferguson*, 47 F.4th 1055, 1066–67 (9th Cir. 2022) (quoting *Lopez*, 630 F.3d at 781) (internal quotation marks omitted). That is so because "a chilling of the exercise of First Amendment

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[14] In this matter, there is a different standard applied to the two pending motions. In the context of a motion to dismiss, "[w]hen the defendant raises a factual attack, the plaintiff must support her jurisdictional allegations with competent proof, under the same evidentiary standard that governs in the summary judgment context." *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (cleaned up). That is, "[t]he plaintiff bears the burden of proving by a preponderance of the evidence that each of the requirements for subject-matter jurisdiction has been met." *Id.* (citations omitted). "[A]t the preliminary injunction stage, a plaintiff must make a 'clear showing' of his injury in fact." *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010) (citing *Winter v. Natural Resources Def. Council, Inc.*, 555 U.S. 7, 23 (2008)).

[15] Although the Medical Providers raise First Amendment, Fourth Amendment, and dormant commerce-clause challenges, the parties' briefing predominately discusses jurisdiction in the context of the First Amendment and makes no specific arguments based on the individual claims. Additionally, as discussed below, the Medical Providers established a likelihood of success on their First Amendment claim, and the Court need not address the remaining claims. Thus, the Court will only address standing in the context of the First Amendment.

rights is, itself, a constitutionally sufficient injury." *Libertarian Party of L.A. Cnty. v. Bowen*, 709 F.3d 867, 870 (9th Cir. 2013); *see also Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1000 (9th Cir. 2010) ("[W]hen a challenged statute risks chilling the exercise of First Amendment rights, the Supreme Court has dispensed with rigid standing requirements and recognized 'self-censorship' as a harm that can be realized even without an actual prosecution.") (citations and internal quotation marks omitted).

Here, as with many First Amendments challenges, one of the key issues is determining whether there is a genuine threat of prosecution sufficient to establish an injury-in-fact. As the parties correctly note, to "determine whether a threat of enforcement is genuine enough to confer an Article III injury[,]" the Ninth Circuit applies the three-factor *Thomas* test: "(1) whether the plaintiff has a 'concrete plan' to violate the law, (2) whether the enforcement authorities have 'communicated a specific warning or threat to initiate proceedings,' and (3) whether there is a 'history of past prosecution or enforcement.'" *Tingley*, 47 F.4th at 1066-67 (quoting *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc)).

The State has only challenged the injury-in-fact element of standing and, more specifically, whether there is a genuine threat of prosecution. *See Def.s' Br.*

at 12-21, Dkt. 41-1. In particular, the State argues that the Medical Providers cannot establish an injury because the Crane Letter was withdrawn, and even before the letter was withdrawn, they still did not have a cognizable injury. *See id*. Because it would be impossible for the Medical Providers to meet the injury-in-fact requirement without establishing that there is a genuine threat of prosecution under the Crane Letter interpretation, the Court will begin there.

a. The Medical Providers have standing to bring their First Amendment claim against Attorney General Labrador under the Crane Letter interpretation.

Mirroring the three-factor *Thomas* test, the State claims that even before the withdrawal of the Crane Letter—i.e., at the time this lawsuit was filed—the Medical Providers lack a cognizable injury because (1) they have not shown an intention to violate the law, (2) no one had threatened them, and (3) the law's enforcement history does not support an injury. *See Def.s' Br.* at 16-21, Dkt. 41-1. As discussed below, the Court finds that the Crane Letter and its interpretation of Idaho's criminal abortion statute is sufficient to establish standing under the less stringent requirements applied in First Amendment cases.

i. The Medical Providers have already violated the Crane Letter interpretation of I.C. 18-622.

The State first challenges whether the Medical Providers have sufficiently demonstrated an intent to violate Idaho's criminal abortion statute as interpreted by

the Crane Letter. *See Def.s' Br.* at 19, Dkt. 41-1. The State claims that the Medical Providers' nondefinitive statements fail to meet the first *Thomas* element because the complaint does not provide specific details "such as[,] when, to whom, where, or under what circumstances" they intend to violate the law in the future. *Id.* (quoting *Lopez*, 630 F.3d at 787). The State views the first *Thomas* element too narrowly.

As the Medical Providers correctly note, the Ninth Circuit has expressly rejected the proposition that a plaintiff must specify "when, to whom, where, or under what circumstances" he plans to violate a challenged law if a plaintiff has "already violated the law in the past." *Tingley*, 47 F.4th at 1068 (citing *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 836 (9th Cir. 2012)); *see also Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1123 (9th Cir. 2009) (finding that, "although the Appellees cannot control when a patient requesting Plan B will visit their pharmacy—prompting a refusal constituting a violation of the new rules—the Appellees can point to specific past instances when they have refused to sell Plan B or have made the decision not to stock the medication, which are direct violations of the challenged rules[,]" satisfying the concrete plan requirement.).

Like the plaintiffs in *Tingley v. Ferguson* and *Stormans, Inc. v. Selecky*, the Medical Providers "cannot control when a [patient] will come to [them]" seeking

medical advice that presents a set of circumstances warranting a referral or information regarding legal out-of-state abortion resources. *See Tingley*, 47 F.4th at 1068. However, the Medical Providers have sufficiently alleged that they have already provided care that would violate Idaho's abortion statute under the Crane Letter's interpretation. Indeed, the State all but concedes this point. *See Def.s' Br.* at 19-20, Dkt. 41-1.

The State summarizes the declarations supporting the Medical Providers' preliminary injunction as follows:

> A Planned Parenthood executive declares that Idaho Planned Parenthood facilities generally referred women to abortion providers in other states after *Dobbs* but stopped doing this when they learned about the Crane Letter. Dkt. 2-2 ¶¶ 12–14. But the executive does not say that these facilities plan to continue referring women for out-of-state abortions now or at any time in the future or when other providers will refer women for abortions out of state.
>
> Plaintiff Gustafson likewise asserts that she was referring women for out-of-state abortions before the Crane Letter's issuance and has since stopped doing so. *See* Dkt. 2-3 ¶¶ 12–18. But she never declares a specific intention to continue referring women for out-of-state abortions in any specific circumstances. *See generally,* Dkt. 2-3 (Gustafson Decl.).
>
> Plaintiff Weyhrich's declaration is even weaker. He asserts that he has not referred *any* women for out-of-state abortions since *Dobbs* but that it would be his "typical practice" to do so if the situation arose—and if the Crane Letter didn't exist. Dkt. 2-4 ¶¶ 12, 15.

Id. The State thus acknowledges that the Medical Providers previously made

referrals to out-of-state abortion services but have stopped since the Crane Letter. Further, following the Medical Providers' explanation of their past violations in their response, the State elected not to challenge their contentions. *See Def.s' Reply*, Dkt. 85.

The Court finds that Planned Parenthood, Dr. Gustafson, and Dr. Weyhrich have sufficiently demonstrated that prior to the Crane Letter, they referred patients to out-of-state abortion providers or provided related information and assistance and that they no longer will.[16] *See Gibron Decl.* ¶¶ 11-14, 17, and 24, Dkt. 2-2; *Gibron Suppl. Decl*. ¶¶ 8-9; Dkt. 35-2; *Gustafson Decl.* ¶¶ 6, 12, 13, and 15-18, Dk. 2-3; *Gustafson Suppl. Decl.* ¶¶ 7-9, Dkt. 35-3; *Weyhrich Decl*. ¶¶ 6, 9, and 11-17, Dkt. 2-4; *Weyhrich Suppl. Decl*. ¶¶ 6-7, Dkt. 35-4; *Compl.* ¶¶ 40-41, Dkt. 1. Thus, the first *Thomas* element is satisfied.

ii. Threat of enforcement against the Medical Providers.

The State next argues that the Medical Providers lack a concrete injury

[16] While the Court recognizes that declarations could have provided more specific statements about the instances in which they provided information about or a referral to an out-of-state medical facility, based on the State's lack of objection and the nature of such conversations, the Court finds the declarations sufficient to establish standing at this stage of litigation. In particular, the Court finds that Dr. Gustafson's declarations provided the clearest depiction of her prior violations and the chilling effect of the Crane Letter, which is sufficient to establish standing in this matter. *See Wasden*, 376 F.3d at 918 (noting that where one plaintiff has standing to bring suit, the court need not consider the standing of the other plaintiffs).

because the complaint fails to identify a "specific warning or threat" of enforcement of Idaho law against them or anyone else. *See Def.s' Br*. at 18, Dkt. 41-1; *Def.s' Reply* at 5, Dkt. 85. The State first argues that the Crane Letter cannot satisfy the threat requirement because it "was sent to one legislator as private legal advice [and] it was not published by the Attorney General or offered as guidance in any capacity." *Def.s' Br.* at 18, Dkt. 41-1. Second, the State claims that there is no threat here because the Attorney General lacks any authority to direct the county prosecutors or prosecute violations of the criminal abortion law. *Id*. The Court is again unpersuaded.

The State's first claim ignores the reality of the circumstances. Even if the Crane Letter was intended as "private legal advice," the letter was promptly disseminated and became widely available to the general public. *See Def.s' Reply* at 5, Dkt. 85. Moreover, while the State tries to diminish the letter's significance by framing it as akin to any attorney providing advice to any client, it cannot be ignored that this letter was issued and *signed* by Attorney General Labrador—Idaho's chief legal officer—and was sent to a member of the Idaho Legislature. More importantly, this letter contained an expressed interpretation of Idaho's criminal abortion statute, which is the only available written interpretation of the statute, public or not, by Attorney General Labrador. The State's argument that the

Crane Letter was not an "official" statement does not negate the effect of the letter.

The State's second argument is essentially a recitation of its claim that Attorney General Labrador is entitled to sovereign immunity. *Def.s' Br.* at 18, Dkt. 41-1. Like that claim, *Wasden* is similarly dispositive on this issue.

In *Wasden*, the Ninth Circuit found that the Attorney General's prosecuting power not only satisfied "*Ex parte Young* with regard to the exposure to the risk of prosecution[,]" but "demonstrate[d] the requisite causal connection for standing purposes." *See Wasden*, 376 F.3d at 920. Moreover, the Ninth Circuit has consistently noted that "Article III justiciability and Eleventh Amendment analysis present 'a closely related—indeed, overlapping—inquiry[.]'" *See Culinary Workers Union, Loc. 226 v. Del Papa*, 200 F.3d 614, 619 (9th Cir. 1999) (quoting *Okpalobi v. Foster*, 190 F.3d 337, 347 (5th Cir.1999)) ("We have no difficulty, however, concluding that the requisite "connection" [for the *Ex parte Young* exception] exists here for the same reasons that the union has demonstrated that a case and controversy exists."); *see also Mecinas v. Hobbs*, 30 F.4th 890, 903 (9th Cir. 2022) ("The question of whether there is the requisite 'connection' between the sued official and the challenged law implicates an analysis that is 'closely related—indeed overlapping'—with the traceability and redressability inquiry already discussed.'"). Accordingly, for the reasons previously given, the Court

rejects the argument that the Medical Providers do not have standing because Attorney General Labrador lacks the authority to prosecute.

The State's corollary argument that the threat of prosecution is too general presents the strongest challenge to the Medical Providers' standing. The State generally claims that the threat of enforcement must be "particular to the plaintiff[,]" and because the Crane Letter was "wholly generalized[,]" the Medical Providers do not have standing. *Id*. (quoting *Cedar Park Assembly of God of Kirkland, Wash. v. Kreidler*, 402 F. Supp. 3d 978 (W.D. Wash. 2019)). Although a closer call, as discussed below, the Medical Providers' self-censorship, which is based on a well-founded fear of enforcement, satisfies the second *Thomas* prong.

As the Ninth Circuit has explained, "in the context of pre-enforcement challenges to laws on First Amendment grounds, a plaintiff 'need only demonstrate that a threat of potential enforcement will cause him to self-censor'" to satisfy the "second prong of the *Thomas* inquiry[.]" *See Tingley*, 47 F.4th at 1068 (quoting *Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 839 (9th Cir. 2014)).[17] "[W]here a plaintiff has refrained from engaging in expressive activity for fear of

[17] There is little doubt, and the State does not contest, that the Medical Providers have refrained from referring patients to out-of-state abortion providers since the Crane Letter and its interpretation. *See Gibron Suppl. Decl.* ¶¶ 8-9, Dkt. 35-2; *Gustafson Decl.* ¶¶ 17-18, Dk. 2-3; *Weyhrich Decl*. ¶¶ 14-17, Dkt. 2-4.

prosecution under the challenged statute, such self-censorship is a constitutionally sufficient injury as long as it is based on an actual and well-founded fear that the challenged statute will be enforced." *Human Life*, 624 F.3d at 1001 (citations and internal quotations omitted).

In *Tingley*, the plaintiff, who was a licensed marriage and family therapist, challenged Washington's ban on practicing conversion therapy on minors under the First Amendment. 47 F.4th at 1066. Similar to this case, the plaintiff sought a preliminary injunction, and the defendants filed motions to dismiss. *Id*. After recognizing the relaxed standard for standing in the First Amendment context, the Ninth Circuit held that "Washington's general warning of enforcement coupled with [plaintiff's] self-censorship in the face of the law satisfy the second prong of the *Thomas* inquiry for standing." *Id*. at 1068. The court explained that even though the defendants never issued a "warning or threat of enforcement to [the plaintiff,]" the government's failure to disavow enforcement of the challenged law weighed in favor of standing. *Id*.

The Court also looks to the Supreme Court's recent decision in *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023), which raised these same standing issues. In that case, the plaintiff, Lorie Smith, offered "website and graphic design, marketing advice, and social media management services" and "decided to expand

her offerings to include services for couples seeking websites for their weddings." *Id.* at 2308. Although she "has yet to carry out her plans" to offer wedding website services, Ms. Smith became concerned that "if she enters the wedding website business . . . she faces a credible threat that Colorado will seek to use [the state's anti-discrimination statute] to compel her to create websites celebrating [homosexual] marriages she does not endorse." *Id.* at 2309. The Tenth Circuit held that Ms. Smith had standing because "she had established a credible threat that, if she follows through on her plans to offer wedding website services, Colorado will invoke CADA to force her to create speech she does not believe or endorse." *Id.* at 2310. Although the Supreme Court did not specifically address the standing issue—noting only that "no party challenges th[e] conclusion" that Ms. Smith had standing—the silence is instructive, since even the Supreme Court's jurisdiction is constitutionally limited to cases where plaintiffs have standing. *303 Creative* therefore underscores the low threshold for establishing standing for pre-enforcement First Amendment claims.

Like the plaintiffs in *Tingley* and *303 Creative*, the Medical Providers' self-censorship is sufficient for standing. The Medical Providers' speech falls within the reach of Idaho's criminal abortion statute for purposes of this challenge. *See, e.g., Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003)

("In the free speech context, such a fear of prosecution will only inure if the plaintiff's intended speech arguably falls within the statute's reach."). While referrals to out-of-state abortion services—the intended speech being chilled—may or may not facially fall within the ambit of Idaho's criminal abortion statute, Attorney General Labrador's own interpretation reveals that the intended speech falls directly in the crosshairs of the conduct prohibited by the statute. *See Lopez*, 630 F.3d at 786) (We have also considered a third factor, whether the challenged law is inapplicable to the plaintiffs, either by its terms or *as interpreted by the government*.") (emphasis added).

The Crane Letter unambiguously states that "Idaho law prohibits an Idaho medical provider from either referring a woman across state lines to access abortion services[,]" and any "Idaho health care professional who refers a woman across state lines to an abortion provider . . . has given support or aid to the woman in performing or attempting to perform an abortion and has thus violated the statute." *See Crane Letter* at 2, Dkt. 1-1. Each of the Medical Provider Plaintiffs easily fall within the broad category of "medical provider." Moreover, the speech they say is chilled is the exact speech criminalized under the Attorney General's interpretation of the statute. *See Arizona Right to Life Pol. Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003) (noting that "it is 'sufficient for

standing purposes that the plaintiff intends to engage in a course of conduct arguably affected with a constitutional interest and that there is a credible threat that the challenged provision will be invoked against the plaintiff") (quoting *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1154–55 (9th Cir. 2000)).

Moreover, the Medical Providers have standing because although the Crane Letter was not sent to them directly, it is more than a mere general warning about enforcing Idaho's criminal abortion statute. Rather, the Crane Letter's interpretation applies to only a small subset of individuals in the state—medical providers who wish to refer individuals to legal out-of-state abortion services. Thus, while the Medical Providers were not individually sent the Crane Letter, the letter is targeted to them insofar as they belong to that small group of individuals who would be subject to criminal prosecution and licensure action under the letter's interpretation of the law.

Finally, the State's failure to disavow the Crane Letter interpretation also weighs in favor of standing. *See, e.g., LSO, Ltd.*, 205 F.3d at 1155 ("Courts have also considered the Government's failure to disavow application of the challenged provision as a factor weighing in favor of a finding of standing."). The State claims that the Ninth Circuit disavowal cases such as *LSO, Ltd. v. Stroh*, 205 F.3d 1146 (9th Cir. 2000) are not applicable because they concern situations where operative

state law prohibits the plaintiff's conduct, whereas here the Medical Providers do "not contend that the law as written prohibits their conduct (in fact, they contend the opposite)." *Def.s' Reply* at 6, Dkt. 85 (citing *Compl.*, ¶ 40, Dkt. 1 and *Plf.s' Br.* at 4-5, Dkt. 2-1).

While it is not exactly clear what the State is arguing, the State nonetheless misconstrues the Medical Providers' claim. The Medical Providers have not asserted that Idaho's criminal abortion statute allows or provides an exception for their intended speech. Rather, the Medical Providers are arguing that the Crane Letter's interpretation of Idaho's criminal abortion statute unconstitutionally prohibits their speech. In this respect, the Medical Providers' claim mirrors a run-of-the-mill First Amendment pre-enforcement challenge. Adopting the State's theory would essentially eliminate standing in all First Amendment disavowal cases, which is clearly not supported by the Ninth Circuit's prior decisions.

The State further argues that to the extent the disavowal cases apply, they refute standing because the Crane Letter "is not operative, having been 'withdrawn' and rendered 'void in its entirety.'" *Def.s' Reply* at 6, Dkt. 85 (quoting *Withdrawal Letter* at 1-2), Dkt. 85. While, as discussed below, the Withdrawal Letter is better analyzed under the mootness doctrine, a close examination of the

Withdrawal Letter refutes the State's assertion.[18]

The Withdrawal Letter offers two reasons why the Crane Letter "is void in its entirety [and] does not represent the views of the Attorney General on any question of Idaho law." *Withdrawal Letter* at 2, Dkt. 42-4. First, it claims that the letter's analysis is moot because "it relates to a law that has been significantly altered by intervening legislation[,]" which also "vitiates the 'question of law' upon which you asked me to opine, rendering the letter void." *Id*. at 1. Second, the Withdrawal Letter claims that "further examination of [Representative Crane's] request suggests it was not an authorized request for an Attorney General's Opinion[,]" because he was merely acting as a pass-through requestor. *Id*.

The problem is that Attorney General Labrador's asserted reasons for withdrawing the Crane Letter are procedural—not substantive.[19] Moreover, the Withdrawal Letter lacks any substantive discussion regarding the challenged interpretation, was provided only hours before the first status conference in this

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[18] The Court acknowledges that the disavowal line of cases arguably diverges from the general proposition that standing should be determined as of the date a complaint is filed, which is discussed in much greater depth below. However, given the breadth of case law applying both concepts, it is not the place of this Court to ignore Ninth Circuit precedent. *See Am. C.L. Union of Nev. v. Lomax*, 471 F.3d 1010, 1016 (9th Cir. 2006).

[19] As discussed in depth below, the Court is unpersuaded by the State's claim that the law has been significantly altered by intervening legislation.

matter, and makes no affirmative statements about future prosecution. *See Withdraw Letter*, Dkt. 42-4. Indeed, the letter is best characterized as "a mere litigation position[.]" *Lopez*, 630 F.3d at 788 ("[o]f course, the government's disavowal must be more than a mere litigation position.") (citing *Am. Arab Anti-Discrimination Comm. v. Thornburgh*, 970 F.2d 501, 508 (9th Cir. 1991)). Accordingly, the Withdrawal Letter is not a disavowal under Ninth Circuit precedent.[20]

Finally, if there is any lingering doubt, the State's counsel unambiguously confirmed that it has *not* disavowed the Crane Letter during oral argument:

> The Court: Well, just to be clear you not only on behalf of the Attorney General but also the prosecuting attorneys that you represent, there is still no disavowal of the legal analysis or conclusion drawn in letter; correct?
>
> Mr. Wilson: Your Honor, I'd say that that is – it's correct.

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[20] *Compare Bland v. Fessler*, 88 F.3d 729, 737 (9th Cir. 1996) (finding the statement that the Attorney General's office "has not brought or indicated that it would bring any action" falls short of a disavowal of enforcement where the "Attorney General of California has *not stated affirmatively* that his office will not enforce the civil statute.") (emphasis added), *and Culinary Workers Union, Loc. 226 v. Del Papa*, 200 F.3d 614, 618 (9th Cir. 1999) ("[w]e do not agree with the state that the attorney general's subsequent disavowal of her authority can be construed to eliminate either the 'credibility,' the 'genuineness,' or the 'effectiveness' of her threat.") *with Lopez*, 630 F.3d at 792 (finding that a supervising official's statement "that no action will be taken against student for expressing their opinions is entitled to significant weight, and vitiates [plaintiff's] claim that he faces a credible threat of enforcement") *and Johnson v. Stuart*, 702 F.2d 193, 195 (9th Cir.1983) (finding plaintiffs did not have standing where the Oregon Attorney General and the school district's counsel "repeatedly disavowed any interpretation of [the statute] that would make it applicable in any way to teachers.").

Transcript of Oral Argument at 39, Dkt. 148. Accordingly, the Court finds that the State's refusal to disavow the Crane Letter interpretation weighs in favor of standing. *See Arizona v. Yellen*, 34 F.4th 841, 850 (9th Cir. 2022) ("That the federal government has not disavowed enforcement of the Offset Provision is evidence of an intent to enforce it.").

The Court recognizes that this case presents a unique set of circumstances, and one that does not lend itself to a simple answer. However, the Medical Providers' decision to self-censor their speech was, at the very least, reasonable at the time this lawsuit was instigated. On April 5, 2023, it is undisputed that a letter signed by Idaho's chief legal officer unequivocally interpreted Idaho's recently enacted criminal abortion statute to prohibit medical providers from "referring a woman across state lines to access abortion services[.]" This letter was made available to the general public, and to the best of this Court's knowledge, was the first, and only, written interpretation of Idaho Code § 18-622 issued by any Idaho legal officer. Then, when this "private" letter became public, the Office of the Attorney General apparently declined to take any affirmative action to withdraw it or denounce its interpretation. Rather, it was only after this lawsuit was filed that Attorney General Labrador withdrew the letter, however, doing so on what can only be considered procedural and non-substantive grounds. To this day, the

Attorney General has refused to disavow the letter's interpretation or affirmatively state that Idaho's criminal abortion statute will not be enforced in such a manner.

For all these reasons, the Court finds that the Medical Providers' claims of self-censorship, coupled with the Crane Letter's interpretation of Idaho's criminal abortion statute, is sufficient to meet the second prong of the *Thomas* test. 220 F.3d at 1139. Simply put, the Medical Providers should not be required "to speak first and take their chances with the consequences." *Lopez*, 630 F.3d at 785 (citations omitted).

iii. The enforcement history of Idaho's criminal abortion statute is entitled to little weight.

The State finally claims that absent evidence of past enforcement of "Idaho Code § 18-622(2) on the theory described in the Crane Letter," the Medical Providers have failed to show a genuine threat of prosecution. *Def.s' Br.* at 21, Dkt. 41-1. The State is incorrect. The history of enforcement has "'little weight' when the challenged law is 'relatively new and the record contains little information as to enforcement or interpretation.'" *Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644, 653 (9th Cir. 2021) (quoting *Wolfson v. Brammer*, 616 F.3d 1045, 1060 (9th Cir. 2010)).

Here, only nine days passed between the issuance of the Crane Letter and the filing of this lawsuit. The Court therefore gives minimal, if any, weight to the

sparse enforcement history of Idaho's criminal abortion statute as interpreted by the Crane Letter. *See Tingley*, 47 F.4th at 1066 (finding that the sparse enforcement history in the three years between the enactment of the challenged statute and the litigation was "not dispositive.").[21]

Because the Court has determined that the first two *Thomas* factors are satisfied, and the third factor carries little weight, the Medical Providers have sufficiently demonstrated that they have standing to bring their First Amendment claim against Attorney General Labrador. *See id*.

b. The Withdrawal Letter should be analyzed under the mootness doctrine.

The State also says that the Withdrawal Letter unequivocally eliminates any alleged threat of prosecution. *See Def.s' Br.* at 12-16, Dkt. 41-1. First, the State argues that following the Withdrawal Letter, the Medical Providers cannot show an imminent threat of prosecution since "the voidance of the [C]rane [L]etter returns [them] to their pre-March 27 position[,]" and the only cause of concern in the complaint is the Crane Letter. *Id.* at 13. Second, the State contends that the Medical Providers cannot maintain their threat of future injury because the

[21] Even considering the enforcement history of Idaho's criminal abortion statute as a whole, the Court finds the third factor is still entitled to little weight. Idaho Code § 18-622 has been in effect for less than a year, which is still considerably less than the three years in *Tingley*.

Withdrawal Letter clarifies that the Crane Letter "does not represent the views of the Attorney General on any questions of Idaho law." *Id*. at 13-14 (quoting *Withdrawal Letter* at 2).

By continuously referencing a threat of prosecution and citing cases discussing the *Thomas* test, the State appears to conflate standing—and, as discussed below, ripeness—with mootness. The Supreme Court has noted that "[s]uch confusion is understandable, given the Court's repeated description of mootness as 'the doctrine of standing set in a time frame[;]'" however, standing must exist—and is determined—at the commencement of the litigation. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000); *see also Yamada v. Snipes*, 786 F.3d 1182, 1203–04 (9th Cir. 2015) ("As with all questions of subject matter jurisdiction *except mootness*, standing is determined as of the date of the filing of the complaint. . . . The party invoking the jurisdiction of the court cannot rely on events that unfolded after the filing of the complaint to establish its standing.") (quoting *Wilbur v. Locke,* 423 F.3d 1101, 1107 (9th Cir. 2005)) (emphasis added). By comparison, mootness is properly invoked when a party challenges the Court's Article III power because of some event that occurs during the pendency of a lawsuit. *Id*.; *see also Lomax*, 471 F.3d at 1016 ("Whereas standing is evaluated by the facts that existed when the complaint was filed,

mootness inquiries, however, require courts to look to changing circumstances that arise after the complaint is filed.") (cleaned up). In other words, "[s]tanding and mootness are similar doctrines. . . . Yet, the doctrines have important differences." *Jackson v. California Dep't of Mental Health*, 399 F.3d 1069, 1072-73 (9th Cir.), *opinion amended on reh'g sub nom. Jackson v. CA Dep't of Mental Health*, 417 F.3d 1029 (9th Cir. 2005).[22]

Here, the Medical Providers sued before the Withdrawal Letter had been authored or delivered. Accordingly, the effect of the Withdrawal Letter, whatever it may be, is not a question of standing but rather of mootness, and the State's claim that "the withdrawal of the Crane Letter defeats Plaintiffs' Article III standing" is misplaced. *Def.s' Br.* at 15, Dkt. 41-1. Even more importantly, although standing and mootness both demand a live case or controversy, "sometimes a case may not be moot even if the plaintiff would not have standing to bring it today." *Planned Parenthood of Greater Wash. & N. Idaho v. U.S. Dep't of Health & Hum. Servs.*, 946 F.3d 1100, 1109 (9th Cir. 2020); *see also TOC*, 528

[22] The Court recognizes the condensed timeline of the conduct in this case raises issues that usually "arise later in the case, when the federal courts are already involved and resources have already been devoted to the dispute[,]" *id.*, it will not however attempt to draw an arbitrary line of when an issue should be analyzed under mootness or standing but rely on the clear statement that standing is analyzed based on "facts that existed when the complaint was filed." *Lomax*, 471 F.3d at 1016.

U.S. at 190 ("the plain lesson is that there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness."). Therefore, the Court will address the Withdrawal Letter under the doctrine of mootness rather than standing.

c. The Medical Providers have not established they have standing to bring their motion against the Idaho State Board of Medicine or Board of Nursing.

As mentioned, the Medical Providers' motion for a preliminary injunction not only seeks to enjoin Attorney General Labrador, but also the Idaho State Board of Medicine and Board of Nursing. *See Plaintiff's Motion*, Dkt. 2. However, as also discussed, the briefing almost entirely focused on the Attorney General. In fact, the Medical Providers provided no discussion, analysis, or factual information regarding standing for their claims against the Board of Medicine or Board of Nursing. Further, the Medical Providers failed to explain what authority either board has to prosecute or enforce violations of Idaho's criminal abortion statute. The Medical Providers therefore failed to make a clear showing that they have standing to bring their claims against the Board of Medicine or Board of Nursing. *See Lopez*, 630 F.3d at 785. Accordingly, the Court will deny the Medical Providers' motion as it relates to the Idaho State Board of Medicine and the Idaho

State Board of Nursing.

2. Ripeness

Although the State intertwines its justiciability arguments, it also contends that the Medical Providers' "case is infected with serious ripeness issues." *Def.s' Reply* at 7, Dkt. 85. The ripeness analysis is separated into constitutional and prudential components. *Twitter, Inc. v. Paxton*, 56 F.4th 1170, 1173 (9th Cir. 2022).[23]

Here, the constitutional component is met because that component "is synonymous with the injury-in-fact prong of the standing inquiry[,]" which the Court has determined is satisfied. *Twitter*, 56 F.4th at 1173 (quoting *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094 n.2 (9th Cir. 2003)). Accordingly, the Court uses two interrelated considerations to evaluate whether to exercise jurisdiction under the prudential ripeness component. *Stormans*, 586 F.3d at 1126. Those guiding considerations "are the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Tingley*, 47 F.4th at 1070 (quoting *Thomas*, 220 F.3d at 114). Like standing, the ripeness requirements

[23] Although the Medical Providers hint at the fact that recent Supreme Court cases demonstrate disapproval of the prudential requirement, the Ninth Circuit continues to apply the dual constitutional and prudential components. *See, e.g.*, *Twitter*, 56 F.4th at 1173; *Tingley*, 47 F.4th at 1070.

are applied "less stringently in the context of First Amendment claims." *Twitter*, 56 F.4th at 1174 (quoting *Wolfson*, 616 F.3d at 1058).

The fitness prong is met when "the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *Tingley*, 47 F.4th at 1070. Relevant considerations for a court include "whether the administrative action is a definitive statement of an agency's position; whether the action has a direct and immediate effect on the complaining parties; whether the action has the status of law; and whether the action requires immediate compliance with its terms." *Skyline Wesleyan Church v. Cal. Dep't of Managed Health Care*, 968 F.3d 738, 752 (9th Cir. 2020) (quoting *Stormans*, 586 F.3d at 1126).

The State first argues that the Medical Providers cannot meet the fitness prong because the Crane Letter "is not 'final'—it is void and withdrawn[,]" never had the status of law, did not require the Medical Providers to comply in any way, and the issues raised in this case "are *not* primarily legal and *will* require further factual development. *See Def.s' Reply* at 7-8, Dkt. 85 (emphasis original). The Court is not persuaded.

While the State is correct that the Crane Letter did not have the status of law, it was a "definitive statement of an agency's position[.]" *Skyline Wesleyan Church*, 968 F.3d at 752. Additionally, the letter expressly interpreted the law to prohibit

certain, specific conduct. Thus, even though the letter did not expressly demand "compliance," it put the Medical Providers in a corner: they could only avoid violating a criminal statute—as interpreted by Attorney General Labrador—by immediately changing the care they provide to patients.

Importantly, the issues raised in this matter are primarily legal and do not need significant factual development. The Medical Providers' claim is limited in scope and only asks whether it is constitutional to prevent a medical provider from referring a patient to legal out-of-state abortion services.[24] Really, the only "hypothetical question" is whether the statute will be enforced as interpreted by Attorney General Labrador. But the Court has already concluded there is a genuine threat of enforcement. Finally, although the State repeatedly asserts that the Crane Letter is "void" because of the Withdrawal Letter, that contention ignores the dispositive fact that the Withdrawal Letter had not been issued when this lawsuit was filed. *See Yamada*, 786 F.3d at 1203-04 ("Ripeness, like standing, is determined as of the date of the filing of the complaint.").

The second prudential prong similarly favors jurisdiction. "To meet the

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[24] The Court recognizes that each claim should usually be addressed individually, but given the limited challenge, the significant overlap, and the parties' failure to differentiate between claims, the Court finds that an analysis of the prudential component regarding each claim is unnecessary.

hardship requirement, a litigant must show that withholding review would result in direct and immediate hardship and would entail more than possible financial loss." *Stormans*, 586 F.3d at 1126 (quoting *US West Commc'ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1118 (9th Cir. 1999)).

Here, the hardship requirement is easily met. If the Medical Providers do not prevail in this lawsuit, they will suffer the very injury they assert—they will be forced to choose between facing criminal penalties themselves and offering referrals and information about legal out-of-state medicinal services to their patients. Simply put, their speech will be chilled. *See, e.g., id*. (the hardship "factor is certainly met, because unless Appellees prevail in this litigation, they will suffer the very injury they assert—they will be required to dispense Plan B over their religious and moral objections.").

The Court will decline the State's request to refrain from exercising its jurisdiction under prudential ripeness principles.

3. Mootness

Because the Court has an independent obligation to ensure jurisdiction exists, it will turn to the question of whether this matter has been rendered moot by

the Withdrawal Letter.[25]

"A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—'when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'" *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam)). However, it is well recognized that "a defendant cannot automatically moot a case simply by ending its unlawful conduct once sued." *Id.* (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)) (explaining that "[o]therwise, a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends."). The party asserting mootness, "has the heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again." *Fikre v. FBI*, 904 F.3d 1033, 1037 (9th Cir. 2018) (cleaned up). Where the party asserting mootness is the government, it is presumed that it is acting in good faith. *Id.* However, "the government must still

[25] While the State did not focus on mootness in its briefing, there were passing references to the issue. The Court will therefore address the State's factual arguments, but under the correct legal standard. *See, e.g., Bernhardt v. Cnty. of Los Angeles*, 279 F.3d 862, 871 (9th Cir. 2002) ("Although mootness was not raised by the County or briefed by the parties—other than Bernhardt's assertion that injuries 'capable of repetition, yet evading review' are an exception to mootness—we must raise issues concerning our subject matter jurisdiction sua sponte.").

demonstrate that the change in its behavior is 'entrenched' or 'permanent.'" *Id.* (quoting *McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015)). Specifically, "a voluntary change in official stance or behavior moots an action only when it is 'absolutely clear' to the court, considering the 'procedural safeguards' insulating the new state of affairs from arbitrary reversal and the government's rationale for its changed practice(s), that the activity complained of will not reoccur." *Id.* at 139 (citations omitted).

Despite the State's protests, the voluntary cessation exception is the proper framework to analyze the Withdrawal Letter. The State claims that the voluntary cessation "doctrine [only] applies when a government official has initiated enforcement of a law and later ceases enforcement[.]" *Def.s' Reply* at 9, Dkt. 85. Not so.[26]

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[26] *See, e.g., Am. Diabetes Ass'n v. United States Dep't of the Army*, 938 F.3d 1147, 1153 (9th Cir. 2019) (analyzing the voluntary cessation exception to a change in policy regarding medical care); *White v. Lee*, 227 F.3d 1214, 1243 (9th Cir. 2000) (finding plaintiff's First Amendment challenge based on an investigation and harassment was not moot); *Speech First, Inc. v. Killeen*, 968 F.3d 628, 645 (7th Cir. 2020), *as amended on denial of reh'g and reh'g en banc* (Sept. 4, 2020) (analyzing the voluntary cessation exception regarding a "University's since-repealed (and never previously enforced) Student Code[.]"); *Ammex, Inc. v. Cox*, 351 F.3d 697, 706 (6th Cir. 2003) (finding the plaintiff's claims were not "mooted by the Attorney General's withdraw of the [Notice of Intended Action] under the voluntary cessation exception."); *Miller v. Bonta*, No. 22CV1446-BEN (JLB), 2022 WL 17363887, at *4 (S.D. Cal. Dec. 1, 2022) (applying the voluntary cessation exception to an Attorney General's statement of non-enforcement of a statute, which had not yet been enforced against plaintiffs).

Rather, the voluntary cessation doctrine is more broadly applied where—as is the case here—a defendant attempts to moot a case through some sort of voluntary conduct. *See White*, 227 F.3d at 1243 ("[t]he Supreme Court has made clear that the standard for proving that a case has been mooted by *a defendant's voluntary conduct* is 'stringent[.]'") (citing *TOC*, 528 U.S. at 188) (emphasis added). More specifically, the Crane Letter is most akin to a change in policy or position, which the Ninth Circuit has repeatedly analyzed under the voluntary cessation doctrine. *See, e.g.*, *Fikre*, 904 F.3d at 1038 (9th Cir. 2018) ("For cases that lie between these extremes [comparing a statutory change to an executive order], we ask whether the government's new position could be easily abandoned or altered in the future.") (internal quotations omitted); *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014) ("Particularly relevant to this case, a policy change not reflected in statutory changes or even in changes in ordinances or regulations will not necessarily render a case moot."). Applying that appropriate voluntary cessation doctrine, the Withdrawal Letter does not moot this case.

The analysis underlying the Withdrawal Letter is entirely procedural. It neither rejects the Crane Letter's statutory interpretation, nor provides an alternative that would resolve the Medical Providers' concern that their conduct is unlawful under Idaho's criminal abortion statute. Simply put, the withdrawal letter

does not indicate that Attorney General Labrador has changed his position, much less establish that such a change is now "entrenched" or "permanent." *Fikre*, 904 F.3d at 1037. Accordingly, the State has not satisfied the heavy burden of establishing this case is moot.[27]

Additionally, the recently enacted amendments to Idaho's criminal abortion statute also fail to moot this case.[28] Although no explanation was provided, the State claims that the Crane Latter is "moot because it relates to a law that has been significantly altered by intervening legislation." *See Def.s' Br.* at 4, Dkt. 41-1; *Withdrawal Letter* at 1, Dkt. 42-4. While the amendments to the statute may be significant in some respects, this claim misses the mark because the specific, relevant language of Idaho's criminal abortion statute—the "assisting" language—

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[27] *See, e.g.*, *Fikre*, 904 F.3d at 1041 (holding that a case was not moot because there were no "procedure hurdles to the government returning to its prior stance," nor any renouncement by the government of its prerogative and authority to do so"); *Porter v. Bowen*, 496 F.3d 1009, 1017 (9th Cir. 2007) (finding that a letter from the former secretary of state, which stated he would not seek to prevent operation of websites like the plaintiff's until legislative clarifications were made, did not moot the case because the letter was not binding, nor did it create any legal obligations); *Ammex, Inc. v. Cox*, 351 F.3d 697, 705 (6th Cir. 2003) (finding that the "Attorney General's withdrawal [of a notice of intent] thus does not make it absolutely clear that the enforcement action is not reasonably likely to recur.").

[28] The day after the Crane Letter was issued, the Idaho Legislature introduced H.B. 374, which amended various aspects of Idaho's abortion laws. H.B. 374 subsequently passed both houses and was signed by Idaho's Governor Brad Little on April 2, 2023. H.B. 374, 67th Leg., Reg. Sess. (Idaho 2023). The amendments to the statute became effective on July 1, 2023. *See id.*

remains unchanged.[29] *Compare* I.C. § 622(1) ("assists in performing or attempting to perform an abortion.") *with* I.C. § 18-622(2) (2020) (same).

In sum, the Court finds that the Medical Providers have established that there is a genuine threat of prosecution. This threat has resulted in the chilling of the Medical Providers' speech—a well-established concrete injury—meeting both the injury-in-fact requirement for standing and the constitutional ripeness requirement. Additionally, the Court sees no reason why it should decline to exercise its jurisdiction under the prudential ripeness component, nor does the Withdrawal Letter meet the burden of demonstrating that this case is moot. Thus, the Court has jurisdiction to hear the Medical Providers' request for a preliminary injunction on its First Amendment claim.

As a final note, whether analyzed through the lens of standing, ripeness, or mootness, it would not have been particularly difficult for the State to definitively establish that no case or controversy exists. That is, all it would have taken is for

[29] Specifically, the amendments made two primary changes to the statute. First, the current version of the statute removed the "trigger" language that became obsolete following *Dobbs*. *Compare* I.C. § 622 *with* I.C. § 18-622 (2020). Second, the current version also converts what used to be affirmative defenses into exceptions to performing a criminal abortion. *See id.* In addition to that change, the amendment added certain clarifying language to the now exceptions. *See id.* Importantly, the exceptions, including the newly added language, do not appear relevant to the issues in this matter, nor has the State argued such.

Attorney General Labrador to denounce the Crane Letter's interpretation or make an affirmative statement that he, or his office, will not enforce Idaho's criminal abortion statute in such a manner. Instead, the Attorney General has strained at every juncture possible to distance himself from his previous statement without committing to a new interpretation or providing any assurances to this Court or the Medical Providers. Attorney General Labrador's targeted silence is deafening.

D. Preliminary Injunction

Having determined that the Medical Providers' First Amendment claim is justiciable, the Court now turns to the merits of the preliminary injunction. As discussed below, the Medical Providers have shown that: (1) they are likely to succeed on the merits of their First Amendment claim; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest.

1. Likelihood of success on the merits

As mentioned, the Medical Providers allege that the Crane Letter interpretation violates the First Amendment, the dormant commerce clause, and the due process clause. The Medical Providers claim they are "overwhelmingly" likely to succeed on the merits of all three claims. *See Plf.s' Br*. at 7, Dkt. 2-1. Interestingly, the State did not engage this argument in any way, relying instead

entirely on its jurisdictional challenges. *See Def.s' Br.*, Dkt. 41-1; *Def.s' Reply*, Dkt. 85. As discussed below, the Court finds that the Medical Providers are likely to succeed on their First Amendment cause of action.

In particular, the Medical Providers contend that the Crane Letter interpretation violates the First Amendment because it impermissibly regulates speech based on content and viewpoint. *See Plf.s' Br*. at 8, Dkt. 2-1. The Medical Providers explain that the interpretation's prohibition of medical providers offering "support or aid" to a woman seeking an abortion, including "refer[ring] a woman across state lines to an abortion provider[,]" is content-based because health care providers are silenced on a single topic—abortion—and is viewpoint discretionary because health care providers can provide information and referrals about out-of-state resources like anti-abortion counseling centers or prenatal care. *Id*. (citing *the Crane Letter*, Dkt. 1-1). The Medical Providers note that the interpretation is therefore subject to strict scrutiny. *Id.* (citing *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015)).

The Medical Providers explain that Crane Letter interpretation "furthers no legitimate state interest, much less a compelling one[,]" *Id.* at 9 (citing *Bigelow v. Virginia*, 421 U.S. 809, 827-28 (1975)). They further contend that the State cannot prove that the interpretation is narrowly tailored to further whatever compelling

interest could be found because it sweeps in a large swath of obviously protected speech. *Id.* at 10 (citing *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011)). Because the State has not opposed the First Amendment claim, and because the Court finds the Medical Providers' argument persuasive, the Court finds that the Medical Providers have shown that they are likely to succeed on the merits of their First Amendment challenge.[30]

2. Irreparable harm

In their briefing, the State does not differentiate between the injury in fact analysis for standing and the threat of imminent harm under a motion for a preliminary injunction. In any event, the Court finds that the Medical Providers have demonstrated they will likely suffer irreparable harm in the absence of preliminary relief. There is no doubt that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury[.]" *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014) ("A colorable First Amendment claim is irreparable injury sufficient to merit the grant of relief.") (internal quotation marks omitted).

[30] Because the Medical Providers have demonstrated they are likely to succeed on their First Amendment challenge, the Court need not address their remaining claims.

3. The balance of equities and public interest

Finally, the balance of equities and public interest in this case strongly favors issuing an injunction. *See Padilla*, 953 F.3d at 1141 (explaining that when the government is a party, the last two factors merge). First, the Ninth Circuit has consistently "recognized the significant public interest in upholding First Amendment principles." *Am. Beverage Ass'n v. City & Cnty. of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019) (*Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014)); *see also Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("it is always in the public interest to prevent the violation of a party's constitutional rights.") (internal quotation marks omitted).

More importantly, the balance of equities strongly weighs in favor of the Medical Providers. The Ninth Circuit has "repeatedly recognized that individuals' interests in sufficient access to health care" can trump a state's interest. *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). This case is no different.

In sum, the Medical Providers have met the requirements for a preliminary injunction. Accordingly, the Court will grant the motion, in part, and enjoin Attorney General Labrador from enforcing Idaho's criminal abortion statute as

interpreted in the Crane Letter.

ORDER

IT IS ORDERED that:

1. The Medical Providers' Motion for Preliminary Injunction (Dkt. 2) is **GRANTED** as it pertains to Attorney General Labrador.

2. Plaintiff's Motion for Preliminary Injunction (Dkt. 2) is **DENIED** as it pertains to the Idaho State Board of Medicine and the Idaho State Board of Nursing.

3. The Court will **DEFER** issuing a ruling on any of the individual county prosecuting attorneys.

4. The Medical Providers' Motion to Strike (Dkt. 122) is **DENIED**.

5. The State's Motion to Dismiss (Dkt. 41) is **DENIED** as it relates to Attorney General Labrador.

6. The parties shall submit a Litigation Plan and Discovery Plan within 14 days of the filing of this Order.

DATED: July 31, 2023

B. Lynn Winmill
U.S. District Court Judge

No. 23-35518

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAII, ALASKA, ET AL.,
Plaintiffs-Appellees,

v.

RAÚL LABRADOR, ET AL.,
Defendant-Appellant,

On Appeal from the United States District Court
for the District of Idaho

No. 1:23-cv-00142-BLW
The Honorable B. Lynn Winmill

EXCERPTS OF RECORD
Volume 2 of 4

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UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

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, vs. 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-00142-BLW **MOTION HEARING**

TRANSCRIPT OF VIDEOCONFERENCE PROCEEDINGS
BEFORE THE HONORABLE B. LYNN WINMILL
MONDAY, APRIL 24, 2023; 2:05 P.M.
BOISE, IDAHO

Proceedings recorded by mechanical stenography, transcript produced by computer.

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I N D E X

APRIL 24, 2023

P R O C E E D I N G S

April 24, 2023

THE CLERK: United States District Court for the District of Idaho is now in session, the Honorable B. Lynn Winmill presiding.

The Court will now hear oral argument on the motion for preliminary injunction in Case 1:23-cv-142, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, versus Raul Labrador.

THE COURT: Good afternoon, Counsel. I want to first thank counsel for accommodating the hearing today. We had discussed the need for an expedited process. I know the defense objected, but I appreciate counsel being willing to work with us on this schedule.

I do need to warn you. I have been back in the country for all of 36 hours, so I'm seriously jet-lagged. I'll try not to let that reflect my questions. I did read all of the briefing in some detail over the last few days on the way back. So I think I'm pretty much up to speed on what the issue is, and I'm going to offer some preliminary comments here in a moment.

With regard to the -- there were a couple of procedural or housekeeping matters that need to be addressed. One has to do with objections to amicus briefs. I've generally found amicus briefs to be helpful, sometimes not, but usually helpful. I'm going to overrule the objection to the amicus

briefs but allow the defendants to file a response to that amicus brief by Thursday at noon. I'll give you until Thursday at noon, which will then allow the matter to be fully at issue and ready for a decision.

I know that's also somewhat expedited, but we need to move quickly given the nature of the proceedings as a request for preliminary injunction.

I'm also going to, I guess, sustain the objection to Mr. Gonick's motion for *pro hac vice* status without a sponsoring attorney. I apparently have relaxed that requirement in a couple hearings in the last little while, but I'm not sure why I did that. I think maybe I was just tired and wasn't aware of, frankly, what was going on. And I have been pretty insistent that we have local counsel even for amicus.

It should be a pretty simple matter, and I would require that the attorney generals who have filed an amicus brief, that they obtain local counsel also by Thursday at noon -- Thursday, April 27th, at noon, for the Court to consider their briefs. I've read it, so I'm well informed.

But I do think, just as a matter of procedure, that if you're going to enter an appearance, you will need to have an attorney admitted in the state of Idaho. It shouldn't be a real difficult thing to accomplish since I'm sure there is any number of attorneys who would be willing to participate in this proceeding.

I would indicate there is a couple of issues -- there is at least one issue I really don't want to spend a lot of time on. There was an argument that we don't have all the defendants served and represented here.

I understand the argument and concern, but if the plaintiffs are entitled to injunctive relief as to the served and represented defendants, it seems to me that we can and must proceed as to them. As additional defendants are added and represented -- and perhaps they have already been added and are represented in some fashion. But if that is not true and they are added and represented in the future, the plaintiffs can seek to extend any injunction to those defendants, and those defendants can oppose it and make additional arguments as to why any injunction should not apply to them. And likewise, if I deny the request for injunction, then obviously it would be moot, and they wouldn't need to take any action at all.

Finally, St. Luke's asked for oral argument time. I indicated I would grant that as long as the plaintiffs would be willing to share that time. I think that's only fair to the defendants. So I understand they're going to cede five minutes of their time to St. Luke's.

I think Ms. Pugh indicated that we would try to limit this to about 20 minutes per side. I can be a little more flexible than that. I might add on five minutes depending on how oral argument is proceeding, but I want to see how that

plays out.

Nevertheless, because I've read the briefing and I'm going to offer some comments as to my preliminary thoughts, for that reason, I think you can get right at the issues, and we won't have to spend a lot of time arguing matters that, frankly, do not interest me at this point.

So here, let me turn then to the merits, the substance of the matter, and I'll lay out my thinking so you can play off from that.

Now, let me indicate that it's very difficult to lay out my thinking without showing, frankly, where I'm leaning, but it is at most a leaning; it is not a firm decision at all. It's really just a way to signal to you what the issues are in my mind, how I typically would look at those issues, and provide you with an opportunity either to reassure me that I'm right in that analysis or indicate why I'm wrong.

So let me go ahead and start off with that.

I think clearly the biggest issue in this case is that of standing and whether there is injury in fact. Just to be clear, I think the standard is in the *Susan B. Anthony List* case, where the injury-in-fact requirement requires three showings: one, that the plaintiff shows that they intend to engage in conduct arguably affected with the constitutional interest; second, that they intend conduct which arguably would be prescribed by the challenged statute; and, third, that the

plaintiff faces a substantial threat of future enforcement under the statute.

It seems to me that the plaintiffs have clearly and unequivocally stated their past practice and future intention of referring patients to out-of-state clinics for medically necessary abortions. So I think the first requirement is clearly met.

The second two requirements, in different ways, hinge really upon the attorney general's letter of March 27th, I believe, offering his opinion that such conduct would violate Idaho's abortion statute.

Now, the attorney general argues that his withdrawal of the letter puts plaintiffs in the same position they were in if it had not been written. I may have added to that by a comment during our status conference earlier that it is -- you know, the withdrawal of the letter means it no longer has any legal effect. I think that's probably accurate. Nevertheless, the question is whether that conduct can, I guess, successfully unring the bell.

It does seem significant to me that General Labrador indicated in his withdrawal letter that the original letter should not have been issued because it was procedurally improper.

However, even so, it strikes me that it does not change the fact that it was a public statement made by Idaho's

chief legal officer that a physician's referral of patients to an out-of-state clinic for an abortion would constitute a violation of the statute and subject the referring doctor to both criminal prosecution and loss of their licensure.

This coupled with his decision not to disavow the legal analysis -- and I think they have cited public statements in which General Labrador has indicated his intent to vigorously enforce Idaho's abortion statute -- it would seem at first blush to create a genuine fear among physicians that their past and intended future conduct of referring patients to out-of-state clinics for an abortion would create a well-founded fear that they may lose their licensure and face criminal prosecution. At first blush, that would seem sufficient to establish standing.

Now, you know, again, I understand and I know that with the errata that was filed by the plaintiffs, that it's now clear that the attorney general is not the primary or does not have the authority to be the primary enforcement agency for the general abortion statute. But nevertheless, given the fact -- as chief legal officer, their opinion carries weight.

And I think for that reason, that, in and of itself, would suggest that the second and third requirements under the *Susan B. Anthony List* case are satisfied, that is, that the plaintiff's intended conduct is arguably proscribed by the challenged statute -- that is because the state's chief legal officer has said so -- and second, that they face a substantial

threat of future enforcement under the statute because it is, again, the opinion of the chief lawyer for the State of Idaho.

So that's my initial thinking on that issue. I think the argument about ripeness -- it does seem to me that, particularly in the area of the First Amendment concern, that the issue of a pre-enforcement challenge really is looked upon favorably because of the chilling effect that enforcement measures would take against a doctor or any plaintiff who is trying to exercise their First Amendment rights.

I'm also concerned with the defense argument that the Eleventh Amendment bars this suit. Clearly, there is the exception that injunctive relief against a state officer who has a significant tie or connection to the enforcement, as expressed by the Ninth Circuit in *Wasden*, would seem to still apply.

And I need to hear from the defense as to why that is no longer good law. I know you have argued that somehow the passage of this new statute -- I think it's termed the Abortion Trafficking Statute -- and the provision of specific enforcement authority to the attorney general somehow bears some relevance as to why the *Wasden* decision is or is not still binding.

And I'm also struggling a little bit with the argument that the *Dobbs* decision itself has changed the lay of the land so that the *Wasden* decision simply no longer applies. I need some real clarity on that because I'm not sure I understand that.

So, with that, let me hear the arguments of counsel, starting with the plaintiff.

Is it Mr. Neiman?

MR. NEIMAN: It is, Your Honor. Thank you for asking.

THE COURT: All right.

MR. NEIMAN: And welcome back.

THE COURT: Thank you.

MR. NEIMAN: And thank you for accommodating our desire to be heard on your first day back in court. We very much appreciate that.

And also thank you for sharing your initial views. Obviously, we are not going to try to talk you out of any of those, but let me see if I can reinforce them a little bit.

So this is, as you say, a pre-enforcement challenge. And I think it's, you know, pretty clear that a prosecutor can't defeat a pre-enforcement challenge by saying you don't have a credible fear of enforcement, while at the same time straining at every turn to preserve his freedom to bring the very enforcement action he claims you have no reason to fear; right? And that's exactly what the attorney general has tried to do here.

If he really wanted to try to address the fear of enforcement that led our clients to file this lawsuit, as documented in their affidavits, it would have been easy for him to say that his March 27th letter was wrong substantively.

THE COURT: Mr. Neiman, do you agree that if Attorney General Wasden had, in fact, said that -- that, "Never mind. You know, it was written by a first-year attorney in our office. He has now been fired. He was wrong, and we are rejecting that analysis," we wouldn't be here? Do you agree with that?

MR. NEIMAN: It would certainly be a much tougher case for us to pursue, Your Honor.

THE COURT: Okay.

MR. NEIMAN: We obviously still have concerns about the actions of other people who have -- within the state of Idaho who have the ability to enforce this law, but it would certainly go -- it would be a much tougher case for us on standing than it is right now.

THE COURT: Okay. Go ahead.

MR. NEIMAN: So -- but he hasn't done that; right? And he has had a lot of opportunities to do that; and instead, he has done the opposite. He's just been very careful in everything that he's said, from his April 7th letter, to the meeting we had with Mr. Wilson on April 10th, to the briefs that he has filed in this case, to preserve for himself the ability to, tomorrow, if this case were dismissed, to go out and continue to seek enforcement on the theory that he laid out in his March 27th letter.

And, really, Your Honor, it shouldn't be a heavy lift for the Attorney General's Office to do just what you said. I

mean, the proposition that underlies the March 27th letter that -- which must be that Idaho outlaws at least some abortions that are performed outside the state, is just plainly contrary to the allocation of authority between the states that's the bedrock of our federal system.

It should have been easy for the attorney general to renounce that premise, but he hasn't. He has chosen over and over again not to do that, and I think it's reasonable to ask why he hasn't done that.

And I think the only reasonable inference here is that he is hoping to kind of his cake and eat it too to get the benefit of the intimidation that the March 27th letter caused for our clients while insulating himself from judicial review of that letter. And that's fundamentally wrong and shouldn't be permitted.

You know, our clients -- Dr. Gustafson, Dr. Wehyrich, Planned Parenthood -- they are healthcare providers. They have patients, some of whom have pressing medical or personal need to terminate their pregnancies. And before March 27th, my clients knew exactly what they should do.

They could advise patients that abortions were lawfully available outside of the state. They could give them information about appropriate out-of-state providers. They could help schedule proceedings out of state, connect their patients with travel assistance, and they could talk to

providers outside the state to ensure continuity of care. And they also could themselves provide abortions out of state, as Planned Parenthood does in Washington and as Dr. Gustafson anticipated doing. Although she is a licensed Idaho provider, she is also licensed in Oregon, and she anticipated providing abortions there as well.

And my clients radically changed their behavior after the March 27th letter. And the attorney general has kind of tried to minimize that letter. But as Your Honor pointed out, it's a letter from the top law enforcement officer in Idaho. It's on his letterhead. It's under his signature, his personal signature.

And, you know, it's interesting, Mr. Wilson included in their reply brief -- I shouldn't say Mr. Wilson -- the Attorney General's Office included in their reply brief, you know, their internal procedural guidance about opinion letters.

And if you look at that, Your Honor -- I would encourage you to, if you haven't had a chance to look at it yet -- it lays out kind of three tiers of opinion letter that the attorney general could issue. There's kind of the informal conversation. There is the letter that's sort of a nonbinding letter that comes from an assistant in the office and has a little proviso at the end that says this is a preliminary view. And then there is the highest level, the formal opinion letter, which is characterized by coming out under the signature of the

attorney general.

That's what this is. This is not a small thing when an attorney general issues a letter like this.

And that kind of formal statement quite naturally chilled my clients, and it's very understandable that they remain chilled when the attorney general isn't willing to say that the analysis is wrong.

So, look, he puts in this April 7th letter -- and I think maybe a sensible way to analyze that letter is under the whole body of case law that addresses sort of voluntary cessation; right? There is a whole body of case law out there. Your Honor actually had a case involving that in the abortion context a few years ago in the *McCormack* case.

And as Your Honor found in *McCormack* and confirmed by the Ninth Circuit, what's required for a voluntary cessation to kind of make a case go away is it has to be absolutely clear -- that's the words, the legal standard, "absolutely clear" -- that the party is not simply going to go back to the prior position as soon as the litigation ends.

There is nothing in the April 7th letter that would make that absolutely clear. And indeed, the attorney general has, you know, quite carefully tried to preserve to himself, in everything he said in this case, the ability to do just that, to go right back to the position that he had once this lawsuit was over.

And that's why, as our supplemental affidavits laid out, our clients can't go back to business as usual as it was before March 27th. They are still right where they were when that letter came out, because the state's highest law enforcement officer has said this is what the law means, and has taken it back on procedural grounds but hasn't been willing to say that it was wrong substantively.

So they have every reason to continue to reasonably fear, which is all that's required here, that if they resume making referrals or whatever it is that the attorney general calls a referral or if they otherwise assist in or perform a lawful abortion outside of Idaho, they could face license revocation and perhaps criminal prosecution.

I think what the attorney general is saying to you is: That's fine. It's fine if my clients continue to labor under that fear, that reasonable fear, that the Court shouldn't do anything, and that our clients -- you know, I don't think he uses these exact words, but sort of the suggestion that, you know, our clients are somehow just looking for a lawsuit and being unreasonable in what they said in their supplemental affidavits, that they haven't gone back to business as usual.

But that's wrong. I mean, my clients, Dr. Gustafson, Dr. Weyhrich, the dedicated people at Planned Parenthood, they take their work and their obligations to their patients extremely seriously. They don't want to be in a lawsuit with

the attorney general. They want to be able to go back and tell their patients the truth about the availability of the care their patients need out of state. They want to go back to being able to help their patients access that care without fear of losing their professional licenses or going to jail.

And that's a perfectly appropriate exercise of this Court's authority, to step in, to protect my clients, who are self-censoring in the face of the Attorney General's letter.

THE COURT: Mr. Neiman, could you just address one concern.

MR. NEIMAN: Sure.

THE COURT: And this goes back to the errata that you filed.

MR. NEIMAN: Yep.

THE COURT: I understand what happened. You took an earlier draft, or someone in your office took an earlier draft of the bill which included kind of an expansive -- or an expansion of the attorney general's authority to initiate prosecutions under Idaho's general abortion statute if a local prosecuting attorney fails or is unwilling to do so. That was changed, and it only applies now to that abortion trafficking, the new bill that takes effect July 1.

So what that means, then, is we are left in the same posture as we were, I think -- and maybe, again, Mr. Wilson will want to address this -- that we were in terms of the *Wasden*

case, where what we have is the attorney general having the ability to come in when invited to do so and participate in prosecution, presumably make referrals to a county prosecutor for possible prosecution. And I don't recall -- I didn't get a chance to go back and reread *Wasden*, although I've read it in the past -- whether or not there was any specific reference to just the persuasive effect of the chief legal officer for the state offering an opinion and how that may impact local prosecutors' decision to seek enforcement.

But, given that, doesn't that limit -- you know, with no prosecutor having made any similar statement, no prosecutor having indicated we are going to interpret the statute the same way the attorney general does, how does that affect your argument with regard to standing and the idea of threatened injury?

MR. NEIMAN: Sure, Your Honor. First, just a couple of quick points on that. I mean, I think *Wasden* is still controlling authority on the Eleventh Amendment issue here. There is nothing in *Dobbs* that undermines *Wasden*.

And I think that I'd also point you to the *Culinary Workers Union* case that I think is cited in our briefs that does talk about the kind of persuasive force of a recommendation from the attorney general being important.

And us thinking about this in sort of two pieces. One: Is the attorney general an appropriate defendant in this

case? And *Wasden* answers that question.

And then the question is: Does the attorney general have to be able to carry out the threatened prosecution all by himself in order for our clients to be afraid? And the answer to that as a practical matter is no; right? I mean, the chief law enforcement officer has said: This is what the statute means, and I'm not taking it back except on procedural grounds. That gives us ample reason to be afraid that his mantle will be picked up by others.

By the way, Your Honor, just, you know, in terms of what the Idaho law is on this point, right, I think it's the *Summer* case that's cited in our briefs and also I think in the attorney general's briefs -- is a case in which the attorney general -- prior attorney general just went into a local grand jury, obtained an indictment, prosecuted the case. The defendant objected and said, like, that's not -- the attorney general doesn't have primary authority.

And what the state Supreme Court said in that case was: Well, okay, but ultimately the local DA was fine with this -- or local prosecuting authority, I should say -- was fine with this. So no harm, no foul; the prosecution is sustained.

So what that means, Your Honor, is that even if he couldn't get a DA to bring case in the first instance, he could bring the case himself, and then there would just be this question about whether the local prosecuting authority would go

to the perhaps politically perilous route of objecting to him having done so.

So this is not a case where he's at all -- I don't think we have to show that he could bring a case himself in order to have standing here. The question is whether we have fear of enforcement, and we do based on what he said and his influence. But I think it's important to recognize that he can do more than just be influential.

THE COURT: Let me ask a related question very quickly. And I'm sure I'm taking up all your time. But you cited in your -- I think it was in your reply brief the idea that the failure to disavow the intent to prosecute can be relevant in terms of determining whether or not there is a real threat of injury.

I didn't get a chance to go back and read those cases that you cited. Were those cases -- and maybe you don't recall either, but do you know whether those cases involve simply a bringing of an action offering some reason for the plaintiff to think that a prosecutor might, in fact, seek to enforce a law in a particular way and where the prosecuting attorney or district attorney failed to disavow his intent to do so -- his or her intent to do so, and that that in some way then becomes relevant in terms of the threat of prosecution? Can you fill me on that? Because that would seem to be quite relevant to this issue.

You know, we've got a number of prosecuting attorneys

who have now been joined and are represented here, not all of them presumably. And would their failure to disavow an intent to prosecute, would that be relevant here or not?

MR. NEIMAN: I think it is -- I think -- I think that's the Ninth Circuit law, Your Honor, is that, you know, a failure to disavow can sustain the credible threat standard. And I think the *Tingley* case says that that we cited in our briefs. You know, it's sensible; right?

It just makes me think back, Your Honor. I had a case earlier in my career where we were working with some British lawyers because our client was British and being prosecuted in the United States. And the British lawyers were saying to us: Well, shouldn't our first argument be the government didn't warn us that they would -- they might charge our client under this law? It was like a novel interpretation of the law.

And I said to them: No, that's actually not a defense in the United States. The government doesn't have to tell you that they're reading a law in a particular way before they prosecute you. Right? The threat of prosecution is created by the law itself and by the attorney general's interpretation of the law. We don't need to have, on top of that, a prosecutor saying, "By the way, I also think I'm going to follow that interpretation," in order to have a threat.

THE COURT: Okay. Go ahead.

MR. NEIMAN: So, Your Honor, I did want to just make a

quick note on potential ripeness, which you addressed briefly in your remarks, just because we didn't have a chance to address that in our briefing because it was raised for the first time in the reply of the defendants.

I would just say, first of all, that's a waiver, right, failure to raise that argument. Potential ripeness is waivable when it wasn't raised until reply, and that's a waiver.

The document is on thin ice right now given the *Susan B. Anthony List* decision of the Supreme Court raises doubts about whether potential ripeness is even a valid doctrine anymore given the obligations of the federal court to hear a case when its jurisdiction has been properly invoked.

And potential ripeness isn't appropriate here substantively because this is a legal dispute about whether Idaho can sort of apply its law to out-of-state conduct and can restrict First Amendment protected speech in Idaho about conduct lawful outside of Idaho, not a factual dispute where further development is required.

So, for multiple reasons, we don't think that that's well taken, but I did want to just address it briefly --

THE COURT: Okay.

MR. NEIMAN: -- because it was not addressed in our brief.

Finally, Your Honor, unless you have other questions --

THE COURT: Well, you have used your 15 minutes. I'm going to add five more minutes for rebuttal and give the defense 25 minutes so as to keep a level playing field here.

MR. NEIMAN: Thank you, Your Honor.

THE COURT: Thank you.

Ms. Olson.

MS. OLSON: Thank you, Your Honor.

St. Luke's Health System, on behalf of its providers and the mission to serve its community, asks this Court to consider five points as it decides the legal issue before it.

First, Your Honor, Idaho healthcare providers need some certainty on whether they can continue to provide out-of-state referrals so their patients can obtain the appropriate standard of care on essential reproductive health matters.

THE COURT: Ms. Olson, does St. Luke's operate anything outside the state of the Idaho? In Oregon?

MS. OLSON: Your Honor, it has a facility in Ontario, Oregon.

THE COURT: I thought it did, and I wondered how that plays into this, if at all.

MS. OLSON: Well, Your Honor, I would say that the way it works for St. Luke's within Idaho, I mean, that is where the concern is with the application of this particular statute. And so the facility in Ontario serves people who live in Ontario and

Eastern Oregon. And sometimes when Idahoans end up over there, they may -- they may end up going there.

But the focus here is on the impact it has within Idaho. Because, as I'm sure the Court knows, you know, the -- St. Luke's is the only health system that is, you know, fully based within Idaho and operates essentially throughout Idaho. And the numbers of patients it serves in terms of actual visits exceeds a million.

So the focus for St. Luke's is --

THE COURT: The reason I asked the question is: If General Labrador's interpretation is correct, then a doctor in Boise faced with a patient for whom an abortion is medically necessary because of preeclampsia or for whatever other reason and which it is uncertain -- now, of course, the law has changed in terms of, you know, protecting the woman's life, but it would -- the General's interpretation of the statute would clearly be relevant to whether they could refer them to a doctor in the same clinic or the same system in Ontario.

And that's part of the concern I guess your client would have, is that we couldn't make referrals even within our own system; is that correct?

MS. OLSON: I think that's -- I mean, that would absolutely be correct, Your Honor.

And I think most significantly, the attorney general's letter, even withdrawn, would have an impact on making such a

referral anywhere out of state, whether it was to St. -- if you're in Northern -- if you're in, I guess, South Central Idaho and Oregon might not be the closest place, you also couldn't refer to another out-of-state location.

THE COURT: To Nevada, for example.

MS. OLSON: Yeah, to Nevada, to Washington. As the Court knows, as a long-term Idahoan, I should have better geography than that. But I think that's -- that's absolutely -- that's absolutely correct.

And I think the Court, in its initial comments when it referred to the -- you know, the proverbial bell that can't be unrung, that is part of St. Luke's real concern here, is that the fact that the letter is out there and asserted that a healthcare provider who made such a referral may have her license suspended or -- and the statute provides on a second offense, not for a short period of time, but revoked altogether -- that the chilling effect that that has on St. Luke's providers and on their patients in what could be the most critical moments for obtaining healthcare, you know, for wanted pregnancies, for women who have other children, for the simple everyday conversations that the St. Luke's providers are used to having with their patients, there is a significant impact there.

And I think, Your Honor, among the other things that St. Luke's wants the Court to really consider and think about as

it decides the legal issue before it is that the chilling effect and the impact this will have on the Idaho OBGYN and other reproductive healthcare providers who already are leaving the state because of the challenges of practicing reproductive health medicine here.

And although in opposing St. Luke's motion to file the brief, Your Honor, the State says: Well, most of the things you cite occurred prior to March 27 and the date when Attorney General Labrador issued the letter -- that may be true, Your Honor, but I think it stands to reason that this interpretation by the chief law enforcement officer in the state, even if withdrawn, will serve as a further impetus for people to leave the state. And significantly, it will detour -- deter other healthcare providers from coming in.

As St. Luke's sets out in its brief, one of the doctors from Northern Idaho with the medical center that's leaving in Bonner County, you know, people who go into the field of medicine, and particularly young, bright residents, have many, many choices of where to go. Even if they are from Idaho, they have opportunities outside. And doctors don't like so much having interaction with the legal profession, and there is simply -- there's no reason for them to come here if they are worried that actually practicing medicine to their standard of care means that they might have increased contact with the -- with the legal profession, Your Honor.

THE COURT: Okay. I think your time is essentially up. But go ahead, and you can wrap up here.

MS. OLSON: Yes, Your Honor.

I just wanted to emphasize, kindly, Your Honor, it is important here for Idaho providers and their patients to have some legal certainties, and that's why we think it's important for the Court to address the issue that plaintiffs have brought before it.

And I thank the Court and also plaintiffs for providing this time to St. Luke's.

THE COURT: All right. Thank you.

Mr. Wilson. Mr. Wilson, just before you start your time, I will at some point want you to answer a question I'm going to give you -- you can kind of mull it over as I'm asking it and then think about it as you're arguing. I'm sure you're capable of doing two things at once there.

But imagine yourself as a doctor -- or excuse me -- as a lawyer, perhaps in Ms. Olson's shoes, and you have an OBGYN doctor who comes to you, and she indicates that she feels the need to refer a patient to a place where they can obtain an abortion for medical reasons; it's a wanted pregnancy but one in which it is not clear to the doctor that the referral would comply -- or that the abortion could be performed in Idaho and, therefore, the referral is being made out of state.

Can you advise that doctor, in the face of General

Labrador's letter, even with the withdrawal of that, that they will not face prosecution or loss of licensure if they proceed to make that referral?

So that's the question I want you to answer. You can work that into your -- I often ask counsel on one side to imagine what their role would be as a counselor if on the other side, as a way of kind of testing the arguments that you're making.

So go ahead with your argument.

MR. WILSON: Thank you, Your Honor. I appreciate it, and I'll definitely make sure to touch upon that.

First of all, we really appreciate the Court making time for us despite the jet lag. We would be happy to have the hearing at 2:00 in the morning. If that's when your good hours are right now --

THE COURT: Great idea.

MR. WILSON: -- we could reschedule for that time.

But aside from that, I would like to just set the table for what we think this dispute is really about and kind of some of the things that I think have been a bit misleading about the way the issues have been presented.

You know, when you look at a typical pre-enforcement challenge in this context, you have someone who -- you have a law that criminalizes the plaintiff's conduct, and the plaintiff brings a lawsuit about it, saying: Well, this law, on its face,

criminalizes my conduct -- and particularly if it's expressive conduct -- and they say that I'm -- there is a threat of enforcement just because this law is on the books, and I'm concerned about it, and so I'm bringing a lawsuit on it.

That's what you have, for example, in the *Tingley* case. And the Ninth Circuit says: Well, the law is on the books. Presumably it will be enforced unless there has been some disavowal that it will be enforced, and so the plaintiff has standing to challenge the law.

And usually in that case, you also have the government responding, and the government's point one of their brief is: The plaintiff doesn't have any standing whatsoever to bring the challenge that they are bringing. And point two is: If the Court finds that the plaintiff has challenging *[sic]*, we're totally right anyway, and everything we did is perfect and constitutional in every way.

Well, let's -- let's take that typical context, pre-enforcement standing, contrast it with this case. This case is not about a challenge to the law itself. The plaintiffs don't allege that 622 prohibits their conduct. In fact, they allege the opposite. They say that even when 622 is in effect, this is what they were already doing, and they believe that their conduct complies with the law.

They say the problem is not the law itself. The problem is the Crane letter that the attorney general sent. And

the Crane letter -- it's important to clarify here. The attorney general has withdrawn that letter, and it's important to understand why.

Because if -- you know, I think the Court knows General Labrador well enough to know that if General Labrador believed in this policy and if this was an official policy, you would see that point two in our brief. You would see: The plaintiffs don't have standing; but if the Court finds they have standing, everything was right about this.

But the fact is we don't have a policy. The attorney general doesn't have a policy. And the Crane letter was not a policy about this. And so there is nothing to defend. It's been withdrawn.

And getting into the details of why it was withdrawn matters. This is a situation where the attorney general -- he gets requests from legislators all the time for advice, and it's his duty under Idaho law to provide that advice. Sometimes it's a phone call. Sometimes it's a letter or an email. And sometimes it's a formal attorney general opinion. And our attorney general opinion policy outlines those three different types of opinions.

Mr. Neiman says that, oh, this is a type 3 opinion because the Attorney General signed it. I think, respectfully, if Mr. Neiman had seen more actual attorney general opinions, he would know that this was not a type 3 opinion. This was a

letter or an email response.

An official attorney general opinion has a different formatting. It's got issues presented section; it's got an analysis section; it's got the discussion and the list of authorities considered at the end.

That's not what has been provided here because this is not an official attorney general opinion. This was a private request by a legislator, and an attorney general provided a private response. The Crane letter, on its face, has Representative Crane's address only in the block that it was sent to.

But what we learned and didn't know at the time that General Labrador signed this opinion was that Representative Crane had requested this on behalf of a third party. And so as soon as he received the letter from General Labrador, he immediately forwarded it to his constituent, who really wanted to know. And the constituent published it on the Internet.

This opinion never would have been published but for that. It would have been private advice provided by the attorney general to Representative Crane. Only the constituent published it.

And we learned about it because the plaintiffs here, they saw it published on the website. They sued about it. And we heard about it when the lawsuit was filed. And when we realized what had happened here, that Representative Crane had

just served as a pass-through for a request by a constituent, we said: That's not the proper use of the Attorney General's opinion -- opinion authority, and this is not something that is the proper use of it.

And so General Labrador has been clear and unequivocal that the opinion is withdrawn, void, and does not state the attorney general's opinion on any question of Idaho law.

And that's why you don't see that point two in our brief, where we say: And in any event, General Labrador is 100 percent right. Because he doesn't have an opinion on this issue. All he did was answer a private request for a legislator that turned out to be an improper --

THE COURT: But, Mr. Wilson, how can you -- well, how can you say that he doesn't have an opinion when he has written a letter, even if it was mistakenly written, was withdrawn -- he has written a letter which has now entered the public forum expressing an opinion as to how the statute should be formulated?

Now, whether it's his personal opinion, it's on his letterhead. It's not signed, you know, "Raul" with no reference to his status as the Attorney General. How does that not trigger the concerns under the *Susan B. Anthony List* case about their conduct is at least arguably a violation of the statute? Because it's arguably a violation of the statute because Attorney General Labrador has said so in a letter which has now

become public, and there are credible threats of prosecution because, obviously, that information is now in the public domain, and all 44 prosecuting attorneys in the state of Idaho know of that opinion.

So how can we just ignore the letter?

I understand that it was, I guess, a mistake. It was not intended to be some kind of binding guidance or any binding statement of the attorney general, but it does reflect an opinion of the Attorney General's Office that was publicly disseminated. And I don't know how you put that genie back in the bottle, even if it has -- it should not have been and even if it was withdrawn.

So that's my concern, which really ties me back into the question I asked at the beginning: How do you advise a doctor if they come to you and say, "I need to refer this patient to Ontario, Oregon, to our office there to perform this surgery which we don't think would be lawful under Idaho law but is lawful under Oregon law and is medically necessary"?

MR. WILSON: Well, Your Honor, I think that's a great question. And the first thing I would say is that we wouldn't characterize issuing this opinion as a mistake. We would characterize the request for this opinion as having been an abuse of the opinion process.

And, you know, while the federal courts lack authority to issue advisory opinions, General Labrador does have the

authority and the duty to issue advisory opinions but only in specific circumstances. And so if those circumstances are not present, that's why he's withdrawn the opinion, because it became clear that this was not a proper request.

But to get to the heart of the Court's concerns that I think really answers the issue here, I'm going to tell you how I would answer that physician if that physician came to me and I was the counsel for the physician. I would say: There's three reasons that you don't have to be concerned here, and these are the three reasons that tie into the things that plaintiffs have to show to show that they have standing here.

And I'd say: First, you don't have to be concerned because the attorney general lacks general prosecutorial jurisdiction in Idaho and any specific jurisdiction over this statute. And I'd say: Second, the Crane letter didn't threaten anybody, much less you, with any prosecution. And I'd say: Third, there is no ongoing conduct of any kind into the future by the attorney general or any of the other defendants in this action that would give rise to a claim.

So taking each of those in turn, and whether you look at this through standing, whether you look at it through ripeness, mootness, irreparable harm, all three things required in the same situation -- sorry -- under every doctrine. You've got to be able to show that you can threaten; you've got to show that you did threaten prosecution; and you've got to show that

it's continuing. None of them are present here.

So on the question of whether the attorney general can threaten, the Court's characterized him as the chief law enforcement officer of the state. I believe a better characterization would be chief legal officer. Because in law enforcement, the attorney general's jurisdiction is limited to assisting local process, the prosecutors.

And so you would have to have an initial action by the prosecutor under this theory -- of which there has been none here and none alleged -- and then the attorney general assisting it in some way. You don't have that.

And the passage of the new law giving the attorney general limited jurisdiction over Section 623 only, that just reinforces the point. There was a specific proposal to give the attorney general prosecutorial jurisdiction over this statute. The legislature removed that, and the version that the governor signed doesn't give him that authority.

So he is not the chief law enforcement officer with respect to the criminal law in this state. He has the ability to assist those local prosecutors if they've asked.

He did not communicate this letter to anyone other than to Representative Crane. It only got into the hands of local prosecutors likely when they were served with a lawsuit about it.

And for these reasons, we don't think the *Wasden*

decision applies. *Wasden* applied a version of the attorney general's statute that's a past iteration. And at the time, it characterized in a footnote -- it said that recent changes that -- had further cabined the attorney general's authority. He said: Oh, those are just dicta, and so they don't matter in this case.

Well, we think that what the Ninth Circuit called dicta back then has become very clear with what the legislature has just done in giving us authority over 623 but not over 622. The attorney general lacks prosecutorial authority in this case.

And I also suspect, Your Honor, that it's not very often that you have a government official coming here to not defend the thing that he wrote on the merits and also say that he doesn't have power over the issue. It's just simply the case under Idaho law.

You know, Mr. Neiman has said that, you know, well, the attorney general hasn't come around and agreed with us on the issue, but we are not required to agree with the plaintiffs to show that there is no controversy here, there is no justiciable dispute. There can be no justiciable dispute simply because we haven't weighed in, and we don't have the authority to.

So if you look at the second prong here of whether there actually was a threat, a credible threat of enforcement, I mean -- and actually, I need to say one more thing before I miss

it.

In terms of our ability to threaten, we think Idaho law is very clear and that *Wasden* has been superseded by the subsequent changes in Idaho statutory law. But if the Court has any doubt on this question --

THE COURT: How is that -- I'm not sure I understand the -- I don't have the section number with me. My understanding was that the *Wasden* decision was based upon the general attorney general authority and was not tied to any specific prosecutorial authority under any abortion statute. And my understanding is that that statute with regard to the attorney general's general authority -- I think it's Title 67, I think -- has not changed since *Wasden*.

So what statutory change has led to a change in law so substantial that we should ignore *Wasden*?

MR. WILSON: What I'd say that -- the two things are -- is that in *Wasden*, you had the version of the statute that was in effect. Frankly, the attorney general argued, similar to what we're arguing here, that his ability was limited to assisting local prosecutors. And the Ninth Circuit construed that in a broad way under the context of a facial challenge to an abortion statute. They construed that in a broad way and said: You do have enforcement authority here.

And it dismissed comments of the Idaho Supreme Court in the *Summer* decision which noted how this statute had cabined

the authority of the Attorney General. It dismissed those as dicta and said, you know, those don't really control because they're dicta here.

Well, if it was dicta then, the legislature has made it more clear precisely by statutes like the one the legislature just passed, which reinforced this structure that the attorney general doesn't have any general law enforcement authority unless it's specifically delegated to him by the legislature or referred to him by a prosecutor.

Now, we think, then, because this is an issue that bears on Idaho's sovereigty, that, again, we think the statutes are clear. But if the Court had any doubt, this is a textbook case for something that should be certified to the Idaho Supreme Court because it depends on the interpretation of state law and state law authority and what the attorney can actually -- the attorney general can actually do.

And I also suspect that if we went to the Idaho Supreme Court and if the Idaho Supreme Court said, yes, the attorney general is right, he doesn't have law enforcement jurisdiction over this, that would also redress any complaint that the plaintiffs have here. Because if the attorney general doesn't have the ability to enforce it, then his opinion is just a legal opinion in a vacuum that doesn't have any possibility of harming them.

And that's -- moving on to the second point of whether

there has been an actual threat here, that's why we are in this situation, is there hasn't been a threat. At a minimum, for a threat, you have to have something that's actually communicated by the threatener to the threatened party. And aside from the fact that the attorney general has not -- cannot threaten, he hasn't made that communication.

He wrote a letter to Representative Crane that was then put out on the Internet, and a bunch of other people saw it.

Now, they may know that, and on one respect they know his -- the fact that he previously expressed this opinion. But that doesn't mean that there is a threat to them.

And you look at the *Twitter* case from the Ninth Circuit; I think this really illustrates the point well because the facts that you had in *Twitter* where the Ninth Circuit said there was no standing are much more clear than this case.

In that case, Attorney General Paxton from Texas had served Twitter with a civil investigative demand requesting documents related to Twitter's policies. And Twitter brought a lawsuit saying, well, this is a -- this is threatening our free speech, and we are self-censoring because of this demand, and so we have standing to challenge your demand.

And the Ninth Circuit said: For one, a civil investigative demand is not an adversarial proceeding. It may

have been sent to Twitter, but it's just requesting documents. There is no subsequent threat of legal proceedings, and imagining what legal proceedings might follow would be purely speculative. So if plaintiffs have censored because of it, they may have subjectively censored. It was self-censorship. It was voluntarily, and it doesn't create standing.

Well, the same thing is true here. If the attorney general -- and much more so because the attorney general hasn't even communicated to the plaintiffs. He didn't send them anything.

And their fear is not about any threat of adversarial proceedings against them or any criminal proceedings against them but rather the possibility that the attorney general might restate an opinion that a prosecutor might credit and believe or might request the assistance of the attorney general to enforce and then bring charges against them, when no prosecutor has threatened such a thing, and the attorney general has no opinion on the question.

So if there was no standing in *Twitter*, it's much more clear that there is no standing in this case, and especially, again, because this was not an opinion that would have been made public. This was not in the format of an official attorney general opinion. It was not -- it was provided only to Representative Crane, and it was a privileged communication until it turned out --

THE COURT: You use the word "privileged." What do you mean by that? Privileged as in attorney-client privilege?

MR. WILSON: Yes, sir.

THE COURT: I'm not sure I understand what that means.

MR. WILSON: Well, so the attorney general has a duty under Idaho law to represent both the legislature, as a body, and also individual legislators when they ask the attorney general for legal advice.

And the opinion duty of the attorney general comes out of that general duty to provide those -- that legal advice. So that means that in an ordinary circumstance, when a legislator requests an opinion of the attorney general, the legislator receives a private response. And there might be --

THE COURT: So you're saying the attorney-client privilege?

MR. WILSON: Yes, Your Honor.

THE COURT: Well, then, hasn't the recipient, Senator Crane, waived that by apparently passing it on to someone who then used it as a fundraiser or at least were on the Internet and then was used as a fundraiser?

I'm not sure -- how does the fact that it was privileged -- how does that even enter into the discussion where it clearly entered the public domain?

MR. WILSON: We don't contest at all that Representative Crane waived the privilege.

THE COURT: Representative Crane.

MR. WILSON: Yes. He waived the privilege.

And -- but it was -- the point is, if you're saying that the attorney general has threatened, we can't have possibly threatened prosecution by providing a privileged communication to a client, like, any more so than, you know, if I -- if I represent a big corporation and I provide them with legal advice about a lawsuit that they might bring against another corporation, I haven't threatened litigation against that other corporation just by providing legal advice about it.

In the same way, if Attorney General Labrador sends a private letter to a legislator, he hasn't threatened anything against anyone by doing that. That's why the context of this communication matters.

He's not saying it's enforcement policy of Idaho law, because he wouldn't have the authority to do that anyway. He is just providing a private opinion to the legislator about what Idaho law means, and that opinion has now been completely withdrawn.

So turning now to the last --

THE COURT: Well, just to be clear, you -- not only on behalf of the attorney general but also the prosecuting attorneys that you represent, there is still no disavowal of the legal analysis or conclusions drawn in that letter; correct?

MR. WILSON: Your Honor, I'd say that that is -- it's

correct, but it's not the right framing of the issue. And that's because if there is no properly presented context for us to have an opinion on this issue, then we don't have an opinion on this issue. Nothing has called on us to do so.

But more importantly --

THE COURT: Well, that's part of the problem with the First Amendment issue. You're saying that the doctor should go ahead, do what they are going to do, and then wait for a criminal enforcement or a loss of their license, and then they can challenge the First Amendment issue.

Isn't that almost precisely why there is a fairly loose standard for injury in fact on First Amendment pre-enforcement claims? Just so that we don't subject someone who is trying to assert a First Amendment right or other constitutional right to the jeopardy of criminal prosecution and loss of medical licensing privileges as a condition of exercising those rights.

MR. WILSON: Well, Your Honor, I'd say that you -- we do have a more lax standard in the First Amendment context, but it's still not met here because, again, this is from someone who cannot threaten and who has not threatened. There is nothing about the Attorney General's private communication to a legislator that constitutes a threat to a doctor.

THE COURT: Well, it's not a threat, but it's a statement of an interpretation of a statute which, if adopted by

prosecuting authorities, would, in fact, result in criminal action and loss of licensure.

MR. WILSON: But I think that --

THE COURT: Do you agree with that?

MR. WILSON: The latter clause that the Court just gave there is key, "if adopted by prosecuting authorities." They are the ones who have the power here. They are the ones who matter. And none of them --

THE COURT: Well, they would have the same ability right now to disavow that interpretation of General Labrador and simply say: That's not what we're doing; that's not our interpretation of the statute, and we will not prosecute.

We have not heard that from anyone; correct?

MR. WILSON: I don't think they've -- the prosecutors have not taken any position about it either before, after, or during. I think they've got many other things that they are busy with.

But I'd also -- I'd note that on the disavowal point, when you look where disavowal is an issue -- like, for example, in the *Tingley* case -- it's not disavowal of your position where you say, "I'm sorry. I was wrong. I never should have said it. It was a mistake. Please forgive me." It's disavowal of enforcement, which can happen for any number of different reasons that -- and that's in the context of a law on the books.

So *Tingley* was a case about Washington's ban on

conversion therapy. And it was because Washington State had not disavowed enforcement of that policy the Ninth Circuit said, well, that gives -- that gives standing to challenge it because you haven't --

THE COURT: How is that different from disavowing an interpretation of a statute which has been publicly disseminated by the state's chief legal officer?

MR. WILSON: Well, I think that, you know, I would read -- frankly, Your Honor, when the attorney general said in this letter here -- he said the Crane letter is void; it is withdrawn; it does not state the opinion of the attorney general on any question of Idaho law -- if that's not a disavowal for Ninth Circuit purposes, I don't know what is. It's --

THE COURT: Well, yeah. I can tell you exactly what it would be, which is that there was an error in the analysis, and that is not the opinion of the attorney general; not that it should not have been issued but that the substantive decision itself was wrong, and we should not have issued it because it is wrong. That's a disavowal.

MR. WILSON: That would also be a disavowal. But there's two -- I think there's -- the Ninth Circuit language is not just disavowal; it's disavowal of enforcement.

And an opinion that does not state the attorney general's opinion on any question of Idaho law and is void and withdrawn, that is not an opinion that is being enforced. So we

have -- you have the equivalent of that disavowal in this situation.

Now, you can also disavow by saying, "I was wrong, and I'm sorry." But that's not -- that's not required. It doesn't -- it's not that every case moves forward and there's always a justiciable controversy until the defendant agrees with the plaintiff. Sometimes there is not a justiciable controversy because the two sides have a joint issue. There is not a dispute. They are not in conflict over the same territory.

And that's what's happened here. The attorney general has said: This does not reflect any opinion I have about Idaho law. So there is not a dispute here.

I see that my time is up. I'm happy to answer any other questions you have.

THE COURT: No. That's fine. Thank you very much.

MR. WILSON: Thank you, Your Honor.

THE COURT: Mr. Neiman.

MR. NEIMAN: Just very briefly, Your Honor. I think it's four points.

First, a suggestion that somehow this communication with the legislator was privileged is a little hard to understand because the statute requires the attorney general opinion letters to be made public and advice that's required to be made public is the opposite of privileged advice.

Second, a suggestion that somehow it's enough to

disavow the -- the -- I'm trying to think of how he said it. Mr. Wilson was suggesting that there has been a disavowal of enforcement here. There has been no disavowal of enforcement here.

He couldn't have been clearer in responding to Your Honor's questions that they are absolutely reserving to themselves the right to move forward on a prosecution cooperatively with the various district attorneys, local prosecuting attorneys that Mr. Wilson represents on exactly the theory that was put forth in the letter. Nothing has disavowed their ability to do that, which is exactly the problem.

Which gets me to my last point, Your Honor, which is, you know, I think, Mr. Wilson has valiantly tried to give an answer to your question about how would you advise a doctor if you were representing them. That was the best answer, I guess, that can be given for someone sitting in his shoes defending his position.

But the only rational advice that any lawyer could give a doctor right now, given that the Attorney General wrote, under his own signature, that a referral violates Idaho's law, is: You are at risk of prosecution if you make a referral. And for that reason, injunctive relief is appropriate here, Your Honor.

And just the last thing I want to say is that the core of our claim is a First Amendment claim, but we also have a very

important due process claim, and I don't want that to be lost here.

THE COURT: Now, We are not -- you know, I, in fact, was going to note -- and it's really what Mr. Wilson alluded to -- the reason why he doesn't go to number two, you know: And we don't argue that even if there is standing; what we did is completely constitutional. There was nothing in the briefing by the attorney general or the other defendants which really addresses that issue, the substantive issues of whether there was a constitutional violation.

Now, I want to be clear, by saying that, Mr. Wilson, I'm not suggesting you are waiving that in any way. I'm just noting that, for purposes of our decision here today, we are going to focus only on the issues that are briefed, which will include primarily standing, whether it's moot, issues of that sort. We are not going to weigh into those other issues simply because they are not briefed here today.

It does make it difficult because I do have to make a determination of likelihood of success on the merits, but I will just have to base that upon what's already been submitted.

All right. Anything else?

MR. NEIMAN: No, Your Honor. Thank you.

MR. WILSON: Your Honor, may I briefly respond?

THE COURT: Yes.

MR. WILSON: Just one point, that Mr. Neiman said that

the statute requires attorney general opinions to be made public. I understand this is probably not something that Mr. Neiman is super familiar with, because it's just the way the Attorney General's Office has operated. But the attorney general does not make every opinion public. There are many opinions that he renders that are just provided privately to legislators and remain privileged. That was true in the last administration just as much as it's true in this one.

THE COURT: Well, you know, that's an interesting problem. I don't -- you know, the State's equivalent of the Freedom of Information Act -- are you saying those could not be obtained by an interested citizen because they are privileged as a communication by the state's elected attorney general and a state-elected member of the House or Senate?

MR. WILSON: That's exactly right, Your Honor.

If Representative Crane hadn't waived privilege by voluntarily disclosing this opinion, it would have remained private until the end of time. And if anyone had requested it through a Freedom of Information Act request, we would have said that we have no responsive nonprivileged documents.

THE COURT: Okay. Well, I don't want to weigh into that; and fortunately, I don't have to.

It does seem to me, if I were a state court judge, I would find that to be a rather interesting issue to address just in terms of transparency of state government. But I would think

any action taken by a state attorney general, except in the context of actual litigation, would seem to be public. But, you know, what do I know?

I don't obviously get into that. It just strikes me as, I guess, a citizen of the state that I would be a little surprised if the attorney general, as an elected state official, cannot reveal the opinions they offer. But it's not an issue I have to address, and it's not an issue that would ever come before me. That's just purely an issue of state law.

MR. WILSON: And, Your Honor, I would say that it's really just because, in that context, the legislator is acting as a client of the attorney general. And so it's privileged legal advice.

The legislators have the right to request these opinions, and they are not made public and published unless the legislator gives consent and it's on a major issue of Idaho law. Then we will then publish the opinion under the appropriate circumstances.

But, otherwise, it's, you know, legislators in the course of a legislative session have all kinds of questions about, well, what does this law mean, what does that law mean. And the Attorney General is there to provide those advisory opinions and give legal advice to help them discharge their duties.

THE COURT: Okay. Well, as I said, it would be

interesting to get into it; but fortunately, I don't have to. I've got enough other stuff on my plate.

So thank you, Counsel. I will take the matter under advisement. We will not consider the matter to be at issue until we see the briefing, if any submitted, by the defendants with regard to the amicus briefs which were due, I think, Thursday I think I said at noon. Let's make it Thursday 5:00 p.m., and we'll consider the matter under advisement at that point.

And I will have Ms. Pugh or Mr. Pedersen communicate with the attorneys representing the other amicus about their obligation to obtain local counsel before the Court will formally consider their amicus brief, although I will have to admit I have already read it, so I'm not sure what that means. But it won't be considered specifically in any decision we issue until they have retained local counsel.

All right. Well, thank you, Counsel. And we'll take the matter under advisement. Thank you.

MR. WILSON: Thank you, Your Honor.

(Proceedings concluded at 3:13 p.m.)

REPORTER'S CERTIFICATE

I, TAMARA I. HOHENLEITNER, CSR, RPR, CRR, certify that the foregoing is a correct transcript of proceedings in the above-entitled matter.

/s/ Tamara I. Hohenleitner 06/08/2023

TAMARA I. HOHENLEITNER, CSR, RPR, CRR Date

No. 23-35518

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAII, ALASKA, ET AL.,
Plaintiffs-Appellees,

v.

RAÚL LABRADOR, ET AL.,
Defendant-Appellant,

On Appeal from the United States District Court
for the District of Idaho

No. 1:23-cv-00142-BLW
The Honorable B. Lynn Winmill

EXCERPTS OF RECORD
Volume 3 of 4

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

PLANNED PARENTHOOD GREATER NORTHWEST, 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-00142-BLW

MEMORANDUM DECISION AND ORDER

INTRODUCTION

Before the Court is Defendant Attorney General Raúl Labrador's emergency motion to stay pending appeal (Dkt. 155). Having thoroughly considered the parties briefing and the relevant record, the Court finds oral argument unnecessary.

For the reasons below, the Court will grant in part and deny in part Attorney General Labrador's motion to stay.

BACKGROUND

On July 31, 2023, the Court partially granted the Plaintiffs' motion for a preliminary injunction and issued an order enjoining Attorney General Labrador, in his official capacity, from prosecuting medical providers for referring patients to legal out-of-state abortion services under Idaho's criminal abortion statute, Idaho Code § 18-622.[1] *See MDO*, Dkt. 153. Per the parties' joint motion to continue (Dkt. 149), the Court also ordered the parties to submit litigation and discovery plans within 14 days. *See Id.*

The day after the issuance of the preliminary injunction, Attorney General Labrador appealed the Court's decision. *See Notice of Appeal*, Dkt. 154. The following day, the Attorney General filed this emergency motion to stay pending appeal and a motion to expedite his emergency motion. *See* Dkts. 155 and 156. Through his motion, the Attorney General requests that this Court stay "all proceedings and all other motions in this case pending appeal of the district court's July 31, 2023, Memorandum Decision and Order[.]" *See Def.'s Mtn.* at 2, Dkt. 155.

[1] The plaintiffs in this case are Planned Parenthood Greater Northwest, Caitlin Gustafson, M.D., and Darin L. Weyhrich, M.D. (collectively the "Medical Providers").

The Medical Providers do not object to staying further proceedings in this case, including discovery, pending appeal. *See Plf.s' Resp.* at 3, Dkt 163. However, the Medical Providers condition their non-opposition on the premise that the preliminary injunction will remain in place during the stay and that the Court maintain the ability to rule on the pending motion to dismiss. *Id*.

ANALYSIS

As a threshold matter, it is necessary to determine the scope of Attorney General Labrador's request for a stay pending appeal. In his motion, Attorney General Labrador requested a stay of "all proceedings and all other motions in this case pending appeal" *Def.'s Mtn.* at 2., Dkt. 155. Then, in his supporting memorandum, Attorney General Labrador states that he "now moves on an emergency basis to stay all proceedings pending appeal, including the Court's order to submit a litigation and discovery plan." *Def.'s Br.* at 1, Dkt. 155-1. Finally, in his reply, "the Attorney General maintains, for the reasons set forth in his motion to stay, that all proceedings—including the Court's preliminary injunction and further decisions on the pending motions to dismiss—should be stayed pending appeal." *Def.'s Reply* at 2, Dkt. 164. Although it is not entirely clear what exactly Attorney General Labrador seeks to stay – the enforcement of the preliminary injunction or just a stay of future proceedings (including discovery)

– the Court will address both requests.

A. Stay of the Preliminary Injunction.

Granting a stay is "an exercise of judicial discretion" that is "dependent upon the circumstances of the particular case." *Nken v. Holder*, 556 U.S. 418, 433, (2009). In exercising its discretion, the Court considers four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* at 434 (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). But "if the petition has not made a certain threshold showing regarding irreparable harm then a stay may not issue, regardless of the petitioner's proof regarding the other stay factors." *Doe v. Trump*, 957 F.3d 1050, 1058 (9th Cir. 2020) (cleaned up) (internal citation omitted). The moving party bears the burden of showing that the circumstances justify an exercise of the court's discretion. *Nken*, 556 U.S. at 434.

The Attorney General first contends that he will suffer irreparable harm if a stay is not issued through the loss of his Eleventh Amendment Immunity. *See Def.'s Br.* at 2-3, Dkt. 155-1. That argument is unpersuasive.

While the Attorney General's cited authority—almost all of which is non-

binding—may offer some support to an argument that *proceedings* should be stayed where the issue on appeal relates to a party's potential sovereign immunity, it offers no such support for staying an *injunction order*. A review of the cited authority shows that those cases are primarily concerned with the harm caused by allowing discovery to continue while the issue of sovereign immunity is resolved on appeal. Importantly, none of those cases involve staying a preliminary injunction order or judgment.[2] Thus, Attorney General Labrador's proffered irreparable injury relates only to a stay of proceedings— in particular, discovery— not the enforcement of the preliminary injunction pending appeal.

More importantly, the harm caused to the Medical Providers by issuing a stay would outweigh any potential harm the Attorney General might face. The

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[2] *See, e.g., Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993) (The Court addressed whether "States and state entities that claim to be 'arms of the State' may take advantage of the collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity[,]" and did not discuss a stay.); *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1250 (11th Cir. 2004) (the issue was "[w]hether a party is entitled to a stay of all proceedings in the district court until resolution of an appeal from a denial of arbitration[.]"); *Goshtasby v. Bd. of Trustees of Univ. of Illinois*, 123 F.3d 427, 428 (7th Cir. 1997) (No injunctive relief was granted and the stay the university was only seeking "to postpone discovery and other proceedings while the case was on appeal."); *Christian v. Commonwealth of the N. Mariana Islands*, No. 1:14-CV-00010, 2016 WL 406340, at *1 (D. N. Mar. I. Feb. 2, 2016) ("the defendants named in their official capacities [only sought] a stay of (1) all discovery with respect to the Commonwealth as to Causes of Action IV through XII of the Second Amended Complaint, and (2) all remaining proceedings in this case once non-expert discovery has been completed for the other parties.").

Court has already determined that the Medical Providers are likely to suffer irreparable harm in the absence of preliminary relief. *See MDO*, Dkt. 153. Staying that relief would, in turn, place the Medical Providers in the exact same position they were in before that determination, subjecting them to the same likelihood of harm. *See, e.g., Theorem, Inc. v. Citrusbyte, LLC*, No. CV 21-4660-GW-AGRX, 2022 WL 1314041, at *2 (C.D. Cal. Jan. 18, 2022)

In short, the Attorney General has neither suggested nor established that he will suffer irreparable harm absent a stay of the preliminary injunction order. *See Leiva-Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011) (without a stay applicant's threshold show of irreparable harm, "a stay may not issue, regardless of the petitioner's proof regarding the other stay factors."). Accordingly, to the extent that Attorney General Labrador seeks to stay the preliminary injunction, the Court will deny his motion.

1. Stay of Proceedings

Next, the Court must determine the appropriate scope of a stay that should be applied in this case.[3] Again, because the Medical Providers do not generally

[3] As discussed, the second condition of the Medical Providers' non-opposition was that this Court be allowed to issue a decision on the pending motion to dismiss while the proceedings are stayed.

oppose a stay pending appeal, including discovery, the only question before the Court is whether the stay should apply to "all other motions in this case," including the pending motion to dismiss. It shall.

Here, efficiency and judicial economy warrant a stay of all proceedings. As the Attorney General correctly noted, although there are unique issues regarding each defendant in this case, many of the jurisdictional questions overlap or are intertwined. As the Supreme Court has explained, "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the cause on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254, (1936).[4] Moreover, since most of the issues on appeal involve jurisdictional challenges, the Ninth Circuit's ruling will not only provide guidance on the legal issues in this case but may even be dispositive. Thus, the Court finds that the most efficient path forward is to stay all

[4] The Court recognizes that the *Landis* test is distinct from the *Nken* test. However, although neither party raised the issue, many district courts in this circuit have found the slightly broader *Landis* test applicable to a stay of proceedings where *Nken* should be applied to a request to stay an order or judgment, such as a preliminary injunction. *See Kuang v. United States Dept of Def.*, No. 18-CV-03698-JST, 2019 WL 1597495, at *3 (N.D. Cal. Apr. 15, 2019) ("a review of the case law suggests that district courts that have directly confronted the question have overwhelmingly concluded that the *Landis* test or something similar governs. Those courts have reasoned that the *Nken* test is applicable when there is a request to stay a district court's *judgment or order* pending an appeal of the same case, while *Landis* applies to the decision to stay *proceedings*, regardless of whether the stay is based on a direct appeal or an independent case.") (internal quotations and multiple citations omitted) (emphasis original).

proceedings, including any pending motions.

The Court recognizes that resolving the pending motion might offer the Medical Providers additional assurance that they will not be prosecuted for referring patients to legal out-of-state abortion services while the appeal is pending; however, the preliminary injunction issued against any effort by Attorney General Labrador to enforce his interpretation of Idaho Code § 18-622 should be sufficient to prevent such enforcement by a county prosecuting attorney during the appeals process. But, of course, there may be unique circumstances of which the Court is unaware which belie that assumption. For that reason, the Medical Providers may, at any point during the appeal, ask the Court to reconsider this aspect of its decision.

Accordingly, to the extent Attorney General Labrador seeks a stay of all proceedings, including discovery and the resolution of any pending matters, the Court will grant his motion.

ORDER

IT IS ORDERED that:

1. Defendant's Emergency Motion for Stay Pending Appeal (Dkt. 155) is **DENIED** as it relates to a request to stay the Court's preliminary injunction against Attorney General Labrador issued July 31, 2023 (Dkt. 153).

2. Defendant's Emergency Motion for Stay Pending Appeal (Dkt. 155) is **GRANTED** as it pertains to all proceedings, including discovery and all other motions in this case, pending appeal.

DATED: August 15, 2023

B. Lynn Winmill
U.S. District Court Judge

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief, Civil Litigation and Constitutional Defense

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UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

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 capacity as the 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-00142-BLW

EMERGENCY MOTION TO STAY PENDING APPEAL

Defendant Raúl Labrador, by and through undersigned counsel, hereby moves the Court for an Order staying all proceedings and all other motions in this case pending appeal of the district court's July 31, 2023, Memorandum Decision and Order, Dkt. 153, granting Plaintiff's motion for preliminary injunction against him.

DATED: August 2, 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: */s/ Lincoln Davis Wilson*
LINCOLN DAVIS WILSON
Chief, Civil Litigation and
Constitutional Defense
BRIAN V. CHURCH
TIMOTHY LONGFIELD
Deputy Attorneys General

Attorneys for Defendant-Appellant Attorney General Raúl Labrador

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to all counsel of record who have appeared in this matter.

/s/ Lincoln Davis Wilson
LINCOLN DAVIS WILSON
Chief, Civil Litigation and
Constitutional Defense

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
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Attorneys for Defendant Raúl Labrador and Certain County Prosecuting Attorneys

UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

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 capacity as the 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-00142-BLW

MEMORANDUM IN SUPPORT OF EMERGENCY MOTION TO STAY PENDING APPEAL

INTRODUCTION

Two days ago, the Court granted a preliminary injunction against the Attorney General and ordered the parties to submit a litigation and discovery plan within 14 days. Dkt. 153. Yesterday, the Attorney General appealed this Court's order. Dkt. 154. So in light of the imminent deadlines set by the Court, the Attorney General now moves on an emergency basis to stay all proceedings pending appeal, including the Court's order to submit a litigation and discovery plan.

First, the Attorney General will experience irreparable harm absent a stay. Subjecting the Attorney General to discovery and further litigation will irretrievably strip away his sovereign interest in being free from such proceedings. This interest is so important that courts have held that it alone requires a stay.

Second, the Attorney General is likely to succeed on the merits of his appeal challenging the Court's jurisdiction to enter an injunction. The Attorney General continues to maintain for the reasons stated in prior briefing that no justiciable controversy exists. Although the Court has ruled otherwise, the fact that it has deferred ruling as to the County Prosecutors shows clearly the serious questions regarding jurisdiction in this case. Those questions, among others, warrant a stay.

Third, the balance of the harms and public interest favor a stay. Because the Attorney General has disclaimed the prosecutorial authority that the Court has enjoined, *see* Formal AG Opinion 23-1 (Dkt. 106-1), Plaintiffs will not be harmed by a stay. And it is in the public interest that federal courts not issue advisory opinions.

The Court should therefore grant a stay of proceedings pending appeal.

ARGUMENT

I. A stay is required to prevent irreparable harm.

Without a stay, the Attorney General would suffer irreparable harm through the loss of his Eleventh Amendment immunity. This is so because "[t]he defense of sovereign … immunity protects government officials not only from having to stand trial, but from having to bear the burdens attendant to litigation, including pretrial discovery." *Blinco v. Green Tree Servicing LLC*, 366 F.3d 1249, 1252 (11th Cir. 2004); *Goshtasby v. Bd. of Tr. of Univ. of Ill.*, 123 F.3d 427, 428 (7th Cir. 1997). Yet "the value to the States of their Eleventh Amendment immunity ... is for the most part lost as litigation proceeds past motion practice." *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.,* 506 U.S. 139, 145 (1993). That is why federal practice provides state officials "with swift access to appellate review" to avoid "the costs and general consequences of subjecting public officials to the risks of discovery and trial." *Summit Med. Assocs. v. James*, 998 F. Supp. 1339 (M.D. Ala. 1998). But if the Court were to require the Attorney General "to continue discovery," he "would irretrievably lose the benefit of [his] immunity." *Christian v. Commonwealth of the N. Mariana Islands*, No. 1:14-CV-00010, 2016 WL 406340, at *2 (D. N. Mar. I. 2016).

This irreparable harm to the Attorney General requires a stay here. In fact, the right to "immediately appeal any order denying such immunity" is so important that asserting it "'divests the district court of jurisdiction to proceed with trial.'" *Id.* (quoting *Chuman v. Wright*, 960 F.2d 104, 105 (9th Cir. 1992)). The Attorney General has important arguments to raise here concerning his Eleventh Amendment

immunity and the Court's attendant lack of jurisdiction. As he has explained in prior briefing, *see* Dkt. 106 at 2; Dkt. 107 at 6; Dkt. 127-1 at 6; Dkt. 128 at 6; Dkt. 147 at 3, he has issued an official opinion that he lacks any authority to enforce Idaho Code § 18-622 "unless a county prosecutor specifically so requests and an appointment is made by the district court under Idaho Code § 31-2603." Dkt. 106-1 at 4. Since no such request or appointment has occurred, the Attorney General lacks prosecutorial authority and is not a proper defendant under *Ex parte Young*. *See* Dkt. 42 at 8; Dkt. 85 at 2–3.

These serious and evolving questions of the Attorney General's enforcement authority have direct bearing on his sovereign immunity. Notably, the legislature's recent decision to not give the Attorney General enforcement authority over the statute at issue here "reinforce[s] the inapplicability of *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908 (9th Cir. 2004)." Dkt. 85 at 3. Among other things, *Wasden* concerned a challenge to the law itself—not, as here, a challenge to a rescinded interpretation by the Attorney General. And even if *Wasden* did apply, courts have held a stay warranted in light of the possibility that "the Ninth Circuit should reconsider its precedent" and hold the Attorney General "possesses sovereign immunity," which would mean he would "immediately be dismissed from this suit." *Christian*, 2016 WL 406340, at *2. The Attorney General's right to protect that immunity on appeal demands a stay.

II. The Attorney General is likely to succeed on his appeal.

The Attorney General is likely to prevail on his contention that the Court lacks Article III jurisdiction over this matter. As the Court is aware, the Attorney General did not defend the Crane Letter on the merits, having rescinded it, and instead defended the action entirely on jurisdictional grounds. The appeal will thus turn solely on the question of jurisdiction, and the Attorney General's arguments are likely to be dispositive on appeal. The Attorney General addresses only a few of them here.

First, the Attorney General is likely to prevail on his arguments that Plaintiffs lack Article III standing. Critically, under Idaho law, criminal prosecutorial authority—including for section 18-622—begins with county prosecutors and may only then be referred out to the Attorney General through a court appointment. *See* Dkt. 106-1 at 4; *State v. Summer,* 139 Idaho 219, 224, 76 P.3d 963, 968 (2003); *Newman v. Lance*, 129 Idaho 98, 922 P.2d 395 (1996). Thus, any attempt to show standing as to the Attorney General over the Crane Letter would require the Court to connect that letter to the county prosecutors. *See* Dkt. 42 at 16–18. Plaintiffs made no attempt to show that connection, and the county prosecutors' declarations in their motion to dismiss conclusively refute any such link. Yet the Court decided to defer consideration of the jurisdictional problems raised by those papers and to proceed with deciding the merits. Dkt. 153 at 17. The Attorney General has strong arguments that putting those jurisdictional questions aside to rule on the merits is inconsistent with the Court's "independent obligation to determine whether subject-matter jurisdiction exists[.]'" *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (citation omitted).

Second, the Attorney General is likely to prevail on his arguments that the Court misapplied the Ninth Circuit's "disavowal" jurisprudence. Those cases do not apply here because they concern situations where operative state law prohibits the plaintiff's conduct, such that "the government's failure to disavow enforcement" weighs in favor of standing. *Tingley v. Ferguson*, 47 F.4th 1055, 1068 (9th Cir. 2022); *Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644, 653 (9th Cir. 2021). They do not apply here, where Plaintiffs contend that the law as written allows their conduct. *See* Dkt. 1 ¶ 40; Dkt. 2-1 at 4–5. Nor does the law hold that a disavowal for reasons that are "procedural—not substantive" is insufficient. Dkt. 153 at 38. The disavowal cases require disavowal of enforcement, not a disavowal of the law itself. *Tingley*, 47 F.4th at 1068. If the defendant has no position on a question, then there is no case or controversy—nothing requires the defendant to go further and to take the same position as the plaintiff.

Third, even accepting the Court's analysis, there is no jurisdiction under the standard the Court announced for itself at the end of its order:

> [I]t would not have been particularly difficult for the State to definitively establish that no case or controversy exists. That is, all it would have taken is for Attorney General Labrador to … make an affirmative statement that he, or his office, will not enforce Idaho's criminal abortion statute in such a manner.

Dkt. 153 at 54–55. The Attorney General did exactly that, repeatedly. He rescinded the Crane Letter, *see* Withdrawal Letter (Dkt. 42-4), and stated directly to the Court that this "opinion that does not state the attorney General's opinion on any question of Idaho law and is void and withdrawn … ***is not an opinion that is being enforced***." Tr. at 45–46 (Apr. 24, 2023) (emphasis added). He emphasized that he

"neither holds nor defends" the interpretation of the Crane Letter. Dkt. 107 at 1; Dkt. 85 at 10. The Attorney General has made clear that he has not enforced the interpretation of the Crane letter, is not enforcing it, and will not enforce it.

The Attorney General went even further than these statements of intent by disclaiming that he ***can*** enforce the interpretation of the Crane Letter. He explained in a formal legal opinion that he has no enforcement authority over this statute "unless a county prosecutor specifically so requests and an appointment is made by the district court under Idaho Code § 31-2603." Dkt. 106-1 at 4. Plaintiffs do not allege that either of those things has happened here, so by his own admission, the Attorney General has no enforcement authority. Nor does the Attorney General have "formal power to refer *anything* to county prosecutors, who are elected officials with different constituencies that do not answer to the Attorney General." Dkt. 107 at 6. And while having no enforcement authority necessarily means having no intent to enforce, even if a case were referred to him by a county prosecutor, the Attorney General does not defend the theory of the Crane Letter and it is not being enforced. Tr. at 45–46 (Apr. 24, 2023); Dkt. 107 at 1; Dkt. 85 at 10. Put simply, the Attorney General has shown that he does not intend to bring any prosecution consistent with the theory of the Crane Letter.

Thus, even if the Ninth Circuit were to accept this Court's interpretation of the law, the Attorney General would have "definitively establish[ed]" that "no case or controversy exists." Dkt. 153 at 54–55. He is likely to prevail.

III. The balance of harms and the public interest favor a stay.

Finally, the Court should find that the balance of harms and public interest also support a stay. For the reasons above, there is no prejudice to Plaintiffs from a stay, since the Attorney General has made clear that the Crane Letter "is not an opinion that is being enforced," Tr. at 45–46, that he "neither holds nor defends" its interpretation, Dkt. 107 at 1, and that he lacks authority to enforce the statute at issue. Dkt. 106-1 at 4. They suffer no harm from a withdrawn interpretation that is not and cannot be enforced. Plaintiffs plainly do not feel threatened by the Crane Letter—even before the Court's order, Planned Parenthood started a campaign through six billboards around the Treasure Valley referring people to other states where they can obtain an abortion.[1]

In addition, it is in the public interest to ensure that federal courts do not issue advisory opinions. Rather, federal jurisdiction is limited to cases where the defendant takes and defends a position opposing the plaintiff. The absence of any such controversy here shows that a stay of such a proceeding pending appeal is warranted.

[1] *See* Andrew Baertlein, *Planned Parenthood billboards will direct Idahoans to out-of-state abortion care*, KTVB7 (July 25, 2023, 7:47 PM MDT), https://tinyurl.com/mmn97ta7.

CONCLUSION

The Court should stay all proceedings pending appeal.

DATED: August 2, 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: */s/ Lincoln Davis Wilson*
LINCOLN DAVIS WILSON
Chief, Civil Litigation and
Constitutional Defense
BRIAN V. CHURCH
TIMOTHY LONGFIELD
Deputy Attorneys General

Attorneys for Defendant-Appellant Attorney General Raúl Labrador

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to all counsel of record who have appeared in this matter.

/s/ Lincoln Davis Wilson
LINCOLN DAVIS WILSON
Chief, Civil Litigation and
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RAÚL R. LABRADOR
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UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAII, ALASKA, INDIANA, KENTUCKY, on behalf of itself, *et al.*,

Plaintiffs,

v.

RAÚL LABRADOR, in his capacity as the Attorney General of the State of Idaho; *et al.*,

Defendants.

Case No. 1:23-cv-00142-BLW

DEFENDANTS' SEVENTH NOTICE OF SUPPLEMENTAL DECLARATIONS REGARDING SUBJECT MATTER JURISDICTION

The undersigned Defendants submit the attached declarations of county prosecutors in connection with the Court's "independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006); *Ex parte McCardle*, 7 Wall. 506, 514 (1868). These declarations further show, consistent with the arguments in Defendants' briefing,[1] that this action does not present a justiciable Article III controversy.

These declarations have been executed by the following county prosecutor: Stanley T. Mortensen, Kootenai County. The undersigned Defendants anticipate submitting further supplemental declarations under separate cover as they become available.

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[1] *See, e.g.*, Dkt. 42 at 4 ("[T]he Crane Letter was not law enforcement guidance sent out publicly to local prosecutors … nor was it ever published by the Office of the Attorney General.") (quotation omitted); Dkt. 42 at 18 ("Plaintiffs do not allege that the Attorney General sent the letter to anyone else, much less to the county prosecutors or the state licensing boards, each of which act independent of the Attorney General."); Dkt. 85 at 5 ("They do not contend that any of the 44 county prosecutors they sued have threatened them or anyone else under the Crane Letter theory."); Dkt. 107 at 1 ("[T]he officials who *have* prosecutorial authority have said and done nothing."); *id.* at 6 ("[N]o county prosecutor or state licensing board has taken any action or expressed any position about the theory of prosecution in the Crane Letter. Nor do Plaintiffs allege otherwise."); *id.* at 8 & n.4 ("Plaintiffs have not shown any relevant action by county prosecutors anywhere, but it is even more troubling for prosecutors in the 41 other c§ounties" where Plaintiffs have no facilities).

DATED: June 2, 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: */s/ Lincoln Davis Wilson*
LINCOLN DAVIS WILSON
Chief, Civil Litigation and
Constitutional Defense
BRIAN V. CHURCH
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Attorneys for Defendants Attorney General Raúl Labrador and Certain County Prosecuting Attorneys[2]

[2] Jan Bennetts, Ada County; Chris Boyd, Adams County; Stephen Herzog, Bannock County; Adam McKenzie, Bear Lake County; Mariah Dunham, Benewah County; Matt Fredback, Blaine County; Paul Rogers, Bingham County; Matt Fredback, Blaine County Prosecutor; Alex Gross, Boise County; Louis Marshall, Bonner County; Randy Neal, Bonneville County; Andrakay Pluid, Boundary County; Steve Stephens, Butte County; Jim Thomas, Camas County; Bryan Taylor, Canyon County; S. Douglas Wood, Caribou County; McCord Larsen, Cassia County; Janna Birch, Clark County; E. Clayne, Clearwater County; Vic Pearson, Franklin County; Lindsay Blake, Fremont County; Erick Thomson, Gem County; Trevor Misseldine, Gooding County; Kirk MacGregor, Idaho County; Mark Taylor, Jefferson County; Brad Calbo, Jerome County; Stanley Mortensen, Kootenai County; Bill Thompson, Latah County; Bruce Withers, Lemhi County; Zachary Pall, Lewis County; Rob Wood, Madison County; Lance Stevenson, Minidoka County; Justin Coleman, Nez Perce; Cody Brower, Oneida County; Chris Topmiller, Owyhee County; Mike Duke, Payette County; Benjamin Allen, Shoshone County; Bailey Smith, Teton Valley County; Grant Loebs, Twin Falls County; Brian Naugle, Valley County; and Delton Walker, Washington County.

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to all counsel of record who have appeared in this matter.

/s/ Lincoln Davis Wilson
LINCOLN DAVIS WILSON
Chief, Civil Litigation and Constitutional Defense

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
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UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

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 capacity as the 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-00142-BLW

DECLARATION OF STANLEY T. MORTENSEN

I, Stanley T. Mortensen, hereby declare and state as follows:

1. I am the prosecuting attorney for Kootenai County, Idaho, and am named as a Defendant in this action.

2. The Idaho Attorney General's Office never sent me a copy of the Attorney General's March 27, 2023 letter to Representative Brent Crane (the "Crane Letter").

3. I received that letter only in connection with this litigation.

4. I did not, and do not, regard the Crane Letter as any type of guidance or directive to me or to my office from the Office of the Attorney General.

5. My office has taken no position regarding the scope of enforcement under Idaho Code § 18-622.

6. My prosecutorial decisions are based on my own independent legal duty, interpretation of the law, and discretion.

7. This is true no less with respect to any prosecution under Idaho Code § 18-622.

8. The Attorney General has no supervisory authority over my work as a prosecutor or the power to direct me to initiate any prosecution without my consent.

9. I am aware of no prosecution, or threat of prosecution, brought by anyone in my office against Plaintiffs under Idaho Code § 18-622.

10. In fact, to my knowledge, none of the Plaintiffs in this action have facilities in my county.

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

Dated: June 2, 2023

Stanley T. Mortensen

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief of Civil Litigation and Constitutional Defense

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and Certain County Prosecuting Attorneys

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAII, ALASKA, INDIANA, KENTUCKY, on behalf of itself, its staff, physicians and patients, *et al.*,

Plaintiffs,

v.

RAÚL LABRADOR, in his capacity as the Attorney General of the State of Idaho, *et al.*,

Defendants.

Case No. 1:23-cv-00142-BLW

BUTTE COUNTY PROSECUTOR DEFENDANT'S JOINDER IN MOTION TO DISMISS (Dkt. 127)

Defendant, County Prosecuting Attorney Steve Stephens, Butte County, hereby joins in the motion to dismiss by certain county prosecutors under Rule 12(b)(1) and Rule 12(b)(6). Dkt. 127.

DATED: May 25, 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: /s/ *Lincoln Davis Wilson*
LINCOLN DAVIS WILSON
Chief, Civil Litigation and
Constitutional Defense
BRIAN V. CHURCH
TIMOTHY LONGFIELD
Deputy Attorneys General

Attorneys for Defendants Attorney General Raúl Labrador and Certain County Prosecuting Attorneys

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 25, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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**Pro hac vice*

/s/ *Lincoln Davis Wilson*
LINCOLN DAVIS WILSON
Chief, Civil Litigation and
Constitutional Defense

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief of Civil and Constitutional Defense

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Attorneys for Defendant Raúl Labrador and Certain County Prosecuting Attorneys

UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAII, ALASKA, INDIANA, KENTUCKY, on behalf of itself, *et al.*,

Plaintiffs,

v.

RAÚL LABRADOR, in his capacity as the Attorney General of the State of Idaho; *et al.*,

Defendants.

Case No. 1:23-cv-00142-BLW

DEFENDANTS' SIXTH NOTICE OF SUPPLEMENTAL DECLARATIONS REGARDING SUBJECT MATTER JURISDICTION

The undersigned Defendants submit the attached declarations of county prosecutors in connection with the Court's "independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006); *Ex parte McCardle*, 7 Wall. 506, 514 (1868). These declarations further show, consistent with the arguments in Defendants' briefing,[1] that this action does not present a justiciable Article III controversy.

These declarations have been executed by the following county prosecutors: S. Douglas Wood, Caribou County; Zachary Pall, Lewis County; and Delton Walker, Washington County. The undersigned Defendants anticipate submitting further supplemental declarations under separate cover as they become available.

//

//

[1] *See, e.g.*, Dkt. 42 at 4 ("[T]he Crane Letter was not law enforcement guidance sent out publicly to local prosecutors … nor was it ever published by the Office of the Attorney General.") (quotation omitted); Dkt. 42 at 18 ("Plaintiffs do not allege that the Attorney General sent the letter to anyone else, much less to the county prosecutors or the state licensing boards, each of which act independent of the Attorney General."); Dkt. 85 at 5 ("They do not contend that any of the 44 county prosecutors they sued have threatened them or anyone else under the Crane Letter theory."); Dkt. 107 at 1 ("[T]he officials who *have* prosecutorial authority have said and done nothing."); *id.* at 6 ("[N]o county prosecutor or state licensing board has taken any action or expressed any position about the theory of prosecution in the Crane Letter. Nor do Plaintiffs allege otherwise."); *id.* at 8 & n.4 ("Plaintiffs have not shown any relevant action by county prosecutors anywhere, but it is even more troubling for prosecutors in the 41 other c§ounties" where Plaintiffs have no facilities).

DATED: May 12, 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: */s/ Lincoln Davis Wilson*
LINCOLN DAVIS WILSON
Chief, Civil Litigation and
Constitutional Defense
BRIAN V. CHURCH
TIMOTHY LONGFIELD
Deputy Attorneys General

Attorneys for Defendants Attorney General Raúl Labrador and Certain County Prosecuting Attorneys[2]

[2] Jan Bennetts, Ada County; Chris Boyd, Adams County; Stephen Herzog, Bannock County; Adam McKenzie, Bear Lake County; Mariah Dunham, Benewah County; Matt Fredback, Blaine County; Paul Rogers, Bingham County; Matt Fredback, Blaine County Prosecutor; Alex Gross, Boise County; Louis Marshall, Bonner County; Randy Neal, Bonneville County; Andrakay Pluid, Boundary County; Jim Thomas, Camas County; Bryan Taylor, Canyon County; S. Douglas Wood, Caribou County; McCord Larsen, Cassia County; Janna Birch, Clark County; E. Clayne, Clearwater County; Vic Pearson, Franklin County; Lindsay Blake, Fremont County; Erick Thomson, Gem County; Trevor Misseldine, Gooding County; Kirk MacGregor, Idaho County; Mark Taylor, Jefferson County; Brad Calbo, Jerome County; Stanley Mortensen, Kootenai County; Bill Thompson, Latah County; Bruce Withers, Lemhi County; Zachary Pall, Lewis County; Rob Wood, Madison County; Lance Stevenson, Minidoka County; Justin Coleman, Nez Perce; Cody Brower, Oneida County; Chris Topmiller, Owyhee County; Mike Duke, Payette County; Benjamin Allen, Shoshone County; Bailey Smith, Teton Valley County; Grant Loebs, Twin Falls County; Brian Naugle, Valley County; and Delton Walker, Washington County.

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to all counsel of record who have appeared in this matter.

/s/ Lincoln Davis Wilson
LINCOLN DAVIS WILSON
Chief, Civil Litigation and Constitutional Defense

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief of Civil and Constitutional Defense

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Attorneys for Defendant Raúl Labrador

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

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 capacity as the 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-00142-BLW

DECLARATION OF ZACHARY PALL

I, ZACHARY PALL, hereby declare and state as follows:

1. I am the Prosecuting Attorney for Lewis County, Idaho, and am named as a Defendant in this action.

2. I never received, directly or indirectly, the Attorney General's March 27, 2023 letter to Representative Brent Crane (the "Crane Letter") at any point prior to this litigation.

3. I did not, and do not, regard the Crane Letter as any type of guidance or directive to me or to my office from the Office of the Attorney General.

4. My office has taken no position regarding the scope of enforcement under Idaho Code § 18-622.

5. My prosecutorial decisions are based on my own independent legal duty, interpretation of the law, and discretion.

6. This is equally true with respect to any prosecution under Idaho Code § 18-622.

7. The Attorney General has no supervisory authority over my work as a prosecutor nor the power to direct me to initiate any prosecution.

8. There has been no prosecution, or threat of prosecution, brought by anyone in my office against Plaintiffs under Idaho Code § 18-622.

9. None of the Plaintiffs in this action have facilities in my county.

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

Dated: May 9, 2023

Zachary Pall

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief of Civil and Constitutional Defense

BRIAN V. CHURCH, ISB #9391
TIMOTHY J. LONGFIELD, ISB #12201
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timothy.longfield@ag.idaho.gov
Attorneys for Defendant Raúl Labrador

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

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 capacity as the 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-00142-BLW

DECLARATION OF S. DOUGLAS WOOD

I, S. Douglas Wood, hereby declare and state as follows:

1. I am the prosecuting attorney for Caribou County, Idaho, and am named as a Defendant in this action.

2. The Idaho Attorney General's Office never sent me a copy of the Attorney General's March 27, 2023 letter to Representative Brent Crane (the "Crane Letter"), and I have never read the letter.

3. I received that letter only in connection with this litigation, but have not read the letter.

4. I did not, and do not, regard the Crane Letter as any type of guidance or directive to me or to my office from the Office of the Attorney General.

5. My office has taken no position regarding the scope of enforcement under Idaho Code § 18-622.

6. My prosecutorial decisions are based on my own independent legal duty, interpretation of the law, and discretion.

7. This is true no less with respect to any prosecution under Idaho Code § 18-622.

8. The Attorney General has no supervisory authority over my work as a prosecutor or the power to direct me to initiate any prosecution without my consent.

9. I am aware of no prosecution, or threat of prosecution, brought by anyone in my office against Plaintiffs under Idaho Code § 18-622.

10. Caribou County is a small, rural area, and I do not believe the Plaintiffs in this action have facilities in my county.

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

Dated: May 11, 2023

S. Douglas Wood

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief of Civil and Constitutional Defense

BRIAN V. CHURCH, ISB #9391
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timothy.longfield@ag.idaho.gov
Attorneys for Defendant Raúl Labrador

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

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 capacity as the 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-00142-BLW

DECLARATION OF DELTON WALKER

I, DELTON WALKER, hereby declare and state as follows:

1. I am the prosecuting attorney for WASHINGTON County, Idaho, and am named as a Defendant in this action.

2. The Idaho Attorney General's Office never sent me a copy of the Attorney General's March 27, 2023 letter to Representative Brent Crane (the "Crane Letter").

3. I received that letter only in connection with this litigation.

4. I did not, and do not, regard the Crane Letter as any type of guidance or directive to me or to my office from the Office of the Attorney General.

5. My office has taken no position regarding the scope of enforcement under Idaho Code § 18-622.

6. My prosecutorial decisions are based on my own independent legal duty, interpretation of the law, and discretion.

7. This is true no less with respect to any prosecution under Idaho Code § 18-622.

8. The Attorney General has no supervisory authority over my work as a prosecutor or the power to direct me to initiate any prosecution without my consent.

9. I am aware of no prosecution, or threat of prosecution, brought by anyone in my office against Plaintiffs under Idaho Code § 18-622.

10. In fact, none of the Plaintiffs in this action have facilities in my county.

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

Dated: May 11, 2023.

Delton Walker

DELTON WALKER

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief of Civil and Constitutional Defense

BRIAN V. CHURCH, ISB #9391
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timothy.longfield@ag.idaho.gov
Attorneys for Defendant Raúl Labrador and Certain County Prosecuting Attorneys

UNITED STATES DISTRICT COURT DISTRICT OF IDAHO

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAII, ALASKA, INDIANA, KENTUCKY, on behalf of itself, its staff, physicians and patients, *et al.*,

Plaintiffs,

v.

RAÚL LABRADOR, in his capacity as the Attorney General of the State of Idaho, *et al.*,

Defendants.

Case No. 1:23-cv-00142-BLW

MOTION TO DISMISS BY DEFENDANT JASON MACKRILL

Defendant Jason Mackrill, Power County Prosecuting Attorney, hereby moves the Court to dismiss Plaintiffs' Complaint, Dkt. 1, under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). In support of this motion, Mr. Mackrill hereby incorporates by reference the prior briefing submitted by Defendants in this matter, *see* Dkts. 42, 85, 107, 127, and proffers the attached Declaration.

DATED: May 9, 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: */s/ Lincoln Davis Wilson*
LINCOLN DAVIS WILSON
Chief, Civil Litigation and
Constitutional Defense
BRIAN V. CHURCH
TIMOTHY LONGFIELD
Deputy Attorneys General

Attorneys for Defendant Jason Mackrill

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 9, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to all counsel of record.

/s/ *Lincoln Davis Wilson*
LINCOLN DAVIS WILSON
Chief, Civil Litigation and Constitutional Defense

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief of Civil and Constitutional Defense

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Attorneys for Defendant Raúl Labrador

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

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,

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RAÚL LABRADOR, in his capacity as the 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-00142-BLW

DECLARATION OF JASON E. MACKRILL

I, JASON E. MACKRILL, hereby declare and state as follows:

1. I am the Prosecuting Attorney for Power County, Idaho, and am named as a Defendant in this action.

2. The Idaho Attorney General's Office never sent me a copy of the Attorney General's March 27, 2023 letter to Representative Brent Crane (the "Crane Letter").

3. I received that letter only in connection with this litigation.

4. I did not, and do not, regard the Crane Letter as any type of guidance or directive to me or to my office from the Office of the Attorney General.

5. My office has taken no position regarding the scope of enforcement under Idaho Code § 18-622.

6. My prosecutorial decisions are based on my own independent legal duty, interpretation of the law, and discretion.

7. This is true no less with respect to any prosecution under Idaho Code § 18-622.

8. The Attorney General has no supervisory authority over my work as a prosecutor or the power to direct me to initiate any prosecution without my consent.

9. I am aware of no prosecution, or threat of prosecution, brought by anyone in my office against Plaintiffs under Idaho Code § 18-622.

10. In fact, none of the Plaintiffs in this action have facilities in my county.

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

Dated: May 9, 2023

JASON E. MACKRILL

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief of Civil and Constitutional Defense

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timothy.longfield@ag.idaho.gov
Attorneys for Defendant Raúl Labrador and Certain County Prosecuting Attorneys

UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAII, ALASKA, INDIANA, KENTUCKY, on behalf of itself, *et al.*,

Plaintiffs,

v.

RAÚL LABRADOR, in his capacity as the Attorney General of the State of Idaho; *et al.*,

Defendants.

Case No. 1:23-cv-00142-BLW

DEFENDANTS' FIFTH NOTICE OF SUPPLEMENTAL DECLARATIONS REGARDING SUBJECT MATTER JURISDICTION

The undersigned Defendants submit the attached declarations of county prosecutors in connection with the Court's "independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006); *Ex parte McCardle*, 7 Wall. 506, 514 (1868). These declarations further show, consistent with the arguments in Defendants' briefing,[1] that this action does not present a justiciable Article III controversy.

These declarations have been executed by the following county prosecutors: Jim Thomas, Camas County; Trevor Misseldine, Gooding County; Paul Rogers, Bingham County; Lindsey Blake, Fremont County; Mike Duke, Payette County; and Chris Topmiller, Owyhee County. The undersigned Defendants anticipate submitting further supplemental declarations under separate cover as they become available.

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[1] *See, e.g.*, Dkt. 42 at 4 ("[T]he Crane Letter was not law enforcement guidance sent out publicly to local prosecutors … nor was it ever published by the Office of the Attorney General.") (quotation omitted); Dkt. 42 at 18 ("Plaintiffs do not allege that the Attorney General sent the letter to anyone else, much less to the county prosecutors or the state licensing boards, each of which act independent of the Attorney General."); Dkt. 85 at 5 ("They do not contend that any of the 44 county prosecutors they sued have threatened them or anyone else under the Crane Letter theory."); Dkt. 107 at 1 ("[T]he officials who *have* prosecutorial authority have said and done nothing."); *id.* at 6 ("[N]o county prosecutor or state licensing board has taken any action or expressed any position about the theory of prosecution in the Crane Letter. Nor do Plaintiffs allege otherwise."); *id.* at 8 & n.4 ("Plaintiffs have not shown any relevant action by county prosecutors anywhere, but it is even more troubling for prosecutors in the 41 other c§ounties" where Plaintiffs have no facilities).

DATED: May 9, 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: */s/ Lincoln Davis Wilson*
LINCOLN DAVIS WILSON
Chief, Civil Litigation and
Constitutional Defense
BRIAN V. CHURCH
TIMOTHY LONGFIELD
Deputy Attorneys General

Attorneys for Defendants Attorney General Raúl Labrador and Certain County Prosecuting Attorneys[2]

[2] Jan Bennetts, Ada County; Chris Boyd, Adams County; Stephen Herzog, Bannock County; Adam McKenzie, Bear Lake County; Mariah Dunham, Benewah County; Matt Fredback, Blaine County; Paul Rogers, Bingham County; Matt Fredback, Blaine County Prosecutor; Alex Gross, Boise County; Louis Marshall, Bonner County; Randy Neal, Bonneville County; Andrakay Pluid, Boundary County; Jim Thomas, Camas County; Bryan Taylor, Canyon County; S. Douglas Wood, Caribou County; McCord Larsen, Cassia County; Janna Birch, Clark County; E. Clayne, Clearwater County; Vic Pearson, Franklin County; Lindsay Blake, Fremont County; Erick Thomson, Gem County; Trevor Misseldine, Gooding County; Kirk MacGregor, Idaho County; Mark Taylor, Jefferson County; Brad Calbo, Jerome County; Stanley Mortensen, Kootenai County; Bill Thompson, Latah County; Bruce Withers, Lemhi County; Zachary Pall, Lewis County; Rob Wood, Madison County; Lance Stevenson, Minidoka County; Justin Coleman, Nez Perce; Cody Brower, Oneida County; Chris Topmiller, Owyhee County; Mike Duke, Payette County; Benjamin Allen, Shoshone County; Bailey Smith, Teton Valley County; Grant Loebs, Twin Falls County; Brian Naugle, Valley County; and Delton Walker, Washington County.

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to all counsel of record who have appeared in this matter.

/s/ Lincoln Davis Wilson
LINCOLN DAVIS WILSON
Chief, Civil Litigation and Constitutional Defense

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief of Civil and Constitutional Defense

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Attorneys for Defendant Raúl Labrador

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

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 capacity as the 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-00142-BLW

DECLARATION OF CHRIS TOPMILLER

I, CHRIS TOPMILLER, hereby declare and state as follows:

1. I am the prosecuting attorney for Owyhee County, Idaho, and am named as a Defendant in this action.

2. The Idaho Attorney General's Office never sent me a copy of the Attorney General's March 27, 2023 letter to Representative Brent Crane (the "Crane Letter").

3. I received that letter only in connection with this litigation.

4. I did not, and do not, regard the Crane Letter as any type of guidance or directive to me or to my office from the Office of the Attorney General.

5. My office has taken no position regarding the scope of enforcement under Idaho Code § 18-622.

6. My prosecutorial decisions are based on my own independent legal duty, interpretation of the law, and discretion.

7. This is true no less with respect to any prosecution under Idaho Code § 18-622.

8. The Attorney General has no supervisory authority over my work as a prosecutor or the power to direct me to initiate any prosecution without my consent.

9. I am aware of no prosecution, or threat of prosecution, brought by anyone in my office against Plaintiffs under Idaho Code § 18-622.

10. In fact, none of the Plaintiffs in this action have facilities in my county.

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

Dated: May 9th, 2023

Chris Topmiller

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief of Civil and Constitutional Defense

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Attorneys for Defendant Raúl Labrador

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

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 capacity as the 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-00142-BLW

DECLARATION OF MICHAEL DUKE

I, MICHAEL DUKE, hereby declare and state as follows:

1. I am the prosecuting attorney for Payette County, Idaho, and am named as a Defendant in this action.

2. The Idaho Attorney General's Office never sent me a copy of the Attorney General's March 27, 2023 letter to Representative Brent Crane (the "Crane Letter").

3. I received that letter only in connection with this litigation.

4. I did not, and do not, regard the Crane Letter as any type of guidance or directive to me or to my office from the Office of the Attorney General.

5. My office has taken no position regarding the scope of enforcement under Idaho Code § 18-622.

6. My prosecutorial decisions are based on my own independent legal duty, interpretation of the law, and discretion.

7. This is true no less with respect to any prosecution under Idaho Code § 18-622.

8. The Attorney General has no supervisory authority over my work as a prosecutor or the power to direct me to initiate any prosecution without my consent.

9. I am aware of no prosecution, or threat of prosecution, brought by anyone in my office against Plaintiffs under Idaho Code § 18-622.

10. In fact, none of the Plaintiffs in this action have facilities in my county.

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

Dated: May 9th, 2023

Michael Duke
Payette County Prosecutor

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief of Civil and Constitutional Defense

BRIAN V. CHURCH, ISB #9391
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Attorneys for Defendant Raúl Labrador

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

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 capacity as the 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-00142-BLW

DECLARATION OF LINDSEY A. BLAKE

I, Lindsey A. Blake, hereby declare and state as follows:

1. I am the prosecuting attorney for Fremont County, Idaho, and am named as a Defendant in this action.

2. The Idaho Attorney General's Office never sent me a copy of the Attorney General's March 27, 2023 letter to Representative Brent Crane (the "Crane Letter").

3. I received that letter only in connection with this litigation.

4. I did not, and do not, regard the Crane Letter as any type of guidance or directive to me or to my office from the Office of the Attorney General.

5. My office has taken no position regarding the scope of enforcement under Idaho Code § 18-622.

6. My prosecutorial decisions are based on my own independent legal duty, interpretation of the law, and discretion.

7. This is true no less with respect to any prosecution under Idaho Code § 18-622.

8. The Attorney General has no supervisory authority over my work as a prosecutor or the power to direct me to initiate any prosecution without my consent.

9. I am aware of no prosecution, or threat of prosecution, brought by anyone in my office against Plaintiffs under Idaho Code § 18-622.

10. In fact, none of the Plaintiffs in this action have facilities in my county.

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

Dated: May 9, 2023

Lindsey A. Blake
Fremont County Prosecuting Attorney

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief of Civil and Constitutional Defense

BRIAN V. CHURCH, ISB #9391
TIMOTHY J. LONGFIELD, ISB #12201
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brian.church@ag.idaho.gov
timothy.longfield@ag.idaho.gov
Attorneys for Defendant Raúl Labrador

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

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 capacity as the 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-00142-BLW

DECLARATION OF PAUL ROGERS

I, Paul Rogers, hereby declare and state as follows:

1. I am the prosecuting attorney for Bingham County, Idaho, and am named as a Defendant in this action.

2. The Idaho Attorney General's Office never sent me a copy of the Attorney General's March 27, 2023 letter to Representative Brent Crane (the "Crane Letter").

3. I received that letter only in connection with this litigation.

4. I did not, and do not, regard the Crane Letter as any type of guidance or directive to me or to my office from the Office of the Attorney General.

5. My office has taken no position regarding the scope of enforcement under Idaho Code § 18-622.

6. My prosecutorial decisions are based on my own independent legal duty, interpretation of the law, and discretion.

7. This is true no less with respect to any prosecution under Idaho Code § 18-622.

8. The Attorney General has no supervisory authority over my work as a prosecutor or the power to direct me to initiate any prosecution without my consent.

9. I am aware of no prosecution, or threat of prosecution, brought by anyone in my office against Plaintiffs under Idaho Code § 18-622.

10. None of the Plaintiffs in this action have facilities in my county.

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

Dated: May 9, 2023

Paul Rogers

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief of Civil and Constitutional Defense

BRIAN V. CHURCH, ISB #9391
TIMOTHY J. LONGFIELD, ISB #12201
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Attorneys for Defendant Raúl Labrador

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

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 capacity as the 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-00142-BLW

DECLARATION OF TREVOR MISSELDINE

I, Trevor Misseldine hereby declare and state as follows:

1. I am the prosecuting attorney for Gooding County, Idaho, and am named as a Defendant in this action.

2. The Idaho Attorney General's Office never sent me a copy of the Attorney General's March 27, 2023 letter to Rep. Brent Crane (the "Crane Letter").

3. I received that letter only in connection with this litigation.

4. I did not, and do not, regard the Crane Letter as any type of guidance or directive to me or to my office from the Office of the Attorney General.

5. My office has taken no position regarding the scope of enforcement under Idaho Code § 18-622.

6. My prosecutorial decisions are based on my own independent legal duty, interpretation of the law, and discretion.

7. This is true no less with respect to any prosecution under I.C. § 18-622.

8. The Attorney General has no supervisory authority over my work as a prosecutor or the power to direct me to initiate any prosecution without my consent.

9. I am aware of no prosecution, or threat of prosecution, brought by anyone in my office against Plaintiffs under Idaho Code § 18-622.

10. In fact, none of the Plaintiffs in this action have facilities in my county.

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

Dated: May 9, 2023.

Trevor Misseldine

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief of Civil and Constitutional Defense

BRIAN V. CHURCH, ISB #9391
TIMOTHY J. LONGFIELD, ISB #12201
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Attorneys for Defendant Raúl Labrador

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

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 capacity as the 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-00142-BLW

DECLARATION OF JIMMY THOMAS, ISBN 4415

I, Jimmy Thomas hereby declare and state as follows:

1. I am the prosecuting attorney for Camas County, Idaho, and am named as a Defendant in this action.

2. The Idaho Attorney General's Office never sent me a copy of the Attorney General's March 27, 2023 letter to Representative Brent Crane (the "Crane Letter").

3. I received that letter only in connection with this litigation.

4. I did not, and do not, regard the Crane Letter as any type of guidance or directive to me or to my office from the Office of the Attorney General.

5. My office has taken no position regarding the scope of enforcement under Idaho Code § 18-622.

6. My prosecutorial decisions are based on my own independent legal duty, interpretation of the law, and discretion.

7. This is true no less with respect to any prosecution under Idaho Code § 18-622.

8. The Attorney General has no supervisory authority over my work as a prosecutor or the power to direct me to initiate any prosecution without my consent.

9. I am aware of no prosecution, or threat of prosecution, brought by anyone in my office against Plaintiffs under Idaho Code § 18-622.

10. In fact, none of the Plaintiffs in this action have facilities in my county.

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

Dated: May 9, 2023

Jimmy Thomas, ISBN 4415

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief of Civil and Constitutional Defense

BRIAN V. CHURCH, ISB #9391
TIMOTHY J. LONGFIELD, ISB #12201
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timothy.longfield@ag.idaho.gov
Attorneys for Defendant Raúl Labrador and Certain County Prosecuting Attorneys

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAII, ALASKA, INDIANA, KENTUCKY, on behalf of itself, *et al.*,

Plaintiffs,

v.

RAÚL LABRADOR, in his capacity as the Attorney General of the State of Idaho; *et al.*,

Defendants.

Case No. 1:23-cv-00142-BLW

DEFENDANTS' FOURTH NOTICE OF SUPPLEMENTAL DECLARATIONS REGARDING SUBJECT MATTER JURISDICTION

The undersigned Defendants submit the attached declarations of county prosecutors in connection with the Court's "independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006); *Ex parte McCardle*, 7 Wall. 506, 514 (1868). These declarations further show, consistent with the arguments in Defendants' briefing,[1] that this action does not present a justiciable Article III controversy.

These declarations have been executed by the following county prosecutors: E. Clayne Tyler, Clearwater County; and Rob Wood, Madison County. The undersigned Defendants anticipate submitting further supplemental declarations under separate cover as they become available.

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[1] *See, e.g.*, Dkt. 42 at 4 ("[T]he Crane Letter was not law enforcement guidance sent out publicly to local prosecutors … nor was it ever published by the Office of the Attorney General.") (quotation omitted); Dkt. 42 at 18 ("Plaintiffs do not allege that the Attorney General sent the letter to anyone else, much less to the county prosecutors or the state licensing boards, each of which act independent of the Attorney General."); Dkt. 85 at 5 ("They do not contend that any of the 44 county prosecutors they sued have threatened them or anyone else under the Crane Letter theory."); Dkt. 107 at 1 ("[T]he officials who *have* prosecutorial authority have said and done nothing."); *id.* at 6 ("[N]o county prosecutor or state licensing board has taken any action or expressed any position about the theory of prosecution in the Crane Letter. Nor do Plaintiffs allege otherwise."); *id.* at 8 & n.4 ("Plaintiffs have not shown any relevant action by county prosecutors anywhere, but it is even more troubling for prosecutors in the 41 other c§ounties" where Plaintiffs have no facilities).

DATED: May 8, 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: */s/ Lincoln Davis Wilson*
LINCOLN DAVIS WILSON
Chief, Civil Litigation and
Constitutional Defense
BRIAN V. CHURCH
TIMOTHY LONGFIELD
Deputy Attorneys General

Attorneys for Defendants Attorney General Raúl Labrador and Certain County Prosecuting Attorneys[2]

[2] Jan Bennetts, Ada County; Chris Boyd, Adams County; Stephen Herzog, Bannock County; Adam McKenzie, Bear Lake County; Mariah Dunham, Benewah County; Matt Fredback, Blaine County; Paul Rogers, Bingham County; Matt Fredback, Blaine County Prosecutor; Alex Gross, Boise County; Louis Marshall, Bonner County; Randy Neal, Bonneville County; Andrakay Pluid, Boundary County; Jim Thomas, Camas County; Bryan Taylor, Canyon County; S. Douglas Wood, Caribou County; McCord Larsen, Cassia County; Janna Birch, Clark County; E. Clayne, Clearwater County; Vic Pearson, Franklin County; Lindsay Blake, Fremont County; Erick Thomson, Gem County; Trevor Misseldine, Gooding County; Kirk MacGregor, Idaho County; Mark Taylor, Jefferson County; Brad Calbo, Jerome County; Stanley Mortensen, Kootenai County; Bill Thompson, Latah County; Bruce Withers, Lemhi County; Zachary Pall, Lewis County; Rob Wood, Madison County; Lance Stevenson, Minidoka County; Justin Coleman, Nez Perce; Cody Brower, Oneida County; Chris Topmiller, Owyhee County; Mike Duke, Payette County; Benjamin Allen, Shoshone County; Bailey Smith, Teton Valley County; Grant Loebs, Twin Falls County; Brian Naugle, Valley County; and Delton Walker, Washington County.

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to all counsel of record who have appeared in this matter.

/s/ Lincoln Davis Wilson
LINCOLN DAVIS WILSON
Chief, Civil Litigation and Constitutional Defense

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief of Civil and Constitutional Defense

BRIAN V. CHURCH, ISB #9391
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timothy.longfield@ag.idaho.gov
Attorneys for Defendant Raúl Labrador

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

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 capacity as the 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-00142-BLW

DECLARATION OF E. CLAYNE TYLER

I, E. Clayne Tyler, hereby declare and state as follows:

1. I am the prosecuting attorney for Clearwater County, Idaho, and am named as a Defendant in this action.

2. The Idaho Attorney General's Office never sent me a copy of the Attorney General's March 27, 2023 letter to Representative Brent Crane (the "Crane Letter").

3. I received that letter only in connection with this litigation.

4. I did not, and do not, regard the Crane Letter as any type of guidance or directive to me or to my office from the Office of the Attorney General.

5. My office has taken no position regarding the scope of enforcement under Idaho Code § 18-622.

6. My prosecutorial decisions are based on my own independent legal duty, interpretation of the law, and discretion.

7. This is true no less with respect to any prosecution under Idaho Code § 18-622.

8. The Attorney General has no supervisory authority over my work as a prosecutor or the power to direct me to initiate any prosecution without my consent.

9. I am aware of no prosecution, or threat of prosecution, brought by anyone in my office against Plaintiffs under Idaho Code § 18-622.

10. In fact, none of the Plaintiffs in this action have facilities in my county.

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

Dated: May 8th, 2023

E. Clayne Tyler
Clearwater County Prosecuting Attorney

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief of Civil and Constitutional Defense

BRIAN V. CHURCH, ISB #9391
TIMOTHY J. LONGFIELD, ISB #12201
Deputy Attorneys General
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timothy.longfield@ag.idaho.gov
Attorneys for Defendant Raúl Labrador

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

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 capacity as the 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-00142-BLW

DECLARATION OF ROBERT WOOD

I, Robert Wood hereby declare and state as follows:

1. I am the prosecuting attorney for Madison County, Idaho, and am named as a Defendant in this action.

2. The Idaho Attorney General's Office never sent me a copy of the Attorney General's March 27, 2023 letter to Representative Brent Crane (the "Crane Letter").

3. I received that letter only in connection with this litigation.

4. I did not, and do not, regard the Crane Letter as any type of guidance or directive to me or to my office from the Office of the Attorney General.

5. My office has taken no position regarding the scope of enforcement under Idaho Code § 18-622.

6. My prosecutorial decisions are based on my own independent legal duty, interpretation of the law, and discretion.

7. This is true no less with respect to any prosecution under Idaho Code § 18-622.

8. The Attorney General has no supervisory authority over my work as a prosecutor or the power to direct me to initiate any prosecution without my consent.

9. I am aware of no prosecution, or threat of prosecution, brought by anyone in my office against Plaintiffs under Idaho Code § 18-622.

10. None of the Plaintiffs in this action have facilities in my county.

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

Dated: May 8, 2023.

/s/ Robert Wood
Robert Wood

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief of Civil Litigation and Constitutional Defense

BRIAN V. CHURCH, ISB #9391
TIMOTHY J. LONGFIELD, ISB #12201
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timothy.longfield@ag.idaho.gov
Attorneys for Defendant Raúl Labrador;
and Certain County Prosecuting Attorneys

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAII, ALASKA, INDIANA, KENTUCKY, on behalf of itself, its staff, physicians and patients, *et al.*,

Plaintiffs,

v.

RAÚL LABRADOR, in his capacity as the Attorney General of the State of Idaho, *et al.*,

Defendants.

Case No. 1:23-cv-00142-BLW

CERTAIN COUNTY PROSECUTOR DEFENDANTS' JOINDER IN MOTION TO DISMISS (Dkt. 127)

Defendants, County Prosecuting Attorneys Jan Bennetts, Ada County; Chris Boyd, Adams County; Stephen Herzog, Bannock County; Mariah Dunham, Benewah County; Paul Rogers, Bingham County; Alex Gross, Boise County; Louis Marshall,

Bonner County; Randy Neal, Bonneville County; Andrakay Pluid, Boundary County; Jim Thomas, Camas County; McCord Larsen, Cassia County; Janna Birch, Clark County; E. Clayne Tyler, Clearwater County; Lindsey Blake, Fremont County Prosecutor; Trevor Misseldine, Gooding County; Kirk MacGregor, Idaho County Prosecutor; Mark Taylor, Jefferson County; Brad Calbo, Jerome County Prosecutor; Stanley Mortensen, Kootenai County Prosecutor; Bill Thompson, Latah County Prosecutor; Bruce Withers, Lemhi County Prosecutor; Zachary Pall, Lewis County Prosecutor; Rob Wood, Madison County; Lance Stevenson, Minidoka County; Cody Brower, Oneida County; Chris Topmiller, Owyhee County Prosecutor; Mike Duke, Payette County Prosecutor; Benjamin Allen, Shoshone County; Grant Loebs, Twin Falls County, Brian Naugle, Valley County; and Delton Walker, Washington County Prosecutor, hereby join in the motion to dismiss by certain county prosecutors under Rule 12(b)(1) and Rule 12(b)(6). Dkt. 127.

DATED: May 8, 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: /s/ *Lincoln Davis Wilson*
LINCOLN DAVIS WILSON
Chief, Civil Litigation and
Constitutional Defense
BRIAN V. CHURCH
TIMOTHY LONGFIELD
Deputy Attorneys General

Attorneys for Defendants Attorney General Raúl Labrador and Certain County Prosecuting Attorneys

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 8, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

Colleen R. Smith
csmith@stris.com

Jennifer R. Sandman*
jennifer.sandman@ppfa.org

Catherine Peyton Humphreville*
catherine.humphreville@ppfa.org

Michael J. Bartlett
michael@bartlettfrench.com

Dina Flores-Brewer
dfloresbrewer@acluidaho.org

Andrew Beck*
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Meagan Burrows*
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Michelle Nicole Diamond*
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Rachel E. Craft*
rachel.craft@wilmerhale.com

Katherine V. Mackey*
katherine.mackey@wilmerhale.com

**Pro hac vice*

/s/ *Lincoln Davis Wilson*
LINCOLN DAVIS WILSON
Chief, Civil Litigation and
Constitutional Defense

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief of Civil Litigation and Constitutional Defense

BRIAN V. CHURCH, ISB #9391
TIMOTHY J. LONGFIELD, ISB #12201
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Attorneys for Defendant Raúl Labrador;
and Certain County Prosecuting Attorneys

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAII, ALASKA, INDIANA, KENTUCKY, on behalf of itself, its staff, physicians and patients, *et al.*,

Plaintiffs,

v.

RAÚL LABRADOR, in his capacity as the Attorney General of the State of Idaho, *et al.*,

Defendants.

Case No. 1:23-cv-00142-BLW

CERTAIN COUNTY PROSECUTOR DEFENDANTS' JOINDER IN MOTION TO DISMISS (Dkts. 42, 85, 107)

Defendants, County Prosecuting Attorneys Bryan Taylor, Canyon County; and S. Douglas Wood, Caribou County, who filed their appearance on May 5, 2023, hereby

join in the prior briefing filed by the Attorney General concerning the Court's jurisdiction. Dkts. 42, 85, 107.

DATED: May 8, 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: /s/ *Lincoln Davis Wilson*
LINCOLN DAVIS WILSON
Chief, Civil Litigation and
Constitutional Defense
BRIAN V. CHURCH
TIMOTHY LONGFIELD
Deputy Attorneys General

Attorneys for Defendants Attorney General Raúl Labrador and Certain County Prosecuting Attorneys

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 8, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

Colleen R. Smith
csmith@stris.com

Jennifer R. Sandman*
jennifer.sandman@ppfa.org

Catherine Peyton Humphreville*
catherine.humphreville@ppfa.org

Michael J. Bartlett
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Andrew Beck*
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Ryan Mendías*
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Michelle Nicole Diamond*
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Rachel E. Craft*
rachel.craft@wilmerhale.com

Katherine V. Mackey*
katherine.mackey@wilmerhale.com

**Pro hac vice*

/s/ *Lincoln Davis Wilson*
LINCOLN DAVIS WILSON
Chief, Civil Litigation and
Constitutional Defense

Richard T. Roats
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prosecutor@lincolncounty.id.gov

Attorney for Lincoln County, Idaho

UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAII, ALASKA, INDIANA, KENTUCKY, on behalf of itself, its staff, physicians, and patients, *et al.*, *Plaintiffs*, v. RAÚL LABRADOR, in his capacity as the Attorney General of the State of Idaho, *et al.*, *Defendants*.	CASE NO. 1:23-cv-00142-BLW **NOTICE OF DEFENDANT LINCOLN COUNTY JOINING IN DEFENDANTS' MOTION TO DISMISS**

COMES NOW, Richard T. Roats, Lincoln County Prosecuting Attorney, and on behalf of the Lincoln County Prosecuting Attorney's Office joins in Defendants' Motion to Dismiss docket number 127.

DATED: May 8, 2023

/s/ Richard T. Roats
Richard T. Roats
Lincoln County Prosecuting Attorney

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief of Civil and Constitutional Defense

BRIAN V. CHURCH, ISB #9391
TIMOTHY J. LONGFIELD, ISB #12201
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Attorneys for Defendant Raúl Labrador and Certain County Prosecuting Attorneys

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAII, ALASKA, INDIANA, KENTUCKY, on behalf of itself, its staff, physicians and patients, *et al.*, Plaintiffs, v. RAÚL LABRADOR, in his capacity as the Attorney General of the State of Idaho, *et al.*, Defendants.	Case No. 1:23-cv-00142-BLW **CERTAIN COUNTY PROSECUTORS' MOTION TO DISMISS**

Defendants move the Court to dismiss Plaintiffs' Complaint, Dkt. 1, under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). As mentioned in the

memorandum in support filed herewith, County Prosecutors: Adam McKenzie, Bear Lake County; Matt Fredback, Blaine County; Bryan Taylor, Canyon County; S. Douglas Wood, Caribou County; Vic Pearson, Franklin County, Erick Thomson, Gem County, Justin Coleman, Nez Perce County; and Bailey Smith, Teton Valley County, move to dismiss for lack of subject matter jurisdiction and failure to state a claim for relief. And there isn't a single fact alleged, much less supported by declaration, against the County Prosecutors, and it is unclear what factual basis Plaintiffs had to even name all 44 Idaho County Prosecutors as Defendants. Therefore, dismissal is required and the Court should deny a preliminary injunction as to the County Prosecutors.

DATED: May 5, 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: */s/ Lincoln Davis Wilson*
LINCOLN DAVIS WILSON
Chief, Civil Litigation and
Constitutional Defense
BRIAN V. CHURCH
TIMOTHY LONGFIELD
Deputy Attorneys General

Attorneys for Defendants Adam McKenzie, Bear Lake County; Matt Fredback, Blaine County; Bryan Taylor, Canyon County; S. Douglas Wood, Caribou County; Vic Pearson, Franklin County, Erick Thomson, Gem County, Justin Coleman, Nez Perce County; and Bailey Smith, Teton Valley County.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 5, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

Colleen R. Smith
csmith@stris.com

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jennifer.sandman@ppfa.org

Catherine Peyton Humphreville*
catherine.humphreville@ppfa.org

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Rachel E. Craft*
rachel.craft@wilmerhale.com

Katherine V. Mackey*
katherine.mackey@wilmerhale.com

**Pro hac vice*

/s/ *Lincoln Davis Wilson*
LINCOLN DAVIS WILSON
Chief, Civil Litigation and
Constitutional Defense

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief of Civil and Constitutional Defense

BRIAN V. CHURCH, ISB #9391
TIMOTHY J. LONGFIELD, ISB #12201
Deputy Attorneys General
Office of the Attorney General
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timothy.longfield@ag.idaho.gov
Attorneys for Defendant Raúl Labrador and Certain County Prosecuting Attorneys

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAII, ALASKA, INDIANA, KENTUCKY, on behalf of itself, *et al.*,

Plaintiffs,

v.

RAÚL LABRADOR, in his capacity as the Attorney General of the State of Idaho; *et al.*,

Defendants.

Case No. 1:23-cv-00142-BLW

DECLARATION OF LINCOLN DAVIS WILSON

I, LINCOLN DAVIS WILSON, declare and state as follows:

1. I am a Deputy Attorney General and Chief of Civil Litigation and Constitutional Defense for the Idaho Attorney General.

2. Attached hereto as Exhibit A is a true and correct copy of email correspondence between myself and counsel for Plaintiffs.

3. Attached hereto as Exhibit B is a declaration by Bailey Smith, Prosecutor for Teton Valley County.

4. Attached hereto as Exhibit C is a declaration by Adam J. McKenzie, Prosecutor for Bear Lake County.

5. Attached hereto as Exhibit D is a declaration by Vic A. Pearson, Prosecutor for Franklin County.

6. Attached hereto as Exhibit E is a declaration by Bryan Taylor, Prosecutor for Canyon County.

7. Attached hereto as Exhibit F is a declaration by Justin Coleman, Prosecutor for Nez Perce County.

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

Executed on May 5, 2023.

By: */s/ Lincoln Davis Wilson*
LINCOLN DAVIS WILSON

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to all counsel of record who have appeared in this matter.

/s/ Lincoln Davis Wilson
LINCOLN DAVIS WILSON
Chief, Civil Litigation and Constitutional Defense

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief of Civil and Constitutional Defense

BRIAN V. CHURCH, ISB #9391
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timothy.longfield@ag.idaho.gov
Attorneys for Defendant Raúl Labrador

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

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 capacity as the 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-00142-BLW

DECLARATION OF BAILEY SMITH

EXHIBIT B

I, BAILEY SMITH, hereby declare and state as follows:

1. I am the prosecuting attorney for Teton County, Idaho, and am named as a Defendant in this action.

2. The Idaho Attorney General's Office never sent me a copy of the Attorney General's March 27, 2023 letter to Representative Brent Crane (the "Crane Letter").

3. I received that letter only in connection with this litigation.

4. I did not, and do not, regard the Crane Letter as any type of guidance or directive to me or to my office from the Office of the Attorney General.

5. My office has taken no position regarding the scope of enforcement under Idaho Code § 18-622.

6. My prosecutorial decisions are based on my own independent legal duty, interpretation of the law, and discretion.

7. This is true no less with respect to any prosecution under Idaho Code § 18-622.

8. The Attorney General has no supervisory authority over my work as a prosecutor or the power to direct me to initiate any prosecution without my consent.

9. I am aware of no prosecution, or threat of prosecution, brought by anyone in my office against Plaintiffs under Idaho Code § 18-622.

10. In fact, none of the Plaintiffs in this action have facilities or operations in my county.

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

Bailey Smith

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief of Civil and Constitutional Defense

BRIAN V. CHURCH, ISB #9391
TIMOTHY J. LONGFIELD, ISB #12201
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timothy.longfield@ag.idaho.gov
Attorneys for Defendant Raúl Labrador

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

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 capacity as the 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-00142-BLW

DECLARATION OF ADAM J. MCKENZIE BEAR LAKE COUNTY PROSECUTING ATTORNEY

EXHIBIT C

I, ADAM J. MCKENZIE, hereby declare and state as follows:

1. I am the prosecuting attorney for Bear Lake County, Idaho, and am named as a Defendant in this action.

2. Prior to this litigation, the Idaho Attorney General's Office never sent me a copy of the Attorney General's March 27, 2023 letter to Representative Brent Crane (the "Crane Letter").

3. I received that letter only in connection with this litigation.

4. I did not, and do not, regard the Crane Letter as any type of guidance or directive to me or to my office from the Office of the Attorney General.

5. My office has taken no position regarding the scope of enforcement under Idaho Code § 18-622.

6. My prosecutorial decisions are based on my own independent legal duty, interpretation of the law, and discretion.

7. This is true no less with respect to any prosecution under Idaho Code § 18-622.

8. The Attorney General has no supervisory authority over my work as a prosecutor or the power to direct me to initiate any prosecution without my consent.

9. I am aware of no prosecution, or threat of prosecution, brought by anyone in my office against Plaintiffs under Idaho Code § 18-622.

10. To my knowledge, none of the Plaintiffs in this action have facilities in my county.

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

Dated: May 5, 2023

ADAM J. MCKENZIE

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief of Civil and Constitutional Defense

BRIAN V. CHURCH, ISB #9391
TIMOTHY J. LONGFIELD, ISB #12201
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Attorneys for Defendant Raúl Labrador

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

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 capacity as the 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-00142-BLW

DECLARATION OF VIC A PEARSON

EXHIBIT D

I, Vic A Pearson, hereby declare and state as follows:

1. I am the prosecuting attorney for Franklin County, Idaho, and am named as a Defendant in this action.

2. The Idaho Attorney General's Office never sent me a copy of the Attorney General's March 27, 2023 letter to Representative Brent Crane (the "Crane Letter").

3. I received that letter only in connection with this litigation.

4. I did not, and do not, regard the Crane Letter as any type of guidance or directive to me or to my office from the Office of the Attorney General.

5. My office has taken no position regarding the scope of enforcement under Idaho Code § 18-622.

6. My prosecutorial decisions are based on my own independent legal duty, interpretation of the law, and discretion.

7. This is true no less with respect to any prosecution under Idaho Code § 18-622.

8. The Attorney General has no supervisory authority over my work as a prosecutor or the power to direct me to initiate any prosecution without my consent.

9. I am aware of no prosecution, or threat of prosecution, brought by anyone in my office against Plaintiffs under Idaho Code § 18-622.

10. In fact, none of the Plaintiffs in this action have facilities in my county.

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

Dated: May 4, 2023

Vic A Pearson,
Franklin County Prosecuting Attorney

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief of Civil and Constitutional Defense

BRIAN V. CHURCH, ISB #9391
TIMOTHY J. LONGFIELD, ISB #12201
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Attorneys for Defendant Raúl Labrador

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

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 capacity as the 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-00142-BLW

DECLARATION OF BRYAN TAYLOR, CANYON COUNTY PROSECUTING ATTORNEY

EXHIBIT E

I, Bryan Taylor, hereby declare and state as follows:

1. I am the prosecuting attorney for Canyon County, Idaho, and am named as a Defendant in this action.

2. The Idaho Attorney General's Office never sent me a copy of the Attorney General's March 27, 2023 letter to Representative Brent Crane (the "Crane Letter").

3. I received that letter only in connection with this litigation.

4. I did not, and do not, regard the Crane Letter as any type of guidance or directive to me or to my office from the Office of the Attorney General.

5. My office has taken no position regarding the scope of enforcement under Idaho Code § 18-622.

6. My prosecutorial decisions are based on my own independent legal duty, interpretation of the law, and discretion.

7. This is true no less with respect to any prosecution under Idaho Code § 18-622.

8. The Attorney General has no supervisory authority over my work as a prosecutor or the power to direct me to initiate any prosecution without my consent.

9. I am aware of no prosecution, or threat of prosecution, brought by anyone in my office against Plaintiffs under Idaho Code § 18-622.

10. In fact, none of the Plaintiffs in this action have facilities in my county.

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

Dated: May 5, 2023

Bryan Taylor

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief of Civil and Constitutional Defense

BRIAN V. CHURCH, ISB #9391
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Attorneys for Defendant Raúl Labrador

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

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 capacity as the 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-00142-BLW

DECLARATION OF JUSTIN J. COLEMAN, Prosecuting Attorney Nez Perce County

EXHIBIT F

I, JUSTIN J. COLEMAN, hereby declare and state as follows:

1. I am the Prosecuting Attorney for Nez Perce County, Idaho; and I am named as a Defendant in this action.

2. The Idaho Attorney General's Office never sent me a copy of the Attorney General's March 27, 2023 letter to Representative Brent Crane (the "Crane Letter").

3. I received the Crane Letter only in connection with this litigation.

4. I did not, and do not, regard the Crane Letter as any type of guidance or directive to me or to my office from the Office of the Attorney General.

5. Prosecutorial decisions are based on my own independent legal duty, interpretation of the law, and discretion.

6. My office takes no position regarding the scope of enforcement under Idaho Code § 18-622.

7. This is true no less with respect to any prosecution under Idaho Code § 18-622.

8. The Attorney General has no supervisory authority over my work as a prosecutor or the power to direct me to initiate any prosecution without my consent.

9. I am unaware of any prosecution, or threat of prosecution, brought by anyone in my office against Plaintiffs under Idaho Code § 18-622.

10. None of the Plaintiffs in this action have facilities in Nez Perce County.

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

Dated: May 5 2023

J. Coleman

JUSTIN J.COLEMAN

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief of Civil and Constitutional Defense

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Attorneys for Defendant Raúl Labrador and Certain County Prosecuting Attorneys

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAII, ALASKA, INDIANA, KENTUCKY, on behalf of itself, *et al.*,

Plaintiffs,

v.

RAÚL LABRADOR, in his capacity as the Attorney General of the State of Idaho; *et al.*,

Defendants.

Case No. 1:23-cv-00142-BLW

DEFENDANTS' THIRD NOTICE OF SUPPLEMENTAL DECLARATIONS REGARDING SUBJECT MATTER JURISDICTION

The undersigned Defendants submit the attached declarations of county prosecutors in connection with the Court's "independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006); *Ex parte McCardle*, 7 Wall. 506, 514 (1868). These declarations further show, consistent with the arguments in Defendants' briefing,[1] that this action does not present a justiciable Article III controversy.

These declarations have been executed by the following county prosecutors: Stephen Herzog, Bannock County; Paul Bruce Withers, Lemhi County; and William W. Thompson, Latah County. The undersigned Defendants anticipate submitting further supplemental declarations under separate cover as they become available.

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[1] *See, e.g.*, Dkt. 42 at 4 ("[T]he Crane Letter was not law enforcement guidance sent out publicly to local prosecutors … nor was it ever published by the Office of the Attorney General.") (quotation omitted); Dkt. 42 at 18 ("Plaintiffs do not allege that the Attorney General sent the letter to anyone else, much less to the county prosecutors or the state licensing boards, each of which act independent of the Attorney General."); Dkt. 85 at 5 ("They do not contend that any of the 44 county prosecutors they sued have threatened them or anyone else under the Crane Letter theory."); Dkt. 107 at 1 ("[T]he officials who *have* prosecutorial authority have said and done nothing."); *id.* at 6 ("[N]o county prosecutor or state licensing board has taken any action or expressed any position about the theory of prosecution in the Crane Letter. Nor do Plaintiffs allege otherwise."); *id.* at 8 & n.4 ("Plaintiffs have not shown any relevant action by county prosecutors anywhere, but it is even more troubling for prosecutors in the 41 other counties" where Plaintiffs have no facilities).

DATED: May 4, 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: */s/ Lincoln Davis Wilson*
LINCOLN DAVIS WILSON
Chief, Civil Litigation and
Constitutional Defense
BRIAN V. CHURCH
TIMOTHY LONGFIELD
Deputy Attorneys General

Attorneys for Defendants Attorney General Raúl Labrador and Certain County Prosecuting Attorneys[2]

[2] Jan Bennetts, Ada County Prosecutor; Chris Boyd, Adams County Prosecutor; Stephen Herzog, Bannock County Prosecutor; Mariah Dunham, Benewah County Prosecutor; Paul Rogers, Bingham County Prosecutor; Matt Fredback, Blaine County Prosecutor; Alex Gross, Boise County Prosecutor; Louis Marshall, Bonner County Prosecutor; Randy Neal, Bonneville County Prosecutor; Andrakay Pluid, Boundary County Prosecutor; Jim Thomas, Camas County Prosecutor; McCord Larsen, Cassia County Prosecutor; Janna Birch, Clark County; E. Clayne, Clearwater County Prosecutor; Vic Pearson, Franklin County Prosecutor; Lindsay Blake, Fremont County Prosecutor; Erick Thomson, Gem County Prosecutor; Trevor Misseldine, Gooding County Prosecutor; Kirk MacGregor, Idaho County Prosecutor; Mark Taylor, Jefferson County Prosecutor; Brad Calbo, Jerome County Prosecutor; Stanley Mortensen, Kootenai County Prosecutor; Bill Thompson, Latah County Prosecutor; Bruce Withers, Lemhi County Prosecutor; Zachary Pall, Lewis County Prosecutor; Rob Wood, Madison County Prosecutor; Lance Stevenson, Minidoka County Prosecutor; Cody Brower, Oneida County Prosecutor; Chris Topmiller, Owyhee County Prosecutor; Mike Duke, Payette County Prosecutor; Benjamin Allen, Shoshone County Prosecutor; Bailey Smith, Teton Valley County Prosecutor; Grant Loebs, Twin Falls County Prosecutor; Brian Naugle, Valley County Prosecutor; and Delton Walker, Washington County Prosecutor.

CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to all counsel of record who have appeared in this matter.

/s/ Lincoln Davis Wilson
LINCOLN DAVIS WILSON
Chief, Civil Litigation and Constitutional Defense

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief of Civil and Constitutional Defense

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Attorneys for Defendant Raúl Labrador

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

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 capacity as the 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-00142-BLW

DECLARATION OF WILLIAM W. THOMPSON, JR.

I, William W. Thompson, Jr., hereby declare and state as follows:

1. I am the prosecuting attorney for Latah County, Idaho, and am named as a Defendant in this action.

2. The Idaho Attorney General's Office never sent me a copy of the Attorney General's March 27, 2023 letter to Representative Brent Crane (the "Crane Letter").

3. I received that letter only in connection with this litigation.

4. I did not, and do not, regard the Crane Letter as any type of guidance or directive to me or to my office from the Office of the Attorney General.

5. My office has taken no position regarding the scope of enforcement under Idaho Code § 18-622.

6. My prosecutorial decisions are based on my own independent legal duty, interpretation of the law, and discretion.

7. This is true no less with respect to any prosecution under Idaho Code § 18-622.

8. The Attorney General has no supervisory authority over my work as a prosecutor or the power to direct me to initiate any prosecution without my consent.

9. I am aware of no prosecution, or threat of prosecution, brought by anyone in my office against Plaintiffs under Idaho Code § 18-622.

10. None of the Plaintiffs in this action have facilities in my county.

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

Dated: May 3, 2023

William W. Thompson, Jr.
Latah County Prosecutor

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief of Civil and Constitutional Defense

BRIAN V. CHURCH, ISB #9391
TIMOTHY J. LONGFIELD, ISB #12201
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timothy.longfield@ag.idaho.gov
Attorneys for Defendant Raúl Labrador

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

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 capacity as the 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-00142-BLW

DECLARATION OF PAUL BRUCE WITHERS

I, PAUL BRUCE WITHERS, hereby declare and state as follows:

1. I am the prosecuting attorney for Lemhi County, Idaho, and am named as a Defendant in this action.

2. The Idaho Attorney General's Office never sent me a copy of the Attorney General's March 27, 2023 letter to Representative Brent Crane (the "Crane Letter").

3. I received that letter only in connection with this litigation.

4. I did not, and do not, regard the Crane Letter as any type of guidance or directive to me or to my office from the Office of the Attorney General.

5. My office has taken no position regarding the scope of enforcement under Idaho Code § 18-622.

6. My prosecutorial decisions are based on my own independent legal duty, interpretation of the law, and discretion.

7. This is true no less with respect to any prosecution under Idaho Code § 18-622.

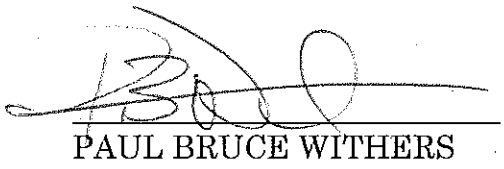
8. The Attorney General has no supervisory authority over my work as a prosecutor or the power to direct me to initiate any prosecution without my consent.

9. I am aware of no prosecution, or threat of prosecution, brought by anyone in my office against Plaintiffs under Idaho Code § 18-622.

10. In fact, none of the Plaintiffs' in this action have facilities in my county.

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

Dated: May 4, 2023



PAUL BRUCE WITHERS

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief of Civil and Constitutional Defense

BRIAN V. CHURCH, ISB #9391
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Attorneys for Defendant Raúl Labrador

UNITED STATE DISTRICT COURT
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Plaintiffs,

v.

RAÚL LABRADOR, in his capacity as the 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-00142-BLW

DECLARATION OF STEPHEN HERZOG

I, STEPHEN HERZOG, hereby declare and state as follows:

1. I am the prosecuting attorney for BANNOCK County, Idaho, and am named as a Defendant in this action.

2. The Idaho Attorney General's Office never sent me a copy of the Attorney General's March 27, 2023 letter to Representative Brent Crane (the "Crane Letter").

3. I received that letter only in connection with this litigation.

4. I did not, and do not, regard the Crane Letter as any type of guidance or directive to me or to my office from the Office of the Attorney General.

5. My office has taken no position regarding the scope of enforcement under Idaho Code § 18-622.

6. My prosecutorial decisions are based on my own independent legal duty, interpretation of the law, and discretion.

7. This is true no less with respect to any prosecution under Idaho Code § 18-622.

8. The Attorney General has no supervisory authority over my work as a prosecutor or the power to direct me to initiate any prosecution without my consent.

9. I am aware of no prosecution, or threat of prosecution, brought by anyone in my office against Plaintiffs under Idaho Code § 18-622.

10. I don't know if plaintiffs in this action have facilities in my county.

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

Dated: May 4, 2023

STEPHEN HERZOG

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief of Civil and Constitutional Defense

BRIAN V. CHURCH, ISB #9391
TIMOTHY J. LONGFIELD, ISB #12201
Deputy Attorneys General
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brian.church@ag.idaho.gov
timothy.longfield@ag.idaho.gov
Attorneys for Defendant Raúl Labrador and Certain County Prosecuting Attorneys

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAII, ALASKA, INDIANA, KENTUCKY, on behalf of itself, *et al.*,

Plaintiffs,

v.

RAÚL LABRADOR, in his capacity as the Attorney General of the State of Idaho; *et al.*,

Defendants.

Case No. 1:23-cv-00142-BLW

DEFENDANTS' SECOND NOTICE OF SUPPLEMENTAL DECLARATIONS REGARDING SUBJECT MATTER JURISDICTION

The undersigned Defendants submit the attached declarations of county prosecutors in connection with the Court's "independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006); *Ex parte McCardle*, 7 Wall. 506, 514 (1868). These declarations further show, consistent with the arguments in Defendants' briefing,[1] that this action does not present a justiciable Article III controversy.

These declarations have been executed by the following county prosecutors: Andrakay Pluid, Boundary County; Erick Thomson, Gem County; Kirk MacGregor, Idaho County; Lance Stevenson, Minidoka County; Mark Taylor, Jefferson County; Christopher Boyd, Adams County; Janna Birch, Clark County; and Randy Neal, Bonneville County. The undersigned Defendants anticipate submitting further supplemental declarations under separate cover as they become available.

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[1] *See, e.g.*, Dkt. 42 at 4 ("[T]he Crane Letter was not law enforcement guidance sent out publicly to local prosecutors … nor was it ever published by the Office of the Attorney General.") (quotation omitted); Dkt. 42 at 18 ("Plaintiffs do not allege that the Attorney General sent the letter to anyone else, much less to the county prosecutors or the state licensing boards, each of which act independent of the Attorney General."); Dkt. 85 at 5 ("They do not contend that any of the 44 county prosecutors they sued have threatened them or anyone else under the Crane Letter theory."); Dkt. 107 at 1 ("[T]he officials who *have* prosecutorial authority have said and done nothing."); *id.* at 6 ("[N]o county prosecutor or state licensing board has taken any action or expressed any position about the theory of prosecution in the Crane Letter. Nor do Plaintiffs allege otherwise."); *id.* at 8 & n.4 ("Plaintiffs have not shown any relevant action by county prosecutors anywhere, but it is even more troubling for prosecutors in the 41 other counties" where Plaintiffs have no facilities).

DATED: May 4, 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: */s/ Lincoln Davis Wilson*
LINCOLN DAVIS WILSON
Chief, Civil Litigation and
Constitutional Defense
BRIAN V. CHURCH
TIMOTHY LONGFIELD
Deputy Attorneys General

Attorneys for Defendants Attorney General Raúl Labrador and Certain County Prosecuting Attorneys[2]

[2] Jan Bennetts, Ada County Prosecutor; Chris Boyd, Adams County Prosecutor; Stephen Herzog, Bannock County Prosecutor; Mariah Dunham, Benewah County Prosecutor; Paul Rogers, Bingham County Prosecutor; Alex Gross, Boise County Prosecutor; Louis Marshall, Bonner County Prosecutor; Randy Neal, Bonneville County Prosecutor; Andrakay Pluid, Boundary County Prosecutor; Jim Thomas, Camas County Prosecutor; McCord Larsen, Cassia County Prosecutor; Janna Birch, Clark County; E. Clayne, Clearwater County Prosecutor; Lindsay Blake, Fremont County Prosecutor; Trevor Misseldine, Gooding County Prosecutor; Kirk MacGregor, Idaho County Prosecutor; Mark Taylor, Jefferson County Prosecutor; Brad Calbo, Jerome County Prosecutor; Stanley Mortensen, Kootenai County Prosecutor; Bill Thopson, Latah County Prosecutor; Bruce Withers, Lemhi County Prosecutor; Zachary Pall, Lewis County Prosecutor; Rob Wood, Madison County Prosecutor; Lance Stevenson, Minidoka County Prosecutor; Cody Brower, Oneida County Prosecutor; Chris Topmiller, Owyhee County Prosecutor; Mike Duke, Payette County Prosecutor; Benjamin Allen, Shoshone County Prosecutor; Grant Loebs, Twin Falls County Prosecutor; and Brian Naugle, Valley County Prosecutor; Delton Walker, Washington County Prosecutor.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 4, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

Colleen R. Smith
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Jennifer R. Sandman*
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Katherine V. Mackey*
katherine.mackey@wilmerhale.com

**Pro hac vice*

/s/ *Lincoln Davis Wilson*
LINCOLN DAVIS WILSON
Deputy Attorney General

RAÚL R. LABRADOR
ATTORNEY GENERAL

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Attorneys for Defendant Raúl Labrador

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

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 capacity as the 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-00142-BLW

DECLARATION OF ANDRAKAY PLUID

I, Andrakay Pluid, hereby declare and state as follows:

1. I am the prosecuting attorney for Boundary County, Idaho, and am named as a Defendant in this action.

2. The Idaho Attorney General's Office never sent me a copy of the Attorney General's March 27, 2023 letter to Representative Brent Crane (the "Crane Letter").

3. I received that letter only in connection with this litigation.

4. I did not, and do not, regard the Crane Letter as any type of guidance or directive to me or to my office from the Office of the Attorney General.

5. My office has taken no position regarding the scope of enforcement under Idaho Code § 18-622.

6. My prosecutorial decisions are based on my own independent legal duty, interpretation of the law, and discretion.

7. This is true no less with respect to any prosecution under Idaho Code § 18-622.

8. The Attorney General has no supervisory authority over my work as a prosecutor or the power to direct me to initiate any prosecution without my consent.

9. I am aware of no prosecution, or threat of prosecution, brought by anyone in my office against Plaintiffs under Idaho Code § 18-622.

10. In fact, none of the Plaintiffs in this action have facilities in my county.

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

Dated: May 3, 2023

ANDRAKAY PLUID

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 4, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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**Pro hac vice*

/s/ *Lincoln Davis Wilson*
LINCOLN DAVIS WILSON
Deputy Attorney General

RAÚL R. LABRADOR
ATTORNEY GENERAL

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Attorneys for Defendant Raúl Labrador

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

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 capacity as the 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-00142-BLW

DECLARATION OF CHRISTOPHER BOYD

I, CHRISTOPHER BOYD, hereby declare and state as follows:

1. I am the duly elected prosecuting attorney for Adams County, Idaho, and am named as a Defendant in this action.

2. The Idaho Attorney General's Office never sent me a copy of the Attorney General's March 27, 2023 letter to Representative Brent Crane (the "Crane Letter").

3. I received that letter only in connection with this litigation.

4. I did not, and do not, regard the Crane Letter as any type of guidance or directive to me or to my office from the Office of the Attorney General.

5. My office has taken no position regarding the scope of enforcement under Idaho Code § 18-622.

6. My prosecutorial decisions are based on my own independent legal duty, interpretation of the law, and discretion.

7. This is true no less with respect to any prosecution under Idaho Code § 18-622.

8. The Attorney General has no supervisory authority over my work as a prosecutor or the power to direct me to initiate any prosecution without my consent.

9. I am aware of no prosecution, or threat of prosecution, brought by anyone in my office against Plaintiffs under Idaho Code § 18-622.

10. To my knowledge, none of the Plaintiffs in this action have facilities in my county.

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

Dated: May 4, 2023

Christopher Boyd
Adams County Prosecuting Attorney

State of Idaho)
)ss
County of Adams)

I, Patricia Paulin a Notary Public, do hereby certify that on Thursday, May 4, 2023, Christopher Boyd, Adams County Prosecuting Attorney personally known to be the person whose name is subscribed to the foregoing instrument.

PATRICIA PAULIN
COMMISSION # 20191306
NOTARY PUBLIC
STATE OF IDAHO
MY COMMISSION EXPIRES 07/05/2025

Patricia Paulin
Notary for the State of Idaho
County of Adams
My Commission Expires: 07/05/2025

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 4, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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Katherine V. Mackey*
katherine.mackey@wilmerhale.com

**Pro hac vice*

/s/ *Lincoln Davis Wilson*
LINCOLN DAVIS WILSON
Deputy Attorney General

RAÚL R. LABRADOR
ATTORNEY GENERAL

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Attorneys for Defendant Raúl Labrador

UNITED STATE DISTRICT COURT
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Plaintiffs,

v.

RAÚL LABRADOR, in his capacity as the 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-00142-BLW

DECLARATION OF ERICK THOMSON

I, ERICK BAYNES THOMSON, hereby declare and state as follows:

1. I am the prosecuting attorney for Gem County, Idaho, and am named as a Defendant in this action.

2. The Idaho Attorney General's Office never sent me a copy of the Attorney General's March 27, 2023 letter to Representative Brent Crane (the "Crane Letter").

3. I received that letter only in connection with this litigation.

4. I did not, and do not, regard the Crane Letter as any type of guidance or directive to me or to my office from the Office of the Attorney General.

5. My office has taken no position regarding the scope of enforcement under Idaho Code § 18-622.

6. My prosecutorial decisions are based on my own independent legal duty, interpretation of the law, and discretion.

7. This is true no less with respect to any prosecution under Idaho Code § 18-622.

8. The Attorney General has no supervisory authority over my work as a prosecutor or the power to direct me to initiate any prosecution without my consent.

9. I am aware of no prosecution, or threat of prosecution, brought by anyone in my office against Plaintiffs under Idaho Code § 18-622.

10. In fact, none of the Plaintiffs in this action have facilities in my county.

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

Dated: May 4, 2023

ERICK BAYNES THOMSON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 4, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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**Pro hac vice*

/s/ *Lincoln Davis Wilson*
LINCOLN DAVIS WILSON
Deputy Attorney General

RAÚL R. LABRADOR
ATTORNEY GENERAL

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Attorneys for Defendant Raúl Labrador

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

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 capacity as the 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-00142-BLW

DECLARATION OF JANNA BIRCH

I, JANNA BIRCH, hereby declare and state as follows:

1. I am the prosecuting attorney for Clark County, Idaho, and am named as a Defendant in this action.

2. The Idaho Attorney General's Office never sent me a copy of the Attorney General's March 27, 2023 letter to Representative Brent Crane (the "Crane Letter").

3. I received that letter only in connection with this litigation.

4. I did not, and do not, regard the Crane Letter as any type of guidance or directive to me or to my office from the Office of the Attorney General.

5. My office has taken no position regarding the scope of enforcement under Idaho Code § 18-622.

6. My prosecutorial decisions are based on my own independent legal duty, interpretation of the law, and discretion.

7. This is true no less with respect to any prosecution under Idaho Code § 18-622.

8. The Attorney General has no supervisory authority over my work as a prosecutor or the power to direct me to initiate any prosecution without my consent.

9. I am aware of no prosecution, or threat of prosecution, brought by anyone in my office against Plaintiffs under Idaho Code § 18-622.

10. In fact, none of the Plaintiffs in this action have facilities in my county.

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

Dated: May 4, 2023

/s/ Janna Birch
Janna Birch

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 4, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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**Pro hac vice*

/s/ *Lincoln Davis Wilson*
LINCOLN DAVIS WILSON
Deputy Attorney General

RAÚL R. LABRADOR
ATTORNEY GENERAL

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Attorneys for Defendant Raúl Labrador

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

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 capacity as the 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-00142-BLW

DECLARATION OF KIRK A. MacGREGOR

I, KIRK A. MacGREGOR, hereby declare and state as follows:

1. I am the prosecuting attorney for Idaho County, Idaho, and am named as a Defendant in this action.

2. The Idaho Attorney General's Office never sent me a copy of the Attorney General's March 27, 2023 letter to Representative Brent Crane (the "Crane Letter").

3. I received that letter only in connection with this litigation.

4. I did not, and do not, regard the Crane Letter as any type of guidance or directive to me or to my office from the Office of the Attorney General.

5. My office has taken no position regarding the scope of enforcement under Idaho Code § 18-622.

6. My prosecutorial decisions are based on my own independent legal duty, interpretation of the law, and discretion.

7. This is true no less with respect to any prosecution under Idaho Code § 18-622.

8. The Attorney General has no supervisory authority over my work as a prosecutor or the power to direct me to initiate any prosecution without my consent.

9. I am aware of no prosecution, or threat of prosecution, brought by anyone in my office against Plaintiffs under Idaho Code § 18-622.

10. In fact, none of the Plaintiffs in this action have facilities in my county.

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

Dated: May 3, 2023

KIRK A. MacGREGOR

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 4, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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**Pro hac vice*

/s/ *Lincoln Davis Wilson*
LINCOLN DAVIS WILSON
Deputy Attorney General

RAÚL R. LABRADOR
ATTORNEY GENERAL

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UNITED STATE DISTRICT COURT
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Plaintiffs,

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RAÚL LABRADOR, in his capacity as the 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-00142-BLW

DECLARATION OF LANCE D. STEVENSON

I, Lance D. Stevenson, hereby declare and state as follows:

1. I am the prosecuting attorney for Minidoka County, Idaho, and am named as a Defendant in this action.

2. The Idaho Attorney General's Office never sent me a copy of the Attorney General's March 27, 2023 letter to Representative Brent Crane (the "Crane Letter").

3. I received that letter only in connection with this litigation.

4. I did not, and do not, regard the Crane Letter as any type of guidance or directive to me or to my office from the Office of the Attorney General.

5. My office has taken no position regarding the scope of enforcement under Idaho Code § 18-622.

6. My prosecutorial decisions are based on my own independent legal duty, interpretation of the law, and discretion.

7. This is true no less with respect to any prosecution under Idaho Code § 18-622.

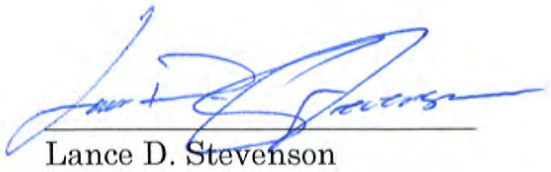
8. The Attorney General has no supervisory authority over my work as a prosecutor or the power to direct me to initiate any prosecution without my consent.

9. I am aware of no prosecution, or threat of prosecution, brought by anyone in my office against Plaintiffs under Idaho Code § 18-622.

10. In fact, none of the Plaintiffs in this action have facilities in my county.

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

Dated: May 4, 2023



Lance D. Stevenson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 4, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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**Pro hac vice*

/s/ *Lincoln Davis Wilson*
LINCOLN DAVIS WILSON
Deputy Attorney General

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief of Civil and Constitutional Defense

BRIAN V. CHURCH, ISB #9391
TIMOTHY J. LONGFIELD, ISB #12201
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timothy.longfield@ag.idaho.gov
Attorneys for Defendant Raúl Labrador

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

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 capacity as the 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-00142-BLW

DECLARATION OF MARK TAYLOR, IN HIS OFFICIAL CAPACITY AS PROSECUTING ATTORNEY OF JEFFERSON COUNTY, IDAHO

I, Mark Taylor, hereby declare and state as follows:

1. I am the prosecuting attorney for Jefferson County, Idaho, and am named as a Defendant in this action in my official capacity.

2. The Idaho Attorney General's Office never sent me a copy of the Attorney General's March 27, 2023 letter to Representative Brent Crane (the "Crane Letter").

3. I received that letter only in connection with this litigation.

4. I did not, and do not, regard the Crane Letter as any type of guidance or directive to me or to my office from the Office of the Attorney General.

5. My office has taken no position regarding the scope of enforcement under Idaho Code § 18-622.

6. My prosecutorial decisions are based on my own independent legal duty, interpretation of the law, and discretion.

7. This is true no less with respect to any prosecution under Idaho Code § 18-622.

8. The Attorney General has no supervisory authority over my work as a prosecutor or the power to direct me to initiate any prosecution without my consent.

9. I am aware of no prosecution, or threat of prosecution, brought by anyone in my office against Plaintiffs under Idaho Code § 18-622.

10. In fact, none of the Plaintiffs in this action have facilities in Jefferson County.

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

Dated: May 3, 2023

Mark Taylor
Prosecuting Attorney
Jefferson County, Idaho

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 4, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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**Pro hac vice*

/s/ *Lincoln Davis Wilson*
LINCOLN DAVIS WILSON
Deputy Attorney General

RAÚL R. LABRADOR
ATTORNEY GENERAL

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Attorneys for Defendant Raúl Labrador

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

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Plaintiffs,

v.

RAÚL LABRADOR, in his capacity as the 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-00142-BLW

DECLARATION OF RANDOLPH B. NEAL

I, **RANDOLPH B. NEAL**, hereby declare and state as follows:

1. I am the duly elected prosecuting attorney for Bonneville County, Idaho, and am named as a Defendant in this action in my official capacity.

2. The Idaho Attorney General's Office never sent me a copy of the Attorney General's March 27, 2023 letter to Representative Brent Crane (the "Crane Letter").

3. I received that letter only in connection with this litigation.

4. I did not, and do not, regard the Crane Letter as any type of guidance or directive to me or to my office from the Office of the Attorney General.

5. My office has taken no position regarding the scope of enforcement under Idaho Code § 18-622.

6. My prosecutorial decisions are based on my own independent legal duty, interpretation of the law, and discretion.

7. This is no less true with respect to any prosecution pursuant to Idaho Code § 18-622.

8. The Attorney General has no supervisory authority over my work as a prosecutor nor does he have the power to direct me to initiate any prosecution without my consent.

9. I am aware of no prosecution, or threat of prosecution, brought by anyone in my office against Plaintiffs under Idaho Code § 18-622.

10. To my knowledge, none of the Plaintiffs in this action have facilities within the jurisdiction of Bonneville County.

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

Dated: May 3, 2023

Randolph B. Neal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 4, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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**Pro hac vice*

/s/ *Lincoln Davis Wilson*
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Deputy Attorney General

RAÚL R. LABRADOR
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timothy.longfield@ag.idaho.gov
Attorneys for Defendant Raúl Labrador and Certain County Prosecuting Attorneys

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAII, ALASKA, INDIANA, KENTUCKY, on behalf of itself, *et al.*,

Plaintiffs,

v.

RAÚL LABRADOR, in his capacity as the Attorney General of the State of Idaho; *et al.*,

Defendants.

Case No. 1:23-cv-00142-BLW

DEFENDANTS' FIRST NOTICE OF SUPPLEMENTAL DECLARATIONS REGARDING SUBJECT MATTER JURISDICTION

The undersigned Defendants submit the attached declarations of county prosecutors in connection with the Court's "independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party."

Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006); *Ex parte McCardle*, 7 Wall. 506, 514 (1868). These declarations further show, consistent with the arguments in Defendants' briefing,[1] that this action does not present a justiciable Article III controversy.

These declarations have been executed by the following county prosecutors: Benjamin Allen, Shoshone County; Cody Brower, Oneida County; Mariah R. Dunham, Benewah County; and Louis Marshall, Bonner County. The undersigned Defendants anticipate submitting further supplemental declarations under separate cover as they become available.

/ / /

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/ / /

[1] *See, e.g.*, Dkt. 42 at 4 ("[T]he Crane Letter was not law enforcement guidance sent out publicly to local prosecutors … nor was it ever published by the Office of the Attorney General.") (quotation omitted); Dkt. 42 at 18 ("Plaintiffs do not allege that the Attorney General sent the letter to anyone else, much less to the county prosecutors or the state licensing boards, each of which act independent of the Attorney General."); Dkt. 85 at 5 ("They do not contend that any of the 44 county prosecutors they sued have threatened them or anyone else under the Crane Letter theory."); Dkt. 107 at 1 ("[T]he officials who *have* prosecutorial authority have said and done nothing."); *id.* at 6 ("[N]o county prosecutor or state licensing board has taken any action or expressed any position about the theory of prosecution in the Crane Letter. Nor do Plaintiffs allege otherwise."); *id.* at 8 & n.4 ("Plaintiffs have not shown any relevant action by county prosecutors anywhere, but it is even more troubling for prosecutors in the 41 other counties" where Plaintiffs have no facilities).

DATED: May 3, 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: */s/ Lincoln Davis Wilson*
LINCOLN DAVIS WILSON
Chief, Civil Litigation and
Constitutional Defense
BRIAN V. CHURCH
TIMOTHY LONGFIELD
Deputy Attorneys General

Attorneys for Defendants Attorney General Raúl Labrador and Certain County Prosecuting Attorneys[2]

[2] Jan Bennetts, Ada County Prosecutor; Chris Boyd, Adams County Prosecutor; Alex Gross, Boise County Prosecutor; Andrakay Pluid, Boundary County Prosecutor; Jim Thomas, Camas County Prosecutor; McCord Larsen, Cassia County Prosecutor; Trevor Misseldine, Gooding County Prosecutor; Mark Taylor, Jefferson County Prosecutor; Rob Wood, Madison County Prosecutor; Lance Stevenson, Minidoka County Prosecutor; Cody Brower, Oneida County Prosecutor; Benjamin Allen, Shoshone County Prosecutor; Grant Loebs, Twin Falls County Prosecutor; and Brian Naugle, Valley County Prosecutor.

CERTIFICATE OF SERVICE

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**Pro hac vice*

/s/ *Lincoln Davis Wilson*
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Deputy Attorney General

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Attorneys for Defendant Raúl Labrador

UNITED STATE DISTRICT COURT
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Plaintiffs,

v.

RAÚL LABRADOR, in his capacity as the 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-00142-BLW

DECLARATION OF LOUIS MARSHALL

I, Louis Marshall, hereby declare and state as follows:

1. I am the prosecuting attorney for Bonner County, Idaho, and am named as a Defendant in this action.

2. The Idaho Attorney General's Office never sent me a copy of the Attorney General's March 27, 2023 letter to Representative Brent Crane (the "Crane Letter").

3. I received that letter only in connection with this litigation.

4. I did not, and do not, regard the Crane Letter as any type of guidance or directive to me or to my office from the Office of the Attorney General.

5. My office has taken no position regarding the scope of enforcement under Idaho Code § 18-622.

6. My prosecutorial decisions are based on my own independent legal duty, interpretation of the law, and discretion.

7. This is true no less with respect to any prosecution under Idaho Code § 18-622.

8. The Attorney General has no supervisory authority over my work as a prosecutor or the power to direct me to initiate any prosecution without my consent.

9. I am aware of no prosecution, or threat of prosecution, brought by anyone in my office against Plaintiffs under Idaho Code § 18-622.

10. In fact, none of the Plaintiffs in this action have facilities in my county.

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

Dated: May3, 2023

Louis Marshall

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 3, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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**Pro hac vice*

/s/ *Lincoln Davis Wilson*
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Deputy Attorney General

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Attorneys for Defendant Raúl Labrador

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

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Plaintiffs,

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RAÚL LABRADOR, in his capacity as the 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-00142-BLW

DECLARATION OF MARIAH R. DUNHAM

I, MARIAH R. DUNHAM, hereby declare and state as follows:

1. I am the prosecuting attorney for Benewah County, Idaho, and am named as a Defendant in this action.

2. The Idaho Attorney General's Office never sent me a copy of the Attorney General's March 27, 2023 letter to Representative Brent Crane (the "Crane Letter").

3. I received that letter only in connection with this litigation.

4. I did not, and do not, regard the Crane Letter as any type of guidance or directive to me or to my office from the Office of the Attorney General.

5. My office has taken no position regarding the scope of enforcement under Idaho Code § 18-622.

6. My prosecutorial decisions are based on my own independent legal duty, interpretation of the law, and discretion.

7. This is true no less with respect to any prosecution under Idaho Code § 18-622.

8. The Attorney General has no supervisory authority over my work as a prosecutor or the power to direct me to initiate any prosecution without my consent.

9. I am aware of no prosecution, or threat of prosecution, brought by anyone in my office against Plaintiffs under Idaho Code § 18-622.

10. In fact, none of the Plaintiffs in this action have facilities in my county.

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

Dated: May 3, 2023

Mariah R. Dunham

MARIAH R. DUNHAM

CERTIFICATE OF SERVICE

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**Pro hac vice*

/s/ *Lincoln Davis Wilson*
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Deputy Attorney General

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Defendants.

Case No. 1:23-cv-00142-BLW

DECLARATION OF BENJAMIN ALLEN, SHOSHONE COUNTY PROSECUTING ATTORNEY

I, BENJAMIN ALLEN, hereby declare and state as follows:

1. I am the prosecuting attorney for Shoshone County, Idaho, and am named as a Defendant in this action.

2. The Idaho Attorney General's Office never sent me a copy of the Attorney General's March 27, 2023 letter to Representative Brent Crane (the "Crane Letter").

3. I received that letter only in connection with this litigation.

4. I did not, and do not, regard the Crane Letter as any type of guidance or directive to me or to my office from the Office of the Attorney General.

5. My office has taken no position regarding the scope of enforcement under Idaho Code § 18-622.

6. My prosecutorial decisions are based on my own independent legal duty, interpretation of the law, and discretion.

7. This is true no less with respect to any prosecution under Idaho Code § 18-622.

8. The Attorney General has no supervisory authority over my work as a prosecutor or the power to direct me to initiate any prosecution without my consent.

9. I am aware of no prosecution, or threat of prosecution, brought by anyone in my office against Plaintiffs under Idaho Code § 18-622.

10. In fact, none of the Plaintiffs in this action have facilities in my county.

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

Dated: May 3, 2023

BENJAMIN ALLEN

CERTIFICATE OF SERVICE

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v.

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Defendants.

Case No. 1:23-cv-00142-BLW

DECLARATION OF CODY L. BROWER, ONEIDA COUNTY PROSECUTING ATTORNEY

I, Cody L. Brower, hereby declare and state as follows:

1. I am the prosecuting attorney for Oneida County, Idaho, and am named as a Defendant in this action.

2. The Idaho Attorney General's Office never sent me a copy of the Attorney General's March 27, 2023 letter to Representative Brent Crane (the "Crane Letter").

3. I received that letter only in connection with this litigation.

4. I did not, and do not, regard the Crane Letter as any type of guidance or directive to me or to my office from the Office of the Attorney General.

5. My office has taken no position regarding the scope of enforcement under Idaho Code § 18-622.

6. My prosecutorial decisions are based on my own independent legal duty, interpretation of the law, and discretion.

7. This is true no less with respect to any prosecution under Idaho Code § 18-622.

8. The Attorney General has no supervisory authority over my work as a prosecutor or the power to direct me to initiate any prosecution without my consent.

9. I am aware of no prosecution, or threat of prosecution, brought by anyone in my office against Plaintiffs under Idaho Code § 18-622.

10. In fact, none of the Plaintiffs in this action have facilities in my county.

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

Dated: May 3, 2023

CODY L. BROWER
Oneida County Prosecuting Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 3, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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**Pro hac vice*

/s/ *Lincoln Davis Wilson*
LINCOLN DAVIS WILSON
Deputy Attorney General

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

PLANNED PARENTHOOD GREATER NORTHWEST, 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 Sate 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-00142-BLW

MEMORANDUM DECISION AND ORDER

This case involves a challenge to Attorney General Labrador's interpretation of Idaho's criminal abortion statute, Idaho Code § 18-622. Plaintiffs filed their complaint and a motion for a preliminary injunction on April 5, 2023. The next day, the Court set a status conference for April 7. Hours before the status

conference, Defendants circulated to Court and counsel a new letter from the Attorney General that withdrew the letter containing the challenged legal interpretation. Dkt. 41-4. At the status conference, the Court and the parties discussed a schedule for litigating the preliminary injunction given the new letter. The Court ultimately set an expedited briefing schedule for both the Plaintiffs' preliminary injunction and Defendants' motion to dismiss. Dkt. 41. On April 24, the Court held a hearing on the motions, which are now under advisement.

Now, three days after the hearing, the Attorney General has asked for supplemental briefing. He has now issued another letter, this one a policy opinion, that interprets his authority to prosecute violations of the criminal abortion statute. He would like to relitigate the preliminary injunction and motion to dismiss in light of this letter. Moreover, he apparently regrets his choice to litigate the case "solely on the ground that no Article III controversy exists." Dkt. 106 at 3. Now, he asks for "the opportunity to brief the extent to which Plaintiffs' intended conduct here—counseling and referrals for out-of-state abortions—constitutes protected speech under the First Amendment." *Id.* at 3.

The Court will deny the motion for supplemental briefing. The Attorney General could have issued the new opinion or made the protected speech argument on the original briefing schedule. Plaintiffs have waited several weeks for urgent

relief—due in part to the Court's calendar—and the Court will not impose further delay for matters that could and should have been brought sooner. The Court will resolve the motion for a preliminary injunction and the motion to dismiss on the briefs that the parties timely filed.

ORDER

IT IS ORDERED that:

1. Defendants Motion for Supplemental Briefing (Dkt. 106) is **DENIED**.

DATED: May 2, 2023

B. Lynn Winmill
U.S. District Court Judge

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief of Civil Litigation and
Constitutional Defense

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and Certain County Prosecuting Attorneys

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAII, ALASKA, INDIANA, KENTUCKY, on behalf of itself, its staff, physicians and patients, *et al.*,

Plaintiffs,

v.

RAÚL LABRADOR, in his capacity as the Attorney General of the State of Idaho, *et al.*,

Defendants.

Case No. 1:23-cv-00142-BLW

DEFENDANT CLARK COUNTY PROSECUTOR'S JOINDER IN MOTION TO DISMISS (Dkt. 41)

Defendant Clark County Prosecuting Attorney, Janna Birch, by and through her attorneys of record, hereby joins in Defendants Attorney General Raúl Labrador

and certain County Prosecuting Attorneys' Motion to Dismiss filed April 14, 2023 (Dkt. 41).

DATED: May 2, 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: /s/ *Lincoln Davis Wilson*
LINCOLN DAVIS WILSON
Chief, Civil Litigation and
Constitutional Defense
BRIAN V. CHURCH
TIMOTHY LONGFIELD
Deputy Attorneys General

Attorneys for Defendants Attorney General Raúl Labrador and Certain County Prosecuting Attorneys

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Defendants.

Case No. 1:23-cv-00142-BLW

CERTAIN COUNTY PROSECUTOR DEFENDANTS' JOINDER IN MOTION TO DISMISS (Dkt. 41)

Defendants, County Prosecuting Attorneys Stephen Herzog, Bannock County Prosecutor; Mariah Dunham, Benewah County Prosecutor; Paul Rogers, Bingham

County Prosecutor; Louis Marshall, Bonner County Prosecutor; Randy Neal, Bonneville County Prosecutor; E. Clayne Tyler, Clearwater County Prosecutor; Shondi Lott, Elmore County Prosecutor; Lindsey Blake, Fremont County Prosecutor; Kirk MacGregor, Idaho County Prosecutor; Brad Calbo, Jerome County Prosecutor; Stanley Mortensen, Kootenai County Prosecutor; Bill Thompson, Latah County Prosecutor; Bruce Withers, Lemhi County Prosecutor; Zachary Pall, Lewis County Prosecutor; Chris Topmiller, Owyhee County Prosecutor; Mike Duke, Payette County Prosecutor; and Delton Walker, Washington County Prosecutor, by and through their attorneys of record, hereby join in Defendants Attorney General Raúl Labrador and certain County Prosecuting Attorneys' Motion to Dismiss filed April 14, 2023 (Dkt. 41).

DATED: April 27, 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: /s/ *Lincoln Davis Wilson*
LINCOLN DAVIS WILSON
Chief, Civil Litigation and
Constitutional Defense
BRIAN V. CHURCH
TIMOTHY LONGFIELD
Deputy Attorneys General

Attorneys for Defendants Attorney General Raúl Labrador and Certain County Prosecuting Attorneys

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UNITED STATE DISTRICT COURT
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Plaintiffs,

v.

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Defendants.

Case No. 1:23-cv-00142-BLW

RESPONSE TO BRIEFS OF AMICI CURIAE

INTRODUCTION

The dispositive question in this case is one of jurisdiction. Is there an actionable pre-enforcement controversy if:

- an official who *lacks* prosecutorial authority expresses a legal opinion in private correspondence,
- the officials who *have* prosecutorial authority have said and done nothing,
- and the original correspondence has been affirmatively voided and withdrawn by the supposedly threatening official?

The answer is plainly no. That is why the official who wrote the withdrawn correspondence—the Idaho Attorney General—has not said anything in this case about the merits of the prosecutorial theory. He has no position on the matter, let alone one that threatens Plaintiffs. An injunction against him over a view he does not hold, cannot enforce, and has not defended would be an advisory opinion of the highest order. And an injunction against the county prosecutors and state licensing officials equally offends the Constitution's bedrock limitation of the federal judicial power to actual cases and controversies.

Still, Plaintiffs insist there's a case and controversy here, and so now Amici have lined up behind them to help manufacture one where none exists. Attempting to shore up the lack of a cognizable injury, St. Luke's has submitted an amicus brief that alleges that the Attorney General's withdrawn letter has various purported harms to non-parties. And to bolster Plaintiffs' challenge to the position in that letter that the Attorney General neither holds nor defends, fourteen states and the District of Columbia present additional argument against that position that the Attorney

General has already withdrawn. But regardless of the commentary these Amici have on the position in the Attorney General's withdrawn letter, what matters is the jurisdiction of this Court. And on this, Amici's muted response is telling.

Since the Attorney General has no position on this question, Amici seek to create a straw man policy for him. They believe that will in turn provide a genuine and imminent threat of enforcement to prompt this Court to issue an order that does not address any enforcement policy that actually exists, but will give providers some additional feeling of certainty. If that sounds like an improper advisory opinion, that's because it is. Because as much as Plaintiffs have urged the Court to provide clarity now that "the genie is out of the bottle," they cannot claim a legal injury from the fact that a once-expressed opinion is being discussed in public discourse with *zero* enforcement action being taken or threatened—none, zip, zilch. That is not a "chilled speech" theory of injury, it is itself an effort to chill speech about the law.[1] The Amici briefs cannot create a justiciable Article III controversy, and this Court should therefore dismiss this action for lack of jurisdiction.

[1] This is an irony that should not be lost. Plaintiffs argue that if the attorney-client advice the Attorney General gave in the Crane Letter were correct, it would illegally restrain their speech if it were enforced against them. Yet in this suit they seek to have the Court restrain an attorney's speech to his client—even though such advice is withdrawn and void and there has been no threat of enforcement against Plaintiffs—because they disagree with the position it once espoused. If the Court entertained such a suit, the chilling effect on any elected official who provides or receives such attorney-client advice could be profound.

ARGUMENT

I. Amici do not show that the Court has jurisdiction.

Defendants have raised multiple threshold issues going to this Court's jurisdiction, any one of which is sufficient "for denying audience to a case on the merits." *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999)). For one, the Eleventh Amendment bars jurisdiction over the Attorney General because he cannot and did not threaten prosecution of anyone under the theory espoused by the Crane Letter. Dkt. 106-1. And for similar and related reasons, Plaintiffs lack standing because their challenge to the position in the Crane Letter is not based on a credible threat of enforcement, especially now that it has been withdrawn. Dkt. 41-1 at 11–14 (citing *Lopez v. Candaele*, 630 F.3d 775, 781 (9th Cir. 2010); *Unified Data Servs., LLC v. FTC*, 39 F.4th 1200, 1210 (9th Cir. 2022)). That the letter has been withdrawn is especially problematic because the Complaint alleged harm solely from the Crane Letter, which plainly can pose no threat of future injury after it has been voided. *Id.* at 14. And without a final position from the Attorney General, "prudential considerations here factor even more heavily in favor of dismissal for lack of ripeness." Dkt. 41-1 at 14–15 (citing *Ammex, Inc. v. Cox*, 351 F.3d 697 (6th Cir. 2003)).[2] The ripeness

[2] Plaintiffs stated at the hearing that the Attorney General did not raise and therefore waived prudential ripeness. This is factually and legally false. As the above quote from the Attorney General's briefing quite plainly shows, even if "magic words" were required to preserve an issue, the Attorney General raised prudential ripeness directly and by name. Dkt. 41-1 at 14–15. And, in any event, waiver is inapplicable to prudential ripeness: "[e]ven when a ripeness question in a particular case is prudential," the court may raise it *sua sponte* "and cannot be bound by the wishes of the

doctrine exists to stop "'courts from becoming entangled in abstract disagreements'" such as this one "that would prevent government actors from refining their policies when confronted with a specific problem." *Id.* (citations omitted). And for the same reasons, any case that may have existed is moot because of the withdrawal of the Crane Letter. *Id.* (citing *Bernhardt v. Cnty. of Los Angeles*, 279 F.3d 862, 871 (9th Cir. 2002)).

At this point, Plaintiffs' theory would mean that any citizen could sue an elected official for allegedly *believing* something contrary to the First Amendment. Article III does not require an accused official to publicly agree with the suing citizen's position in order to avoid First Amendment suit. And a citizen's self-censorship cannot create federal jurisdiction; otherwise, plaintiffs could rewrite Article III's limitations through self-inflicted injuries. This case is even weaker because the apparently offending instrument has been unequivocally voided and withdrawn: "It does not represent the views of the Attorney General on any question of Idaho law." Dkt. 42-4 at 2.

Plaintiffs' lack of injury is underscored by their admission that Idaho law does not actually proscribe the conduct they wish to engage in. Plaintiffs cannot bring a First Amendment claim when no state law or state action threatens them in any way. *See United States v. Rowlee*, 899 F.2d 1275, 1280 (2d Cir. 1990) (noting that if a party did not violate state statute, then "the restrictions imposed by that statute did not

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parties." *Reno v. Catholic Soc. Servs., Inc.*, 509 US 43, 57 n.18 (1993) (citation omitted).

violate their First Amendment rights"). The doctrine of constitutional avoidance buttresses this point: "federal courts should not decide federal constitutional issues when alternative grounds yielding the same relief are available." *Kuba v. 1-A Agric. Ass'n*, 387 F.3d 850, 856 (9th Cir. 2004). This is particularly true where alleged First Amendment claims can be equally remedied under state law. *See Barnes-Wallace v. City of San Diego*, 704 F.3d 1067, 1078 (9th Cir. 2012). Plaintiffs have no injury and no meritorious First Amendment or Due Process claim.

The Amici do nothing to address these defects. To the contrary, the brief submitted by Washington, other states, and the District of Columbia acknowledges they are addressing the substance of the Crane Letter itself, even while they recognize, as they put it, that such advice has been "retracted." Dkt. 95 at 1 n.1. These other States thus focus entirely on a question as to which the Attorney General takes no position. Their brief is simply irrelevant to jurisdiction, the threshold and dispositive question at issue in this case.

While St. Luke's purports to address the issue of legal harm, it fares no better in showing it. St. Luke's acknowledges that it, too, is basing its concern on the now-withdrawn position in the Crane Letter. Dkt. 92-1 at 1. But St. Luke's, like Plaintiffs, also ignores that the Crane Letter has been formally withdrawn, admitting only that the Attorney General "purports" to have done so. *Id.* at 10. St. Luke's cannot gin up an Article III controversy by failing to acknowledge the Attorney General's official, public actions.

St. Luke's also refuses to accept that there is no genuine threat of enforcement of the letter. But St. Luke's gives away the weakness of its position when it says it worries about the impacts on patient care "*if* the … legal interpretation [in the Crane letter] *is implemented*." *Id.* at 3 (emphasis added). That is because no such interpretation has been implemented by anyone, least of all the Attorney General. And St. Luke's refuses to acknowledge that no county prosecutor or state licensing board has taken any action or expressed any position about the theory of prosecution in the Crane Letter. Nor do Plaintiffs allege otherwise.

Tacitly conceding the lack of any relevant action by the *actual* enforcement authorities, St. Luke's baldly asserts that the Attorney General's views "are highly likely to carry weight with the county prosecutors charged with enforcing this law and with the Idaho Division of Occupational and Professional Licenses." *Id.* at 1–2. Not only is that the very definition of speculative, it also again misapprehends state law. As the Attorney General has described in Formal Attorney General Opinion 23-1, he has no formal power to refer *anything* to county prosecutors, who are elected officials with different constituencies that do not answer to the Attorney General. [Dkt. 106-1][3] Likewise, while St. Luke's says that the Division of Occupational and Professional Licensing "relies on the Attorney General and his deputies for interpretation of Idaho law," Dkt. 92-1 at 2, that is a matter of discretion that the Division

[3] The Attorney General has separately moved for leave to submit supplemental briefing regarding the significance of Official Attorney General Opinion 23-1, which bears decisively on both the question of Article III standing and on the Attorney General's sovereign immunity.

has chosen not to exercise. Instead, the Division has to date hired its own attorneys "to advise them and represent them" in this matter. Idaho Code § 67-1406(2); *see also* Idaho Code § 67-2601(2)(h). St. Luke's theory of harm is nothing more than the speculative fear that officials with actual enforcement authority may choose to follow a withdrawn letter written by an official who has no authority over them. Quite simply, that is not an injury.

What St. Luke's and Plaintiffs are asking for is an advisory opinion from this Court. Such an opinion would have to put words in the mouth of the Attorney General and define an official interpretation that he has renounced. It would then have to impute that theory to prosecutors and licensing officials who have said nothing about the matter to try to create a genuine and imminent threat of enforcement targeted at the Plaintiffs, to whom none of the Defendants have said anything. Neither the law nor the record will sustain that elaborate construct. The Court should refuse to sponsor it and should dismiss for lack of jurisdiction.

II. Hearsay and unsourced assertions in amicus briefs are not evidence.

St. Luke's also attempts to use its amicus brief to broaden the scope of this non-class proceeding to assert injuries for other physicians around the state. But hearsay assertions in an amicus brief do not expand the scope of a controversy or the Court's jurisdiction. *See* FED. R. EVID. 801(c), 802. Sometimes the speaker is identified, but at other times the speaker is unnamed. Sometimes those statements appear in newspaper or other news outlet articles, and other times there is simply a summary of what an unnamed physician told someone. They do not suffice to reinforce

Plaintiffs' unsuccessful effort to generate a controversy here. St. Luke's states in a footnote that "[t]hese stories come to *amicus* directly from Idaho physicians." Dkt. 92-1 at 5 n.3. But that doesn't turn unsworn non-party statements, many of them anonymous, into sworn party testimony, much less provide an opportunity for the Attorney General to cross-examine them in any way. *See id.* at 5–10. Those statements are irrelevant to Plaintiffs' standing to sue and they are not admissible evidence.

Because none of those assertions are admissible, they are no help to St. Luke's in trying to expand this case into a statewide controversy. This action concerns just three Plaintiffs who together operate in just three counties: Ada, Twin Falls, and Valley Counties. It is bad enough that Plaintiffs have not shown any relevant action by county prosecutors *anywhere*, but it is even more troubling for prosecutors in the 41 other counties,[4] since Plaintiffs have failed to show how they are possibly threatened by prosecution in counties where they do not treat patients. Plaintiffs' theory against the county prosecutors remains hopelessly attenuated, broken, and speculative.

Neither are the assertions in St. Luke's brief relevant to a purported "chilling effect" on speech. The Ninth Circuit has been clear that naked assertions of chilled

[4] Those 41 other counties to which Plaintiffs have not attempted to establish any connection are 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 Valley, and Washington.

speech are inadequate to confer standing or show ripeness. *Twitter, Inc. v. Paxton*, 56 F.4th 1170, 1173–75 (9th Cir. 2022). Thus, even when an attorney general served a corporation with a civil investigative demand, because that demand did not threaten adversary proceedings, any corresponding decrease in speech by the corporation was voluntary and self-inflicted—not an Article III injury. *Id.* at 1176. So here too, Plaintiffs' assertions of chilled speech—and by extension, the assertions of St. Luke's—are of no avail in establishing standing when the Attorney General cannot prosecute, has not threatened to do so, and has not made any communications to Plaintiffs whatsoever. There has been no specific threat to Plaintiffs' speech, and there is therefore no standing.

St. Luke's gets no further by expressing its desire for "clarity." It asserts that physicians generally are confused by "constantly changing interpretations and representations" and says it can speak for "Idaho's OB-GYN departments." Dkt. 92-1 at 2. It also claims that as a result of the Attorney General's attorney-client advice, "physicians now understand they risk legal liability and suspension of their medical licenses for simply having frank conversations with their patients." *Id.* And so St. Luke's wants the position articulated by the Attorney General in the now withdrawn letter enjoined. *Id.* at 3. But the desire of an amicus curiae for "clarity" for physicians, writ broadly, does not create a justiciable controversy and cannot justify issuing an advisory opinion, much less an advisory injunction.

St. Luke's shows its real disagreement is with the policy the Legislature has adopted. *Id.* at 9 ("Idaho's stringent ban on abortions, and the lack of clarity

surrounding when termination of a pregnancy is permissible to save the life of the mother, itself creates grave uncertainty for physicians attempting to provide the gold standard of medical care when it matters most."). *Id.* But the appropriate channel for St. Luke's to raise its policy concerns is through the Idaho Legislature, where it can provide information to the policymaking body of the State. Those policy concerns cannot be shoehorned into federal litigation over a letter the Attorney General has taken great pains to unequivocally withdraw.

CONCLUSION

The Amici briefs in this case do nothing to show that this Court has jurisdiction over this suit, which does not present a justiciable Article III controversy. The Court should dismiss it for lack of jurisdiction.

DATED: April 27, 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: */s/ Lincoln Davis Wilson*
LINCOLN DAVIS WILSON
Chief, Civil Litigation and
Constitutional Defense
BRIAN V. CHURCH
TIMOTHY LONGFIELD
Deputy Attorneys General

Attorneys for Defendants Attorney General Raúl Labrador and Certain County Prosecuting Attorneys[5]

[5] Jan Bennetts, Ada County Prosecutor; Chris Boyd, Adams County Prosecutor; Stephen Herzog, Bannock County Prosecutor; Mariah Dunham, Benewah County Prosecutor; Paul Rogers, Bingham County Prosecutor; Alex Gross, Boise County Prosecutor; Louis Marshall, Bonner County Prosecutor; Randy Neal, Bonneville County

CERTIFICATE OF SERVICE

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/s/ Lincoln Davis Wilson
LINCOLN DAVIS WILSON
Chief, Civil Litigation and Constitutional Defense

Prosecutor; Andrakay Pluid, Boundary County Prosecutor; Jim Thomas, Camas County Prosecutor; McCord Larsen, Cassia County Prosecutor; E. Clayne, Clearwater County Prosecutor; Lindsay Blake, Fremont County Prosecutor; Trevor Misseldine, Gooding County Prosecutor; Kirk MacGregor, Idaho County Prosecutor; Mark Taylor, Jefferson County Prosecutor; Brad Calbo, Jerome County Prosecutor; Stanley Mortensen, Kootenai County Prosecutor; Bill Thopson, Latah County Prosecutor; Bruce Withers, Lemhi County Prosecutor; Zachary Pall, Lewis County Prosecutor; Rob Wood, Madison County Prosecutor; Lance Stevenson, Minidoka County Prosecutor; Cody Brower, Oneida County Prosecutor; Chris Topmiller, Owyhee County Prosecutor; Mike Duke, Payette County Prosecutor; Benjamin Allen, Shoshone County Prosecutor; Grant Loebs, Twin Falls County Prosecutor; and Brian Naugle, Valley County Prosecutor; Delton Walker, Washington County Prosecutor.

RAÚL R. LABRADOR
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Plaintiffs,

v.

RAÚL LABRADOR, in his capacity as the 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-00142-BLW

MOTION FOR SUPPLEMENTAL BRIEFING

Defendants Attorney General Raúl Labrador and the county prosecuting attorneys listed below hereby move for leave to submit supplemental briefing to address two additional matters in this litigation before the Court rules on the pending motion to dismiss and motion for preliminary injunction. These Defendants respectfully request that the Court order the parties to submit simultaneous briefs of no more than ten pages each to address the two following issues.

First, earlier today, the Attorney General issued the attached published, Official Attorney General Opinion under Level 3 of his opinion policy addressing his authority to prosecute violations of Idaho Code § 18-622. That opinion concludes "that the Idaho Attorney General may not bring or assist in a prosecution under Idaho Code § 18-622 unless a county prosecutor specifically so requests and an appointment is made by the district court under Idaho Code § 31-2603." AG Opinion 23-1 at 4. This is problematic for Plaintiffs' case because they do not even allege, much less attempt to show, that any county prosecutor has taken any position whatsoever about prosecutions under Idaho Code § 18-622, let alone threatened to do so under the theory of the Crane Letter. Thus, the Attorney General's formal and official denial that he has any authority to bring or assist in any such prosecution without the advance approval and request of a county prosecutor renders Plaintiffs' deficient and already-speculative theory of standing, ripeness, and irreparable harm hopelessly attenuated. Supplemental briefing is therefore warranted to address the effect of AG Opinion 23-1 on the existence of a justiciable Article III controversy in this matter.

Second, the undersigned Defendants are grateful for the Court's remarks at the hearing that it would not deem any defense on the merits of this case to have been waived because Defendants have defended this action solely on the ground that no Article III controversy exists. Although it is not possible for the Attorney General to address the merits of the legal interpretation proffered in the Crane Letter because it "does not represent the views of the Attorney General on any question of Idaho law," Withdrawal Letter at 1-2, the undersigned Defendants do wish to address one issue of the merits that closely overlaps with the question of standing. Specifically, Defendants seek the opportunity to brief the extent to which Plaintiffs' intended conduct here—counseling and referrals for out-of-state abortions—constitutes protected speech under the First Amendment. Defendants appreciate the latitude the Court has granted to other parties in seeking leave to submit briefing on an expedited schedule that may aid in the Court's consideration of the questions in this complex matter and respectfully request its indulgence for their efforts to do so here.

The undersigned Defendants therefore respectfully request that the Court order the parties to complete simultaneous supplemental briefing on the above questions, not to exceed 10 pages per side.

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/ / /

DATED: April 27, 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: */s/ Lincoln Davis Wilson*
LINCOLN DAVIS WILSON
Chief, Civil Litigation and
Constitutional Defense
BRIAN V. CHURCH
TIMOTHY LONGFIELD
Deputy Attorneys General

Attorneys for Defendants Attorney General Raúl Labrador and Certain County Prosecuting Attorneys[1]

[1] Jan Bennetts, Ada County Prosecutor; Chris Boyd, Adams County Prosecutor; Adam McKenzie, Bear Lake County Prosecutor; Stephen Herzog, Bannock County Prosecutor; Mariah Dunham, Benewah County Prosecutor; Paul Rogers, Bingham County Prosecutor; Matt Fredback, Blaine County Prosecutor; Alex Gross, Boise County Prosecutor; Louis Marshall, Bonner County Prosecutor; Randy Neal, Bonneville County Prosecutor; Andrakay Pluid, Boundary County Prosecutor; Jim Thomas, Camas County Prosecutor; McCord Larsen, Cassia County Prosecutor; Tyler, E. Clayne, Clearwater County Prosecutor; Shondi Lott, Elmore County Prosecutor; Lindsey Blake, Fremont County Prosecutor; Trevor Misseldine, Gooding County Prosecutor; Kirk MacGregor, Idaho County Prosecutor; Mark Taylor, Jefferson County Prosecutor; Brad Calbo, Jerome County Prosecutor; Stanley Mortensen, Kootenai County Prosecutor; Bill Thompson, Latah County Prosecutor; Bruce Withers, Lemhi County Prosecutor; Zachary Pall, Lewis County Prosecutor; Rob Wood, Madison County Prosecutor; Lance Stevenson, Minidoka County Prosecutor; Cody Brower, Oneida County Prosecutor; Chris Topmiller, Owyhee County Prosecutor; Mike Duke, Payette County Prosecutor; Benjamin Allen, Shoshone County Prosecutor; Grant Loebs, Twin Falls County Prosecutor; Brian Naugle, Valley County Prosecutor; and Delton Walker, Washington County Prosecutor.

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to all counsel of record who have appeared in this matter.

/s/ Lincoln Davis Wilson
LINCOLN DAVIS WILSON
Chief, Civil Litigation and Constitutional Defense

ATTACHMENT
Attorney General Opinion No. 23-1

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
RAÚL R. LABRADOR

ATTORNEY GENERAL OPINION NO. 23-1

TO: The Honorable Bruce Skaug
Idaho House of Representatives
P.O. Box 83720
Boise, Idaho 83720-0038

You have requested an opinion from the Attorney General on the Attorney General's authority to prosecute violations of Idaho Code § 18-622. Your request raises important questions of Idaho law in the public interest and therefore this opinion is published as an official opinion of the Idaho Office of the Attorney General.

QUESTION PRESENTED

What authority does the Idaho Attorney General have to bring prosecutions for criminal abortion under Idaho Code § 18-622?

ANSWER

The Idaho Attorney General's criminal prosecutorial authority exists only where specifically conferred by statute or upon referral or request by county prosecutors. The Legislature has not granted the Attorney General any authority to prosecute violations of Idaho Code § 18-622. Thus, the Idaho Attorney General may bring or assist in a prosecution under Idaho Code § 18-622 only if specifically requested by a county prosecutor pursuant to an appointment made by a district court under Idaho Code § 31-2603.

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ANALYSIS

The Attorney General is Idaho's "chief legal officer," but not its chief law enforcement officer. *Newman v. Lance*, 129 Idaho 98, 102, 922 P.2d 395, 399 (1996). Rather, Idaho Code dictates that it is "the policy of the state of Idaho that the primary duty of enforcing all the penal provisions of any and all statutes of this state, in any court, is vested in the sheriff and prosecuting attorney of each of the several counties." Idaho Code § 31-2227. Those elected county prosecutors have plenary criminal enforcement authority to prosecute crimes that occur in their respective jurisdictions and do not answer to the Attorney General. Idaho Code § 31-2604. In fact, while Idaho law previously allowed the Attorney General to "exercise supervisory powers over prosecuting attorneys in all matters pertaining to their duties," *Newman,* 129 Idaho at 102, 922 P.2d at 399, the Legislature struck that provision in 1998, limiting the Attorney General's criminal enforcement authority to the ability to "assist the prosecuting attorney" in each respective county. *State v. Summer*, 139 Idaho 219, 224, 76 P.3d 963, 968 (2003). Even the Governor's authority in the matter is limited to "requir[ing] the attorney general to aid any prosecuting attorney in the discharge of his duties." Idaho Code § 67-802(7). The Governor may not require the Attorney General to assume those duties himself.

The Attorney General's ability to prosecute criminal cases as referrals from county prosecutors comes in two forms. First, when a county prosecutor cannot perform his or her duties, the county prosecutor may refer a case to the Attorney General and move for a court order appointing him as special prosecutor to assume "all the powers of the prosecuting attorney." Idaho Code § 31-2603(a). Second, a county prosecutor who wants to utilize the resources of the Attorney General's Office may seek the appointment of a special assistant Attorney General to prosecute or assist in prosecuting a criminal case. Idaho Code § 31-2603(b). Thus, under Idaho law, the Attorney General has prosecutorial authority only if specifically conferred by the Legislature or if requested by county prosecutors and approved by a state district judge.

I. The Legislature Has Not Given the Attorney General Independent Authority to Prosecute Violations of Idaho Code § 18-622.

The Legislature has conferred prosecutorial authority on the Attorney General to prosecute specific crimes in specific circumstances. For example, the Legislature has granted the Attorney General authority to prosecute violations of criminal law by county elected officials acting in their official capacity. Idaho Code § 31-2002. In addition, the Legislature recently enacted a new law to take effect May 5, 2023 that would give the Attorney General discretion to prosecute violations of Idaho Code § 18-623, but only "if the prosecuting attorney … refuses to prosecute violations." H.B.

242, § 18-623(4). The Legislature has not granted the Attorney General any such authority to prosecute violations of Idaho Code § 18-622.[1] Thus, the Attorney General has no power to bring independent prosecutions under that statute.

II. The Attorney General May Prosecute Violations of Idaho Code § 18-622 Only Upon Request by a County Prosecutor.

In the absence of a specific grant of prosecutorial authority, the Attorney General has that power only where his assistance is requested by a county prosecutor. That power is set forth in Idaho statutory law, which gives the Attorney General the "duty," "[w]hen required by the public service, to repair to any county in the state and assist the prosecuting attorney thereof in the discharge of duties." Idaho Code § 67-1401(7). As construed by the Idaho Supreme Court, the Attorney General's authority under this statute is entirely derivative: it exists only if the county prosecutor specifically requests the assistance of the Attorney General via an appointment by the district court under Idaho Code § 31-2603.

The Idaho Supreme Court construed these principles in *Newman*, where it rejected the Attorney General's attempt "to appear in a criminal case and assume control and direction of the case on behalf of the state." 129 Idaho at 99, 922 P.2d at 396. At the time the *Newman* case was decided, Idaho statutory law still gave the Attorney General supervisory authority over county prosecutors. *See id.* Nevertheless, the Idaho Supreme Court relied on the fact that "[t]he legislature has made it the primary obligation of the Prosecutor to enforce the state penal laws" by making it "the policy of the state of Idaho that the primary duty of enforcing all the penal provisions of any and all statutes of this state, in any court, is vested in the sheriff and prosecuting attorney of each of the several counties." 129 Idaho at 103, 922 P.2d at 400. Thus, the Idaho Supreme Court granted a writ "prohibiting the Attorney General from asserting dominion and control over the cases" absent a request by the county prosecutor. 129 Idaho at 104, 922 P.2d at 401.

The Idaho Supreme Court further explained these principles in *Summer*. There, the Court observed that "in 1998 the Legislature deleted the provision allowing the Attorney General to exercise supervisory powers over prosecuting attorneys," which it said "apparently reduc[ed] the authority of the Attorney General in relation to county prosecuting attorneys." 139 Idaho at 224, 76 P.3d at 968. And, in any event, "[e]ven prior to the 1998 amendment ..., *Newman* made it clear that the prosecuting attorney has primary responsibility for the enforcement of state penal

[1] The original version of this bill would have given the Attorney General discretion to prosecute violations of Idaho Code § 18-622 as well. *See* H.B. 242, original bill text Feb. 28, 2023. However, those references were removed in subsequent amendments to the bill, which were ultimately passed by the Legislature and signed by the Governor.

laws." *See id.* The Idaho Supreme Court thus reaffirmed that, absent a specific statutory grant of prosecutorial authority, the Attorney General has independent authority to prosecute only upon motion by the county prosecuting attorney under Idaho Code § 31-2603.[2]

Finally, the foregoing limitations on the Attorney General's authority also mean he has no separate referral power. While county prosecutors have statutory power to refer a matter to the Attorney General for prosecution by requesting his assistance and appointment by the district court, *see* Idaho Code §§ 67-1401(7), 31-2603, Idaho law does not grant a reciprocal right to the Attorney General to refer a matter to county prosecutors. In those circumstances, the Attorney General stands in the same shoes as any citizen: he has the right to apprise a county prosecutor of facts that they believe constitute a prosecutable crime that the prosecutor may or may not decide to pursue. So whether it is the Attorney General or any other private citizen who apprises the prosecutor of those matters, it remains within the county prosecutor's discretion to bring charges absent an express referral to the Attorney General and an appointment by the district court. Idaho Code § 31-2603.

CONCLUSION

For the reasons above, I conclude that the Idaho Attorney General may not bring or assist in a prosecution under Idaho Code § 18-622 unless a county prosecutor specifically so requests and an appointment is made by the district court under Idaho Code § 31-2603.

AUTHORITIES CONSIDERED

1. Idaho Code:

H.B. 242, 2023 Legislative Session
Idaho Code § 18-622
Idaho Code § 18-623
Idaho Code § 31-2002
Idaho Code § 31-2227
Idaho Code § 31-2603
Idaho Code § 31-2604
Idaho Code § 67-802
Idaho Code § 67-1401

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[2] The Ninth Circuit's decision in *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908 (9th Cir. 2004), is immaterial to this analysis, since a federal court's ruling on sovereign immunity under *Ex parte Young*, correct or not, cannot create state-law powers that do not exist under operative state law.

2. Idaho Cases:

Newman v. Lance, 129 Idaho 98, 922 P.2d 395 (1996).
Planned Parenthood of Idaho, Inc. v. Wasden, 376 F.3d 908 (9th Cir. 2004).
State v. Summer, 139 Idaho 219, 76 P.3d 963 (2003).

* * * *

Dated this 27th day of April, 2023.

Raúl R. Labrador

RAÚL R. LABRADOR
Attorney General

Analysis by:

JEFF NYE
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UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

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 capacity as the 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-00142-BLW

REPLY IN SUPPORT OF STATE OF IDAHO'S MOTION TO DISMISS

INTRODUCTION

Plaintiffs attempt to move forward in this case based on a view of the law and the facts that just isn't accurate. They say their case is about the "Labrador Interpretation," not just the now-withdrawn Crane Letter, but they don't cite anything other than the Crane Letter that evinces that purported interpretation (because there is none). They say that this letter, addressed only to Rep. Crane, was necessarily directed to the public too, but the Attorney General publishes only some of the legislative opinions he gives, and then only if the client waives privilege. They say the Crane Letter threatened prosecution, but the Attorney General has no authority to bring such prosecutions and the Crane Letter does not say or do otherwise. And they claim to fear that the ghost of the Crane Letter still lingers because the Attorney General has not "disavowed" it, even though he expressly stated that it was "withdrawn," "void in its entirety," and "does not represent the views of the Attorney General on any question of Idaho law." Withdrawal Letter at 1–2.

Plaintiffs complain about harm from a letter the Attorney General didn't send them, about powers the law doesn't give him, that he hasn't threatened to exercise against anyone, regarding an opinion he doesn't have. That is not an injury, and this case is not a real controversy. The Court should dismiss it for lack of jurisdiction.[1]

[1] The undersigned Defendants omit here the arguments for dismissal that certain county prosecutors have based on lack of service and lack of personal jurisdiction, since this motion concerns only subject matter jurisdiction. For present purposes, it suffices to say that despite Plaintiffs' claims to have served 46 of 47 Defendants, service was not completed in accordance with Fed. R. Civ. P. 4 for several Defendants.

ARGUMENT

I. The Attorney General is immune from suit.

Plaintiffs say that the Attorney General is a proper defendant under *Ex parte Young*, 209 U.S. 123 (1908), for their challenge to criminal enforcement of the now-rescinded private advisory opinion in the Crane Letter. But that would be true only if the Attorney General can make such prosecutions and he threatened to do so here. *Ex parte Young*, 209 U.S. at 155–56. Plaintiffs can show neither.

Plaintiffs say they are threatened by prosecuting power the Attorney General denies he has. As the Idaho Supreme Court has recognized, statutory changes have "reduc[ed] the authority of the Attorney General in relation to county prosecuting attorneys." *See State v. Summer,* 76 P.3d 963, 968 (2003). Those statutes provide that, except for special circumstances not applicable here, the Attorney General may only "assist the prosecuting attorney" in those matters, Idaho Code § 67-1401(7), not initiate them himself. Idaho Attorney General, Explanation of Duties and Responsibilities, *available at* https://tinyurl.com/2u8eeds8; *Newman v. Lance*, 129 Idaho 98 (1996). So the Attorney General might be a proper defendant if a prosecutor brought charges and requested his assistance. But not over a letter he withdrew, never sent to prosecutors, and that no prosecutor has threatened to bring charges under.

At first, Plaintiffs argued that the recently enacted House Bill 242 gave the Attorney General "influence over decisions of local prosecutors" with respect to Idaho Code § 18-622, the criminal statute at issue here. Dkt. 81 at 7. But they betrayed that argument's weakness when they withdrew it 29 hours after their filing deadline

under a purported "notice of errata." That is because H.B. 242 does not give the Attorney General ***any*** authority over prosecutions under section 622. That is no accident: while the original version of the bill would have granted the Attorney General power to prosecute violations of section 622,[2] the version the legislature passed and the Governor signed limited that power to prosecutions under section 623, which is not at issue here. *See* H.B. 242, § 18-623(4). Not only that, but by granting the Attorney General prosecuting power only "if the prosecuting attorney … refuses to prosecute violations," H.B. 242 underscores that the county prosecutors have plenary authority while the Attorney General's powers exist only on referral or where specifically granted by statute. H.B. 242, § 18-623(4).

These legislative changes also reinforce the inapplicability of *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908 (9th Cir. 2004), which held that the Attorney General was a proper defendant to a pre-*Dobbs* facial challenge to Idaho's abortion statutes. In so holding, the Ninth Circuit dismissed as dicta the Idaho Supreme Court's recognition in *Summer* that legislative changes had "reduc[ed] the authority of the Attorney General in relation to county prosecuting attorneys." *See Summer,* 76 P.3d at 968; *Wasden*, 376 F.3d at 919-20 nn.7–8. But that was before both *Dobbs*, which limited the scope of facial challenges to abortion statutes, and H.B. 242, which has made clear that the Attorney General lacks both general prosecutorial power and special power over prosecutions under section 622.

[2] *See* H.B. 242, original bill text Feb. 28, 2023, https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2023/legislation/H0242.pdf.

Nor is this case controlled by *Culinary Workers Union, Local 226 v. Del Papa*, 200 F.3d 614, 619 (9th Cir. 1999). There, the Nevada attorney general expressly threatened the plaintiff that it would either enforce the statute or refer the matter to a local prosecutor and "defend[ed] her authority and power to do so during much of the proceedings before the district court." *Culinary Workers*, 200 F.3d at 619. The opposite is true here: the Attorney General never sent the Crane Letter to Plaintiffs, never threatened Plaintiffs, never referred the matter to any local prosecutor, and has disclaimed any authority to bring such a prosecution. Dkt. 41-1 at 8.

Much more analogous is *McBurney v. Cuccinelli*, 616 F.3d 393 (4th Cir. 2010). There, the plaintiffs named the Virginia attorney general in their challenge to the enforcement of state law because he had "issued 'hundreds' of advisory opinions on similar facts." *Id.* at 401 n.5. The Fourth Circuit rejected this as a "special relation" under *Ex parte Young* because simply issuing advisory opinions—as the Attorney General did here with the Crane Letter—is insufficient. *Id.* Plus, the Fourth Circuit also said it would not apply the *Ex parte Young* exception "because the Attorney General has not acted or threatened to act." *Id.* at 402. The same is true here.

Finally, while the limitations of the Attorney General's prosecutorial authority are clear from the authorities above, to the extent the Court has any doubts, the Attorney General requests that this Court certify this dispositive question of sovereign immunity controlled by state law to the Idaho Supreme Court under Idaho Appellate Rule 12.3. *See Davis v. Blast Props., Inc.*, No. 1:21-cv-00218-BLW, 2023 WL 1767311, at *6 (D. Idaho 2023).

II. Plaintiffs have shown no credible threat.

As Plaintiffs acknowledge, they must prove "they face a credible threat of prosecution" both to show standing to sue, Reply at 12 (internal quotation marks and citation omitted), and to overcome the Attorney General's Eleventh Amendment immunity in federal court. They fail to do so. They do not contend that any of the 44 county prosecutors they sued have threatened them or anyone else under the Crane Letter theory. And they do not claim the Attorney General made any specific threat to them or anyone else. Instead, they contend only that the Crane Letter is a "general warning of enforcement" that, "coupled with [plaintiffs'] self-censorship in the face of the law," gives them standing. Reply at 13 (citation omitted). This is wrong.

First, the Crane Letter, as a private, privileged communication to a legislator, did not threaten enforcement against ***anyone***, either in general or in specific. The letter lacked the capacity to do so because, as explained above, the Attorney General cannot bring prosecutions under Idaho's abortion law. Nor was the letter addressed to any purported threat recipient—it was a privileged communication directed solely to Rep. Crane that became public only because he forwarded it to a constituent who posted it online. Plaintiffs insist the letter cannot have been private because Idaho law demands that Attorney General opinions be "made available for public consumption." Reply at 15 (quoting Idaho Code § 67-1401(6)). To the contrary, the Attorney General's opinion policy dictates that only "Official Attorney General Opinions" are published, while those "rendered in the form of an email or letter" are kept private.

See Ex. 4, OAG Feb. 24, 2023 Opinion Policy at 1. That was true in the last administration just as it is in this one.

Second, Plaintiffs cannot transform the Crane Letter's private opinion into a public threat by charging that the Attorney General has failed to adequately disavow it. The Ninth Circuit's "disavowal" cases concern situations where operative state law prohibits the plaintiff's conduct, such that "the government's failure to disavow enforcement" weighs in favor of standing. *Tingley v. Ferguson*, 47 F.4th 1055, 1068 (9th Cir. 2022); *Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644, 653 (9th Cir. 2021). That principle has little application here, since Plaintiffs do not contend that the law as written prohibits their conduct (in fact, they contend the opposite). *See* Dkt. 1 ¶ 40; Dkt. 2-1 at 4–5. And to the extent the "disavowal" cases do apply, they refute standing, because the thing Plaintiffs complain about—a private letter by the Attorney General—is not operative, having been "withdrawn" and rendered "void in its entirety." Withdrawal Letter at 1–2. Plaintiffs itch for more, complaining that the Attorney General's withdrawal of the Crane Letter neglected "to renounce its contents." Reply at 18. But disavowal does not require repudiation, and Article III does not demand every case proceed unless the defendant agrees to take the plaintiff's side.

Third, against all of this, Plaintiffs' "naked assertion" that their speech is still being chilled by the specter of the Crane Letter is not an injury. *Twitter, Inc. v. Paxton*, 56 F.4th 1170, 1175 (9th Cir. 2022). "Chilling speech" implies, at minimum, (1) that an official has directed a communication to the speaker (2) that threatens consequences the official can impose. Neither of those are true here. While a concrete

injury need not be tangible, it "must actually exist," and if Plaintiffs have self-censored in the face of a non-existent threat, "those injuries are self-inflicted." *Twitter, Inc.*, 56 F.4th at 1175–77.

III. The Attorney General has no opinion and Plaintiffs have no case.

Even apart from the matter of standing, Plaintiffs' case is infected with serious ripeness issues, as they invite the Court to decide abstract and theoretical questions of law and fact. The ripeness doctrine exists to turn away suits like this one by "prevent[ing] courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Twitter, Inc.*, 56 F.4th 1170, 1173 (9th Cir. 2022). Unsurprisingly, Plaintiffs steer clear of the ripeness analysis the Ninth Circuit requires. *See, e.g., id.*; *Tingley*, 47 F.4th 1055, 1070 (9th Cir. 2022). That is because they cannot satisfy its prudential requirements: (1) "the fitness of the issues for judicial decision" and (2) "the hardship to the parties of withholding court consideration." *Tingley*, 47 F.4th at 1070.

Plaintiffs cannot meet the fitness prong, which requires them to show that "the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *Id.* That test requires courts to "consider whether the action 'has a direct and immediate effect on the complaining parties; whether the action has the status of law; and whether the action requires immediate compliance with its terms.'" *Id.* (citation omitted). Each of these points weighs against Plaintiffs.

First, the Crane Letter is not "final"—it is void and has been withdrawn. The Crane Letter is not "a definitive statement of [the Attorney General's] position," and

so any claimed injury is conjectural and hypothetical. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th Cir. 2009). The Court can stop there because finality is essential to ripeness. *Id.*; *Tingley*, 47 F.4th at 1070. Plaintiffs are tilting at windmills.

Second, as a private advisory opinion sent to a single legislator, the Crane Letter never had the status of law. It carried no legal force or prosecutorial relevance and did not "require" Plaintiffs to comply in any way. *See Tingley*, 47 F.4th at 1070.

Third, the issues Plaintiffs raise are *not* primarily legal and *will* require further factual development. *Id.* This is especially true now that the Crane Letter is void and Plaintiffs pivot to a hypothetical "Labrador Interpretation" that they suspect the Attorney General of privately holding. Among other things, deciding Plaintiffs' claims would require complex factual judgments about what aspects of a physician's abortion referral are protected speech and an individualized accounting of the policies of all 44 county prosecutors (before they have all been served, and before any of them has taken any position on the question). This is why "[a] concrete factual situation is necessary to delineate the boundaries of what conduct the government may or may not regulate" lest the Court decide First Amendment "questions in a vacuum." *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1141 (9th Cir. 2000).

Neither can Plaintiffs meet the hardship prong of the ripeness analysis, which "dovetails, in part, with the constitutional consideration of injury." *Id.* at 1142. For the reasons already explained, Plaintiffs do not face any actual or imminent, as opposed to conjectural or hypothetical, injury. *See Twitter, Inc.*, 56 F.4th at 1173. There hasn't been a hint of "real" or "imminent" enforcement against any physician,

Thomas, 220 F.3d at 1142, and self-censorship and subjective chill aren't enough. *Twitter, Inc.*, 56 F.4th at 1174. On the other hand, "by being forced to defend" Plaintiffs' challenge now without "any particular victims"—let alone without an actual opinion—the Attorney General "would suffer hardship." *Thomas*, 220 F.3d at 1142.

Plaintiffs' invocation of this Court's jurisdiction is also foreclosed by the doctrine of mootness. As this Court has recognized, "[t]he repeal of a specific law challenged by a plaintiff usually moots a case" about the law. *McCormack v. Hiedeman*, 900 F. Supp. 2d 1128, 1138 (D. Idaho 2013) (Winmill, J.), *aff'd*, 788 F.3d 1017 (9th Cir. 2015). So here too, the voidance of the Crane Letter moots a case about the letter. Plaintiffs say the voluntary cessation doctrine keeps their case alive. But that doctrine applies when a government official has initiated enforcement of a law and later ceases enforcement. *See, e.g., Fikre v. FBI*, 904 F.3d 1033, 1037 (9th Cir. 2018) (enforcement of No Fly List regulations); *McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015), *abrogated by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (enforcement of Idaho Code § 18-606). It is inapplicable to a First Amendment pre-enforcement challenge that it is not directed at a law, but an opinion letter that was withdrawn before "any enforcement action against Plaintiff." *S. Mountain Creamery, LLC v. U.S. FDA*, 438 F. Supp. 3d 236, 243 n.8 (M.D. Pa. 2020).

Plaintiffs dismiss the Attorney General's standing arguments as "litigation-inspired tactical moves, obfuscation, and inapplicable procedural defenses" so he can avoid having "to defend the constitutionality of his own interpretation of Idaho law." Reply at 1. But the rules of standing are fundamental to the Court's jurisdiction, not

just tactics. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). And the Attorney General has no interpretation he can defend because, as he has made painstakingly clear, the Crane Letter "does not represent the views of the Attorney General on any question of Idaho law." Withdrawal Letter at 1–2.[3]

To grant Plaintiffs' request to decide questions of law adverse to the Attorney General over views he does not have would invite just the sort of collusive proceeding that Article III forbids. It is difficult to even envision what meaningful relief to Plaintiffs would be—an injunction that no prosecutor bring charges on a theory that no prosecutor has sponsored? That is not a justiciable controversy, it is a plea for this Court to render an advisory opinion adverse to the one the Attorney General has already withdrawn.

CONCLUSION

The Court should dismiss this action for lack of jurisdiction.

[3] Plaintiffs say the Attorney General "made clear" to them that he withdrew the Crane Letter on "procedural grounds and that Plaintiffs should draw no substantive inferences about the Labrador Interpretation of the Total Abortion Ban from its withdrawal." Reply at 4–5 (citation omitted). The Attorney General disputes that characterization. He did not state that the letter was withdrawn on procedural grounds and did not sponsor the existence of a "Labrador Interpretation." Second Wilson Decl. ¶ 5. Rather, he explained that, given the withdrawal of the Crane Letter, he has no opinion and so it is impossible to draw any inferences one way or another about what any such opinion might be. *Id.* ¶ 8.

DATED: April 20, 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

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Deputy Attorneys General

Attorneys for Defendants Attorney General Raúl Labrador and Certain County Prosecuting Attorneys[4]

[4] Jan Bennetts, Ada County Prosecutor; Chris Boyd, Adams County Prosecutor; Alex Gross, Boise County Prosecutor; Andrakay Pluid, Boundary County Prosecutor; Jim Thomas, Camas County Prosecutor; McCord Larsen, Cassia County Prosecutor; Trevor Misseldine, Gooding County Prosecutor; Mark Taylor, Jefferson County Prosecutor; Rob Wood, Madison County Prosecutor; Lance Stevenson, Minidoka County Prosecutor; Cody Brower, Oneida County Prosecutor; Benjamin Allen, Shoshone County Prosecutor; Grant Loebs, Twin Falls County Prosecutor; and Brian Naugle, Valley County Prosecutor.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 20, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

Colleen R. Smith
csmith@stris.com

Jennifer R. Sandman*
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**Pro hac vice*

/s/ Lincoln Davis Wilson
LINCOLN DAVIS WILSON
Chief, Civil Litigation and
Constitutional Defense

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief of Civil and Constitutional Defense

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Attorneys for Defendant Raúl Labrador and Certain County Prosecuting Attorneys

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

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 capacity as the 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-00142-BLW

SECOND DECLARATION OF LINCOLN DAVIS WILSON

I, LINCOLN DAVIS WILSON, declare and state as follows:

1. I am a Deputy Attorney General and Chief of Civil Litigation and Constitutional Defense for the Idaho Attorney General.

2. Attached hereto as Exhibit 4 is a true and correct copy of the Opinion Policy of the Idaho Office of the Attorney General, effective February 24, 2023.

3. In briefing and declarations submitted in this matter, Plaintiffs have made representations about statements I made on a telephone call on April 10, 2023.

4. I have reviewed my contemporaneous notes of that telephone call and have determined that Plaintiffs have mischaracterized my statements.

5. During that telephone call, I did not, as Plaintiffs have said, state that the Crane Letter was withdrawn on "procedural grounds" or sponsor in any way the existence of a "Labrador Interpretation" of Idaho's abortion laws on these matters.

6. To the contrary, I explained repeatedly that the Attorney General's office has no position on the matters addressed in the Crane Letter because that letter has been withdrawn and nothing has been presented that would require the Attorney General to formulate a position or policy on the matter.

7. Plaintiffs asked about whether one could infer from the withdrawal of the Crane Letter that the Attorney General had ruled out that interpretation of Idaho law.

8. I responded and clarified that it is not possible to make any inferences about what the Attorney General's opinion might or might not be or whether the Attorney General had ruled in or ruled out any interpretation of Idaho law.

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

Executed on April 20, 2023.

By: */s/ Lincoln Davis Wilson*
LINCOLN DAVIS WILSON

OPINIONS POLICY – OFFICE OF IDAHO ATTORNEY GENERAL

I. Basis for Opinions.

The relevant duties of the Idaho Attorney General are enumerated, *inter alia*, in Idaho Code § 67-1401(6) and include:

> To give an opinion in writing, without fee, to the legislature or either house thereof, or any senator or representative, and to the governor, secretary of state, treasurer, state controller, and the superintendent of public instruction, when requested, upon any question of law relating to their respective offices ….

II. Types of Opinions.

All opinions must be approved by the Attorney General, Chief Deputy, Associate Attorney General, or Solicitor General *before* being relayed back to the requestor. The Office of Attorney General (OAG) issues three types of opinions:

A. **Level One – Verbal Opinions**: rendered while providing legal or strategic assistance. These opinions involve simple matters when one of the individuals enumerated in Idaho Code §67-1401(6) requests one based upon any question of law relating to their respective offices. The vast majority of requests will be answered in this manner.
B. **Level Two – Informal Opinions**: rendered in the form of an email or letter. These opinions involve questions of law of some complexity where a response in writing is appropriate or expected; and
C. **Level Three – Official Attorney General Opinions**: issued in response to authorized questions of major importance and/or statewide interest. Additionally, the Attorney General may issue written opinions on his own accord on questions of major importance and/or statewide interest.

III. General Policies.

The following policies and practices apply to requests for written opinions:

A. The OAG will opine in writing only in response to a specific, written request signed by an authorized requestor named in Idaho Code § 67-1401(6).
B. The OAG will render an opinion only if the question of law relates to the respective offices of the enumerated requestors. *See* Idaho Code § 67-1401(6).
C. The OAG does not render opinions to private parties including but not limited to members of the public, lobbyists, and the media. He is the attorney of the State of Idaho—a body corporate—and additionally provides legal services to state entities as directed by the Legislature.
D. The OAG does not offer written opinions on questions that are abstract, hypothetical, or moot.
E. The OAG does not generally express opinions on matters in litigation, matters likely to be litigated, or matters before administrative boards for hearing and decision.
F. The OAG does not generally opine on the constitutionality of an enacted state statute. The Attorney General has a duty and may be called upon to defend

state statutes against a constitutional challenge.

G. The OAG does not decide facts. When a legal conclusion would depend upon factual predicates that are unavailable or unprovided, the OAG will be unable to provide a written legal opinion.

The general policies and practices above may be waived in certain circumstances after consultation with the Attorney General or Chief Deputy.

IV. Processing.

A. Receipt and Assignment. When a request for an AG opinion is received by the OAG in writing, it is to be forwarded to the executive office paralegal who will record the request in the AG correspondence log. The Chief Deputy or the Associate Attorney General (AAG) will then assign the request to a division specifying the level of opinion to be prepared and the target date for completion of the draft opinion. The executive office paralegal will log the division to whom the assignment was made and the target date.

B. Acknowledgement. The deputy to whom the request is assigned ("lead author") will immediately acknowledge the assignment to the executive office paralegal who will note this in the correspondence log. The lead author will also acknowledge receipt of the assignment to the requestor by either email or letter and will apprise the requestor periodically of the expected response date.

C. Submission of Draft. The Chief Deputy or the AAG is principally responsible for reviewing opinions. After a draft opinion is completed and has been reviewed by the Division Chief, it is forward to the AAG. The lead author of the opinion will keep the Division Chief, AAG, and the Chief Deputy informed as to any circumstance that might cause the draft's delay.

D. Opinion Conferences. Occasionally, when a matter is particular sensitive or controversial, or when deputies or agencies have differing views on the issues being analyzed, the Chief Deputy may assign two deputies to draft opposing opinions. The lead authors of these opinions will meet to discuss and if possible, reach an accord on their disparate views. In these instances, and when otherwise appropriate, the Chief Deputy will call an opinion conference to discuss the merits of each draft opinion. All participating in the opinion conference will frankly and completely discuss the merits of each approach. However, once the Chief Deputy decides upon which approach to take, the OAG will speak with one voice and dissents will not be published or otherwise communicated.

E. Opinion Delivery. Upon receipt of a final draft, the Chief Deputy or the AAG will make final decisions about the level of opinion, the person who will deliver that opinion, and when.
Generally,
   A. **Level One** (verbal) opinions will be delivered by the AAG or by the lead author or both;

B. **Level Two** (email or letter) opinions will be dispatched by the Chief Deputy, AAG, or lead author; and
C. **Level Three** (Official) Opinions will be released under the Attorney General's signature after the Chief Deputy receives the AG's approval.

V. Prior Opinions.

A. When assigned a request for an opinion, the lead author will review prior OAG opinions and guidelines on the same subject or statute. If a prior opinion provides an adequate response to a request, it should be sent with a cover email, or letter to the requestor and a new opinion should not be issued. Prior opinions are not overruled unless they are clearly erroneous and the reasons for doing so are expressly stated in the response. A deputy who concludes that a prior opinion must be overruled, will bring this to the attention of the Chief Deputy or his designee.
B. WESTLAW has all OAG opinions since 1977. Earlier opinions are catalogued in the index card file in the executive office receptionist area.

VI. Preparation and Format. Level Three opinions will be signed by the Attorney General and the lead author's name will be noted. They will consist of four parts:

A. Statement of the Question;
B. Conclusion;
C. Analysis of the question; and
D. Authorities considered.

Level Two opinions will follow typical correspondence format. Each written response should conclude with:

> This response is provided to assist you. It is an informal and unofficial expression of the views of this office based upon the research of the author.

* * * *

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief of Civil Litigation and Constitutional Defense

BRIAN V. CHURCH, ISB #9391
TIMOTHY J. LONGFIELD, ISB #12201
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Attorneys for Defendant Raúl Labrador and Certain County Prosecuting Attorneys

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

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 capacity as the 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-00142-BLW

DECLARATION OF LINCOLN DAVIS WILSON

I, LINCOLN DAVIS WILSON, declare and state as follows:

1. I am a Deputy Attorney General and Chief of Civil Litigation and Constitutional Defense for the Idaho Attorney General.

2. Attached hereto as Exhibit 1 is a true and correct copy of a letter sent by the Attorney General to Representative Brent Crane on March 27, 2023.

3. Attached hereto as Exhibit 2 is a true and correct copy of the Declaration of Russell Barron dated April 14, 2023.

4. Attached here as Exhibit 3 is a true and correct copy of a letter sent by the Attorney General to Representative Brent Crane on April 7, 2023.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 14, 2023.

By: */s/ Lincoln Davis Wilson*
LINCOLN DAVIS WILSON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 14, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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Andrew Beck*
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Meagan Burrows*
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**Pro hac vice*

/s/ Lincoln Davis Wilson
LINCOLN DAVIS WILSON
Chief, Civil Litigation and
Constitutional Defense

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
RAÚL R. LABRADOR

March 27, 2023

BY HAND DELIVERY

The Honorable Brent Crane
Idaho House of Representatives
Idaho State Capitol
700 W. Jefferson Street, Rm. EW46
Boise, Idaho 83702

Re: Request for AG Analysis

Dear Representative Crane:

This letter is in response to your recent inquiry regarding Idaho's criminal prohibitions on abortion. Specifically, you asked whether Idaho's abortion prohibitions preclude 1) the provision of abortion pills, 2) the promotion of abortion pills, and 3) referring women across state lines to obtain abortion services or prescribing abortion pills that will be picked up across state lines. Idaho law prohibits each of these activities.

1) Idaho's criminal prohibition on performing an abortion includes providing abortion pills. Idaho's criminal law defines abortion to mean "the use of *any means* to intentionally terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child." Idaho Code § 18-604(1) (emphasis added). The criminal abortion statute, to which the statutory definition of "abortion" applies, does not distinguish between an abortion carried out as a medical procedure and an abortion carried out by pills or chemicals; the use of *any means* to carry out an abortion is prohibited. *See* Idaho Code § 18-622.

2) Two Idaho criminal statutes prohibit promoting abortion pills to the public. Idaho Code section 18-603 prohibits the promotion of abortion pills, unless the promoter is a licensed physician: "Every person, except licensed physicians . . ., who willfully publishes any notice or advertisement of any medicine or means for

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EXHIBIT 1

producing or facilitating a miscarriage or abortion . . . is guilty of a felony." Idaho Code § 18-603. Similarly, under Idaho Code section 18-607, "[a] person who . . . offers to sell, . . . advertises, or displays for sale anything specially designed to terminate a pregnancy, or held out by the actor for that purpose, commits a misdemeanor." The statute has several exceptions, but none of them apply to the promotion of abortion pills to the public.

3) Idaho law prohibits an Idaho medical provider from either referring a woman across state lines to access abortion services or prescribing abortion pills for the woman to pick up across state lines. Idaho law requires the suspension of a health care professional's license when he or she "*assists* in performing or attempting to perform an abortion." Idaho Code § 18-622(2) (emphasis added). The plain meaning of assist is to give support or aid. An Idaho health care professional who refers a woman across state lines to an abortion provider or who prescribes abortion pills for the woman across state lines has given support or aid to the woman in performing or attempting to perform an abortion and has thus violated the statute.

Please let me know if you have any additional questions.

Sincerely,

Raúl R. Labrador

RAÚL R. LABRADOR
Attorney General

RRL:kw

RAÚL R. LABRADOR
ATTORNEY GENERAL

LINCOLN DAVIS WILSON, ISB #11860
Chief of Civil and Constitutional Defense

BRIAN V. CHURCH, ISB #9391
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Attorneys for Defendant Raúl Labrador and Certain County Prosecuting Attorneys

UNITED STATE DISTRICT COURT
DISTRICT OF IDAHO

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 capacity as the 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-00142-BLW

DECLARATION OF RUSSELL S. BARRON

EXHIBIT 2

I, RUSSELL S. BARRON, declare and state as follows:

1. I am the Division Administrator with the Idaho Division of Occupational and Professional Licenses (DOPL), which oversees the Idaho State Board of Medicine and Idaho State Board of Nursing. My responsibilities include those duties set forth in Chapter 26, Title 67, Idaho Code and include administering the laws regulating the professions within DOPL.

2. The Idaho Attorney General did not at any time furnish a copy of the March 27, 2023 Letter to Brent Crane to DOPL or its constituent boards or otherwise advise the same with regard to any of the matters referred to in that letter.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 13, 2023.

By: Russell S. Barron
RUSSELL S. BARRON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 14, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

Colleen R. Smith
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**Pro hac vice*

/s/ Lincoln Davis Wilson
LINCOLN DAVIS WILSON
Chief, Civil Litigation and
Constitutional Defense

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
RAÚL R. LABRADOR

April 7, 2023

Representative Brent Crane
Idaho House of Representatives
Idaho State Capitol
700 W. Jefferson Street, Rm. EW46
Boise, ID 83702
NON-PRIVILEGED COMMUNICATION

Re: Withdrawal of March 27 Letter

Representative Crane:

On March 27, 2023, I provided you with a letter analysis of several questions prepared by my Associate Attorney General. Since then, the letter analysis has been mischaracterized as law enforcement guidance sent out publicly to local prosecutors and others. It was not a guidance document, nor was it ever published by the Office of the Attorney General.

Due to subsequent events in the legislative process and my determination that your request was not one I was required to provide under Idaho law, that analysis is now void. Accordingly, I hereby withdraw it.

First, the March 27 analysis is now moot because it relates to a law that has been significantly altered by intervening legislation. The day after I issued the analysis, the Legislature introduced HB374 to amend Idaho's laws concerning the legal definition and proscription of abortion that my analysis summarily addressed. That legislation passed on March 31, 2023, and was enacted upon the Governor's signature on April 6, 2023. The amendment of the existing statute by HB374 vitiates the "question of law" upon which you asked me to opine, rendering the letter void. Idaho Code § 67-1401(6).

Second and troublingly, further examination of your request suggests it was not an authorized request for an Attorney General's Opinion as contemplated by Idaho Code § 67-1401(6). You were not asking for an opinion related to your duties as a legislator but were merely acting as a pass-through "requestor." State law

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EXHIBIT
3

authorizes the Attorney General to render an opinion when requested by, inter alia, "any senator or representative," *id.*, on questions of law related to their respective offices. As a result, the letter is withdrawn, and the resulting analysis is void.

Indeed, the subsequent use of the analysis illustrates the problems that arise when the Attorney General Opinion process is misused. Immediately after I transmitted this attorney-client letter to you, it was publicly posted by a nongovernmental third party who requested it in service of a political fundraising plea. This is precisely why I have sought to reform the opinion process and simply stick to a textualist reading of Idaho Code § 67-1401(6).

Again, for these reasons the March 27, 2023 letter is void in its entirety. It does not represent the views of the Attorney General on any question of Idaho law.

Respectfully,

Raúl R. Labrador

RAÚL R. LABRADOR
Attorney General

Exhibit 1

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Attorneys for Plaintiffs

Additional counsel for Plaintiffs identified on following page

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

** Admitted pro hac vice*

DECLARATION OF RACHEL E. CRAFT, ESQ.

I, Rachel E. Craft, Esq., 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. If called to do so, I am competent to testify as to the matters contained herein.

2. I represent Plaintiffs in the above-captioned action. I am an attorney admitted to practice in New York and Massachusetts. My Motion for Appearance Pro Hac Vice was granted on April 6, 2023.

3. Idaho's Attorney General issued a letter dated March 27, 2023, interpreting Idaho Code § 18-622(2) to prohibit Idaho medical care providers from referring patients to out-of-state abortion services and to prohibit out-of-state abortions provided to Idaho residents.

4. On April 7, 2023, the Attorney General issued a new letter, attached hereto as Exhibit A. The April 7 letter states that the Attorney General is withdrawing the March 27 letter because there had been "intervening legislation" and because Representative Crane's request was not procedurally proper. Ex. A at 1.

5. On April 10, 2023, at 11:30 A.M. E.S.T., I attended a call with Lincoln Wilson and Brian Church, who are representing the Attorney General's office in this action. I participated as counsel for Plaintiffs, along with Peter Neiman and Colleen Smith. The purpose of the call was to discuss the April 7 letter.

6. On the call, Lincoln Wilson made clear that the April 7 letter was withdrawn on procedural grounds and that Plaintiffs should draw no substantive inferences about the Attorney General's interpretation of Idaho Code § 18-622(2) from the withdrawal of the March 27 letter.

7. During the call, Mr. Wilson was given multiple opportunities to repudiate the legal analysis in the March 27 letter. He expressly declined to do so. Thus, when directly asked whether, given the withdrawal of the March 27 letter, the Attorney General's office is still taking the position that a referral for out-of-state abortions violates Idaho Code § 18-622(2), Mr. Wilson responded that no inference can be drawn about what the position of the Attorney General's office would be in such a situation.

8. When we directly asked whether, given the withdrawal of the March 27 letter, the Attorney General's office is still taking the position that abortions provided out-of-state violate Idaho Code § 18-622(2), Mr. Wilson responded that no inference can be drawn about what the position of the Attorney General's office would be in such a situation.

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

Executed on April 13 2023 in New York, NY.

Rachel E. Craft, Esq.

Exhibit A

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
RAÚL R. LABRADOR

April 7, 2023

Representative Brent Crane
Idaho House of Representatives
Idaho State Capitol
700 W. Jefferson Street, Rm. EW46
Boise, ID 83702
NON-PRIVILEGED COMMUNICATION

Re: Withdrawal of March 27 Letter

Representative Crane:

On March 27, 2023, I provided you with a letter analysis of several questions prepared by my Associate Attorney General. Since then, the letter analysis has been mischaracterized as law enforcement guidance sent out publicly to local prosecutors and others. It was not a guidance document, nor was it ever published by the Office of the Attorney General.

Due to subsequent events in the legislative process and my determination that your request was not one I was required to provide under Idaho law, that analysis is now void. Accordingly, I hereby withdraw it.

First, the March 27 analysis is now moot because it relates to a law that has been significantly altered by intervening legislation. The day after I issued the analysis, the Legislature introduced HB374 to amend Idaho's laws concerning the legal definition and proscription of abortion that my analysis summarily addressed. That legislation passed on March 31, 2023, and was enacted upon the Governor's signature on April 6, 2023. The amendment of the existing statute by HB374 vitiates the "question of law" upon which you asked me to opine, rendering the letter void. Idaho Code § 67-1401(6).

Second and troublingly, further examination of your request suggests it was not an authorized request for an Attorney General's Opinion as contemplated by Idaho Code § 67-1401(6). You were not asking for an opinion related to your duties as a legislator but were merely acting as a pass-through "requestor." State law

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authorizes the Attorney General to render an opinion when requested by, inter alia, "any senator or representative," *id.*, on questions of law related to their respective offices. As a result, the letter is withdrawn, and the resulting analysis is void.

Indeed, the subsequent use of the analysis illustrates the problems that arise when the Attorney General Opinion process is misused. Immediately after I transmitted this attorney-client letter to you, it was publicly posted by a nongovernmental third party who requested it in service of a political fundraising plea. This is precisely why I have sought to reform the opinion process and simply stick to a textualist reading of Idaho Code § 67-1401(6).

Again, for these reasons the March 27, 2023 letter is void in its entirety. It does not represent the views of the Attorney General on any question of Idaho law.

Respectfully,

Raúl R. Labrador

RAÚL R. LABRADOR
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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,

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SUPPLEMENTAL DECLARATION OF REBECCA GIBRON

I, Rebecca Gibron, hereby declare as follows:

1. I am over the age of eighteen. I make this supplemental 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.

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 supplemental declaration in support of Plaintiffs' Motion for Preliminary Injunctive Relief.

3. In my previous declaration, I stated that "[t]he Attorney General's overbroad interpretation of Idaho Code § 18-622 [in his March 27, 2023 letter] will prevent Planned Parenthood and our dedicated team of medical professionals from fulfilling" our mission of providing "comprehensive reproductive health services." Gibron Decl. (ECF No. 2-2) ¶¶ 15-16. Specifically, I stated that medical personnel "will be forced to stop providing information and recommendations about abortion services because they fear criminal prosecution and losing their professional licenses" and that they fear that "provid[ing] abortions outside of Idaho . . . could result in the revocation of their Idaho licenses despite the fact that abortion is lawful in those other states." *Id.* ¶¶ 17, 24.

4. On April 7, 2023, I learned of and read Attorney General Labrador's second letter withdrawing his March 27 letter. *See* Craft Decl. Ex. A.

5. I understand that Lincoln Wilson, the Attorney General's Civil Litigation and Constitutional Defense Division Chief, has since made clear in conversations with my attorneys that the original March 27 letter was rescinded on procedural grounds. I further understand that,

in response to direct questioning from my attorneys regarding whether, given the withdrawal of the letter, the Attorney General's office is still taking the position that a referral for out-of-state abortions violates Idaho Code § 18-622(2), Mr. Wilson responded that no inference can be drawn about what the position of the Attorney General's office would be in such a situation.

6. Because the Attorney General has refused to say that Idaho Code § 18-622 does not bar referrals for out-of-state abortions or extend to abortions performed outside of Idaho, I remain concerned that the Attorney General still believes that the legal reasoning in the March 27 letter was correct and that he may use that reasoning to penalize Planned Parenthood providers and staff for supplying information about or providing out-of-state abortion care.

7. The Attorney General's actions still appear to be "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." Gibron Decl. ¶ 23. Thus, the harm to Planned Parenthood, our providers, and our patients continues unabated.

8. Our medical providers are still unable to ensure care for our patients by recommending providers in other states who can provide the necessary abortion care that Idaho does not permit. Licensed providers and other staff at our Idaho health centers are still unable to provide information and recommendations about abortion services because they fear criminal prosecution and losing their professional licenses.

9. Planned Parenthood's staff continue to fear they could be subjected to attempts to bring civil or even criminal charges against them.

10. Moreover, Planned Parenthood providers are still concerned about the licensure penalties for providing referrals to patients for out-of-state abortions or otherwise giving "support or aid" to patients seeking abortions. Certain Planned Parenthood providers who are licensed in

Idaho wish to provide abortions outside of Idaho but continue to 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 are still considering giving up their Idaho licenses altogether to avoid the still-looming threat to their licenses.

11. Beyond the credible fears of Planned Parenthood providers and staff, I also remain concerned about the harm to our patients. As I explained in my prior declaration, some patients will not know how to access abortion outside of Idaho or will face delays in accessing this information and in accessing the care itself. *Id.* ¶¶ 18-19. This poses risks to our patients' health, particularly for our patients who are people of color or are low income or who live in rural areas. *Id.* ¶¶ 20-21.

12. In short, the Attorney General's April 7 letter has not allayed my fears or those of Planned Parenthood staff and providers about threats of licensure penalties or even criminal charges. This continues to pose threats to Idahoans' health.

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

Executed on April 13, 2023 in Anchorage, Alaska.

Rebecca Gibron

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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,

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SUPPLEMENTAL 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 supplemental declaration based on personal knowledge of the matters stated herein and on information known or reasonably available to me. If called to do so, I am competent to testify as to the matters contained herein.

2. I am a plaintiff in the above captioned action. As detailed in the first declaration I submitted in this case, *see* Gustafson Decl. (ECF No. 2-3), 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. I submit this supplemental declaration in support of Plaintiffs' Motion for Preliminary Injunctive Relief.

3. In my previous declaration, I stated that, "as a result of the Attorney General's letter"—which states that providers violate Idaho Code § 18-622(2) by referring women out of state to access abortion care—"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." Gustafson Decl. ¶ 17.

4. I understand that on April 7, 2023, the Attorney General sent a follow-up letter to Representative Brent Crane withdrawing his original letter from March 27, 2023. I understand that the April 7 letter states that it is withdrawing the March 27 letter because the original analysis had been altered by "intervening legislation" and that Representative Crane's request was not procedurally proper. Craft Decl. Ex. A at 1.

5. I understand that Lincoln Wilson, the Attorney General's Civil Litigation and Constitutional Defense Division Chief, has since made clear in conversations with my attorneys

that the original March 27 letter was rescinded on procedural grounds. I further understand that, in response to direct questioning from my attorneys regarding whether, given the withdrawal of the letter, the Attorney General's office is still taking the position that a referral for out-of-state abortions violates Idaho Code § 18-622(2), Mr. Wilson responded that no inference can be drawn about what the position of the Attorney General's office would be in such a situation.

6. Given that the Attorney General has refused to renounce the legal substance of his original March 27 letter, I continue to fear that, if I were to have conversations with patients concerning the availability of abortion services outside of Idaho, or if I were to recommend 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.

7. I also continue to fear that I could be subject to prosecution for providing abortion services or information related to licensed abortion care outside the state of Idaho.

8. I am still forced to tell my patients who require abortions 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.

9. The Attorney General's refusal to renounce the legal substance of his original letter thus continues to have 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.

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

Executed on April 13, 2023 in McCall, Idaho

Caitlin Gustafson MD

Caitlin Gustafson, M.D.

No. 23-35518

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAII, ALASKA, ET AL.,
Plaintiffs-Appellees,

v.

RAÚL LABRADOR, ET AL.,
Defendant-Appellant,

On Appeal from the United States District Court
for the District of Idaho

No. 1:23-cv-00142-BLW
The Honorable B. Lynn Winmill

EXCERPTS OF RECORD
Volume 4 of 4

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Defendants.

Case No. 1:23-cv-142

MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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** Pro hac vice applications forthcoming*

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,
/s/ Colleen R. Smith

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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)

And I FURTHER CERTIFY that on such date I served the foregoing on the following non-CM/ECF registered participants via U.S. first class mail, postage prepaid addressed as follows:

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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

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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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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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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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.

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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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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.

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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

COMPLAINT

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COMPLAINT

Plaintiffs Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky ("Planned Parenthood"), Caitlin Gustafson, M.D., and Darin L. Weyhrich, M.D., by and through their attorneys, bring this civil action for declaratory and injunctive relief and allege as follows:

PRELIMINARY STATEMENT

1. Shortly after the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228 (2022), Idaho's criminal ban on all abortions, Idaho Code § 18-622 (the "Total Abortion Ban"), went into effect, depriving Idahoans of the right to choose to terminate a pregnancy. Since that time, Plaintiffs have not performed any abortions in Idaho.

2. Having complied with Idaho's stringent abortion ban for months, Plaintiffs are now the targets of a new attack at the hands of Idaho Attorney General Raúl Labrador ("Labrador"). On March 27, 2023, Labrador publicly issued a letter asserting that Idaho law "prohibits an Idaho medical provider from . . . referring a woman across state lines to access abortion services" and claimed that Idaho law "requires the suspension of a health care professional's license" for doing so. Ex 1, Labrador Letter. Labrador's interpretation is unprecedented and amounts to a clear threat that Idaho will seek to punish individuals for speech and conduct related to abortions that take place in states where abortion is legal.

3. Labrador's interpretation attempts to bring plainly First Amendment-protected activity within the ambit of the Total Abortion Ban. Moreover, his interpretation depends on the assertion that Idaho law punishes abortions performed outside of Idaho —a clear Due Process and Dormant Commerce Clause violation.

4. Plaintiffs provide comprehensive reproductive healthcare consistent with Idaho state law, including consulting with patients and advising them regarding available medical treatments, consistent with their ethical and legal obligations. As part of their practice, providers

counsel patients on their pregnancy options, including providing patients with information on how to obtain lawful out-of-state abortion care when desired by the patient, including at times referring patients to specific out-of-state providers. Absent Attorney General Labrador's overbroad and unsupported interpretation of Idaho's Total Abortion Ban, Plaintiffs would provide pregnant patients with critical information to obtain necessary abortion care where it is safe and legal—that is, outside of Idaho. As a result of Attorney General Labrador's letter, Dr. Gustafson, Dr. Weyhrich, and Planned Parenthood's Idaho health center providers and other staff have ceased having comprehensive conversations with their patients about out-of-state abortion options and no longer provide patients with information about out-of-state resources or recommend to them out-of-state providers who can offer them abortion care.

5. Plaintiffs wish to resume the comprehensive care that they are ethically obligated to provide to their patients, which includes being able to discuss all available, legal options, and refer patients to medically appropriate resources. To that end, Plaintiffs seek declaratory and injunctive relief protecting them from this unconstitutional and unprecedented application of Idaho law.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action under 28 U.S.C. §§ 1331 and 1343. This is an action to enforce civil and constitutional rights pursuant to 42 U.S.C. § 1983 and the United States Constitution.

7. This Court has authority to award the requested declaratory and injunctive relief under 28 U.S.C. §§ 2201, 2202, 1343, Federal Rules of Civil Procedure 57 and 65, and the general legal and equitable powers of the court.

8. Venue is proper in this judicial district under 28 U.S.C. § 1391(b) because Defendants reside within this judicial district and because a substantial part of the acts or omissions giving rise to this action arose from events occurring within this judicial district.

9. Pursuant to D. Idaho Civ. R. 3.1, venue is proper in the Southern Division because some Defendants legally reside in Ada County, Idaho, and because that is where the claim for relief arose.

PARTIES

I. Plaintiffs

10. Plaintiff Planned Parenthood is a not-for-profit corporation organized under the laws of the State of Washington and doing business in Idaho. It is the largest provider of reproductive health services in Idaho, operating two health centers in the State, one in Ada County (Meridian) and one in Twin Falls County (Twin Falls). Planned Parenthood provides 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 brings this lawsuit on behalf of itself, its providers and other staff, and its current and future patients.

11. Plaintiff Dr. Caitlin Gustafson is a licensed physician based in Valley County, Idaho, and practices family medicine with fellowship training in obstetrics. Dr. Gustafson brings this lawsuit on behalf of herself and her current and future patients.

12. Plaintiff Dr. Darin L. Weyhrich is a licensed physician based in Ada County, Idaho, who practices obstetrics and gynecology. Dr. Weyhrich brings this lawsuit on behalf of himself and his current and future patients.

13. Plaintiffs have standing to sue to prevent enforcement of Idaho Code § 18-622(2) as to speech about, and the provision of or "assist[ance]" in providing, lawful out-of-state abortions based on the Attorney General's threatened enforcement.[1]

II. Defendants

14. Defendant Raúl Labrador is the Attorney General of Idaho, named in his official capacity.

15. State attorneys general are proper defendants where they "intend[] either to enforce a statute or to 'encourage local law enforcement agencies to do so.'" *Culinary Workers Union*, 200 F.3d at 618–619 (quoting *Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir. 1992)). Through his March 27 letter, Attorney General Labrador has demonstrated a clear intent to enforce the statute against Idaho health care providers who give comprehensive information to patients seeking an out of state abortion, or who otherwise "assist" patients in obtaining such an abortion, or to encourage and/or direct state licensing boards and prosecuting attorneys to do so, or both.

16. The Attorney General has also demonstrated that he interprets Idaho Code § 18-622(2) to apply to at least some abortions obtained outside of Idaho. When criminal enforcement

[1] *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) ("[A] plaintiff satisfies the injury-in-fact requirement where he alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.") (quoting *Babbitt v. Farm Workers*, 442 U. S. 289, 298 (1979)); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007) ("[W]here threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—--for example, the constitutionality of a law threatened to be enforced."); *Culinary Workers Union, Loc. 226 v. Del Papa*, 200 F.3d 614, 618–619 (9th Cir. 1999) ("[Courts] do not require, especially in the context of First Amendment cases, that the plaintiff risk prosecution by failing to comply with state law.").

is possible, the Idaho Attorney General is a proper defendant. *See Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919–920 (9th Cir. 2004).

17. Defendants County Prosecuting Attorneys (the "County Prosecuting Attorneys") are the 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. 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. They are designated by their official title pursuant Federal Rule of Civil Procedure 17(d).

18. The individual members of the Idaho State Board of Medicine and Idaho State Board of Nursing are sued in their official capacities. These are members of professional licensing boards charged with the duty of suspending and revoking the licenses of doctors, and nurses in Idaho. *See* Idaho Code §§ 54-1814(6), 54-1404(2). They are designated by their official title pursuant to Federal Rule of Civil Procedure 17(d).

FACTUAL ALLEGATIONS

III. State of Idaho Abortion Law

19. Idaho law makes it a felony for "[e]very person" to "perform[] or attempt[] to perform an abortion." Idaho Code § 18-622(2). Anyone who violates the Ban's prohibition is subject to between two and five years' imprisonment. *Id.*

20. An "abortion" is defined as "the use of any means to intentionally terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those

means will, with reasonable likelihood, cause the death of the unborn child . . . . " Idaho Code § 18-604(1).

21. Further, the statute states that "[t]he professional license of 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 shall be suspended by the appropriate licensing board for a minimum of six (6) months upon a first offense and shall be permanently revoked upon a subsequent offense." Idaho Code § 18-622(2).

22. In other words, the licensing provision applies only where the licensed professional assists with an abortion that itself violates the Total Abortion Ban. *Id.* (referencing abortions performed "in violation of this subsection").

23. On March 27, 2023, in response to an inquiry from Representative Brent Crane, Idaho Attorney General Raúl Labrador issued publicly a letter interpreting Idaho's prohibitions on abortion.

24. In relevant part, Representative Crane asked "whether Idaho's abortion prohibitions preclude . . . referring women across state lines to obtain abortion services." Ex. 1.

25. Labrador responded that, with respect to referring a patient "across state lines to access abortion services," "Idaho law requires the suspension of a health care professional's license when he or she '*assists* in performing or attempting to perform an abortion.'" Ex. 1 (citing Idaho Code § 18-622(2)) (emphasis added by Labrador). According to Labrador,

> The plain meaning of assist is to give support or aid. An Idaho health care professional who refers a woman across state lines to an abortion provider . . . has given support or aid to the woman in performing or attempting to perform an abortion and has thus violated the statute.
>
> Ex. 1

26. Labrador's letter thus announces two premises with respect to the Total Abortion Ban. First, he concludes that Idaho law prohibits healthcare providers from providing assistance to Idahoans in need of out-of-state abortion services by giving them information about and/or making referrals to aid them in obtaining 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 to at least some abortions performed out-of-state, because he interprets an abortion performed out-of-state as an abortion that triggers the license suspension, which applies *only* 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. As detailed below, both premises are unconstitutional.

IV. The Effect of the Attorney General's Overreaching and Unconstitutional Interpretation of Section 18-622(2) on Idahoan's Health Care

27. It is common for medical providers to counsel their patients about and recommend them for individualized and specialized medical treatments out of state. There are cancer clinics, for example, that draw their patients from across the country because of clinical trials or treatments only available in those locations. Consultation with a medical provider in Idaho regarding the availability of these options is often the first step in providing Idahoans access to these critical treatments. Similarly, with respect to pregnancy, patients have the right to seek counsel and medical advice, or any other form of "assist[ance]," from their medical provider about all options, including those options—such as abortion—that are banned in Idaho but permitted elsewhere.

28. Pregnancy and childbirth impact an individual's physical and mental health, finances, and personal relationships. Whether to take on the health risks of pregnancy and the

responsibilities of parenting is an extremely personal and consequential decision that must be left to the individual to determine without governmental interference. To make those decisions, Idahoans have the right to ask their medical provider for information regarding all treatments—including those options that are lawful and available outside of Idaho. Providers likewise have a right to provide information and recommendations about health care options.

29. Guided by their individual health needs, values, and circumstances, Idahoans may seek guidance from their health care providers about abortion for a variety of deeply personal reasons, including medical, familial, and financial concerns. Those reasons can include preserving their health, protecting their ability to care and provide for their children, financial concerns about the ability to work or go to school while pregnant or parenting, or complicated family circumstances. Without the ability to discuss with their health care provider information related to their health, including the risks of continuing a pregnancy, Idahoans will lose the right to make critical decisions about their health, bodies, lives, and futures.

30. Health care providers are trusted with some of the most intimate information a person has. What a patient eats and drinks, what medications they take, with whom they engage in sexual activity—all of this is provided to physicians to diagnose and treat conditions or ailments. Health care providers also aim to, and are trusted to, offer their honest opinions to patients.

31. A number of existing laws acknowledge and recognize the unique relationship between physician and patient. For example, to facilitate the open and honest exchange of information between a patient and her doctor, communications between doctors and patients are protected from compelled disclosure by state law. *See* Idaho R. Evid. 503. Erecting governmental barriers to the free exchange of information between the patient and their health

care providers undermines the bedrock tenets of their relationship, and isolates patients from essential information about safe and legal healthcare provided in other states.

32. If providers cannot provide information to patients about safe abortion care out of state, including the provision of referrals to an out of state provider for such care, and if patients cannot otherwise make the trip out of state because of uncertainty of access to care, the Total Abortion Ban will force some patients to terminate their unwanted pregnancies outside a clinical setting, which could put them at medical or legal risk.

33. The negative impacts of prohibiting abortions are often most severe for those who are already marginalized. For example, victims of domestic violence are at an increased risk of harm during pregnancy. For Idahoans experiencing intimate partner violence, forced pregnancy exacerbates the risk of new or increased violence, and further—often permanently—tethers the victim and the victim's family to their abuser. Furthermore, while poor Idahoans already struggled to scrape together the resources necessary to pay for an abortion, they now face additional costs of traveling out of state.

34. Even those patients whose dire situations may technically qualify for the life exception within Idaho may still be refused care within the state of Idaho because providers fear being held criminally liable under the Total Abortion Ban. Removing the ability for providers to provide information, including referrals, to patients about safe abortion care out of state, will be devastating for those at risk for or experiencing complications that may seriously and permanently impair their health. This is particularly true because the Total Abortion Ban contains only an affirmative defense—not an exception—for abortions "necessary to prevent the death of the pregnant woman." Idaho Code § 18-622(3)(a)(ii). In other words, an abortion provider could still be criminally charged for saving a patient's life.

35. The inability to provide information to patients about safe abortion care out of state, including the provision of referrals for such care, will inhibit patients from accessing necessary care in any of a number of extraordinarily difficult circumstances, including where a patient has an underlying health condition that is exacerbated by pregnancy, or where she has received a diagnosis of a health condition in the fetus, including potentially lethal conditions. This compounds an already difficult scenario by making the patient feel abandoned and alone as they navigate the next steps for their family, negatively impacting the patient's health and wellbeing.

36. In addition to the effect on patients, Labrador's interpretation of the Total Abortion Ban is likely to drive more health care providers, particularly those who provide obstetric and gynecological care, away from Idaho due to their credible fear of civil and criminal prosecution.[2]

37. The fear of licensure penalties is particularly acute for health care providers who, like Dr. Gustafson and some Planned Parenthood providers, are licensed in Idaho and another state.

38. Some of these providers, including Plaintiff Dr. Gustafson, had planned to begin providing abortions in states where doing so is lawful, including to patients from Idaho, but those plans have been put in jeopardy because of Labrador's interpretation of the Total Abortion Ban.

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[2] *See* John Werdel, *Change is Needed in Idaho's Abortion Laws Before it is Too Late*, Idaho Capital Sun (Mar. 7, 2023), https://idahocapitalsun.com/2023/03/07/change-is-needed-in-idahos-abortion-laws-before-it-is-too-late/; https://www.idahostatesman.com/opinion/readers-opinion/article272519522.html; Kelcie Moseley-Morris, *Citing Staffing Issues and Political Climate, North Idaho Hospital Will No Longer Deliver Babies*, Idaho Capital Sun (Mar. 17, 2023), Kylie Cooper, *I'm a Maternal-Health Doctor, and I'm Leaving Idaho Because of Restrictive Abortion Ban*, The Idaho Statesman (Feb. 16, 2023) https://idahocapitalsun.com/2023/03/17/citing-staffing-issues-and-political-climate-north-idaho-hospital-will-no-longer-deliver-babies/.

In other words, Labrador's interpretation is affecting the health care Idahoans are able to receive outside of Idaho, even in states where abortion is legal.

39. Others of these cross-licensed health care providers primarily practice in other states but have, in the past, served Idaho communities. These providers may give up their Idaho licenses altogether due to their concerns about Labrador's overreaching interpretation of the Total Abortion Ban, reducing Idahoans access to needed health care within the State's borders.

40. Similarly, before Labrador's letter, Planned Parenthood providers would counsel their patients about their pregnancy options and resources for medical care, including outside the state of Idaho, and from time to time, assist patients in scheduling care outside of Idaho. Providers would provide an information packet of resources including general information about different pregnancy options, including abortion; a list of "Abortion Providers Nearest to You" that lists health centers operated by both Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky and other providers in Washington, Montana, Nevada, Wyoming, Oregon, and Utah; an information 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. Following Labrador's letter, Planned Parenthood providers no longer do so.

41. But for the Attorney General's interpretation, Dr. Gustafson and Dr. Weyhrich likewise would, where appropriate and consistent with their legal and ethical obligations, inform and counsel patients regarding abortion, including potentially referring patients to out-of-state providers.

42. The Attorney General's interpretation also demonstrates that he is taking the position that at least some abortions in other states are banned by Idaho criminal law—a truly novel, shocking and blatantly unconstitutional interpretation of Idaho's Total Ban that risks

further isolating Idaho patients by cutting them off from critical health care in other states that is legal in those states.

43. Plaintiffs have no adequate remedy at law.

CLAIMS FOR RELIEF

COUNT I
(UNCONSTITUTIONAL RESTRICTIONS ON SPEECH IN VIOLATION OF THE FIRST AMENDMENT TO THE U.S. CONSTITUTION)

44. Plaintiffs bring this claim against all Defendants. Plaintiffs incorporate by reference all of the allegations set forth in the preceding paragraphs 1 through 43.

45. The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." The First Amendment applies to state and local governments under the Fourteenth Amendment to the United States Constitution, including applying to professional licensing regimes.

46. Content-based restrictions on speech are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to further a compelling governmental interest. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). Viewpoint-based restrictions are "an egregious form of content discrimination" and are presumptively unconstitutional in any setting. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828-829 (1995).

47. The Total Abortion Ban, Idaho Code § 18-622(2), as interpreted by the Idaho Attorney General, unconstitutionally restricts Plaintiffs' rights of free speech.

48. The Total Abortion Ban, under the Attorney General's interpretation, is a content- and viewpoint-based restriction that prohibits physicians and other medical providers from providing any "support or aid" to a woman seeking abortion, including "refer[ing] a woman across state lines to an abortion provider." Ex. 1, Labrador Letter.

49. The Total Abortion Ban, as interpreted by Labrador, does not further a compelling governmental interest.

50. Idaho has no legitimate interest, much less a compelling interest, in preventing its physicians and other 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, 827-828 (1975) ("This asserted interest [in preventing citizens from learning information about activities outside of the state's borders], even if understandable, was entitled to little, if any, weight.").

51. Labrador's interpretation of the Total Abortion Ban is not narrowly tailored, as there are many less-restrictive means that Idaho could have employed even if it had a compelling government purpose, which it does not.

52. The Total Abortion Ban, and Labrador's interpretation of it, is unconstitutional as applied to the provision of information, referrals, or other "assist[ance]" to patients seeking abortions in states in which abortion is legal.

53. The Total Abortion Ban and Labrador's interpretation of it unconstitutionally chill Plaintiffs' speech, and without declaratory and injunctive relief, will continue to do so.

54. Accordingly, Plaintiffs are entitled to a declaratory judgment, judgment awarding them preliminary and permanent injunctive relief, attorneys' fees, costs, and any other relief the Court deems just and appropriate.

COUNT II
(UNCONSTITUTIONAL EXTRATERRITORIAL APPLICATION IN VIOLATION OF THE COMMERCE CLAUSE)

55. Plaintiffs Planned Parenthood and Dr. Gustafson bring this claim against all Defendants. Plaintiffs incorporate by reference all of the allegations set forth in the preceding paragraphs 1 through 43.

56. The Commerce Clause of the United States Constitution prohibits a state from applying its laws extraterritorially to regulate out-of-state activity which is lawful where it occurs, and prohibits state laws which discriminate against interstate commerce or impose undue burdens on interstate commerce. U.S. Const. Art. I, § 8, cl 3; *see also South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018); *Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989).

57. The Attorney General's interpretation of the Total Abortion Ban seeks to criminalize otherwise lawful abortion care provided outside the state, and therefore constitutes a regulation of "commerce that takes place wholly outside of the State's borders," in violation of the dormant Commerce Clause. *Healy*, 491 U.S. at 336.

58. The medical services at issue in this case—the provision of abortion care to Idahoans outside of Idaho—unquestionably constitutes commerce under the dormant commerce clause. *See, e.g.*, *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 329 (1991) ("provision of health care services" is "commerce").

59. By restricting Idahoans' access to out-of-state abortion care, Idaho seeks to "directly control[] commerce occurring wholly outside [its] boundaries," thereby "exceed[ing] the inherent limits of the enacting State's authority." *Healy*, 491 U.S. at 336. Further, it is well-settled that the fact that a state's residents engage in commercial activity taking place elsewhere does not give the state license to regulate that out-of-state activity. *See, e.g.*, *Sam Francis Found. v. Christies*, 784 F.3d 1320, 1323 (9th Cir. 2015) (en banc).

60. Idaho's attempt to regulate the provision of out-of-state commercial activity, in the form of abortion care taking place beyond its borders in jurisdictions where the provision of abortion services is legal, is unconstitutional in violation of the Dormant Commerce Clause, and it must be enjoined and declared unlawful.

61. Accordingly, Plaintiffs are entitled to a declaratory judgment, judgment awarding preliminary and permanent injunctive relief, declaratory relief, attorneys' fees, costs, and any other relief the Court deems just and appropriate.

COUNT III
(UNCONSTITUTIONAL EXTRATERRITORIAL APPLICATION IN VIOLATION OF THE DUE PROCESS CLAUSE)

62. Plaintiffs Planned Parenthood and Dr. Gustafson bring this claim against all Defendants. Plaintiffs incorporate by reference all of the allegations set forth in the preceding paragraphs 1 through 42.

63. The Fourteenth Amendment of the United States Constitution prohibits a state from applying its laws extraterritorially to criminalize out-of-state activity which is lawful where it occurs. U.S. Const. amend. XIV; *see also Nielsen v. State of Oregon*, 212 U.S. 315, 321 (1909) ("[F]or an act done within the territorial limits of [one state], under authority and license from that state, one cannot be prosecuted and punished by . . . [a different] state.").

64. Any attempt by Idaho officials to punish providers for providing Idaho residents with abortion services in other states, which are legal in the jurisdictions where they are performed, violates Plaintiffs' due process rights. As the Supreme Court has made clear, "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *BMW of N.A. v. Gore*, 517 U.S. at 559 n.19 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)).

65. The same is true for Labrador's threat of licensing sanctions against Idaho healthcare professionals who "assist" Idaho residents in obtaining such an out-of-state abortion by, for example, providing information or referrals.

66. The Attorney General's interpretation of the Total Abortion Ban violates fundamental principles of due process and must be declared unlawful.

67. Accordingly, Plaintiffs are entitled to a declaratory judgment, judgment awarding preliminary and permanent injunctive relief, attorneys' fees, costs, and any other relief the Court deems just and appropriate.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

1) Declaratory judgment relief:

   a. That enforcement of Idaho Code § 18-622 against Plaintiffs or any of their agents, staff, or volunteers for abortions that take place outside of Idaho is unconstitutional;

   b. That enforcement of Idaho Code § 18-622 against Plaintiffs or any of their agents, staff, or volunteers for speech related to abortion services outside of Idaho is unconstitutional, including, but not limited to:

      i. Counseling about abortion services outside of Idaho;

      ii. Informing about abortion services outside of Idaho;

      iii. Recommending abortion services outside of Idaho;

      iv. Informing about particular abortion providers outside of Idaho;

      v. Informing about sources of funding for abortion services outside of Idaho and/or sources of funding for travel and other expenses related to those abortion services;

      vi. Referring a patient to an abortion provider outside of Idaho;

   c. That Idaho's abortion statutes do not apply to abortions obtained or performed outside of Idaho.

   d. That Attorney General Labrador's interpretation of Idaho Code § 18-622 is unconstitutional because it violates the U.S. Constitution's Commerce Clause, Due Process Clause, and the First Amendment.

2) Enter an Order temporarily, preliminarily, and permanently enjoining Attorney General Labrador from enforcing his unconstitutional interpretation of Idaho Code § 18-622.

3) Enter an Order temporarily, preliminarily, and permanently enjoying the County Prosecuting Attorneys from enforcing Attorney General Labrador's unconstitutional interpretation of Idaho Code § 18-622.

4) Enter an Order temporarily, preliminarily, and permanently enjoining the Licensing Boards from enforcing Attorney General Labrador's unconstitutional interpretation of Idaho Code § 18-622.

5) Reasonable attorneys' fees and costs.

6) Any other relief that the Court deems just and proper.

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** Pro hac vice applications forthcoming*

EXHIBIT 1

STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

RAÚL R. LABRADOR

March 27, 2023

BY HAND DELIVERY

The Honorable Brent Crane
Idaho House of Representatives
Idaho State Capitol
700 W. Jefferson Street, Rm. EW46
Boise, Idaho 83702

Re: Request for AG Analysis

Dear Representative Crane:

This letter is in response to your recent inquiry regarding Idaho's criminal prohibitions on abortion. Specifically, you asked whether Idaho's abortion prohibitions preclude 1) the provision of abortion pills, 2) the promotion of abortion pills, and 3) referring women across state lines to obtain abortion services or prescribing abortion pills that will be picked up across state lines. Idaho law prohibits each of these activities.

1) Idaho's criminal prohibition on performing an abortion includes providing abortion pills. Idaho's criminal law defines abortion to mean "the use of *any means* to intentionally terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child." Idaho Code § 18-604(1) (emphasis added). The criminal abortion statute, to which the statutory definition of "abortion" applies, does not distinguish between an abortion carried out as a medical procedure and an abortion carried out by pills or chemicals; the use of *any means* to carry out an abortion is prohibited. *See* Idaho Code § 18-622.

2) Two Idaho criminal statutes prohibit promoting abortion pills to the public. Idaho Code section 18-603 prohibits the promotion of abortion pills, unless the promoter is a licensed physician: "Every person, except licensed physicians . . ., who willfully publishes any notice or advertisement of any medicine or means for

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producing or facilitating a miscarriage or abortion . . . is guilty of a felony." Idaho Code § 18-603. Similarly, under Idaho Code section 18-607, "[a] person who . . . offers to sell, . . . advertises, or displays for sale anything specially designed to terminate a pregnancy, or held out by the actor for that purpose, commits a misdemeanor." The statute has several exceptions, but none of them apply to the promotion of abortion pills to the public.

3) Idaho law prohibits an Idaho medical provider from either referring a woman across state lines to access abortion services or prescribing abortion pills for the woman to pick up across state lines. Idaho law requires the suspension of a health care professional's license when he or she "*assists* in performing or attempting to perform an abortion." Idaho Code § 18-622(2) (emphasis added). The plain meaning of assist is to give support or aid. An Idaho health care professional who refers a woman across state lines to an abortion provider or who prescribes abortion pills for the woman across state lines has given support or aid to the woman in performing or attempting to perform an abortion and has thus violated the statute.

Please let me know if you have any additional questions.

Sincerely,

Raúl R. Labrador

RAÚL R. LABRADOR
Attorney General

RRL:kw

RAÚL R. LABRADOR
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UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAII, ALASKA, INDIANA, KENTUCKY, on behalf of itself, *et al.*, Plaintiffs, v. RAÚL LABRADOR, in his capacity as the Attorney General of the State of Idaho; *et al.*, Defendants.	Case No. 1:23-cv-00142-BLW **NOTICE OF APPEAL**

Defendant Raúl Labrador, in his capacity as Attorney General for the State of Idaho, hereby appeals the district court's July 31, 2023 Memorandum Decision and Order [153] granting Plaintiffs' motion for preliminary injunction against him.

FORM 1 INFORMATION

- Date case was first filed in U.S. District Court: April 5, 2023
- Date of judgment or order being appealed: July 31, 2023
- Docket entry number of judgment or order appealed from: 153 (Memorandum Decision and Order)
- Docketing fee of $505 paid to the U.S. District Court for the District of Idaho.
- Appellant: Defendant Raúl Labrador
- This is not a cross-appeal
- A representation statement follows on the next page.

DATED: August 1, 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: /s/ *Lincoln Davis Wilson*
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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2023, I electronically filed the foregoing with the Clerk of the Court using 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:

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APPEAL,LC10,STAYED

U.S. District Court
District of Idaho (LIVE) NextGen 1.7 (Boise - Southern)
CIVIL DOCKET FOR CASE #: 1:23-cv-00142-BLW

Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky et al v. Labrador et al
Assigned to: Judge B Lynn Winmill
Case in other court: USCA, 23-35518
Cause: 28:1331 Fed. Question: Other Civil Rights

Date Filed: 04/05/2023
Jury Demand: None
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

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Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky
On Behalf of Itself, It's Staff, Physicians and Patients

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Plaintiff

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In His Official Capacity as Attorney General of the State of Idaho

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Defendant

Idaho State Board of Nursing
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Defendant

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Defendant

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Defendant

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Defendant

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Defendant

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Defendant

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Date Filed	#	Docket Text
04/05/2023	1	COMPLAINT against All Defendants (Filing fee $ 402 receipt number BIDDC-2548374.), filed by All Plaintiffs. (Attachments: # 1 Exhibit 1, # 2 Cover Sheet)(Smith, Colleen)
04/05/2023	2	MOTION for Temporary Restraining Order *and Preliminary Injunction filed by* Colleen Rosannah Smith appearing for Plaintiffs Caitlin Gustafson, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Darin Weyhrich. Responses due by 4/26/2023 (Attachments: # 1 Memorandum in Support, # 2 Declaration of Rebecca Gibron, # 3 Declaration of Caitlin Gustafson, M.D., # 4 Declaration of Darin L. Weyhrich, M.D.)(Smith, Colleen)
04/05/2023	3	MOTION FOR PRO HAC VICE APPEARANCE by Andrew Beck. (Filing fee $ 250 receipt number AIDDC-2548436.)Colleen Rosannah Smith appearing for Plaintiffs Caitlin Gustafson, Darin Weyhrich. Responses due by 4/26/2023 (Smith, Colleen)
04/05/2023	4	MOTION FOR PRO HAC VICE APPEARANCE by Meagan Burrows. (Filing fee $ 250 receipt number AIDDC-2548447.)Colleen Rosannah Smith appearing for Plaintiffs Caitlin Gustafson, Darin Weyhrich. Responses due by 4/26/2023 (Smith, Colleen)
04/05/2023	5	MOTION FOR PRO HAC VICE APPEARANCE by Ryan Mendias. (Filing fee $ 250 receipt number AIDDC-2548453.)Colleen Rosannah Smith appearing for Plaintiffs Caitlin Gustafson, Darin Weyhrich. Responses due by 4/26/2023 (Smith, Colleen)
04/05/2023	6	MOTION FOR PRO HAC VICE APPEARANCE by Scarlet Kim. (Filing fee $ 250 receipt number AIDDC-2548465.)Colleen Rosannah Smith appearing for Plaintiffs Caitlin Gustafson, Darin Weyhrich. Responses due by 4/26/2023 (Smith, Colleen)

04/05/2023	7	MOTION FOR PRO HAC VICE APPEARANCE by Jennifer R. Sandman. (Filing fee $ 250 receipt number AIDDC-2548470.)Colleen Rosannah Smith appearing for Plaintiff Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky. Responses due by 4/26/2023 (Smith, Colleen)
04/05/2023	8	MOTION FOR PRO HAC VICE APPEARANCE by Catherine P. Humphreville. (Filing fee $ 250 receipt number AIDDC-2548481.)Colleen Rosannah Smith appearing for Plaintiff Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky. Responses due by 4/26/2023 (Smith, Colleen)
04/05/2023	9	MOTION FOR PRO HAC VICE APPEARANCE by Peter Neiman. (Filing fee $ 250 receipt number AIDDC-2548563.)Colleen Rosannah Smith appearing for Plaintiffs Caitlin Gustafson, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Darin Weyhrich. Responses due by 4/26/2023 (Smith, Colleen)
04/05/2023	10	MOTION FOR PRO HAC VICE APPEARANCE by Alan Shoenfeld. (Filing fee $ 250 receipt number AIDDC-2548566.)Colleen Rosannah Smith appearing for Plaintiffs Caitlin Gustafson, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Darin Weyhrich. Responses due by 4/26/2023 (Smith, Colleen)
04/05/2023	11	MOTION FOR PRO HAC VICE APPEARANCE by Rachel Craft. (Filing fee $ 250 receipt number AIDDC-2548568.)Colleen Rosannah Smith appearing for Plaintiffs Caitlin Gustafson, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Darin Weyhrich. Responses due by 4/26/2023 (Smith, Colleen)
04/05/2023	12	MOTION FOR PRO HAC VICE APPEARANCE by Michelle Diamond. (Filing fee $ 250 receipt number AIDDC-2548569.)Colleen Rosannah Smith appearing for Plaintiffs Caitlin Gustafson, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Darin Weyhrich. Responses due by 4/26/2023 (Smith, Colleen)
04/05/2023	13	MOTION FOR PRO HAC VICE APPEARANCE by Katherine Mackey. (Filing fee $ 250 receipt number AIDDC-2548571.)Colleen Rosannah Smith appearing for Plaintiffs Caitlin Gustafson, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Darin Weyhrich. Responses due by 4/26/2023 (Smith, Colleen)
04/05/2023	14	Corporate Disclosure Statement by Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky. (Smith, Colleen)
04/06/2023	15	DOCKET ENTRY ORDER APPROVING (DKTs. 3 , 4 , 5 , 6 , 7 , 8 , 9 , 10 , 11 , 12 & 13) Motion for Pro Hac Vice Appearance of attorney Scarlet Kim, Andrew Beck,Meagan Burrows,Ryan Mendias,Peter G Neiman,Alan Schoenfeld,Rachel E. Craft,Michelle Nicole Diamond,Katherine V. Mackey, Jennifer R. Sandman,Catherine P. Humphreville,,Per Local Rule 83.4(e), out-of-state counsel shall immediately register for ECF. (Notice sent to CM/ECF Registration Clerk) (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (lm)
04/06/2023	16	Summons Issued as to All Defendants. (Print attached Summons for service.) (Attachments: # 1 Summons, # 2 Summons, # 3 Summons, # 4 Summons, # 5 Summons, # 6 Summons, # 7 Summons, # 8 Summons, # 9 Summons, # 10 Summons, # 11 Summons, # 12 Summons, # 13 Summons, # 14 Summons, # 15 Summons, # 16 Summons, # 17 Summons, # 18 Summons, # 19 Summons, # 20 Summons, # 21 Summons, # 22 Summons, # 23 Summons, # 24 Summons, # 25 Summons, # 26 Summons, # 27 Summons, # 28 Summons, # 29 Summons, # 30 Summons, # 31 Summons, # 32 Summons, # 33 Summons, # 34 Summons, # 35 Summons, # 36 Summons, # 37 Summons, # 38 Summons, # 39 Summons, # 40 Summons, # 41 Summons, # 42 Summons, # 43 Summons, # 44 Summons, # 45 Summons, # 46 Summons)(lm)

04/06/2023	17	REQUEST FOR REASSIGNMENT TO DISTRICT JUDGE AND REASSIGNMENT OF CASE. Case reassigned to Judge B Lynn Winmill for all further proceedings. US Magistrate Judge Debora K Grasham no longer assigned to case. Please use this case number on all future pleadings, 1:23-cv-142-BLW (km)
04/06/2023	18	DOCKET ENTRY NOTICE of Hearing: A Status Conference set for April 7, 2023 at 1:00 PM in before Judge B Lynn Winmill. A Zoom link will be sent to counsel by separate notice. (hgp)
04/07/2023	19	NOTICE of Appearance by Lincoln Davis Wilson on behalf of Raul Labrador (Wilson, Lincoln)
04/07/2023	20	NOTICE of Appearance by Brian V Church on behalf of Raul Labrador (Church, Brian)
04/07/2023	21	NOTICE of Appearance by Timothy Longfield on behalf of Raul Labrador (Longfield, Timothy)
04/07/2023	22	DOCKET ENTRY NOTICE OF HEARING: A Video Status Conference is set for 4/7/2023 at 1:00 PM mountain time before Judge B Lynn Winmill. Counsel received a video link via separate notification. Members of the public may use the following to attend this matter via Audio ONLY: 1-669-254-5252, Meeting ID: 161 909 6869, Meeting Passcode: 405590. Persons granted remote access to proceedings are reminded of the general prohibition under federal law and Local Rule 83.1 against photographing, recording, and rebroadcasting of court proceedings.(jlg)
04/07/2023	23	NOTICE of Appearance by M Anthony Sasser on behalf of Rob Wood (Sasser, M)
04/07/2023	99	Minute Entry for proceedings held before Judge B Lynn Winmill: A Status Conference was held via Zoom on 4/7/2023. (Court Reporter Tammy Hohenleitner.) (jlg) (Entered: 04/25/2023)
04/11/2023	24	SUMMONS Returned Executed by Darin Weyhrich, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson. Raul Labrador served on 4/6/2023, answer due 4/27/2023. (Smith, Colleen)
04/11/2023	25	SUMMONS Returned Executed by Darin Weyhrich, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson. Members of the Idaho State Board of Medicine served on 4/6/2023, answer due 4/27/2023. (Smith, Colleen)
04/11/2023	26	SUMMONS Returned Executed by Darin Weyhrich, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson. Idaho State Board of Nursing served on 4/6/2023, answer due 4/27/2023. (Smith, Colleen)
04/11/2023	27	WAIVER OF SERVICE Returned Executed by Darin Weyhrich, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson. Andrakay Pluid waiver sent on 4/6/2023, answer due 6/5/2023. (Smith, Colleen)
04/11/2023	28	WAIVER OF SERVICE Returned Executed by Darin Weyhrich, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson. McCord Larsen waiver sent on 4/6/2023, answer due 6/5/2023. (Smith, Colleen)
04/11/2023	29	WAIVER OF SERVICE Returned Executed by Darin Weyhrich, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson. Jimmy Thomas waiver sent on 4/6/2023, answer due 6/5/2023. (Smith, Colleen)
04/11/2023	30	ORDER SETTING EXPEDITED BRIEFING SCHEDULE: Defendants shall respond to the motion for a preliminary injunction (Dkt. 2) by April 14, 2023 at 12:00 PM. Plaintiffs shall reply by April 18, 2023 at 12:00 PM. IT IS FURTHER ORDERED that if Defendants wish to pursue an expedited motion to dismiss, they must file the motion by

		April 14, 2023 at 12:00 PM. Plaintiffs must respond by April 18, 2023 at 12:00 PM. Defendants must reply by April 20, 2023 at 5:00 PM. Signed by Judge B Lynn Winmill. (hgp)
04/11/2023		Set/Reset Deadlines as to MOTION for Preliminary Injunction (Dkt. 2). Responses due by 4/14/2023 at 12:00 PM. Replies due by 4/18/2023 at 12:00 PM.(hgp)
04/11/2023	31	WAIVER OF SERVICE Returned Executed by Darin Weyhrich, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson. Rob Wood waiver sent on 4/6/2023, answer due 6/5/2023. (Smith, Colleen)
04/12/2023	32	DOCKET ENTRY NOTICE OF HEARING regarding 2 MOTION for Preliminary Injunction: A Video Motion Hearing is set for 4/24/2023 at 2:00 PM (Mountain Time) via Zoom before Judge B Lynn Winmill. A Zoom link will be provided prior to the date of the hearing. (jlg)
04/13/2023	33	WAIVER OF SERVICE Returned Executed by Darin Weyhrich, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson. Cody Brower waiver sent on 4/6/2023, answer due 6/5/2023. (Smith, Colleen)
04/13/2023	34	WAIVER OF SERVICE Returned Executed by Darin Weyhrich, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson. Steve Stephens waiver sent on 4/6/2023, answer due 6/5/2023. (Smith, Colleen)
04/13/2023	35	MOTION for Leave to File *Supplemental Declarations in Support of Motion for Preliminary Injunction* Colleen Rosannah Smith appearing for Plaintiffs Caitlin Gustafson, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Darin Weyhrich. Responses due by 5/4/2023 (Attachments: # 1 Exhibit 1 - Declaration of Rachel Craft, # 2 Exhibit 2 - Declaration of Rebecca Gibron, # 3 Exhibit 3 - Declaration of Caitlin Gustafson, # 4 Exhibit 4 - Declaration of Darin Weyhrich)(Smith, Colleen)
04/13/2023	36	AMENDED DOCUMENT by County Prosecuting Attorneys, Raul Labrador. *Amended Notice of Appearance for certain county prosecutors and Raul Labrador*. (Wilson, Lincoln)
04/13/2023	37	AMENDED DOCUMENT by County Prosecuting Attorneys, Raul Labrador. *Amended Notice of Appearance for certain county prosecutors and Raul Labrador*. (Church, Brian)
04/13/2023	38	AMENDED DOCUMENT by County Prosecuting Attorneys, Raul Labrador. *Amended Notice of Appearance for certain county prosecutors and Raul Labrador*. (Longfield, Timothy)
04/14/2023	39	DOCKET ENTRY ORDER: finding good cause exists, the Court will grant Plaintiffs' Motion for Leave to File (Dkt. 35). The Court will further reset the expedited briefing schedule as follow: Defendants' deadline to file a response to Plaintiffs' Motion for Preliminary Injunction and any potential motions to dismiss will be April 14, 2023 at 11:59 PM; Plaintiffs' deadline to file a reply in support of their motion and response to any potential motion to dismiss will be April 18, 2023 at 12:00 PM; Defendants' deadline to file a reply, if applicable, will be April 20, 2023 at 5:00 PM. Signed by Judge B. Lynn Winmill. (eap). (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jap)
04/14/2023	40	NOTICE of Substitution - Attorney Lincoln Davis Wilson for Rob Wood added. Attorney M Anthony Sasser terminated. Request to Leave Noticing ON for this case by Attorney (Wilson, Lincoln)
04/14/2023	41	MOTION to Dismiss Lincoln Davis Wilson appearing for Defendants Benjamin Allen, Jan Bennetts, Chris Boyd, Cody Brower, Alex Gross, Raul Labrador, McCord Larsen, Grant Loebs, Trevor Misseldine, Brian Naugle, Andrakay Pluid, Lance Stevenson, Mark

		Taylor, Jim Thomas, Rob Wood. Responses due by 5/5/2023 (Attachments: # 1 Memorandum in Support)(Wilson, Lincoln)
04/14/2023	42	RESPONSE to Motion re 2 MOTION for Temporary Restraining Order *and Preliminary Injunction filed by* filed by Benjamin Allen, Jan Bennetts, Chris Boyd, Cody Brower, Alex Gross, Raul Labrador, McCord Larsen, Grant Loebs, Trevor Misseldine, Brian Naugle, Andrakay Pluid, Lance Stevenson, Mark Taylor, Jim Thomas, Rob Wood. Replies due by 4/28/2023. (Attachments: # 1 Declaration of Lincoln Davis Wilson, # 2 Exhibit 1 to Wilson Declaration, # 3 Exhibit 2 to Wilson Declaration, # 4 Exhibit 3 to Wilson Declaration)(Wilson, Lincoln)
04/14/2023	43	MOTION Motion for Leave to File Overlength Brief re 41 MOTION to Dismiss , 42 Response to Motion,, Lincoln Davis Wilson appearing for Defendants Benjamin Allen, Jan Bennetts, Chris Boyd, Cody Brower, Alex Gross, Raul Labrador, McCord Larsen, Grant Loebs, Trevor Misseldine, Brian Naugle, Andrakay Pluid, Lance Stevenson, Mark Taylor, Jim Thomas, Rob Wood. Responses due by 5/5/2023 (Wilson, Lincoln)
04/16/2023	44	DOCKET ENTRY ORDER: good cause appearing, the Defendants' Motion for Leave to File Overlength Brief (Dkt. 43) is hereby GRANTED. Signed by Judge B. Lynn Winmill. (eap). (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jap)
04/17/2023	45	SUMMONS Returned Executed by Darin Weyhrich, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson. Brad Calbo served on 4/12/2023, answer due 5/3/2023. (Smith, Colleen)
04/17/2023	46	SUMMONS Returned Executed by Darin Weyhrich, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson. Brian Naugle served on 4/12/2023, answer due 5/3/2023. (Smith, Colleen)
04/17/2023	47	SUMMONS Returned Executed by Darin Weyhrich, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson. Bailey Smith served on 4/13/2023, answer due 5/4/2023. (Smith, Colleen)
04/17/2023	48	SUMMONS Returned Executed by Darin Weyhrich, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson. Janna Birch served on 4/12/2023, answer due 5/3/2023. (Smith, Colleen)
04/17/2023	49	SUMMONS Returned Executed by Darin Weyhrich, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson. Grant Loebs served on 4/12/2023, answer due 5/3/2023. (Smith, Colleen)
04/17/2023	50	SUMMONS Returned Executed by Darin Weyhrich, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson. Lindsey Blake served on 4/12/2023, answer due 5/3/2023. (Smith, Colleen)
04/17/2023	51	SUMMONS Returned Executed by Darin Weyhrich, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson. Louis E. Marshall served on 4/13/2023, answer due 5/4/2023. (Smith, Colleen)
04/17/2023	52	SUMMONS Returned Executed by Darin Weyhrich, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson. Lance Stevenson served on 4/12/2023, answer due 5/3/2023. (Smith, Colleen)
04/17/2023	53	SUMMONS Returned Executed by Darin Weyhrich, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson. Mark Taylor served on 4/12/2023, answer due 5/3/2023. (Smith, Colleen)

04/17/2023	54	SUMMONS Returned Executed by Darin Weyhrich, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson. Paul Rogers served on 4/13/2023, answer due 5/4/2023. (Smith, Colleen)
04/17/2023		NOTICE TO COURT that counsel M. Anthony Sasser wishes to no longer be noticed electronically on this case as of the date of this notice. (Sasser, M)
04/17/2023	55	SUMMONS Returned Executed by Darin Weyhrich, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson. Randy Neal served on 4/12/2023, answer due 5/3/2023. (Smith, Colleen)
04/17/2023	56	SUMMONS Returned Executed by Darin Weyhrich, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky. Richard Roats served on 4/12/2023, answer due 5/3/2023. (Smith, Colleen)
04/17/2023	57	SUMMONS Returned Executed by Darin Weyhrich, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson. Stephen Herzog served on 4/13/2023, answer due 5/4/2023. (Smith, Colleen)
04/17/2023	58	SUMMONS Returned Executed by Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson, Darin Weyhrich. Stanley Mortensen served on 4/12/2023, answer due 5/3/2023. (Smith, Colleen)
04/17/2023	59	SUMMONS Returned Executed by Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson, Darin Weyhrich. Trevor Misseldine served on 4/12/2023, answer due 5/3/2023. (Smith, Colleen)
04/17/2023	60	SUMMONS Returned Executed by Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson, Darin Weyhrich. Jan Bennetts served on 4/11/2023, answer due 5/2/2023. (Smith, Colleen)
04/17/2023	61	SUMMONS Returned Executed by Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson, Darin Weyhrich. Christopher Topmiller served on 4/11/2023, answer due 5/2/2023. (Smith, Colleen)
04/17/2023	62	SUMMONS Returned Executed by Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson, Darin Weyhrich. Chris Boyd served on 4/11/2023, answer due 5/2/2023. (Smith, Colleen)
04/17/2023	63	SUMMONS Returned Executed by Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson, Darin Weyhrich. Delton Walker served on 4/11/2023, answer due 5/2/2023. (Smith, Colleen)
04/17/2023	64	SUMMONS Returned Executed by Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson, Darin Weyhrich. Adam Strong served on 4/11/2023, answer due 5/2/2023. (Smith, Colleen)
04/17/2023	65	SUMMONS Returned Executed by Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson, Darin Weyhrich. Erick Thomson served on 4/11/2023, answer due 5/2/2023. (Smith, Colleen)
04/17/2023	66	SUMMONS Returned Executed by Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson, Darin Weyhrich. Bryan Taylor served on 4/11/2023, answer due 5/2/2023. (Smith, Colleen)
04/17/2023	67	SUMMONS Returned Executed by Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson, Darin Weyhrich. Benjamin Allen served on 4/12/2023, answer due 5/3/2023. (Smith, Colleen)

04/17/2023	68	SUMMONS Returned Executed by Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson, Darin Weyhrich. E. Clayne Tyler served on 4/13/2023, answer due 5/4/2023. (Smith, Colleen)
04/17/2023	69	SUMMONS Returned Executed by Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson, Darin Weyhrich. Kirk MacGregor served on 4/13/2023, answer due 5/4/2023. (Smith, Colleen)
04/17/2023	70	SUMMONS Returned Executed by Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson, Darin Weyhrich. Bill Thompson served on 4/12/2023, answer due 5/3/2023. (Smith, Colleen)
04/17/2023	71	SUMMONS Returned Executed by Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson, Darin Weyhrich. Shondi Lott served on 4/12/2023, answer due 5/3/2023. (Smith, Colleen)
04/17/2023	72	SUMMONS Returned Executed by Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson, Darin Weyhrich. Matt Fredback served on 4/14/2023, answer due 5/5/2023. (Smith, Colleen)
04/17/2023	73	SUMMONS Returned Executed by Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson, Darin Weyhrich. Mariah Dunham served on 4/13/2023, answer due 5/4/2023. (Smith, Colleen)
04/17/2023	74	SUMMONS Returned Executed by Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson, Darin Weyhrich. Zachary Pall served on 4/13/2023, answer due 5/4/2023. (Smith, Colleen)
04/18/2023	75	SUMMONS Returned Executed by Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson, Darin Weyhrich. Vic Pearson served on 4/17/2023, answer due 5/8/2023. (Smith, Colleen)
04/18/2023	76	SUMMONS Returned Executed by Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson, Darin Weyhrich. Adam McKenzie served on 4/17/2023, answer due 5/8/2023. (Smith, Colleen)
04/18/2023	77	SUMMONS Returned Executed by Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson, Darin Weyhrich. S. Doug Wood served on 4/17/2023, answer due 5/8/2023. (Smith, Colleen)
04/18/2023	78	SUMMONS Returned Executed by Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson, Darin Weyhrich. Justin Coleman served on 4/13/2023, answer due 5/4/2023. (Smith, Colleen)
04/18/2023	79	SUMMONS Returned Executed by Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson, Darin Weyhrich. Paul Withers served on 4/14/2023, answer due 5/5/2023. (Smith, Colleen)
04/18/2023	80	SUMMONS Returned Executed by Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson, Darin Weyhrich. Jason Mackrill served on 4/18/2023, answer due 5/9/2023. (Smith, Colleen)
04/18/2023	81	MEMORANDUM in Support re 2 MOTION for Temporary Restraining Order *and Preliminary Injunction filed by and in Opposition to 41 Motion to Dismiss* filed by Caitlin Gustafson, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Darin Weyhrich. (Attachments: # 1 Exhibit A - Declaration of Rachel E. Craft)(Smith, Colleen)

04/18/2023	82	SUMMONS Returned Executed by Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson, Darin Weyhrich. Mike Duke served on 4/17/2023, answer due 5/8/2023. (Smith, Colleen)
04/19/2023	83	WAIVER OF SERVICE Returned Executed by Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Caitlin Gustafson, Darin Weyhrich. Justin Oleson waiver sent on 4/19/2023, answer due 6/19/2023. (Smith, Colleen)
04/19/2023	84	NOTICE by Caitlin Gustafson, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Darin Weyhrich re 81 Memorandum in Support of Motion, *of Errata* (Attachments: # 1 Attachment 1 - Corrected Combined Memorandum in Opposition to Certain Defendants' Motion to Dismiss and Reply in Support of Plaintiffs' Motion for Preliminary Injunction)(Smith, Colleen)
04/20/2023	85	REPLY to Response to Motion re 41 MOTION to Dismiss filed by Benjamin Allen, Jan Bennetts, Chris Boyd, Cody Brower, Alex Gross, Raul Labrador, McCord Larsen, Grant Loebs, Trevor Misseldine, Brian Naugle, Andrakay Pluid, Lance Stevenson, Mark Taylor, Jim Thomas, Rob Wood.Motion Ripe Deadline set for 4/21/2023. (Attachments: # 1 Affidavit Second Declaration of Lincoln Wilson, # 2 Exhibit Exhibit 4)(Wilson, Lincoln)
04/21/2023	86	MOTION to File Amicus Brief *in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction and Opposition to Defendants' Motion to Dismiss* Wendy Olson appearing for Amicus St. Luke's Health System Ltd.. Responses due by 5/12/2023 (Attachments: # 1 Exhibit A - Proposed Amicus Curiae Brief)(Olson, Wendy)
04/21/2023	87	DOCKET ENTRY NOTICE OF HEARING regarding 2 Motion for Preliminary Injunction: A Video Motion Hearing is set for 4/24/2023 at 2:00 PM (Mountain Time) via Zoom before Judge B Lynn Winmill. Counsel received a video link via separate notification. Members of the public may use the following to attend this matter via Audio ONLY: 1-669-254-5252, Meeting ID: 161 127 3561, Meeting Passcode: 709338. Persons granted remote access to proceedings are reminded of the general prohibition under federal law and Local Rule 83.1 against photographing, recording, and rebroadcasting of court proceedings.(jlg)
04/21/2023	88	RESPONSE to Motion re 86 MOTION to File Amicus Brief *in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction and Opposition to Defendants' Motion to Dismiss* filed by Benjamin Allen, Jan Bennetts, Chris Boyd, Cody Brower, Alex Gross, Raul Labrador, McCord Larsen, Grant Loebs, Trevor Misseldine, Brian Naugle, Andrakay Pluid, Lance Stevenson, Mark Taylor, Jim Thomas, Rob Wood. Replies due by 5/5/2023.(Wilson, Lincoln)
04/21/2023	89	NOTICE of Appearance by Lincoln Davis Wilson on behalf of County Prosecuting Attorneys (Wilson, Lincoln)
04/21/2023	90	NOTICE of Appearance by Brian V Church on behalf of County Prosecuting Attorneys (Church, Brian)
04/21/2023	91	NOTICE of Appearance by Timothy Longfield on behalf of County Prosecuting Attorneys (Longfield, Timothy)
04/21/2023	92	ERRATA by Amicus St. Luke's Health System Ltd. re 86 MOTION to File Amicus Brief *in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction and Opposition to Defendants' Motion to Dismiss* . (Attachments: # 1 Exhibit A - Proposed Amicus Curiae Brief)(Olson, Wendy)
04/21/2023	93	MOTION FOR PRO HAC VICE APPEARANCE by Peter B. Gonick. (Filing fee $ 250 receipt number AIDDC-2556592.)Peter Gonick appearing for Amicus Peter B Gonick.

		Responses due by 5/12/2023 (Gonick, Peter)
04/21/2023	94	MOTION for Leave to File *Amici Curiae Brief on behalf of the States of Washington, Arizona, California, Colorado, Delaware, Hawaii, Illinois, Maine, Minnesota, Nevada, New Jersey, New York, Oregon, Rhode Island, and the District of Columbia* Peter Gonick appearing for Amicus Peter B Gonick. Responses due by 5/12/2023 (Gonick, Peter)
04/21/2023	95	MOTION to File Amicus Brief *on behalf of the States of Washington, Arizona, California, Colorado, Delaware, Hawaii, Illinois, Maine, Minnesota, Nevada, New Jersey, New York, Oregon, Rhode Island, and the District of Columbia* Peter Gonick appearing for Amicus Peter B Gonick. Responses due by 5/12/2023 (Gonick, Peter)
04/24/2023	96	RESPONSE re 93 MOTION FOR PRO HAC VICE APPEARANCE by Peter B. Gonick. (Filing fee $ 250 receipt number AIDDC-2556592.) filed by Benjamin Allen, Jan Bennetts, Lindsey Blake, Chris Boyd, Cody Brower, Brad Calbo, Mike Duke, Mariah Dunham, Alex Gross, Stephen Herzog, Raul Labrador, McCord Larsen, Grant Loebs, Shondi Lott, Louis E. Marshall, Trevor Misseldine, Stanley Mortensen, Brian Naugle, Zachary Pall, Andrakay Pluid, Paul Rogers, Lance Stevenson, Mark Taylor, Jim Thomas, Bill Thompson, Christopher Topmiller, E. Clayne Tyler, Delton Walker, Bruce Withers, Rob Wood . (Wilson, Lincoln)
04/24/2023	97	RESPONSE to Motion re 95 MOTION to File Amicus Brief *on behalf of the States of Washington, Arizona, California, Colorado, Delaware, Hawaii, Illinois, Maine, Minnesota, Nevada, New Jersey, New York, Oregon, Rhode Island, and the District of Columbia* filed by Benjamin Allen, Jan Bennetts, Lindsey Blake, Chris Boyd, Cody Brower, Brad Calbo, Mike Duke, Mariah Dunham, Alex Gross, Stephen Herzog, Raul Labrador, McCord Larsen, Grant Loebs, Shondi Lott, Louis E. Marshall, Trevor Misseldine, Stanley Mortensen, Brian Naugle, Zachary Pall, Andrakay Pluid, Paul Rogers, Lance Stevenson, Mark Taylor, Jim Thomas, Bill Thompson, Christopher Topmiller, E. Clayne Tyler, Delton Walker, Bruce Withers, Rob Wood. Replies due by 5/8/2023.(Wilson, Lincoln)
04/24/2023	98	LITIGATION ORDER AND NOTICE OF TELEPHONIC SCHEDULING CONFERENCE - The Court will conduct a telephonic scheduling conference on June 28, 2023, at 3:00 p.m. On or before June 21, 2023, the parties must file with the Court the joint Litigation Plan and Discovery Plan. Signed by Judge B Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (lm)
04/24/2023	100	Minute Entry for proceedings held before Judge B Lynn Winmill: A Motion Hearing was held via Zoom on 4/24/2023 re 2 Plaintiffs' Motion for Preliminary Injunction. The Court GRANTED 86 MOTION to File Amicus Brief filed by St. Luke's Health System Ltd. and GRANTED 94 MOTION for Leave to File Amici Curiae Brief on behalf of the States of Washington, Arizona, California, Colorado, Delaware, Hawaii, Illinois, Maine, Minnesota, Nevada, New Jersey, New York, Oregon, Rhode Island, and the District of Columbia. Responses to Amicus Briefs are due by 5:00 PM on April 27, 2023. The Court took Plaintiffs' Motion for Preliminary Injunction under advisement. A written decision is forthcoming. (Court Reporter Tammy Hohenleitner.) (jlg) (Entered: 04/25/2023)
04/26/2023	101	First MOTION to Amend/Correct 93 MOTION FOR PRO HAC VICE APPEARANCE by Peter B. Gonick. (Filing fee $ 250 receipt number AIDDC-2556592.) Emily A Mac Master appearing for Amicus Parties District of Columbia, State of Arizona, State of California, State of Colorado, State of Delaware, State of Hawaii, State of Illinois, State of Maine, State of Minnesota, State of Nevada, State of New Jersey, State of New York, State of Oregon, State of Rhode Island, State of Washington. Responses due by 5/17/2023 (Mac Master, Emily)

04/27/2023	102	DOCKET ENTRY ORDER approving 101 Amended Motion for Pro Hac Vice Appearance of attorney Peter Gonick for District of Columbia, State of Arizona, State of California, State of Colorado, State of Delaware, State of Hawaii, State of Illinois, State of Maine, State of Minnesota, State of Nevada, State of New Jersey, State of New York, State of Oregon, State of Rhode Island, and State of Washington. Per Local Rule 83.4(e), out-of-state counsel shall immediately register for ECF. (Notice sent to CM/ECF Registration Clerk). (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (km)
04/27/2023	103	NOTICE of Appearance by Lincoln Davis Wilson on behalf of County Prosecuting Attorneys (Wilson, Lincoln)
04/27/2023	104	NOTICE of Appearance by Brian V Church on behalf of County Prosecuting Attorneys (Church, Brian)
04/27/2023	105	NOTICE of Appearance by Timothy Longfield on behalf of County Prosecuting Attorneys (Longfield, Timothy)
04/27/2023	106	MOTION for Supplemental Briefing Lincoln Davis Wilson appearing for Defendants Benjamin Allen, Jan Bennetts, Lindsey Blake, Chris Boyd, Cody Brower, Brad Calbo, Mike Duke, Mariah Dunham, Matt Fredback, Alex Gross, Stephen Herzog, Raul Labrador, McCord Larsen, Grant Loebs, Shondi Lott, Kirk MacGregor, Louis E. Marshall, Adam McKenzie, Trevor Misseldine, Stanley Mortensen, Brian Naugle, Randy Neal, Zachary Pall, Andrakay Pluid, Paul Rogers, Lance Stevenson, Mark Taylor, Jim Thomas, Bill Thompson, Christopher Topmiller, E. Clayne Tyler, Delton Walker, Bruce Withers, Rob Wood. Responses due by 5/18/2023 (Attachments: # 1 Attachment)(Wilson, Lincoln)
04/27/2023	107	RESPONSE re 95 MOTION to File Amicus Brief *on behalf of the States of Washington, Arizona, California, Colorado, Delaware, Hawaii, Illinois, Maine, Minnesota, Nevada, New Jersey, New York, Oregon, Rhode Island, and the District of Columbia*, 94 MOTION for Leave to File *Amici Curiae Brief on behalf of the States of Washington, Arizona, California, Colorado, Delaware, Hawaii, Illinois, Maine, Minnesota, Nevada, New Jersey, New York, Oregon, Rhode Island, and the District of Columbia* filed by Benjamin Allen, Jan Bennetts, Lindsey Blake, Chris Boyd, Cody Brower, Brad Calbo, Mike Duke, Mariah Dunham, Matt Fredback, Alex Gross, Stephen Herzog, Raul Labrador, McCord Larsen, Grant Loebs, Kirk MacGregor, Louis E. Marshall, Adam McKenzie, Trevor Misseldine, Stanley Mortensen, Brian Naugle, Randy Neal(Bonneville County Prosecutor), Zachary Pall, Andrakay Pluid, Paul Rogers, Lance Stevenson, Mark Taylor, Jim Thomas, Bill Thompson, Christopher Topmiller, E. Clayne Tyler, Delton Walker, Bruce Withers, Rob Wood . (Wilson, Lincoln)
04/27/2023	108	NOTICE by Benjamin Allen, Jan Bennetts, Lindsey Blake, Chris Boyd, Cody Brower, Brad Calbo, Mike Duke, Mariah Dunham, Matt Fredback, Alex Gross, Stephen Herzog, Raul Labrador, McCord Larsen, Grant Loebs, Shondi Lott, Kirk MacGregor, Louis E. Marshall, Adam McKenzie, Trevor Misseldine, Stanley Mortensen, Brian Naugle, Randy Neal(Bonneville County Prosecutor), Zachary Pall, Andrakay Pluid, Paul Rogers, Lance Stevenson, Mark Taylor, Jim Thomas, Bill Thompson, Christopher Topmiller, E. Clayne Tyler, Delton Walker, Bruce Withers, Rob Wood re 41 MOTION to Dismiss *Certain County Prosecutor Defendants' Joinder in Motion to Dismiss* (Wilson, Lincoln)
04/28/2023	109	MEMORANDUM in Opposition re 106 MOTION for Supplemental Briefing filed by Caitlin Gustafson, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Darin Weyhrich. Replies due by 5/12/2023.(Smith, Colleen)
05/02/2023	110	NOTICE of Appearance by Lincoln Davis Wilson on behalf of County Prosecuting

		Attorneys (Wilson, Lincoln)
05/02/2023	111	NOTICE of Appearance by Brian V Church on behalf of County Prosecuting Attorneys (Church, Brian)
05/02/2023	112	NOTICE of Appearance by Timothy Longfield on behalf of County Prosecuting Attorneys (Longfield, Timothy)
05/02/2023	113	JOINDER by Defendant County Prosecuting Attorneys joining 41 MOTION to Dismiss *Joinder by Clark County Prosecuting Attorney, Janna Birch*. (Wilson, Lincoln)
05/02/2023	114	MEMORANDUM DECISION AND ORDER - Defendants Motion for Supplemental Briefing (Dkt. 106) is DENIED. Signed by Judge B Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (lm)
05/03/2023	115	NOTICE of Appearance by Richard T Roats on behalf of Richard Roats (Roats, Richard)
05/03/2023	116	NOTICE by Benjamin Allen, Jan Bennetts, Janna Birch, Lindsey Blake, Chris Boyd, Cody Brower, Brad Calbo, Mike Duke, Mariah Dunham, Matt Fredback, Alex Gross, Stephen Herzog, Raul Labrador, McCord Larsen, Grant Loebs, Kirk MacGregor, Louis E. Marshall, Adam McKenzie, Trevor Misseldine, Stanley Mortensen, Brian Naugle, Randy Neal(Bonneville County Prosecutor), Zachary Pall, Andrakay Pluid, Paul Rogers, Lance Stevenson, Mark Taylor, Jim Thomas, Bill Thompson, Christopher Topmiller, E. Clayne Tyler, Delton Walker, Bruce Withers, Rob Wood (Attachments: # 1 Declaration of Louis Marshall, # 2 Declaration of Mariah R. Dunham, # 3 Declaration of Benjamin Allen, # 4 Declaration of Cody Brower)(Wilson, Lincoln)
05/04/2023	117	NOTICE by Benjamin Allen, Jan Bennetts, Janna Birch, Lindsey Blake, Chris Boyd, Cody Brower, Brad Calbo, Mike Duke, Mariah Dunham, Matt Fredback, Alex Gross, Stephen Herzog, Raul Labrador, McCord Larsen, Grant Loebs, Kirk MacGregor, Louis E. Marshall, Adam McKenzie, Trevor Misseldine, Stanley Mortensen, Brian Naugle, Randy Neal(Bonneville County Prosecutor), Zachary Pall, Andrakay Pluid, Paul Rogers, Lance Stevenson, Mark Taylor, Jim Thomas, Bill Thompson, Christopher Topmiller, E. Clayne Tyler, Delton Walker, Bruce Withers, Rob Wood (Attachments: # 1 Declaration of Andrakay Pluid, # 2 Declaration of Christopher Boyd, # 3 Declaration of Erick Thomson, # 4 Declaration of Jana Birch, # 5 Declaration of Kirk MacGregor, # 6 Declaration of Lance Stevenson, # 7 Declaration of Mark Taylor, # 8 Declaration of Randy Neal) (Wilson, Lincoln)
05/04/2023	118	NOTICE of Appearance by Lincoln Davis Wilson on behalf of Benjamin Allen, Jan Bennetts, Janna Birch, Lindsey Blake, Chris Boyd, Cody Brower, Brad Calbo, Mike Duke, Mariah Dunham, Alex Gross, Stephen Herzog, McCord Larsen, Grant Loebs, Kirk MacGregor, Louis E. Marshall, Trevor Misseldine, Stanley Mortensen, Brian Naugle, Randy Neal(Bonneville County Prosecutor), Zachary Pall, Andrakay Pluid, Paul Rogers, Lance Stevenson, Mark Taylor, Jim Thomas, Bill Thompson, Christopher Topmiller, E. Clayne Tyler, Delton Walker, Bruce Withers, Rob Wood (Wilson, Lincoln)
05/04/2023	119	NOTICE of Appearance by Brian V Church on behalf of Benjamin Allen, Jan Bennetts, Janna Birch, Lindsey Blake, Chris Boyd, Cody Brower, Brad Calbo, County Prosecuting Attorneys, Mike Duke, Mariah Dunham, Alex Gross, Stephen Herzog, McCord Larsen, Grant Loebs, Kirk MacGregor, Louis E. Marshall, Trevor Misseldine, Stanley Mortensen, Brian Naugle, Randy Neal(Bonneville County Prosecutor), Zachary Pall, Andrakay Pluid, Paul Rogers, Lance Stevenson, Mark Taylor, Jim Thomas, Bill Thompson, Christopher Topmiller, E. Clayne Tyler, Delton Walker, Bruce Withers, Rob Wood (Church, Brian)

05/04/2023	120	NOTICE of Appearance by Timothy Longfield on behalf of Benjamin Allen, Jan Bennetts, Janna Birch, Lindsey Blake, Chris Boyd, Cody Brower, Brad Calbo, County Prosecuting Attorneys, Mike Duke, Mariah Dunham, Alex Gross, Stephen Herzog, McCord Larsen, Grant Loebs, Kirk MacGregor, Louis E. Marshall, Trevor Misseldine, Stanley Mortensen, Brian Naugle, Randy Neal(Bonneville County Prosecutor), Zachary Pall, Andrakay Pluid, Paul Rogers, Lance Stevenson, Mark Taylor, Jim Thomas, Bill Thompson, Christopher Topmiller, E. Clayne Tyler, Delton Walker, Bruce Withers, Rob Wood (Longfield, Timothy)
05/04/2023	121	NOTICE by Benjamin Allen, Jan Bennetts, Janna Birch, Lindsey Blake, Chris Boyd, Cody Brower, Brad Calbo, County Prosecuting Attorneys, Mike Duke, Mariah Dunham, Matt Fredback, Alex Gross, Stephen Herzog, McCord Larsen, Grant Loebs, Kirk MacGregor, Louis E. Marshall, Trevor Misseldine, Stanley Mortensen, Brian Naugle, Randy Neal(Bonneville County Prosecutor), Zachary Pall, Vic Pearson, Andrakay Pluid, Paul Rogers, Bailey Smith, Lance Stevenson, Mark Taylor, Jim Thomas, Bill Thompson, Erick Thomson, Christopher Topmiller, E. Clayne Tyler, Delton Walker, Bruce Withers, Rob Wood (Attachments: # 1 Affidavit Declaration of William W. Thompson, # 2 Affidavit Declaration of Bruce Withers, # 3 Affidavit Declaration of Stephen Herzog) (Wilson, Lincoln)
05/04/2023	122	MOTION to Strike 121 Notice (Other),,, 116 Notice (Other),, 117 Notice (Other),,, *Defendants' Notices of Supplemental Declarations* Colleen Rosannah Smith appearing for Plaintiffs Caitlin Gustafson, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Darin Weyhrich. Responses due by 5/25/2023 (Smith, Colleen)
05/05/2023	123	NOTICE of Appearance by Lincoln Davis Wilson on behalf of Benjamin Allen, Jan Bennetts, Janna Birch, Lindsey Blake, Chris Boyd, Cody Brower, Brad Calbo, Justin Coleman, County Prosecuting Attorneys, Mike Duke, Mariah Dunham, Matt Fredback, Alex Gross, Stephen Herzog, Raul Labrador, McCord Larsen, Grant Loebs, Kirk MacGregor, Louis E. Marshall, Adam McKenzie, Trevor Misseldine, Brian Naugle, Randy Neal(Bonneville County Prosecutor), Zachary Pall, Vic Pearson, Andrakay Pluid, Paul Rogers, Bailey Smith, Lance Stevenson, Bryan Taylor, Mark Taylor, Jim Thomas, Bill Thompson, Christopher Topmiller, E. Clayne Tyler, Delton Walker, Bruce Withers, Rob Wood, S. Doug Wood (Wilson, Lincoln)
05/05/2023	124	NOTICE of Appearance by Brian V Church on behalf of Benjamin Allen, Jan Bennetts, Janna Birch, Lindsey Blake, Chris Boyd, Cody Brower, Brad Calbo, Justin Coleman, County Prosecuting Attorneys, Mike Duke, Mariah Dunham, Matt Fredback, Alex Gross, Stephen Herzog, Raul Labrador, McCord Larsen, Grant Loebs, Kirk MacGregor, Louis E. Marshall, Adam McKenzie, Trevor Misseldine, Stanley Mortensen, Brian Naugle, Randy Neal(Bonneville County Prosecutor), Zachary Pall, Vic Pearson, Andrakay Pluid, Paul Rogers, Bailey Smith, Lance Stevenson, Bryan Taylor, Mark Taylor, Jim Thomas, Bill Thompson, Erick Thomson, Christopher Topmiller, E. Clayne Tyler, Delton Walker, Bruce Withers, Rob Wood, S. Doug Wood (Church, Brian)
05/05/2023	125	NOTICE of Appearance by Timothy Longfield on behalf of Benjamin Allen, Jan Bennetts, Janna Birch, Lindsey Blake, Chris Boyd, Cody Brower, Brad Calbo, Justin Coleman, County Prosecuting Attorneys, Mike Duke, Mariah Dunham, Matt Fredback, Alex Gross, Stephen Herzog, Raul Labrador, McCord Larsen, Grant Loebs, Kirk MacGregor, Louis E. Marshall, Adam McKenzie, Trevor Misseldine, Stanley Mortensen, Brian Naugle, Randy Neal(Bonneville County Prosecutor), Zachary Pall, Vic Pearson, Andrakay Pluid, Paul Rogers, Bailey Smith, Lance Stevenson, Bryan Taylor, Mark Taylor, Jim Thomas, Bill Thompson, Erick Thomson, Christopher Topmiller, E. Clayne Tyler, Delton Walker, Bruce Withers, Rob Wood, S. Doug Wood (Longfield, Timothy)

05/05/2023	126	MEMORANDUM in Opposition re 122 MOTION to Strike 121 Notice (Other),,, 116 Notice (Other),, 117 Notice (Other),,, *Defendants' Notices of Supplemental Declarations* filed by Benjamin Allen, Jan Bennetts, Janna Birch, Lindsey Blake, Chris Boyd, Cody Brower, Brad Calbo, Justin Coleman, County Prosecuting Attorneys, Mike Duke, Mariah Dunham, Matt Fredback, Alex Gross, Stephen Herzog, Raul Labrador, McCord Larsen, Grant Loebs, Kirk MacGregor, Louis E. Marshall, Adam McKenzie, Trevor Misseldine, Stanley Mortensen, Brian Naugle, Randy Neal(Bonneville County Prosecutor), Zachary Pall, Vic Pearson, Andrakay Pluid, Paul Rogers, Bailey Smith, Lance Stevenson, Bryan Taylor, Mark Taylor, Jim Thomas, Bill Thompson, Erick Thomson, Christopher Topmiller, E. Clayne Tyler, Delton Walker, Bruce Withers, Rob Wood, S. Doug Wood. Replies due by 5/19/2023.(Wilson, Lincoln)
05/05/2023	127	Motion to Dismiss for Failure to State a Claim *and Lack of Subject Matter Jurisdiction* Lincoln Davis Wilson appearing for Defendants Benjamin Allen, Jan Bennetts, Janna Birch, Lindsey Blake, Chris Boyd, Cody Brower, Brad Calbo, Justin Coleman, County Prosecuting Attorneys, Mike Duke, Mariah Dunham, Matt Fredback, Alex Gross, Stephen Herzog, Raul Labrador, McCord Larsen, Grant Loebs, Kirk MacGregor, Louis E. Marshall, Adam McKenzie, Trevor Misseldine, Stanley Mortensen, Brian Naugle, Randy Neal, Zachary Pall, Vic Pearson, Andrakay Pluid, Paul Rogers, Bailey Smith, Lance Stevenson, Bryan Taylor, Mark Taylor, Jim Thomas, Bill Thompson, Erick Thomson, Christopher Topmiller, E. Clayne Tyler, Delton Walker, Bruce Withers, Rob Wood, S. Doug Wood. Responses due by 5/26/2023 (Attachments: # 1 Memorandum in Support, # 2 Declaration of Lincoln Davis Wilson, # 3 Ex A, # 4 Ex B, # 5 Ex C, # 6 Ex D, # 7 Ex E, # 8 Ex F)(Wilson, Lincoln)
05/05/2023	128	RESPONSE to Motion re 2 MOTION for Temporary Restraining Order *and Preliminary Injunction filed by* filed by Benjamin Allen, Jan Bennetts, Janna Birch, Lindsey Blake, Chris Boyd, Cody Brower, Brad Calbo, Justin Coleman, County Prosecuting Attorneys, Mike Duke, Mariah Dunham, Matt Fredback, Alex Gross, Stephen Herzog, Raul Labrador, McCord Larsen, Grant Loebs, Kirk MacGregor, Louis E. Marshall, Adam McKenzie, Trevor Misseldine, Stanley Mortensen, Brian Naugle, Randy Neal(Bonneville County Prosecutor), Zachary Pall, Vic Pearson, Andrakay Pluid, Paul Rogers, Bailey Smith, Lance Stevenson, Bryan Taylor, Mark Taylor, Jim Thomas, Bill Thompson, Erick Thomson, Christopher Topmiller, E. Clayne Tyler, Delton Walker, Bruce Withers, Paul Withers, Rob Wood, S. Doug Wood. Replies due by 5/19/2023.(Wilson, Lincoln)
05/08/2023	129	NOTICE by Richard Roats re 127 Motion to Dismiss for Failure to State a Claim *and Lack of Subject Matter Jurisdiction* (Roats, Richard)
05/08/2023	130	JOINDER by Defendants Benjamin Allen, Jan Bennetts, Janna Birch, Lindsey Blake, Chris Boyd, Cody Brower, Brad Calbo, Justin Coleman, Mike Duke, Mariah Dunham, Matt Fredback, Alex Gross, Stephen Herzog, Raul Labrador, McCord Larsen, Grant Loebs, Kirk MacGregor, Louis E. Marshall, Adam McKenzie, Trevor Misseldine, Stanley Mortensen, Brian Naugle, Randy Neal, Zachary Pall, Vic Pearson, Andrakay Pluid, Paul Rogers, Bailey Smith, Lance Stevenson, Bryan Taylor, Mark Taylor, Jim Thomas, Bill Thompson, Erick Thomson, Christopher Topmiller, E. Clayne Tyler, Delton Walker, Bruce Withers, Rob Wood, S. Doug Wood joining 85 Reply to Response to Motion, 107 Response(generic),,,, 42 Response to Motion,, . (Wilson, Lincoln)
05/08/2023	131	JOINDER by Defendants Benjamin Allen, Jan Bennetts, Janna Birch, Lindsey Blake, Chris Boyd, Cody Brower, Brad Calbo, Justin Coleman, Mike Duke, Mariah Dunham, Matt Fredback, Alex Gross, Stephen Herzog, Raul Labrador, McCord Larsen, Grant Loebs, Kirk MacGregor, Louis E. Marshall, Adam McKenzie, Trevor Misseldine, Stanley Mortensen, Brian Naugle, Randy Neal, Zachary Pall, Vic Pearson, Andrakay Pluid, Paul Rogers, Bailey Smith, Lance Stevenson, Bryan Taylor, Mark Taylor, Jim Thomas, Bill Thompson, Erick Thomson, Christopher Topmiller, E. Clayne Tyler, Delton Walker,

		Bruce Withers, Rob Wood, S. Doug Wood joining 127 Motion to Dismiss for Failure to State a Claim *and Lack of Subject Matter Jurisdiction* . (Wilson, Lincoln)
05/08/2023	132	NOTICE by Benjamin Allen, Jan Bennetts, Janna Birch, Lindsey Blake, Chris Boyd, Cody Brower, Brad Calbo, Justin Coleman, County Prosecuting Attorneys, Mike Duke, Mariah Dunham, Matt Fredback, Alex Gross, Stephen Herzog, Raul Labrador, McCord Larsen, Grant Loebs, Kirk MacGregor, Louis E. Marshall, Adam McKenzie, Trevor Misseldine, Stanley Mortensen, Brian Naugle, Randy Neal(Bonneville County Prosecutor), Zachary Pall, Vic Pearson, Andrakay Pluid, Paul Rogers, Bailey Smith, Lance Stevenson, Bryan Taylor, Mark Taylor, Jim Thomas, Bill Thompson, Erick Thomson, Christopher Topmiller, E. Clayne Tyler, Delton Walker, Bruce Withers, Rob Wood, S. Doug Wood (Attachments: # 1 Declaration of E. Clayne Tyler, # 2 Declaration of Robert Wood)(Wilson, Lincoln)
05/09/2023	133	NOTICE by Benjamin Allen, Jan Bennetts, Janna Birch, Lindsey Blake, Chris Boyd, Cody Brower, Brad Calbo, Justin Coleman, County Prosecuting Attorneys, Mike Duke, Mariah Dunham, Matt Fredback, Alex Gross, Stephen Herzog, Raul Labrador, McCord Larsen, Grant Loebs, Kirk MacGregor, Louis E. Marshall, Adam McKenzie, Trevor Misseldine, Stanley Mortensen, Brian Naugle, Randy Neal(Bonneville County Prosecutor), Zachary Pall, Vic Pearson, Andrakay Pluid, Paul Rogers, Bailey Smith, Lance Stevenson, Bryan Taylor, Mark Taylor, Jim Thomas, Bill Thompson, Erick Thomson, Christopher Topmiller, E. Clayne Tyler, Delton Walker, Bruce Withers, Rob Wood, S. Doug Wood (Attachments: # 1 Declaration of Chris Topmiller, # 2 Declaration of Mike Duke, # 3 Declaration of Lindsey Blake, # 4 Declaration of Paul Rogers, # 5 Declaration of Trevor Misseldine, # 6 Declaration of Jim Thomas)(Wilson, Lincoln)
05/09/2023	134	NOTICE of Appearance by Lincoln Davis Wilson on behalf of Benjamin Allen, Jan Bennetts, Janna Birch, Lindsey Blake, Chris Boyd, Cody Brower, Brad Calbo, Justin Coleman, County Prosecuting Attorneys, Mike Duke, Mariah Dunham, Matt Fredback, Alex Gross, Stephen Herzog, Raul Labrador, McCord Larsen, Grant Loebs, Kirk MacGregor, Louis E. Marshall, Adam McKenzie, Trevor Misseldine, Stanley Mortensen, Brian Naugle, Randy Neal(Bonneville County Prosecutor), Zachary Pall, Vic Pearson, Andrakay Pluid, Paul Rogers, Bailey Smith, Lance Stevenson, Bryan Taylor, Mark Taylor, Jim Thomas, Bill Thompson, Erick Thomson, Christopher Topmiller, E. Clayne Tyler, Delton Walker, Bruce Withers, Rob Wood, S. Doug Wood (Wilson, Lincoln)
05/09/2023	135	MOTION to Dismiss Lincoln Davis Wilson appearing for Defendants Benjamin Allen, Jan Bennetts, Janna Birch, Lindsey Blake, Chris Boyd, Cody Brower, Brad Calbo, Justin Coleman, County Prosecuting Attorneys, Mike Duke, Mariah Dunham, Matt Fredback, Alex Gross, Stephen Herzog, Raul Labrador, McCord Larsen, Grant Loebs, Kirk MacGregor, Jason Mackrill, Louis E. Marshall, Adam McKenzie, Trevor Misseldine, Stanley Mortensen, Brian Naugle, Randy Neal, Zachary Pall, Vic Pearson, Andrakay Pluid, Paul Rogers, Bailey Smith, Lance Stevenson, Bryan Taylor, Mark Taylor, Jim Thomas, Bill Thompson, Erick Thomson, Christopher Topmiller, E. Clayne Tyler, Delton Walker, Bruce Withers, Rob Wood, S. Doug Wood. Responses due by 5/30/2023 (Attachments: # 1 Declaration of Jason Mackrill)(Wilson, Lincoln)
05/09/2023	136	NOTICE of Appearance by Brian V Church on behalf of Benjamin Allen, Jan Bennetts, Janna Birch, Lindsey Blake, Chris Boyd, Cody Brower, Brad Calbo, Justin Coleman, County Prosecuting Attorneys, Mike Duke, Mariah Dunham, Matt Fredback, Alex Gross, Stephen Herzog, Raul Labrador, McCord Larsen, Grant Loebs, Kirk MacGregor, Jason Mackrill, Louis E. Marshall, Adam McKenzie, Trevor Misseldine, Stanley Mortensen, Brian Naugle, Randy Neal(Bonneville County Prosecutor), Zachary Pall, Vic Pearson, Andrakay Pluid, Paul Rogers, Bailey Smith, Lance Stevenson, Bryan Taylor, Mark Taylor, Jim Thomas, Bill Thompson, Erick Thomson, Christopher Topmiller, E. Clayne Tyler, Delton Walker, Bruce Withers, Rob Wood, S. Doug Wood (Church, Brian)

05/09/2023	137	NOTICE of Appearance by Timothy Longfield on behalf of Benjamin Allen, Jan Bennetts, Janna Birch, Lindsey Blake, Chris Boyd, Cody Brower, Brad Calbo, Justin Coleman, County Prosecuting Attorneys, Mike Duke, Mariah Dunham, Matt Fredback, Alex Gross, Stephen Herzog, Raul Labrador, McCord Larsen, Grant Loebs, Kirk MacGregor, Jason Mackrill, Louis E. Marshall, Adam McKenzie, Trevor Misseldine, Stanley Mortensen, Brian Naugle, Randy Neal(Bonneville County Prosecutor), Zachary Pall, Vic Pearson, Andrakay Pluid, Paul Rogers, Bailey Smith, Lance Stevenson, Bryan Taylor, Mark Taylor, Jim Thomas, Bill Thompson, Erick Thomson, Christopher Topmiller, E. Clayne Tyler, Delton Walker, Bruce Withers, Rob Wood, S. Doug Wood (Longfield, Timothy)
05/11/2023	138	ERRATA by Defendants Justin Coleman, Matt Fredback, Jason Mackrill, Adam McKenzie, Vic Pearson, Bailey Smith, Bryan Taylor, Erick Thomson, S. Doug Wood re 127 Motion to Dismiss for Failure to State a Claim *and Lack of Subject Matter Jurisdiction* . (Wilson, Lincoln)
05/12/2023	139	NOTICE by Zachary Pall, Delton Walker, S. Doug Wood (Attachments: # 1 Declaration of Zachary Pall, # 2 Declaration of S. Douglas Wood, # 3 Declaration of Delton Walker) (Wilson, Lincoln)
05/16/2023	140	MOTION for Leave to File *Notice of Supplemental Authority* Colleen Rosannah Smith appearing for Plaintiffs Caitlin Gustafson, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Darin Weyhrich. Responses due by 6/6/2023 (Attachments: # 1 Notice of Supplemental Authority, # 2 Exhibit 1)(Smith, Colleen)
05/19/2023	141	MEMORANDUM in Opposition re 127 Motion to Dismiss for Failure to State a Claim *and Lack of Subject Matter Jurisdiction*, 135 MOTION to Dismiss *and Reply to Opposition to Motion for Preliminary Injunction* filed by Caitlin Gustafson, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Darin Weyhrich. Replies due by 6/2/2023.(Smith, Colleen)
05/25/2023	142	NOTICE of Appearance by Lincoln Davis Wilson on behalf of Raul Labrador, Steve Stephens (Wilson, Lincoln)
05/25/2023	143	NOTICE of Appearance by Timothy Longfield on behalf of Raul Labrador, Steve Stephens (Longfield, Timothy)
05/25/2023	144	NOTICE of Appearance by Brian V Church on behalf of Raul Labrador, Steve Stephens (Church, Brian)
05/25/2023	145	MOTION for Joinder Lincoln Davis Wilson appearing for Defendants Raul Labrador, Steve Stephens. Responses due by 6/15/2023 (Wilson, Lincoln)
06/02/2023	146	NOTICE by Raul Labrador, Stanley Mortensen (Attachments: # 1 Declaration of Stan Mortensen)(Wilson, Lincoln)
06/02/2023	147	REPLY to Response to Motion re 127 Motion to Dismiss for Failure to State a Claim *and Lack of Subject Matter Jurisdiction* filed by Benjamin Allen, Jan Bennetts, Janna Birch, Lindsey Blake, Chris Boyd, Cody Brower, Brad Calbo, Justin Coleman, Mike Duke, Mariah Dunham, Matt Fredback, Alex Gross, Stephen Herzog, Raul Labrador, McCord Larsen, Grant Loebs, Kirk MacGregor, Jason Mackrill, Louis E. Marshall, Adam McKenzie, Trevor Misseldine, Stanley Mortensen, Brian Naugle, Randy Neal(Bonneville County Prosecutor), Zachary Pall, Vic Pearson, Andrakay Pluid, Paul Rogers, Bailey Smith, Steve Stephens, Lance Stevenson, Bryan Taylor, Mark Taylor, Jim Thomas, Bill Thompson, Erick Thomson, Christopher Topmiller, E. Clayne Tyler, Delton Walker, Bruce Withers, Rob Wood, S. Doug Wood.Motion Ripe Deadline set for 6/5/2023. (Wilson, Lincoln)

06/09/2023	148	Notice of Filing of Official Transcript of Proceedings held on 4/24/23 before Judge B. Lynn Winmill. Court Reporter Tamara Hohenleitner, Email tammy_hohenleitner@id.uscourts.gov. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. This transcript is not available to the general public and as such is sealed until release of transcript restriction re 100 Motion Hearing, Terminate Motions. Redaction Request due 6/30/2023. Redacted Transcript Deadline set for 7/10/2023. Release of Transcript Restriction set for 9/7/2023. (th)
06/20/2023	149	Joint MOTION to Continue *Deadline for Submission of Litigation and Discovery Plans* Colleen Rosannah Smith appearing for Plaintiffs Caitlin Gustafson, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Darin Weyhrich. Responses due by 7/11/2023 (Smith, Colleen)
06/22/2023	150	DOCKET ENTRY ORDER: finding good cause exists, the Court will grant the parties' Joint Motion to Continue (Dkt. 149). The Court will further vacate the telephonic scheduling conference scheduled for June 29, 2023, and all corresponding deadlines (Dkt. 98). Signed by Judge B Lynn Winmill. (eap)
07/07/2023	151	MOTION for Leave to File *Notice of Supplemental Authority* Colleen Rosannah Smith appearing for Plaintiffs Caitlin Gustafson, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Darin Weyhrich. Responses due by 7/28/2023 (Attachments: # 1 Notice of Supplemental Authority, # 2 Exhibit A, # 3 Exhibit B)(Smith, Colleen)
07/28/2023	152	RESPONSE to Motion re 151 MOTION for Leave to File *Notice of Supplemental Authority Notice of Non-Opposition to Motion for Leave to File Notice of Supplemental Authority* filed by Benjamin Allen, Jan Bennetts, Janna Birch, Lindsey Blake, Chris Boyd, Cody Brower, Brad Calbo, Justin Coleman, Mike Duke, Mariah Dunham, Matt Fredback, Alex Gross, Stephen Herzog, Raul Labrador, McCord Larsen, Grant Loebs, Kirk MacGregor, Jason Mackrill, Louis E. Marshall, Adam McKenzie, Trevor Misseldine, Stanley Mortensen, Brian Naugle, Randy Neal(Bonneville County Prosecutor), Zachary Pall, Vic Pearson, Andrakay Pluid, Paul Rogers, Bailey Smith, Steve Stephens, Lance Stevenson, Bryan Taylor, Mark Taylor, Jim Thomas, Bill Thompson, Erick Thomson, Christopher Topmiller, E. Clayne Tyler, Delton Walker, Bruce Withers, Rob Wood, S. Doug Wood. Replies due by 8/11/2023.(Wilson, Lincoln)
07/31/2023	153	MEMORANDUM DECISION AND ORDER - The Medical Providers Motion for Preliminary Injunction (Dkt. 2) is GRANTED as it pertains to Attorney General Labrador. Plaintiffs Motion for Preliminary Injunction (Dkt. 2) is DENIED as it pertains to the Idaho State Board of Medicine and the Idaho State Board of Nursing. The Court will DEFER issuing a ruling on any of the individual county prosecuting attorneys. The Medical Providers Motion to Strike (Dkt. 122) is DENIED. The States Motion to Dismiss (Dkt. 41) is DENIED as it relates to Attorney General Labrador. The parties shall submit a Litigation Plan and Discovery Plan within14 days of the filing of this Order. Signed by Judge B Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (lm)
08/01/2023	154	NOTICE OF APPEAL 23-35518 as to 153 Order by Raul Labrador. Filing Fee Due. $ 505, receipt number AIDDC-2606698. (Notice sent to Court Reporter & 9th Cir) (Wilson, Lincoln) Modified on 8/2/2023, to add USCA case number (jd).
08/02/2023	155	Emergency MOTION to Stay re 153 Order on Motion to Dismiss,,,, Order on Motion for TRO,,,, Order on Motion to Strike,,, Lincoln Davis Wilson appearing for Defendant Raul Labrador. Responses due by 8/10/2023 (Attachments: # 1 Memorandum in Support)

		(Wilson, Lincoln) Modified on 8/4/2023 (lm) to change the response deadline. Per deo 159.
08/02/2023	156	MOTION to Expedite Lincoln Davis Wilson appearing for Defendant Raul Labrador. Responses due by 8/23/2023 (Wilson, Lincoln)
08/02/2023	157	USCA Case Number 23-35518 for 154 Notice of Appeal, filed by Raul Labrador. (jd)
08/03/2023	158	DOCKET ENTRY ORDER: finding good cause, the Court will grant Defendant's motion to expedite (Dkt. 156). Plaintiffs shall file a response to the motion to expedite on or before 8/10/2023. Signed by Judge B Lynn Winmill. (eap).
08/03/2023	159	DOCKET ENTRY ORDER: correcting the Court's previous Order (Dkt. 158). Due to the Court granting Defendant's motion to expedite (Dkt. 156), Plaintiffs shall file a response to Defendant's emergency motion to stay (Dkt. 155) on or before 8/10/2023. Signed by Judge B Lynn Winmill. (eap)
08/04/2023		Set/Reset Deadlines as to (Dkt. 155) Plaintiff's Response to Defendant's Emergency Motion to Stay is Due by 8/10/2023. Per DEO 159(lm)
08/04/2023	160	ORDER of USCA 23-35518 - The appeal filed August 1, 2023 is a preliminary injunction appeal. Accordingly, Ninth Circuit Rule 3-3 shall apply, as to 154 Notice of Appeal filed by Raul Labrador (lm)
08/09/2023	161	DOCKET ENTRY ORDER: finding good cause exists, Plaintiffs' unopposed Motion for Leave to File (Dkt. 140) is GRANTED. Signed by Judge B Lynn Winmill. (eap).
08/09/2023	162	DOCKET ENTRY ORDER: finding good cause exists, Plaintiffs' unopposed Motion for Leave to File (Dkt. 151) is GRANTED. Signed by Judge B Lynn Winmill. (eap).
08/10/2023	163	RESPONSE to Motion re 155 Emergency MOTION to Stay re 153 Order on Motion to Dismiss,,,, Order on Motion for TRO,,,, Order on Motion to Strike,,, filed by Caitlin Gustafson, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Darin Weyhrich. Replies due by 8/24/2023.(Smith, Colleen)
08/10/2023	164	REPLY to Response to Motion re 155 Emergency MOTION to Stay re 153 Order on Motion to Dismiss,,,, Order on Motion for TRO,,,, Order on Motion to Strike,,, *Reply in Support of Motion to Stay in Pending Appeal* filed by Raul Labrador.Motion Ripe Deadline set for 8/11/2023.(Wilson, Lincoln)
08/11/2023	165	TRANSCRIPT REQUEST *Already Completed* by Raul Labrador for proceedings held on 04/24/2023 before Judge B. Lynn Winmill.. (Wilson, Lincoln)
08/11/2023	166	MOTION for Leave to File *Sur-Reply to 155 Emergency MOTION to Stay* Colleen Rosannah Smith appearing for Plaintiffs Caitlin Gustafson, Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Darin Weyhrich. Responses due by 9/1/2023 (Attachments: # 1 Sur-Reply)(Smith, Colleen)
08/15/2023	167	MEMORANDUM DECISION AND ORDER - Defendants Emergency Motion for Stay Pending Appeal (Dkt. 155) is DENIED as it relates to a request to stay the Courts preliminary injunction against Attorney General Labrador issued July 31, 2023 (Dkt. 153).Defendants Emergency Motion for Stay Pending Appeal (Dkt. 155) is GRANTED as it pertains to all proceedings, including discovery and all other motions in this case, pending appeal. Signed by Judge B Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (lm)

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